

**U.S. Department of Labor  
Office of Federal Contract Compliance Programs  
Supply and Service Program**

**OMB Control Number 1250-0003**

**A. JUSTIFICATION**

The U.S. Department of Labor’s (DOL) Office of Federal Contract Compliance Programs (OFCCP)<sup>1</sup> is requesting Office of Management and Budget (OMB) reauthorization of its supply and service (non-construction) program. This information collection request (ICR) outlines the legal authority, procedures, burden, and cost associated with the recordkeeping and reporting requirements of supply and service Federal contractors and subcontractors.<sup>2</sup> This ICR also contains the information collection instrument that notifies contractors that they have been selected to undergo a compliance evaluation. OFCCP is seeking reauthorization of the existing instrument approved under this collection: the Supply and Service Scheduling Letter and Itemized Listing (collectively referred to as the “scheduling letter”). In addition to seeking the reauthorization of the scheduling letter, this ICR outlines the proposed revisions to the scheduling letter. The proposed revisions are detailed below in Paragraph 8.

**1. Legal and Administrative Requirements**

OFCCP administers and enforces the three equal employment opportunity authorities<sup>3</sup> listed below, which prohibit employment discrimination and set affirmative action requirements for contractors that meet certain jurisdictional thresholds.<sup>4</sup>

- Executive Order 11246, as amended (E.O. 11246);
- Section 503 of the Rehabilitation Act of 1973, as amended (Section 503); and
- Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended (VEVRAA).

This ICR covers the reporting requirements for supply and service contractors under all three authorities as well as the recordkeeping requirements under E.O. 11246. The recordkeeping requirements for VEVRAA and Section 503 are covered under OMB Control Nos. 1250-0004 and 1250-0005, respectively.

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<sup>1</sup> “OFCCP” and “agency” are used interchangeably throughout this document.

<sup>2</sup> Hereinafter all references to “contractors” includes Federal contractors and subcontractors unless otherwise stated.

<sup>3</sup> OFCCP promulgated regulations implementing these programs consistent with the Administrative Procedure Act. OFCCP’s regulations are found at Title 41 of the Code of Federal Regulations (CFR) in Chapter 60.

<sup>4</sup> OFCCP’s jurisdictional thresholds are available at <https://www.dol.gov/agencies/ofccp/jurisdictional-thresholds> (last accessed April 3, 2023).

## **Executive Order 11246**

E.O. 11246 prohibits contractors from discriminating against applicants and employees based on race, color, religion, sex, sexual orientation, gender identity, and national origin and requires contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. Additionally, it prohibits contractors from taking adverse employment actions against applicants and employees for inquiring about, discussing, or disclosing information about their pay or the pay of their co-workers, subject to certain limitations. E.O. 11246 applies to contractors (including Federally assisted construction contractors) holding a Government contract in excess of \$10,000, or Government contracts that have, or can reasonably expect to have, an aggregate total value exceeding \$10,000 in a 12-month period. E.O. 11246 also applies to Government bills of lading, depositories of Federal funds in any amount, and to financial institutions that are issuing and paying agents for U.S. savings bonds and notes in any amount.

### **41 CFR Part 60-1 – Obligations of Contractors and Subcontractors**

This part prescribes the nondiscrimination and general affirmative action requirements under E.O. 11246 and contains recordkeeping, reporting, and third-party disclosure requirements. OFCCP discusses the specific sections of this part, below, that carry a recordkeeping or reporting requirement and are relevant to this ICR.

Section 60-1.4 describes the equal opportunity clause that must be included in Government contracts. This section includes the requirement that contractors state in all solicitations or advertisements for employment that applicants will receive consideration without regard to one or more of the protected bases<sup>5</sup> and that contractors notify labor organizations of their obligations under E.O. 11246.<sup>6</sup>

Section 60-1.7 requires specific contractors to file an Employer Information Report (EEO-1 Report) annually.<sup>7</sup> The U.S. Equal Employment Opportunity Commission (EEOC) and OFCCP use EEO-1 Report data to analyze employment patterns. Although the EEO-1 Report constitutes a joint data collection with OFCCP,<sup>8</sup> the EEOC is the sponsor of the collection and carries the public reporting burden.<sup>9</sup>

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<sup>5</sup> 41 CFR 60-1.4(a)(2).

<sup>6</sup> 41 CFR 60-1.4(a)(4).

<sup>7</sup> Supply and service contractors who must file the EEO-1 Report are prime contractors or first tier subcontractors; have 50 or more employees; have a contract, subcontract, or purchase order amounting to \$50,000 or more, or serve as depositories of Government funds in any amount, or are financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes; and are not otherwise exempt from OFCCP's regulations, in accordance with 41 CFR 60-1.5.

<sup>8</sup> 41 CFR 60-1.7(a).

<sup>9</sup> The EEO-1 Report is sponsored by the EEOC and approved by OMB under OMB Control No. 3046-0049. This information collection is available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202002-3046-002](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202002-3046-002) (last accessed April 3, 2023).

Section 60-1.10 requires the contractor to notify OFCCP when an employee or potential employee is denied a visa of entry to a country in which or with which it is doing business and it believes the denial was due to one, or more, of the protected bases covered by E.O. 11246.

Section 60-1.12 outlines the record retention requirements. Contractors are required to preserve any personnel or employment record made or kept for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a contract of at least \$150,000, the record retention period is one year from the date of the making of the record or the personnel action involved, whichever occurs later. This section also provides that the contractor must be able to identify the gender, race, and ethnicity of each employee for any record the contractor maintains. Where possible, the contractor must also identify the gender, race, and ethnicity of each applicant or Internet Applicant.<sup>10</sup>

Section 60-1.20 outlines the investigative methods OFCCP uses to evaluate a contractor's compliance with the agency's regulations. A compliance evaluation may consist of one or any combination of the investigative procedures listed in the regulations, *i.e.*, a compliance review, an off-site review of records, a compliance check, and/or a focused review. With the exception of focused reviews, evaluation of compliance with E.O. 11246 is usually performed concurrently with evaluation of the contractor's compliance with Section 503 and VEVRAA. This section also provides that if a contractor fails to submit an affirmative action program (AAP) and the supporting documents within 30 calendar days of OFCCP's request, OFCCP may initiate enforcement procedures.

Section 60-1.40 requires the development and maintenance of an AAP under E.O. 11246. This section requires each contractor with 50 or more employees that meets one or more of the following criteria to develop an AAP for each of its establishments:

- has a contract of \$50,000 or more; or
- has Government bills of lading which in any 12-month period total, or can reasonably be expected to total, \$50,000 or more; or
- serves as a depository of Government funds in any amount; or
- is a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

#### 41 CFR Part 60-2 – Affirmative Action Programs

This part prescribes the scope, application, purpose, and contents of AAPs under E.O. 11246.

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<sup>10</sup> "Internet Applicant" is defined at 41 CFR 60-1.3.

Section 60-2.1 describes which contractors must develop AAPs (the general requirements are listed at section 60-1.40), when contractors must develop AAPs, and which employees to include.

Section 60-2.10 describes the general purpose and contents of AAPs. This section designates the general purpose of an AAP to be a management tool designed to ensure equal employment opportunity and lists the contents, outlined in the sections that follow. This section also requires contractors to maintain and make available to OFCCP the documentation demonstrating compliance with Sections 60-2.11 through 60-2.17.

Section 60-2.11 requires that contractors use either an organizational display or workforce analysis as their organizational profile. An organizational profile depicts an establishment's staffing pattern and contractors use it to determine whether barriers to equal employment opportunity exist in their organizations. The organizational profile also provides an overview of the demographic composition of the workforce at the establishment level to assist in identifying organizational units where there is an underrepresentation or concentration of minorities and/or women. An organizational display is a detailed graphical or tabular chart, text, spreadsheet or similar presentation of a contractor's organizational structure. A workforce analysis is a listing of each job title as it appears in applicable collective bargaining agreements or payroll records ranked from the lowest to highest paid within each department or other similar organizational unit, including departmental or unit supervision.

Section 60-2.12 describes what is required for a job group analysis. A job group analysis is a method of combining job titles within a contractor's establishment. Contractors with 150 or more employees must group jobs by similarity of content, wage rates, and opportunities. However, contractors with fewer than 150 employees have the option of using the occupational groups used in the EEO-1 Report as job groups. The job group analysis must include a list of job titles that comprise each job group. Generally, a job group analysis includes all jobs located at an establishment. Jobs located at another establishment must be annotated to identify their actual job location.

Section 60-2.13 addresses incumbency in job groups and requires the contractor to record separately the percentage of minorities and women it employs within each job group.

Section 60-2.14 applies to determining availability; it requires the contractor to separately determine the availability of qualified minorities and women available for employment in a given job group. Availability is expressed as a percentage of all qualified persons available for employment in that job group.

Section 60-2.15 compares incumbency to availability by requiring the contractor to compare the representation of minorities and women in each job group with their representation among those available for employment in the job group. When the representation of minorities or women in a job group is less than would reasonably be expected given their availability, the contractor must set a placement goal.

Section 60-2.16 contains the parameters and criteria for setting placement goals.

Section 60-2.17 sets forth additional required elements of an AAP. These elements are the designation of a responsible official for implementing equal employment opportunity and the AAP, the identification of problem areas in the employment process, the creation and execution of action-oriented programs designed to correct identified problem areas, and the use of an internal auditing and reporting system to measure the effectiveness of the AAP.

Collectively, Sections 60-2.11 through 2.17 describe the required recordkeeping elements of developing, maintaining, and updating an AAP.

#### 41 CFR Part 60-3 – Uniform Guidelines on Employee Selection Procedures

DOL, along with the EEOC, the U.S. Office of Personnel Management (OPM), and the Department of Justice (DOJ) adopted the Uniform Guidelines on Employee Selection Procedures (UGESP) in 1978.<sup>11</sup> UGESP applies to tests and other selection procedures used to make employment decisions. When a test or other selection procedure is determined to have an adverse impact, UGESP provides that the contractor validate the test or procedure and retain the validation documentation. Each contractor must maintain records and other information for each job sufficient to permit analyses of the impact of its selection procedures on the employment opportunities of people based on race, sex, or ethnic group. Using this information, the contractor and OFCCP identify and evaluate the contractor's selection procedures for adverse impact.

#### VEVRAA

VEVRAA prohibits contractors from discriminating in employment on the basis of veteran status — a protection that includes not only protected veterans<sup>12</sup> but also their spouses and other known associates.<sup>13</sup> VEVRAA also requires contractors to take affirmative action to employ, and advance in employment, qualified protected veterans. Its requirements apply to contractors with a Government contract of \$150,000 or more.<sup>14</sup>

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<sup>11</sup> The UGESP information collection requirements are sponsored by the EEOC and approved under OMB Control No. 3046-0017. To view this information collection, visit [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202106-3046-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202106-3046-001) (last accessed April 3, 2023).

<sup>12</sup> Protected veteran means a veteran who is protected under the non-discrimination and affirmative action provisions of VEVRAA; specifically, a veteran who may be classified as a “disabled veteran,” “recently separated veteran,” “active duty wartime or campaign badge veteran,” or an “Armed Forces service medal veteran.” *See* 41 CFR 60-300.2.

<sup>13</sup> 41 CFR 60-300.21(e).

<sup>14</sup> Effective October 1, 2015, the coverage threshold under VEVRAA increased from \$100,000 to \$150,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See*, Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 80 FR 38293 (July 2, 2015).

41 CFR Part 60-300 – Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors Regarding Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans

This part establishes the nondiscrimination and affirmative action requirements under VEVRAA. OFCCP discusses specific sections of this part below.

Section 60-300.5 describes the equal opportunity clause that must be included in covered Federal contracts and subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract).

Section 60-300.40 requires contractors with 50 or more employees and a contract of \$150,000 or more to develop a VEVRAA AAP.<sup>15</sup> This section also provides that the contractor shall submit the AAP within 30 days of a request from OFCCP, unless the request provides for a different time, and that the contractor shall make the AAP promptly available on-site upon OFCCP's request.

Section 60-300.42 requires contractors with a contract of \$150,000 or more to invite applicants to self-identify whether they believe they are a protected veteran covered by VEVRAA. The invitation must be given prior to an offer of employment being made, as well as after an offer of employment but before the applicant begins their job duties.

Section 60-300.44 identifies the required elements of a VEVRAA AAP, outlined below:

- Develop and include an equal opportunity policy statement in the AAP.
- Review personnel processes to ensure that qualified protected veterans are provided equal opportunity and that the contractor's personnel practices do not stereotype protected veterans in a manner which limits job opportunities.
- Review all physical and mental job qualification standards to ensure that those that tend to screen out qualified disabled veterans are job-related and are based on business necessity.
- Provide reasonable accommodations for physical and mental limitations.
- Develop and implement procedures to ensure that employees are not harassed because of their protected veteran status.
- Develop procedures and practices to disseminate affirmative action policies, both internally and externally.
- Design and implement an audit and reporting system to measure the effectiveness of the AAP.
- Designate a responsible official to implement and oversee the AAP.

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<sup>15</sup> OFCCP covers the AAP recordkeeping burden for VEVRAA under OMB Control No. 1250-0004.

- Provide training to all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes to ensure that the commitments in the contractor's AAP are implemented.
- Document data collection analysis pertaining to applicants and hires on an annual basis and maintain this data for a period of three years. The data shall include the number of applicants who self-identified as protected veterans pursuant to 41 CFR 60-300.42(a), or who are otherwise known as protected veterans; the total number of job openings and total number of jobs filled; the total number of applicants for all jobs; the number of protected veteran applicants hired; and the total number of applicants hired.

Section 60-300.45 requires contractors to either adopt the national hiring benchmark or establish a hiring benchmark for protected veterans using the five factors specified in the regulations.

