



# **Charting the Course for OFCCP for 2017 and Beyond**

## **Briefing and Background Materials**

**Prepared by**

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**Executive Summary**

The Institute for Workplace Equality and its members strongly support the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP’s”) fundamental mission in furthering the goals of affirmative action and non-discrimination among federal contractors under Executive Order 11246, and the statutory provisions addressing individuals with disabilities and protected veterans.

Despite our support for OFCCP’s mission, it is our view that OFCCP has significantly deviated from its central purpose and no longer functions either as an effective enforcement agency that identifies and addresses noncompliance or as an agency that provides effective leadership in highlighting policies and practices that federal contractors can follow to meet their obligations. We concur with GAO<sup>1</sup> and Congressional<sup>2</sup> evaluations which have established that during the last eight years, OFCCP has embarked on expanded, protracted, misdirected audits with modest results. In addition, OFCCP has expended its resources in extensive rulemaking that expands its enforcement opportunities and imposes substantially greater burdens on contractors, but further removes the agency from its core mission of assuring equal employment opportunity.

In this paper, we hope to build on the GAO Report and provide our own recommendations that will enable OFCCP to more efficiently and fairly execute its important mission without inflicting federal contractors with even more unreasonable and unnecessary burdens.

**I. The Main Problems**

1. OFCCP has ceased being an investigatory agency devoted to enabling compliance and has become a prosecutorial body dedicated to “gotcha” statistics.
2. OFCCP’s change of its audit process in 2013 from Active Case Management (“ACM”) to Active Case Enforcement (“ACE”), effectuated the switch from investigation to prosecution. The important difference between ACE and ACM is that ACE essentially presumes that the contractor is in violation—which it, in fact, seldom is. Because of this presumption, OFCCP invests tremendous time and effort in every audit, trying to uncover evidence of presumed violations, evidence that often is not there to be found.<sup>3</sup>

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<sup>1</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-750, EQUAL EMPLOYMENT OPPORTUNITY: STRENGTHENING OVERSIGHT COULD IMPROVE FEDERAL CONTRACTOR NONDISCRIMINATION COMPLIANCE (2016), available at <http://www.gao.gov/assets/680/679960.pdf> [hereinafter “GAO Report”].

<sup>2</sup> S. REP. NO. 114-74, at 29 (2015), available at <https://www.congress.gov/114/crpt/srpt74/CRPT-114srpt74.pdf>; H.R. REP. NO. 114-195, at 16 (2015), available at <https://www.congress.gov/114/crpt/hrpt195/CRPT-114hrpt195.pdf>.

<sup>3</sup> The change to ACE has resulted in a 47% reduction in the number of audits performed by OFCCP, a significant increase in contractor time and expense in responding to audits, and a decrease in the effectiveness of audits to uncover systemic discrimination.

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3. To make unearthing “violations” involving compensation less difficult for the agency, OFCCP has replaced known, articulated standards for contractors with vague, ambiguous guidelines (Directive 307),<sup>4</sup> so that no contractor can know the standard it should aim to achieve or the criteria by which it will be evaluated.
4. The implementation of Directive 307, addressing investigations of contractor compensation practices, has resulted in OFCCP policies and practices that are ineffective, expensive, and do not result in Notices of Violation (“NOV”) that can survive legal scrutiny.
5. As a result of shifting the agency’s focus to compensation disparities, OFCCP has been compelled to seek more complex and ambiguous data (such as that to be collected by the controversial expanded EEO-1 Report<sup>5</sup>) and base its enforcement on unstable statistical “violations.”
6. The narrow focus of OFCCP on isolated issues ignores the core mission of identifying systemic discrimination.
7. OFCCP personnel lack the training needed to effectively and fairly perform their jobs.

