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April 14, 2015

Ms. Debra A. Carr
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Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: RIN 1250-AA05; Notice of Proposed Rulemaking on Government Contractors, Discrimination on the Basis of Sex

Dear Ms. Carr:

We are pleased to provide these comments on behalf of the U.S. Chamber of Commerce (Chamber) in response to the Notice of Proposed Rulemaking (NPRM) that the Office of Federal Contract Compliance Programs (OFCCP) published in the January 30, 2015 edition of the Federal Register.[1] The NPRM purports to set forth obligations that contractors must meet to comply with Executive Order 11246, specifically with regard to discrimination on the basis of sex.

I. INTRODUCTION

The Chamber is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region. 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. A significant portion of Chamber members are federal contractors and subcontractors. The

[1] 80 Fed. Reg. 5246.

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.

The Chamber supports equal opportunity, specifically equal pay for equal work, and effective mechanisms to achieve these important goals. The Chamber believes that such mechanisms already exist in the current laws that address discrimination on the basis of sex, such as Title VII of the Civil Rights Act of 1964 (Title VII) and Executive Order 11246 ("Executive Order"). Despite these existing protections, the NPRM impermissibly transforms previous guidance to the status of a "regulation" and seeks to impose additional burdens that have been specifically rejected by the Supreme Court or by Congress. The Chamber has concerns with these additional obligations.

Specifically, the NPRM relies heavily on social science which has been pointedly rejected by the Supreme Court and characterizes the state of related research in a manner that suggests far greater consensus than exists in reality. In addition, the NPRM adopts the Equal Employment Opportunity Commission's (EEOC) position as set forth in its July 2014 Enforcement Guidance: Pregnancy Discrimination and Related Issues (the "EEOC Pregnancy Discrimination Guidance"), which the Supreme Court unanimously rejected in *Young v. UPS* on March 25, 2015. In addition, while the NPRM states that its major proposed revisions are "in accordance with existing law and policy," the NPRM plainly adopts measures contained in the Employment Nondiscrimination Act and Paycheck Fairness Act, neither of which has been enacted into law.

We address these issues below.

II. THE OFCCP LACKS THE AUTHORITY TO TRANSFORM GUIDELINES INTO REGULATIONS

The OFCCP issued Guidelines addressing Sex Discrimination in 1970.[2] While the substance of the Guidelines have not changed, the OFCCP correctly notes that

[2] Indeed, when Executive Order 11246 was first issued, like its predecessor Executive Orders, it did not address the issue of gender inclusion or sex discrimination. E.O. 11246 was therefore amended in 1967 by Executive Order 11375 to include sex as a protected category under the requirements of E.O. 11246, as amended. The regulations of the OFCCP were appropriately amended although the

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the legal requirements addressing gender discrimination and inclusion have substantially evolved, both in terms of statutory requirements as well as case law essentially interpreting Title VII but also the Equal Pay Act. However, this inevitable evolution of the law makes clear that enshrining any current interpretation of judicial requirements or statutory changes in the rigid construct of regulations which cannot be changed except by a lengthy regulatory process makes absolutely no sense. And in particular, an effort to unilaterally claim that evolutionary guidance achieves "the full force and effect of law" by a regulatory fiat is simply a case of breathtaking regulatory overreach.

The OFCCP proposes to transform the "Sex Discrimination Guidelines" into regulations "that align with current law and legal principles and address their application to current workplace practices and issues."[3] However, OFCCP states that it "interprets the nondiscrimination provisions of the Executive Order consistent with the principles of title VII of the Civil Rights Act of 1964."[4] Thus, the OFCCP binds itself, as it must, to the jurisprudence of Title VII in advising contractors as to what their non-discrimination obligations are. However, Title VII does not permit any agency, including the Equal Employment Opportunity Commission, to promulgate substantive regulations.[5] *See*, *e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, (1979) (the "exercise of regulatory authority by agencies must be rooted in a grant of such power by the Congress"). And while the Executive Order does permit the Secretary to issue regulations, it is clear from the historical record of the OFCCP that those regulations have essentially been procedural regulations, instructing contractors as to the form and content of their affirmative action plans and compliance obligations but do *not* prescribe the substance of their employment policies, particularly with respect to the non-discrimination obligations enunciated by the Executive Order. Title VII does not grant such authority to *any* agency, and therefore, OFCCP's effort to transform "guidelines" into "regulations" is improper.

