

**STATEMENT OF**  
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**COMMITTEE ON EDUCATION AND THE WORKFORCE**  
**SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS**  
**HEARING ON**  
**REVIEWING THE IMPACT OF THE OFFICE OF FEDERAL CONTRACT**  
**COMPLIANCE PROGRAMS' REGULATORY AND ENFORCEMENT**  
**ACTIONS**

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**Introduction**

Chairman Roe, Ranking Member Andrews, and Members of the Subcommittee, thank you for inviting me to testify today about the major changes that the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has proposed making to the way it enforces the employment nondiscrimination and affirmative action obligations of federal contractors. I appear here today as President of the Equal Employment Advisory Council (EEAC), a nonprofit association of nearly 300 major federal contractors that, since its creation in 1976, has dedicated itself exclusively to the development and advancement of practical and effective programs to eliminate employment discrimination.

EEAC member companies are — and always have been — fully supportive of OFCCP's mission to eliminate discrimination in the workplace and establish policies that serve to promote equal employment opportunities for all employees — including women, minorities, individuals with disabilities, and veterans. To that end, EEAC has filed written comments with OFCCP on virtually every regulatory and sub regulatory initiative the agency has undertaken over the past 36 years, including those that are the focus of today's hearing.

Simply stated, the pending regulatory proposals are unprecedented in terms of their scope, detail, and potential cost impact. If finalized in their current form they would fundamentally transform, in a negative way, the traditional working relationship of mutual trust and respect between OFCCP and federal contractors. They are also very technical and complex. Given this complexity, I will devote a few moments at the outset of my remarks to provide some background and context for today's discussion.

### **Background: EEOC versus OFCCP**

There are two federal agencies primarily responsible for prohibiting employment discrimination in the private sector — the Equal Employment Opportunity Commission (EEOC), and the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP).

Both agencies enforce federal laws that prohibit employment discrimination on the basis of race, color, religion, sex, national origin, and disability. The EEOC — but not the OFCCP — also enforces laws that prohibit discrimination on the basis of age and genetic composition. The OFCCP — but not the EEOC — also enforces laws that prohibit discrimination against veterans. EEOC’s jurisdiction encompasses any private employer with 15 or more employees. OFCCP’s jurisdiction extends only to employers that are federal contractors and subcontractors, entities which collectively employ roughly one-quarter of the private sector U.S. workforce.

While both agencies are responsible for enforcing *nondiscrimination* requirements, OFCCP — and only OFCCP — is also responsible for enforcing the obligations imposed on federal contractors to engage in *affirmative action*. This often misunderstood term simply means in practice that in addition to refraining from discrimination, federal contractors also have an obligation to undertake affirmative, proactive steps to ensure that applicants and employees are afforded equal opportunities in all aspects of their employment.

The dual mandate imposed on federal contractors (nondiscrimination and affirmative action) has given rise to very different enforcement procedures for the EEOC and OFCCP. Under the EEOC’s procedures discrimination claims generally are raised through the filing of administrative charges by aggrieved individuals or by someone on their behalf. The nature and scope of EEOC’s investigation is defined largely by the claims made in these individual charges.

The vast majority of OFCCP enforcement actions, in contrast, take the form of agency-initiated “compliance evaluations” conducted at selected federal contractor establishments. In the recent past OFCCP has conducted approximately 4,000 compliance evaluations each year. Unlike EEOC charge investigations that generally focus on the specific allegations raised in a charge, OFCCP compliance evaluations are open-ended and can encompass virtually any aspect of the contractor’s employment practices or policies that OFCCP chooses to evaluate.

If finalized as currently proposed, OFCCP’s recent regulatory initiatives will have two major consequences: (1) impose extensive new and highly burdensome obligations on federal contractors to satisfy their affirmative action obligations, and (2) expand exponentially the scope and detail of workforce data that contractors would be required to collect, maintain and make available to OFCCP during routine compliance evaluations.

The crucial question of course is whether these regulatory initiatives are the most effective way to accomplish OFCCP's and federal contractors' shared goal of matching qualified applicants with available jobs. In our view, the answer is no.

### **OFCCP's Traditional Regulatory Approach**

During its 47-year history, OFCCP has adopted a set of regulations and sub-regulatory guidance that both define the standards by which contractor compliance is measured, and establish procedures and protocols for conducting agency compliance evaluations. With respect to identifying unlawful discrimination, OFCCP generally applies the same legal standards followed by the EEOC. With respect to defining and evaluating federal contractor *affirmative action* commitments, OFCCP has tended to focus on four primary areas:

- (1) Development of written affirmative action programs (AAPs) for women and minorities, individuals with disabilities, and protected veterans;
- (2) Development of targeted outreach programs seeking diverse qualified applicant pools for all openings;
- (3) Statistical monitoring of selection rates (hires, promotions, transfers, terminations, educational opportunities, etc.) to ensure there are no institutional or attitudinal barriers to equal opportunity for any particular group; and
- (4) Monitoring of compensation patterns to ensure nondiscrimination in pay for all employees.