## **II. The Solutions**

1. Return to a focus on effective compliance evaluations by restoring the Active Case Management process.
2. Rescind Directive 307 and re-implement the 2006 Compensation Standards and Self-Audit Guidelines or similar guidance based on controlling judicial decisions that includes “safe harbor” provisions.
3. Have federal contractors certify in a summary format that they are in compliance and focus audits only on contractors that do not certify their compliance.
4. Rescind or revise the recent changes to the EEO-1 collection of compensation data.
5. Focus on systemic discrimination rather than looking for isolated issues based solely on statistical significance.
6. Increase OFCCP transparency during audits so that the goal is to arrive at the concrete evidence rather than embarking on “fishing expeditions.”
7. Provide increased training to OFCCP personnel so that they become experts in the areas in which they are asked to perform.

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<sup>4</sup> *Procedures for Reviewing Contractor Compensation Systems and Practices*, Directive 2013-03, Office of Federal Contract Compliance Programs, U.S. Department of Labor (Feb. 28, 2013), *available at* [http://www.dol.gov/ofccp/regs/compliance/directives/Dir307\\_508c.pdf](http://www.dol.gov/ofccp/regs/compliance/directives/Dir307_508c.pdf).

<sup>5</sup> Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45479 (July 14, 2016), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-07-14/pdf/2016-16692.pdf>; Notice of Office of Management and Budget Action, OMB Control No. 3046-0007 (Sept. 29, 2016), <https://www.reginfo.gov/public/do/DownloadNOA?requestID=275763>.

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**Setting the Course for OFCCP**

**Briefing and Background by The Institute for Corporate Equality**

The following briefing and background materials are provided by The Institute for Corporate Equality (“The Institute”) to assist the Trump Administration in its assessment and determination of the new policy goals and objectives for the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”).

The Institute is a non-profit national employer association based in Washington, DC. The Institute trains and educates federal contractors in understanding and complying with their affirmative action and equal employment opportunity obligations. The Institute’s programs also address related human resource management strategies to assist employers in creating and maintaining diverse organizations free from workplace bias and The Institute advocates on behalf of its member employers.

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During the last eight years, OFCCP has engaged in extensive rulemaking and embarked on expanded and protracted audits with modest results. The Institute supports OFCCP’s important role in enforcing federal contractors’ affirmative action and non-discrimination obligations, and The Institute and its members strongly support OFCCP’s important mission, the protections and obligations provided by Executive Order 11246, and the statutory provisions addressing individuals with disabilities and protected veterans.

However, in our view, OFCCP has regressed and no longer currently provides effective leadership in developing policies and practices that federal contractors can follow to meet their obligations. Nor does OFCCP function as an effective enforcement agency that identifies and addresses noncompliance. In the spirit of offering constructive recommendations that can result in the restoration of OFCCP’s effectiveness, The Institute is providing its recommendations for re-constituting OFCCP.

First, some background on how we have arrived at our current, unsustainable situation.

**I. Background**

The OFCCP enforces Executive Order 11246<sup>6</sup> which requires affirmative action and prohibits discrimination based on race, color, religion, sex, sexual orientation, gender identity or national origin; Section 503 of the Rehabilitation Act of 1973,<sup>7</sup> which requires affirmative action and prohibits discrimination against individuals with disabilities; and the affirmative action

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<sup>6</sup> 30 Fed. Reg. 12985 (Sept. 24, 1965).

<sup>7</sup> 29 U.S.C. § 793 (2015).

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provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974<sup>8</sup> which prohibits discrimination and requires affirmative action for certain veterans. These apply to federal contractors and subcontractors who meet certain criteria including contract dollar amounts and employee count thresholds. OFCCP conducts routine compliance evaluations utilizing a “neutral” selection process to select contractor establishments for an audit. OFCCP currently audits approximately two percent of contractor establishments per year.

**A. The Obama Years**

In a nutshell, when assessing OFCCP's current state, we find that for the past eight years the agency has engaged in extensive but largely unsuccessful efforts: numerous expansive regulations; expanded but fruitless compliance evaluations; and new but unproductive approaches to analyzing potential discrimination in compensation that are not grounded on governing legal standards—and not surprisingly, OFCCP has few results from the time and effort spent.

