

**Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503**

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Subject:

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August 6, 1999

VIA MESSENGER

Mr. Joshua Gotbaum
Executive Associate Director
Office of Management and Budget
Old Executive Office Building
Washington, D.C. 20503
Attn: Stuart Shapiro

Dear Mr. Gotbaum:

We have reviewed carefully the issues that were discussed at our July 30, 1999, meeting related to OFCCP's request for desk audit submission of employee-specific compensation information. As you requested, we have identified a procedure for testing whether summary compensation data arguably could be useful in flagging potential pay problems requiring an onsite investigation. Given our skepticism that such an approach is viable under any circumstances, we have developed an alternative approach to analyzing compensation information during a desk audit that we believe responds to the legitimate needs of both OFCCP and federal contractors.

Since we were given a short one-week deadline by OMB, neither recommendation has been approved by the Equal Employment Advisory Council (EEAC) Board of Directors, or by the governing bodies of any of the other employer organizations that participated in the July 30 meeting. Accordingly, please consider this document only as a good faith attempt by the EEAC staff to assist OMB in its review of OFCCP's clearance request. We would hope that this letter will be used as the basis for further collaborative discussions between OMB and the contractor community on this issue.

OFCCP's Pending Request

As we have discussed, in OFCCP's pending request to extend its recordkeeping and reporting requirements, the agency is seeking to compel federal contractors and subcontractors to submit detailed information on each employee at the establishment under review. That information would include, among other items, "name (which can be coded), race, gender, salary grade or salary band, job title, hire date, date in current

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position, and current annual salary or hourly wage rate." Contractors also would be required to submit a detailed description of their compensation system, a document that they may not actually now have or that may not speak to the equal employment opportunity aspects of managing compensation.

OFCCP justifies its request, in part, by claiming that receipt of such information at the desk audit stage could facilitate expeditious completion of the compliance evaluation if after reviewing the data the agency concludes that an onsite visit is unnecessary. Contractors, on the other hand, are concerned that the requested submission would (1) violate employee privacy, (2) compromise the confidentiality of sensitive employer data, (3) be burdensome (by requiring the computerization of records not now computerized at many companies,¹ and by requiring an often impromptu writing of a compensation manual), and (4) would actually impede the efficient completion of the audit because of OFCCP's unorthodox and legally untested method of analyzing compensation. While we recognize OMB's reluctance to arbitrate a dispute over OFCCP's compensation analysis methodology, the fact that the agency employs what is widely regarded as a legally and statistically indefensible process raises significant doubts about the *practical utility* of its request—and that is an OMB concern.

We believe, however, that we have a solution that addresses both OFCCP's needs and contractors' concerns.

An Alternative Solution

As noted above, underlying OFCCP's desk audit request for compensation data is the belief that receiving a standard set of data along with a written explanation of the contractor's compensation system often would facilitate completion of the audit by enabling the agency to avoid an onsite visit. This belief is based, in part, on the assumption that compensation systems can be simply explained in a document, and that they can be analyzed in a uniform manner (much as if they were as consistently applied as the highly structured system used for federal career employees).

As we tried to explain in the July 30 meeting, however, compensation systems used by federal contractors vary tremendously, not just among employers, but within

¹ As OMB is aware from other contexts, the contractor community has continued to raise issues involving the lack of computer programming resources in light of the existing Y2K priorities and timeframes. Accordingly, all changes to existing reports or data formatting should be postponed until after the year 2000.

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individual companies as well. Admittedly, some contractors over the past few years have been content to send OFCCP information in the form they are now requesting. Many others, however, have preferred instead to wait for the onsite visit so that OFCCP can be fully briefed as to how the compensation system operates before commencing its analysis. That briefing, quite easily given in person, can be very difficult to write into text. Text also cannot provide feedback, answer follow-up questions or clarify confusion of interpretation.

A face to face discussion of compensation can be in the interests of both parties. The contractor has the opportunity to explain its compensation system so that a valid desk audit analysis can be conducted and a determination made as to the necessity for a follow-up onsite visit. OFCCP has the opportunity to review supporting records. If this discussion and review were to occur at the OFCCP's offices as part of the desk audit, the agency's goal of evaluating the necessity for an onsite visit would be accomplished.

Under such an arrangement, the contractor's designated representatives would travel to the district office at a mutually agreed upon time during the desk audit. Depending upon the circumstances of each case, they could bring with them such items as a roster of information that meets OFCCP's current request; an alternative roster of information; the results of the contractor's own evaluation of its compensation system; or any other information that permits OFCCP to verify that the contractor's implementation of its compensation system is nondiscriminatory. Were issues to arise that could not be resolved during the desk audit, an onsite visit would be scheduled.