Each one of these four affirmative action categories has been the subject of one or more OFCCP-initiated Administrative Procedure Act rulemakings. EEAC and other contractor associations have used these rulemakings to provide input into the practical implications of the agency's proposals, including the need for OFCCP to understand that federal contractors are not monolithic; their businesses are not all structured in the same way; nor do they select, develop or compensate employees in a one-size-fits-all fashion.

Until recently, this process has yielded, if not complete agreement on all issues, at least a respectful mutual understanding of the important role OFCCP and federal contractors each play in promoting equal employment opportunity. Contractors have looked to OFCCP to define and enforce the compliance standards in a clear, consistent and transparent manner, and OFCCP has looked to contractors to undertake good faith efforts to apply those standards in the context of their unique business environments.

The regulatory proposals issued by OFCCP over the past 16 months, if finalized in their current form, threaten to unravel this respectful mutual understanding to the

detriment of the very individuals OFCCP and federal contractors are committed to protect. As discussed below, the proposals would convert current regulatory guidance and recommendations into highly prescriptive mandates, rejecting “good faith efforts” as a measure of compliance in favor of extensive recordkeeping and accomplishment of artificially created numerical benchmarks.

Perhaps most troubling, the proposals appear to reflect an unspoken but yet unmistakable underlying OFCCP assumption that virtually all employers subject to the agency’s oversight are engaging in unlawful discrimination, and as such must be compelled to adhere to the processes prescribed by OFCCP; must document each and every outreach effort and employment decision; and must make all of this information available to OFCCP during compliance evaluations so that the agency can assure itself that contractors are, in fact, keeping their commitments. Simply stated, the respectful mutual understanding developed between OFCCP and federal contractors over the years is today very much in jeopardy.

### **OFCCP Has Underestimated the Potential Economic Impact of Its Pending Regulatory Proposals**

During calendar year 2011, OFCCP proposed five major changes to its enforcement regulations:

- *January 3:* Rescind existing guidance on procedures and standards for investigating systemic compensation discrimination
- *April 26:* Require establishment of numerical targets for veterans’ employment and impose sweeping new obligations related to documenting the identification, recruitment and treatment of veterans
- *August 10:* Impose broad new compensation reporting requirements on contractors
- *September 11:* Seek permission from OMB to vastly expand the scope and amount of data requested of contractors at the outset of compliance evaluations
- *December 9:* Impose 7% hiring goal for individuals with disabilities and impose sweeping new obligations related to documenting the identification, recruitment and treatment of individuals with disabilities

In addition to these proposals OFCCP has indicated that major changes to its construction industry regulations and sex discrimination guidelines will be proposed in the near future.

For each proposal OFCCP conducted a cost and burden analysis under the Paperwork Reduction Act. In the course of preparing comment letters on the proposals, EEAC solicited feedback from its member companies regarding OFCCP’s cost and burden estimates. Without exception, EEAC members concluded that OFCCP’s figures vastly understated the actual burdens and costs of implementing the proposals in their workplaces.

The specific deficiencies in OFCCP's economic impact analyses are discussed in detail in each EEAC comment letter. They include inaccurate counts of the number of covered contractor establishments; complete omission of certain critical compliance requirements; inaccurate assessments of the ease with which certain workforce data can be extracted from contractor computer systems; and wholly unrealistic estimates of the time required for contractors to accomplish prescribed new responsibilities.

The most in-depth analysis of the accuracy of OFCCP's economic impact estimates was conducted with respect to the proposed revisions to the disability regulations. Shortly after the proposal was published, EEAC, the U.S. Chamber of Commerce and the Center for Corporate Equality developed a survey instrument to collect from their federal contractor members fact-based estimates of the proposal's anticipated burdens and utility. A total of 108 major federal contractors submitted complete or substantially complete responses to the survey. Collectively, these respondents employ more than 4.54 million employees in the United States, or roughly 17% of the entire federal contractor workforce, as estimated by OFCCP. During 2011 these companies filled more than 1.1 million job openings, for which they received more than 37 million applications.

OFCCP estimated the cost of implementing its disability proposal to be \$80.1 million. The survey results estimated that the actual implementation costs will be at least \$2 billion in the initial year (more than *30 times* the agency estimate) and at least \$1.5 billion annually thereafter. Additional survey results are noted in the more detailed analysis that follows. The consistent pattern of substantial discrepancies between OFCCP's burden and cost estimates and those of major federal contractors raises serious concerns over whether OFCCP has performed an adequate assessment of the likely impact of its proposals as required by Executive Orders 12866 and 13536 and the Paperwork Reduction Act of 1995.