**1. Regulations**

On the regulatory front, in 2013, OFCCP substantially revised the regulations for Section 503<sup>9</sup> and VEVRAA<sup>10</sup> to add specific goals and benchmarks for federal contractors, including intrusive requirements for self-identification of individuals with disabilities, including disabled veterans. The OFCCP also revised the sex discrimination guidelines with the new regulations becoming effective on August 15, 2016.<sup>11</sup>

The agency has also spent significant agency time and taxpayer money (and contractor time and resources) aimed at finding and remedying systemic pay discrimination among federal contractors. In July 2010, the National Equal Pay Task Force—established to work with OFCCP, EEOC and the Department of Labor, in general, to close the gender pay gap—issued a number of recommendations to OFCCP.<sup>12</sup> In response to those recommendations, OFCCP rescinded the 2006 Interpretive Standards entitled, “Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination” and its related guidance,<sup>13</sup> replacing it with “Directive 307” which became

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<sup>8</sup> 38 U.S.C. § 4212 (2015).

<sup>9</sup> 78 Fed. Reg. 58681 (Sept. 24, 2013).

<sup>10</sup> 78 Fed. Reg. 58613 (Sept. 24, 2013).

<sup>11</sup> 81 Fed. Reg. 39107 (June 15, 2016).

<sup>12</sup> Mona Sutphen, *Putting Washington at the Service of the Middle Class*, THE WHITE HOUSE BLOG (Jan. 27, 2010, 10:23 PM), <https://www.whitehouse.gov/blog/2010/01/27/putting-washington-service-middle-class>.

<sup>13</sup> Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35124 (June 6, 2006); Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246, 71 Fed. Reg. 35114 (June 6, 2006).

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effective on February 28, 2013.<sup>14</sup> The new Directive eliminated the articulated standards of its predecessor and substituted ambiguous criteria permitting broad OFCCP discretion.

In addition, the Obama Administration rescinded the Bush Administration’s highly effective Active Case Management (“ACM”) protocol that had been put in place since 2003 to “concentrate agency resources on identifying and remedying cases of systemic discrimination.”<sup>15</sup> In 2013, the agency replaced ACM with what has proven to be an overly burdensome and ineffective Active Case Enforcement (“ACE”) procedure which required all audits to be full blown “deep dive” audits, and removed the limit on the number of audits a contractor could receive in a given year.<sup>16</sup> The ACE process ultimately resulted in a significant *decrease* in both the number of compliance evaluations as well as the successful results from the evaluations proving that this process did not work.

## **2. Agency Initiatives**

In 2010, OFCCP submitted a revised Scheduling Letter and Itemized Listing (which outlines data that must be submitted to the agency during the initial desk audit stage of the review).<sup>17</sup> The new Scheduling Letter marked the agency’s shift to gain access to employee level compensation data in hopes of identifying and remedying compensation discrimination. Beginning in 2014, contractors being audited were required to submit the following additional data on **each** employee included in the AAP under review:<sup>18</sup>

19. Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of the date of the workforce analysis in your AAP. Provide gender and race/ethnicity information and hire date for each employee as well as job title, EEO-1 Category and job group in a single file. Provide all requested data electronically, if maintained in an electronic format.

a. For all employees, compensation includes base salary and or wage rate, and hours worked in a typical workweek. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.

b. You may provide any additional data on factors used to determine employee compensation, such as education, past

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<sup>14</sup> *Directive 307, supra* note 4.

<sup>15</sup> Active Case Management had provided the agency with the opportunity to decide which audits required a full audit and limited the number of active audits any one contractor would have to 25.

<sup>16</sup> *Active Case Enforcement (ACE) Procedures*, Directive 2011-0, Office of Federal Contract Compliance Programs, U.S. Department of Labor (Dec. 16, 2010).

<sup>17</sup> Agency Information Collection; Announcement of OMB Approval, 79 Fed. Reg. 189 (Sept. 30, 2014).

