



November 11, 2014

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

Delivery Method
PDF file uploaded to:
<http://www.regulations.gov>

Dear Ms. Carr:

Notice of Proposed Rulemaking
Government Contractors, Requirement to Report Summary Data on Employee Compensation
OMB RIN: 1250-AA03

This letter responds to the Office of Federal Contract Compliance Programs' (OFCCP) request for public comments to a Notice of Proposed Rulemaking published in the *Federal Register* on August 8, 2014. We appreciate the opportunity to provide input on behalf of our clients, all of whom do business with the Federal government.

Introduction and Statement of Interest

Maly Consulting LLC (originally founded as Maly & Associates in 1986) is a human resource management consulting firm that specializes in the analysis and reporting of human resource data for equal employment and affirmative action compliance and for OFCCP audits. Maly's clients are Federal contractors and subcontractors, nationwide, ranging in scope and size from large, multi-national corporations to smaller organizations of less than 100 employees.

Maly helps its clients understand and comply with Federal affirmative action regulations, including *Executive Order 11246*, the *Vietnam Era Veterans' Readjustment Assistance Act of 1974*, as amended by the *Jobs for Veterans Act of 2002* (38 U.S.C. 4212, or VEVRAA and JVA) and *Section 503 of the Rehabilitation Act of 1973*. We also serve our clients by compiling, pre-analyzing, and submitting compensation and employment data and other required AAP documents and data to OFCCP during compliance reviews.

Having served in this capacity since 1986, the Maly staff is familiar with OFCCP's previous data collection tools and the burdens that accompanied them. That includes the *Equal Opportunity Survey (EOS)*, the ineffective forerunner to the *Equal Pay Report* now proposed by OFCCP.

Focus of this Response

We recognize OFCCP's duty to monitor compliance within the Federal contractor community and the need for information to carry out that responsibility. However, we have concerns about the escalating regulatory creep that is becoming inherent within the Federal government. This letter addresses our particular concerns with OFCCP's latest regulatory requirement proposal.

- Collection of Highly Sensitive Data

Despite OFCCP's expressed need to promote "greater deterrence of noncompliant behaviors by contractors and subcontractors," throughout our history of working with Federal contractors, we have not found them to be blatantly discriminatory, noncompliant and in dire need of "greater deterrence." We are concerned about OFCCP's proposal to collect and take ownership of that which has historically been the proprietary and confidential property of private-sector employers. We are particularly disturbed when we see the ends to which the agency plans to go to develop another audit selection tool and to eradicate pay gaps that are most accurately described as extremely complex and still matters of wide-ranging study and discussion. Myriad independent studies show that the size and causes of pay gaps, particularly the gender pay gap, are debatable and not simply attributable to employer "noncompliant behaviors." In its October 11, 2011 ANPRM public comments, the Equal Employment Advisory Council cited information and studies that highlight the shortfalls in the gender pay gap theory in particular.

Since the Agency already has a somewhat neutral audit selection process and the size and all-inclusive causes of pay gaps in the U.S. workforce are still under dispute, we would like to see OFCCP reconsider instituting the *Equal Pay Report* altogether.

- Cost and Ease of Complying with *Equal Pay Report* Requirements

The size, types and configurations of payroll and Human Resource Information Systems (HRIS) are as varied and numerous as the variety and number of Federal contractors. Some of Maly's clients have fairly sophisticated systems; others do not. We predict that even for those with more advanced information systems, the cost of producing the data outlined in the NPRM will be extensive. Data that OFCCP describes as "readily available" will require hands-on preparation and verification because race, gender, EEO-1 category, and other employment data are HRIS components, while wage- and earnings-related information is maintained in accounting/payroll systems. To produce the summary data figures that OFCCP portrays as brief and simple, information normally maintained in two different databases will have to be merged, maneuvered, cleaned, verified and analyzed several different ways.

In addition to the time and effort it will take to merge data from two information systems, re-creating the same population of employees as the contractor's previous EEO-1 report will be a painstaking task. Data for employees who were included in the EEO-1 report but who terminated before the December 31st data downloads will have to be retrieved from historical records and added back in to the December 31st data. Employees newly hired *after* the EEO-1 report snapshot will have to be identified and removed from the December 31st data.

The cost of complying with this latest reporting requirement will depend on the size of the contractor and how much outside help is needed with the report. We estimate the cost to contractors to retrieve, prepare, and produce summary data for the *Equal Pay Report* could be well into the thousands of dollars – annually. OFCCP's own *Equal Pay Report* cost estimates reveal that the Agency itself does not really think this is a simple request for "readily available" data. Moreover, these costs are *in addition* to the cost of current Affirmative Action Plan and program work and in-depth analyses already being done by Federal contractors. Finally, all of the above does *not* include the cost of information system add-ons and alterations that may be required for some contractors.

