CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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June 11, 2019

Mr. Harvey D. Fort
Acting Director
Division of Policy and Program Development
Room C-3325
Office of Federal Contract Compliance Programs
200 Constitution Avenue, NW
Washington, DC 20210

Via: www.regulations.gov

Re: Proposed Renewal of the Approval of Information Collection Requirements – 84 Fed. Reg. 14974, April 12, 2019

Dear Mr. Fort:

The United States Chamber of Commerce ("Chamber") submits the following comments in response to the Office of Federal Contract Compliance Programs' ("OFCCP's" or "the Agency's") proposed renewal of the approval of the Information Collection Requirements published in the Federal Register on April 11, 2019. (84 Fed. Reg. 14974, April 12, 2019) The OFCCP's proposed renewal extends to three separate information collection requests: (1) the Scheduling Letter and Itemized Listing ("Scheduling Letter") that initiates a full compliance evaluation; (2) the Compliance Check Letter; and (3) the Focused Review Letter. The Chamber's detailed comments on each appear below.

The OFCCP proposals, taken together, constitute an unwarranted and extreme expansion of the data and information federal contractors would be required to submit to the Agency at the outset of a compliance evaluation, intrude upon the attorney-client and attorney work product privileges, and incorporate a superficial and insufficient Paperwork Reduction Act ("PRA") analysis. Accordingly, OFCCP should withdraw all proposed revisions to the Scheduling Letter, the Compliance Check Letter and the Focused Review Letter. As this is a PRA action, the Chamber will also be forwarding these comments directly to OMB.

A. OFCCP Should Withdraw the Proposed Changes to the Supply and Service Scheduling Letter

The OFCCP proposes five objectionable changes to the Scheduling Letter: (1) mandating that contractors furnish "[r]esults of the most recent analysis of the compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities;" (2) requiring that contractors perform utilization and job group analyses on a racial subgroup basis, rather than by

grouping all racial subgroups together, as contractors have done for decades; (3) requiring contractors who receive the Scheduling Letter six months or more into their current affirmative action plan ("AAP") year to provide data and information not just for the prior AAP year but for "every completed month of the current AAP year"; (4) mandating that contractors produce the "pool of candidates from which the promotions were selected by gender and by race/ethnicity;" and (5) compelling contractors to provide the OFCCP a list of their "three largest subcontractors based on contract value, excluding those expiring within six months" of receipt of the Scheduling Letter." The OFCCP then claims that gathering and producing all of this additional information and data would add just 1.1 hours of burden to each contractor who receives a Scheduling letter. The Chamber addresses each of the objectionable expansions in turn and then sets forth its response to the OFCCP's burden assessment and wholly insufficient PRA analysis.

1. The Proposed Requirement that Contractors Furnish the "Results" of Their Compensation Analysis Should be Rejected Because the OFCCP Does Not Need Such Analyses and Because It Tramples on the Attorney-Client Privilege and Potentially the Attorney Work Product Privilege.

a. The OFCCP Can and Has Satisfied its Investigatory and Enforcement Duties without Requiring Contractors to Furnish Results of Their Analyses of Their Compensation Systems.

In 2000, the OFCCP revised its regulations to include the requirement that contractors analyze their "compensation system(s)" to determine "whether there are gender-, race-, or ethnicity-based disparities." 41 C.F.R. Section 60-2.17(c); (65 Fed. Reg. 68042, Nov. 13, 2000). Though this regulatory requirement did not exist until 2000, the OFCCP had been assessing whether contractors discriminated in pay for many years prior to 2000. Thus, for more than 20 years, OFCCP compliance evaluations have included an assessment of whether the contractor discriminates on the basis of race or sex in its compensation practices.

