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October 11, 2011

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

Re: RIN 1250-AA03
Comments in Response to OFCCP's Advance Notice of Proposed Rulemaking
Regarding a Compensation Data Collection Tool

Dear Ms. Carr:

The Employment Task Force of The Leadership Conference on Civil and Human Rights appreciates the opportunity to comment on the Office of Federal Contract Compliance Programs' (OFCCP) Advance Notice of Proposed Rulemaking regarding the development and implementation of a compensation data collection tool.

The Leadership Conference is 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. We support the creation of such a tool and believe that it will prove highly useful for detecting potential pay discrimination among current contractors, analyzing trends in compensation practices across businesses, and preventing future discrimination by screening companies before they receive a contract.

With jurisdiction over at least 26 million workers, comprising nearly one quarter of the civilian workforce, OFCCP plays a unique and vital role in combating unlawful employment discrimination. The agency is responsible for enforcing Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act, which require federal contractors and subcontractors to ensure equal employment opportunity. Identifying and remedying compensation discrimination has always been an important part of OFCCP enforcement efforts and we commend the agency's efforts to make this issue a priority. This undertaking will help to ensure that the over \$500 billion in taxpayer dollars spent on federal contracts each year are not used to subsidize unlawful compensation discrimination.

Our nation's commitment to civil rights and equal employment opportunity requires strong leadership by the federal government. A compensation data

collection instrument is essential to the Department of Labor's pursuit of these important goals. It will help contractors improve their compliance with equal opportunity requirement and helps OFCCP make efficient use of limited resources. A compensation data collection tool will provide contractors with the necessary means to assess and improve their pay policies and identify disparities in pay that require closer scrutiny by OFCCP.

As OFCCP has recognized, women and minority workers continue to face significant pay disparities in the United States. The average woman working full time, year round is still paid only 77 cents for every dollar paid to the average man.¹ African-American and Latina women are at a particular disadvantage: as full-time workers, they earn only 62 percent and 54 percent, respectively, of what white men earn.² Women in every age group,³ at every level of educational achievement,⁴ and in every industry,⁵ are underpaid relative to their male counterparts. These troubling statistics underscore the need for government scrutiny of discriminatory pay practices by federal contractors.

We applaud OFCCP's move to address the pay gap by instituting a new instrument for collecting compensation data from federal contractors. The data collected by this instrument will offer an invaluable tool in efforts to eliminate discriminatory pay practices. We encourage OFCCP to use this instrument to identify those establishments that are most likely to be out of compliance with pay equity requirements, to analyze compensation trends at the industry level, and to assist contractors in conducting self-audits.

Collecting data in a wide range of compensation-related categories will enable OFCCP to determine whether further investigation into pay practices is needed. OFCCP should request data for average starting compensation, average pay raises, average bonuses, minimum and maximum salary, standard deviation or variance of salary, the number of workers in each gender and race/ethnicity category, and average compensation by job series. This information would highlight any pay disparities that might point to the existence of discrimination. However, OFCCP should also request data on factors that could legitimately explain pay disparities, such as average tenure and average number of hours worked.

OFCCP should collect data in the manner that will best predict pay discrimination. OFCCP should collect compensation data by job title and by Affirmative Action Plan (AAP) job group, rather than by EEO-1 categories. According to a recent survey, 70

¹ Calculations from U.S. Census Bureau, Current Population Survey, 2011 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2010 - People 15 Years Old and Over by Total Money Earnings in 2010, Age, Race, Hispanic Origin, and Sex, *available at* <http://www.census.gov/hhes/www/cpstables/032011/perinc/toc.htm>.

² *Id.*

³ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2009 (2010), *available at* <http://www.bls.gov/cps/cpswom2009.pdf>.

⁴ AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP (2011), *available at* <http://www.aauw.org/learn/research/upload/SimpleTruthAboutPayGap.pdf>.

