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Debra A. Carr
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, N.W., Room C-3325
Washington, D.C. 20210

Re: OMB Control No. 1250-0003
Comments in Support of OFCCP's Changes to Scheduling and Compliance Check Letters

Dear Ms. Carr:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, the undersigned organizations write to comment on the Office of Federal Contract Compliance Programs' (OFCCP) proposal to extend the Office of Management and Budget's approval of the non-construction supply and service Information Collection. We strongly support the proposed changes and additions to OFCCP's Scheduling Letter and the accompanying Itemized Listing, which will strengthen efforts to combat discriminatory practices among federal supply and service contractors.

OFCCP plays a critical role in ensuring that taxpayer dollars are not used to subsidize employment discrimination. OFCCP's mission under Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act is to ensure that federal contractors comply with their obligations not to discriminate in the workplace, and that they take affirmative action to ensure equal employment opportunity. With jurisdiction over millions of workers – nearly a quarter of the civilian workforce – the agency can and should play a pivotal role in combating unlawful discrimination. The agency must be equipped with the tools and information it needs to carry out this important mission.

We applaud OFCCP's decision to gather more information about contractors' personnel policies and hiring, promotion, termination, and compensation decisions upon initiating a compliance review. The enhanced request for information will enable the agency to more effectively investigate, analyze, detect, and rectify discrimination. We offer the following comments on the proposed Information Collection – in particular, the proposed revisions to the Itemized Listing.

The revised Itemized Listing will promote compliance by contractors while also aiding OFCCP in identifying those contractors engaged in unlawful discrimination. In the course of collecting and providing more detailed information at the "desk audit" phase, contractors may become aware of potential compliance issues that might otherwise go unnoticed and unaddressed. The process of responding to the enhanced information request will lead contractors to review personnel practices that may lead to unlawful discrimination. Moreover, by gathering more comprehensive data in the early stages of a compliance evaluation, OFCCP will be better able to determine which contractors merit an on-site

review. The data will allow OFCCP to more quickly and accurately identify potential violations and better focus its limited enforcement resources. Additionally, the data will alert OFCCP to the particular areas in which contractors are likely out of compliance, which will narrow the issues that require further investigation and auditing. The revised Itemized Listing will ultimately decrease the burden on law-abiding businesses by enabling OFCCP to recognize when on-site review is unnecessary.

The collection of personnel policies, including leave and religious accommodation policies, will enable OFCCP to better to detect discrimination on the basis of sex, disability, or religion and will enable increased departmental coordination. Item 8 of the Itemized Listing would supplement existing obligations to submit equal employment opportunity and affirmative action policies by requiring contractors to submit copies of their collective bargaining agreements and employment leave policies relating to the Family and Medical Leave Act, pregnancy leave, and accommodations for religious observances and practices. Analysis of leave policies would enhance OFCCP's ability to detect discrimination on the basis of sex or religion. Furthermore, because OFCCP's enforcement responsibilities intersect with those of the Wage and Hour Division and the Equal Employment Opportunity Commission, auditing and sharing these policies would improve the efficiency and effectiveness of operations at all three agencies.

In addition to collecting the personnel policies noted above, the Department of Labor (Department) should obtain information about contractors' arbitration policies. Particularly in the wake of the Supreme Court's recent decision in *AT&T Mobility v. Concepcion*, arbitration policies may be designed to prevent employees from vindicating their equal employment opportunity rights in the courts, on an individual basis or as a class. Such arbitration policies can place OFCCP in a unique position to obtain systemic relief for systemic discrimination.

The revised Itemized Listing will enable OFCCP to identify similarly-situated employees with the same job title or within the same job group. Proposed Item 11 of the Itemized Listing would require contractors to submit data related to applications, hires, promotions, and terminations by job group and job title, rather than one or the other. In some cases, comparisons within job group may be appropriate, while in other cases comparing employees with the same job title may yield more useful information. Collecting more robust data will provide OFCCP with flexibility to consider the various factors that may influence personnel decisions.

Additionally, the new item 11 would require data to be sorted by specific racial and ethnic group, rather than minority or non-minority. The revised requirement will eliminate confusion as to who qualifies as a minority. Moreover, the enhanced precision of the data collected will enable OFCCP to perform a more refined analysis of personnel decisions, in order to ensure that they reflect equal treatment of applicants and employees in all racial and ethnic groups. Rather than requesting applicant flow information after a desk audit, this information will be analyzed at the desk audit stage of a compliance evaluation. By requiring contractors to provide data about the actual pool of individuals considered for hire, promotion, or termination decisions, OFCCP will be better able to identify a potential adverse impact earlier in the investigatory process.

The revised Itemized Listing will collect compensation data to enable OFCCP to more readily identify unlawful pay discrimination. Proposed Item 12 of the Itemized Listing would require contractors to provide individualized compensation data for each employee, rather than collective compensation data for each sex and racial/ethnic group. Individualized, employee-level data will permit OFCCP to conduct a more sophisticated and effective compensation analysis. Moreover, this revision

would reduce the burden on contractors, who currently must perform the extra step of aggregating their compensation data.

This information collection will bolster OFCCP's pay equity enforcement efforts. The comprehensive definition of "compensation," to include base salary, wage rate, bonuses, incentives, commissions, merit increases, locality pay, and overtime, would ensure that all possible forms of employee remuneration are taken into account when the agency assesses a contractor's compensation practices. Additionally, requiring contractors to submit any documentation and policies that explain the factors and reasoning used to determine compensation would help OFCCP ascertain whether pay disparities reflect discriminatory bias or legitimate considerations such as education and experience. In addition to the documentation noted above, we urge OFCCP to consider requiring contractors to submit their paid leave policies and any policies relating to employee communications about compensation.

OFCCP's proposed Information Collection should supplement rather than substitute for a compensation data collection tool. In February 2011, OFCCP issued an Advance Notice of Proposed Rulemaking regarding a compensation data collection tool. OFCCP should remain on course to develop and implement such a tool. Creating an instrument specific to compensation data would underscore the agency's renewed commitment to rooting out pay discrimination. The data collected can be used strategically to identify contractors who are likely engaging in pay discrimination and whose compensation practices warrant closer inspection.

The proposed changes to OFCCP's compliance check process also will aid OFCCP's enforcement efforts. Currently, OFCCP's compliance check process entails an on-site review to ensure that contractors maintain records consistent with regulatory obligations. We support the proposal to provide contractors with the option to arrange for an on-site review or mail Affirmative Action Plan information, examples of job advertisements and listings, and examples of accommodations for persons with disabilities.

Thank you for the opportunity to provide comments on this important issue. The proposed revisions to the Information Collection will enable OFCCP to conduct a more robust examination of contractors' personnel practices at an early stage and maximize agency resources in subsequent investigations.

If you have any questions regarding these recommendations, please feel free to contact Sarah Crawford, Director of Workplace Fairness at the National Partnership for Women & Families, at 202-986-2600, or Lisa Bornstein, Senior Counsel at The Leadership Conference on Civil and Human Rights, at 202-263-2856.

Sincerely,

9to5, National Association of Working Women
American Association of University Women (AAUW)
American Civil Liberties Union (ACLU)
The Leadership Conference on Civil and Human Rights
Legal Momentum
National Employment Lawyers Association (NELA)
National Partnership for Women & Families