I now offer comments on each of OFCCP's five pending regulatory proposals.

### **Revision of Regulations Pertaining to Individuals with Disabilities and Covered Veterans**

Two of the five pending regulatory proposals pertain to federal contractor nondiscrimination and affirmative action obligations on behalf of veterans covered by the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"), and individuals with disabilities protected under Section 503 of the Rehabilitation Act ("Section 503"). The current VEVRAA and Section 503 regulations are very similar, although not identical. Because OFCCP has always enforced them in parallel fashion, I discuss them together.

In sum, the pending proposals would transform a *qualitative* program based on situation-specific good faith efforts, equal opportunity, and respect for privacy of a

person's disability into a *quantitative* program based on federally mandated numeric targets, preferential treatment, ineffective and extraordinarily burdensome paperwork requirements, and invasive inquiries into the disability status of tens of millions of U.S. workers and job seekers each year.

#### *Establishment of Numeric Hiring Goals*

OFCCP has long required federal contractors to establish numeric placement rate goals for minorities and women in situations where their current employment levels are below what reasonably would be expected given their representation (*i.e.*, "availability") in the labor market. The goals are calculated using the U.S. Census Bureau's Special EEO File which provides detailed minority and gender labor force participation rates broken out by job category, specific occupation and location.

OFCCP has never before required numeric hiring goals for veterans and individuals with disabilities. Both proposals would require their establishment for the first time. The problem with such a requirement, however, is that there are no reliable "availability" data for veterans and individuals with disabilities comparable to that provided through Census data for women and minorities. The proposals address this inconvenience in two different, and equally ineffective, ways.

The veterans' proposal contemplates that contractors will calculate their own "availability" estimates utilizing two data points provided by OFCCP and three data points unique to each contractor. These five data points are then "weighted" by the contractor according to their relative significance to arrive at a single veteran availability estimate upon which the goals would be based. In contrast, the Section 503 proposal does not require contractors to calculate their own availability estimates for individuals with disabilities, but rather mandates use of a standard 7% utilization goal for each job group in the contractor's affirmative action plan. The primary data source for the 7% disability goal is the Census Bureau's American Community Survey (ACS), an instrument that does not collect disability information in a manner consistent with Section 503 or the Americans with Disabilities Act.

The most fundamental flaw in both proposals is that there is not an exact match between the individuals upon which the benchmarks are based and individuals with disabilities protected by Section 503 or veterans covered under VEVRAA. Without an apples-to-apples comparison as exists with respect to women and minorities, the estimated veterans and disability benchmarks are useless standards by which to evaluate the success of a contractor's outreach efforts. Moreover, numeric hiring goals not based upon true availability encourage one of two unacceptable outcomes — contractors simply "checking the box" that the goals had been accomplished or, more significantly, engaging in unlawful preferences simply to meet the goal and avoid OFCCP scrutiny.

OFCCP estimates that calculating goals for veterans will take each establishment 1 hour per year, while EEAC's estimate is 4 hours per year. The net difference between OFCCP's economic impact estimate for all goal-related aspects of its veterans' proposal and EEAC's estimate is approximately \$95 million per year.

*Recruitment Requirements — Mandatory State Job Postings and Linkage Agreements*

OFCCP traditionally has left it up to contractors to identify the most productive recruitment sources and determine the most effective way to utilize them. While contractors are still free to do so, the disability and veterans' proposals mandate that federal contractors must also list their open positions with certain state and local employment agencies, and establish and monitor "linkage agreements" with referral agencies specified by OFCCP. In addition to being administratively burdensome, the mandated local recruitment efforts ignore the national scope of most contractors' recruitment initiatives and the sophisticated Internet-based technology used in today's employment searches.

Mandatory State Job Listings

Contractors for many years have been required by VEVRAA to list most of their open positions at an appropriate local employment service office. This "mandatory listing" requirement has posed enormous compliance challenges for federal contractors, for OFCCP, and for the hundreds of state agencies that often lack the financial, technical and personnel resources to handle the volume of job postings filed. The advent of Internet recruiting has only exacerbated the challenge.

The mandatory job listing requirement has been handled in several different ways. At one time contractors could satisfy their obligation by simply listing their openings on the America's Job Bank (AJB), a nationwide job board maintained by the U.S. Department of Labor. When AJB was eliminated in 2007, OFCCP required contractors to list their openings directly with the state or local employment agencies, but permitted them to do so in a manner (FAX, e-mail, or other electronic postings) *acceptable to the contractor*. More recently, OFCCP has flipped this option and now requires that job openings be posted in the "manner and format" *required by the local agency*. With no consistency in the filing requirements imposed by the local agencies, this obligation presents enormous burdens and costs for contractors engaged in nationwide recruiting.