⁵ U.S. Dep't of Labor, Bureau of Labor Statistics, TED: The Editor's Desk, Women's Earnings and Employment by Industry, 2009, http://www.bls.gov/pub/ted/2011/ted_20110216_data.htm (last visited Aug. 22, 2011).

percent of federal contractors group their employees by job title when conducting a compensation analysis.⁶ Thus, collecting data by job title should not be burdensome for most contractors. Furthermore, individuals who share a job title are likely to be similarly situated. However, it is possible that employees with different job titles may also be similarly situated. For this reason, OFCCP should also collect compensation data by AAP job group. Because contractors are required to establish AAP job groups and maintain personnel activity data by those job groups, contractors are already familiar with this method of categorization. By contrast, EEO-1 categories are broad and often include jobs that differ widely in skill, effort, and responsibility. Thus, gathering data by EEO-1 category may not facilitate a reliable analysis of similarly-situated individuals and could limit an effective analysis of pay disparities.

“Compensation” should be defined broadly to ensure that all possible forms of employee remuneration are taken into account. OFCCP should instruct contractors to submit data, under the umbrella of “compensation,” on total W-2 earnings, base salary, holiday pay, hourly wage, shift differential, overtime pay, hazard pay, cost-of-living allowance, commissions, stock options, paid leave, health and retirement benefits, disability and life insurance, and fringe benefits such as tuition assistance and child-care subsidies. Contractors may use any combination of these elements to pay employees for their services, and OFCCP must ensure that contractors do not deny certain types of compensation to employees in a discriminatory manner.

OFCCP should require contractors to submit any documentation and policies related to the factors and reasoning used to determine each element of compensation. Collecting copies of such policies would help OFCCP ascertain whether pay disparities reflect discriminatory bias or legitimate, job-related criteria. Where written policies do not exist, contractors should submit a statement to that effect. OFCCP should also require contractors to submit any policies relating to employee communications about compensation. Pay secrecy policies may perpetuate unlawful pay discrimination by preventing workers from discovering and challenging such discrimination. Therefore, where these policies exist, OFCCP’s role in investigating possible compensation discrimination becomes all the more critical.

OFCCP should use the data collected to conduct compensation trend analyses in industries of particular interest. OFCCP should conduct compensation trend analyses to inform its outreach, education, compliance assistance, and enforcement efforts to ensure nondiscrimination in federal contracting. Earlier this year, the Bureau of Labor Statistics disseminated industry-specific data about the pay gap. The Department of Labor should conduct a similar analysis of racial and ethnic pay disparities. An in-depth analysis of those industries with the largest pay gaps will foster a better understanding of, and help address, the root causes of compensation discrimination.

OFCCP should conduct industry-focused compensation reviews. OFCCP should target its limited resources to combat pay discrimination in those industries where pay gaps are

⁶ AFFIRMATIVE ACTION SERVS., *BACK TO THE FUTURE AND INTO THE PAST: WHAT TO EXPECT FROM THE OFCCP IN 2011 30* (2011), available at <http://affirmativeactionservices.com/OFCCPin2011June.pdf>.

particularly large, as in the financial activities industry,⁷ and in those industries where low-wage workers are concentrated, as in the agriculture industry and the leisure and hospitality industry.⁸

OFCCP should conduct nationwide multi-establishment compensation reviews. For some contractors, similarly-situated workers may work at different establishments across the country. Multi-establishment compensation reviews would be particularly valuable where a central office dictates compensation policies and practices, and where the data reveal common patterns or disparities in compensation across a contractor's various establishments.

The compensation data collection tool should be designed to permit contractors to independently assess their compensation practices. The categories of data collected would be highly useful to contractors who wish to self-evaluate, and OFCCP should encourage contractors to use the tool in this manner. In turn, contractors' voluntary identification and modification of problematic pay practices will enable OFCCP to make better use of limited resources by decreasing the burden on both contractors and the agency.

The Equal Opportunity (EO) Survey, had it been implemented as originally intended, would have assisted OFCCP in identifying likely discriminators and streamlining enforcement efforts. The EO Survey was the product of years of careful design and testing. A preliminary study of the first round of EO Survey responses in 2000 concluded that the Survey had "positive indications of predictive power" and that, with more complete and refined data, the Survey would eventually demonstrate "substantial power" in predicting which contractors were violating equal opportunity requirements.⁹ However, the Survey never had a chance to fulfill its promise. Although OFCCP had initially announced its intent to issue the Survey to at least one-half of all nonconstruction contractors each year, no Surveys were sent out in 2001 or 2005, and in each intervening year, the agency sent the Survey to only one-tenth of nonconstruction contractors. In addition, OFCCP never used the Survey responses to make the best use of limited resources in selecting contractors for compliance reviews.

