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January 5, 2015

VIA ELECTRONIC FILING

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

Re: RIN 1250-AA03 - Government Contractors, Requirement to Report Summary Data on Employee Compensation

Dear Ms. Carr:

On behalf of the U.S. Chamber of Commerce, we are pleased to submit these comments in response to the Office of Federal Contract Compliance Programs' (OFCCPs' or "Agency's") notice of proposed rulemaking ("NPRM" or "Proposed Rule") relating to non-discrimination in compensation and a compensation data collection tool, as published in the *Federal Register* on November 5, 2014.

STATEMENT OF INTEREST

The United States Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, 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. An important function of the Chamber is to represent the interests of its members in employment matters before the courts, Congress, the Executive Branch, and independent federal agencies. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process. A significant portion of Chamber members are federal contractors and subcontractors. The Chamber also represents many state and local chambers of commerce and other associations who, in turn, represent many additional contractors and

subcontractors. Should the OFCCP's proposal be adopted, it will have a significant impact on these members.

INTRODUCTION

The Chamber strongly believes that compensation decisions should not be made based on an employee's race, ethnicity or gender, but instead on an employee's merit, qualifications, and contributions to his or her employer. While we strongly support non-discrimination in compensation, the Chamber does not support the proposed Equal Pay Report (EPR). The Chamber believes that the proposed EPR will require contractors and subcontractors to spend significant time, money and resources to compile and submit compensation data that will not augment the OFCCP's enforcement efforts and will not assist contractors in their compliance efforts. As explained in detail below, every contractor's compensation system is unique and myriad factors impact compensation decisions and results. As the OFCCP has found with similar efforts to collect compensation data on a broad scale, compensation data cannot be subjected to a normalized, one-size-fits-all method of interpretation. As a result, we believe the proposed data collection will not yield data that will permit the Agency to achieve either of the purposes identified in the NPRM. Because the OFCCP cannot achieve the objectives identified in the NPRM through any mechanism, and certainly not through the mechanism it has identified, and because the Proposed Rule would impose additional burdens on the contracting community, we submit that the Agency should refrain from implementing this data collection effort.

Should the Agency decide to nonetheless proceed with the EPR, the Chamber commends the Agency for its decision to at least refrain from proposing that contractors submit individualized, employee-level compensation data or data regarding the multitude of factors that impact pay decisions. Such data is not amenable to the broad-scale capture the OFCCP proposes in the NPRM, largely because every compensation system is unique and covers a range of unique positions within each workforce. Furthermore, requiring contractors and subcontractors to assemble and submit such data would be significantly more burdensome, and would be highly problematic from a confidentiality standpoint.

DISCUSSION

I. OFCCP Has Failed to Demonstrate Why the Equal Pay Report is Necessary to Fulfill Its Mission or is Useful to the Agency or the Contracting Community

The OFCCP states in the Proposed Rule that it is necessary for the Agency to collect aggregate compensation data on an annual basis from the overwhelming majority of contractors and subcontractors – and impose yet another data collection obligation on the

vast majority of that population – in order to "help combat pay discrimination."[1] The Agency asserts that "women working full-time earn approximately 77 cents on the dollar compared to men" and that "the weekly median earnings of women are about 82% of that for men."[2] The Agency further claims that this proposed new compensation data collection tool, the EPR, will further the OFCCP's efforts to reduce this alleged pay gap, will "enable OFCCP to direct its enforcement resources toward federal contractors whose summary data suggests potential pay violations" and, through public release of "objective industry standards," will encourage contractors to "review their pay data using the same metrics as OFCCP and take voluntary compliance measures."[3] While the Chamber fully supports pay equity, this burdensome new data collection effort is based upon a faulty premise and will not permit the Agency to accomplish any of these stated goals.

A. OFCCP's Justification for the EPR is Based on Misleading Statements about Pay Disparities

The OFCCP asserts that "pay discrimination is a real problem that continues to plague American working families"[4] and identifies the allegedly substantial pay gap between men and women as the justification for the EPR. OFCCP's position, however, is based on two misleading suppositions – first, that there is a substantial pay gap between men and women, and second, that any existing wage disparities are necessarily the result of discrimination by employers.

The Agency repeatedly relies upon the oft-quoted "77 cents on the dollar" statistic as justification for the EPR, stating in the NPRM that "looking at annual earnings reveals large gaps, where women working full-time earn approximately 77 cents on the dollar compared to men" and "the weekly median earnings of women is about 82 percent of that for men."[5] The reality, however, is that "77 cents on the dollar" is not a meaningful or defensible statistic. This alleged variance does not take into account any number of the variables that impact pay. Indeed, a 2009 report commissioned by the U.S. Department of Labor, Office of Employment Standards Administration, and prepared in conjunction with CONSAD Research Corp, *An Analysis of Reasons for the Disparity in Wages Between Men and Women*, concluded that, when accounting for factors such as occupation, human capital development, work experience, career interruptions, industry, health insurance, fringe

[1] Department of Labor Press Release, August 6, 2014.

[2] Government Contractors, Requirement to Report Summary Data on Employee Compensation; Proposed Rule 79 FR 46562 (hereinafter "NPRM") p. 46566.

[3] DOL Fact Sheet, Notice of Proposed Rulemaking: Government Contractor Requirement to Submit Equal Pay Report.

[4] NPRM p. 46566

[5] Id.

benefits, and overtime work, the unexplained hourly wage differences between men and women were between only 4.8 and 7.1 percent. [6]

The data upon which the OFCCP relies ignore the many other complex factors that can explain the differences in wages between men and women, including education, prior experience, length of time in the workforce, tenure at a particular company, time in a particular job, job performance, the availability, and desirability to an employee, of other non-economic benefits offered by an employer, an employee's willingness to negotiate pay, and an employee's willingness and ability to work particular shits or work in particular locations. Many of these elements factor into the personal choices that both men and women make about their careers and compensation opportunities and are not, in any manner, discriminatory. After an exhaustive study, the report commissioned by the Department of Labor concluded:

> "This study leads to the unambiguous conclusion that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of the individual choices being made by both male and female workers."[7]

In addition to the readily-available data and studies discrediting OFCCP's assertions regarding the magnitude of the alleged wage gap, the OFCCP's own enforcement activities belie its assertion that employer compensation discrimination is a rampant problem that must be addressed. The OFCCP conducts thousands of compliance reviews each year and has found no discriminatory pay practices in the overwhelming majority of those reviews. In its FY 2015 Congressional Budget Justification, the OFCCP stated that from January 2010 to September 2013, it entered into conciliation agreements "with financial settlements remedying pay discrimination on the bases of gender and race" in approximately ninety (90) compliance evaluations[8] out of the more than 12,000 it conducted during that period. In short, fewer than *one percent* of the compliance evaluations conducted over a three-year period revealed pay disparities the OFCCP pursued. The OFCCP is now asking the contracting community to spend a vast amount of time and resources to provide data to allegedly address a problem that it cannot even prove exists.[9]

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[6] CONSAD Research Corporation, *An Analysis of the Reasons for the Disparity in Wages Between Men and Women Final Report* (January 12, 2009), p. 1 (Foreword).

[7] Id. at p. 2.

[8] OFCCP 2015 Congressional Budget Justification p. 17

[9] For further discussion of the fallacy of the wage gap, see the April 1, 2014 Testimony of Camille A. Olson Before the Senate Committee on Health Education, Labor & Pensions regarding the Paycheck Fairness Act, attached as Exhibit 1.

B. No Broad-Brush Data Collection Tool – Including the EPR – Will Permit OFCCP to Identify Potential Pay Violations

OFCCP asserts that the EPR will "enable OFCCP to direct its enforcement resources toward entities for which reported data suggest potential pay violations, and not toward entities for which there is no evidence of potential pay violations."[10] For reasons addressed in more detail below, there is simply no circumstance under which broad-brush, aggregate compensation data can be used effectively on a grand scale to target contractors for review. Every compensation system is unique and myriad factors impact compensation decisions and results. As the OFCCP has found with similar efforts to collect compensation data on a broad scale, compensation cannot be subjected to a normalized, one-size-fits-all method of interpretation. As a result, the proposed data collection will have no meaningful value.[11] The OFCCP simply cannot achieve the objectives identified in the NPRM through any mechanism, and certainly not through the mechanism it has identified.

1. *The EPR Fails to Account for Lessons Learned*

The OFCCP acknowledges that it has attempted to collect compensation data on a grand scale before, and concedes that the prior effort failed to produce any meaningful data. Yet, fourteen years later, the Agency proposes returning to a data collection tool that will not yield better results. In 2000, the OFCCP launched the "EO Survey" for stated purposes very similar to their current justifications for the EPR: to help identify contractors most likely out of compliance, and to increase compliance through contractor awareness and self-evaluations.[12] Abt Associates' study of the EO Survey, commissioned by the Agency, illustrated the complete futility of that exercise. Abt found that the EO Survey's predictive power was only slightly better than chance, noting that it has a 93% chance of identifying compliant contractors as non-compliant and also had a high rate of classifying actual discriminators as non-discriminators.[13] There is little in the NPRM to suggest that the results are going to be significantly different this time around. The proposed EPR, though

[10] NPRM p. 46562

[11] In addition to the various and complex factors relevant to pay disparities noted above, for companies that have grown their workforce via acquisitions, the merging companies' different compensation structures and philosophies also play a key role in pay differences. As the summary data fails to account for these factors, it will yield misleading results. In some cases, the data will suggest discrimination where none exists.

[12] OFCCP's stated objectives of the EO Survey were "(1) to increase compliance with equal opportunity requirements by improving contractor self-awareness and encourage self evaluations; (2) to improve the deployment of scarce federal government resources towards contractors most likely to be out of compliance; (3) to increase agency efficiency by building on the tiered-review process already accomplished by OFCCP's regulatory reform efforts thereby allowing better resource allocation." Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, 65 Fed. Reg. 68,039 (Nov. 13, 2000)

[13] Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, 71 Fed. Reg. 53,033 (Sept. 8, 2006).

perhaps less burdensome than the EO Survey only because it requires less data collection, will still fail to address the flaws that were fatal to the EO Survey and will be fatal to the efficacy of this proposed data collection tool.

In the NPRM, the OFCCP also purports to account for the report issued by the National Research Council (NRC) of the National Academy of Sciences (NAS) that raised serious concerns about the efficacy of a compensation data collection tool, but falls short of actually addressing the concerns raised in that report. The NRC report recommended that any data collection be preceded by a comprehensive plan for using the compensation data. Despite its empty assertions to the contrary, the NPRM does not actually set out a comprehensive plan as to how the data would be used. The NRC also recommended a pilot of any proposed data collection effort before it is implemented on a broad scale. Again, despite its statements to the contrary, the OFCCP does have the leeway through the rulemaking process to conduct such a pilot program, but has chosen not to do so. Should the OFCCP move forward with the EPR, the Chamber strongly encourages the Agency to begin with a limited pilot program to test the efficacy and usefulness of the data to be collected.

2. *The Data Collection Will Yield Meaningless Data*

An examination of the specifics of OFCCP's proposal illustrates exactly why the data to be collected will not, in any manner, further the Agency's compliance efforts. The NPRM proposes that the EPR gather aggregate data on the average W-2-reported compensation paid to men, women, minorities and non-minorities by EEO-1 category for each location reported in the annual EEO-1 report. This data will tell the OFCCP virtually nothing about whether the contractor's pay practices are discriminatory because of the wide range of job titles encompassed by each EEO-1 category and because of the numerous elements of compensation encompassed by W-2 wages. Further, because establishments identified in EEO-1 reports do not necessarily coincide with a contractor's Affirmative Action Plan (AAP) structure, results of analyses of data collected by EEO-1 establishment will tell the Agency little about the compensation of the employees included in a particular AAP that could be subjected to a compliance evaluation.

First, collection by the broad EEO-1 categories will provide meaningless data and could result in numerous "false positives" or "false negatives." Here are just a few of many possible examples that illustrate the flaws inherent in this approach:

- The Executive/Senior Level Officials and Managers EEO-1 category may encompass titles from the Chief Executive Officer, to Executive Vice Presidents (EVPs) one level below the CEO, to Senior Vice Presidents (SVP) yet another level below the EVPs. If a contractor has a male CEO, one or two more male EVPs than female EVPs, and a higher percentage of female SVPs than male SVPs, the average salary

for men in the Executive/Senior Level Officials and Managers EEO-1 category would likely be significantly higher than the average salary for women. This variance is not a result of discrimination, but rather flows from the fact that women presently hold the lower level positions within the EEO-1 category. Alternately, if a contractor has a female CEO who is highly compensated, but also has several female SVPs who are paid less than truly comparable male SVPs, the average salary by EEO-1 category may suggest that women are earning wages comparable to men when, in fact, there could be some gender-based disparities.