<sup>18</sup> *Id.*

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experience, duty location, performance ratings, department or function, and salary level/band/range/grade.

c. Documentation and policies related to compensation practices of the contractor should also be included in the submission, particularly those that explain the factors and reasoning used to determine compensation

In addition to the collection of detailed compensation data during the desk audit, OFCCP also recently proposed a regulation to develop a survey to collect pay data from federal contractors.<sup>19</sup> However, that effort was abandoned in 2016 when it was decided that the EEOC would add the pay data to the existing EEO-1 Report which was subsequently revised to add the requirement that employers with 100 or more employees report both W-2 pay data and hours worked for all their employees.<sup>20</sup> This data would be shared with OFCCP.

In 2010, OFCCP received 25 percent increase in funding (from approximately \$85 million to \$105 million) to hire and train new personnel to increase contractor compliance and to review their compensation systems for systemic discrimination<sup>21</sup>. However, the significantly increased resources have failed to yield improved results by OFCCP. The number of audits performed by the agency has steadily and substantially decreased by two-thirds from 4,942 in FY2010 to 1,695 in FY2016. Likewise, the amount of money collected by the agency has not increased. In addition to the diminished results, the time period required for the review of federal contractors has substantially increased. As reported by the GAO in 2016 (see more detailed discussion below), the average processing days for cases without a violation now has reached 8 months (247 days).<sup>22</sup> The average processing time for a technical violation (no findings of discrimination) was more than a year (402 days), and the average processing time for a finding of discrimination was over four years (1,487 days).<sup>23</sup>

### **3. Congressional Response**

These profound shifts in agency practices, regulations, and outcomes did not go unnoticed by Congress. During the FY2016 budget cycle, both the House and Senate took the unprecedented step of expressing their displeasure with OFCCP in pointed detail:

S. Report 114-74 page 29:<sup>24</sup>

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<sup>19</sup> Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. 154, 49398 (Aug. 11, 2011); Government Contractors, Requirement to Report Summary Data on Employee Compensation, 79 Fed. Reg. 153, 46562 (Aug. 8, 2014).

<sup>20</sup> 81 Fed. Reg. 45479 (July 14, 2016).

<sup>21</sup> FY 2011, CONGRESSIONAL BUDGET JUSTIFICATION, OFFICE OF FEDERAL CONTRACTOR COMPLIANCE PROGRAMS (2010), available at <https://www.dol.gov/dol/budget/2011/pdf/cbj-2011-v2-04.pdf>.

<sup>22</sup> GAO REPORT, *supra* note 1 at 27.

<sup>23</sup> *Id.*

<sup>24</sup> S. REP. NO. 114-74, at 29 (2015).

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The Committee is concerned that OFCCP [Office of Federal Contract Compliance Programs] has lost its focus on identifying and addressing real employment discrimination and is imposing excessive compliance burdens on contractors. More specifically, OFCCP appears to prioritize specific quota results rather than equal consideration and opportunity because of its reliance on statistical analysis in evaluating contractor hiring practices. OFCCP should focus on actual discriminatory treatment instead of presumed discrimination based solely on benchmarks that may not be uniformly applicable. Strict and exclusive use of statistical significance tests effectively requires contractors to use a quota hiring system in violation of the Civil Rights Act to avoid adverse impact claims by OFCCP. The Committee is also concerned about reports that OFCCP is increasingly subjecting contractors to overly broad and unnecessary document and data requests as well as unreasonably numerous and lengthy compliance reviews. OFCCP is directed to cease utilization of this de facto quota system for evaluating hiring practices and to report within 120 days of enactment to the Committees on Appropriations of the House of Representatives and Senate on steps it is taking to enforce non-discrimination standards on a more fair, case-by-case basis focused on evidence of actual discrimination rather than on statistical generalizations and quota benchmarks.

H. R. Report 114-195<sup>25</sup>: Quotas

The Committee is concerned that OFCCP has lost its focus on identifying and addressing real discrimination in employment and has become hyper-focused on fulfilling quotas instead of equal opportunity by relying on statistics alone in evaluating contractors. The Committee believes OFCCP should take steps to use common sense in the use of government resources to focus on finding actual discriminatory treatment instead of presumed discrimination based solely on what OFCCP assumes through statistics. Further, the Committee believes that OFCCP should end its reliance on threatening sanctions, including debarment and the costs associated with an extremely drawn-out administrative litigation process, to induce contractors to waive their legal rights and to enter into conciliation agreements that are not justified by the evidence.