It is clear from the jurisprudence of *Chrysler Corp.* to the present in the decision issued by the Supreme Court in *Young v. UPS*, that agencies do not have the authority to issue – at whim – binding regulations or even guidance to interpret and expand upon their authority. Thus, the structure of the proposed Regulations on

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treatment of sex discrimination and affirmative action evolved to the point where it was indistinguishable from the treatment of race discrimination and affirmative action only in 1977.

[3] *Id.* at 5246.

[4] *Id.*

[5] Title VII only permits the EEOC to promulgate *procedural* regulations. 42 U.S.C. § 2000e-12(a).

Discrimination on the Basis of Sex claiming to have regulatory authority is simply beyond the power of the OFCCP.

III. THE OFCCP SHOULD NOT GIVE THE GOVERNMENT'S IMPRIMATUR TO THE THEORY OF IMPLICIT BIAS

The NPRM cites to several studies to justify the following proposition:

> Decades of social science research have documented the extent to which sex based stereotypes about the roles of women and men and their respective capabilities in the workplace can influence decisions about hiring, training, promotions, pay raises, and other conditions of employment.
>
> Research clearly demonstrates that widely held social attitudes and biases can lead to discriminatory decisions, even where there is no formal sex-based (or race based) policy or practice in place.[6]

The NPRM plainly mischaracterizes the state of the research on social science, as the theory of "implicit bias" and its role in predicting behavior is a matter of intense dispute within the scientific and academic communities.[7] Indeed, the legal

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[6] 80 Fed. Reg. at 5252.

[7] *See*, *e.g.*, Philip E. Tetlock & Gregory Mitchell, "Implicit Bias and Accountability Systems: What Must Organizations Do To Prevent Discrimination?," Research in Organizational Behavior, 29, 1-38 (2009) (critical evaluation of evidence supporting claims that implicit bias leads to workplace discrimination); Hart Blanton & James Jaccard, "Arbitrary Metrics in Psychology," American Psychologist, 61, 27-41 (2006) (criticizing evaluation of Implicit Association Test (IAT) and arbitrariness of its labeling of bias); Russel H. Fazio & Michael A. Olson, "Implicit Measures in Social Cognition Research: Their Meaning and Uses," Annual Review of Psychology, 54, 297-327 (criticizing evaluation of measures of implicit bias and lack of convergence across measures of rates of supposed implicit bias); Klaus Fiedler, Claude Messner, & Matthias Bluemke, "Unresolved Problems with the 'I', the 'A' and the 'T': A Logical and Psychometric Critique of the Implicit Association Test (IAT)," European Review of Social Psychology, 17, 74-147 (2006) (criticizing evaluation of IAT and discussing substantial risk of test falsely portraying someone as biased); Bertram Gawronski, Etienne LeBel, & Kurt R. Peters, "What Do Implicit Measures Tell Us?: Scrutinizing the Validity of Three Common Assumptions," Perspectives on Psychological Science, 2, 181-193 (2007) (evaluating measures of implicit bias and concluding that they are not accurate

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relevance of social science and its predictive behavioral value has been clearly rejected by the Supreme Court. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ---, 131 S. Ct. 2541, 2553-55 (2011), the Supreme Court affirmatively rejected a "social framework" analysis of the sort contemplated by the NPRM, and specifically noted its failure to have any predictive value.

IV. THE NPRM GOES FAR BEYOND CODIFYING EXISTING LAW, BUT RATHER ADOPTS STANDARDS REQUIRED BY FAILED LEGISLATION OR REJECTED BY THE SUPREME COURT

The NPRM suggests that its major proposed revisions are "consistent with the principles of Title VII of the Civil Rights Act of 1964" and "in accordance with existing law and policy."[8] For the reasons set forth below, the proposed regulations go far beyond existing law. Indeed, many of the new obligations go beyond even recent Executive Orders that specifically address certain topics, but for whatever reason, stopped short of imposing the obligations that the OFCCP now proposes, to wit, Executive Order 13672.