- The Professionals EEO-1 category can encompass positions ranging from an entry-level human resources generalist position – a relatively low-paying position within the EEO-1 category – to an information technology professional with specialized, highly-sought-after skills that would likely command premium compensation. Aggregating employees from those two positions into one broad group for reporting purposes ignores the realities of their positions and tells the OFCCP nothing about whether these employees are being compensated in a non-discriminatory manner.

Second, a collection based on annual W-2 wages will tell the OFCCP virtually nothing about whether the contractor's pay practices are discriminatory because W-2 wages include non-discriminatory variables that may significantly impact pay, including overtime compensation, shift differentials, bonuses, and commissions. By using W-2 wages, the OFCCP will not be assessing comparable salaries. The following are but a few of the many possible examples to illustrate the issue:

- Two administrative support workers who have the same base salary could have significantly different W-2 earnings because one of them worked 200 hours of overtime while the other worked no overtime hours.

- Two sales employees have the same base salary and the same commission plan, but one sales employee's W-2 wages could be significantly higher than the other's because that sales person made more sales throughout the year.

Third, because the OFCCP audits contractors and subcontractors on an AAP basis, not on an EEO-1 establishment basis, and because there is not a one-to-one relationship between AAP establishments and EEO-1 establishments, any information gleaned from submission of data on an EEO-1 establishment basis would not enable OFCCP to target its enforcement efforts at a corresponding AAP location. AAP establishments are defined

differently from EEO-1 establishments. The EEO-1 report requires reporting by physical establishment and states that "units at different physical locations, even though engaged in the same kind of business operation, must be reported as separate establishments." In contrast, the Agency's regulations permit contractors to aggregate "employees who work at an establishment where the contractor employs fewer than 50 employees" into another AAP using one of three different methods.[14] Further, the Agency's regulations require that "employees who work at establishments other than that of the manager to whom they report, must be included in the affirmative action program of their manager."[15] As such, any data that the Agency may collect for an EEO-1 establishment could have little relationship to the compensation for all employees encompassed by a particular AAP. For example:

- The EEO-1 report for Establishment A (which has 49 employees) includes five female and five male Executive/Senior Officials and Managers. The average W-2 wages for the females, as would be reported on the EPR for Establishment A, is significantly lower than the average W-2 wages for the males. The OFCCP uses this data to identify Establishment A for a compliance review. In response to a scheduling letter, the contractor indicates that the employees employed at Establishment A are actually included in AAP Establishment 1, which includes employees from a variety of physical locations. OFCCP's examination of the compensation data for the employees in the AAP Establishment 1, submitted during the audit, indicates that the male and female Executive/Senior Officials and Managers' salaries are comparable and there is no indication of discrimination. In this example, the OFCCP's reliance on the EPR would create a "false positive" and result in no maximization of resources.

- The EEO-1 Report for Establishment B (which has 100 employees) includes 10 female and 10 male Executive/Senior Officials and Managers. Here, the average W-2 wages for the females are equal to the average W-2 wages for the males. As such, OFCCP does not include Establishment B on its audit list. In actuality, however, half of the Executive/Senior Officials and Managers from Establishment B report to managers in AAP Establishment 2 and half report to managers in AAP Establishment 3. Were AAP Establishment 2 audited, the OFCCP would have found that a number of women and men in comparable positions were not paid comparably. Here, the EPR data would have actually hindered, rather than assisted, OFCCP's efforts to root out potential compensation discrimination.

[14] 41 CFR 60-2.1(d)(2)
[15] 41 CFR 60-2.1(d)(1)

This flaw in the Agency's proposal holds particularly true for those contractors who maintain functional AAPs (FAAPs). FAAPs are prepared based on "functional or business units" and bear no direct relationship to the contractor's EEO-1 establishments. As such, the EPR would be meaningless for purposes of identifying a contractor's particular FAAP for review.[16]

As the Chamber of Commerce predicted in its comments to the OFCCP's ANPRM, the fundamental flaw in the NPRM is not simply that the OFCCP has chosen the incorrect basis for the submission of compensation data – i.e., by W-2 earnings. The fundamental flaw is the OFCCP's incorrect assumption that there exists a one-size-fits-all data collection methodology or tool that can be applied to all contractors and subcontractors that will yield meaningful data about whether and, more importantly, *which* contractors or subcontractors engage in discriminatory pay practices. The very fact that pay decisions are highly individualized and take into account a broad and varying range of factors means that there is no tool that can be applied across the entire population of contractors that would yield data that were in any way predictive of discrimination or non-discrimination in compensation. In short, there is no alternative to reporting by EEO-1 category that would be viable and/or permit the Agency to achieve its stated goals. There is simply no way for the OFCCP to discern, on a grand scale, whether pay variances are due to discriminatory or non-discriminatory factors. That fact only underscores the need to abandon this data collection effort; it does not justify a decision to proceed with the EPR requiring data to be submitted on an EEO-1 category basis.

C. Publishing Supposed "Objective Industry Standards" Will Not Be Useful to Contractors in Establishing Fair Pay Practices and Will Not Compel Compliance

OFCCP states that "the disclosure of compensation data summarized at the industry level" – characterized as "objective industry standards" – will "enable[ ] contractors and subcontractors to assess their compensation structure along with those of others in the same industry,"[17] and claims that "routinely sharing aggregate compensation data at the industry and/or labor market level with contractors should drive some additional portion of the contractor community to engage in voluntary self-assessments of their compensation practices and make needed corrections."[18] These are similar to the claims made about the

[16] All of this is not to suggest that the OFCCP could resolve the problems with the EPR simply by requiring that the data be submitted on an AAP basis rather than an EEO-1 establishment basis. First, there are many legitimate factors that impact pay, unaccounted for in the data collection, that would continue to render the data virtually useless – most notably the significant geographic location differences in salaries that may be encompassed within a single AAP. Second, collection on an AAP basis would be significantly more burdensome for contractors and wholly unjustified given the data's lack of utility.

[17] NPRM p. 46563

[18] Id.

failed EO Survey, and they are just as misguided here. For the same reasons that the EPR will not provide OFCCP meaningful data on which to select contractors for review, supposed "objective industry standards" developed based on the EPR will also not serve as a useful tool for contractors seeking to maintain equitable compensation systems.

First, data on the average salaries of men and women (or minorities and non-minorities) in broad EEO-1 categories offer little value to contractors. By way of example, the average salary of all male and all female Senior Officials and Managers in a particular industry tells a contractor very little about its own pay practices because each senior management team is unique in its composition, years of experience, expertise, and performance. Similarly, knowing the average salary for all male and female Professionals in its industry does little to inform a contractor whether it is actually paying employees with comparable job duties, skills, experience, tenure and performance, equitably. For example, knowing that the average W-2 wages for Professionals in the computer software industry is $X, tells a contractor nothing about whether it is paying its Financial Accounting Specialist (one of the job titles in its Professionals workforce) an appropriate salary. It does not even give the contractor any particularly useful insights into whether it is broadly paying all of its Professionals in a non-discriminatory manner because, even within an industry, the combinations of jobs encompassed by an EEO-1 category in any particular contractor's workforce is going to be different than the combination of jobs of others within the same industry.

Second, even assuming a contractor were interested in assessing its current compensation on an EEO-1 category basis against an industry standard, "standards" that combine, in one metric, W-2 earnings of those who perform overtime (at overtime rates) with those who perform no overtime will yield no useful information. A contractor would have little reason to make any compensation changes based upon data indicating that the average W-2 wages for Administrative Support Workers is $X, when that number could be dramatically inflated due to overtime hours worked by others in the industry while this contractor may choose to limit the amount of overtime worked by its Administrative employees. Geographic pay differentials and shift differentials, also captured in W-2 earnings, likewise render any such industry "standard" useless.

Third, many contractors produce a wide range of products and/or provide a wide range of services and, therefore, cannot easily be pigeon-holed into one "industry" for comparison purposes. For instance, one large contractor maintains a specialty chemicals line of business on the one hand and a consumer products line of business on the other hand. Another large contractor maintains an electronics line of business, a food and beverage line of business, and an energy line of business. For these two companies, and many others like them, there is no single "industry standard" that would be at all useful.

Fourth, data about "industry standards" tell contractors nothing about whether their own pay practices are non-discriminatory. Contractors have an obligation not to

discriminate against women or minorities in their pay practices. There is nothing in the regulations to suggest an "industry standards" overlay to this obligation. That is, contractors cannot use as a defense to claims of inequitable pay practices that others in its industry are also paying women in a particular EEO-1 category less than men. Conversely, it is not discriminatory for a contractor 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 contractor's aggregate numbers are below the "industry standards" is no proof, for either the contractor or the OFCCP, that the contractor's pay practices are discriminatory.

Fifth, contractors are not now – and have never been – clamoring for "industry standards" because they recognize that such data would not be useful to either setting competitive compensation or eliminating any potential disparities in pay. Contractors already have many different, much more finely-tuned, methods by which they can benchmark their compensation against others for particular jobs. Many companies, large and small alike, look to market data that is specific to the jobs in their workforce to assess their position vis-à-vis their competitors. The data that could be assembled through the EPR will lack the reliability of such targeted market data – data that contractors can and do already access. As such, the EPR will do nothing to further contractors' efforts to ensure non-discrimination in their compensation practices.

Finally, the EPR will not encourage compliance or have the "deterrent" effect the OFCCP espouses. OFCCP states that "[d]ata collection and analysis of data are likely to serve as a disincentive for noncompliance and are, therefore effective deterrents."[19] The EPR will not serve as any sort of deterrent for pay discrimination because, for the reasons explained above: (1) OFCCP cannot effectively target their enforcement efforts based on the data; and (2) the data is too broad and generalized to be of any practical use to those contractors who endeavor to establish equitable pay practices.

D. The OFCCP's Approach to Reporting of Hours for Salaried, Part-Time and Terminated Employees Further Denigrates the Efficacy of the Data

The NPRM's proposed approach to reporting data for employees exempt from the overtime provisions of the FLSA, part-time employees, and employees who are hired or terminated mid-year, further illustrates the useless nature of the data to be collected. First, OFCCP has proposed that, for contractors who do not capture actual hours worked by part-time salaried employees, contractors can report 1040 as the hours worked.[20] Such an across-the-board rule does further harm to the efficacy of the data, as the hours reported for an employee who is hired to work one day a week would be the same as the hours reported for

[19] Id.
[20] NPRM p. 46578

one who is hired to work four days a week. Any hourly pay rates based on such guesstimates would be wholly unreliable.

Second, the NPRM states that "reported hours may also be adjusted for part year work using date of hire or dates of leave as well, but this is not specifically required."[21] Reporting hours in a manner that does not equate to the W-2 wages renders the data even more meaningless. For example, a contractor could include in its data $75,000 for the W-2 wages of an employee who had a base salary of $100,000/year and quit three-quarters of the way through the year (shortly after the EEO-1 reporting period so he would nonetheless still be included in the EPR) and $75,000 for an employee, in the exact same position, who had a base salary of $75,000 and worked the entire year, and the contractor could report 2080 hours as the hours for both employees. Such reporting would also completely mask any compensation disparities that exist.

Finally, the OFCCP proposes that contractors use 2080 hours as the reported hours for all full-time FLSA exempt employees.[22] This ignores the reality that certain positions may actually require substantially more hours worked to perform the job, even if the contractor does not track exact hours worked due to the exempt status, and that salaries often reflect that heightened expectation. If, in the Professionals EEO-1 category, a contractor reports 2080 hours for a lawyer whose job regularly requires him or her to work substantially more hours than a standard 40 hours/week schedule, and 2080 hours for a computer programmer who generally adheres to a 40 hours/week schedule, the invalidity of the aggregate data is only further exacerbated.

II. The Equal Pay Report Represents an "End Run" Around the Will of the Legislative Branch

The Obama Administration has been trying, unsuccessfully, to enact the Paycheck Fairness Act (PFA) since 2009. Congress has repeatedly rejected the PFA, most recently in both April and September 2014. One component of the PFA was to re-establish the flawed and previously rejected EO Survey.[23] The OFCCP now seeks an "end run" around the legislative process, to implement, through rulemaking, a burdensome obligation for which the Administration has repeatedly been unable to garner the necessary support in Congress.