Section 60-300.60 identifies the investigative methods OFCCP uses to evaluate a contractor's compliance with the agency's regulations. A compliance evaluation may consist of one or any combination of the investigative procedures listed in the regulations, *i.e.*, a compliance review, an off-site review of records, a compliance check, and/or a focused review. With the exception of focused reviews, evaluation of compliance with VEVRAA is usually performed concurrently with evaluation of the contractor's compliance with E.O. 11246 and Section 503.

### **Section 503**

Section 503 prohibits contractors from discriminating against applicants and employees on the basis of disability and requires contractors to take affirmative action to employ, and advance in employment, qualified individuals with disabilities. Its requirements apply to contractors with a Government contract in excess of \$15,000.<sup>16</sup>

### **41 CFR Part 60-741 – Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors Regarding Individuals with Disabilities**

This part establishes the affirmative action and nondiscrimination obligations under Section 503. OFCCP discusses specific sections of this part below.

Section 60-741.5 describes the equal opportunity clause that must be included in covered Federal contracts and subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract).

Section 60-741.40 requires contractors with 50 or more employees and a contract of \$50,000 or more to develop a Section 503 AAP. This section also provides that the contractor shall submit

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<sup>16</sup> Effective October 1, 2010, the coverage threshold under Section 503 increased from \$10,000 to \$15,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See*, Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 75 FR 53129 (Aug. 30, 2010).

the AAP within 30 days of a request from OFCCP, unless the request provides for a different time, and that the contractor shall make the AAP promptly available on-site upon OFCCP's request.

Section 60-741.42 requires contractors with 50 or more employees and a contract of \$50,000 or more to invite applicants to self-identify whether they believe they are an individual with a disability covered by Section 503. The invitation must be given at the time of application or consideration for employment, as well as after an offer of employment but before the applicant begins their job duties. In addition, the invitation must be given to all employees every five years.

Section 60-741.44 identifies the required elements of an AAP, outlined below:

- Develop and include an equal opportunity policy statement in the AAP.
- Review personnel processes to ensure that qualified individuals with disabilities are provided equal opportunity and that the contractor's personnel practices do not stereotype individuals with disabilities in a manner which limits job opportunities.
- Review all physical and mental job qualification standards to ensure that those that tend to screen out qualified individuals with disabilities are job-related and are based on business necessity.
- Provide reasonable accommodations for physical and mental limitations.
- Develop and implement procedures to ensure that employees are not harassed because of their disability.
- Develop procedures and practices to disseminate affirmative action policies, both internally and externally.
- Design and implement an audit and reporting system to measure the effectiveness of the AAP.
- Designate a responsible official to implement and oversee the AAP.
- Provide training to all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes to ensure that the commitments in the contractor's AAP are implemented.
- Document data collection analysis pertaining to applicants and hires on an annual basis and maintain this information for a period of three years. The data collection analysis must include the number of applicants who self-identified as individuals with disabilities pursuant to 41 CFR 60-741.42(a), or who are otherwise known to be individuals with disabilities; the total number of job openings and total number of jobs filled; the total number of applicants for all jobs; the number of applicants with disabilities hired; and the total number of applicants hired.

Section 60-741.45 requires contractors to apply a seven percent utilization goal for employment of qualified individuals with disabilities to each of their job groups, or to their entire workforce if the contractor has 100 or fewer employees. This section also requires contractors to conduct a utilization analysis to evaluate the representation of individuals with disabilities.



Section 60-741.60 identifies the investigative methods OFCCP uses to evaluate a contractor's compliance with the agency's regulations. A compliance evaluation may consist of one or any combination of the investigative procedures listed in the regulations, *i.e.*, a compliance review, an off-site review of records, a compliance check, and/or a focused review. With the exception of focused reviews, evaluation of compliance with Section 503 is usually performed concurrently with evaluation of a contractor's compliance with E.O. 11246 and VEVRAA.

## **2. Use of Collected Material**

OFCCP uses the collected material to ensure contractor compliance with the agency's regulations related to the creation and maintenance of AAPs, and other recordkeeping requirements. During a compliance evaluation, OFCCP may review the contractor's AAPs under E.O. 11246, Section 503, and VEVRAA, along with supporting documentation, personnel data, and other documents to determine whether the contractor is complying with their obligations to ensure nondiscrimination and take affirmative action.

## **3. Use of Information Technology**

Pursuant to the Government Paperwork Elimination Act (GPEA), Government agencies must provide the option of using and accepting electronic documents and signatures, and electronic recordkeeping, where practicable.<sup>17</sup> OFCCP fulfills the GPEA requirements by permitting electronic recordkeeping of contractors' documentation. OFCCP's regulations do not specify a method with which contractors must collect and maintain information. Therefore, contractors have the flexibility to develop and use methods that best suit their business needs as long as the information can be retrieved and provided to OFCCP when requested.

For this information collection, OFCCP requests contractors submit the requested information in an electronic format.<sup>18</sup> For example, when submitting compensation data, the most useful and efficient format to submit is a manipulable electronic database or spreadsheet. Due to the nature of the analyses conducted in a desk audit, providing PDFs of electronic databases or spreadsheets increases the time it takes for a compliance officer to complete their analyses, and also increases the burden on the contractor by converting already existing electronic files to a PDF format. Specifics on where the information should be submitted to OFCCP will be found in the scheduling letter the contractor receives initiating a compliance evaluation.

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<sup>17</sup> Government Paperwork Elimination Act (Public Law 105-277, 1998), <https://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf> (last accessed April 3, 2023).

<sup>18</sup> 41 CFR 60-300.81 and 60-741.81 require contractors to provide records and other information in any of the formats in which they are maintained, as selected by OFCCP.

Information technology systems used to comply with data requirements under OFCCP’s regulations should be capable of performing certain functions, including but not limited to, those listed below.

- Conducting workforce analysis
- Conducting job group analysis
- Facilitating calculation of availability
- Conducting E.O. 11246 utilization analysis
- Calculating placement goals
- Collecting employment activity data related to E.O. 11246, Section 503, and VEVRAA
- Collecting and analyzing compensation data
- Conducting Section 503 utilization analysis
- Analyzing outreach and recruitment
- Tracking voluntary self-identification
- Disseminating equal employment opportunity (EEO) policies
- Providing notice to subcontractors and vendors
- Facilitating calculation of VEVRAA benchmarks

#### **4. Description of Efforts to Identify Duplication**

The reporting requirements in this ICR result exclusively from E.O. 11246, Section 503, and VEVRAA and their implementing regulations. No duplication of effort exists because no other Federal agencies administer and enforce these regulations. Where possible, OFCCP participates in information sharing and standardized requirements, such as the use of the EEO-1 Report data<sup>19</sup> and the use of UGESP created by EEOC, OPM, DOJ, and DOL.<sup>20</sup>

#### **5. Impact on Small Businesses**

The impact of this information collection on small businesses is minimal for the following reasons:

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<sup>19</sup> The EEO-1 Report is promulgated jointly by OFCCP and the EEOC. *See* 41 CFR 60-1.7(a). The EEO-1 Report is sponsored by the EEOC and approved by OMB under OMB Control No. 3046-0049. This information collection is available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202002-3046-002](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202002-3046-002) (last accessed April 3, 2023).

<sup>20</sup> The UGESP information collection requirements are sponsored by the EEOC and approved under OMB Control No. 3046-0017. To view this information collection, visit [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202106-3046-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202106-3046-001) (last accessed April 3, 2023).

- Contractors with fewer than 50 employees are exempt from the AAP requirement.<sup>21</sup>
- Recordkeeping requirements found at 41 CFR 60-1.12(a), 60-300.80(a), and 60-741.80(a) reduce the two-year recordkeeping requirement to one year for contractors with fewer than 150 employees.
- When preparing an E.O. 11246 AAP, contractors with fewer than 150 employees are permitted to use their EEO-1 categories as job groups, thus reducing burden related to job group formulation.<sup>22</sup>
- When preparing a Section 503 AAP, contractors with 100 or fewer employees need not use AAP job groups for utilization analysis; they have the option to measure representation of individuals with disabilities in their entire workforce.<sup>23</sup>

## **6. Consequences of a Less Frequent Collection**

A less frequent collection could undermine the success of contractors' nondiscrimination and affirmative action efforts and impede OFCCP's ability to carry out its mission and provide the appropriate compliance assistance. OFCCP achieves its mission through both enforcement actions and compliance assistance. The agency must continuously verify that contractors maintain annual AAPs, employment records, and other supporting documentation. Although OFCCP does not evaluate every contractor establishment, the agency initiates compliance evaluations using the instrument included in this ICR on an ongoing basis. Without this ICR, these establishments' employment data would become outdated, discrimination could be undetected for longer periods, and victims would not receive timely remedies for discrimination.

## **7. Special Circumstances**

There are no special circumstances for the collection of this information.

## **8. Consultation Outside the Agency**

On November 21, 2022, OFCCP published a 60-day notice in the *Federal Register* (87 FR 70867) seeking comments from the public on this information collection request.<sup>24</sup> Particularly, OFCCP sought feedback on the proposed revisions to the scheduling letter. OFCCP received 48 comments during the 60-day notice period, with some in support of the proposed revisions and some opposed. The commenters included employer associations, law firms, human resources consulting firms, a prime contractor, various civil rights and worker advocacy groups,

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<sup>21</sup> Per 41 CFR 60-2.1, once OFCCP's AAP requirement covers one establishment of the contractor, all of its employees must be accounted for in an AAP whether or not each of the contractor's establishments meet the minimum 50 employee threshold.

<sup>22</sup> 41 CFR 60-2.12(e).

<sup>23</sup> 41 CFR 60-741.45(d)(2)(i).

<sup>24</sup> Hereinafter, the term "60-day notice" refers to the notice in the *Federal Register*, and its attachments including the supporting statement and proposed scheduling letter.

individuals, and a labor union. After careful consideration of the comments, OFCCP has decided to proceed with the proposed information collection with some modifications. Specifically, OFCCP has modified the requested information on contractors' promotions and has updated the burden estimates (*see* Item 18(c) in attached scheduling letter and the burden discussion below). OFCCP has also made nonsubstantive language changes to Item 21 and Item 24 in the scheduling letter for clarity. OFCCP has also renumbered some items for consistency with the current scheduling letter. OFCCP addresses the public comments and these changes below.

### **Emailing Scheduling Letters**

In the 60-day notice, OFCCP proposed adding in an option for the scheduling letter to be issued via email with a read receipt requested. OFCCP received five comments on this proposal. Three commenters, including employer associations and a law firm, expressed support for the proposal, provided that OFCCP confirms the correct email address prior to issuance and that the 30-day response period begins upon confirmation of receipt by the correct recipient. Two other commenters, an employer association and a human resources consulting firm, disagreed with this proposal. These commenters expressed concerns about how OFCCP will obtain the correct email address and stated that the proposal does not align with OFCCP's Federal Contract Compliance Manual (FCCM).<sup>25</sup>

OFCCP has carefully reviewed the five comments and has decided to proceed with this proposal. During the Covid-19 pandemic, OFCCP personnel were converted to a mandatory full-time telework status, and OFCCP field offices were instructed to issue all scheduling letters via e-mail. This practice proved successful and allowed OFCCP to continue scheduling compliance reviews despite the remote working conditions. It also provided benefits to the agency since there was no additional cost to print and mail, allowing for quicker delivery and confirmation of receipt, and contributed to the goal of becoming a paperless agency. Although OFCCP has returned to in-office work, sending scheduling letters via e-mail is a practice that has benefited OFCCP and contractors and OFCCP will formalize this practice through the scheduling letter.

Further, technological advances and the Covid-19 pandemic have resulted in workplaces trending towards more remote work. An estimated 22% of the workforce (36.2 million Americans) will work remotely by 2025, which represents an 87% percent increase from pre-pandemic levels.<sup>26</sup> An estimated 82% of employers plan to offer employees the ability to work

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<sup>25</sup> The FCCM outlines OFCCP's procedural framework for executing quality and timely compliance evaluations and complaint investigations. The FCCM does not create new legal rights or requirements or change current legal rights or requirements for Federal contractors. The FCCM is located at <https://www.dol.gov/agencies/ofccp/manual/fccm> (last accessed April 3, 2023).

<sup>26</sup> *See* Upwork Study Finds 22% of American Workforce Will be Remote by 2025 (Dec. 15, 2020), <https://www.upwork.com/press/releases/upwork-study-finds-22-of-american-workforce-will-be-remote-by-2025> (last accessed April 3, 2023).

remotely at least on a part-time basis post-pandemic.<sup>27</sup> With these changes, both contractors and OFCCP will benefit from the option to submit and receive the scheduling letter electronically. For these reasons, OFCCP is moving forward with this proposal.

In response to the commenters' concerns, OFCCP notes that prior to sending the scheduling letter, field offices take extensive measures to verify the appropriate contact for sending the scheduling letter (*e.g.*, contacting the company via telephone, researching available information on company officials, *etc.*).<sup>28</sup> In addition, OFCCP also contacts the contractor within 15 days to ensure the scheduling letter was received.<sup>29</sup> Collectively these measures ensure that OFCCP is emailing an appropriate point of contact, and that the contractor will have the full 30-day period to respond. With regards to the FCCM, OFCCP notes that once a new scheduling letter is approved, the agency will update all relevant guidance, including the FCCM, to reflect any changes in policies.

### **Electronic Submission of AAPs and Itemized Listing Information**

In the 60-day notice, OFCCP proposed electronic submission of AAPs and Itemized Listing information. The proposal also included a point of contact if the contractor wanted to discuss a different electronic submission method and stated that contractors still have the option to submit the information via mail.

Only one commenter, a law firm, provided feedback on this proposal. Although the law firm agreed that these revisions align with OFCCP's present practice and contractor preferences, they expressed concern regarding confidentiality. The law firm recommended that OFCCP thoroughly explain all safeguards the agency will take to ensure the confidentiality and integrity of the data received.