There never has been a similar posting obligation for individuals with disabilities. The new disability proposal, however, would require that contractors for the first time post their open positions at the "One-Stop Career Center" nearest to the contractor's facility. Unfortunately, there is no guarantee that the nearest "One-Stop Career Center" will also be the state employment service office that the contractor is using to satisfy its veterans' mandatory job listing requirement. EEAC has recommended to OFCCP that

any posting with the state employment service satisfy both the veterans' and disability posting requirements.

OFCCP's economic impact analysis assumes that contractor establishments will have only *two* open positions per year that require posting. The 108 EEAC survey respondents alone had *1.1 million* such openings in 2011.

Over the years, EEAC members have found the mandatory listing requirement to be burdensome, costly and only marginally productive in matching veterans with job openings. Since the requirement is statutorily based, the compliance challenges it has created for federal contractors, OFCCP and the state agencies can only be alleviated through a Congressional response. In our view, the current mandatory listing requirement should be eliminated and replaced with a national job board patterned after America's Job Bank that could serve as a centralized job posting system which would serve as the federal government's clearinghouse of job opportunities for which employers are specifically recruiting individuals with disabilities and protected veterans.

#### Linkage Agreements

In addition to the mandatory postings, the disability and veterans' proposals also both require contractors to execute formal "linkage agreements" with OFCCP-specified referral agencies. Each set of regulations requires a minimum of three linkage agreements per establishment. One of the specified linkage agreements would qualify under both proposals thus resulting in a minimum total of five written linkage agreements per establishment. In addition, the effectiveness of each linkage agreement would need to be evaluated annually. With approximately 285,000 contractor establishments in the U.S., a total of 1,425,000 written linkage agreements would need to be negotiated and/or reviewed each year.

Mandating linkage agreements with government-specified agencies ignores the fact that most contractors already have well-established relationships with various employment services and placement organizations, and have become adept at utilizing Internet-based recruiting techniques. Unlike the centralized job posting system recommended above, the proposed linkage agreements will not facilitate matching veterans and individuals with disabilities with available jobs.

The linkage agreements will instead constrain the already limited resources of both contractors and employment services agencies. Indeed, in comments filed with OFCCP on the proposed disability regulation, the National Association of State Workforce Agencies (NASWA) — an advocacy organization for state workforce programs and policies — warned that "[t]he volume of paperwork and administrative bulk of creating, approving, signing and maintaining such linkage agreements would be overwhelming. Without any administrative funding provided, this becomes an unfunded



mandate to an already severely constrained system trying to provide universal services to a growing labor force.”

- Time required to *initiate* each linkage agreement: OFCCP estimate = 5.5 hours; EEAC survey estimate (35% of respondents) = 10 hours
- Time to annually *update* each linkage agreement: OFCCP estimate = 15 minutes; EEAC survey estimate (54% of respondents) = 3 or more hours

#### *Invitations to Self-Identify*

Federal contractors are already required under current regulations to solicit veteran and disability-related information from job applicants after an offer of employment has been extended, but before the individual begins working. Both sets of regulations would expand contractors’ self-identification obligations. Individuals with disabilities would be afforded three opportunities to self-identify: (1) whenever they apply for or are considered for employment, (2) after being extended a job offer but before they begin working, and (3) annually as part of a required anonymous survey conducted by their employer. Veterans would be extended two invitations to self-identify: (1) a pre-offer invitation to self-identify as a “protected veteran,” and (2) a post-offer, pre-employment invitation to self-identify with respect to each applicable category of protected veteran.

OFCCP’s approach to the identification and treatment of individuals with disabilities (including disabled veterans) as reflected in the new proposals is very different than the approach advocated by the EEOC since enactment of the Americans with Disabilities Act (ADA). The EEOC prohibits employers from making pre-employment disability inquiries except when required to undertake affirmative action by federal, state or local law, or when using the information to benefit individuals with disabilities (such as running sheltered workshops). The EEOC also has been very reticent to sanction post-employment invitations to self-identify as mandated in the proposals.

It has always been unclear whether simply being subject to Section 503 is sufficient to justify extending pre-offer invitations to self identify. OFCCP apparently assumes that it is. The EEOC recently issued updated guidance on the ADA that simply reaffirms its traditional policies and fails to answer the question directly. Nevertheless, OFCCP’s self-identification proposals, along with the requirement that contractors maintain special employment files on applicants and employees with disabilities (discussed below), stand in stark contrast to the EEOC’s approach under the ADA that an individual’s disability status generally is relevant only in the context of considering the need for reasonable accommodations.

Contractors thus have concerns about OFCCP’s self-identification proposals from the standpoint of (1) invasion of employee privacy, (2) potential exposure to ADA claims, and (3) cost.