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[21] NPRM p. 46579

[22] NPRM p. 46578

[23] Section 9(b)(3) of the PFA states "The Director of the Office of Federal Contract Compliance Programs shall ensure that employees of the Office . . . (3) shall reinstate the Equal Opportunity Survey, as required by section 60–2.18 of title 41, Code of Federal Regulations (as in effect on September 7, 2006), designating not less than half of all non-construction contractor establishments each year to prepare and file such survey, and shall review and utilize the responses to such survey to identify contractor establishments for further evaluation and for other enforcement purposes as appropriate."

The EPR is just the latest in a series of efforts by the Administration to impose upon government contractors obligations that it has not been able to more broadly enact through legislation. Examples of these efforts include:

- Executive Order 13658, which raised the minimum wage for employees working on certain government contracts to $10.10/hour (following failed attempts to pass legislation that would increase the federal minimum wage to $10.10/hour).

- Executive Order 13672, which added sexual orientation and gender identity to the list of protected characteristics in Executive Order 11246 (following failed attempts to pass the Employment Non-Discrimination Act, which would prohibit discrimination on the basis of sexual orientation or gender identity by all employers covered by Title VII).

- Executive Order 13665, which prohibits federal contractors from discharging or discriminating against employees or applicants for inquiring about, discussing or disclosing compensation information (following failed attempts to pass the Paycheck Fairness Act).

Given the legislative branch's clear and unambiguous rejection of the Paycheck Fairness Act, the Administration should refrain from attempting to secure – through this rule-making effort – key components of the failed legislation.

III. If OFCCP Proceeds with Equal Pay Report, the NPRM Raises Several Concerns that Should be Addressed

A. OFCCP Should Take All Possible Actions to Protect the Confidentiality and Security of the Highly Confidential, Proprietary Data Being Requested

The compensation data that would be submitted in the EPR is some of the most sensitive, confidential and proprietary data that any contractor maintains. The contracting community has significant concerns that OFCCP will not adequately protect the data after the EPR is submitted and urges the OFCCP to modify the framework it has proposed for ensuring such data will not be released pursuant to FOIA requests. The OFCCP asserts that it will "treat information submitted for the report as confidential to the maximum extent permitted under the Freedom of Information Act."[24] However, the OFCCP generally takes a passive approach to its obligations under FOIA, putting the onus on the contractor to oppose improper disclosure of confidential information and demonstrate that its disclosure

[24] NPRM p. 46582.

would result in commercial harm.[25] As such, the agency's alleged adherence to FOIA is of little comfort to contractors. Moreover, to the extent an audit has been concluded without litigation, the FOIA protections are of even less value to the contractor.

We believe the OFCCP should create a presumption that data provided through the EPR would be maintained as confidential and not subject to disclosure. The EEOC has adopted such an approach to requests for EEO-1 Report data. *See* 29 C.F.R. Section 1610.17(e) (EEO-1 reports pertaining to a particular employer "is exempt from disclosure to the public"). Because the EPR is a proposed augmentation of contractors' EEO-1 reporting obligations and because the EPR would reflect data that is even more sensitive than EEO-1 report data, the OFCCP should develop a rule that parallels the EEOC's rule and apply the rule to the submission of aggregated compensation data.

Separate and apart from FOIA, the submission of so much highly confidential and proprietary data presents substantial data privacy concerns. Data breaches, whether caused by hacking, physical loss of documents or electronic equipment, unintended disclosure, or deliberate leaking, are rapidly increasing within government agencies. An April 2014 GAO report found that "the number of reported information security incidents [within government agencies] involving personally identifiable information (PII) has more than doubled" from 2009 to 2013.[26] The GAO further stated "[a]s GAO has previously reported, major federal agencies continue to face challenges in fully implementing all components of an agency-wide information security program, which is essential for securing agency systems and the information they contain." Contractors are understandably wary about annually submitting highly confidential and proprietary data to OFCCP without any assurances that the Agency's security infrastructure is sufficient to protect it from disclosure.

The OFCCP further insists that the collection of only "summary" data, rather than individualized data, addresses contractors' concerns that the Equal Pay Report will reveal highly confidential information about its pay practices. OFCCP's position ignores the realities of the reporting requirement. The NPRM would require that a separate report be submitted for each establishment. The vast majority of large contractors have some small establishments with only a few employees at these locations. As such, even "summary" data from these establishments could well reveal individualized compensation. For example, if an establishment has only one or two male and female senior officials and managers, their individual salaries would be readily apparent even in this "aggregate" reporting.

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[25] *See, e.g.* 41 CFR 60-40.

[26] United States Government Accountability Office, *Information Security: Federal Agencies Need to Enhance Responses to Data Breaches*; http://www.gao.gov/assets/670/662227.pdf

B. The Timing of the Submission Should Be Coordinated with the EEO-1 Report

The OFCCP has proposed a January 1 to March 31 report filing window for the EPR, and has proposed that the EPR include "summary compensation data using total W-2 earnings paid as of the end of each calendar year for each worker who was included in the contractor's EEO-1 report for that year."[27] The EEO-1 report is currently based on an employer's workforce during a payroll period between July 1 and August 31, and has a filing deadline of September 30. As such, the proposal requires contractors to report, by March of each year, on the compensation of their workforce as it existed six months previously.

The disconnect between the timing of the EEO-1 report and the EPR will create significant administrative burdens for contractors and result in outdated data that does not reflect the contractor's existing workforce at the time of submission, further amplifying its uselessness. First, reporting on six-month-old data requires contractors to go back in time to pull data for those employees who were employed by the company during the EEO-1 reporting period. The separate reporting timeframes means that contractors will be required to prepare reports at two different reporting cycles, rather than combining the reporting obligations to one time period. Second, due to the six-month gap, contractors will be reporting on just some of their actual workforce as it exists at the time of filing. The data will include employees who terminated after the EEO-1 filing in September and will not include those who have been hired since that time. As such, any data OFCCP receives will already be significantly outdated.

If OFCCP ultimately decides to collect full-year W-2 earnings and sets as the reporting period January 1-March 31, the Agency should change the reporting periods and filing deadlines for the EEO-1 report to coincide with the EPR. The OFCCP identifies this in the NPRM as an alternative that would require coordination with the EEOC. The Chamber encourages the OFCCP to do that, and resolve the disparate reporting periods before implementing the EPR.

C. OFCCP Should Ensure that the Manner of Submission is User-Friendly

OFCCP has indicated that the data for the Equal Pay Report will be submitted via "OFCCP's web-based filing system." Prior governmental efforts to collect data online, most notably the Vets 100 and 100A, have had numerous technical problems. The Vets 100A system does not permit a contractor to save the data for review before submission. OFCCP should carefully consider the structure and format of the online tool and should thoroughly test the application before implementing it for contractor use. OFCCP should ensure that the online tool for the EPR allows contractors to upload the data from its HRIS systems,

[27] NPRM p. 46570.

rather than requiring manual data entry, and to enter the data and save it prior to submission so that the company can review it and correct after entry, as necessary, before finalizing and submitting the reports.

D. Regulatory Language Should Clarify the Basis on Which Data Will be Submitted

The OFCCP states repeatedly in the commentary of the NPRM that the data for the EPR will be submitted on an EEO-1 category basis. However, the proposed language of the actual regulation does not specify that data are to be submitted on an EEO-1 category basis. Instead, it states that contractors and subcontractors must submit "[t]he Equal Pay Report, promulgated by OFCCP", thereby providing "summary data on the compensation paid to employees by sex, race, ethnicity, specified job categories, and other relevant data points. Contractors must submit the Equal Pay Report in the format and manner required by OFCCP." This language suggests that the OFCCP can change the basis on which the data must be submitted – even changing the requirement to be the submission of individualized data for each employee, or the submission of compensation other than W-2 wages – without any further notice and comment rulemaking. If the OFCCP truly believes that EEO-1 category is the best basis on which to collect the data, the Agency should specify in the rule that this is how the data will be submitted.

IV. The OFCCP Underestimates the Burden Associated with the Requirements of the NPRM, and Such Burden Outweighs Any Intended Benefit

The OFCCP estimates that each contractor will spend only $2,176 preparing the EPR. This estimate is unrealistic given the work that will be required, by both human resources and legal functions, to gather, verify, analyze and submit the data. Given the resources required, the total one-time burden estimate of $33.5 million and recurring annual burden estimate of $12.6 million fall far short of the expected costs to be imposed on contractors.

A. OFCCP's Burden Estimate is Unrealistic and Underestimates the Actual Burden on Federal Contractors

Executive Orders 12866 and 13563 require agencies to consider the costs and benefits of any proposed regulation and of each of the alternatives (including the alternative of no regulation) to the approach selected. Agencies are directed to choose an approach that will achieve any given benefit at the least cost and to base their analyses on a foundation of data and research, rather than speculation. When relevant data are not readily at hand, agencies are expected to exercise reasonable efforts to obtain credible data to support regulatory impact analyses through surveys, examination of administrative records, experiments and other research methods. In particular, agencies are directed by Executive

Order 13563 to calculate monetary estimates of benefits for comparison to compliance costs whenever it is feasible to do so.

When an agency fails to avail itself of information that is readily obtainable to inform its analysis of regulatory costs and benefits and, instead, bases its regulatory impact analysis on suppositions without foundation in fact, the agency's decisions are arbitrary, and the outcome of the regulatory process is capricious. Such regulatory decisions are contrary to the intent of Executive Orders 12866 and 13563 and of relevant statutes (Regulatory Flexibility Act and Unfunded Mandates Act) that regulatory decisions be informed by facts and be based on rational analysis of alternatives. As explained in more detail below, the OFCCP's uninformed economic burden analysis raises serious questions as to whether it has properly adhered to these rulemaking criteria.

1. *OFCCP's Cost Burden is Not Based Upon Surveys, Experiments, Or Other Empirical Research*

The OFCCP's estimates of one-time, start-up contractor compliance costs of $30,104,167 for systems modification ($1,417 per company based on OFCCPs estimate of 21,251 affected companies) and of annual reporting costs of $12,654,414 for actual reporting operations ($595 per company based on OFCCP's estimate of 21,251 affected companies) are inaccurate and incomplete. The estimated hours of labor for compliance tasks from which these estimates were constructed lack any factual basis in experiential or experimental data. The OFCCP does not cite any source for these estimates of labor hours. Instead, the hours used throughout OFCCP's calculations of contractors' compliance costs appear to be arbitrary guesses with no basis in the realities of the operation of human resource management and reporting systems. The failure of OFCCP to cite any surveys, reports, interviews with human resource management professionals or human resource information systems experts or any other basis for its estimates suggests that OFCCP failed to "base its decisions on the best reasonably obtainable scientific, technical, economic, and other information, " failed to "use the best available science," failed to "use the best available techniques to quantify anticipated and future benefits and costs," and failed to "ensure the objectivity of any scientific and technological information." [28]

By way of example, OFCCP could have provided a more accurate and realistic cost burden by engaging in the following exercises:

- The OFCCP should have and readily could have conducted a retrospective study of contractor compliance with existing requirements for the EEO-1 report, including surveys or field research regarding the labor time and other expenses that employers incur annually to compile and submit the required

[28] Executive Order 12866, Section 1(b) and Executive Order 13563, Sections 1 – 6.

data. Such a study could have easily included inquiry regarding the initial systems modification expenses that new contractor firms incur the first time that they are subject to the EEO-1 reporting requirement. The Department of Labor maintains within the Office of the Assistant Secretary for Policy a Chief Evaluation Officer and staff who have specific expertise to assist agencies to conduct this type of research. While the EEO-1 report collects different information than the proposed EPR, data from a study of EEO-1 reporting would have provided a reasonable proxy and starting point for an objective, fact-based, scientific inquiry regarding the likely costs of compliance with the contemplated report.

- The OFCCP should have and readily could have conducted an internal experimental study in which the DOL's own human resources and payroll systems unit tested implementation of the proposed report for each of several agencies within the DOL while keeping track of the information system report preparation time and other costs and requirements for compiling the data and submitting it in the required format. This approach would have provided the added benefit to the OFCCP of testing the utility of the data as an indicator of potential pay discrimination by enabling the examination of whether differences in reported values for particular agencies in comparison to the Departmental total in fact provided a basis for meaningful inferences or a basis for further investigation.

- The OFCCP should have and readily could have conducted field surveys and interviews of experienced human resource professionals and information systems specialists in contractor companies, among relevant consulting services providers, and among other relevant experts to obtain estimates based on experience and informed judgment regarding the labor time, other costs, and relevant cost-drivers affecting compliance costs for the proposed report. Even if obtaining OMB clearance for an information collection survey were an insurmountable obstacle (which it is not), the OFCCP could have conducted nine expert interviews (and reported them in the regulatory docket) without OMB clearance.