Although a second report, issued in 2005 by Abt Associates, concluded that the Survey had little predictive value, this report relied on a seriously skewed data sample. The sample excluded contractors who refused to respond to the Survey (10 percent), asserted that OFCCP lacked jurisdiction (27 percent), or offered incomplete or internally inconsistent responses (15 percent).¹⁰ Nevertheless, on the basis of this flawed report, OFCCP rescinded the EO Survey.

Without any data collection tool, OFCCP has been hampered in its ability to root out compensation discrimination. The proposed compensation data collection instrument would gather compensation data that is not currently available to OFCCP, unless such data is

⁷ The pay gap is largest in the financial activities industry, where women earn only 70.5 percent of what men earn. *Id.*

⁸ According to the most recent data, women's median weekly earnings were lowest in the agriculture industry (\$413) and the leisure and hospitality industry (\$421). U.S. Dep't of Labor, Bureau of Labor Statistics, TED: The Editor's Desk, Women's Earnings and Employment by Industry, 2009, http://www.bls.gov/opub/ted/2011/ted_20110216_data.htm (last visited Aug. 22, 2011).

⁹ MARC BENDICK, JR. ET AL., THE EQUAL OPPORTUNITY SURVEY: ANALYSIS OF A FIRST WAVE OF SURVEY RESPONSES 26 (2000).

¹⁰ ABT ASSOCS., INC., AN EVALUATION OF OFCCP'S EQUAL OPPORTUNITY SURVEY 9-10 (2005).

specifically requested from an individual contractor. The new instrument should detect pay discrimination by collecting thorough information on contractors' pay practices. The EO Survey defined annual monetary compensation to include only base salary or wage rate plus other earnings such as cost-of-living allowance or hazard pay. Benefits, overtime, and one-time payments such as relocation expenses were specifically excluded. The new compensation data collection tool should inquire about all forms of compensation, thus offering OFCCP a more complete and accurate picture of how – and how much – employees are paid.

Another shortcoming of the compensation section of the EO Survey was that it compared all minority employees to all non-minority employees. By lumping together members of different racial and ethnic groups, the Survey failed to tease out whether individuals of a particular race or ethnicity might be experiencing pay discrimination. Research shows that African American, Asian American, and Hispanic/Latino workers all face different pay gaps.¹¹ If the new tool asks contractors to break down compensation data by specific races and ethnicities, OFCCP will be able to assess whether contractors are in fact providing equal pay to members of all racial and ethnic groups, as the law requires.

Finally, an important strength of the EO Survey was that it collected information regarding not only compensation, but also applicants, hires, promotions, and terminations. Thus, the EO Survey provided more robust data about contractors' overall personnel activities, which could help to explain compensation disparities. In this respect, the EO Survey was more comprehensive than the tool OFCCP now proposes. We urge OFCCP to consider expanding the scope of its data collection to include information on these categories of personnel decisions, in addition to collecting data on compensation.

OFCCP should require contractors to submit data electronically. Because most contractors maintain compensation data electronically, electronic submission of the data would minimize the burden on contractors and would lessen the environmental impact. Moreover, electronic data would make it easier for OFCCP to search and manipulate data and to improve transparency in compensation by making aggregate data accessible online to the public.

OFCCP should require businesses that are bidding on federal contracts to submit compensation data as part of the Request for Proposal process. Contracting with the federal government is a privilege, not a right, and American taxpayer dollars should not be used to subsidize pay discrimination. Therefore, any business seeking a contract with the federal government should be obliged to demonstrate compliance with pay equity requirements. OFCCP should also analyze the workforce of an aspiring contractor to ensure that the business is providing equal employment opportunity.