- Time required to develop capability to extend pre-offer disability invitations: OFCCP estimate = 5 minutes per establishment; EEAC survey estimate = on average more than 560 hours per contractor
- Time required to develop capability to extend post-offer/pre-employment disability invitations: OFCCP estimate = no additional economic impact; EEAC survey estimate = on average more than 458 hours per contractor
- Time required to develop capability to extend annual anonymous survey of employee disability status: OFCCP estimate = 5 minutes per establishment; EEAC survey estimate = on average more than 722 hours per contractor

#### *Ineffective and Burdensome Paperwork Requirements*

The proposed disability and veterans' regulations would impose a wide array of paperwork requirements and costly administrative burdens on contractors while contributing little if anything to matching veterans and disabled individuals with job openings.

#### Annual Review of Personnel Processes

The existing disability and veterans' regulations require the "periodic" review of personnel processes to ensure that individuals with disabilities and veterans are considered for open positions and training opportunities. The appendix to the current regulations contains suggested methods for carrying out such reviews.

The new proposals turn these suggested methods into mandates by requiring contractors to:

- Identify each known applicant and employee who is disabled or is a protected veteran;
- Keep a record of every vacancy and training opportunity for which protected veterans or disabled applicants and employees are considered;
- Prepare a statement for each instance in which protected veterans or disabled applicants and employees are rejected for a vacancy, promotion, or training opportunity, outlining the reason for the rejection and any accommodations considered;
- Describe the nature and type of accommodations accorded to disabled individuals (including disabled veterans) who were selected for hire, promotion, or training programs; and
- Make these statements available to the applicant or employee upon request.

The net effect of these requirements will be to require contractors to create a unique compliance file on each and every protected veteran and disabled applicant and employee, documenting each and every employment and training opportunity the

individual has ever had with the company, along with the reasons in each instance where the person was not successful.

- Time required to construct and maintain files: OFCCP estimate = 30 minutes per establishment; EEAC survey estimate (57% of respondents) = 3 hours or more per individual
- Time required to justify and document each non-selection decision: OFCCP estimate = 30 minutes per establishment; EEAC survey estimate (45% of respondents) = 3 hours or more per individual
- In cases where changes to existing systems, forms or procedures would be necessary to comply with this requirement, more than half of EEAC survey respondents reported that the cost would exceed \$100,000

#### Review of Physical and Mental Job Qualifications

The current disability and veteran regulations require the “periodic” review of all physical and mental job qualifications to ensure that where such qualifications tend to screen out disabled veterans or persons with disabilities, they are job-related and consistent with business necessity. The proposed regulations would mandate that these reviews be performed for all jobs on an *annual* basis, irrespective of whether there has been a vacancy or the job has changed over the prior year. In addition, such reviews must be documented in such a way that would “list the physical and mental job qualifications for the job openings during a given AAP year ... and provide an explanation as to why each requirement is related to the job to which it corresponds.”

- Time to conduct annual review: OFCCP estimate = 2.5 hours per establishment; EEAC estimate = 2,500 hours per contractor

#### New Data Collection and Analysis Requirements

The new disability and veterans’ proposals require contractors to collect and tabulate ten (disability) or eleven (veterans) new data points annually, to be used in the assessment of the contractor’s disability and veterans affirmative action efforts. These data points pertain to such minute details as:

- The number of *referrals* of protected veterans and individuals with disabilities — separately calculated for referrals from employment service offices, “linkage” agencies, and other sources;
- The number of *applicants* who are known to be or who self-identified as being a protected veteran or individual with a disability;
- Total number of *job openings*, total number of jobs filled, and the ratio of jobs filled to openings;
- Total number of *applicants* for all jobs, the ratio of protected applicants to all applicants (“applicant ratio”), and the number of protected applicants hired; and

- The total number of applicants hired and the ratio of protected applicants hired to all hires (“hiring ratio”).

The cost to federal contractors to comply with this one requirement is staggering:

- Time to design and implement the systems, forms and procedures to comply with this mandate: OFCCP estimate = one hour per establishment per year; EEAC survey estimate = on average more than 3,755 hours per contractor
- Time to perform and document the annual evaluation of the effectiveness of each outreach and recruitment effort: OFCCP estimate = 10 minutes per establishment; EEAC survey estimate = on average more than 1,946 hours per contractor

#### New Required Training

The disability and veterans’ proposals both impose new mandatory training obligations on federal contractors. First, the contractor’s disability and veterans affirmative action policies must be discussed “thoroughly in any employee orientation and management training programs.” Second, training must be provided annually for all personnel involved in “recruitment, screening, selection, promotion, disciplinary, and related processes.” The proposals detail the specific topics that must be covered in the training as well as the contemporaneous records that must be maintained regarding which personnel received the training, when they received it, and who facilitated it.

Among the records that must be retained are the written and electronic materials used for the training, which must cover, at minimum, the following topics: (1) the benefits of employing protected veterans and individuals with disabilities; (2) appropriate sensitivity toward veterans and individuals with disabilities; (3) the legal responsibilities of the contractor and its agents regarding protected veterans and individuals with disabilities; and (4) the obligation to provide reasonable accommodation.

