



July 29, 2019

**VIA ELECTRONIC UPLOAD**  
**FEDERAL RULEMAKING PORTAL**

Office of Information and Regulatory Affairs  
Attn: OMB Desk Office for DOL—OFCCP  
Office of Management and Budget  
Room 10235  
725 17<sup>th</sup> Street NW  
Washington, DC 20503

**RE: Letter of Comment of The Institute of Workplace Equity on Proposed Renewal of Information Collection Requirements for OFCCP Supply and Service Program (OMB Control No. 1250-0003)**

Dear Sir or Madame:

The Institute for Workplace Equality (“IWE” or “The Institute”) submits the following Comment in response to the Office of Management and Budget (“OMB”)’s invitation for comments on the OFCCP Recordkeeping and Reporting Requirements—Supply and Service. The renewal<sup>1</sup> sets forth proposed changes to the US Department of Labor’s Office of Federal Contract Programs’ (“OFCCP” or the “Agency”) Scheduling Letter and Itemized Listing; its Compliance Check Letter; its Section 503<sup>2</sup> Focused Review Scheduling Letter and the addition of a VEVRAA<sup>3</sup> Focused Review Scheduling Letter.<sup>4</sup> The Institute appreciates the opportunity to provide our Comment.

**Background on The Institute for Workplace Equality**

The Institute, formerly known as The OFCCP Institute, is a national non-profit employer association based in Washington, D.C. The Institute’s mission includes the education of federal contractors as to their affirmative action, diversity, and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal, and staffing functions representing many of the nation’s largest and most sophisticated federal contractors.

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<sup>1</sup> See, OFCCP Recordkeeping and Reporting Requirements—Supply and Service, OMB Control No. 1250-003 (June 28, 2019), available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201906-1250-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-1250-001).

<sup>2</sup> Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793.

<sup>3</sup> Vietnam Era Veterans’ Readjustment Assistance Act of 1974, 38 U.S.C. § 4212.

<sup>4</sup> See Section 503 and VEVRAA Focused Review Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at <https://www.regulations.gov/docket?D=OFCCP-2019-0002>.

The Institute recognizes the responsibility of all employers, including contractors, to create a nondiscriminatory workplace. We applaud and support all efforts to make the workplace free from all forms of discrimination. To that end, we agree that OFCCP has a proper and important role in well-designed and effective enforcement efforts.

## **Overview**

The Institute submitted comments to the OFCCP's initial proposal published in the *Federal Register* on April 12, 2019.<sup>5</sup> The Institute has carefully reviewed the changes OFCCP made in response to its comments, and while the Agency removed many of the more onerous aspects of its proposals, The Institute remains concerned about a number of those that remain.

As outlined in more detail below, The Institute respectfully requests that OMB not approve the changes proposed by OFCCP.

### **I. Response to OFCCP's revised Supply and Service Scheduling Letter and Itemized Listing Proposal**

#### **A. List of subcontractors**

OFCCP's initial proposal was to require federal contractors to collect the "three largest subcontractors based on contract value."<sup>6</sup> In the revised letter submitted to OMB, OFCCP altered that language to provide "a list of the subcontractor names and locations for the three most recently awarded subcontracts."<sup>7</sup>

In its Supporting Statement<sup>8</sup> to OMB, OFCCP stated that it was retaining the proposal in a modified form. The Agency rejected contractors' arguments, saying the proposal as modified alleviated the associated burden on contractors "while still providing OFCCP with enough information to carry out its obligations." As to exactly which subcontracts are "necessary" to the performance of a contract, OFCCP promised to issue public guidance once the letter is approved.

#### *1. Definition is too vague to apply*

OFCCP has consistently struggled with identifying subcontractors over which it has jurisdiction. Contractors have struggled for years to determine which subcontracts are "necessary" to their performance of a federal contract. Clearly, the regulations do not intend for every subcontract to be covered by their reach. But, there is no clear place to draw the line, no criteria a contractor can use to assess this "necessary" threshold. Further, contractors are not obligated to confirm a subcontractor's status as a covered subcontractor, but to put the subcontractor on notice that its relationship with the covered contractor could subject it to OFCCP regulations. A company engaged in good faith efforts at compliance, including those that

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<sup>5</sup> See, Supply & Service Scheduling and Compliance Check Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at <https://www.regulations.gov/docket?D=OFCCP-2019-0002>; See Section 503 and VEVRAA Focused Review Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at <https://www.regulations.gov/docket?D=OFCCP-2019-0002>.

<sup>6</sup> *Id.*

<sup>7</sup> See, OFCCP Recordkeeping and Reporting Requirements—Supply and Service, OMB Control No. 1250-003 (June 28, 2019), available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201906-1250-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-1250-001).

<sup>8</sup> *Id.*

properly notify its subcontractors of their potential obligations, could nonetheless find itself in violation of this Item 4 requirement. The requirement is simply too vague to impose upon contractors.