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<sup>25</sup> H.R. REP. 114-195 at 16 (2015).

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**4. GAO Report**

In response to a request from Congress, the GAO undertook an investigation of OFCCP and “(1) assessed how OFCCP conducts supply and service compliance evaluations, including the methodology, resources, and results, and (2) evaluated OFCCP outreach, assistance, and guidance efforts to assist contractors in complying with the requirements it enforces.”<sup>26</sup>

The GAO recommended that the Secretary of Labor direct the Director of OFCCP to take the following six actions<sup>27</sup>:

1. Make changes to the contractor scheduling list development process so that compliance efforts focus on those contractors with the greatest risk of not following equal employment opportunity and affirmative action requirements.
2. Develop a mechanism to monitor AAPs from covered federal contractors on a regular basis. Such a mechanism could include electronically collecting AAPs and contractor certification of annual updates.
3. Make changes to the current scheduling list distribution process so that it addresses changes in human capital and does not rely exclusively on geographic location.
4. Provide timely and uniform training to new staff, as well as provide continuing training opportunities to assist compliance officers in maintaining a level of competence to help ensure quality and consistency of evaluations across regions and district offices.
5. Review outreach and compliance assistance efforts and identify options for improving information provided to federal contractors and workers to enhance their understanding of nondiscrimination and affirmative action requirements to ensure equal employment opportunities for protected workers.
6. Assess existing contractor guidance for clarity to ensure that contractors have information that helps them better understand their responsibilities regarding nondiscrimination and affirmative action requirements to ensure equal employment opportunities for protected workers.

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<sup>26</sup> GAO REPORT, *supra* note 1 at 2.

<sup>27</sup> *Id.* p. 37–38.

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## **II. Recommendations for OFCCP**

In an effort to provide constructive feedback for an improved OFCCP, we believe we can build on the GAO's results and offer the following recommendations:

### **A. Strategic plan**

- Develop and implement a strategic plan that marshals resources and expertise effectively and efficiently.

In order for the agency to more effectively and efficiently deploy its resources, it needs to start by developing a strategic plan that uses the recommendations of the GAO as its starting point. The strategic plan would allow OFCCP to evaluate what is most important to it over the next five years and then determine how best to deploy its resources as a result. Recently, the EEOC prepared a five-year strategic enforcement plan which OFCCP might evaluate to determine if a similar process could work for it as well.

### **B. Addressing Non-compliance regarding AAP submission**

- Create a non-burdensome compliance certification program that enables the agency to focus its enforcement efforts on those contractors that are overtly out of compliance.

Currently, unlike the annual filing of taxes with the IRS, federal contractors are not required to submit the annual affirmative action plan and corresponding analytics to OFCCP. The only time OFCCP receives a copy of the required documents is when the contractor is scheduled for a compliance evaluation. To put that in perspective, there are approximately 200,000 federal contractor establishments in the U.S. and OFCCP only audits anywhere from 2,000 to 4,000 contractor establishments per year (1%-2%!). Therefore, OFCCP does not have the ability to assess the basic compliance of a majority of contractors to identify those contractors that are out of compliance with the regulations. This disconnect was noted by the GAO in its report and its recommendation was that the agency develop a mechanism to monitor AAPs from covered federal contractors on a regular basis.<sup>28</sup>

### **C. Audit/Review Selection**

- Evaluate effectiveness of selections and re-tool as appropriate.

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<sup>28</sup> *Id.* at 18–19.