OFCCP has decided to proceed with this proposal. As the commenter noted, as a matter of practice, many contractors already choose to submit this information electronically. The Department has several safeguards in place to ensure that its email system is secure, including

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<sup>27</sup> See Gartner Survey Reveals 82% of Company Leaders Plan to Allow Employees to Work Remotely Some of the Time (July 14, 2020), <https://www.gartner.com/en/newsroom/press-releases/2020-07-14-gartner-survey-reveals-82-percent-of-company-leaders-plan-to-allow-employees-to-work-remotely-some-of-the-time> (last accessed April 3, 2023).

<sup>28</sup> The FCCM details extensive measures OFCCP takes for verifying contacts prior to sending a scheduling letter via mail. Similar measures will apply when sending the letters via email. See FCCM at *1B00 Initial Contact with the Contractor*, <https://www.dol.gov/agencies/ofccp/manual/fccm/1b-pre-desk-audit-actions/1b00-initial-contact-contractor> (last accessed April 3, 2023).

<sup>29</sup> FCCM at *1B04 Follow-Up Contact with Contractor and Jurisdiction Challenges*, <https://www.dol.gov/agencies/ofccp/manual/fccm/1b-pre-desk-audit-actions/1b04-follow-contact-contractor-and-jurisdiction> (last accessed April 3, 2023).

ensuring that all employees access the network using a Personal Identity Verification card. Contractors can also submit data to OFCCP using the Department’s secure file sharing system, Kiteworks.<sup>30</sup> All employees also receive annual training on safeguarding information when using IT systems, and the FCCM includes specific procedures for ensuring the confidentiality of contractors’ submissions.<sup>31</sup> Further, OFCCP treats information obtained in the compliance evaluation as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552.<sup>32</sup>

### **Contractor Portal**

In the 60-day notice, OFCCP requested feedback on allowing contractors to use the agency’s Contractor Portal to submit AAPs and Itemized Listing data.<sup>33</sup> OFCCP received two comments in response to this request. One human resources consulting firm stated that it experienced problems accessing OFCCP’s Contractor Portal and believes OFCCP would need to ensure these issues have been thoroughly resolved prior to using the Contractor Portal for AAP submissions. Further, this commenter inquired about whether there are security concerns and whether OFCCP has measures in place to protect contractors’ data. A law firm also stated that it had problems using the Contractor Portal.

After careful consideration of these comments, OFCCP has decided to include the Contractor Portal as a submission method on the scheduling letter. As described below, the portal offers a secure, electronic method for submitting AAPs and Itemized Listing data. It is also a more efficient method than mailing the information to OFCCP or sending the information via multiple emails. OFCCP is continuing to develop the upload functionality, and contractors will be able to upload their AAPs and Itemized Listing data once the functionality is live. In response to concerns about security risks, OFCCP notes that the agency has implemented extensive security measures to address privacy and security risks with the Contractor Portal. The Contractor Portal is built on a Drupal platform. The platform is a content management system for Government agencies with built-in security modules, including the following:

- A Security Kit that deals with any issue or attack concerning HTML injection;
- A login security method that denies full (or unauthorized) access to the web content or platform coding;

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<sup>30</sup> In the attached scheduling letter, OFCCP has modified the scheduling letter to specifically note the Department’s Kiteworks system as an option for submitting the AAP and Itemized Listing data.

<sup>31</sup> FCCM at *4A02 Confidentiality*, <https://www.dol.gov/agencies/ofccp/manual/fccm/4a-introduction/4a02-confidentiality> (last accessed April 3, 2023).

<sup>32</sup> 41 CFR 60-1.20(g).

<sup>33</sup> The Contractor Portal is OFCCP’s electronic platform where covered contractors must certify whether they are meeting their requirement to develop and maintain annual AAPs. More information on the Contractor Portal can be found at <https://www.dol.gov/agencies/ofccp/contractorportal> (last accessed April 3, 2023). OFCCP is also authorized to use the Contractor Portal to receive AAPs from contractors scheduled for compliance evaluations. *See* OMB Control Number 1250-0012.

- A password policy that requires passwords to be more complex;
- A secure login feature that enables safe login procedures and prevents user data theft; and
- A Cross-site Scripting (XSS) Protection module that protects the website from XSS attacks.

Data is secured according to the National Institute of Standards and Technology’s Federal Information Processing Standards, which are verified by DOL’s Office of the Chief Information Officer. Additionally, OFCCP staff are required to use their Personal Identification Verification card to access the interface. These measures are designed to secure the transmission of data while allowing the parties to more efficiently exchange information through electronic submission.

In response to concerns about potential technical problems using the Contractor Portal, OFCCP notes that contractors will be provided with technical assistance, including an instruction manual, the Contractor Portal help desk line, and other technical assistance materials via OFCCP’s website. The Contractor Portal will also be one of many options contractors can use to submit their AAPs and Itemized Listing data. Scheduled contractors will still be able to use the other submission methods described above.

#### **Submission Requirements of Post-Secondary Institutions and Contractors with “Campus-like Settings”**

In the 60-day notice, OFCCP proposed adding the following clarifying language to the scheduling letter:

If you are a post-secondary institution or Federal contractor with a campus-like setting that maintains multiple AAPs, you must submit the information requested in this scheduling letter for all AAPs developed for campuses, schools, programs, buildings, departments, or other parts of your institution, or company located in [city and state only].

OFCCP received 25 comments in response to this proposed language. The majority of commenters (14) supported OFCCP’s proposal. Various civil rights and worker advocacy groups and a labor union stated that obtaining such information will provide OFCCP with complete and holistic information regarding the campus and its practices. A total of 11 commenters, including law firms, human resources consulting firms, employer associations, and an individual, opposed the proposal. Most of these commenters asserted that OFCCP cannot add this item without undergoing the rulemaking process.

OFCCP disagrees that this proposal exceeds its current regulatory authority and requires rulemaking. E.O. 11246 authorizes OFCCP to request and receive records relevant to

compliance.<sup>34</sup> OFCCP’s regulations also state that “[c]ontractors subject to the affirmative action program requirements must develop and maintain a written affirmative action program for each of their establishments. Each employee in the contractor’s workforce must be included in an affirmative action program.”<sup>35</sup> As part of its enforcement discretion, OFCCP issued technical assistance guidance that allows contractors with “campus-like settings” to develop and implement a single AAP or multiple AAPs depending on how the operations of the contractor is organized.<sup>36</sup> This guidance does not change contractors’ regulatory obligations or OFCCP’s authority to review AAP analyses covering all employees in the contractor’s workforce. In addition, OFCCP’s regulations do not limit the agency to scheduling only one establishment in a given area.

Further, the scheduling letter proposal is merely clarifying existing policy. In the university context, for example, OFCCP already has guidance explaining that a university review includes the entire university located in one city.<sup>37</sup> OFCCP also made this clarification when it posted its recent Scheduling Methodology.<sup>38</sup> With this proposal, OFCCP clarifies that other contractors with campus-like settings, such as hospitals and information technology companies, are similarly required to produce all AAPs for the campus located in that city. Collecting this information is consistent with the regulations described above, provides a more efficient use of agency resources, and promotes a broader understanding of an organization’s EEO policies and practices. For these reasons, OFCCP has decided to proceed with this proposal.

### **Minor Language Changes**

In the 60-day notice, OFCCP proposed revising all references to “DOL” or “Department of Labor” to state “U.S. Department of Labor.” OFCCP also made other minor language changes for clarity and proposed renumbering the items to account for additional requirements. OFCCP did not receive comments on these changes and will proceed with these changes.

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<sup>34</sup> See, e.g., EO 11246 Sec. 202(6).

<sup>35</sup> See 41 CFR 60-2.1(d); VEVRAA and Section 503’s AAP requirements are also described at 41 CFR 60-300.40 and 41 CFR 60-741.40.

<sup>36</sup> Educational Institutions Technical Assistance Guide at 7 (Oct. 2019), <https://www.dol.gov/sites/dolgov/files/ofccp/CAGuides/files/OFCCP-EI-TAG.pdf> (last accessed April 3, 2023).

<sup>37</sup> Corporate Scheduling Announcement List (CSAL) Frequently Asked Questions, FAQ #17, <https://www.dol.gov/agencies/ofccp/faqs/scheduling-lists#Q17> (last accessed April 3, 2023).

<sup>38</sup> The scheduling methodology (“Methodology for Developing the Supply & Service Scheduling List FY 2020, Release – 1 Amended”) is available at <https://www.dol.gov/agencies/ofccp/scheduling/Methodologies> (“University reviews shall include the entire university campus located in one city. University reviews of one campus will not include the university’s other campuses in another city, medical school, and/or its affiliated hospital. Further, these reviews will not include university extension programs/services that are located outside of the main campus. If a university has multiple campuses in different cities, each campus is treated as a separate establishment of the university. Similarly, medical schools and hospitals, if owned by the university, are treated as separate establishments and will not be included in the review.”) (last accessed April 3, 2023). See also Corporate Scheduling Announcement List (CSAL) Frequently Asked Question Number 17, <https://www.dol.gov/agencies/ofccp/faqs/scheduling-lists#Q17> (last accessed April 3, 2023).



#### **Determining Minority and Female Availability (Itemized Listing Item 4)**

The regulations at 41 CFR 60-2.14 require contractors to determine the number of qualified minorities and women available for employment in a given job group. In the current scheduling letter, Item 4 only requests documentation on parts of the § 60-2.14 obligations, stating, “For each job group, [provide] a determination of minority and female availability that considers the factors given in 41 CFR 60-2.14(c)(1) and (c)(2).”

In the 60-day notice, OFCCP proposed revising Item 4 to refer to all of § 60-2.14. The proposed Item 4 states, “For each job group, [provide] a determination of minority and female availability pursuant to 41 CFR 60-2.14.”

OFCCP received 18 comments in response to this proposal. Most of these commenters (16) supported the proposal. These commenters, including various civil rights and worker advocacy groups and a labor union, stated that this revision would improve OFCCP’s ability to evaluate contractors’ compliance. One commenter, an employer association, stated they do not believe such information is necessary at the desk audit stage. Another commenter, a law firm, did not object to this proposed language but asserted that contractors are already providing the requested information.

After considering these comments, OFCCP will proceed with this proposal. The current Item 4 only requests information pertaining to § 60-2.14(c)(1) and (c)(2). However, § 60-2.14 includes additional requirements. For example, § 60-2.14(f) requires the contractor to identify the pool of promotable, transferable, and trainable employees when conducting its availability analysis. With the current scheduling letter, OFCCP does not have a way to verify this information at the desk audit stage.

The proposed change allows OFCCP to better assess whether scheduled contractors are in full compliance with the § 60-2.14 requirements. Further, having this information at the desk audit stage enables OFCCP to verify compliance in all scheduled reviews, rather than only in the subset of reviews that move past the desk audit stage.

#### **Identifying Action Oriented Programs (Itemized Listing Item 7)**

In the 60-day notice, OFCCP proposed adding a new item requesting a list identifying all action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR 60-2.17(b). OFCCP received 26 comments in response to this proposal. A total of 18 commenters, including law firms, various civil rights and worker advocacy groups, and a labor union, supported OFCCP adding this new item. Such groups stated that this information will enable OFCCP to better tailor its review processes and will allow OFCCP to assess whether contractors are implementing effective programs to remove identified barriers to equal employment opportunity.

Eight commenters, including employer associations, human resources consulting firms, and a law firm, opposed OFCCP’s proposal to include this additional item. These groups stated that the proposal goes beyond OFCCP’s regulatory requirements.

In response, OFCCP notes that the regulations at 41 CFR 60-2.17(c) already require contractors to develop and execute action-oriented programs to address barriers to equal employment opportunity. The proposed item is consistent with these existing obligations.

Further, as the majority of commenters stated, this information will allow OFCCP to assess whether contractors are implementing action-oriented programs to remove identified barriers to equal employment opportunity. Under the current scheduling letter, OFCCP does not have access to documentation at the desk audit stage to verify whether contractors are meeting this existing obligation. The proposal would ensure that OFCCP has access to this documentation in all scheduled reviews.

For clarity, OFCCP is proposing to reword Item 7 to allow contractors to provide documentation of their compliance, rather than requiring a list. Contractors can choose to provide a list but can also provide OFCCP with other documentation they have maintained that demonstrates their compliance. Item 7 has been updated to state the following:

Pursuant to 41 CFR § 60-2.17(c), provide documentation demonstrating the development and execution of action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b).

### **Section 503 Outreach and Recruitment Activities (Itemized Listing Item 8)**<sup>39</sup>

OFCCP’s current scheduling letter requests information on contractors’ Section 503 outreach and recruitment activities. In the 60-day notice, OFCCP proposed clarifying this request to provide more specificity on the documentation a contractor must submit regarding their Section 503 outreach and positive recruitment efforts. Specifically, the proposal would require contractors to document whether they believe that the totality of their outreach and recruitment efforts were effective.

OFCCP received 18 comments in response to this proposal. Of these 18 comments, 12 supported the proposal. Various civil rights and worker advocacy groups and a labor union stated that this increased level of detail will require contractors to submit more than the current cursory summaries, thereby improving OFCCP’s ability to determine compliance. Six commenters, including law firms, employer associations, and one individual, opposed this proposal. These commenters asserted that this level of detail is unnecessary at the initial stage of a compliance

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<sup>39</sup> This item is Item 7 in the current scheduling letter.

evaluation. They also stated that the additional language is subjective and would result in inconsistent contractor submissions.

However, the regulations at 41 CFR 60-741.44(f)(3) already require contractors to assess the effectiveness of their outreach and recruitment efforts and describe how contractors must document this assessment, stating:

The contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities. The contractor shall document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor's conclusion as to whether each effort was effective...