To permit the OFCCP to complete its assessment, the Scheduling Letter currently requires contractors to submit individualized, "employee level compensation data for all employees." *See* Item 19 of Current Scheduling Letter. Among the data contractors are required to submit at the outset of every compliance evaluation are: (1) base salary, bonuses, incentives, commissions, and other forms of compensation; and (2) each employee's race, ethnicity, gender, hire date, EEO-1 Category, and AAP Job Group. Contractors are also invited, through Item 19, to provide "any additional data or factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade." As every contractor who has experienced an OFCCP audit in the last decade knows, the OFCCP often issues follow-on requests for additional data that may inform its analysis including additional years' of compensation data and information on salary histories.

The existing Scheduling Letter already permits the OFCCP to gather any and all data it needs to perform an assessment of a contractor's pay practices. Indeed, over the last several years, the OFCCP has entered into numerous Conciliation Agreements with contractors resolving alleged discrimination in pay and is currently litigating several high-profile cases alleging discrimination in pay. It has achieved these results without seeking to require contractors to furnish results of their internal pay equity analyses. Thus, there is simply no basis for the OFCCP's current request to modify the Scheduling Letter to require contractors to furnish their internal analyses of pay.

b. Contractors Should Not Be Required To Furnish Analyses of Compensation Systems that are Performed Pursuant to Legal Privileges.

Compliance-oriented contractors have been performing legally-privileged analyses of their compensation practices for years. The Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, as amended, have – for more than 50 years – prohibited employers from discriminating in pay against employees on the basis of sex, race, and other protected characteristics. In addition, nearly every state has equal pay laws that likewise prohibit discrimination in pay based on sex, race or other characteristics. Recently, state legislatures have responded to the pay equity movement by amending their Equal Pay laws and some have created "safe harbors" or legal defenses that apply when an employer has conducted internal analyses to assess pay equity. *See, e.g.,* Massachusetts General Laws, Part I, Title XXI, Chapter 149, Section 105A; ORS 652.210, et. seq.

Against this legal backdrop, many employers – large and small – perform analyses of their compensation practices to determine whether they have exposure to potential pay discrimination claims. Those analyses are typically performed pursuant to the attorney-client privilege – i.e., the analysis is performed to permit legal counsel (in-house and outside counsel) to provide legal advice as to potential pay discrimination claims and steps the employer may take to ameliorate those specific legal risks and exposure. Counsel typically retains labor economists to assist with the analysis, provides legal advice as to the type of analysis to be performed, interprets the results in light of the existing legal framework, and then conveys legal advice to the employer based on the results of the analysis. Initial compensation analyses frequently require refinement based on legal advice, as well, as counsel identifies other factors that may be influencing pay and the statistical results. To the extent the employer is defending against filed or asserted claims of pay discrimination, such analyses are also performed subject to the attorney work product privilege.[1]

The OFCCP's proposal to require contractors to submit the "[r]esults of the most recent analysis of the compensation system(s)" makes no exception for such commonly privileged analyses. If the proposal were approved as written, contractors who perform such legally

[1] Certain Regional offices of the OFCCP have, in compliance evaluations initiated in the last several years, requested copies of the contractor's internal pay analyses. The Chamber is aware of some members, in response, declining to produce those analyses, asserting legal privilege. To the Chamber's knowledge, the OFCCP has not challenged any such assertions by a contractor or initiated litigation to compel production of the analyses.

privileged analyses would routinely be faced with a Hobson's choice: decline the OFCCP's request and risk a Show Cause Notice ("SCN"), followed by costly and burdensome administrative litigation to defend its legal privileges, or waive any and all applicable legal privileges and produce the results of its analyses. Both paths are unacceptable and contractors should not be compelled to make such a choice, particularly since the OFCCP has no need for the results of the analyses.

To address these concerns, the Chamber suggests that OFCCP eliminate entirely Item 7 of the Proposed Scheduling Letter. OFCCP has demonstrated no legitimate need for the internal analyses prepared by contractors.