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**Audit selection:** Another issue is that OFCCP’s current selection system selects the same contractors (perhaps different establishments) over and over again just to conclude over and over again that they are in compliance with the regulations. It would make intuitive sense for OFCCP to focus its audit activities on those contractors that have not been found to be in compliance with the regulations. In order to achieve this objective, OFCCP could, on an annual basis, require all covered contractors to annually certify to the agency that they in **good faith** have completed their required AAPs. This certification could be very simple and not require much time and effort to complete. Certification is a process already used by the federal government in its procurement process so federal contractors will be familiar with the process. The longer term answer, as suggested by the GAO, is for OFCCP to develop the technology to receive copies of contractors’ AAPs on an annual basis similar to the “e-filing” of federal tax return.

This simple solution would allow OFCCP to focus its limited investigative resources on those contractors who are by definition out of compliance (because they failed to file the annual certification) rather than spending those limited resources auditing the same contractor over and over again. To ensure that certified contractors are meeting all of their obligations, a small percentage of randomly selected certified contractors could be scheduled for audits.

The GAO report points out that since 2010, “OFCCP has not found violations in a vast majority of its compliance evaluations.”<sup>29</sup> From FY2013 to FY2015, OFCCP has found minor technical violations in fewer than 27% of its audits and evidence of discrimination in fewer than 2% of all of its audits. In FY2015, OFCCP did not find any violations in 83% of its audits.<sup>30</sup>

According to the GAO,

the process used by OFCCP to select contractors for compliance evaluations cannot ensure that contractors with the highest risk of not following equal employment opportunity and affirmative action requirements will be selected. OFCCP’s contractor selection process is nonrandom and does not produce a generalized sample of contractors for evaluation. As a result, OFCCP is not able to draw conclusions about noncompliance risk in the overall federal contractor population.<sup>31</sup>

In order to allow OFCCP to focus on those contractors most likely to be violating its affirmative action and equal employment opportunity requirements, the process for

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<sup>29</sup> *Id.* at 16.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

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selecting contractors for audit must be revised; perhaps using the results of the annual certification process proposed here or by evaluating its history of audits and use the data from that information to develop a predictive algorithm to select contractors most likely to be in violation.

**D. Audit Process:**

- Re-tool the compliance evaluation criteria—return to the Active Case Management or similar criteria that allow for appropriate resources based on the actual results.

As mentioned above, OFCCP revised its audit process in 2013 from Active Case Management to Active Case Enforcement. The GAO Report points out that in the years since ACE was adopted, the number of audits conducted by OFCCP has plummeted 47% from FY2010 to FY2015.<sup>32</sup> Under ACM, once a contractor was selected and submitted the required data to the agency, the compliance officer could evaluate the submitted data to determine whether the contractors' site needed a full audit. This process allowed the agency to make the best use of its limited resources which is why the process was adopted in 2003. OFCCP closed twice as many audits under the ACM process than it under its current ACE process. In addition, the agency recovered substantially more money from contractors using the ACM process for audits.

An important distinction between ACE and ACM is that ACE assumes from the beginning that the contractor is in violation—which it seldom is—and OFCCP invests significant time and effort in all audits. In contrast, ACM does not make any initial assumptions and only invests time and effort where there are initial signs that a contractor might be in violation. This more targeted approach results in a greater number of violations because OFCCP only initiates an investigation if it has evidence of a violation in the first place.

In addition, the agency should limit audits to a reasonable period of no more than 24 months which is the maximum period for back pay that can be recovered.

**E. Compensation Data Collection:**

- Work with EEOC and immediately rescind or revise the EEO-1 compensation data collection; follow the Senate's 2016 appropriation report guidance and apply lawful, Title VII criteria regarding employee groupings and legal analysis.

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<sup>32</sup> *Id.*

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A major focus during the previous administration was systemic compensation discrimination. The focus on systemic compensation discrimination led the agency to revise its Itemized Listing to collect data on individual employee compensation described above. Despite this, OFCCP has been singularly unsuccessful in finding many instances of systemic compensation discrimination in the last eight years.<sup>33</sup> Recommendations on what approaches should be used to evaluate pay discrimination are discussed below but one recommendation is that neither OFCCP nor EEOC collect pay data in the aggregate as proposed under the new EEO-1 Report. The National Academy of Science's expert panel recommended that neither agency collect pay data in the manner that the EEOC with OFCCP's support is scheduled to implement in 2018.<sup>34</sup> The pending revised EEO-1 data collection process will be very burdensome and will not enhance either agency's ability to find systemic pay discrimination. Therefore, the revised EEO-1 Report pay data and work hours reporting should be revised or rescinded.