The OFCCP cannot claim cost as an obstacle to conducting any of these research activities. The OFCCP states within the preamble to the proposal that it plans to expend an additional $3.4 million during the first year to upgrade its own systems to receive and process the report and an increased $359,000 per year in perpetuity to maintain and analyze the report data. For a one-time cost of about $300,000, the OFCCP could have readily conducted a survey or other research to develop credible, fact-based data. Nor is the lack of time a justification for the OFCCP's neglect of reasonable regulatory impact analysis research: the proposed information collection has been under consideration and discussion

within the OFCCP since 2009. There has been ample time to obtain the facts needed to perform an adequate regulatory analysis of both the compliance costs and of the putative benefits of the proposed rule.

Instead of doing the simple research work that it should have done and that it had the means at its disposal to do, the OFCCP has chosen to base its regulatory analysis and decision on unsubstantiated, arbitrary and capricious parameters. OFCCP should take the time and effort to make its regulatory decision on the basis of facts instead of conjecture.

2. *The Chamber's Independent Economic Survey Further Calls Into Question OFCCP's Estimates*

To fill the information vacuum left by the OFCCP, the Chamber conducted its own field research, including surveys and interviews of affected human resource professionals in affected companies and interviews of consultants and technical specialists who provide affirmative action compliance assistance and payroll information processing services to employers. We surveyed and interviewed experienced senior human resource managers in 13 companies. In each case, the respondents were professionals whose current duties include preparing their EEO-1 submissions. We also interviewed representatives of service providers who furnish payroll processing and other human resource information processing services and software to employers. A copy of the survey instrument with response summary statistics is attached as Appendix A. The findings of our compliance cost survey are summarized below.

The OFCCP's unsubstantiated estimate that the typical affected employer would require 30 hours of management and information technology specialist hours to redesign human resource information systems to produce the required compensation reports contrasts significantly with the average of 516.67 hours of internal labor time reported by survey respondents.[29] Compared to the OFCCP's sanguine estimate of $1,417 per affected contractor company to accomplish the necessary information system modifications to accommodate the Equal Pay Report mandate, these survey respondents found, on average, that the cost of internal labor alone would be $37,532 (516.67 hours x $72.64 per hour).

It is notable too, that the cost of information systems modifications is not expected to vary significantly with the size of the company in terms of either employment or establishments. OFCCP acknowledged this invariance relative to number of employees or number of establishments in its own calculation, which was presented as a single company-wide cost element, not dependent on the number of establishments.[30] Our follow-up

[29] The OFCCP's estimate is below the 135 hour lower bound of the 95% confidence interval around the sample mean.

[30] NPRM, p. 46588. "21,251 contractor companies x 30 hours."

interviews of survey respondents and of payroll/human resource information processing service providers confirmed this. One representative of a service provider suggested that the information systems modification costs for the smallest affected companies with 100 to 250 employees would be somewhat higher than average for large firms because such firms do not as typically have automated systems, software or relationships with service providers in place.[31]

Furthermore, the hourly labor cost cited by survey respondents, $72.64 on average, is significantly higher than the hourly compensation value for IT professionals cited by the OFCCP ($47.22) based on Bureau of Labor Statistics Employer Costs for Employee Compensation estimates. The BLS value underestimates the full economic cost to a company of using its internal labor resources because it reflects only wages and non-wage employee compensation (such as paid leave, health insurance, and payroll taxes paid by the employer). The BLS value does not include the full economic opportunity cost of shifting internal resources away from valuable internal projects to the indicated regulatory compliance project. The BLS value also reflects only information technology specialist labor, not the full mix of labor likely to be included to accomplish a major information systems modification, especially one like the EPR, which may have significant legal as well as technical implications. Indeed, follow-up interviews confirmed that many survey responses for the labor cost item included managerial and legal labor costs, as well as information technology labor costs.

Survey respondents revealed an important element of the information systems modification process that the OFCCP overlooked: in addition to internal labor costs to assess system modification needs, to link separate data systems, and to design and test automated report formats, six companies indicated that they would also require input from external service providers, consultants, or software vendors. These indicated, on average, costs of $40,619 for external service provider or consultant fees. Other respondents indicated that they may also use external resources, but did not provide an estimated value.

Including both internal resources and external resources, the total compliance cost for the initial systems modification component reported by our survey respondents averaged $78,512. While we acknowledge that the number of survey responses was small, the sample was not selected randomly from the potentially affected universe of contractors, and relatively larger companies were represented, the difference between our finding and the $1,417 amount put forth by the OFCCP without any supporting empirical data should give pause to any reasonable regulatory decision maker. It should suggest the need for the OFCCP to examine the issue of systems modification burden and to explore regulatory alternatives that could reduce that burden. It should suggest the need for the OFCCP to

[31] Interview by R. Bird on Dec 3, 2014, of service provider name withheld per confidentiality agreement.

conduct the basic empirical research that it should have already conducted before proceeding to this point in the rule making process. Finally, the OFCCP should consider the stark contrast between its assertion of what the typical data provider will need to do to prepare to send the data and its own internal estimate that OFCCP will need over three million dollars of taxpayer money to modify its information systems to receive the data.

In addition to estimating the initial costs of information systems modifications to accommodate the proposed EPR mandate, the OFCCP estimated that annual operations to compile and submit the report data would cost the typical company $595. Our survey addressed this cost issue two ways: (1) we asked companies what they currently spend to compile and submit EEO-1 data, and (2) we asked companies to estimate what it would cost to compile and submit the proposed EPR data. Both approaches yielded similar responses. Companies reported, on average, that they spend $19,822 per year for EEO-1 compliance. Companies estimated, on average, that the EPR data compilation and submission would cost $22,339. Follow-up interviews confirmed that compilation and submission of EEO-1 data, currently, and of the prospective EPR data entails more effort, care, supervision and management review than OFCCP seems to have understood. These reports are legally required to be accurate and complete, and submission entails a significant corporate liability and fiduciary responsibility. The suggestion in the OFCCP analysis that such a task can be largely relegated to junior administrative staff is unrealistic.

Even after making allowance for survey issues of response number, large company over-representation, and non-random sample selection, these on-going annual compliance operations values should suggest that the OFCCP's assumptions should be examined more closely. The OFCCP has presented exactly zero survey responses, interviews, experiments or other research data to substantiate its estimate. More research needs to be done and more alternatives need to be considered before this rulemaking moves forward.

B. The Actual Burden Far Outweighs the Intended Benefit, Particularly When Considered in the Context of Other Onerous, New, and Upcoming Burdens

As noted above, the data to be collected by the proposed EPR would literally be of no value to the OFCCP's mission and to contractor self-assessments of pay. Thus, any burden imposed by the NPRM will outweigh the intended benefit.

The cost-benefit analysis becomes even more problematic when one considers this NPRM in the context of the numerous other extraordinary new burdens that are being imposed upon contractors by other OFCCP initiatives. The Agency's revisions to the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act regulations, which went into effect March 24, 2014, have prompted the contracting community to expend extraordinary time and resources to revise processes, collect and analyze data, and establish reporting mechanisms. Regulations implementing the

President's Fair Pay and Safe Workplaces Executive Order, looming on the horizon, will impose additional reporting obligations on contractors already weighed down by compliance requirements. The EPR, in conjunction with these other compliance obligations, will increase measurably the costs of doing business with the government and may well result in fewer participants in the government marketplace, which stands in direct contravention of the Administration's hope to expand federal contracting opportunities.

CONCLUSION

In conclusion, the Chamber believes that the proposed EPR will require contractors to spend significant time, money and resources to compile and submit data that will be useless to the OFCCP's enforcement efforts and will not assist contractors in their compliance efforts. We urge the Agency to abandon its stated intent to implement this data collection effort. Assuming the OFCCP moves forward with the EPR, we strongly encourage the Agency to consider the issues raised in these comments and modify the EPR accordingly.

Thank you very much for your consideration of these concerns. Please do not hesitate to contact us if the Chamber may be of assistance as you consider these important issues.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

James Plunkett
Director
Labor Law Policy

Of Counsel:

/s/ Kris D. Meade
Kris D. Meade
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Crowell & Moring LLP

Appendix A

U.S. Chamber Survey of Compliance Costs							
Summary Table							
Item	n	min	Max	mean	sample standard deviation	mean standard error	relative standard error
Number of Employees	13	465	201068	49,772.15	53,025.56	14,706.64	29.5%
Number of Establishments	13	13	6345	773.38	1,725.68	478.62	61.9%
Annual labor hours EEO-1 report	13	0	500	111.38	136.16	37.76	33.9%
Hourly labor cost EEO-1 report	13	0	135	57.78	36.21	10.04	17.4%
External services EEO-1 report	13	3500	25790	14,708.33	18,943.05	5,253.86	35.7%
Total internal/external annual EEO-1 report	13	773.7	53000	19,822.82	18,839.98	5,225.27	26.4%
Estimated labor hours IT systems setup	9	39	2,000	516.67	583.76	194.59	37.7%
Estimated hourly labor cost IT systems setup	9	43	134	72.64	34.52	11.51	15.8%
Estimated external services IT systems setup	7	0	172500	40,619.29	63,735.02	24,089.57	59.3%
Total internal/external IT systems setup	10	2112	202000	78,512.10	74,026.43	23,409.21	29.8%
Estimated labor hours annual submission EPR	10	0	240	105.00	76.29	24.12	23.0%
Estimated hourly labor cost annual submission EPR	10	0	140	64.32	41.81	13.22	31.6%
Estimated external	8	435	50000	18,766.88	20,315.77	7,182.71	35.4%

services annual submission EPR							
Total internal/external cost annual submission EPR	10	8200	50080	22,339.46	18,366.74	5,808.07	31.6%

Survey Instrument

The following questions will help us to gauge the accuracy of OFCCP's compliance cost estimates and to present, if appropriate, an alternative cost estimate. Please return by email to xxxxxxxxxxxxxxxxxxx.

1. How many employees, company-wide did your company report on its most recent EEO-1 form?
   _____ employees, including full-time and part-time.

2. For how many separate establishments (including headquarters) would you report if the
   Equal Pay Report requirement were required this year?
   _____ establishments, including _____ with fewer than 50 employees each.

3. Does your company prepare EEO-1 reports centrally for all establishments, or does your company delegate the preparation of EEO-1 reports to individual establishment managers?
   _____ all reports are prepared centrally. _____each establishment prepares its own report. _____some establishments independently prepare reports.

4. For all establishments combined, how much internal labor time (if any) does your company expend, what is the average hourly labor cost that is appropriate to value those hours and how much is expended for external consultant/vendor services annually to complete the current EEO-1 forms that are required for your headquarters, for each other establishment with 50 or more employees, and for the combined EEO-1 form for remaining establishments having fewer than 50 employees? We are looking for company-wide aggregates, not per establishment data.
   - _____ annual hours internal labor at $_____ per hour (average).
   - $_____ annual cost of external consultant/vendor services.

5. Does your firm have an established relationship with a human resources information systems consultant or services provider? _____yes _____no

6. Do you agree with the OFCCP estimate that the necessary programming, human resource systems modifications, staff training and other "one-time" costs of setting up systems to comply with the Equal Pay Report requirement will be about $1,417 as

a company-wide total, including internal labor time and costs for outside consultant/vendor services?

_____ yes _____no

If not, please estimate: (range estimates are okay)

a. The amount of internal labor time that would be required (total company-wide) and the hourly labor rate that would be appropriate, on average, to value those hours.
   _____ hours of internal labor effort at
   $_____per hour
   Optional: list labor hours by type and separate type hourly rates if you wish.
b. The amount of any external consultant/vendor services costs that would be incurred in addition to internal labor identified above.
   $_____

7. Do you agree with the OFCCP estimate that after one-time systems modifications have been made, the routine, annual costs of compiling, tabulating, verifying and submitting to OFCCP the Equal Pay Report requirement will be about $595 total company-wide, including internal labor time and any costs for outside consultant/vendor services?

   _____yes _____no

   If not please estimate: (range estimates are okay) see next page ➔

   a. The usual annual amount of internal labor time that would be required company-wide and the hourly labor compensation rate that would be appropriate, on average, to value those hours.
      _____ hours of internal labor effort at
      $_____ per hour
      Optional: list labor hours by type and separate type hourly rates if you wish.
   b. The usual annual amount of any external consultant/vendor services costs that would be incurred in addition to internal labor identified above.
      $_____.