2. OFCCP's New Proposed Requirement that Contractors Perform Utilization and Job Group Analyses by Racial Subgroup and Gender Within Racial Subgroup is Contrary to Regulatory Obligations and Overly Burdensome.

The OFCCP's proposal would substantially increase the amount of data and number of analyses that contractors would be required to produce to the Agency at the outset of a compliance review. These proposed changes would modify the requirements of Itemized Listing Nos. 3, 4, 6, and 16:

- Proposed Item #3 adds language requiring contractors to "identify the specific race for each employee contained within each job group" in the job group analysis.

- Proposed Item #4 adds language requiring contractors, in their availability analyses, to "provide the availability for each job group by race/ethnicity used to determine whether there were substantial disparities in the utilization of specific minority groups such that separate goals for those groups may be necessary."

- Proposed Item #6 adds language requiring that contractors, in crafting placement goals, "provide information sufficient to determine whether there are substantial disparities in the utilization of any one particular minority group or the utilization of men or women of any one particular minority group, such that separate goals for these groups may be necessary."

- Proposed Items #16 (a), (b), and (c) add language requiring contractors to provide information regarding job group representation at the start of the AAP year, placement goals, and the number of placements by gender and racial subgroup "along with information sufficient to determine whether there were substantial disparities in the utilization of any one particular minority group or the utilization of men or women of any one particular minority group, such that separate goals for these groups may be required.

OFCCP should withdraw these proposed changes because they exceed contractors' regulatory obligations and are unduly burdensome.

a. The Proposed Revisions are Contrary to Contractors' Regulatory Obligations Regarding Job Group Analyses, Availability Analyses, and Placement Goals.

The OFCCP's *regulations* make clear that, absent evidence of "substantial disparities," contractors are only required to analyze availability and representation and set placement goals for women and minorities as a whole, not for each racial subgroup or for women and men within each racial subgroup.

- Job Group Analysis – a "contractor must separately state *the percentage of minorities and the percentage of women* it employs in each job group." 41 CFR §60-2.13 (emphasis added).

- Availability Analysis – "Availability is an estimate of the number of *qualified minorities or women* available for employment in a given job group . . . (b) The contractor must separately determine the availability of *minorities and women* for each job group. (c) In determining availability, the contractor must consider at least the following factors: (1) The percentage of *minorities or women* with requisite skills in the reasonable recruitment area. . . . (2) The percentage of *minorities or women* among those promotable, transferable, and trainable within the contractor's organization." 41 CFR §60-2.14 (emphasis added).

- Comparison of Availability to Incumbency/Placement Goals – "The contractor must compare the percentage of *minorities and women* in each job group determined pursuant to §60-2.13 with the availability for those job groups determined pursuant to §60-2.14. (b) When the percentage of *minorities or women* employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal in accordance with §60-2.16." 41 CFR §60-2.15 (emphasis added).

- Placement Goals – "(c) Where, pursuant to §60-2.15, a contractor is required to establish a placement goal for a particular job group, the contractor must establish a percentage annual placement goal at least equal to the availability figure derived for *women or minorities*, as appropriate, for that job group. (d) The placement goal-setting process described above contemplates that contractors will, where required, *establish a single goal for all minorities*." 41 CFR §60-2.16 (c) and (d) (emphasis added).

There is no regulatory requirement that contractors include "the specific race for each employee within the job group" as the OFCCP's proposed Scheduling Letter revisions would require. There is no regulatory obligation that contractors calculate availability, set placement goals, or report the job group representation at the start of the AAP year based upon each racial subgroup, much less based on the intersectionality of race and gender, for every job group.