**F. Criteria to Follow in Conducting Compliance Evaluations**

- Rescind Directive 307 and re-implement the 2006 Compensation Standards and Self-Audit Guidelines or similar guidance that includes safe harbors.
- Evaluate the current singular reliance on statistical significance testing to “prove” a systemic discrimination case by considering additional measures of practical significance.

The major criticism of the agency expressed by both the Senate and the House Appropriations Committees quoted above was that the agency had lost its focus on identifying and addressing real employment discrimination. We agree.

The agency should refocus its compliance evaluations based on Title VII standards rather than using statistical significance testing alone to support their positions. One recommendation to facilitate this is for OFCCP to work with EEOC and DOJ to evaluate the use of statistical significance testing in pattern and practice cases and determine whether some measure of practical significance should be used.

As it relates to compensation discrimination enforcement, Directive 307 provides inadequate guidance to contractors and offers untrammelled discretion to OFCCP and should be rescinded. It likely does not comply with Title VII standards. In its place, the agency should reinstate its 2006 Compensation Standards or similar guidance that includes a “safe harbor” for those contractors who certify that they do annual pay

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<sup>33</sup> Lauren Weber, *U.S. Push for Fair Pay Racks Up Few Victories*, THE WALL STREET JOURNAL, Mar. 16, 2016, <http://www.wsj.com/articles/u-s-push-for-fair-pay-racks-up-few-victories-1458065433>.

<sup>34</sup> NATIONAL RESEARCH COUNCIL, COLLECTING COMPENSATION DATA FROM EMPLOYERS ix-x (2012).

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analyses to ensure that their compensation systems do not discriminate. The safe harbor should be similar to what Massachusetts is planning to implement in 2018.<sup>35</sup>

- Create “full transparency” policies and procedures that require compliance officers to specify what, if any, indicators have been identified during the desk audit review to warrant any additional requests or focused investigations.
- Provide additional training for both new and current OFCCP staff to improve consistency.

One of the major criticisms of the agency noted by the GAO is its inconsistency in compliance evaluations. The GAO attributed this to a lack of training for compliance officers.<sup>36</sup> The GAO found that, not only were new compliance officers not receiving sufficient training, but current staff members are not receiving continuing training opportunities to ensure they are maintaining sufficient levels of competence.<sup>37</sup> To substantially improve its staff, OFCCP should consider having private sector representatives, such as The OFCCP Institute, assist in the development and training of OFCCP staff. In addition, the agency should consider having specialty teams trained for headquarter and other industry specific audits.

- Improve OFCCP outreach and compliance assistance efforts to the contractor community.

An important part of OFCCP’s mission is to provide outreach and assistance to contractors, especially new and small contractors. According to the GAO Report, since 2012, OFCCP has significantly decreased the number of outreach events to assist contractors by 80%—from 1,257 in 2012 to 204 in 2014.<sup>38</sup> The GAO found that without improvement in outreach to contractors, the agency is not able to educate federal contractors in satisfaction of its responsibilities and obligations.<sup>39</sup>

**G. Restore the Excellence in Voluntary Efforts (“EVE”) or Similar Contractor Awards Programs that Highlight and Recognize Best Practices and Provide Incentive for Achieving Such Awards (e.g., No Audits for a Period of Time)**

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<sup>35</sup> An Act to Establish Pay Equity, Bill S.2119, 189th (Mass. 2016), available at <https://malegislature.gov/Bills/189/Senate/S2119>.

<sup>36</sup> GAO REPORT, *supra* note 1 at 21–24.

<sup>37</sup> *Id.* at 27.

<sup>38</sup> *Id.* at 28.

<sup>39</sup> *Id.* at 28–29.