41 CFR 60-741.44(f)(3). The proposal is merely clarifying that contractors must provide this information, a required AAP element, as part of their submission. With the current scheduling letter, some contractors are already providing this information, while others have expressed confusion over whether this information should be included in their submission. Adding in the proposed language will clarify that this information is required, will promote uniformity in contractors' submissions, and will allow OFCCP to more efficiently assess whether the contractor is in full compliance with 41 CFR 60-741.44(f). For these reasons, OFCCP will proceed with this clarification as proposed.

### **Section 503 Utilization Analysis (Itemized Listing Item 11)**<sup>40</sup>

OFCCP's current scheduling letter requests information on contractors' Section 503 utilization analysis. In the 60-day notice, OFCCP proposed revising the request to provide more specificity on the documentation a contractor must submit regarding their Section 503 utilization analysis. The current scheduling letter request reads as follows:

The utilization analysis evaluating the representation of individuals with disabilities in each job group, or, if appropriate, evaluating the representation of individuals with disabilities in the workforce as a whole, as provided in 41 CFR 60-741.45. If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year progress.

OFCCP proposed revising this item to read as follows:

The utilization analysis evaluating the representation of individuals with disabilities in each job group, or, if appropriate, evaluating the representation of individuals with disabilities in the workforce as a whole, as provided in 41 CFR 60-741.45. If any underutilization of individuals with disabilities is identified, provide a description of the

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<sup>40</sup> This item is Item 10 in the current scheduling letter.

steps taken to determine whether and where impediments for equal employment opportunity exist in accordance with 41 CFR 60-741.45(e). Per 41 CFR 60-741.45(e) and (f), this description shall include your assessment of personnel processes, the effectiveness of your outreach and recruitment efforts, the results of your affirmative action program audit, any other areas that might affect the success of the affirmative action program, and a description of action-oriented programs developed and executed to correct any identified problem areas. Provide this information for the immediately preceding AAP year. If you are six months or more into your current AAP year on the date you receive this listing, provide the information that reflects your progress for at least the first six months of the current AAP year.

OFCCP received seven comments in response to its proposal. These commenters included law firms, employer associations, and one individual. All seven commenters opposed OFCCP's proposed language, stating that the new language is duplicative of other AAP requirements and that this information is unnecessary at the desk audit stage of a compliance evaluation.

OFCCP disagrees that this proposal is duplicative of other AAP requirements. This proposal specifically addresses contractors' responsibilities regarding the utilization of qualified individuals with disabilities. None of the current scheduling letter items request a detailed description of contractors' compliance, as required in 41 CFR 60-741.45(e) and (f).<sup>41</sup>

OFCCP also disagrees that this information is unnecessary at the desk audit stage. Contractors are already subject to these affirmative action requirements (*see* 41 CFR 60-741.45). Having this information at the desk audit stage ensures that all scheduled contractors are meeting their obligations. Adding in the proposed language will also promote uniformity in contractors' submissions and ensure consistency in what OFCCP is requesting to review across field offices. For these reasons, OFCCP will proceed with this item as proposed.

### **VEVRAA Outreach and Recruitment Activities (Itemized Listing Item 12)**<sup>42</sup>

OFCCP's current scheduling letter requests information on contractors' VEVRAA outreach and recruitment activities. In the 60-day notice, OFCCP proposed clarifying this request to provide more specificity on the documentation a contractor must submit regarding their VEVRAA outreach and positive recruitment efforts. Specifically, the proposal would require contractors to document whether they believe that the totality of their outreach and recruitment efforts were effective.

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<sup>41</sup> Item 10 of the current scheduling letter already requires contractors who are six months or more into the current AAP year on the date they receive the Itemized Listing to submit § 60-741.45 information that reflects current year progress.

<sup>42</sup> This item is Item 11 in the current scheduling letter.

OFCCP received 19 comments in response to this proposal. Of these 19 comments, 13 supported the proposal. Various civil rights and worker advocacy groups and a labor union stated that this increased level of detail will require contractors to submit more than the current cursory summaries, thereby improving OFCCP's ability to determine compliance. Six commenters, including law firms, employer associations, and one individual, opposed the proposal. These commenters asserted that this level of detail is unnecessary at the initial stage of a compliance evaluation. They also stated that the additional language is subjective and would result in inconsistent contractor submissions.

However, the regulations at 41 CFR 60-300.44(f)(3) already require contractors to assess the effectiveness of their outreach and recruitment efforts and describes how contractors must document this assessment, stating:

The contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness in identifying and recruiting qualified protected veterans. The contractor shall document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor's conclusion as to whether each effort was effective...

41 CFR 60-300.44(f)(3). The proposal is merely clarifying that contractors must provide this information, a required AAP element, as part of their submission. With the current language, some contractors are already providing this information, while others have expressed confusion over whether this information should be included in their submission. Adding in the proposed language will clarify that this information is required, will promote uniformity in contractors' submissions, and will allow OFCCP to more efficiently assess whether the contractor is in full compliance with 41 CFR 60-300.44(f). For these reasons, OFCCP will proceed with this item as proposed.

### **VEVRAA Hiring Benchmark (Itemized Listing Item 15)**<sup>43</sup>

OFCCP's current scheduling letter requests documentation on contractors' VEVRAA hiring benchmark. In the 60-day notice, OFCCP proposed adding language to clarify that OFCCP is seeking information regarding the VEVRAA hiring benchmark for the current AAP year. OFCCP received one comment on this proposal. A law firm stated that the revision will cause confusion and does not believe anyone previously had difficulties interpreting this item. OFCCP disagrees with this comment. While similar items in the scheduling letter specify the applicable AAP period, the current language for this item does not. Adding in the clarifying language will provide clear guidance to contractors and promote consistency with other items in the scheduling letter. Adding this clarification is also consistent with the Government Accountability Office's

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<sup>43</sup> This item is Item 14 in the current scheduling letter.

recommendation for OFCCP to provide more clarity on the VEVRAA benchmark requirements.<sup>44</sup> Further, adding this clarification does not impose any new obligations on contractors. For these reasons, OFCCP has decided to proceed with this clarification as proposed.

### **EEO-1 and IPEDS Reports (Itemized Listing Item 16)**<sup>45</sup>

The current scheduling letter requests copies of Component 1 of contractors' Employer Information Report (EEO-1 Report) for the last three years. Component 1 of the EEO-1 Report provides information on a contractor's workforce demographics and composition.<sup>46</sup> Covered contractors are required to submit this information to EEOC on an annual basis.<sup>47</sup> As described in detail in the FCCM, OFCCP requests copies of Component 1 of the EEO-1 Report during its desk audit so that compliance officers can review EEO trends within a contractor's workforce, such as changes in the representation of racial and gender groups over time.<sup>48</sup>

Post-secondary institutions do not file an EEO-1 Report but do file a similar report known as the Integrated Postsecondary Education Data System (IPEDS).<sup>49</sup> Similar to Component 1 of the EEO-1 Report, the Human Resources Survey Component of the IPEDS Report provides information on the demographics and workforce composition for post-secondary institutions. However, OFCCP's current scheduling letter does not request this report. To address this issue, OFCCP proposed adding in a request for post-secondary institutions to submit copies of their IPEDS Human Resources Survey Component data collection reports for the last three years.

OFCCP received six comments on this proposal from human resources consulting firms, law firms, employer associations, and an individual. These commenters stated that OFCCP lacks regulatory authority to seek such reports, as the IPEDS report is mandated by the U.S. Department of Education. These commenters also asserted that this request is unnecessary because the IPEDS information is publicly available.

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<sup>44</sup> U.S. Government Accountability Office, GAO-22-104599, *Equal Employment Opportunity – Better Assistance and Data Use Could Improve Oversight of Veterans' Federal Contractor Employment*, May 2022, 38-39, <https://www.gao.gov/assets/gao-22-104599.pdf>.

<sup>45</sup> The request for copies of Component 1 of contractors' EEO-1 Reports is Item 15 in the current scheduling letter.

<sup>46</sup> See EEO-1 Report Frequently Asked Questions, <https://www.dol.gov/agencies/ofccp/faqs/eo1-report> (last accessed April 3, 2023).

<sup>47</sup> A contractor is required to file an EEO-1 Report if it (1) has 50 or more employees; (2) is a prime contractor or first-tier subcontractor; and (3) has a contract, subcontract, or purchase order amounting to \$50,000 or more or serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Notes. See <https://www.dol.gov/agencies/ofccp/faqs/eo1-report> (last accessed April 3, 2023).

<sup>48</sup> See FCCM, *1K00 EEO-1 Trend Analysis*, <https://www.dol.gov/agencies/ofccp/manual/fccm/1k-analysis-executive-order-11246-aap-overview-itemized-listing-data-eo> (last accessed April 3, 2023).

<sup>49</sup> See Integrated Postsecondary Education Data System, <https://nces.ed.gov/ipeds/> (last accessed April 3, 2023).

OFCCP disagrees that the agency lacks the regulatory authority to require this information. E.O. 11246 and OFCCP’s regulations provide that the agency can request all records relevant to determining a contractor’s compliance.<sup>50</sup> OFCCP is seeking the Human Resources Survey Component of IPEDS, which includes relevant information on the contractor’s workforce composition. OFCCP’s FCCM specifically describes how compliance officers will use the IPEDS information during the compliance review to conduct meaningful analyses such as examining a contractor’s workforce composition and identifying similarly situated groups.<sup>51</sup> Field offices routinely request and review this information at later stages of the compliance review. By requiring this information at the beginning of a compliance review, the proposal will reduce delays and promote more efficient analysis.

Further, as noted above, OFCCP is only requesting one component of the IPEDS report, the Human Resources Survey Component, rather than the entire report. OFCCP already reviews workforce composition data (the Component 1 of the EEO-1 Report) from contractors who are not post-secondary institutions. By requesting the IPEDS Human Resources Survey Component, OFCCP will have similar information to review during its compliance evaluations of post-secondary institutions.

Additionally, having contractors submit copies of their IPEDS ensures that OFCCP will have the most current data. Due to the IPEDS data collection and release schedule, public data may be delayed for up to 20 months.<sup>52</sup> Obtaining the reports directly from contractors will allow OFCCP to analyze the most up-to-date information, thereby providing the most accurate analysis. For these reasons, OFCCP will proceed with this change as proposed.

**Information on E.O. 11246 Affirmative Action Goals (Itemized Listing Item 18 in 60-day Notice/Renumbered to Item 20 in the 30-day Notice)**<sup>53</sup>

OFCCP’s current scheduling letter requests information on contractors’ E.O. 11246 affirmative action goals. In the 60-day notice, OFCCP proposed minor language changes to clarify the applicable AAP periods for the requested information. OFCCP did not receive any comments on these proposed changes and will proceed with the changes.

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<sup>50</sup> See EO 11246 Sec. 202(6); 41 CFR 60-1.12.

<sup>51</sup> FCCM at 9-10 (“In educational institution evaluations, the [compliance officer (CO)] will examine data regarding the educational institution’s workforce composition, tenure requirements, and practices on hiring, promotion, termination, and compensation. Unlike other contractors, the labor force of educational institutions is tracked through a reporting system called the Integrated Postsecondary Education Data System (IPEDS). The CO may start with the IPEDS categories to identify similarly situated employee groups but if they are too broad, the CO will narrow down the categories to more appropriate job groups to conduct meaningful analyses...), [https://www.dol.gov/sites/dolgov/files/OFCCP/FCCM/508\\_FCCM\\_05012020.pdf](https://www.dol.gov/sites/dolgov/files/OFCCP/FCCM/508_FCCM_05012020.pdf) (last accessed April 3, 2023).

<sup>52</sup> See Timing is Everything: Understanding the IPEDS Data Collection and Release Cycle (Aug. 10, 2022), <https://nces.ed.gov/blogs/nces/post/timing-is-everything-understanding-the-ipeds-data-collection-and-release-cycle> (last accessed April 3, 2023).

<sup>53</sup> This item is Item 17 in the current scheduling letter.

**Policies and Practices Regarding Recruiting, Screening, and Hiring (Itemized Listing Item 19 in 60-day Notice/Renumbered to Item 21 in the 30-day Notice)**

In the 60-day notice, OFCCP proposed adding a new item requesting documentation of a contractor's policies and practices regarding all employment recruiting, screening and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures.

OFCCP received 32 comments on this proposal. Of these 32 comments, 18 supported OFCCP's proposal, while 14 opposed. Those in support included various civil rights and worker advocacy groups and a labor union. These groups stated that the information was necessary, as technology-based employment selection procedures can create barriers to equal employment opportunity for protected groups, including women, individuals with disabilities and LGBTQ workers.

Law firms, employer associations, human resources consulting firms, and individuals opposed the proposal. These groups asserted that OFCCP's request is overly broad and unnecessarily burdensome at this stage of the compliance evaluation process and is outside the scope of OFCCP's regulatory authority. OFCCP disagrees with these commenters. OFCCP's regulations clearly prohibit contractors from discriminating against employees and applicants in all employment actions, including selection procedures.<sup>54</sup> OFCCP's regulations also provide that the agency can request all records relevant to determining a contractor's compliance, and that such records include, but are not necessarily limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.<sup>55</sup> As such, requesting and reviewing contractors' policies and practices for making selection decisions is within the scope of OFCCP's authority, and is an integral part of reviewing contractors' compliance. In addition, the UGESP requirements at 41 CFR part 60-3 (described in part A(1) above) apply to artificial intelligence-based selection procedures.<sup>56</sup>

Requesting information specific to technology-based selection procedures is particularly important as more employers are using automated systems to make their selection decisions. Today, an estimated 79% of employers use some form of automated systems to make job selection decisions compared with only 56% in 2019.<sup>57</sup> As noted in the 60-day notice, use of these technologies may lead to instances of screening or selection bias such as assigning lower ratings

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<sup>54</sup> See 41 CFR 60-1.4, 60-300.5, 60-741.5.