2. *OFCCP does not have legal authority to require contractors to provide subcontractor information*

Nowhere in Executive Order 11246, Section 503 of the Rehabilitation Act, the Vietnam-Era Veterans Readjustment Assistance Act (“VEVRAA”), or any of their implementing regulations, is a federal contractor required to specifically identify each of its covered federal subcontractors; much less to rank those subcontractors by size. OFCCP would exceed its authority if it implements a Scheduling Letter with even with the revised Item 4.

3. *The requirement would be impossible to meet for many contractors*

Most contractors do not currently track subcontractors by whether they are federal subcontractors. This requirement would place a large burden on contractors to create a new database that they do not have at present. Employers would need to pull in people from procurement, HR, compliance, legal, and other departments, to undertake this involved and difficult identification task. That means substantial time away from their job duties, and business operations. That is an incredible burden to add to contractors, who already have a host of obligations and requirements under OFCCP.

**B. FOIA Statement**

In light of the U.S. Supreme Court’s decision in *Food Marketing Institute v. Argus Leader Media*,<sup>9</sup> the OMB should direct the OFCCP to revise the Freedom of Information Act language proposed in its revised Scheduling Letter<sup>10</sup> to mirror the requirements outlined in the decision.

**II. Response to Compliance Check Letter**

The OFCCP continues to propose in its revised compliance check letter<sup>11</sup> to require contractors to submit as Item 1:

Written AAPs prepared in accordance with Executive Order 11246, Section 503, and VEVRAA (41 CFR §§ 60-1.12(b); 300.80; 60-741.80).

Currently, the agency’s compliance check letter requires contractors to provide “AAP results for the preceding year (41 CFR §§ 60-1.12(b); 300.80; 60-741.80).”<sup>12</sup> It is not clear based on this change what portion of the AAPs the agency is expecting contractors to provide in

<sup>9</sup>--- S. Ct. ---, 2019 WL 2570624 (S.Ct. June 24, 2019).

<sup>10</sup> This same discussion applies to the identical language in the proposed Compliance Check Letter and in the Focused Review letters.

<sup>11</sup> See, OFCCP Recordkeeping and Reporting Requirements—Supply and Service, OMB Control No. 1250-003 (June 28, 2019), available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201906-1250-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-1250-001).

<sup>12</sup> Compliance Check Scheduling Letter, OFCCP Website, <https://www.doi.gov/ofccp/ComplianceChecks/SchedulingLetter.html>.

response to a compliance check scheduling letter.

In the spirit of transparency and efficiency, The Institute asks the OMB to require the agency to clarify exactly what contractors are required to submit in response to this revised request.

### **III. Response to Section 503/VEVRAA Focused Review Letters**

#### **A. The requirement in proposed request 11 to provide applicant and employee level employment activity for all applicants and employees under Section 503 and VEVRAA violates the commitment the Agency made in finalizing Section 503 and VEVRAA regulations.**

When the OFCCP finalized its new regulations for Section 503<sup>13</sup> and VEVRAA<sup>14</sup> in the *Federal Register* on September 24, 2013, the Agency stated in the preamble to each final rule the following:

OFCCP Compliance Officers will not be using the applicant and hiring data to conduct underutilization or impact ratio analyses, as is the case under Executive Order 11246, and enforcement actions will not be brought solely on the basis of statistical disparities between individuals with, and without, disabilities in this data. Rather, Compliance Officers will look to see whether the contractor has fulfilled its various obligations under § 60–741.44, including its obligation, pursuant to § 60–741.44(f)(3), to critically analyze and assess the effectiveness of its recruitment efforts, using the data in paragraph (k) and any other reasonable criteria the contractor believes is relevant, and has pursued different or additional recruitment efforts if the contractor concludes that its efforts were not effective.

Request 11 of the proposed focused review scheduling letter would require contractors to provide the Agency with individual applicant and employment activity data for all applicants and employees, at the outset of the audit – before any analysis has been conducted by OFCCP, and thus, before the agency had any indicators warranting the need for additional review. OFCCP appears to be poised to use individual level data to perform adverse impact analysis for protected veterans and individuals with disabilities. This would violate the commitment made by the Agency in the preamble to both Section 503 and VEVRAA.

#### **B. The requirement to provide employee level compensation data for all employees is excessively burdensome and is not likely to produce meaningful results.**

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<sup>13</sup> Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, 78 Fed. Reg. 58682, 58702 (Sept. 24, 2013)(to be codified at 41 C.F.R. pt. 60-741.

<sup>14</sup> Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans, 78 Fed. Reg. 58614, 58637 (Sept. 24, 2013)(to be codified at 41 C.F.R. pts. 60-250 and 60-300).

