



**SUBMITTED ELECTRONICALLY**

January 2, 2015

Ms. Debra A. Carr  
Director, Division of Policy and Program Development  
Office of Federal Contract Compliance Programs  
Room C-3325  
200 Constitution Avenue N.W.  
Washington, DC 20210

RE: Docket ID No. OFCCP-2014-0004-0001, Proposed Rules for Government Contractors, Requirement to Report Summary Data on Employee Compensation RIN No. 1250-AA03

Dear Ms. Carr:

The U. S. Poultry & Egg Association, the National Chicken Council and the National Turkey Federation are non-profit trade associations representing the producers and processors of chickens, turkeys, other poultry, eggs and affiliated industry suppliers. Our associations appreciate the opportunity to submit these comments on the proposed rule issued by the Office of Federal Contract Compliance Programs (“OFCCP”) and published in the Federal Register on August 8, 2014 (79 FR 46562-01). This proposed rule seeks to amend implementing regulations for Executive Order 11246 to require certain Federal contractors and subcontractors (hereinafter “contractors”) to collect, retain and submit with their Employer Information Report (EEO-1 Report) additional summary data on employee compensation broken down by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked and number of employees, in a newly designated “Equal Pay Report.”

For reasons discussed more fully below, our associations oppose the proposed regulation as drafted and respectfully request that OFCCP decline to adopt the proposed rule. The proposed rule would impose new and burdensome requirements on contractors to compile, organize and submit extensive compensation data which would not serve the purpose of Executive Order 11246. Moreover, the collection and submission of this compensation data would not meet the stated objectives set forth under the proposed rule. To the contrary, the implementation of the proposed rule would hinder contractors from conducting a more thorough and useful evaluation of their personnel data and would divert scarce OFCCP resources from more vigorously enforcing equal employment laws in a more effective manner.

After determining whether they are covered under the proposed rule, contractors will have to develop new customized reports that will allow them to connect various compensation

records pulled from multiple sources. EEO-1 data normally comes from Human Resources Information Systems while W-2 earnings come from payroll systems. The contractor will need to develop new software to merge these two systems to create one report or will need to manually separate and organize the data for each covered location and sort the information by each EEO-1 category. Either option will necessarily require contractors to routinely cross-check W-2 payroll data with EEO-1 personnel data to resolve any discrepancies between the two lists. This will be a time consuming and expensive process and the compilation of such aggregate summary data on an individual contractor and industry basis would not assist in identifying discrimination or encourage voluntary compliance. One member company has estimated that at least 80 hours of work will be needed annually to produce and review the report in addition to the costs of software development and upgrades. Further OFCCP estimates that only one hour will be needed to familiarize a management professional with the new requirements. We believe this greatly underestimates the time required and suggest that a minimum of 8 hours per professional is a more likely estimate.

The utilization of an Equal Pay Report would not achieve the stated goals of the proposed rule as it would not enhance or improve OFCCP's ability to identify and target compensation discrimination amongst federal contractors. Likewise, compiling and disseminating such compensation data would not lead to greater voluntary compliance nor deter non-compliance. As recently as 2006, OFCCP backtracked on implementing a proposed Equal Opportunity Survey (EO Survey) which, like the Equal Pay Report, would have required contractors to prepare and file certain information concerning compensation.

As part of evaluating the value and effectiveness of the EO Survey, OFCCP commissioned two studies which found that the compensation data was not useful in predicting systemic discrimination and was not an effective enforcement tool. In fact, one study concluded that the EO Survey data would only have predictive power slightly better than chance and would not improve in any meaningful way OFCCP's ability to target for review contractors engaging in systemic discrimination. Worse yet, this study found that the survey would produce 93% false positives. For the same reasons, the study found that the use of an EO Survey would not increase contractor self-awareness or compliance since such data would not be useful in analyzing systemic discrimination. The study also concluded that any small marginal utility of the EO Survey compensation data was significantly outweighed by the burden on contractors to complete the survey, and on OFCCP to process and use the survey data. The study warned that focusing on the EO Survey data would divert scarce OFCCP resources from more vigorously enforcing equal employment laws in a more effective manner through existing data analysis and protocols. For example, the studies noted that the data sought under the EO Survey was largely duplicative of information that would be obtained by OFCCP during a routine desk audit.

Based on the studies, OFCCP concluded that the objectives of the Executive Order 11246 would be better accomplished through means other than the EO Survey. Since the EO Survey could not predict systemic discrimination, it would have limited utility in predicting whether and how the selected contractors are discriminating. OFCCP found that it already had better procedures than the EO Survey to target contractors such as the Active Case Management (ACM) system. Under the ACM procedure, OFCCP uses "automated statistical methods," and ranks and prioritizes establishments for a full review based on the probability that discrimination would be uncovered during a more in-depth review. OFCCP also found that the EO Survey

would impose significant burdens on contractors and would consume scarce OFCCP resources which would not be justified by the limited utility of the survey where better alternatives already existed.