<sup>55</sup> See 41 CFR 60-1.12(a).

<sup>56</sup> Validation of Employee Selection Procedures, FAQ #6, <https://www.dol.gov/agencies/ofccp/faqs/employee-selection-procedures#Q6> (last accessed April 3, 2023).

<sup>57</sup> Institute for Workplace Equality, *Technical Advisory Committee Report, EEO and DEI&A Considerations in the Use of Artificial Intelligence in Employment Decision Making*, Dec. 2022, at 15, <https://www.theinstitute4workplaceequality.org/ai-tac-report-release> (last accessed April 3, 2023).



to minority or women candidates in a screening process. Individuals with disabilities are also at risk of exclusion due to these tools.<sup>58</sup> The proposed language will ensure that OFCCP and contractors are evaluating whether these tools are creating barriers to equal employment opportunity. For these reasons, OFCCP will proceed with this new item. To clarify the scope of the request, OFCCP has agreed to revise the language for this item. The revised language is as follows:

Identify and provide information and documentation of policies, practices, or systems used to recruit, screen, and hire, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.

**Promotions Data (Itemized Listing Item 20(c) in 60-day Notice/Renumbered to Item 18(c) in the 30-day Notice)**<sup>59</sup>

OFCCP’s current scheduling letter requests data on contractors’ promotions by gender, race, and ethnicity. In the 60-day notice, OFCCP proposed modifying this request to require contractors to identify whether a promotion is “competitive” or “non-competitive.” The proposal also requests information on the previous supervisor, current supervisor, previous compensation, and current compensation of each individual promoted. Additionally, OFCCP proposed adding a requirement for contractors to provide documentation of their established policies and practices related to promotions.

OFCCP received 29 comments on the proposed changes. A total of 14 commenters, including various civil rights and worker advocacy groups, supported the proposal. These commenters stated that more detailed information about promotions would help reveal instances or patterns of discrimination.

A total of 14 commenters, including law firms, employer associations, and human resources consulting firms, opposed the proposal. They asserted that the request is burdensome, and that this information is unnecessary or should only be requested once an indicator of potential discrimination is identified. Further, these commenters asserted that tracking competitive and non-competitive promotions is not required by the regulations, and that OFCCP would have to implement this proposal through the rulemaking process.

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<sup>58</sup> See EEOC Guidance – The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees, May 12, 2022, <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence> (last accessed April 3, 2023).

<sup>59</sup> This item is Item 18(c) in the current scheduling letter.

One individual stated that OFCCP should finalize definitions for the terms “competitive” and “non-competitive” and once finalized, include the definitions in the scheduling letter and regulations or FAQs.

OFCCP disagrees that this proposed item exceeds OFCCP’s regulatory authority and requires rulemaking. As part of their nondiscrimination obligations, contractors are prohibited from discriminating in all employment actions, including promotions.<sup>60</sup> As such, requesting and reviewing information on contractors’ promotions is relevant and within the scope of OFCCP’s authority. However, after careful consideration of these comments, OFCCP is modifying this proposal.

OFCCP is retaining the request for documentation on established policies and practices related to promotions, as this information assists the agency with understanding contractors’ promotion practices. OFCCP has decided to remove the requirement for contractors to identify each promotion as “competitive” or “noncompetitive,” as all contractors may not have this data readily available in their human resource information systems. OFCCP will continue its current practice of requesting more detailed information about the type of promotion at later stages of the compliance review process, if the desk audit analysis reveals potential issues. As a best practice, OFCCP encourages all contractors to maintain this data, as this enables them to more accurately analyze their promotions practices. In the scheduling letter, OFCCP encourages, but does not require, contractors who do maintain this data to submit it to OFCCP, as this will assist the agency in refining its analyses pool and will provide more details on the contractors’ promotion practices. To provide more clarity and uniformity in this area, OFCCP will also provide subregulatory guidance on categorizing promotions as “competitive” and “noncompetitive.”

OFCCP is also removing the request for information on the previous supervisor, current supervisor, previous compensation, current compensation, department, job group, and job title from which and to which individuals were promoted. OFCCP will continue its current practice of requesting this type of information at later stages of the compliance review process, if the desk audit analysis reveals potential issues.

**Terminations Data (Itemized Listing Item 20(d) in 60-day Notice/Renumbered to Item 18(d) in the 30-day Notice)**<sup>61</sup>

The current scheduling letter requests that contractors provide the total number of employee terminations by gender and race/ethnicity for each job group or job title. When providing information on terminations by job title, contractors must also include the department and job group from which the employee was terminated. OFCCP proposed modifying this request to

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<sup>60</sup> See 41 CFR 60-1.4, 60-300.5, 60-741.5.

<sup>61</sup> This item is Item 18(d) in the current scheduling letter.

require contractors to also provide “the total number of employee terminations, broken down by reason(s) for termination (*e.g.*, retirement, resignation, conduct, *etc.*).”

OFCCP received 22 comments in response to this proposal. Various civil rights and worker advocacy groups supported the proposal, stating it would help reveal instances or patterns of discrimination. Eight commenters, including law firms, employer associations, and human resources consulting firms, opposed this more detailed request, stating that there is no regulatory requirement to separately examine reasons for termination. They also stated that even if such details are maintained, contractors are not required to produce such records at this stage of a compliance evaluation. These commenters also stated that this information should not be requested until initial indicators are identified, as having to compile reasons for terminations imposes a burden.

After careful consideration of these comments, OFCCP has decided to remove the request for information on the specific reasons for terminations. OFCCP will continue its practice of requesting this information at a later stage of the review if there are indicators of potential discrimination. While not a requirement, OFCCP encourages contractors to provide this information to OFCCP at the beginning of a desk audit, as having information on the reason for the termination at the beginning of a review will help OFCCP better understand the contractor’s policies and will help the agency create more accurate pools for its impact ratio analyses. Providing this information will also benefit contractors, as OFCCP can better refine its analyses to focus on individuals who may have been terminated for discriminatory reasons. Item 18(d) now reads as follows:

Terminations: For each job group or job title, provide the total number of employee terminations by gender and race/ethnicity. When presenting terminations by job title, also include the department and job group from which the person(s) terminated.

**Number of Employees as of the Start of the Immediately Preceding AAP Year (Itemized Listing Item 20(e) in 60-day Notice/Renumbered to Item 18(e) in the 30-day Notice)**

In the 60-day notice, OFCCP proposed adding the following request to the scheduling letter:

For each job title or job group, provide the total number of employees, by gender and race/ethnicity, as of the start of the immediately preceding AAP year.

Only one commenter, an employer association, submitted a comment on this item. This commenter stated that the information requested is duplicative of and contradicts proposed Item 18(a) in the supporting statement. OFCCP disagrees with this comment. Item 18(a) in the supporting statement requests prior year workforce data by aggregate minority/non-minority and male/female groupings only, which differs from this proposed item. Having information on the total number of employees, by gender and race/ethnicity, as of the start of the immediately preceding AAP year, ensures that OFCCP can create accurate pools for the promotion and termination impact ratio analyses. For these reasons, OFCCP will proceed with this proposal.

**Compensation Data (Itemized Listing Item 21 in 60-day Notice/Renumbered to Item 19 in the 30-day Notice)**<sup>62</sup>

The current scheduling letter requests employee-level compensation data. In the 60-day notice, OFCCP proposed the following changes to this request: Requesting two snapshots of employee-level compensation data (instead of one); clarifying that temporary employees include those provided by staffing agencies; requiring contractors to provide information on factors used to determine compensation; and requiring the submission of documentation and policies related to compensation.<sup>63</sup> OFCCP addresses each issue below.

*Two Snapshots*

OFCCP received 29 comments in response to the proposal to require two snapshots of compensation data. Sixteen organizations, including various civil rights and worker advocacy groups and a labor union, supported the proposal. These groups stated that this additional information will better enable OFCCP to identify potential pay discrimination. These groups also stated that contractors are already required to maintain this information and that collecting this data at the beginning of the compliance review is more efficient as it allows OFCCP to identify systemic pay disparities earlier in the compliance review process.

Thirteen organizations, including employer associations, law firms, human resources consulting firms, and an individual, opposed OFCCP's proposal. These groups stated that increasing the burden related to compliance evaluations diverts contractor resources away from conducting a full, self-critical evaluation of their compensation systems. One law firm asserted that requesting a second snapshot does not improve the statistical models for OFCCP's compensation analysis. Other groups stated that OFCCP's compliance reviews can take a long time and that reviewing multiple years of data would be more time consuming and would impose significant burden on contractors. Other groups stated that this proposal is outside OFCCP's regulations and should be implemented through the rulemaking process.

OFCCP disagrees that this proposed item exceeds OFCCP's current regulatory authority. As part of their nondiscrimination obligations, contractors are prohibited from discriminating in all employment actions, including compensation.<sup>64</sup> As such, requesting and reviewing information on contractors' compensation is within the scope of OFCCP's authority. Further, OFCCP already reviews one snapshot of data, and may ask for pay data and additional documentation covering a

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<sup>62</sup> This item is Item 19 in the current scheduling letter.

<sup>63</sup> The current scheduling letter states that contractors "may" provide information on factors that determine compensation and that contractors "should" provide documentation and policies on their compensation practices.

<sup>64</sup> See 41 CFR 60-1.4, 60-300.5, 60-741.5.

period beginning two years before the date the contractor received the scheduling letter.<sup>65</sup> Receiving two snapshots of pay data is consistent with this policy.

OFCCP also disagrees with the comment asserting that an additional snapshot will not improve OFCCP’s statistical analyses. Generally, OFCCP uses statistical analyses to determine whether there are statistically significant gender, race, or ethnicity-based disparities after controlling for legitimate pay related factors. Two years of data allows OFCCP to better identify whether there is a pattern or practice of systemic compensation discrimination. Also, if the data reveals disparities for the two-year period, OFCCP can remedy the discrimination for the full two-year period (and going forward if it is a continuing violation), thereby ensuring that victims are made whole.<sup>66</sup>

OFCCP also disagrees that this new item will impose a significant burden or somehow divert contractor resources away from conducting their own self-analyses. Contractors are already required to provide one snapshot of compensation data, so have systems in place to provide this information. This new proposal would request the same information for an additional snapshot. For these reasons, OFCCP will proceed with this proposal.

### *Temporary Employees*

OFCCP received 14 comments in response to the proposal clarifying that temporary employees include those provided by staffing agencies. Four organizations, including various civil rights and worker advocacy groups, stated this clarifying language will provide contractors with greater clarity on the meaning of “temporary employees,” and will ensure that compensation data will be collected on a category of workers uniquely susceptible to pay inequity and other poor working conditions.

Ten groups, including employer associations, law firms, a human resources consulting firm, a prime contractor, and an individual, opposed the additional clarification, stating that staffing agency employees are employees of a separate unrelated company in which the contractor has no input on pay decisions. These groups also asserted that contractors’ human resource information systems generally do not include pay information for temporary employees that are provided by staffing agencies. Law firms, employer associations, and a prime contractor stated that OFCCP does not have jurisdiction over non-employee workers, while a human resources consulting firm stated this type of change would require OFCCP to add definition of “employee” to its regulations.

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<sup>65</sup> See FCCM, 1C04 Additional Data Requests, <https://www.dol.gov/agencies/ofccp/manual/fccm/1c-receipt-aaps-and-itemized-listing-data-desk-audit/1c04-additional> (last accessed April 3, 2023).

<sup>66</sup> See FCCM, 7B00 Continuing Violations, <https://www.dol.gov/agencies/ofccp/manual/fccm/7b-timeliness-and-continuing-violation/7b00-continuing-violation> (last accessed April 3, 2023).

In response, OFCCP notes that the agency already has guidance for determining whether an individual is an “employee” and clarifies that this guidance would still apply when assessing the status of temporary employees.<sup>67</sup> This guidance includes factors such as assessing the method of payment to the individual, the source of equipment and materials needed to perform the work, the right to assign additional projects, *etc.*<sup>68</sup> A temporary employee that has an employment relationship with the contractor based on these factors should be included in its compensation data.<sup>69</sup> For these reasons, OFCCP will proceed with this proposal.

### *Pay Factors*

OFCCP received 10 comments in response to the proposal requiring contractors to provide information on factors affecting compensation. Four civil rights and worker advocacy groups supported this proposal, stating that this information will assist OFCCP with identifying pay discrimination. These groups also noted that having this information will provide OFCCP with greater clarity concerning contractors’ pay practices, thereby leading to a more accurate compensation analysis. It will also reduce the need for OFCCP to make additional data requests.

Six organizations, including employer associations and law firms, opposed OFCCP’s proposal, stating that producing this information creates a substantial new burden on contractors, as these factors may not be included in a centralized database. Some also asserted that there is no regulatory requirement to maintain factors related to pay in a certain manner.

OFCCP disagrees that this requirement will be overly burdensome or is inconsistent with regulatory requirements. The regulations at 41 CFR 60-2.17(b) already require contractors to self-audit their compensation systems. Further, the regulations at 41 CFR 60-2.10(c) state that contractors must maintain and make available documentation of their compliance with the § 60-2.17 requirements. Thus, as part of their existing requirements, contractors should already be analyzing their compensation systems to determine if there are impediments to equal employment opportunity. This includes assessing whether various compensation factors are driving pay disparities. The proposal is merely asking contractors to provide information on these factors.

Further, contractors often contend that OFCCP’s analyses are inconsistent with contractors’ pay policies. Having information on factors that affect pay will ensure that OFCCP has relevant information at the beginning of the compliance evaluation and can use this information to inform and increase the accuracy of its compensation analyses. OFCCP regularly requests this

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<sup>67</sup> Employer-Employee Relationship Frequently Asked Questions, <https://www.dol.gov/agencies/ofccp/faqs/employee-relationship> (last accessed April 3, 2023).