The OFCCP is proposing in proposed request 12 to require contractors to provide employee level compensation data for all employees, as it currently requires under Item 19 of its Executive Order 11246 Scheduling Letter and Itemized Listing.<sup>15</sup> It appears OFCCP is planning to analyze the compensation of individuals with disabilities (“IWD”) and protected veterans just as it has been analyzing compensation for women and minorities. The Institute is certainly in favor of advancing fair pay for IWDs. However, as the OFCCP is aware, applicants and employees must voluntarily identify as IWDs or as protected veterans. As a result, significant numbers of applicants and employees do not identify themselves, despite contractor best efforts. Absent a mandate for non-voluntary disclosure and without more complete data, such compensation analyses on the entire workforce is likely to be skewed and provide false indicators of pay disparities.

The Agency rejected the arguments of federal contractors in its Supporting Statement to OMB<sup>16</sup> that there was insufficient data to do meaningful analysis. The Agency argues that “even with the low response rates to the invitation to self-identify, and thus smaller pools for analysis, OFCCP has methods for analyzing employment and compensation information to identify disparities”,<sup>17</sup> and that therefore it is keeping this proposal with minor modifications. This argument is misplaced and the agency suggests that it could merely utilize small group analyses to account for the inherent problem with the data. This approach will not correct the underlying data problems with low self-identification rates, and will lead to both false positive and false negatives.

The Institute requests that OMB not approve OFCCP’s proposed collection of this data as it is burdensome and will not provide meaningful data. If the Agency believes any individual with a disability or protected veteran has been discriminated against, it has other means available to make those determinations other than by requiring federal contractors to provide this data.

### **C. The regulations for Section 503 and VEVRAA do not allow the OFCCP to collect data during a plan year**

In letters of comment on October 10, 2014 and December 28, 2015, copies of which are attached, The Institute’s predecessor pointed out that Section 503 and VEVRAA regulations (41 C.F.R. § 60-741.44(k) and 41 C.F.R. § 60-300.44(k)) only require contractors to document computations or comparisons pertaining to applicants and hires “on an annual basis,” not on a monthly basis. Thus, the collection of an additional six months of data was beyond OFCCP’s authority. Nevertheless, the Agency retained the requirement in the current Scheduling Letter and Itemized Listing.<sup>18</sup>

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<sup>15</sup> See Scheduling Letter and Itemized Listing, Office of Management and Budget Control #1250-003 (October 29, 2016), available at [https://www.reginfo.gov/public/do/PRAViewIC?ref\\_nbr=201602-1250-001&icID=13735](https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201602-1250-001&icID=13735).

<sup>16</sup> See, OFCCP Recordkeeping and Reporting Requirements—Supply and Service, OMB Control No. 1250-003 (June 28, 2019), available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201906-1250-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-1250-001).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* See Itemized Listing numbers 9, 10, 13, and 14.

The Institute respectfully requests the OMB to direct the OFCCP re-evaluate its authority for, and the associated burden, on contractors, and ultimately maintain the existing data collection done annually.

#### **IV. Response to OFCCP's Burden Analysis**

##### **A. Burden of Proposed Changes to Scheduling Letter and Itemized Listing**

The OFCCP has concluded that its additional data requests for its revised scheduling letter and itemized listing will only increase the burden on contractors from 27.9 to 29 hours. The Institute believes that this burden estimate substantially underestimates the amount of time federal contractors spend in complying with these requirements. Federal contractors currently spend a great deal more than 27.9 hours<sup>19</sup> preparing the data now required by the Scheduling Letter and Itemized Listing.

The Institute requests that the OMB direct the OFCCP to review and re-evaluate the burden imposed not only by the Agency's proposed changes to the Scheduling Letter and Itemized Listing, but also the impact of the Agency's prior changes to the Scheduling Letter and Itemized Listing as well.

##### **B. Burden of Proposed Changes to Focused Review Letters**

The OFCCP states that complying with the new Focused Review Letters data requests will only take contractors about 10.5 hours.<sup>20</sup> The new requirements that contractors provide applicant and employment level activity data and compensation data will require much more than 10.5 hours to complete.

The Institute respectfully requests OMB direct the OFCCP re-evaluate the burden on contractors prior to implementing another requirement on contractors.

#### **V. Conclusion**

The Institute respectfully request OMB have the OFCCP reassess its proposals to revise its Supply and Service Letters in light of the Administration's focus on transparency and efficiency and push for deregulation.

Thank you in advance for your consideration, and we appreciate your time to address The Institute's concerns. We are as always happy to provide any additional information you may need or to answer any questions you may have.

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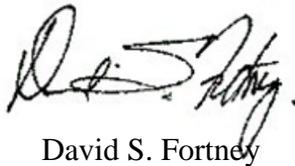
<sup>19</sup> See, OFCCP Recordkeeping and Reporting Requirements—Supply and Service, OMB Control No. 1250-003 (June 28, 2019), available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201906-1250-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-1250-001).

<sup>20</sup> See, OFCCP Recordkeeping and Reporting Requirements—Supply and Service, OMB Control No. 1250-003 (June 28, 2019), available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201906-1250-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-1250-001).

Respectfully,



David B. Cohen



David S. Fortney



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