OFCCP believes the burden and costs for this training to be minimal — 20 minutes to develop and 5 minutes to present the orientation sessions per establishment each year, and 40 minutes to develop and 20 minutes to deliver the personnel selection training per establishment each year. These estimates are totally unrealistic in part because they totally ignore the costs involved in removing employees from their jobs to attend and receive the training. The EEAC survey estimates the actual costs of the orientation training to be \$310.3 million and the actual costs of the personnel selection training to be \$254.5 million — a combined training cost of approximately \$564.8 million.

### **Proposed Expansion of Contractor Desk Audit Submission Requirements**

As noted earlier, OFCCP carries out its enforcement responsibilities primarily through conducting agency-initiated compliance evaluations at selected contractor establishments. Unlike the scope of EEOC investigations which are defined primarily by the allegations contained in the discrimination charge, OFCCP compliance evaluations are largely open-ended and thus potentially can embrace any and all of a contractor's employment policies, practices and decisions.

Contractor establishments are notified of their selection for review through OFCCP issuance of an OMB-approved Scheduling Letter and attached Itemized Listing. The Itemized Listing enumerates information OFCCP may request at the outset of the compliance evaluation such as copies of Affirmative Action Plans (AAPs); recent EEO-1 Reports; summaries of applicants, hires, promotions and terminations; aggregate compensation information; and copies of collective-bargaining agreements.

The requested information must be submitted by the contractor to OFCCP within 30 days of receipt of the Scheduling Letter, and OFCCP uses the information to conduct its preliminary analysis — referred to as the “desk audit.” If OFCCP's desk audit review reveals potential compliance questions, additional information may be requested through focused follow-up data requests or through compliance officers visiting the contractor's premises to conduct an “onsite investigation.”

Until recently, OFCCP's practice was to evaluate the desk audit submission to ensure that the AAPs and other written information conformed to all technical requirements of the regulations, and to conduct preliminary statistical analyses of the employment transactions (hires, promotions and terminations) and compensation. In cases where the submission conformed to the regulations and there were no statistical “indicators” of potential discrimination against any group, the audit was closed. Conversely, where there were indicators of noncompliance or statistical adverse impact, a further investigation would be conducted focused on the problematic areas.

This “tiered” or “phased” approach to compliance evaluations offered several advantages to both OFCCP and to contractors. Contractors knew from the Itemized Listing what information they needed to maintain on an ongoing basis for submission to OFCCP, and by authorizing OFCCP to evaluate only that information during the desk audit phase, OMB discouraged OFCCP from venturing off into unfocused “fishing expeditions” during their compliance evaluations. This approach also enabled OFCCP to focus its resources on issues having significant potential for noncompliance.

The key to maintaining this effective balance is the OMB-approved Itemized Listing. Each time the Itemized Listing comes up for periodic OMB renewal under the Paperwork Reduction Act there is a struggle between OFCCP and federal contractors. OFCCP invariably seeks OMB authorization to collect more comprehensive and detailed

information for desk audit review, and federal contractors invariably seek OMB protection from being required to disclose highly sensitive and confidential information to OFCCP at the outset of a compliance evaluation before there is any indication of a compliance-related need for it.

The Scheduling Letter and Itemized Listing currently are before OMB for reauthorization, and the struggle continues — but this time the stakes are much higher given the breadth of OFCCP’s request for information and the agency’s abandonment of a tiered approach to compliance evaluations. There are several new items of information that OFCCP wants to add to the Itemized Listing, but two of them are particularly problematic for federal contractors — employment transactions data and compensation data.

#### *Employment Transactions Data*

Currently federal contractors are required to submit to OFCCP summary information on applicants, hires, promotions and terminations (1) by gender and *minority/nonminority* status, (2) for each AAP job group *or* each job title. This is the source information that OFCCP traditionally has used to determine whether there are any preliminary “indicators” of statistically significant adverse impact in selections.

OFCCP is now seeking authorization from OMB to collect such information (1) by gender and *individual race/ethnicity* categories, (2) for each AAP job group *and* job title. In addition, OFCCP wants contractors to identify by race and gender the “actual pool of candidates” who applied or were considered for promotion, or who were considered for termination. This request is objectionable for two reasons — the data in the preferred format are too granular to be useful for many statistical selection analyses, and most contractors do not utilize “pools” for all of their promotions and terminations.