While 41 CFR §60-2.16 (d) states that "[i]n the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, *a contractor may be required* to establish separate goals for those groups," (emphasis added) this single sentence does not justify the dramatic expansion of reporting obligations envisioned by the proposed Scheduling Letter. First, as pointed out by the contracting community at the time this regulatory language was added, there is no explanation of what constitutes a "substantial disparity," so contractors have no guidance as to when they may be required to establish such separate goals. Second, the language is conditional rather than universal ("may be required"). Third, when the OFCCP added this sentence in the 2000 rulemaking, the Agency noted that it did not intend it to change contractors' then-existing obligations. (165 Fed. Reg. 68035, additional language regarding separate goals for particular minority groups "is not intended to represent a change"). OFCCP should not use its Scheduling Letter to impose additional obligations that far exceed the scope of contractors' regulatory obligations.

b. The Proposed Revisions are Overly Burdensome.

The OFCCP's proposal would substantially increase every contractor's burden in responding to the Scheduling Letter. Currently, contractors must conduct two availability calculations for each job group – the female and minority availability percentages – and potentially set two placement goals. The OFCCP's proposal would increase this by requiring up to twenty (20) separate calculations *per job group*.[2] Furthermore, it would be quite difficult for contractors to obtain the census data necessary to develop availability percentages based on the intersectionality of race and gender (e.g. the percentage of African-American females or Asian males "with requisite skills in the reasonable recruitment area"). Most AAP software does not include such data or calculate availability percentages in this manner. OFCCP should withdraw the proposed revisions given the substantial burden they would impose upon each contractor.

3. OFCCP's New Proposed Requirement That Contractors Receiving a Scheduling Letter Six Months or More Into the AAP Year Must Provide Additional Data for Every Completed Month of the Current AAP Year is Unnecessary and Unduly Burdensome.

[2] These include: Females, Minorities, African-Americans, Hispanics, Asians, American Indians or Alaskan Natives, Native Hawaiians or Other Pacific Islanders, Two or More Races, African-American Females, Hispanic Females, Asian Females, American Indian or Alaskan Native Females, Native Hawaiian or Other Pacific Islander Females, Two or More Races Females, African-American Males, Hispanic Males, Asian Males, American Indian or Alaskan Native Males, Native Hawaiian or Other Pacific Islander Males, Two or More Races Males.

If a contractor receives a Scheduling Letter when it is six months or more into its current AAP year, the OFCCP's proposal would require that the contractor provide information regarding applicants, hires, and promotions ("personnel activity data") "for every completed month of the current AAP year."[3] This is an overly burdensome requirement that is not necessary for the OFCCP's enforcement purposes.

The current Scheduling Letter states that if the contractor is "six months or more into your current AAP year when you receive this listing," the contractor must "provide the [personal activity data] *for at least the first six months of the current AAP year*." (emphasis added). The current requirement properly balances two competing interests: (1) the OFCCP's desire for updated data; and (2) a contractor's interest in preparing for a compliance evaluation in advance. Under the current approach, once a contractor passes the six-month mark in its AAP year, it can collect and analyze the data for the first six months and be prepared to submit that data should it receive a Scheduling Letter in the latter six months of its AAP year. For its part, the OFCCP receives 18 months of data – a substantial amount of information that is more than sufficient for the OFCCP to determine whether there are any indicators of adverse impact or potential discrimination.

The new proposal, if adopted, will radically change this balance and will result in unnecessary administrative activity for any contractor audited in the second half of its AAP year. There will be no way to prepare in advance for the audit because the contractor will have no way of knowing when a Scheduling Letter may arrive; thus, it will not know – until it receives the Scheduling Letter – what data it must produce and what those data show. For example, if a contractor with a calendar-year AAP receives a Scheduling Letter on October 1st, the contractor would have only thirty days to compile, analyze and submit ten months of data, including data for the just-completed month of September. If adopted, this proposed change would effectively require contractors to conduct monthly data pulls and analysis just to ensure they are prepared in the event of an audit and are taking appropriate steps if there are indicators of adverse impact.