<sup>68</sup> *Id.*

<sup>69</sup> Item 19 of the scheduling letter already requires the submission of employee-level compensation data for all employees, including temporary employees.

information during the course of its reviews, as this information allows staff to better understand the contractor’s compensation system(s) and make more accurate findings. This benefits contractors, as OFCCP can conduct analyses (and issue findings in its Predetermination Notices and Notice of Violations, if necessary) that are consistent with the contractor’s practices. For these reasons, OFCCP will proceed with this proposal.

#### *Documentation and Policies Related to Compensation*

OFCCP received four comments in response to the proposal requiring the submission of documentation and policies related to compensation. Employer associations and a law firm opposed OFCCP’s proposal, stating that this additional information is not only not required by the regulations, but is unnecessary at the beginning of a compliance review. These groups also stated that it is unreasonable to ask all contractors to submit such information when only some contractors have unexplained pay disparities.

In response, OFCCP notes that contractors are prohibited from discriminating in all employment actions, including compensation.<sup>70</sup> As such, requesting and reviewing information on contractors’ compensation practices is within the scope of OFCCP’s authority. Further, as discussed above, contractors often contend that OFCCP’s analyses are inconsistent with contractors’ pay policies. Requiring documentation and policies related to compensation will ensure that OFCCP has all relevant information at the beginning of the compliance evaluation and can identify whether there are unexplained pay disparities that require further investigation. For these reasons, OFCCP will proceed with this proposal.

#### **Self-Analysis of Compensation Systems (Itemized Listing Item 22)**

In the 60-day notice, OFCCP proposed adding a new item requesting contractors submit documentation that the contractor has satisfied its obligation to evaluate its “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities,” as required by 41 CFR 60-2.17(b)(3). This new item, as proposed, would read as follows:

Documentation that the contractor has satisfied its obligation to evaluate its “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities,” as part of the contractor’s “in-depth analyses of its total employment process” required by 41 CFR 60-2.17(b)(3). Include documentation that demonstrates at least the following:

- a. When the compensation analysis was completed;
- b. The number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded;

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<sup>70</sup> See 41 CFR 60-1.4, 60-300.5, 60-741.5.

- c. Which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis (*e.g.*, base pay alone, base pay combined with bonuses, *etc.*);
- d. That compensation was analyzed by gender, race, and ethnicity; and
- e. The method of analysis employed by the contractor (*e.g.*, multiple regression analysis, decomposition regression analysis, meta-analytic tests of z-scores, compa-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis, *etc.*).

OFCCP received 27 comments on this proposal. Of these 27 comments, 16 supported and 11 opposed. Various civil rights and worker advocacy groups and a labor union supported this new item. They stated that obtaining this detailed information at the beginning of a compliance review would prompt greater contractor compliance and ultimately benefit more workers. They also stated it will encourage employers to self-audit their employment systems. Further, these groups stated that the request is crafted to ensure that contractors will not be required to produce privileged information.

Those opposing the proposal included law firms, employer associations, and an individual. Two commenters, an employer association and a law firm, stated that contractors will spend more time gathering information for OFCCP rather than conducting full, self-critical evaluations of their compensation systems. They also stated that the information may be subject to attorney-client privilege, so contractors may choose not to perform meaningful analyses due to the risk of disclosure. Other commenters stated that this proposed item conflicts with Directive 2022-01 Revision 1, which states that OFCCP may request additional compensation information if the desk audit reveals disparities. Some commenters also stated that the proposal exceeds OFCCP's regulatory authority, and that the agency must undergo the rulemaking process to add this item.

OFCCP disagrees with the comments opposing the proposal. With respect to regulatory authority and burden, OFCCP notes that the regulations at 41 CFR 60-2.17(b) already require contractors to self-audit their compensation systems. Further, the regulations at 41 CFR 60-2.10(c) state that contractors must maintain and make available documentation of their compliance with the § 60-2.17 requirements. Thus, the proposal is requesting documentation of analyses that contractors should already be conducting. OFCCP has also addressed concerns about privilege as OFCCP will not require the production of privileged attorney-client communications or attorney work product.<sup>71</sup>

To address contractors' concerns about what documentation is sufficient, the proposed language also provides greater specificity on what information OFCCP is requesting. This language will clarify contractors' obligations and will ensure uniformity in submissions. Further, having this information at the beginning of a desk audit will enable OFCCP to conduct a more efficient

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<sup>71</sup> See Directive 2022-01, Revision 1, *Advancing Pay Equity Through Compensation Analysis* (Aug. 18, 2022), available at <https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1> (last accessed April 3, 2023).



analysis of a contractor’s compensation systems (*e.g.*, avoid delays due to follow up requests or disputes about what information should be submitted). With respect to Directive 2022-01 Revision 1, OFCCP notes that once a new scheduling letter is approved, it will update all relevant guidance, including any relevant directives, to align with the new scheduling letter. For these reasons, OFCCP will proceed with the proposed item.

### **Reasonable Accommodation Policies (Itemized Listing Item 23)**<sup>72</sup>

The current scheduling letter requires contractors to provide copies of reasonable accommodation policies and documentation of any accommodation requests received and their resolution. In the 60-day notice, OFCCP proposed adding language to clarify the applicable timeframes for the requested documentation. OFCCP received two comments from an employer association and a law firm on this proposal. The commenters stated that providing this information would be burdensome, as contractors may use numerous systems for tracking reasonable accommodations. These commenters stated that having to gather the requested information may also require input from multiple individuals. Additionally, these commenters stated that there is no regulatory basis to support this proposal.

OFCCP disagrees with these comments. First, the current scheduling letter already requests this information. The proposal is only clarifying that the agency wants documentation pertaining to the immediately preceding AAP year. The current language does not specify a time period. Second, OFCCP disagrees that the proposal exceeds the agency’s regulatory authority or imposes a major burden. As explained above, contractors already provide this information pursuant to the current scheduling letter. Contractors are required to maintain any records “made or kept” relating to requests for reasonable accommodations.<sup>73</sup> Further, contractors are already required to provide this information to OFCCP upon request.<sup>74</sup>

Having this information at the desk audit stage allows OFCCP to verify that all scheduled contractors are meeting their obligations. Adding in the proposed language will also promote uniformity in contractors’ submissions and ensure consistency in what OFCCP is requesting to review across field offices. For these reasons, OFCCP will proceed with this clarification as proposed.

### **EEO Policies (Itemized Listing Item 24)**

In the 60-day notice, OFCCP proposed adding a new item requesting copies of existing written employment policies concerning equal opportunity, including anti-harassment policies, EEO complaint procedures, and employment agreements, such as arbitration agreements, that impact employees’ equal opportunity rights and complaint processes.

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<sup>72</sup> This item is Item 20 in the current scheduling letter.

<sup>73</sup> See 41 CFR 60-1.12(a), 60-300.80(a), and 60-741.80(a).

<sup>74</sup> See 41 CFR 60-1.12(c)(2), 60-300.81, and 60-741.81.

OFCCP received 24 comments on this proposal. Most of the commenters (14) supported the proposal. These commenters included various civil rights and worker advocacy groups and a labor union. In their comments, these groups stated that requesting these policies at the beginning of a compliance review is essential for OFCCP to understand the contractors' employment policies and practices. One of these commenters stated that providing copies of these workplace policies should not be particularly burdensome for contractors, as OFCCP seeks only copies of existing written policies, which employers should already have made readily available to all employees.

Ten commenters, including employer associations, human resources consulting firms and law firms, either opposed OFCCP's proposal entirely or suggested revisions to the proposal. These commenters stated that the requested information is unnecessary at the desk audit stage, exceeds the regulatory requirements, is overly broad, and would impose a substantial burden on contractors. One law firm asserted that OFCCP was requiring contractors to identify and produce all agreements between the contractor and individual employees, and that this would be burdensome and would violate employees' privacy. One law firm requested that OFCCP narrow the scope of the request to a "sample" of redacted agreements.

OFCCP disagrees with the comments opposing the proposal. First, with this proposal, OFCCP is not requesting copies of individual employment agreements. Rather, OFCCP is requesting copies of relevant policies that impact employees' equal employment opportunity rights. To clarify this point, OFCCP has revised the language for the proposed item. The revised language is as follows:

Copies of equal employment opportunity (EEO) policies, including antiharassment policies, policies on EEO complaint procedures, and policies on employment agreements that impact employees' equal opportunity rights and complaint processes (*e.g.*, policies on arbitration agreements). Please provide this information for policies in place for the immediately preceding AAP year. If you are six months or more into your current AAP year when you receive this listing, provide this information for at least the first six months of the current AAP year.

Second, OFCCP disagrees that providing these policies would be overly burdensome, as contractors are providing copies of existing policies. To the extent that contractors are concerned about maintaining the confidentiality of these policies, OFCCP notes that the agency keeps the information confidential to the maximum extent allowed under FOIA.<sup>75</sup> As discussed above, the Department also has a number of safeguards in place to ensure that its IT system is secure, including ensuring that all employees access the network using a Personal Identity Verification

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<sup>75</sup> 41 CFR 60-1.20(g).

card. All employees also receive annual training on safeguarding information, and the FCCM includes specific procedures for ensuring the confidentiality of contractors' submissions.<sup>76</sup>

Lastly, OFCCP agrees with commenters who asserted that this proposal would help the agency better assess a contractor's EEO compliance. An early review of this documentation will help OFCCP ascertain whether these policies limit or interfere with employees' rights. With this information, OFCCP will be better able to determine where to focus its inquiries to have the greatest impact. For these reasons, OFCCP has decided to proceed with this proposal.

### **Review of Personnel Processes (Itemized Listing Item 25)**<sup>77</sup>

The current scheduling letter requires contractors to provide their most recent assessment of their personnel processes, as required by 41 CFR §§ 60-300.44(b) and 60-741.44(b). In the 60-day notice, OFCCP proposed revising this request to include more specificity on the documentation a contractor must submit regarding its review of personnel processes. With these revisions, the item would read as follows:

The contractor's most recent assessment of its personnel processes, as required by 41 CFR 60-300.44(b) and 60-741.44(b). This assessment shall include, at a minimum, a description of the assessment, any impediments to equal employment opportunity identified through the assessment, and any actions taken, including modifications made or new processes added, as a result of the assessment.

OFCCP received five comments on this proposal. Specifically, law firms, employer associations, and an individual opposed the proposal. The law firms stated that this request is duplicative of Item 11 in the supporting statement and is unclear. An employer association and the individual stated this request is a required component of the AAP, therefore making it duplicative and unnecessary.

After careful consideration of these comments, OFCCP has decided to proceed with this change, as proposed. The regulations at 41 CFR 60-300.44(b) and 60-741.44(b) require contractors to assess their personnel processes to determine if their job qualifications are creating barriers to equal employment opportunity for protected veterans and individuals with disabilities. The current scheduling letter does not request detailed information to verify whether contractors are meeting these requirements. The proposed language will assist OFCCP in verifying compliance and will ensure greater protections for individuals with disabilities and protected veterans.

To address confusion about what documentation is required, the proposal includes specific information on what OFCCP is requesting to review. It specifically states that the "assessment

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<sup>76</sup> FCCM at 4A02 Confidentiality, <https://www.dol.gov/agencies/ofccp/manual/fccm/4a-introduction/4a02-confidentiality> (last accessed April 3, 2023).

<sup>77</sup> This item is Item 21 in the current scheduling letter.

shall include, at a minimum, a description of the assessment, any impediments to equal employment opportunity identified through the assessment, and any actions taken, including modifications made or new processes added, as a result of the assessment.” This additional language provides clear guidance on what contractors must submit to demonstrate their compliance.

In response, OFCCP notes that Item 25 focuses on assessing personnel processes with respect to job qualifications for protected veterans and individuals with disabilities (*see* 41 CFR 60-300.44(b) and 60-741.44(b)). Item 11 is limited to the Section 503 regulations and focuses on the contractor’s underutilization analysis. It only requires contractors to assess their personnel processes if there is underutilization for individuals with disabilities and requires the contractor to assess all personnel processes that may be driving the underutilization (not just those related to job qualifications). This may result in contractors assessing similar information as Item 25 when there is underutilization. To avoid duplicative assessments, contractors may choose to reference their Item 11 assessment in such situations. Item 11 also requests other information such as outreach and recruitment efforts, the results of the AAP audit, and any other areas that might affect the success of the AAP. Item 25 does not request this information. For these reasons, OFCCP has decided to proceed with this change, as proposed.

### **30-day Response Period**

Contractors are currently required to submit their AAPs and Itemized Listing information no later than 30 calendar days from the date of receipt of the scheduling letter. OFCCP received 16 comments in response to the 30-day submission period. All 16 commenters opposed OFCCP’s retention of the 30-day period. Some employer associations stated that a 30-day response time is an unrealistic timeframe given the additional items OFCCP is requesting. Law firms argued that 30 days is not enough time to collect, review, and submit the requested items, and would result in more data errors. One law firm in particular suggested that OFCCP should exclude from the 30-day production requirement those items which contractors are not required to maintain in the normal course of business.

After careful consideration of these comments, OFCCP declines to extend the 30-day submission period. OFCCP’s E.O. 11246 regulations specifically require contractors to submit an AAP and supporting documents within 30 days of a request, while the Section 503 and VEVRAA regulations require the submission of the AAP within 30 days of a request from OFCCP, unless the request provides for a different time.<sup>78</sup> OFCCP understands that extraordinary circumstances may prevent contractors from meeting this 30-day period. To account for these situations, OFCCP allows for extensions in the event of extraordinary circumstances (*e.g.*, medical absence

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<sup>78</sup> *See* 41 CFR 60-1.20(e), 60-300.40(d), and 60-741.40(d).

or unexpected departure of key personnel).<sup>79</sup> Moreover, longer response periods delay remedies for victims of discrimination. For these reasons, OFCCP will retain the 30-day period.