#### *Compensation Data*

Over the years the compensation data requested on the Itemized Listing has served as the greatest source of friction between OFCCP and federal contractors. OFCCP has contended that it needs employee-specific compensation data to conduct meaningful compensation analyses; contractors have responded that employee-specific compensation data at the higher levels of an organization are among the most sensitive and competitively confidential information they maintain. The result thus far has been a compromise brokered by OMB — OFCCP has been authorized to collect aggregate level (*i.e.*, not-employee specific) compensation data for purposes of desk audit analysis, and then may issue requests for detailed employee-specific information when a need for it has been established. This compromise has generally worked well, although the standards utilized by OFCCP to demonstrate “need” for the follow-up information have eroded significantly in recent years.

As with the transactions data, OFCCP is now petitioning OMB for permission to request in the Itemized Listing far more detailed compensation information. The new request modifies (1) the *date* the compensation “snapshot” is taken [February 1 each year], (2) the *range of employees* for whom compensation information must be provided [including contract, per diem, day labor, and temporary employees], and (3) the *scope and detail* of the compensation data requested [in addition to base salaries and wage rates—such items as bonuses, incentives, commissions, merit increases, locality pay, and overtime].

In addition to being extremely burdensome (discussed below) and technically objectionable, OFCCP’s transaction and compensation data requests are also operationally objectionable because they reflect the agency’s abandonment of tiered compliance evaluations in favor of thorough “wall-to-wall” compliance evaluations in each and every compliance review. OFCCP apparently assumes that most (or all) federal contractors are out of compliance with their nondiscrimination and affirmative action obligations and it is therefore necessary to gather at the outset of each compliance evaluation—before there is any indication of a compliance issue—*all* employment information that *might* be potentially relevant *in case* a potential violation should develop as the review unfolds. We believe such an assumption is unwarranted, and OFCCP’s request to OMB, if approved, will result in contractors maintaining, evaluating and disclosing to OFCCP large amounts of sensitive and confidential business information that will turn out to be unnecessary for a determination of compliance.

#### *OFCCP Burden Estimates*

Notwithstanding seeking permission to require audited contractors to provide OFCCP with more data, more records, more manual tabulations, and more information at the outset of the review, OFCCP estimates that its proposed changes will actually *reduce* the overall burden on each audited federal contractor by approximately 1.34 hours per audit. In addition to defying logic, over two-thirds of the comments submitted to OFCCP in response to its proposed changes questioned the agency’s burden estimates as being unrealistically low. EEAC members report that if OMB grants OFCCP’s request, their current burden hours will increase three- and in some instances four-fold. OFCCP’s burden estimates are simply not credible.

#### **Compensation Analysis**

In addition to the proposed Scheduling Letter changes, two other OFCCP proposals will impact the way federal contractors and OFCCP evaluate compensation. The first is OFCCP’s proposal, announced in early 2011, to rescind its 2006 Systemic Compensation Discrimination Guidelines and replace them with new—*as yet unpublished*—guidance. The second is OFCCP’s intention to develop a new compensation data collection tool that will require federal contractors to periodically

report to the agency extensive information about their compensation systems, practices and patterns.

*Rescission of Systemic Compensation Discrimination Guidelines*

Prior to 2006, OFCCP did not have a consistent approach to how it audited contractor compensation practices. There was no consistency with respect to such fundamental questions as: (1) how employees should be grouped together for purposes of analysis, (2) what pay variables should be included in the analysis, (3) what statistical methodologies were appropriate for conducting the analysis, (4) how to interpret the statistical results, or (5) whether discrimination allegations could be predicated upon statistics alone or needed to be supplemented with anecdotal evidence of discrimination. In those days the results in any particular audit would depend upon which field offices — or which auditors — were conducting the analysis.

This changed in 2006 when these and other questions were addressed in OFCCP's systemic compensation discrimination guidelines. While admittedly not perfect in all respects, the guidelines nevertheless were predicated upon sound legal and statistical principles accepted by the federal courts in compensation discrimination cases. They thus constituted a valuable blueprint for both OFCCP and federal contractors to follow in conducting compensation analyses. The predictability generated by the guidelines encouraged federal contractors to conduct voluntary self-critical analyses of their compensation systems.

The compensation guidelines serve as a good illustration of the beneficial consequences that can flow from clearly articulated, consistently applied OFCCP policies. Unfortunately, OFCCP concluded that the guidelines were too rigid and constraining and that it needed greater flexibility to utilize a “variety of investigative and analytical tools.” OFCCP has indicated that it will not officially rescind the 2006 guidelines until new guidance is developed to replace it. Thus far there is no indication of what form that guidance will take other than a commitment that it will be based upon principles contained in Title VII of the Civil Rights Act of 1964.

The key point to be learned by the rescission of the compensation guidelines is that preserving investigative flexibility for OFCCP invariably carries with it investigative uncertainty for contractors. In most instances OFCCP's mission will be better served through a clear articulation of policy and standards that both OFCCP and contractors can rely upon — as was the case with the 2006 systemic compensation discrimination guidelines.