The burden to contractors of going through such never-ending cycles of adverse impact analyses grossly outweighs any benefit to the Agency. Without this change, the OFCCP will continue to receive 18 months of personnel activity in any such audit. Moreover, the Agency currently has – and often exercises – an ability to seek updated data if the produced data include indicators of potential discrimination. Given that the OFCCP will retain that right, there is no justification for modifying the requirements that would be imposed on <u>all</u> contractors if the proposed change is adopted. In short, the current requirements do not impede the OFCCP's enforcement efforts in any way they should be maintained.

4. OFCCP's New Proposed Requirement that Contractors Identify "Promotion Pools" Is Overly Vague.

[3] Interestingly, without any explanation, the OFCCP does not extend this requirement to the terminations data required in #17(d).

The OFCCP proposed Scheduling Letter would add a new requirement that contractors "provide the pool of candidates from which promotions were selected by gender and race/ethnicity." In doing so, the OFCCP wrongly assumes that there is a definable pool for each promotion and provides no guidance as to how contractors are to determine such promotion pools. The reality is that workforces are constantly changing, through hires, terminations and other personnel actions. As a result, promotion decisions made throughout the year may be based on very different promotion pools, or no "pools" at all.

This is not the first time the Agency has considered amending the Scheduling Letter to request promotion pool information. In 2014, the OFCCP also initially proposed changes to the Scheduling Letter that would have required contractors to submit promotion pool data. At that time, the contracting community raised the same concerns expressed herein. In response to those concerns, the Agency withdrew the proposed change, due to "challenges that contractors face in providing pools of candidates for promotions." *See Supporting Statement final 09 11 2014*, at 20. Now the OFCCP is once again seeking this data without addressing, in any manner, the "challenges" the contracting community previously identified and the OFCCP previously acknowledged. Those challenges remain today.

Finally, the Agency attempts to justify this requested change by stating "this information *may be* requested in follow-up communications with the contractors during the course of the compliance evaluation" and claiming, by requesting the data at the outset of every audit from every contractor, the OFCCP is simply "reducing follow-up requests." This is not a valid reason to impose this requirement upon every contractor at the outset of every compliance review. When the OFCCP seeks "promotion pool" data during the course of an audit, the contractor has an opportunity to work with the OFCCP to define the challenges associated with furnishing such data. That practice should not change in the name of OFCCP's purported expediency.

5. OFCCP's New Proposed Requirement that Contractors Identify Their Three Largest Subcontractors is Overly Vague and Unnecessary.

The OFCCP's proposed Scheduling Letter adds a new requirement that contractors provide "a list of your three largest subcontractors based on contract value, excluding those expiring within six months of receipt of this letter." OFCCP should withdraw this proposed revision because it is unclear exactly what information the OFCCP is seeking, it is often difficult for contractors to ascertain subcontractor information, and the OFCCP has other means of identifying employers that qualify as "subcontractors" under its existing regulations.

First, the OFCCP's requirement is vague. Though the proposal instructs contractors to identify their largest subcontractors "based on contract value," it is unclear what that means in practice. For example:

- Are contractors to make this determination based on subcontracts performed by the establishment under audit, or the contractor as a whole?

- Are contractors to make this determination based on a single subcontract or all the subcontracts between a contractor and particular subcontractor?

- Is this determination based on the annual value or total value of one (or more) contracts?

- Is this determination based on the anticipated value of a subcontract, or what has actually been paid during the past year or even perhaps over the duration of the entire subcontract?

Given the uncertainty presented by the proposed language, contractors will have no idea what information should be reported and will likely make determinations based on an inconsistent set of criteria.

Second, subcontractor information is often not readily ascertainable, particularly by the Human Resources departments that are often responsible for preparing responses to the OFCCP's Scheduling Letter. Subcontract information may be housed in many different IT systems, spread across many different departments or business units, and the existence and value of such subcontracts is constantly changing. It would be a significant additional burden for contractors to have to ascertain and report on subcontractors in every compliance review.