For the same reasons, the Equal Pay Report should not be implemented by OFCCP since it does not meet the objectives of the proposed rule and where such objectives can be accomplished using existing systems in a more efficient and cost effective manner. While OFCCP requested public comments on alternative methods and frameworks for collecting such compensation data in a single uniform process, improving the recordkeeping and transmission of the data is irrelevant where the data is ultimately not useful to serving the goals and interests of OFCCP or contractors. At the very least, before OFCCP proceeds with implementing a new and costly reporting requirement, the agency should conduct similar independent studies like the ones that analyzed the EO Survey to determine if such compensation data would be the most practical and best use of resources.

In addition, as part of considering the collection and analysis of wage data, a National Academy of Sciences (NAS) panel was convened to review methods for measuring and collecting pay information by gender, race, and national origin from U.S. employers and to assess the value and usefulness of collecting such information. In its August 2012 report, the NAS panel concluded that the collection of earnings data would be a significant undertaking and that there might well be an increased reporting burden on some employers. The panel also concluded that there was no clearly articulated vision of how the data on wages could be used in conducting the enforcement responsibilities of the relevant agencies. The panel was concerned that beyond general statements of purpose, there were no specific mechanisms by which the data would be assembled, assessed, compared, and used in a targeting operation. There was not even a clearly articulated plan for using the earnings data if it was collected. The panel was also concerned that existing studies of the cost-effectiveness of an instrument for collecting wage data and the resulting burden were not adequate to assess any new program since a comprehensive plan had not been established to determine with precision, the actual burden on employers and the probable costs and benefits of the collection.

Consequently, the panel made numerous recommendations that it determined should be accomplished before the implementation of any wage reporting requirement. The panel's recommendations included: (1) preparing a comprehensive plan for use of earnings data before initiating any data collection; (2) conduct a pilot study by an independent contractor to test the collection instrument and measure the resulting data quality, fitness for use in the comprehensive plan, cost, and burden; (3) relevant agencies should enhance its capacity to summarize, analyze, and protect earnings data; (4) that the data collected should be based on rates of pay, not actual earnings or pay bands, in a manner that permits the calculation of measures of both central tendency and dispersion; (5) acknowledging that employee compensation data is considered highly sensitive, even proprietary information, by most employers, it is important to develop and implement appropriate data protection techniques which should include supporting research for the development of such applications; and (6) the need to establish clear and legally enforceable protections of confidential information provided by employers which should include actual legislation to serve that purpose along with penalties to non-agency employees that fail to observe the confidentiality of the data.

The proposed rule does not sufficiently address the recommendations offered by the NAS report and OFCCP did not wait to consider the results of an ongoing pilot study being conducted by EEOC related to these issues. Outside of general commentary on what data is to be collected and submitted, OFCCP has not provided a comprehensive plan on what data it will require and how such data can be submitted. While the preamble contemplates using wages reported on W-2 forms, the actual language in the proposed rule does not mention W-2 wages or hours worked. Instead, the proposed rule allows the OFCCP to publish the report and to collect “other relevant data points.” Given the breadth of the proposed rule, the OFCCP could arguably change the report to require more onerous reporting and request information other than W-2 wages, total employees and hours worked, without comment from the public.

The proposed rule also does not consider at all the NAS recommendation to collect rates of pay data, not actual earnings or pay bands. And at this point, no independent pilot study has been undertaken to test the collection methods or analysis of such compensation data or compare the usefulness of such data with the relative cost and burdens on the parties. The estimated costs in the proposed rule are purely speculative and have no objective basis. It also needs to be pointed out that the data proposed to be collected in the Equal Pay Report is meaningless. It is simply aggregate data based on EEO-1 job categories. Because each EEO-1 job category includes a large number of very different jobs, the proposed report does not, and cannot, identify pay discrimination. There are many legitimate non-discriminatory reasons why one employee may be paid more than another including the type of job, level of responsibility, tenure, qualifications and experience, and also voluntary overtime, attendance, extended unpaid leave, shift differentials, and production bonuses.

In the case of poultry producers for example, Job Group 8: Laborers and Helpers include all types of positions from live hang, to evisceration, to debone, to specialty cutters, to leaders, to shipping and dock workers, to inspectors, to forklift operators, etc. The factors that go into setting and determining wages are as varied as the positions that are grouped together under this category. The generic aggregate compensation data sought under the rule will not accurately reflect such factors that affect pay rates. This would include possible number of work hours in shifts, overtime, performance bonuses, vacation/holiday pay, seniority pay and other variations in pay that can change yearly or even quarterly. The aggregate compensation data simply cannot and does not take this information into account and thus would be of little use to OFCCP or contractors.