*Compensation Data Collection Tool*

On August 10, 2011, OFCCP requested public comment on a proposed new collection tool that would require federal contractors to collect, calculate, and disclose to



OFCCP millions of confidential data points on their pay and benefits policies and decisions. OFCCP posed 15 specific questions regarding the scope, content, and format of the data collection tool — not one of which posed the fundamental question of whether there is actually a need for such a potentially burdensome and intrusive requirement.

EEAC, in conjunction with several other business organizations, have asked OFCCP not to proceed with developing the compensation data collection tool. The agency already has extensive compensation information available to it in the files of recently-completed compliance evaluations, and will have significantly more information from this source should OMB grant the agency's request to expand the Scheduling Letter and Itemized Listing.

In addition, the EEOC currently is sponsoring a project being conducted by the National Academy of Sciences ("NAS") to "review methods for measuring and collecting pay information" from U.S. employers for purposes of administering Title VII. Given the Obama Administration's emphasis on having agencies coordinate their enforcement efforts — and given the EEOC's and OFCCP's commitment to the National Equal Pay Enforcement Task Force to do so — OFCCP should not proceed with the development of a compensation data collection tool independently of the NAS study.

## **Conclusion**

Over the past sixteen months, OFCCP has published five major regulatory proposals. In three instances (disability regulations, veterans' regulations, and revisions to the compliance evaluation Scheduling Letter Itemized Listing), OFCCP is proposing to expand exponentially the recordkeeping, data collection and analysis, and reporting requirements already imposed on federal contractors by the agency's existing regulations. In one instance (rescission of the 2006 compensation guidelines), OFCCP is proposing to withdraw and replace well-founded legal guidance that served as a useful catalyst for voluntary compliance. And in one instance (compensation data collection tool), OFCCP is proposing development of a massive reporting requirement without having established a need for it and apparently without coordination with a parallel study being conducted by the EEOC.

By itself, each proposal carries with it significant burdens and costs for federal contractors. In combination, the burdens and costs are enormous, and the economic analyses conducted by OFCCP suggest a serious underestimation of what those burdens and costs actually will be.

Last month, Cass Sunstein, Administrator of OMB's Office of Information and Regulatory Affairs, reminded the heads of all executive departments and agencies to be aware of the "cumulative effects of regulations." He noted that President Obama's Executive Order 13563 urges agencies to promote "coordination, simplification, and harmonization," and directs them to "propose or adopt a regulation only upon a reasoned

determination that its benefits justify its costs.” He further observed that consistent with the Executive Order, agencies should:

“[t]ake active steps to take account of the cumulative effects of new and existing rules and to identify opportunities to harmonize and streamline multiple rules. The goals of this effort should be to simplify requirements on the public and private sectors; to ensure against unjustified, redundant, or excessive requirements; and ultimately to increase the net benefits of regulations.”

None of the five proposals discussed in this testimony has been finalized. It is still possible, therefore, to identify and modify their most problematic aspects. As it has throughout its 36-year history, EEAC is ready and willing to engage in a serious and reasoned dialogue with OFCCP to identify and address those aspects of the proposals that we see as roadblocks to our shared goal of matching qualified applicants — including women, minorities, veterans and individuals with disabilities — with available job openings. It is in that spirit that we make the following six recommendations:

1. The outdated, onerous, and only marginally effective mandatory job listing requirements for veterans should be replaced with a national job board patterned after the former America’s Job Bank. Such a step would facilitate national recruitment efforts, capitalize on current Internet-based recruiting techniques, and eliminate the need for negotiating and annually updating approximately 1.4 million costly and locally-oriented linkage agreements.
2. OFCCP and EEOC should reconcile their seemingly divergent approaches to identifying and employing individuals with disabilities. OFCCP’s insistence upon multiple and ongoing self-identification invitations, in combination with the obligation to build special files on applicants and employees with disabilities, raises the uncomfortable possibility that contractor compliance with OFCCP’s regulations can be accomplished only at the risk of violating the Americans with Disabilities Act.
3. OFCCP should not require the establishment of numerical hiring goals for veterans and individuals with disabilities in the absence of reliable labor market availability data.
4. The numerous recommended affirmative action measures for veterans and individuals with disabilities in the current regulations should remain “recommendations” and not be converted into prescriptive, mandatory requirements complete with exhaustive documentation and recordkeeping obligations. Such internally-focused “process” requirements do little to promote actual job creation or placement.

5. Federal contactors should be provided with clear and consistently-applied guidance regarding OFCCP's compliance standards. Such guidance promotes voluntary compliance.
6. The "phased" approach to compliance evaluations should be retained. Contractors should not be required to submit volumes of detailed and highly sensitive employment information to OFCCP at the outset of an audit before there is any indication of a compliance-related need for it.

Thank you again for the opportunity to testify before the Subcommittee today. I will be pleased to answer any questions you may have.