8. Does your company currently maintain actual hours (including worked and paid leave) records for FLSA exempt employees?

   _____yes _____no

   a. If no, would the adoption of the proposed Equal Pay Report cause your company to change its recordkeeping system to record actual hours for FLSA exempt employees?
      _____yes _____maybe _____no _____not sure
   b. What would be the estimated cost of making such a change?
      $_____

9. Would someone in your organization be available to answer additional questions or to clarify your responses to the questions above?

   _____ no.
   _____ yes. Below is name, title, email address and telephone number.

EXHIBIT 1

Statement of the U.S. Chamber Of Commerce

ON: **THE PAYCHECK FAIRNESS ACT (S. 84)**

TO: **THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS**

BY: **CAMILLE A. OLSON**
SEYFARTH SHAW LLP

DATE: **APRIL 1, 2014**

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 U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business — manufacturing, retailing, services, construction, wholesaling, and finance — is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

TESTIMONY OF CAMILLE A. OLSON

BEFORE THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS

THE PAYCHECK FAIRNESS ACT

APRIL 1, 2014

Good afternoon Mr. Chairman and members of the Committee. On behalf of the U.S. Chamber of Commerce, I am pleased to testify on S. 84, the "Paycheck Fairness Act" (the "Act").[32] I am Chairwoman of the Chamber's equal employment opportunity policy subcommittee. The Chamber is the world's largest business federation, representing more than three million businesses of all sizes, industry sectors, and geographical regions.

I am also a partner with the law firm of Seyfarth Shaw LLP,[33] where I chair the Labor and Employment Department's Complex Discrimination Litigation Practice Group. In addition to my litigation practice, which has specialized in representing local and national companies in federal court litigation involving claims of employment discrimination, I also represent employers in designing, reviewing, and evaluating their pay practices to ensure compliance with federal and local equal employment opportunity laws. I have represented business and human resource organizations as *amicus curiae* in landmark employment cases, including *Dukes v. Wal-Mart*, and also teach federal equal employment opportunity law topics at Loyola University Chicago School of Law.

In today's testimony[34] I discuss the meaning and impact of the Act on the Equal Pay Act of 1963[35] ("EPA"). If enacted, the Act would amend the EPA significantly in substantive and procedural ways, all upon a fundamental yet unsubstantiated premise – namely, that throughout the United States of America, all unexplained wage disparities existing between men and women are necessarily the result of intentional discrimination by employers.[36]

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[32] In July 2007, I testified before the House Subcommittee on Workforce Protections on H.R. 1338 (also entitled The Paycheck Fairness Act), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg36467/html/CHRG-110hhrg36467.htm.

[33] Seyfarth Shaw LLP is a global law firm of over 800 attorneys specializing in providing strategic, practical legal counsel to companies of all sizes. Nationwide, over 350 Seyfarth attorneys provide advice, counsel, and litigation defense representation in connection with discrimination and other labor and employment matters affecting employees in their workplaces.

[34] I would like to acknowledge Seyfarth Shaw LLP attorneys Richard B. Lapp, Paul H. Kehoe, Kevin A. Fritz, and Lawrence Z. Lorber, as well as Jae S. Um for their invaluable assistance in the preparation of this testimony.

[35] 29 U.S.C. § 206(d)(1).

[36] The proponents of the Act have not cited any evidence establishing that a wage gap is actually caused by employer discrimination. They essentially propose acceptance of the existence of the wage gap as presumptive proof. However, this unsubstantiated syllogism does not withstand scrutiny. As labor economists and feminist scholars have observed, any wage gap between men and women is attributable to a number of factors bearing no relationship whatsoever to alleged

(Continued...)

On the unsupported assertion that women today earn 77 cents for every dollar a man earns as a result of intentional employer discrimination, the Act would impose harsher, "lottery-type" penalties upon all employers, in effect eliminate the factor other than sex defense,[37] and make available a more attorney-friendly class action device. The Act's proponents contend that these changes are necessary to ensure equal pay for women. Nothing could be further from the truth because existing laws already provide robust protections and significant remedies to protect employees against gender-based pay discrimination (protections exist under both the EPA, Title VII of the Civil Rights Act of 1964 ("Title VII")[38] as well as Executive Order 11,246). Plaintiffs are taking advantage of the multiple forms of redress available to remedy pay discrimination through both the filing of discrimination charges as well as federal and state court individual lawsuits and class actions.

Instead, in practice, the Act would: (1) impose enormous burdens and risks on employers who base compensation decisions on factors other than sex such as training, experience, and education, or reliance on the current market value placed on skills and experience and economic

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employer discrimination. *See, e.g.*, BUREAU OF LABOR STATISTICS REPORT 1045, HIGHLIGHTS OF WOMEN'S EARNINGS (2013); JOINT ECON. COMM., INVEST IN WOMEN, INVEST IN AMERICA (2010); and AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN Commissioned by the U.S. Dep't of Labor, Office of Employment Standards Administration, and prepared in conjunction with CONSAD Research Corp. (2009) (when accounting for factors such as: occupation, human capital development, work experience, career interruptions, industry, health insurance, fringe benefits, and overtime work, the 2009 Report found that the unexplained hourly wage differences were between 4.8 and 7.1 percent).

The so-called gender wage gap ignores the complexity and documented factors that have been identified in social science research to explain the differences in wage rates between men and women, including the following differences: the availability of other non-economic benefits provided by the employer; an employees' willingness and ability to negotiate pay; pay history; the number of hours worked; an employee's willingness to work during certain shifts and in certain locations; certifications and training obtained by the employee; the amount and type of education achieved; prior experience; length of time in the workforce; length of service with the employer; time in a particular job; the frequency and duration of time spent outside the workforce; job performance; personal choices regarding other family or social obligations; occupational choice, self-selection for promotions and the attendant status and monetary awards; and other "human capital" factors. Many of these factors are a function of personal choices employees make. Reliance on this figure as sufficient evidence of widespread employer discrimination in today's workforce runs counter to every facet of the long-held standard of equal pay for equal work.

[37] Revisions to the "factor other than sex" defense would render it a nullity, allowing judges and juries to second guess employers and the marketplace as to the relative worth of job qualifications in individual pay decisions. The Act, in effect, requires employers to implement a civil service philosophy with respect to all pay decisions, eliminating individual pay advancements unless an employer can prove its pay raise was a business necessity and it cannot be shown that a different economic decision could have been implemented that would not have caused a wage differential for female employees without the pertinent job qualifications.

[38] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*, as amended by the Civil Rights Act of 1991, PL 102-166, 105 Stat. 1071. *See* 42 U.S.C. §§ 12117(a), 1981a(2) ("Title VII").

need, (2) devalue in the marketplace enhanced skills, training, and experience (as well as other non-discriminatory factors for pay differences between employees), and (3) expand litigation opportunities for class action lawyers seeking millions of dollars from companies without ever having to prove that the companies intentionally discriminated against women.

The proposed changes to the EPA are also contrary to its most fundamental underpinnings; the requirement of *equal pay for equal work* balanced against the mandate that government not interfere with private companies' valuation of a worker's qualifications, the work performed, and more specifically, the setting of compensation.[39] The proposed changes are also inappropriate given the EPA's distinguishing features, relative to other anti-discrimination legislation. Perhaps the most notable difference is the lack of any requirement that a prevailing EPA plaintiff prove intentional employer discrimination. This feature separates the EPA from Title VII, the Age Discrimination in Employment Act,[40] the Americans with Disabilities Act,[41] as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871.[42] These statutes allow for the imposition of compensatory and punitive damages, but only upon a finding of intentional discrimination by the employer. In contrast, the EPA currently imposes liability on employers without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency in the EPA as rendering employers "strictly liable" for any pay disparity between women and men for substantially equal work unless the employer can show that the pay differential was due to: a seniority system, a merit system, a system measuring quality or quantity of work, or any other factor other than sex. The irrelevancy of an employer's intent is a defining feature of the EPA, and must be remembered as the significant amendments to the EPA suggested by the Act are debated. By eliminating the factor other than sex defense, and replacing it with an unattainable standard of an affirmative employer showing that any individual wage difference was: (1) job-related and required by "business necessity" and (2) not "derived from a sex-based differential in compensation," the Act imports a business necessity "plus" standard for an employer to defend every individual pay decision even where no evidence of discrimination is required to be shown.[43]

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[39] Indeed, the Government's experience with wage setting finds its genesis with the War Labor Board in World War II when the Board looked to determine market rates to apply to women then entering previously male-dominated jobs.

[40] 29 U.S.C. § 621 *et seq*.

[41] Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq*. Like Title VII, under the ADA, punitive and compensatory damages are only available where intentional disability discrimination is shown. *See* 42 U.S.C. §§ 12117(a), 1981a(2). Similarly, disparate impact claims under Title VII do not subject an employer to punitive or compensatory damage claims.

[42] 42 U.S.C. §§ 1981 and 1983, respectively.

[43] Under the Act, market forces would effectively be excluded from consideration when an employer sets an individual's pay rates unless an employer is able to prove a negative -- that the market rate used was not derived or influenced by a sex-based differential in pay. Under the Act, an employee's request for higher pay to match a competitor's offer could not be "matched" unless, first, the employer proved the competitor's offer was not influenced by a sex-based differential (practically, a very difficult burden) and second, the employee's increase was a business necessity (how does an employer prove that one employee's retention is a business necessity?).

And, if the Act becomes law, a plaintiff could erase an employer's defense and leave it open to a jury award of unlimited punitive and compensatory damages in large mass actions on the basis of one employee's complaint (without regard to the size of the employer). Under the Act, employer liability attaches every time a plaintiff's lawyer shows an employer could have implemented an alternative employment practice that would serve the same business purpose without producing a differential in pay between a male and female employee. This is true even where the employer shows that the factor other than sex justifying the differential in pay is education, training, or experience. The Act does not describe any examples of alternative employment practices that would suffice to defeat the employer's burden. If a plaintiff countered an employer's justification of education, training, or experience by suggesting that the employer had the financial ability to raise everyone's pay in the same job – is that alternative an alternative employment practice that would defeat the employer's defense (in every case, so that the Act's "factor other than sex" defense is in fact a complete illusion)? In effect, the Act suggests that the universal alternative would be to "round up" any wage distinction. No answer is found in the Act; yet, there is no question that this one issue would lead to considerable uncertainty and litigation.

The Act's elimination of the EPA's defense of a factor other than sex with the imposition of a statutory framework previously reserved for application to an employer's neutral policy decisions that have a disparate impact on minority employees (where employers are not liable for compensatory or punitive damages) is unworkable, ill-advised, and inappropriate as an analytical tool to judge an employer's individualized wage decisions.

For these reasons, and all of the reasons set forth below, the Chamber strongly opposes the Paycheck Fairness Act. We urge the Committee to carefully consider the issues raised by the Chamber and proceed cautiously in considering the Act.

Current Protections Against Sex-Based Wage Discrimination

Overview

Since 1963, it has been unlawful under the EPA for an employer to pay a female employee less than a male employee for equal work. Today, employees enjoy a substantial assortment of protections against wage discrimination. Since 1979, the EPA has been enforced by the Equal Employment Opportunity Commission.[44] In addition to the protections against wage discrimination based on sex afforded by the EPA, sex discrimination in wages is also

[44] In 1986, the EEOC issued detailed regulations entitled "EEOC's Interpretations of the Equal Pay Act," 29 CFR § 1620, *as amended*. In 2006, the EEOC issued regulations under the EPA, 29 CFR § 1621, *as amended*. Since Fiscal Year 2008, the EEOC has received between 919 and 1,082 charges asserting violations of the Equal Pay Act annually, representing roughly 1% of total charge filings. *See* EEOC CHARGE STATISTICS FY 1997 THROUGH FY 2013, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

prohibited by Title VII, many state antidiscrimination statutes, and, for employees of federal contractors and subcontractors.[45]

Today, the EPA and Title VII provide a woman who prevails on her wage discrimination claim a collection of favorable and effective remedies. Those combined remedies include: back pay; front pay; liquidated damages; attorneys' fees; costs; affirmative injunctive relief in the nature of an increase in wages on a going forward basis; prejudgment interest; $300,000 in punitive and compensatory damages. If an employer is a government contractor, as many are, it may also face sanctions (including, for example, debarment, the cancellation, termination or suspension of any existing contract) and remedies (such as elimination of practices, seniority relief, monetary and equitable relief to identified class members, and accelerated training). These contractor remedies exceed those available to victims of intentional discrimination under Title VII generally, the ADA, and the ADEA.