OFCCP should expand the scope of the compensation data collection tool to include construction contractors in addition to supply and service contractors. The prohibition

¹¹ INST. FOR WOMEN'S POLICY RESEARCH, THE GENDER WAGE GAP: 2010 (2011), *available at* http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2010-updated-march-2011/at_download/file.

against compensation discrimination contained in Executive Order 11246 governs construction contractors as well as supply and service contractors. The same goals served by requiring supply and service contractors to submit compensation data on a routine basis are likewise served by extending this requirement to construction contractors. OFCCP would be able to identify those construction contractors likely out of compliance with pay equity requirements and thereby enhance the efficiency of enforcement operations. The agency would also gain insight into trends in compensation in the construction industry. Finally, the compensation data collection tool would provide construction contractors with a useful means of self-evaluation.

Just as importantly, OFCCP must ensure that construction contractors are taking good-faith steps to achieve federally-mandated goals for the utilization of women and minorities. Women are grossly underrepresented in the construction industry, comprising only 2.7 percent of construction workers.¹² Hispanics or Latinos represent 29.1 percent of the workforce in the construction industry, African Americans represent 6.1 percent, and Asians represent just 1.4 percent.¹³ Construction contractors, like supply and service contractors, have an obligation to take affirmative action to ensure equal employment opportunity for women and minorities, and OFCCP should vigorously enforce this obligation.

The benefits of collecting compensation data from small entities far outweigh any costs to those entities. Taken together, small businesses and other small entities comprise a large segment of the federal contractor community. In Fiscal Year 2009, small businesses won \$96.8 billion in federal prime contracts, representing nearly 22 percent of all federal contracts.¹⁴ OFCCP must diligently monitor small entities contracting with the federal government to ensure that they compensate their employees without regard to sex, race, color, national origin, or religion. The new data compensation collection tool would aid OFCCP in rooting out pay discrimination among contractors of all sizes.

In contrast, the burden on small entities, and indeed on any type of contractor, would be light. Federal contractors are already obligated to maintain compensation data; the new data collection tool would simply require them to submit this data as a matter of course rather than waiting until OFCCP conducts an on-site compliance review. OFCCP estimated that the EO Survey would take a mere 21 hours to complete the first time and 12 hours thereafter.¹⁵ Given that the tool OFCCP now proposes would collect only a limited subset of the data collected by the EO Survey, it will pose a minimal cost to contractors.

We appreciate this opportunity to submit comments. We strongly support the development and swift implementation of a compensation data collection tool and believe that

¹² U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 43 (2010), available at <http://www.bls.gov/cps/wlf-databook-2010.pdf>.

¹³ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES (2010), available at: <http://www.bls.gov/cps/cpsaat11.pdf>.

¹⁴ Press Release, U.S. Small Bus. Admin., Small Business Procurement Scorecard Shows Progress toward Meeting 23 Percent Goal for Small Business Contracting (Aug. 27, 2010), available at <http://www.sba.gov/content/small-business-procurement-scorecard-shows-progress-toward-meeting-23-percent-goal-small-business-contracting>.

¹⁵ Government Contractors, Affirmative Action Requirements; Final Rule, 165 Fed. Reg. 68022, 68036 (Nov. 13, 2000).



this action will significantly advance OFCCP's efforts to combat pay discrimination. If you have any questions regarding these recommendations, please contact Sarah Crawford, Director of Workplace Fairness at the National Partnership for Women & Families, at scrawford@nationalpartnership.org or 202-986-2600, or Lisa Bornstein, Senior Counsel at The Leadership Conference on Civil and Human Rights, at Bornstein@civilrights.org or 202-263-2856.

Sincerely,

The Employment Task Force of The Leadership Conference on Civil and Human Rights
A Better Balance: The Work & Family Legal Center
African American Ministers in Action
American Association of University Women (AAUW)
American Civil Liberties Union (ACLU)
American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)
Asian American Justice Center, member of Asian American Center for Advancing Justice
Equal Pay Coalition NYC
Hadassah, The Women's Zionist Organization of America, Inc.
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW
Lawyers' Committee for Civil Rights Under Law
National Council of Jewish Women
National Organization for Women Foundation
National Partnership for Women & Families
National Women's Law Center
New York Women's Agenda
Women Employed
Women of Color Policy Network, NYU Wagner
9to5, National Association of Working Women