A. Adopting The EEOC's Position Set Forth In Its Pregnancy Discrimination Enforcement Guidance

Section 60-20.5(b)(5) requires contractors to provide alternative job assignments, modified duties or other accommodations. As described in the Preamble, this requirement is based on the government's position in *Young v. United Parcel Service, Inc.* (at the time, a pending decision at the Supreme Court) and the EEOC Pregnancy Discrimination Guidance. On March 25, 2015, the Supreme Court issued its opinion in *Young*, and rejected both the government's position and the EEOC Pregnancy Guidance. *See Young v. UPS, Inc.*, No. 12-1226, slip op. at 12-13, 16-17 (S. Ct. March 25, 2015) (rejecting both the "most-favored nation" status sought by the petitioner and the persuasive authority of the EEOC Pregnancy Guidance). The Supreme Court's *Young* decision makes it clear that adopting the "most-favored

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measures); Patrick F. McKay & Michael A. McDaniel, "A Reexamination of Black—White Mean Differences in Work Performance: More Data, More Moderators," Journal of Applied Psychology, 91, 538-554 (2006) (meta-analysis of field studies concluding that subject performance evaluation measures do not disfavor minorities relative to objective measures of performance); Philip L. Roth, Allen I. Huffcutt & Philip Bobko, "Ethnic Group Differences in Measures of Job Performance: A New Meta-Analysis," Journal of Applied Psychology, 88, 694-706 (2003) (same).

[8] *Id.* at 5246-47.

nation" status to all pregnant employees is improper, and any OFCCP regulations should not include those rejected concepts.

In addition, while the regulatory language is unclear, the Preamble indicates that this section provides that "employers may not impose a shorter maximum amount of pregnancy leave as compared to the maximum time off allowed for other types of medical or short-term disability leave."[9] Based on that language, it would require contractors to provide a pregnant woman with the same amount of leave as an individual taking a medical leave to battle cancer. Depending on the circumstances, an individual may require a medically necessary extended leave period to fight cancer. It would be far more rare for a pregnant individual to require a medically necessary leave period for such a long period of time. Ironically, this provision may cause contractors to reconsider their leave policies and reduce the length of permitted leave periods.

B. Requiring Contractors To Allow Transgendered Individuals To Use The Restroom of His or Her Choice

Section 60-20.2(b)(10) requires contractors to permit transgendered employees access to the bathrooms of their choice. No such provision or requirement exists under Title VII or Executive Orders 11246 or 13672. Indeed, the President did not include this requirement in Executive Order 13672, issued on July 21, 2014, which amended Executive Order 11246 to include sexual orientation and gender identity as protected bases. In fact, it is somewhat surprising that after just issuing regulations implementing Executive Order 13672, which are silent as to any special treatment for transgendered individuals, the OFCCP chooses this regulatory effort designed to update its Sex Discrimination Guidelines to address specific issues not otherwise addressed at all by Executive Order 11246. This requirement can only be traced to the Employment Nondiscrimination Act, which has not become law, and therefore, it is improper to include that requirement here by regulatory fiat.

C. Requiring Compliance With Paycheck Fairness Act Standards

The Chamber strongly supports equal pay for equal work. In fact, it has been the law since 1963. However, the Chamber is concerned with the ambiguity contained in the NPRM relating to compensation discrimination. Section 60-20.4 prohibits compensation practices that have an adverse impact on the basis of sex and

[9] *Id.* at 5257.

are not job related and consistent with business necessity. While an accurate statement of the law, it is unclear what the OFCCP means by "compensation practice." For example, if a contractor 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 -- would that violate the regulation? Such a practice does not violate the Equal Pay Act.[10] This concept can only be traced to the Paycheck Fairness Act, which has not become law, and therefore, it is improper to include that requirement as well.

V. THE OFCCP UNDERESTIMATES THE BURDEN ASSOCIATED WITH THE REQUIREMENTS OF THE NPRM, AND SUCH BURDEN OUTWEIGHS ANY INTENDED BENEFIT