Third, it is unnecessary for the OFCCP to require contractors to provide such information because the Agency has other means of identifying subcontractors. For example, first tier subcontractors must answer questions on their annual EEO-1 reports identifying themselves as contractors or subcontractors. Contractors subject to FAR clause 52.204-10 are required to file Federal Funding Accountability and Transparency Act (FFATA) reports identifying any subcontracts greater than $30,000. Given that there are other means to obtain this information, there is no reason the OFCCP should impose this additional burden as a part of every compliance review. If the Agency believes that these means are insufficient, the appropriate response should be legislative changes that revise subcontractor reporting obligations, rather than Scheduling Letter changes that place additional burdens on prime contractors.

B. OFCCP Should Withdraw the Proposed Changes to the Compliance Check Scheduling Letter.

The OFCCP's proposed amendments to the compliance check scheduling letter previously utilized by the agency represent an unsupported attempt to reach beyond the scope of inquiry authorized by the regulations implementing Executive Order 11246, Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), and Section 503 of the Rehabilitation Act of 1973 (Section 503). Additionally, the agency has failed to appropriately estimate the additional burden that would be forced on contractors if these more expansive investigatory powers are allowed in connection with a compliance check.

1. There Is No Precedent Or Regulatory Support For The OFCCP To Initiate A Full Compliance Evaluation If It Does Not Receive The Records Requested Under The Compliance Check Letter.

There is no regulatory support for the OFCCP's statement in the proposed compliance check letter that the agency may "reschedule [a contractor] for a full compliance review if [a contractor] fail[s] to provide the records requested in this letter." Per the regulations, a compliance review is "[a] comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor." 41 CFR §60-1.20(a)(1). In contrast to this expansive review of affirmative action efforts, the compliance check is "[a] determination of whether the contractor has maintained records consistent with §60-1.12; at the contractor's option the documents may be provided either on-site or off-site."

These definitions clearly outline that the agency endeavors to focus on two wholly separate goals with each of these different actions. The compliance check focuses solely on recordkeeping which is an inherently more limited review than that contemplated in a full compliance review. Indeed the compliance check letter's use of the phrase "full compliance review" clearly contemplates that the compliance check is lesser than the compliance review.

The suggestion that the OFCCP would initiate a more onerous review without completing its previous scheduled evaluation is incongruent with how the OFCCP conducts other types of enforcement actions. For example, when the OFCCP does not receive the requested documentation in connection with a compliance evaluation, it issues a Show Cause Notice and initiates an enforcement action to obtain the information that it has requested. The new response in the Compliance Check Letter seems to equate a full compliance review as a penalty. Further there may well be legitimate issues between the OFCCP and the contractor as to what data may be requested at this stage. To "threaten" a full compliance review in this context is inappropriate and is contrary to the better practice of OFCCP seeking a more open and cooperative relationship with contractors.

2. The OFCCP Has Failed To Appropriately Estimate The Additional Burden Associated With Providing The Additional Materials Requested Under The Compliance Check.

The current compliance check letter requested: 1) AAP results for the preceding year; 2) examples of job advertisements; 3) examples of requests for accommodations. The new letter has expanded that request to include not just the AAP results, but the full AAPs. Additionally, the new letter no longer requires examples of requests for accommodations, but rather all accommodation requests.

Gathering these additional pieces of information and the associated backup documentation represents a significant undertaking which is much greater than the additional 1.5

hours that the OFCCP has allocated. Additionally, there is no discernable benefit that the agency will receive from these materials that it would not be able to achieve from the current materials.

The AAP results give the OFCCP ample information from which to assess whether the contractor has kept appropriate records. The only difference between a review of the results and a review of the full AAP is the amount of time that it will take the contractor to compile the information and the amount of time that it will take the agency to review the materials. This is not time well spent by either party.