- Development of a Single Report for Both OFCCP's Equal Pay Report and EEOC's EEO-1 Reports

This alternative would reduce the number of reports that contractors and subcontractors will have to file. However, we are not reassured by the references in this NPRM to the Equal Employment Opportunity Commission's (EEOC) explorations toward additionally collecting and analyzing compensation data. This points toward a Federal government in pursuit of overseeing and influencing *all* private-sector pay-setting, not just that of employers who do business with the Federal government. Once collected and garnered, this data will become the property of the Federal government and will be used however a wide range of people in two sizable Federal agencies see fit. This is a daunting scenario to the U.S. private business community, including those who hold Federal contracts.

We have also noted in the past that the OFCCP Director says prospective contractors should simply factor in the cost of OFCCP compliance when they bid for Federal contracts. If/when EEOC gains equal access to private employer compensation data, how will those who are *not* receiving income via Federal contracts pay for the cost of defending themselves and for providing the alarming amount of private information the Federal government says it must have? These employers will have the same escalating costs and burdens as Federal contractors but with no resource except a personal business bank account with which to pay the cost.

We do not agree that compensation data needs to be regularly reported to *any* Federal agency, much less that it should flow back and forth between *multiple* agencies. We cannot endorse this alternative even though it cuts reporting from twice to once a year.

- Creation and Publication of "Reliable and Objective Industry Standards"

This is a proposal for an unknown number and variety of people to aggregate and manipulate a large amount of highly sensitive and confidential "probative" data in order to "construct" what everyone is expected to accept as "reliable" and "objective" standards worthy of adopting for given jobs within given industries. Moreover, most of these data crunchers will have no HR experience, educational background or understanding of the complexities of hiring, compensation and resource management. In addition, there is a proposal to add in more, yet-to-be-determined "other existing resource information," such as labor market survey data. We do not see how the Agency expects *anyone* to truly accept these Standards as reliable, objective and devoid of creative manipulation for a given purpose somewhere during the "construction" process.

Speaking beyond the construction of the standards, the proposed use of the Reliable and Objective Industry Standards is concerning. Ranking and prioritizing contractors for audit by the largest race and gender pay gaps by Standards comparisons sounds like a simple and neutral method for selecting contractors for review. Will this be "the new method" for selecting contractors for review or actually another method to be added to the methods subjectively applied during the current selection process? However it is applied, the pay-gap-selection method leaves little room for an employer whose business simply does not fit the cookie cutter Standard. We also note that OFCCP plans for contractors to use the Standards for self-assessment. Contractors are *already* extensively "self-assessing" (analyzing) their own workforce structures, compensation and employment activities – annually. There is one last concern that we cannot overlook: What other uses for contractor compensation data and the Industry Standards will be deemed to be needful, appropriate, and acceptable in the future?

■ Security of Highly Sensitive and Proprietary Data

Under the section titled *Confidentiality of the Equal Pay Report Data*, the NPRM states that “OFCCP proposes creating the authority to publish aggregate information based on compensation data collected from the *Equal Pay Report*, such as ranges or averages by industry, labor market, or other groupings, but only in such a way as not to reveal any particular establishment’s or individual employee’s data [emphasis added].” Even information aggregated by category is easily distinguishable when an organization has only one or very few employees in a category. When this occurs – more often than one might think – a single individual’s personal salary/earnings as well as race and gender are easily recognizable. This is ample information for those who engage in identity theft, as well as for business competitors who may wish to recruit an individual away from a current employer by offering more money, particularly since the individual’s entire current W-2 earnings will be known. These concerns should not be summarily disregarded.

Given the security climate in today’s world, we should not have to go into detail about the growing threat of computer hacking, security breaches, and the inadequacies of the *Freedom of Information Act (FOIA)* as a dependable safe haven for confidentiality and data security. *FOIA* is increasingly becoming a tool used by the Federal government, rather than a tool to protect the privacy or personal property or reputation of U.S. citizens. Equally *unreassuring* is the NPRM’s assurance that “It is the *practice* of OFCCP not to release contractor data . . . [emphasis added]” for cited reasons that are clearly and solely the discretionary determination of the Agency itself in each case. The security breach possibilities in the entire *Equal Pay Report* proposal are understandably a source of anxiety and skepticism to all who will be forced to entrust highly sensitive and confidential information to a virtually untouchable and unaccountable entity.

These shortcomings in the proposed configuration of the *Equal Pay Report* and heightened security risks overall should be addressed more thoroughly before any compensation data collection report is instituted and certainly before data or Standards in any form are published.

Summary and Conclusion

Throughout our many years in the field of affirmative action compliance, our clients have consistently demonstrated their willingness to comply with the regulatory requirements that go along with their Federal contracts by the amount of time, effort and capital they expend annually. We would regret seeing their good-faith efforts rewarded with yet more intrusive, risk-inducing, costly and time-consuming reporting and record-keeping requirements.

Thank you for considering our experienced perspective and comments.

Respectfully submitted,



Jennifer Newingham, PHR
President