A. OFCCP Should Have Conducted an Initial Retrospective Economic Analysis of the Existing Regulations

The justification for rulemaking provided on pages 5248-5252 and page 5260 of the NPRM is based on the argument that the existing regulatory text, adopted in 1970, is outmoded in relation to statutory and case law and in relation to current business practices and labor market conditions. While the OFCCP does cite specific examples of existing text that has been rendered moot or revised by more recent statutes or case law, the justification for regulatory action at this time would be more convincing if the agency had first undertaken and posted for public comment a formal retrospective analysis of the existing regulations. Executive Order 13563 requires agencies to undertake such comprehensive retrospective studies of regulatory relevance and compliance issues to identify regulations that are redundant or in need of revision. Here the OFCCP has identified a putative need for regulatory revision, but if the initial stage of retrospective evaluation and review had been conducted through a formal and public process, the agency and the public could have benefited. In particular, the agency could have better identified examples of costs (including litigation) that are imposed because of confusion created by outmoded regulatory text and commensurate benefits of revision. The NPRM describes benefits of revised regulatory text in vague, qualitative terms, but a benefit of a systematic retrospective analysis could have been more specific and credible estimates of actual monetary benefits of regulatory revision.

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[10] *See Winkes v. Brown Univ.*, *et al.*, 747 F.2d 792 (1st Cir. 1984) (rejecting a male professor's Equal Pay claim that a female professor received higher pay after the university matched another employer's offer to retain the female professor).

B. OFCCP Underestimates the Costs of Familiarization with the Rule

The OFCCP identifies familiarization cost as the primary compliance cost of the proposed rule. The OFCCP's calculation of familiarization cost as $25,790,000 as the familiarization cost is based on its estimate that 500,000 potentially affected firms will each on average expend on hour of time to "read" the revised rules, and that hour per firm time is valued at the average hourly compensation cost of a human resources professional manager. There are at least three errors in this analysis.

First, the OFCCP's estimate of one hour per affected firm to "read" the regulation is not based on any empirical evidence. The OFCCP failed to do the simple things that it had within its power to do to establish a credible, factual estimate of per firm familiarization time. For example, it could have conducted an experiment using government employees as subjects to read the rule with recorded time and to answer questions to test comprehension. The OFCCP could also have conducted surveys of regulated firms to ascertain the amount of time and the number employees and level of responsibility of personnel involved in the process of initial familiarization and assessment of compliance needs for similar past regulatory actions. For example, it could have asked contractors about their experience of familiarization with the recently promulgated OFCCP affirmative action regulations regarding persons with disabilities and veterans. Our experience, based on our own surveys of members in connection with those recent regulations, suggests that for a typical firm, the familiarization process involves 5 to 15 labor hours distributed among human resource specialists, senior executives, and lawyers. The naïve notion of a single employee engaged in familiarization is probably applicable only to the very smallest company. A typical company with about 50 employees would likely involve at least three in the familiarization process: a human resource manager, a senior executive and an internal or external legal counsel. For larger firms, the number of personnel involved would increase substantially. For a large defense contractor, the basic familiarization process could readily involve the participation by several dozen highly compensated personnel at several hours' time each. It is conceivable that the aggregate familiarization costs for the proposed rule could exceed several hundred million dollars merely by considering more realistic amounts of labor hours. Given the importance of the time and personnel issues related to personnel costs, it is perplexing that the OFCCP so utterly failed to take the simple analytical steps that were available to establish credible empirical data for this calculation.

Another error in the analysis by the OFCCP is in the 500,000 number of firms used as a multiplier in the calculation. This number was obtained from the SAM

database of currently active or inactive holders of Federal contracts or subcontracts. While the proposed rule certainly affects holders of Federal contracts, it also affects firms which contemplate bidding on Federal contracts. Every firm that bids on a Federal contract, whether winning an award or not, would need to be familiar with the rule and fully prepared to comply if a bid is accepted.[11] Furthermore, any firm that contemplates bidding on a Federal contract would also need to be familiar with the rule, and knowledge of the regulatory requirements may be a factor in the decision to seek Federal contract work or not. The potential number of firms subject to familiarization time and cost will be in excess of 500,000, perhaps by several orders of magnitude. It is arguable that all five million U.S. companies with employees would incur some familiarization cost associated with this rule. In that case, even without adjusting the unrealistic one hour time proposed by OFCCP, the familiarization cost would be over $250 million.