Similarly, the agency is not likely to gain any additional insight from a review of a complete listing of accommodation requests beyond what it will find from reviewing examples of the request. All the proposed adjustment does is increase the volume of requests that must be turned over and reviewed. This additional volume may force organizations to tap additional resources to collect the information which may expand the circle of people with access to the confidential medical information of those requesting accommodations beyond what is necessary under the current request for only examples. This additional confidentiality burden is not easily quantifiable though it is easy to identify that it represents more than an additional 1.5 hours of burden on its own.

C. OFCCP Should Withdraw the Proposed Changes to the Focused Review Scheduling Letters.

We address our objections to the OFCCP's proposed focused review letters for both Section 503 and VEVRAA together as each letter is requesting similar information for the group which is the focus of the particular review. The focused review letter requires information beyond the scope of the permissible inquiry by requesting the E.O. 11246 affirmative action plan. The letter also requests compensation information which will be wholly useless to the agency in connection with a review of affirmative action and nondiscrimination as it relates to protected veterans and individuals with disabilities. Finally, the letter requests information related to promotion eligibility and consideration which will be overly burdensome to gather.

1. There Is No Regulatory Support For A Review Conducted Under Either VEVRAA Or Section 503 To Request Or Review Information Related To Executive Order 11246.

The scheduling letter for Section 503 states that the agency is "conducting this focused review under the authority of Section 503 of the Rehabilitation Act of 1973 (Section 503) and its implementing regulations in 41 CFR part 60-741." The scheduling letter for VEVRAA contains identical language with corresponding references to VEVRAA and its implementing regulations. Neither of the sets of implementing regulations contemplate enforcement of the affirmative action or nondiscrimination provisions based on race/ethnicity or gender enshrined in E.O. 11246. Therefore, the focused review scheduling letter is requesting information that will be disregarded by the agency because it does not relate to the primary purpose of the review. In this

case, the agency's request represents needless burden to contractors with absolutely no corollary benefit to the government or the public.

The other possibility is that the government will conduct a review of E.O. 11246 in conjunction with the focused review. If this is the case, then there is no purpose whatsoever for the focused review as it is treading the exact same ground as a regular compliance review only with a mandate that the review include an onsite. *See* OFCCP Directive 2018-04 ("In the focused reviews anticipated by this Directive, OFCCP would go onsite and conduct a comprehensive review of the particular authority at issue."). In this circumstance, the OFCCP would be overreaching in an attempt to bypass the requirement that it proceed to an onsite "based on the circumstances of the evaluation and the outcome of the initial review." *See* Federal Contract Compliance Manual, 2B Determining the Need for an Onsite Review Pg. 59 (July 2013).

2. The Agency Would Gain No Benefit From Its Request For Compensation Information.

The VEVRAA focused review letter currently requests:

> Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, and temporary employees) as of the start date of the current VEVRAA AAP. Provide hire date for each employee as well as job title, EEO-1 Report category and Executive Order 11246 AAP job group in a single file.

This request, as well as the Section 503 request, does not contain any language related to demographic information (e.g. protected veteran status, disability status) which would be necessary to evaluate whether employees are being compensated without regard for their protected veteran or disability status. This lack of demographic status makes this information completely unusable. Even if the agency were to adjust its request to include demographic information, the low response rate for protected veteran and disability status makes it impossible to perform any sort of robust compensation analysis with respect to protected veteran or disability status. The OFCCP's own statistical experts acknowledge that it is necessary to have a sufficient number of members of the observable group in order to prepare a statistical analysis. *See e.g.*, Analysis of Contractor Compensation Practices During a Compliance Evaluation Frequently Asked Questions *available at:* *https://www.dol.gov/ofccp/regs/compliance/faqs/compguidance_faq.htm* (last visited June 9, 2019) ("OFCCP then additionally tries to ensure that there are at least 10 observations (or employees) per control variables to be able to conduct a sound statistical analysis"). Experience indicates that such a sufficient number is highly unlikely be found for either protected veterans or individuals with disability.