### **Failing to Timely Submit Information**

In the 60-day notice, OFCCP proposed adding language that clarifies that the agency may initiate enforcement proceedings if the requested information is not provided within 30 calendar days of receiving the scheduling letter.

OFCCP received two comments opposing this proposed language. Specifically, a human resources consulting firm stated that contractors may need more than 30 days to produce the scheduling letter items, as they do not always maintain the items in the format requested by OFCCP. A law firm argued that OFCCP’s proposal “is clearly intended to be understood by contractors as a threat designed to coerce compliance with the unreasonable 30-day requirement, but in context the proposed statement is deeply misleading and by omission suggests a broad abrogation of contractors’ constitutional rights.”

OFCCP disagrees with these comments. As noted above, the 30-day response period is set forth in OFCCP’s regulations.<sup>80</sup> OFCCP understands that extraordinary circumstances may prevent contractors from meeting this 30-day period and such extraordinary circumstances do not necessarily infer non-compliance. As described above, OFCCP allows for extensions in the event of extraordinary circumstances such as the unexpected turnover or departure of key affirmative action officials.<sup>81</sup> Therefore, OFCCP has implemented procedures for contractors who may be unable to comply with the 30-day deadline. Further, OFCCP has also narrowed the scope of the collection by removing the request for items such as information on competitive and noncompetitive promotions, reasons for termination, and removed the request for information on the previous supervisor, current supervisor, previous compensation, current compensation, department, job group, and job title from which and to which individuals were promoted. For these reasons, OFCCP has decided to proceed with this proposal.

### **General Comments**

In response to the 60-day notice, commenters also provided comments on various general topics. An individual expressed support for OFCCP’s overall proposal, stating that the change is essential for OFCCP to conduct more efficient, consistent, and effective reviews of contractor compliance.

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<sup>79</sup> Requesting Extensions to Submit AAP(s) and Supporting Data, FAQ #2, <https://www.dol.gov/agencies/ofccp/faqs/scheduling-letters#Q0> (last accessed April 3, 2023).

<sup>80</sup> OFCCP’s regulations provide that if “a contractor fails to submit an AAP and supporting documents, including the workforce analysis, within 30 days of a request, the enforcement procedures specified in § 60-1.26(b) shall be applicable.” 41 CFR 60-1.20(e).

<sup>81</sup> Requesting Extensions to Submit AAP(s) and Supporting Data, FAQ #2, <https://www.dol.gov/agencies/ofccp/faqs/scheduling-letters#Q0> (last accessed April 3, 2023).

One anonymous commenter expressed that OFCCP continues to add additional requirements while never providing guidance on what is expected of contractors. OFCCP disagrees with this comment. To assist contractors, OFCCP issues extensive guidance documents, including directives, compliance assistance guides, FAQs, and the FCCM. Collectively, these sources provide extensive guidance to contractors, outlining recordkeeping and reporting requirements, OFCCP’s procedures, as well as best practices to assist contractors in complying with their obligations. OFCCP notes that once a new scheduling letter is approved, it will update all relevant guidance to align with the new scheduling letter. In addition, OFCCP has a help desk line that provides technical assistance to all stakeholders, including contractors.

OFCCP also received a comment from an anonymous submitter raising concerns about the intersection of this ICR with the agency’s authority under the Federal Property and Administrative Services Act of 1949 (Property Act) and the “Major Questions Doctrine” articulated by the Supreme Court. With regard to the Property Act, courts of appeals long ago pronounced that E.O. 11246 “is . . . firmly rooted in congressionally delegated authority,” *United States v. Mississippi Power & Light Co.*, 638 F.2d 899, 905 (5th Cir. 1981); *see also Contractors Ass’n*, 442 F.2d at 170-71; *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964), and that regulations implementing that order “embod[y] a longstanding, congressionally approved policy in government procurement,” *Mississippi Power & Light Co.*, 638 F. 2d at 906. In the many decades since those decisions, Congress has specifically reviewed E.O. 11246, *see, e.g.*, Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary on the Philadelphia Plan and S. 931, 91st Cong., 1st Sess. (1969), and has repeatedly revised the Procurement Act, *see, e.g.*, Public Law 107-217, secs. 1, 5(a)-(b), 116 Stat. 1062, 1063, 1068, 1303 (2002) (recodifying relevant provisions of the Act while “mak[ing] no substantive change in existing law”), yet has not taken any steps to question or limit the well-known judicial understanding of those authorities.

With regard to the “major questions” doctrine, OFCCP respectfully submits that the additional information requested in this ICR includes information that OFCCP has historically requested at some point during specific compliance evaluations under its well-established authority to request and inspect records and information relevant to compliance;<sup>82</sup> in general, this renewed ICR is merely requesting that contractors provide this information earlier in the compliance evaluation process. To the extent that new information is being requested, such as certain company policies relevant to equal employment opportunity or additional information related to contractors’ promotion and termination practices, OFCCP has carefully tailored such requests to information that is relevant to compliance with OFCCP’s existing legal authorities. Accordingly, we respectfully submit that the scope of changes at issue in this reauthorization are, at most,

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<sup>82</sup> *See* E.O. 11246 §§ 202(6), 205, 206(a); 41 CFR 60-1.12(a) and (b), 60-1.43, 60-2.10(c), 60-2.32.

incremental ones that do not approach the “magnitude and consequence” of agency actions that have been challenged under the “major questions” doctrine.<sup>83</sup>

### **Burden**

OFCCP received 39 comments addressing the agency’s burden estimates for contractors to develop and maintain AAPs and respond to the scheduling letter. Some of the comments, primarily from civil rights and worker advocacy groups, stated that the proposed changes to the scheduling letter will improve the information the agency receives while minimizing the additional burden on contractors. These groups also stated that the proposal will reduce contractors’ uncertainty about their obligations.

Some commenters, including law firms, employer associations, and a human resources consulting firm, stated that OFCCP’s proposed changes do not comply with the Paperwork Reduction Act (PRA). Specifically, these groups asserted that the purpose of the PRA is to reduce the total amount of burden the Federal Government imposes on private entities and balance this burden against the practical utility of collected information. They argued that OFCCP’s proposal increases burden but fails to explain the utility of the collected information.

Other commenters, primarily employer associations and law firms, disagreed with OFCCP’s burden estimates. They asserted that the agency underestimated the additional burden on contractors to respond to the proposed scheduling letter and stated that contractors’ human resource information systems do not capture all the information OFCCP is requesting. One commenter stated that OFCCP underestimated the number of employees involved in developing and maintaining AAPs and the actual cost per employee hour. The same commenter suggested that a senior human resources professional is primarily responsible for developing and maintaining AAPs, and OFCCP’s estimate should account for this official having a greater role in the review process. Finally, some commenters stated that OFCCP underestimated the burden for its own staff to review documentation received in response to the scheduling letter. These commenters noted that the staff burden for the proposal is the same as the estimate in the supporting statement for the current scheduling letter.

OFCCP carefully considered the comments received and addresses each topic below:

#### *PRA and the Utility of the Collected Information*

OFCCP disagrees with the commenters who asserted that OFCCP’s proposal does not comply with the PRA because the proposal increases burden but fails to explain the utility of the collected information. OFCCP described the utility of the proposal in the 60-day notice and has

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<sup>83</sup> See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (finding that an EPA regulation that “force[d] a nationwide transition away from the use of coal to generate electricity” based on “the vague language of an ‘ancillary provision’” of the Clean Air Act was inconsistent with the “major questions” doctrine).

again provided extensive information on the utility of the collected information in this supporting statement. As described in more detail above, collecting this information will benefit OFCCP, contractors and workers in several ways, including:

- Benefiting workers and strengthening OFCCP’s enforcement by ensuring that OFCCP has the documentation necessary to verify contractors’ compliance with existing nondiscrimination and affirmative action obligations;
- Collecting two years of data, which allows OFCCP to better identify whether there is a pattern or practice of systemic compensation discrimination. This information also benefits workers, as OFCCP can remedy the violations for the full two-year period (and going forward if there is a continuing violation);
- Helping contractors and OFCCP better identify whether there are barriers to equal employment opportunity in their workplaces earlier in the review process;
- Enabling OFCCP to conduct more accurate promotion and termination analyses;
- Helping OFCCP better understand contractors’ policies and conduct analyses (and issue findings in its Predetermination Notices and Notices of Violation, if necessary) that are consistent with contractors’ practices;
- Promoting uniformity in contractors’ submissions by providing more specific instructions on the documentation they must submit. This will also promote consistency in what OFCCP is requesting to review across field offices.

#### *Wage Rates*

OFCCP acknowledges that different employees, such as management analysts and human resources managers, may be responsible for developing and maintaining AAPs and responding to the scheduling letter. In the 60-day notice, OFCCP estimated a wage rate based on an 80/20 split between management analysts and human resources managers, respectively.

OFCCP agrees with commenters who asserted that human resources managers typically play a greater role in developing and maintaining AAPs and responding to the scheduling letter. For this reason, OFCCP changes the wage rate to a 60/40 split between human resources managers and management analysts, respectively. This results in a \$10.06 increase per burden hour.

#### *Time Burden for Contractors*

As described above, OFCCP is no longer requiring contractors to identify the specific reasons for terminations and whether a promotion is “competitive” or “non-competitive.” OFCCP is also removing the request for information on the previous supervisor, current supervisor, previous compensation, current compensation, department, job group, and job title from which and to which individuals were promoted. This reduces the burden for responding to the proposed scheduling letter from 39 hours to 37.5 hours (*see* burden calculations below).



The agency declines to make additional changes to the time burden estimates for contractors. OFCCP acknowledges that the precise amount of time each contractor will take to develop and maintain AAPs and respond to the scheduling letter is difficult to estimate, as contractors vary in terms of resources and procedures. To estimate the burden, the agency uses weighted averages to account for contractors of different sizes. The agency provides different burden estimates for contractors with 50 – 100 employees, 101 – 150 employees, 151 – 500 employees, and 501 or more employees and then uses a weighted average across all four groups. The burden estimates detailed below are based on these averages (*see* burden calculations below).

#### *Time Burden for OFCCP Staff*

As described above, OFCCP believes that the proposed changes will result in fewer follow-up requests for information. The proposed changes will also enable staff to refine analyses earlier in the compliance review, thereby resulting in closing reviews more expeditiously. However, OFCCP acknowledges that agency staff will need additional time to review and analyze newly added items such as the additional compensation snapshot and EEO policies. Accordingly, the agency increases the staff burden estimate from 32 to 42 hours. This change is reflected in Paragraph 14 below.

### **9. Gift Giving**

OFCCP does not provide gifts or payments to respondents.

### **10. Confidentiality of Information**

Some of the information contractors submit to OFCCP during a compliance evaluation may be considered business confidential information or personally identifiable information. OFCCP will treat records provided by the contractor as confidential to the maximum extent the information is exempt from public disclosure under the FOIA, 5 U.S.C. 552. OFCCP will evaluate all information requests pursuant to the public inspection and disclosure provisions of FOIA and DOL's implementing regulations at 29 CFR part 70.

OFCCP safeguards and protects personally identifiable information it receives from contractors to the maximum extent allowable under the law in accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a). In addition, the regulation at 41 CFR 60-1.20(f) allows a contractor that is concerned with the confidentiality of personally identifiable information such as lists of employee names, reasons for termination, or pay data, to use alphabetic or numeric coding or an index. The coding or index for pay and pay ranges must be consistent with the ranges assigned to each job group for purposes of the compliance evaluation.

### **11. Questions of Sensitive Nature**

Generally, OFCCP does not collect information of a personal nature, such as marital status, religious beliefs, or most other matters commonly considered private during the course of its

compliance evaluation. During compliance evaluations, OFCCP regularly requests information from contractors on workplace accommodations received, including reasonable accommodation requests for disability or religious accommodation requests, and their resolution. Where allegations of employment discrimination are present, evidence of a personal nature may become relevant. Under such circumstances, OFCCP may seek evidence concerning race, color, religion, sex, sexual orientation, gender identity, national origin, disability status, or veteran status of job applicants and employees, and the compensation of a contractor's employees, as appropriate. In general, the gathering of such data is unique to each investigation.

OFCCP's regulations require contractors to list employees and applicants by sex and by race or ethnicity in their employment activity data to evaluate contractors' nondiscrimination and affirmative action efforts. Similarly, contractors invite applicants to self-identify whether they are a protected veteran or have a disability. Contractors, as required by OFCCP's regulations, regularly survey their employees as to whether they have a disability. Contractors inform their employees that they collect and maintain such data for purposes of meeting their nondiscrimination and affirmative action obligations.

## **12. Information Collection Hour Burden**

The public impact of this information collection is broken down into recordkeeping, reporting, and third-party disclosure burdens. The sections that follow outline the calculations of the burden based on the legal and administrative requirements covered in Paragraph 1 of this supporting statement. OFCCP bases its calculations on the average number of contractor establishments that meet the threshold for developing and maintaining an E.O. 11246 AAP. The average number of contractor establishments is 104,303.<sup>84</sup> OFCCP updated the estimate from the 60-day notice in the *Federal Register* for the number of contractor establishments that meet the threshold for developing and maintaining an E.O. 11246 AAP to use a three-year average.

### **Recordkeeping Burden**

OFCCP's regulations impose the following recordkeeping burden for maintaining documentation and records and developing, updating, and maintaining AAPs:<sup>85</sup>

- Preservation of personnel or employment records
- Initial development of an AAP
- Annual update of an AAP
- Maintenance of an AAP
- Uniform Guidelines on Employee Selection Procedures

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<sup>84</sup> OFCCP obtained the average number of contractor establishments from the most recent EEO-1 Report data available, which is from FY 2020, FY 2019, and FY 2018.