Mechanics of the EPA and Title VII

The Equal Pay Act of 1963

The EPA provides that no employer shall pay employees of one sex at a rate less than the rate at which the employer pays employees of the opposite sex for equal work.[46] An employee may assert an EPA claim either by filing a charge of discrimination with EEOC or by proceeding directly to federal court and filing a lawsuit there.

To prevail under the EPA, an employee must make a *prima facie* showing of discrimination by presenting evidence that: (1) different wages were paid to employees of the opposite sex; (2) the employees performed equal work requiring equal skill, effort, and responsibility; and (3) the employees shared similar working conditions.[47] If the employee makes that showing, she has established a presumption of discrimination. The burden of persuasion then shifts to the employer, who can only avoid liability by proving that the wage differential is pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex.[48] Note, even if an employer meets this burden, a plaintiff prevails if able to show that the employer's proffered reason is not bona fide, but is a pretext or excuse for paying higher wages to men for equal work. Critically, there is no requirement under the EPA for a plaintiff to prove any discriminatory intent or animus on the part of the employer. That element is not present in the liability scheme under the EPA.[49]

The EPA is contained within the Fair Labor Standards Act ("FLSA").[50] Under the FLSA, a successful EPA plaintiff may recover back pay, front pay, prejudgment interest, and attorneys'

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[45] Exec. Order No. 11,246, Section 202(1), 30 Fed. Reg. 12,319 (Sept. 24, 1965), *as amended* by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).

[46] 29 U.S.C. § 206(d).

[47] 29 U.S.C. § 206(d)(1); *Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989).

[48] 29 U.S.C. § 206(d)(1).

[49] *See* 29 U.S.C. § 206(d)(1) (making clear only relevant inquiry is whether alleged disparity resulted from "any factor other than sex"); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310-11 (10th Cir. 2006).

[50] 29 U.S.C. 201 *et seq*.

fees and costs. Where willfulness is shown, a plaintiff may also recover an additional amount of back pay as liquidated ("double") damages, and the defendant may also be fined up to $10,000 and imprisoned for up to six months.[51]

Title VII

Similarly, under Title VII, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex . . . ."[52] An employee may assert a claim for sex-based pay discrimination by filing a charge of discrimination with EEOC and then, upon receipt of her notice of right to sue (and regardless of whether EEOC finds "cause" for concluding that discrimination occurred), may file a lawsuit in federal court. Further, an employee need not engage an attorney to participate in the EEOC processes, including investigation of their allegations of discrimination under the EPA and Title VII, as well as conciliation and litigation of their claim in federal court (if the EEOC determines to file suit on the employee's behalf).

To establish that similarly-situated males were more favorably compensated, as is necessary to prevail in a disparate treatment pay claim under Title VII, a plaintiff must either provide direct evidence of discrimination, or prove discrimination through the indirect method by providing evidence of a *prima facie* case of discrimination. Once she has done so, the employer must articulate a legitimate, non-discriminatory reason for the wage differential. At that juncture, the plaintiff has an opportunity to prove that the proffered reason is a pretext for unlawful employment discrimination. The plaintiff's burden is higher under Title VII in connection with discrimination-based pay claims than under the EPA, where establishment of a disparity in pay for equal work obligates the employer to prove that the disparity is for a reason other than sex to avoid strict liability.

Comparison of EPA and Title VII

Both the EPA and Title VII provide remedies for women who believe they have been subjected to sex discrimination in pay, and we have included examples below demonstrating that both serve as effective mechanisms for women to redress alleged claims of sex-based pay discrimination. From an employee's perspective, the EPA is the more favorable and lenient of the two statutes with respect to both the ease of pursuing a claim against an employer and the relatively low standard for establishing liability. For example:

- Under the EPA, an "employer" includes entities and individuals. An employer employing as few as two employees is included within its coverage (whereas Title VII covers employers of 15 or more employees);

- Establishment of the *prima facie* case of pay discrimination under the EPA entitles an employee to a legal presumption of discrimination, with the burden of production and persuasion moving to the employer. In contrast, under Title VII, even where a plaintiff establishes a *prima facie* case of pay discrimination, she at all times retains the burden of

[51] 29 U.S.C. § 216(b).
[52] 42 U.S.C. § 2000e-2(a). *See also* 42 U.S.C. § 2000e-2(h).

persuasion as to discrimination. To avoid the imposition of liability, an employer must prove that the disparity was caused by one of four permissible reasons. As a result, under the EPA, plaintiffs are much more successful in defeating employer's motions for summary judgment and having their claims heard by a jury;[53]

- The EPA provides for strict liability, meaning that a plaintiff need not show discriminatory intent on the part of the employer to prevail, whereas a disparate treatment plaintiff under Title VII must show the existence of discriminatory intent on the part of the employer to prevail;

- There is a much longer, more generous limitations period (2 years for a general violation, 3 years for a violation found to be willful) under the EPA as opposed to at most 300 days for the filing of an administrative charge of discrimination with the EEOC under Title VII (which is a prerequisite to suit in federal court); and

- Under the EPA there is no charge filing requirement with an administrative agency.

The EPA also shares many of the advantages accorded to claimants under Title VII, including:

- Plaintiffs may recover attorneys' fees and costs;

- The EEOC may bring public suits to enforce the EPA, including seeking injunctive and other remedies; and

- Plaintiffs may file a charge alleging a violation of the EPA and request the EEOC investigate the violation.

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[53] *King v. Acosta Sales & Mktg., Inc*., 678 F.3d 470, 474 (7th Cir. 2012) (reversing summary judgment for employer where it only articulated, rather than proved, that education and experience accounted for a pay differential between male and female managers); *Vehar v. Cole Nat. Group Inc.*, No. 06-4542, 2007 WL 3127913, at *7-8 (5th Cir. 2007) (reversing summary judgment for employer where the differences in experience between male and female computer programmers were not enough to support summary judgment); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 794 (7th Cir. 2007) (reversing summary judgment for employer where a genuine issue of material fact existed regarding the justification – perceived performance and one additional year of seniority – for a $2 per hour pay differential between male and female press feeders); *EEOC v. Health Management Group*, No. 09-1762, 2011 WL 4376155, at *5-6 (N.D. Ohio Sept. 20, 2011) (denying employer's motion for summary judgment where it argued that a pay differential between male and female franchise distributors was based on the male's prior negotiating skills with physicians, where a question of fact existed regarding whether the hiring official knew of that skill). *See also, Mickelson*, 460 F.3d at 1311 ("This is not to say that an employer may never be entitled to summary judgment on an EPA claim if the plaintiff establishes a prima facie case. But, because the employer's burden in an EPA claim is one of ultimate persuasion, 'in order to prevail at the summary judgment stage, the employer must prove at least one affirmative defense so clearly that no rational jury could find to the contrary'") (internal citation omitted).

In the aggregate, these overlapping non-discrimination statutes provide employees multiple avenues for pursuing claims of unequal pay for equal work. They also provide employees with multiple forms of redress with respect to alleged pay discrimination, including: a direct right to a jury trial on their own behalf in federal court, the filing of a charge of discrimination with the EEOC, the right to have the EEOC pursue a claim on their behalf in federal court, and the right to bring a collective action or class action on behalf of other similarly-situated employees who choose to participate in an action under the EPA or Title VII, respectively (on their own or by their attorney of choice). It is not uncommon for a worker suing to enforce his or her rights to equal pay under the EPA to also file a charge of discrimination with the Equal Employment Opportunity Commission, file a lawsuit in federal or state court, and, if their employer is a federal contractor, raise a claim under Executive Order 11,246 with the Office of Federal Contract Compliance Programs (or do all of the above).

And, of course, notwithstanding the differences between the statutes, claimants may bring parallel claims under the EPA and Title VII to ensure that they receive the fullest protection under the law. Indeed, they may recover under both statutes for the same period of time provided they do not receive a double or duplicative recovery for the same "wrong." As such, a prevailing plaintiff may recover back pay, a front pay adjustment, compensatory damages, punitive damages, liquidated damages, and injunctive relief, among other relief. Put simply, women who believe that they suffer wage discrimination as a result of their sex have available to them federal statutes that provide significant remedies.[54]

Concerns Regarding Proposed Changes to the Equal Pay Act

Inappropriate Expansion of EPA Remedies for Unintentional Wage Discrimination to Include Unlimited Compensatory and Punitive Damages

Critics of the EPA in its current form have observed that it is not a "lottery."[55] Indeed, it is not intended to be. Rather, its remedial provisions are intended to compensate employees for sex-based pay inequities, whether inadvertent (which is sufficient for the imposition of liability) or not. Awarding compensatory and punitive damages where no showing of intent is required would be inappropriate and contrary to the purposes behind the allowance for compensatory and punitive damages in cases of *intentional* discrimination.

In passing the Civil Rights Act of 1991, Congress expanded the forms of relief available to an individual who is the victim of *intentional discrimination* under Title VII so as to include compensatory and punitive damages. Prior to passage of that Act, 42 U.S.C. § 1981 "permitted the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination, but no similar remedy existed in cases of intentional sex, religious, or disability discrimination.[56] As then-Congresswoman Pat Schroeder from Colorado explained in her statement during the Congressional floor debate from August 2, 1990, regarding punitive damages for Civil Rights Act:

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[54] BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 15 (3d ed. 1996).

[55] Sara L. Zeigler, *Litigating Equality: The Limits of the Equal Pay Act*, 26 REV. PUB. PERS. ADMIN. 199, 204 (2006).

[56] *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001).

> Mrs. SCHROEDER. Mr. Chairman, I want to answer some of the things that we have just heard. We are hearing here that there is something wrong with this bill because there are remedies **. . . .** Let me tell Members one more thing about punitive damages. *You do not get punitive damages unless there was intent. It is all equitable, unless there is intent.* It seems to me in this country that if there is intent to discriminate, then we certainly should be out trying to assess some kind of punitive damages. Otherwise, someone just assigns it as a cost of doing business.[57]

As evidenced by the above, compensatory and punitive damages serve distinct and specific purposes. Compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[58] Punitive damages are "intended to punish the defendant and to deter future wrongdoing."[59] Under Title VII, "[A] finding of liability does not of itself entitle a plaintiff to an award of punitive damages."[60] "The purpose of awarding punitive damages is to 'punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct.'").[61] "Such an award must be supported by the record, and may not constitute merely a windfall for the plaintiff."[62] It strains logic and flouts the entire body of federal anti-discrimination law to suggest – or, as the Act would do, to mandate – that damages conceived and intended to punish and deter wrongful conduct should apply to claims of inadvertent, unintentional conduct that has the effect of violating the EPA. It is inconsistent to introduce a concept of malice or reckless indifference into a strict liability statute.

In sum, it is inappropriate here to amend the EPA, a strict liability remedial statute that requires no showing of discriminatory intent, to facilitate the imposition of unlimited punitive and compensatory damages. It would serve no legitimate purpose, and it would serve the illegitimate purposes of both turning the EPA into a lottery for plaintiffs willing to roll the dice to capitalize on likely legitimate wage differentials and to unjustly enrich plaintiffs' attorneys.

<u>*De Facto* Elimination of the "Factor Other Than Sex" Affirmative Defense</u>

Perhaps the most significant substantive revision to the EPA contained in the Act is found in its re-writing of the "factor other than sex" affirmative defense. If enacted, it would be extremely onerous, impracticable, and prohibitively expensive for an employer to defend against a claim that a wage differential existed on the basis of a factor other than sex.

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[57] 101 CONG. REC. S. 1745 (daily ed. Aug. 2, 1990) (Statement of Cong. Schroeder).

[58] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, (2001).

[59] *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence") and *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O'CONNOR, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").

[60] *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986).

[61] *Id.* (internal citations omitted).

[62] *Id.* (internal citations omitted).

The EPA's existing factor other than sex affirmative defense was explained by the EPA's primary sponsor in the House of Representatives, Representative Charles E. Goodell, back in 1963, as follows:

> We want the private enterprise system, employer and employees and a union . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it. . . . Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction.[63]

So, clearly, just as important to the EPA's sponsors of the legislation as the goal of eliminating sex-based pay differentials was the bedrock of free enterprise. Given how critical that concept is to the EPA – and the fundamental importance of the factor other than sex affirmative defense in achieving it – it is clear that this Act would not actually "amend" the EPA. Instead, what the Paycheck Fairness Act seeks to do is require employers to justify individualized pay decisions on a case-by-case basis based on vague, but clearly onerous, standards.