Likewise, other than stating OFCCP’s general practice not to release contractor data that it determines is confidential, the proposed rule provides no specific steps it will take to ensure the protection of such data. This has become a serious issue where recent data breaches, hackers and rouge government employees have shown how easy it is to take and disseminate sensitive and confidential information maintained by government agencies and employers. As acknowledged, such pay data is highly sensitive and the release of it to unauthorized parties could cause significant commercial harm to contractors still in business. Thus, before any rule on the collection of such wage data is imposed, careful consideration must be made as to ensuring the data is adequately protected. The proposed rule only makes vague assurances that it would keep the data secure and confidential among only a small group of agency employees who need to know the information. However, at this point the proposed rule does not even evaluate or detail what systems it will put in place to handle and retain such sensitive company

data. The propose rule only contemplates planning to design a web-based portal for reporting and maintaining compensation information that conforms with applicable government IT security standards.

As part of its support for the Equal Pay Report, OFCCP notes that the compilation and disclosure of compensation data would allow contractors to assess their compensation structure as compared to others in the same industry and allow the contractors to make adjustments as necessary. However, such pay comparisons among industries is of little use where many factors go into compensation such as education, prior relevant experience, performance, seniority, skill set, scope of responsibility, etc. In addition, the jobs grouped together under EEO-1 categories are so vastly different that simply comparing aggregate data will be of little value to contractors, industries or OFCCP. OFCCP should also be aware that simply comparing aggregate compensation information may give contractors a false sense of security. For example, contractors can become complacent if other similar industries are under representing females in certain job categories and thus the contractor believes that it is acceptable to continue that underrepresentation. In the same way, a contractor may become complacent if discrepancies in pay exist in the job groups of similar industries and thus does not take affirmative steps to address the discrepancies.

The proposed rule also states that the disclosure of compensation data summarized at the industry level may encourage lower paying employers to voluntarily change their pay structure to meet up with industry peers because such employers would not want to be known as one of the lowest paying members in their industry. This reason to support the proposed rule is not consistent with and does not promote the objectives set forth under Executive Order 11246 and will unnecessarily cause undue hardship for an employer that otherwise is complying with the law. Executive Order 11246 was not implemented to shame employers or to raise wages among certain job categories across various industries. Executive Order 11246 was intended to require federal contractors to take affirmative action to avoid discrimination. Comparing compensation and pay structures across various industries, located in different geographic areas with varying cost of living considerations, which employ different type of workers with different levels of education and experience, does not serve the purpose of addressing discrimination. Even OFCCP notes in the proposed rule that a contractor's ability to meet or exceed some objective industry compensation standard cannot be basis of a violation of OFCCP's laws or regulations. The shaming theory fails completely in understanding that the cost of living differentials in different regions can make very real differences in the earning capacity. Similar earnings in the rural South and in urban Northeast have very different buying power. Furthermore, no shaming will result in increased earnings if the business cannot make a profit.

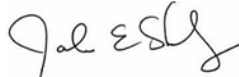
The proposed Equal Pay Report should also not be viewed in a vacuum or in isolation. The past few years have seen the implementation or proposal of numerous new and onerous requirements for federal contractors. This includes: (1) the setting of a \$10.10 per hour minimum wage for the employees of certain federal contractors; (2) disclose to federal agencies violations of 14 federal employment/labor laws to be considered in the bidding process; (3) new OFCCP rules and recordkeeping requirements for affirmative action plans for veterans and the disabled; (4) expansion of OFCCP rules to ban sexual orientation and gender identity discrimination of federal contractors; (5) an OFCCP proposal announced on September 15, 2014 that would prohibit federal contractors from maintaining pay secrecy policies; and (6) now, new

proposed equal pay rules. The government should carefully consider the imposition of so many new and costly obligations on federal contractors as it might unintentionally price itself out of the market. All these obligations act as a disincentive from being a federal contractor. The net result is that the government may end up losing otherwise qualified contractors that no longer are willing or able to subject themselves to such burdensome regulations.

For these and other reasons addressed in comments submitted by other interested parties, OFCCP should not adopt the proposed rule. The rule implementing a new Equal Pay Report requirement on federal contractors will not aid the agency in detecting and targeting systemic discrimination but instead will divert scarce OFCCP resources that could be better served utilizing existing enforcement mechanisms. The compensation data sought to be collected is of little value where it seeks aggregated data when compared to the extensive burden and cost that will be placed on contractors to compile and submit the data and for OFCCP to process and utilize the data. Moreover, there is no evidence that the compilation and dissemination of such data would lead to greater voluntary compliance or deter non-compliance.

OFCCP should also defer to recent studies evaluating the EO Survey and the NAS panel recommendations in withdrawing the proposed rule. Not only would the adoption of an Equal Pay Report not achieve the goals of the proposed rule, basic foundations to support the purpose and implementation of the rule has not been adequately established. A comprehensive plan for the use of such earning data has not been made, it is still unclear exactly what data will be collected and in what format and how it will be transmitted and retained, no pilot study by an independent contractor has been accomplished to test the data collection or resulting data quality, no proper evaluation of the cost of implementing this system has been made, and clear and legally enforceable data protection techniques to ensure the confidentiality of this sensitive material have not been established.

Respectfully submitted,



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