<sup>85</sup> This ICR excludes the AAP recordkeeping burden for VEVRAA and Section 503 AAPs as it is covered under OMB Control Nos. 1250-0004 and 1250-0005, respectively.

The paragraphs that follow break down the calculations for each requirement.

(1) Preservation of Personnel or Employment Records

OFCCP estimates the burden hours for the preservation of personnel or employment records to be zero hours. This burden for contractors with fewer than 50 employees is covered by UGESP, and contractors with 50 or more employees are covered by the AAP recordkeeping requirements (except for contractors with 1 to 14 employees, the burden for which is covered under this ICR, as described below).

(2) Initial Development of an AAP

OFCCP estimates that 1,043 or 1 percent, of the 104,303 contractor establishments are first-time contractors developing AAPs. OFCCP assesses this burden using the following calculation:

Contractor establishments with 50 to 100 employees will take 73 hours to develop an AAP; establishments with 101 to 150 employees will take 91 hours; establishments with 151 to 500 employees will take 144 hours; establishments with 501 or more employees will take 186 hours. Using a weighted average of 108 hours per establishment multiplied by 1,043, OFCCP calculates the total burden for the initial development of an AAP by all new contractors to be 112,644 hours.

(3) Annual Update of an AAP

OFCCP estimates that 103,260, or 99 percent, of existing contractor establishments will conduct an annual update of AAPs. OFCCP assesses this burden using the following calculation:

Contractor establishments with 50 to 100 employees will take 18 hours to conduct an annual update of an AAP; establishments with 101 to 150 employees will take 35 hours; establishments with 151 to 500 employees will take 78 hours; establishments with 501 or more employees will take 105 hours. Using a weighted average of 47 hours per establishment multiplied by 103,260, OFCCP calculates the total burden for all contractors' annual update of an AAP to be 4,853,220 hours.

(4) Maintenance of an AAP

As all contractor establishments meeting the jurisdictional thresholds are required to maintain an AAP, OFCCP assesses this burden using the following calculation:

Contractor establishments with 50 to 100 employees will take 18 hours to maintain an AAP; establishments with 101 to 150 employees will take 35 hours; establishments with 151 to 500 will take 78 hours; establishments with 501 or more employees will take 105 hours. Using a

weighted average of 47 hours per establishment multiplied by 104,303, OFCCP calculates the burden for maintaining an AAP to be 4,902,241 hours.

(5) UGESP

As stated previously, the EEOC sponsors the UGESP information collection.<sup>86</sup> However, that collection only accounts for the burden associated with all employers with 15 or more employees. Since contractors with 1 to 14 employees are subject to OFCCP’s recordkeeping requirements, OFCCP includes a burden estimate for all contractors with 1 to 14 employees, estimated to be an average of 1,018 contractor establishments.<sup>87</sup> OFCCP assumes that contractors spend approximately 2 hours meeting the UGESP obligations. Therefore, the burden for this requirement is estimated at 2,036 hours (1,018 contractor establishments x 2 hours).

Total Recordkeeping Burden

<b>Activity</b>	<b>Hours</b>
Preservation of Personnel or Employment Records	0
Initial development of an AAP	112,644
Annual update of an AAP	4,853,220
Maintenance of an AAP	4,902,241
UGESP	2,036
<b>Total</b>	<b>9,870,141</b>

Reporting Burden

This section breaks down the burden incurred by contractors when responding to the scheduling letter. Item 2 contains a reporting requirement for reporting denied visas.

1) Scheduling Letter

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<sup>86</sup> See OMB Control No. 3046-0017, available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202106-3046-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202106-3046-001) (last accessed April 3, 2023).

<sup>87</sup> The average number of establishments with 1 to 14 employees derived from the most recent EEO-1 report data available, which is from FY 2020, FY 2019, and FY 2018.

OFCCP sends the scheduling letter to contractors when they are selected for a compliance review. OFCCP estimates the burden hours for assembling and submitting the requested documents and responding to the scheduling letter to be approximately 37.5 hours per contractor. OFCCP anticipates conducting approximately 1,258 reviews annually.<sup>88</sup> The burden for assembling and submitting the requested material is estimated at 47,175 hours (1,258 x 37.5 hours). OFCCP updated the estimate from the 60-day notice in the *Federal Register* for assembling and submitting the requested documents and responding to the scheduling letter to account for changes to the requested items.

## 2) Reporting Denied Visas

OFCCP estimates that it would take 2 hours for a contractor to prepare and send the notification of a visa denial, as required by 41 CFR 60-1.10. However, OFCCP has never received a visa denial notification and has no reason to believe that there will be an upcoming increase of notifications. Therefore, the reporting burden is 0 hours.

### Total Reporting Burden

Type of Compliance Evaluation	Burden Hours
Scheduling Letter	47,175
Reporting Denied Visas	0
<b>Total Reporting Burden</b>	<b>47,175</b>

### Third-Party Disclosure Burden

OFCCP’s third-party disclosure requirements are found at 41 CFR 60-1.4(a)(4), 60-300.5(a)(10), and 60-741.5(a)(5), which require contractors to notify their labor organizations that they must comply with E.O. 11246, VEVRAA, and Section 503. OFCCP estimates an average of 1 hour per contractor establishment to notify labor organizations, which is largely an overestimation because it assumes that all contractor establishments have a labor union to notify. OFCCP has no accurate way of determining the exact number of contractors with labor unions. The third-party disclosure burden is estimated at 104,303 hours (104,303 contractor establishments x 1 hour).

### Total Recordkeeping, Reporting, and Third-Party Disclosure Burden Hours

The table below contains the summary of the total burden hours associated with this ICR, combining recordkeeping, reporting, and third-party disclosure hours.

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<sup>88</sup> OFCCP obtained the number of compliance reviews conducted annually by averaging the number of compliance reviews completed in FY21, FY20, and FY19 (1,125 + 1,318 + 1,331/ 3).

Recordkeeping burden hours	9,870,141
Reporting burden hours	47,175
Third-party disclosure burden hours	104,303
<b>Total hours</b>	<b>10,021,619</b>

### **Monetized Burden Cost**

OFCCP estimates that the total burden hours translate to approximately \$853,441,074 in burden costs to contractors using data from the Bureau of Labor Statistics (10,021,619 hours x \$85.16).<sup>89</sup> OFCCP updated the estimate from the 60-day notice in the *Federal Register* for the wage rate to a 60/40 split between human resources managers and management analysts, respectively.

### **13. Information Collection Cost Burden**

OFCCP estimates that contractors will have some operating and maintenance costs associated with this collection. The agency prefers that contractors submit required documentation electronically, but approximately 50 percent of contractors will send paper copies through the mail.

OFCCP assesses a cost for the 50 percent of contractors that send paper copies of the required documents through the mail. OFCCP estimates the average submission of the required documentation to be approximately 60 pages and using a cost of \$.16 per page, the agency calculates that the copying cost is \$6,038 (60 pages x 629 contractors x \$.16 per page).<sup>90</sup>

In addition, OFCCP estimates an average mailing cost of \$8.05 per contractor, using a USPS Priority Mail, flat rate envelope.<sup>91</sup> Therefore OFCCP estimates that the cost of mailing the required documentation to OFCCP is \$5,063 (629 contractors x \$8.05).

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<sup>89</sup> Bureau of Labor Statistics, Occupational Employment Statistics, Occupational Employment and Wages, May 2021, [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm) (last accessed April 3, 2023). \$65.67 per hour for Human Resource Managers and \$48.33 per hour for Management Analysts. The calculation uses a 60/40 split between Human Resource Managers and Management Analysts, which equals \$58.73. BLS, Employer Costs for Employee Compensation, September 2022, <https://www.bls.gov/news.release/ecec.toc.htm> (last accessed April 3, 2023), fringe benefit and overhead costs are 45 percent of wages. \$58.73 x 1.45 = \$85.16.

<sup>90</sup> Based on the average copying cost at major paper supply stores.

<sup>91</sup> <https://www.usps.com/business/prices.htm> (last accessed April 3, 2023).

The total estimated operating and maintenance cost for all contractors is an estimated \$11,101 (\$6,038 copying costs + \$5,063 mailing costs).

Moreover, OFCCP estimates an average mailing cost of \$.47 per contractor for notifying labor organizations.<sup>92</sup> The total mailing cost is estimated at \$24,511 (\$.47 x 52,152 contractor establishments).

The total information collection cost burden to respondents is \$35,612 (\$11,101 + \$24,511). OFCCP updated the cost estimate from the 60-day notice in the *Federal Register* for copying and using a USPS Priority Mail, flat rate envelope based on the most current rates.

#### **14. Cost to the Federal Government**

OFCCP estimates the annual cost to the Federal Government as follows:

OFCCP staff will spend approximately 42 hours reviewing documentation received in response to a compliance review. The burden is calculated at 52,836 hours (42 hours x 1,258 compliance reviews). The cost is \$2,870,580 (52,836 x \$54.33<sup>93</sup>). OFCCP updated the burden estimate from the 60-day notice in the *Federal Register* for OFCCP staff to review documentation received in response to a compliance review to account for the additional time needed to review the new items added to the scheduling letter.

#### **15. Program Changes or Burden Adjustments**

OFCCP is requesting OMB approval of 10,021,619 burden hours. The previous clearance in 2020 contained approval of 10,567,633 hours. This results in an overall decrease of 546,014 hours. The 60-day supporting statement requested OMB approval of 9,021,158 burden hours. OFCCP changed the methodology for estimating the number of contractor establishments impacted by the recordkeeping, reporting, and third-party disclosure requirements in this ICR. Previously, OFCCP used a single year of the most recent EEO-1 data and now OFCCP is using a three-year average of the most recent EEO-1 data because it is more representative of the fluctuating number of contractor establishments who meet OFCCP's jurisdictional thresholds. A summary of the changes for the individual requirements is outlined below.

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<sup>92</sup> *Id.*

<sup>93</sup> Hourly rate based on grade 12, step 4 on the General Schedule, which represents an average salary for an OFCCP compliance officer. See "Salary Table 2023-GS Incorporating the 4.1% General Schedule Increase," available at [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/GS\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/GS_h.pdf) (last accessed April 3, 2023). BLS, Employer Costs for Employee Compensation, September 2022, <https://www.bls.gov/news.release/ecec.toc.htm> (last accessed April 3, 2023), fringe benefit and overhead costs are 45 percent of wages. \$37.47 x 1.45 = \$54.33.

a. Recordkeeping Burden Hours

1) Preservation of personnel or employment records

The previous submission included zero hours. The current request is also for zero hours. The burden associated with records maintained by contractors with fewer than 50 employees is covered by UGESP and by contractors with 50 or more employees is covered by the AAP recordkeeping requirements (except for contractors with 1 to 14 employees, the burden for which is covered under this ICR).

2) Initial Development of an AAP

The previous submission included 118,720 hours. The current request is 112,644 hours for an adjustment decrease of 6,076 hours. The decrease is attributable to the decrease in the number of contractor establishments from the previous submission (112,007) to the three-year average in the current request (104,303).

3) Annual Update of an AAP

The previous submission included 5,100,802 hours. The current request is 4,853,220 hours for an adjustment decrease of 247,582 hours. The decrease is attributable to the decrease in the number of contractor establishments from the previous submission (112,007) to the three-year average in the current request (104,303).

4) Maintenance of an AAP

The previous submission included 5,152,322 hours. The current request is 4,902,241 hours for an adjustment decrease of 250,081 hours. The decrease is attributable to the decrease in the number of contractor establishments from the previous submission (112,007) to the three-year average in the current request (104,303).

5) Uniform Guidelines on Employee Selection Procedures

The previous submission included 2,032 hours. The current request is 2,036 hours for an adjustment increase of 4 hours. The increase is attributable to the slight increase in the number of contractor establishments that employ 1 to 14 employees from the previous submission (1,016) to the three-year average in the current request (1,018).

b. Reporting Burden Hours

1) Scheduling Letter



The previous submission included a total of 70,000 burden hours associated with the scheduling letter. The current request is for 47,175 hours for an adjustment decrease of 22,825 hours. The individual burden per contractor for responding to the scheduling letter increased from 28 hours to 37.5 hours because of the new requirements added in the proposal (as described above). However, the overall burden for the compliance review scheduling letter decreased because OFCCP changed its methodology to use the average number of compliance reviews completed in the last three years to estimate the number of compliance reviews it expects to complete annually (1,258 vs. 2,500 in the previous submission). The previous estimate used was more than double what OFCCP actually completed. If OFCCP used the three-year methodology in the previous submission, the overall burden for the scheduling letter would have increased due to the 9.5 hour increase per contractor to respond to the new items.

c. Third-Party Disclosure Burden Hours

The previous submission included 112,007 hours. The current request is 104,303 hours for an adjustment decrease of 7,704 hours. The decrease is attributable to the decrease in the number of contractor establishments from the previous submission (112,007) to the three-year average in the current request (104,303).

d. Cost Burden

The previous submission included \$62,677 in cost burden. The current request is \$35,612 for an adjustment decrease of \$27,065. Although the average costs of copying and mailing increased, the overall cost decreased due to the decrease in the number of compliance reviews from the previous submission (2,500) to the three-year average in the current request (1,258). It also decreased due to the decrease in the number of contractor establishments from the previous submission (112,007) to the three-year average in the current request (104,303).

**16. Publication of Data for Statistical Use**

OFCCP does not publish the data collected by way of the items contained under this information collection as statistical tables.

**17. Approval Not to Display the Expiration Date**

OFCCP is not seeking approval to not display the expiration date.

**18. Exception to the Certification Statement**

OFCCP is not seeking exemptions to the certification statement.

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**B. STATISTICAL METHODS**

This information collection does not use statistical methods.