The third error in the calculation of familiarization cost is in the application of the $51.58 per hour compensation for a human resource management professional. This BLS data item is an excellent starting point for the analysis, but compensation alone is not the complete answer for valuing labor time. The economic cost to society of a regulation that claims the scarce resource of labor time is the opportunity cost of that labor time: What value could have alternatively been produced by the labor time conscripted for regulatory compliance purposes. In addition to direct labor compensation (wages and fringe benefits) measured by the BLS survey, the opportunity cost includes lost revenue that would have contributed to covering fixed overhead costs, taxes and profits. A full accounting for the opportunity cost of an hour of managerial/professional labor time could exceed $100 per hour. Indeed, the prices that the government routinely pays for contract labor typically are three times the underlying direct labor compensation amount per hour. Full opportunity costs may vary by both types of labor and by size and industry of the affected firms. This is an issue that the OFCCP should examine more closely as an element of every regulatory economic analysis.

[11] A firm bidding on a contract for less than the $10,000 threshold for coverage under the regulation would need to spend some time reading the regulation to discover the $10,000 threshold exemption.

C. The Calculation of Compliance Costs Associated with Accommodations for Pregnancy is Incomplete

The OFCCP's estimation of compliance costs associated with the additional requirements in the revised regulation regarding accommodations for pregnancy (Section 60-20.5) seems to be founded upon much more empirical data than its estimates of familiarization costs. The application of data from the National Center for Health Statistics, the Census, and the survey reports from the W.K Kellogg Foundation, the National Women's Law Center and the Job Accommodation Network is appropriate and informative. While additional survey work by OFCCP to confirm whether or not the imputed pregnancy rates and baseline compliance rates for the general population are correct for the contractor population, the estimate of annual accommodation costs of $9,671,000 appears to be a reasonable foundation. However, OFCCP's calculations only reflect the costs of materials or equipment, as reported in the Job Accommodation Network report.[12] The calculations omit the opportunity cost of administrative and managerial time to receive, process and respond to accommodation request. Also omitted is the initial cost of establishing systems and procedures for handling requests, and costs for training managers and others regarding their accommodation duties. Based on responses provided by employers in other, but similar, contexts these indirect costs could equal or exceed the direct cost estimate published by OFCCP. We encourage OFCCP to undertake further empirical research to address this question of accommodation costs more fully.

D. Additional Sections of the NPRM Require Economic Burden Estimates

In addition to the pregnancy accommodation provisions in Section 60-20.5, there are several other sections of the proposed regulation that present regulatory text that is completely new or so thoroughly revised as to represent essentially new compliance requirements. Even though these provisions may reflect statutory or case law requirements, rather than regulatory discretion, the OFCCP should follow its example in the Section 60-20.5 case and present estimates of compliance costs, including reduction for estimated baseline compliance. This approach reflects OIRA

[12] https://askjan.org/media/downloads/LowCostHighImpact.pdf.

guidance regarding benefit/cost analysis.[13] These sections for which compliance cost estimates have been omitted and should be provided include new Sections 60-20.4 (Compensation Practices), 60-20.6 (Other fringe benefits), 60-20.7 (Employment decisions made on the basis of sec-based stereotypes), and 60-20 (Harassment and hostile work environments). At the least, compliance cost estimates for these provisions should address the costs of establishing and maintaining requisite procedures, operating, records, and internal compliance assessment systems. OFCCP should conduct surveys and other research to ascertain the baseline proportion of covered employers who are already in full compliance and reduce imputed regulatory impact accordingly.

* * *

Given the potentially substantial familiarization costs and other compliance costs of the proposed regulation, the lack of any attempt by the OFCCP to present a monetary estimate of the benefits of the proposed rule is a grave failure to comply with the requirements of Executive Orders 12866 and 13563. The effects of sex discrimination are subject to statistical and economic measurement. Indeed, the detection of discrimination and enforcement of remedies depends on such measures. If, as the OFCCP claims, the proposed revision and clarification of anti-discrimination rules will reduce discrimination, it is reasonable to ask the OFCCP to estimate "how much?" and to assign a monetary value (e.g., increased earnings, improved productivity, recovered denied wages) to the regulatory benefit.

VI. CONCLUSION

The Chamber strongly supports the principles of equal pay for equal work and a workplace free of gender-based discrimination. Our concerns lie in the fact that the current proposed regulations go beyond existing law and Title VII principles, as some of the proposed regulations ignore Supreme Court precedent and adopt positions not passed by Congress.

Thank you for your consideration of these comments. As always, please contact us if you have questions or would like to discuss our comments on this important matter.

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[13] See Office of Information and Regulatory Analysis, "Regulatory Impact Analysis: A Primer," p.4 at https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf

Sincerely,

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