Today, the "factor other than sex" affirmative defense forms the crux of the EPA. It provides that, where a wage differential exists, the employer has not engaged in sex discrimination under the EPA if the reason for the wage differential is a gender-neutral factor other than sex.[64] This affirmative defense enables employers to consider a wide range of permissible, *i.e.*, non-discriminatory, factors in setting salaries. For example, employers may consider an applicant's or employee's education, experience, special skills, seniority, and expertise, as well as other external factors such as marketplace conditions, in setting salaries. Although some circuit courts have attempted to read a "business justification" or "business necessity" element into this affirmative defense,[65] the U.S. Supreme Court, quite prudently, has never endorsed such a reading and has made clear that the affirmative defense means what it says – any factor other than sex.[66]

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[63] 109 CONG. REC. 9198 (1963) (statement of Rep. Goodell, principal exponent of the Act).

[64] *See, e.g.*, *Fallon v. State of Ill.*, 882 F.2d 1206, 1211-12 (7th Cir. 1989) (ruling that the district court prematurely rejected the State's asserted affirmative defense that Veterans Service Officers' requisite war-time veteran status was a factor other than sex justifying the pay differential).

[65] *See, e.g.*, *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992); *EEOC v. J.C. Penney Co., Inc.*, 843 F.2d 249, 253 (6th Cir. 1988); and *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).

[66] *See Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005). *Compare* the Second, Third, Sixth, Ninth, and Eleventh Circuits' application of a "legitimate business reason" standard to the Act's "factor other than sex" *with* the Fourth, Seventh, and Eight Circuits' application of a "gender neutral test" requiring the "factor other than sex" to be both facially gender neutral and uniformly applied. *See*, Kouba v. Allstate Ins. Co., 691 F.2d 783, 876 (9th Cir. 1982) *with Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005) and *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003) (court noted its function is not to sit as a "super personnel department" and that inquiring into the reasonableness of an employer's decision would narrow the exception beyond the plain language of the statute). *Smith v. Leggett Wire Co*., 220 F.3d 752, 763 (6th Cir. 2000) ("[I]t is inappropriate for the judiciary to substitute its judgment for that of

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The Act would effectively eliminate the EPA's factor other than sex defense. Under the Act, even if an employer proved an applicant's job experience or education was the factor considered when paying a male applicant more than a female applicant, the employer faces liability if it cannot prove paying the male applicant a higher starting wage based on his greater job experience or education was a business necessity.

In addition, an employer who determines to pay an applicant or an employee a higher wage based on market forces – i.e. matching a higher pay offer from a competitor – does so at considerable peril. Under the Act, payment of a wage rate as a result of a market condition is unacceptable unless an employer can prove all of the above plus that the market rate of its competitor is "not based upon or derived from a sex-based differential in compensation." How does a small employer demonstrate the absence of sex-based discrimination in its competitor's setting of wages when faced with an imminent decision as to whether to match the pay rate or lose a valuable employee? The Act provides no guidance.

And, finally, having passed each of the above hurdles for every individual wage decision, an employer remains liable for a violation of the Act, if a plaintiff responds to the job-related, business necessitated prior job experience, prior training, or education reason for the higher starting wage rate for the male applicant by "demonstrat[ing] that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice."[67] If an employee demonstrates that an employer was not required to employ a worker with the most experience in the business, or has the financial ability to pay all employees in that position a higher starting wage rate, does the employee satisfy this burden and eliminate the employer's defense? The Act provides no guidance.

Having shown an employer could have adopted another employment practice instead of paying a male applicant a higher wage rate because of their greater experience, education or training, the Act seals the liability of the employer for unlimited compensatory and punitive damages for paying a male applicant a higher wage rate that was job-related, consistent with business necessity, and not the result of sex discrimination, because in retrospect, years later, a jury determined it could have chosen an alternative employment practice.

If the Act were law, it would be imprudent and highly risky for an employer to ever reward applicants or employees in a job title for their individual educational, training, or experience,[68] without providing that same reward to all employees in the job, regardless of their

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management."). *See also Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 697 (7th Cir. 2006) (holding that courts do not "sit as super-personnel department with authority to review an employer's business decision as to whether someone should be fired or disciplined because of a work-rule violation.").

[67] S. 84, 113th Cong. (2013-2014).

[68] For example, under this replacement for the factor other than sex affirmative defense, an employer who wishes to pay a higher wage to an employee who has five years more experience than another employee may not be able to do so because a court finds that the differential in experience could be overcome by in-house training over an

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inferior business-related qualifications. Yet, what is the purpose of compensation? Is it to fairly compensate employees for work performed as well as to enable employers to attract the skills and experience necessary to promote the enterprise? The Act looks to the first concept (though it minimizes the importance of education, experience and training by saddling any wage payment differential based on these examples with other prerequisites before they can be used to justify a wage increase), but ignores the second. By placing an employer's decision to value intangible skills and experience under a business necessity test, the Act motivates employers to lean toward compensation practices of an earlier industrial age where many jobs were fungible and skills and education were not regarded as valuable. These concepts have long since been rejected, but the Act will resurrect them as national policy.

As such, the Act places judges and juries in the human resources offices of American businesses to determine whether sex-neutral factors were appropriate considerations – and appropriately considered in an employer's wage-setting decision-making. As the Seventh Circuit Court of Appeals aptly observed with respect to questions of relative job valuation, "Our society leaves such decisions to the market, to the forces of supply and demand, because there are no good answers to the normative question, or at least no good answers that are within the competence of judges to give.[69]

Application of a Disparate Impact Defense to EPA Disparate Treatment Claim is Inappropriate

Section 3(a) of the Act would alter the "factor other than sex" affirmative defense by requiring employers to *prove*, in order to counter the presumption of wage discrimination, that the factor responsible for a wage differential is a bona fide factor other than sex, job related, consistent with business necessity, and is not based upon or derived from a sex-based differential in compensation.

The job-related and consistent with business necessity defense, however, is an offshoot of disparate impact law under Title VII, intended to address the effects of an employer's neutral policies that disproportionately impact a protected group.[70] A helpful key to explaining the improper application of the business necessity standard to EPA defendants can be found in the supposition of discrimination uniquely afforded to the EPA plaintiff. To establish a *prima facie case* of disparate impact under Title VII, a plaintiff must not only demonstrate that a disparity exists, but also identify a specific policy or practice and establish a causal relationship between the disparity and the policy or practice.[71] It is in direct response to this challenged, specific,

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extended period of time. That is a judgment that employers should have an ability to retain in order to have an effective, efficient workforce and in order to achieve their own specific business objectives and priorities.

[69] *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007).

[70] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i)-(ii) which provides "a complaining party demonstrates that a respondent uses a *particular employment practice* that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity or the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice." Notably, the job-related and consistent with business necessity defense was left undefined in the Civil Rights Act of 1991.

[71] *See* 42 U.S.C. § 2000e–2(k)(1)(B)(i), which provides that "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact . . ."

particular policy or practice identified by the Title VII plaintiff that Title VII defendants must demonstrate the business necessity of the specific practice. In contrast, EPA plaintiffs are already free from this requirement of specificity, as EPA claims directly challenge an employer's pay practices based on the existence of a pay disparity alone.

Courts have long held that these frameworks are not compatible. In *Wernsing*, the Seventh Circuit found that "[a]n analogy to disparate-impact litigation under Title VII does not justify a "business reason" requirement under the Equal Pay Act, however, because the Equal Pay Act deals exclusively with disparate treatment. It does not have a disparate impact component."[72] As the Ninth Circuit explained in *Spaulding v. University of Washington*:

> The [disparate impact] model was developed as a form of pretext analysis to handle specific employment practices not obviously job-related . . . As the court in *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 800 (5th Cir.1982) (Pouncy), made clear: "[t]he discriminatory impact model of proof . . . is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." The [Plaintiff-Appellant] unconvincingly cites cases for the proposition that "the disparate impact analysis has been applied to wage discrimination cases." They do not involve wide-ranging allegations challenging general wage policies but rather challenges to specific employer practices. [73]

Attaching a disparate impact framework onto a disparate treatment claim is fundamentally illogical, because it removes the intermediary step of identifying the practice or policy, whose application allegedly serves as the basis for the assertion of employer discrimination. In other words, EPA claims challenge pay practices directly rather than identifying a policy that results in the pay disparity, because under the EPA, discrimination is presumed to exist once a disparity is shown.

It is important to note that the plain text of the Act proposes to apply the "bona fide" determination to factors including education, training, or experience. And where such tests have been permitted by courts in pay discrimination cases under Title VII, the question has always pertained to a limited threshold test: whether the non-discriminatory factor is truly necessary and inseparably intertwined with the performance of duties and responsibilities of a job. In other words, Title VII applies the business necessity test to questions that result in a binary answer: either a factor is necessary to job performance or it is not. For instance, the *Griggs* court found that a high school diploma was not necessary to job performance; and it is from this business necessity showing that courts infer whether defendants are able to produce explanations that are "bona fide" factors, rather than merely a pretext for discrimination that would exclude certain groups. In that sense, the business necessity test as established by the *Griggs* court and applied to Title VII claims since then upholds the equality of opportunity explicitly protected by the

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[72] 427 F.3d 466, 469 (7th Cir. 2005). *See also Smith v. City of Jackson*, 544 U. S. at 239 n.11 (2005) (noting in EPA, Congress intended to prohibit all disparate impact claims).

[73] 740 F. 2d 686 (9th Cir. 1984) (overruled on other grounds). *See also Wards Cove Packing Company, Inc. v. Atonio*, 490 U.S. 642, 655-58 (1989).

Civil Rights Act and implicitly promised by the principles that have guided this country since its founding.

In contrast, the Act would now apply standards of job-relatedness and business necessity to questions that require economic valuations of an unlimited number of factors. The Act essentially invites employees and employers to dispute in court whether certain qualifications, including education, training, or experience, are justifications for disparities in compensation. In that sense, the Act represents an unprecedented intrusion of government into the independent business decisions of private enterprises by eroding the fundamental purpose of compensation;[74] in reality, compensation functions not only as a means to remunerate employees for work performed, but also to enable employers to attract the skills and experience likely to promote the competitiveness of the enterprise. In contrast to its usage in Title VII and ADA claims, the business necessity test as applied by the amended EPA would sacrifice the autonomy of private enterprise because the statute uniquely presumes discrimination merely on the basis of unequal outcomes.

The EPA's Collective Action Mechanism in Section 216(b) Should Not be Amended to Incorporate Fed. R. Civ. P. 23

Section 3(c)(4) of the Act allows an action brought to enforce section 6(d) to be maintained as a class action under the Federal Rules of Civil Procedure. Like multi-plaintiff actions under the FLSA and the ADEA, EPA actions brought by women on behalf of themselves and others similarly situated under the collective action mechanism of Section 216(b) require interested parties to file with the court a consent that they wish to "opt-in" to the case before becoming part of the action, including before becoming affirmatively bound by any adverse rulings against the employees' interests adjudicated in the case. FLSA, ADEA, and EPA collective actions, as they are known under Section 216(b), provide employees with a generally more lenient standard with respect to a plaintiff's initial showing of being similarly situated to fellow employees than that required under Federal Rule of Civil Procedure 23(a), which is applicable to class actions sought under Title VII, and proposed by the proponents of the Paycheck Fairness Act as the applicable new class action mechanism to apply to EPA claims.

[74] The Act's business necessity test takes standards of rigor designed to measure and justify the impact of a specific policy to bar certain groups from access to employment and impose the same standards on individualized compensation decisions. As such, the Act improperly thrusts onto the judiciary an untold number of fact-finding exercises with respect to whether certain qualifications result in incremental performance gains that justify the challenged pay differential. For example, if a law degree is not necessary to the performance of duties and responsibilities of a policy analyst, Title VII will provide appropriate protection if it is used as an inappropriate barrier to employment. However, application of the Act would place members of this legislative body at risk for unlimited damages for paying a higher salary to a male analyst with a law degree as well as a Master of Public Policy degree in comparison with a female analyst without a law degree. In response, the hypothetical defendant would bear the burden of showing that the second degree is indeed a bona fide factor that justifies added compensation, and would face the risk of a judicial body determining otherwise, or determining that, even if so, there was another employment decision that could have been made that would lead to a lesser pay differential between the two policy analysts (*i.e.* paying both the same pay regardless of the fact one had different qualifications). However, the Act invites such disputes into courtrooms, forcing the judiciary to weigh the merits of the economic judgments of employers.

The Chamber submits that the Act's proponents have not articulated a compelling reason for any change in the current collective action mechanism available to plaintiffs under the EPA.