Given the sensitive nature of compensation information, we request that the OFCCP remove this request as the data will not be useful for purposes of evaluation and therefore represents only a burden to the contractor and no benefit to the agency. Further, the OFCCP has

not presented a plan to ensure that the confidentiality of the compensation information will be protected. Since the number of employees included within the Section 503 or VEVRAA universe is necessarily more limited, it will be relatively easy to identify the individuals and their compensation from this data request. Such potential exposure contradicts the requirements of the Paperwork Reduction Act and the Department of Labor's own privacy regulations. *See* 29 CFR § 71.13(b)(2).

D. The OFCCP Has Failed to Conduct a Proper PRA Analysis.

As set forth above, the OFCCP's proposed revised information collection procedures included within a proposed revised scheduling letter, revised focused review scheduling letter, and related data requests is being proposed and reviewed pursuant to the Paperwork Reduction Act, 44 USC § 5501 et. seq. (1995). ("PRA") The PRA, first passed in 1980 and amended in 1995 is designed to ensure that federal paperwork and data collection requirements are designed in a manner to minimize the burden created by the obligation, maximize the utility derived from the data being collected both for the requesting agency and submitting filer and ensure, to the extent possible, that data being collected will not be subjected to inappropriate disclosure and the privacy of the data be maintained. The PRA is not a substitute for agency rulemaking nor can it be used as an undeclared procedure by which agencies can amend or alter their regulations, which are otherwise governed by the Administrative Procedure Act and the authorizing statutory bases for the information gathering requirement. Too often, agencies opt to change or enhance their data or information collection requirements not through formal notice and comment rulemaking governed by the APA but through the PRA process which, although it does provide for public comment is much more limited in the protections it provides to those being regulated, and the requirements for justification placed on the agency. The PRA requires a mechanistic analysis of the burden, utility and confidentiality standards, but without an underlying analysis of the basis for the new demand.

As set forth in the detailed analysis above, the OFCCP has not undertaken even the minimal PRA analysis but rather has chosen to significantly change, and expand, its regulatory reach by imposing significant new data and information requests with little justification or explanation. So, as set forth, the OFCCP has determined that it can demand production of compensation analyses without providing a supporting basis. It has determined that it can alter the required production of accommodation requests and responses without analyzing the extreme burden such a demand will entail. It is demanding that contractors submit entire AAPs rather than the summary before a decision is made to conduct a full scale audit. It is requiring contractors to identify their "three largest subcontractors" without identifying the basis to determine the "three largest subcontractors" or identifying its authority to do so. The OFCCP does not have the authority to require that contractors police the performance of subcontractors yet it is using the PRA process to create these new obligations.

The comments above elaborate on these and other examples of the misuse of the PRA process. The comments also highlight the OFCCP's cavalier determination of the increased burden compelled by these new requirements. OFCCP suggests that these wholesale expansions

to the data and information submissions will take practically no additional time and no additional cost. Nor does OFCCP set out how these new requirements, which can identify specific employee compensation and individuals requesting accommodation as well as other sensitive information, will be kept confidential.

As noted, the PRA is an important but limited process in the government's massive regulatory machine. It was enacted for the salutary purpose of compelling government agencies to limit their demands for data and information by engaging in required self-analysis of the enhanced cost, the regulatory need, and the need to protect the confidentiality of the data and information being demanded. There are other means to review the underlying legal basis for these demands, either by legislation or reviewed regulation. Using the PRA as a *sub rosa* means of undertaking significant regulatory revisions is inappropriate and should be rejected.
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For the foregoing reasons, OFCCP should withdraw the proposed changes to the Supply and Service Scheduling Letter, the Compliance Check Scheduling Letter, and the Focused Review Scheduling Letters. Thank you in advance for your consideration.

Sincerely,

Vice President, Workplace Policy
Employment Policy Division
U.S. Chamber of Commerce

CC: Russell Vought, Acting Director, OMB

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