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Prior to the outgoing administration, OFCCP had a number of programs that rewarded federal contractors for being compliant. These programs were successfully adopted by Diversity and Inclusion organizations, such as Catalyst, to promote Diversity and Inclusion in corporate organizations, many of which are also federal contractors. These awards allow contractors to be acknowledged for their best practices and to involve senior management in compliance efforts. Previously, organizations that won the agency's awards were given a grace period from audits and an opportunity to be recognized.

**H. File Bona Fide Cases**

Prior to making decisions to litigate, OFCCP should work with DOJ Civil Rights Division experts who are familiar with Title VII standards and who are in a position to properly evaluate the potential success of proposed litigation. Litigation must align with and support program priorities such as compensation discrimination, while being based on principles consistent with established discrimination case law.

**I. Additional Items to Consider**

- Bring back regional ombudspersons.
- Continue training personnel for centers of excellence.
- Create teams of SMEs for areas such as compensation, hiring, corporate headquarters reviews, etc.
- Utilize technology for mandatory training of all OFCCP personnel.
- Review and revise some of the more recent changes to 503 and VEVRAA regulations as well recent Directives and FAQs.
- Adopt EEOC's public hearing strategy for new issues or topics.

**III. Conclusions**

- A. The Institute for Workplace Equality and its members strongly support OFCCP's core mission as well as the affirmative action and non-discrimination obligations of federal contractors under Executive Order 11246, and the statutory provisions addressing individuals with disabilities and protected veterans.
- B. In the past eight years, the changes in OFCCP policy and practice have substantially increased the economic burden on federal contractors as well as

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decreased OFCCP effectiveness as an enforcement agency. These changes, rather than serving a useful purpose, have resulted in a decrease, by any measure of performance, in OFCCP's ability to fulfill its mission.

- C. There are simple, concrete changes that will allow OFCCP to better complete its mission of affirmative action and non-discrimination while at the same time reducing the economic burden on contractors and the American taxpayer. The recommendations do not require additional budget or staffing resources for OFCCP. By implementing new policies and directions, OFCCP's resources and staffing can be used much more effectively.

Please contact The Institute for Workplace Equality if you would like additional information about these matters.

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**RECOMMENDATIONS**

- 1) **THRESHOLD** - Increase threshold coverage for EO11246 to \$250,000 and 250 employees to have a written affirmative action plan.
- 2) **CERTIFICATION** - Simple certification program consistent with the requirements of §60-2.35. The certification would require that contractors, on an annual basis, certify on OFCCP's website that they have developed affirmative action plans consistent with the requirements of EO 11246, Section 503 and VEVRAA. This will allow OFCCP to build a database of contractors and then **focus** a majority of its audit resources on those contractors that did not certify.
- 3) **AUDIT PROTOCOL** - Rescind ACE and replace with a revised ACM. The new ACM will allow compliance officers to quickly close an audit within 30 days of receipt if there are no apparent issues. This will allow OFCCP to do more with less.
- 4) **COMPENSATION** - Rescind Directive 307 and replace with a new directive similar to the 2006 Compensation Standards. In addition, OFCCP would implement a **voluntary** safe harbor provision. Here is how it would work:
  - Upon submission of the desk audit contractor would notify OFCCP that an annual analysis consistent with the new Standards has been conducted.
  - OFCCP would still collect Item 19 data and conduct an analysis. Contractors have the option of providing OFCCP with SSEGs as a field in the submitted data. If a contractor submits the SSEGs, OFCCP will evaluate. If the SSEGs are reasonably developed, OFCCP will rely on the submitted SSEGs for its unit of analysis.
  - If OFCCP identifies a disparity, it will then notify the contractor of the identified groups of interest.
  - Contractor has the option to present its regression analyses just for the groups of interest. If the contractor conducted the self-critical analysis consistent with the Standards, OFCCP will accept the contractor's proactive analysis.
  - If OFCCP rejects but the contractor has made adjustments based on its models OFCCP will take that into consideration as a mitigating factor.