Under Rule 23, to bring a class action a plaintiff must first meet all of the "strict requirements" of Rule 23(a) and at least one of the alternative requirements of Rule 23(b). Under Rule 23(a) a plaintiff must show: the class is too numerous to join all members; there exist common questions of law or fact; the claims or defenses of representative parties are typical of those of the class members; and the representative parties will fairly and adequately represent the class. Once these requirements are satisfied, a plaintiff must also satisfy one of the subsections of Rule 23(b). Rule 23(b) requires that a plaintiff show either: that prosecution of individual actions would result in inconsistent holdings or that adjudications would be dispositive of the interests of those not named in the lawsuit, that the party opposing the class has acted on grounds applicable to the entire class making relief appropriate for the class as a whole, or that questions of law or fact common to the members of the class predominate over questions affecting only the individual members of the class and that certification is superior to other available methods for fairness and efficiency purposes. When conducting the required analysis under Rule 23, courts must perform a "rigorous analysis" of plaintiff's ability to meet each of Rule 23's requirements.[75]

Conversely, under Section 216(b), while some courts use the Rule 23 approach to the extent those elements do not conflict with Section 216 (such as numerosity, commonality, typicality and adequacy of representation), many courts use a less stringent standard, requiring the plaintiff to show only that she is similarly situated to other employees. [76] The similarly situated requirement is met through allegations and evidence of class wide discrimination. Courts generally apply a lenient standard to conditional certification of an EPA claim. A person is considered a member of a collective action under Section 216(b) and is bound by and will benefit from any court judgment upon merely filing a written consent with the court and affirmatively "opting into" the suit. This requirement was added to collective actions under Section 216(b) to ensure that a defendant would not be surprised by their testimony or evidence at trial.[77]

Courts regularly face and grant requests to certify both Federal Rule of Civil Procedure 23(a) class actions alleging wage disparity based on sex, as well as Rule 216(b) collective actions under the EPA.[78] When faced by facts presenting a close call as to whether a purported class of workers is similarly situated under the EPA's Section 216(b) and Title VII's Rule 23

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[75] *See e.g., Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 671 (N.D. Ga. 2003).

[76] *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001) (at the notice stage, the court makes a decision using a fairly lenient standard that typically results in "conditional certification" of a collective or representative action); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996); *Garza v. Chicago Transit Auth.*, No. 00 C 0438, 2001 U.S. Dist. LEXIS 6132, at *5 (N.D. Ill. 2001) (citing *Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982)).

[77] Portal-to-Portal Pay Act, 29 U.S.C. § 256(b); *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1134 (5th Cir. 1984).

[78] *See, e.g., Jarvaise v. Rand Corp*., No.96-2680 (RWR), 2002 U.S. Dist. LEXIS 6096, at *5 (D.C.C. Feb. 19, 2002) (class certification granted under EPA and Title VII to all female employees in exempt positions who did not make compensation decisions); *Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418, 422-24 (M.D. Ala. 1991) (EPA collective action motion granted on behalf of female medical sales representatives).

mechanisms, and otherwise appropriate for mass action treatment, it is generally the EPA collective claim that survives opposition to a motion to certify a class alleging sex discrimination in pay.[79] The reason is clear – Section 216(b) contains a more lenient standard for a plaintiff who is attempting to bring a claim on behalf of herself and other similarly-situated women for unequal pay. Specifically, it is viewed by many courts as encompassing a more liberal standard for conditional certification relative to Rule 23. For all of these reasons, the Chamber submits that this collective action mechanism should not be amended to conform to Rule 23 requirements as proposed by the Paycheck Fairness Act.

Other Concerns

In addition to the concerns discussed above, the Act raises other serious concerns. Some of those concerns are noted below:

Reinstatement of the EO Survey

Section 9(b)(3) of the Act reinstates the EO Survey, originally adopted in late 2000 for the primary purpose of effectively targeting OFCCP compliance review resources pursuant to Executive Order 11246.[80] However, the EO Survey was a flawed tool as it failed to accurately target contractors whose pay practices were either compliant or noncompliant. Indeed, in April 2000, Bendick and Eagan Economic Consultants Inc. reported serious concerns to the OFCCP regarding the results of the pilot program and recommended that the survey be validated before implementation before implementation.[81] The OFCCP failed to conduct the recommended study.[82] In 2002, OFCCP contracted with Abt Associates to evaluate the reliability and usefulness of the EO Survey.[83] Abt determined that the EO Survey's predictive power was only slightly better than chance, with a false positive rate (identifying compliant contractors as non-compliant) of 93% and a high rate of classifying true discriminators as non-discriminators.[84] Based on the EO Survey's limited reliability, the Department of Labor rescinded the EO Survey in 2006.[85]

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[79] *See, e.g., Rochlin v. Cincinnati Insurance Co.*, No. IP 00-1898-C H/K, 2003 U.S. Dist. LEXIS 13759, at *49-51, 64 (S.D. Ind. July 8, 2003) (Rule 23 class certification of sex discrimination in pay claim denied, but Section 16(b) collection action claim allowed to proceed as a class action as the standard is more lenient under the EPA).

[80] The stated objectives of the EO Survey were "(1) To improve the deployment of scarce federal government resources towards contractors most likely to be out of compliance; (2) To increase agency efficiency by building on the tiered-review process already accomplished by OFCCP's regulatory reform efforts thereby allowing better resource allocation; and (3) To increase compliance with equal opportunity requirements by improving contractor self-awareness and encourage self-evaluations." Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, 65 Fed. Reg. 68,039 (Nov. 13, 2000).

[81] Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, 71 Fed. Reg. 53,033 (Sept. 8, 2006).

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

Data Collection Requirements and Regulations

In 2010, the EEOC requested that the National Academy of Sciences convene a panel to review methods for measuring and collecting pay information by gender, race and national origin.[86] The panel concluded that collecting earnings data would be a significant undertaking for the EEOC and a potential increased burden for employers.[87] The panel also found that the EEOC had "no clearly articulated plan of how the data on wages could be used in the conduct of enforcement responsibilities of the relevant agencies."[88] In addition, the panel determined that existing studies of the cost effectiveness of an instrument for collecting wage data and the resulting burden [were] inadequate to assess any new program."[89] Given the real budgetary and personnel constraints facing the EEOC and the current backlog of pending investigations, simply adding a requirement to adopt regulations and collect data is unwise. The EEOC simply does not have the personnel or the expertise in analyzing this data.

OFCCP Program Initiatives

Under the innocuous title "Reinstatement of Pay Equity Programs and Pay Equity Data Collection," Section 9 of the Act instructs the Director of the OFCCP to ensure that OFCCP employees, among other things, use a full range of investigatory tools and not to require a multiple regression analysis or anecdotal evidence in a compensation discrimination case. In 2006, the OFCCP adopted two enforcement guidance documents, commonly known as the "Compensation Standards" and "Voluntary Guidelines." Among other items, the Compensation Standards only compared "similarly situated individuals," required OFCCP to use multiple regression analysis, and required that statistical showings be supported with anecdotal evidence of discrimination. Effective February 29, 2013, the OFCCP rescinded these common sense guidelines.

Two provisions are worth particular note: the provisions relating to the agency's analysis of systematic compensation discrimination and the provisions targeted toward surveying the federal contractor community.[90]

Section 9 of the Act appears to be designed to statutorily mandate that the OFCCP refrain from requiring the adoption of multiple regression analysis or anecdotal evidence for a compensation discrimination case, among other things. Notwithstanding that the OFCCP recently rescinded the above-noted 2006 Compensation Standards and Voluntary Guidelines, the Chamber opposes the utilization of pay grade analysis as a method for proving that systemic compensation discrimination exists for one very simple reason: it does not work. Assuming individuals in the same pay "band" are similarly situated is simply too crude a statistical tool.

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[86] *See* PANEL ON MEASURING AND COLLECTING PAY INFORMATION FROM U.S. EMPLOYERS BY GENDER, RACE, AND NATIONAL ORIGIN ET AL., COLLECTING COMPENSATION DATA FROM EMPLOYERS, (National Academies Press 2013).

[87] *Id*. at 2.

[88] *Id.*

[89] *Id.*

[90] A full discussion of these issues is beyond the scope of this testimony. Extensive comment by the Chamber on related issues is available on the Chamber's web site at: www.uschamber.com.

Multiple regression analysis, on the other hand, is the widely accepted method by which plaintiffs and defendants make their case. Robust statistical tools like this are necessary to analyze the many factors that determine compensation and determine whether pay differentials are due to discrimination or some other factor. Statistical techniques will result in the OFCCP alleging discrimination more frequently, without adequate proof, forcing employers to unnecessarily incur legal costs and wasting OFCCP's resources. One perverse result of making such a change would be that employers would choose to settle with OFCCP based on such an inadequate statistical analysis would open themselves up to charges of reverse discrimination under Title VII or state law.[91]

Section 9(b)(3) appears to statutorily mandate the OFCCP equal opportunity survey. It should be noted that the OFCCP's survey, which was intended to help identify federal contractors that should be audited by the OFCCP, was substantively flawed, failed to serve as a useful enforcement tool of the agency, and placed a significant, unnecessary burden on contractors. Years ago, a neutral study of the survey was conducted by Abt Associates as part of the OFCCP's review of the survey. That study conclusively demonstrated that the survey provided no useful data and was extremely burdensome (with a conservative estimate that the study cost contractors approximately $6 million per year). Imposing this burden, which has been proven to do nothing to help identify or eradicate discrimination, on the federal contractor community cannot be justified.

Permitted Inquiries About Wages

Section 3(c) of the Act appears to provide an unprecedented broad right to employees under the EPA. Employees would have the right to "inquire about wages of the employee or another employee . . ." without fear of any adverse action by an employer. The new right does not appear to be narrowed in any way by relevancy to the employee's pay or by confidentiality concerns of an employer. This language goes far beyond any rights enjoyed by non-unionized and unionized employees under the National Labor Relations Act ("NLRA").

For example, under the NLRA, non-unionized employees have the right to discuss their own wages with other employees, but do not otherwise have the right to obtain written documentation about the wages of any other employees. Although unionized employees, as part of an employer's duty to bargain in good faith, have the right to inquire about wage information for bargaining purposes, this right is not without boundaries and not without safeguards. In *International Business Machines Corp. and Hudson*, the National Labor Relations Board ("NLRB") held that employees could discuss their own wages with each other, but could not access or distribute company-compiled information as the company had a valid business

[91] *See Maitland v. Univ. of Minn.* 155 F.3d. 1013, 1016-18 (8th Cir. 1998) (reversing district court's grant of summary judgment to employer on reverse discrimination claim and ruling that "the fact that the affirmative action salary plan was implemented pursuant to a consent decree does not bolster the District Court's conclusion at the summary judgment stage of this case and that there was a manifest imbalance in faculty salaries."); *see also Rudebusch v. Hughes*, 313 F.3d 506, 515-516 (9th Cir. 2002) (reverse discrimination case based on allegedly insufficient multiple regression analysis, ultimately resulted in a ruling requiring the employer to pay male faculty members $1.4 million); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676-77 (4th Cir. 1996) (reverse discrimination claim based on inadequate multiple regression analysis).

justification for its rule against distribution of wage data compiled and classified as confidential.[92] Instead, the NLRB explained that the employer had a valid business justification for discharging an employee who disclosed wage information in violation of the company's rule. In contrast, here, the Paycheck Fairness Act would provide an open door for an employee's inquiries in the wages of all employees, without any balancing of an employer's need for confidentiality and other legitimate concerns.

New Definition of "Establishment"

Section 3(a) of the Act appears to redefine and expand the definition of equal work, by amending the EPA to allow an employee to raise a claim of denial of equal pay for equal work if the inequality between men and women pay exists between men and women who work at different physical places of business within the company. Currently, in keeping with the EPA's prohibition against denying employees equal pay for equal work because of their sex, the EPA requires an employee to compare their wages earned against other employees within the physical place of business in which they work. According to the Regulations issued by EEOC to construe the EPA, "establishment" "refers to a distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business. Accordingly, each physically separate place of business is ordinarily considered a separate establishment."[93] We urge the Committee to consider the difficulty and impropriety of comparing jobs across locations and geographical regions in determining whether equal pay is being paid for equal work, and reject the unworkable proposal contained within the Act.

Conclusion

In conclusion, the Chamber has serious concerns with the Paycheck Fairness Act. Mr. Chairman and members of the Committee, we thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division, if we can be of further assistance in this matter.

[92] 265 NLRB 638 (1982).
[93] 29 C.F.R. §1620.9(a).