In implementing this procedure, we suggest that the scheduling letter provide contractors with three options for presenting compensation information for desk audit review:

1. Submit to OFCCP the data specifically requested by the agency;
2. Submit to OFCCP other information developed by the contractor that enables the agency to evaluate whether the contractor's compensation system is nondiscriminatory; or
3. Agree to present compensation information to OFCCP during the desk audit in a meeting at the district office.

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The text of the scheduling letter might incorporate language such as the following:

Compensation is among the practices we will review during this compliance evaluation. It would be of assistance to us if you could submit data such as the following, together with an explanation of your compensation system:

- a unique identifier for each employee (name, Social Security number or some unique identifying number or code of your choosing)
- race and gender
- a unique identifier for each job (job title, job code or some other unique code or identifier of your choosing)²
- salary grade, salary band or some other indicator of the level of compensation
- date of hire
- date in current position, if available
- any other information items relevant to the analysis of compensation (location, department, etc.)

You are not obligated to submit the compensation information in the precise format requested above. As an alternative, you may submit data in some other format tailored to your system that will enable us to determine whether your compensation practices are nondiscriminatory. Such a format might include your own analysis if you have conducted one and prefer to submit that analysis in lieu of the data as requested.

Finally, in lieu of submitting data to us you may elect to schedule a visit to our offices at a mutually agreeable time during our desk audit review. At that meeting you may present any information and discussion you believe necessary to enable us to verify that your compensation system is nondiscriminatory.

² The reason for suggesting use of job codes rather than job titles is that it often is easy to identify specific employees by name in situations where there is only one or a few individuals in a job title. In addition, job title information can be useful to competitors in determining what the contractor is paying for specific key jobs. The use of job codes reduces, if not eliminates, these privacy and confidentiality concerns.

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Failure to submit data or refusal to participate in a meeting about compensation during the desk audit as outlined above may result in an evaluation of compensation at your place of business.

Testing the Viability of Summary Compensation Data To Flag Need for Onsite Visits

At the July 30 meeting, we indicated that summary compensation data could not be used effectively to evaluate compensation practices that are administered on a decentralized basis. To test this proposition — and as an alternative to simply approving OFCCP's pending request — you asked us to identify an alternative submission to OFCCP's data request that could be used for purposes of conducting a study of the predictive powers of summary compensation data. We believe that such data would, of necessity, have to be based upon contractor EEO-1 forms.

The EEO-1 is the only standard form that employers submit to the government and therefore is the only basis on which comparisons among employers can be made. Median compensation by EEO-1 category may provide a basis on which to judge whether an onsite review of compensation is necessary.

During our discussion, two challenges to conducting a meaningful test using summary data were mentioned. One is that the compliance officers conducting audits included in the test should not know that they are participating in the test. Having such knowledge would simply encourage them to find pay problems so as to validate the use of summary data. Second, there would have to be some agreement on the standards to be used in finding pay disparities—judicial standards as reflected in the EEOC guidelines and the Title VII and Equal Pay Act caselaw, or a lower “investigative standard” as advocated by some OFCCP officials.

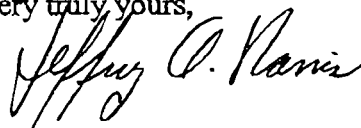
We know OMB is not interested in becoming involved in the second challenge, but there is perhaps a way to avoid the first. That would be not to perform the test on audits to be conducted *in the future*, but rather to conduct them on the results of audits that *already have been completed*. Under this approach, a random sample of recently-closed audits, perhaps 200, would be selected. The contractors would be asked to complete a brief survey that would request median compensation by EEO-1 category for men, women, minorities and non-minorities, as well as the number of men, women, minorities and non-minorities in each category.

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The data collected in the survey would be compared to the results of the compliance review to see if apparent disparities in the summary data were valid indicators of underlying discrimination. Limiting the study to completed compliance reviews would avoid any bias that might occur if such information were collected prospectively. In addition, the study could be completed promptly in a matter of weeks rather than the months (and in some cases years) it takes to complete most compliance reviews where compensation is an issue.

Thank you very much for requesting our views in evaluating OFCCP's clearance request. We hope you find our recommendations constructive. Please call if we can be of additional assistance.

Very truly yours,



Jeffrey A. Norris
President

cc: M. Bartlett, Chamber of Commerce
P. Cleary, NAM
D. Copus, Jones, Day
S. Meisinger, SHRM
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