

March 28, 2003

Ms. Hazel Bell  
U.S. Department of Labor  
200 Constitution Ave., NW.  
Room S-3201  
Washington, D.C. 20210

Dear Ms. Bell:

**OFCCP's Request for a Two Year Extension of Approval  
for Its "Equal Opportunity Survey"**

This letter responds to the request for written comments on the Employment Standards Administration's (ESA) Office of Federal Contract Compliance Programs' (OFCCP) request for a two year extension of approval for the Equal Opportunity Survey (EO Survey).

**Background - Maly & Associates LLC**

Maly & Associates is a management consulting firm located in San Rafael, California. We specialize in the analysis and reporting of human resource data, affirmative action compliance, and government audits. All of our clients are federal government contractors and range in scope from large, multi-national corporations to smaller organizations of 100+ employees nationwide. We assist clients in understanding and complying with the federal regulations for affirmative action, including Executive Order 11246, the Vietnam Era Veterans Readjustment Assistance Act of 1974, and Section 503 of the Rehabilitation Act of 1973. Our firm has written hundreds of Affirmative Action Programs (AAPs) over the almost 17 years that we've been in business, and assisted many clients with compiling their data for EEO-1 Reports, VETS-100 Reports and in preparation for OFCCP audits. We are keenly aware of the high costs and organizational burdens imposed on our clients by unclear regulations and the inconsistent and overlapping government requests for employee data. We believe the EO Survey is just the latest in a long line of such requests.

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**Focus of Our Comments**

The ESA's notice identified four specific areas in which it is interested in receiving comments. Our letter will number and address each of these four areas below. Most of our arguments were originally made in a March 3, 2000 public comment letter to Stuart Shapiro, Office of Management and Budget, addressing the EO Survey prior to its inclusion in the Code of Federal Regulations.

However, two years of experience with the survey have served to fortify our positions and have revealed new areas of concern. In summary, our assessment after assisting clients with 2001 and 2002 EO Surveys is that the cost and burden to federal contractors to comply with this 12-page form is much greater than any benefits the OFCCP is hoping to get from the survey's results. On behalf of our 80-plus clients, the consultants within our firm recommend that the extension be denied.

**1. Is the EO Survey useful and necessary to the performance of OFCCP functions?**

**No.** There is no indication that the OFCCP currently has any system for evaluating the data collected in the EO Survey. An assessment of predictive power can and should be made prior to imposing the burden of data collection and reporting required for the EO Survey. The receipt of EO Surveys over the past two years provides more than sufficient data to determine how and if they can be used as a selection tool.

At the least, the OFCCP should determine how each page of information will further the selection process before requesting that data. For example, if the OFCCP cannot show that the gathering of promotion and termination data serves to improve the selection process, those sections should not be included in the survey.

Furthermore, the OFCCP has stated that the EO Survey will provide the agency "with a useful comparative measure among similarly situated contractor establishments." It is not a function of the OFCCP to compare compensation and personnel decisions among similarly situated *contractors* but among similarly situated *employees* in a particular contractor's establishment. While the data being requested by this survey may serve the OFCCP in comparing one contractor to another (a responsibility it does not have), the data certainly will not serve the purpose of discerning whether a contractor is in compliance nor will it allow the OFCCP to conduct valid analyses to determine potential discrimination against women and minorities.

Specifically, the EO Survey requires that personnel activity (applicants, hires, promotions, and terminations) and aggregate compensation data be submitted by EEO-1 category. Because the categories lump together many highly diverse jobs, they are far too general to help the OFCCP understand the personnel and compensation practices of any one particular contractor.

The OFCCP claim that contractors will benefit by collecting these data by EEO-1 category is simply not true. Essentially, the EO Survey forces contractors to mix apples and oranges, and thus would actually reduce both the OFCCP's and the contractor's ability to assess employment and compensation practices correctly.

Regardless of how much or how little burden is involved, the federal government should never force the collection and reporting of any data that does not serve a useful purpose.

**2. Does the information collection requirement pose an unreasonable burden for contractors?**

**Yes.** The data collection format required by the OFCCP has imposed many new and burdensome costs on contractors, costs which, in our estimation, are grossly underestimated in the "Supplementary Information" section of the notice. Our experience has shown that the average burden per response is almost twice the burden estimated — closer to 40 hours per respondent rather than the agency's estimate of 21 hours. Furthermore, the data being requested by the OFCCP places an unreasonable burden upon most employers to disclose highly confidential and proprietary employee pay information.

**Contradictory Reporting Requirements:** The EO Survey requires compensation data to be filed by EEO-1 category, which contradicts the requirements of paragraph 11 of the OFCCP's compliance evaluation scheduling letter. Thus, contractors have to collect the same data in two differing formats, which can consume costly programming and employee time.

**Applicant Issue:** Confusion continues to surround the question of how the EO Survey defines "applicant" and the contractor's regulatory requirement to solicit race and gender data from applicants. Obviously, the more broadly an "applicant" is defined, the more burdensome and costly it is for contractors to collect and report these data. Until the issue is settled (the EEOC led task force has been given yet another extension until March 31, 2003), accurate cost and burden figures cannot be estimated. Furthermore, the very ambiguous language (i.e. *the concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunity*) used in the latest definition does nothing to help clarify this highly charged issue between the contractor community and the OFCCP.

**Cost/Burden:** The OFCCP estimates that the EO Survey takes an average of 21 hours to complete, almost double the original estimate of 12 hours. Even this new estimate is unrealistic. It does not fully account for all capital and start-up costs, including but not limited to employee retraining, hiring new employees to complete the additional work, software purchasing, installation and/or reprogramming. Additionally, it ignores the tremendous number of resources it will take a contractor to maintain these new data — especially if the broad definition of applicant is accepted. Furthermore, we believe the amount of professional/managerial time that will be required to complete the survey has been greatly underestimated. Professionals and managers will need to decide, on an ad hoc basis, those movements that do not involve a change in grade or rank, but will constitute *an opportunity for increased pay, rank, skill or responsibility*. This process will certainly require input from multiple professionals and managers in order to avoid subjective or arbitrary decisions.

**Burden to Disclose Confidential Employee Pay Data:** The EO Survey forces contractors to disclose and give up *onsite* custody of its summarized

pay data — argued by many to be some of the most sensitive data in the private sector. Unlike the federal government with its well-known public pay scale, most private employers take great precautions to protect pay data from both competitors and employment agency headhunters. Granted, salary information of the highest paid executives within a public company must already be disclosed in SEC filings and wage data of employees covered by a collective bargaining agreement are also usually announced publicly. However, some companies are simply more challenged by competitors than others — for them “total compensation” for all professionals, for example, may verge on a “trade secret.”

In its confidentiality statement on the survey form, the OFCCP states the agency, “will treat the information... as sensitive and confidential to the *maximum extent possible* under the Freedom of Information Act (FOIA).” (Emphasis added.) Yet, FOIA is a mandatory disclosure statute over which the OFCCP has no control. Even if we assume that the OFCCP has the highest level of interest in preserving the confidentiality of compensation data, disclosure is required unless the data falls within one of the limited exemptions.

Historically, the agency has had access to confidential data and has also been permitted to take some of the data offsite — when necessary — in the course of conducting its compliance evaluations. We do not question the agency’s authority to conduct a legitimate compensation analysis on a contractor’s pay system. However, we do question the OFCCP’s plan to collect data by EEO-1 categories and its goal to compare compensation practices among similarly situated contractors.

**3. Does the EO Survey improve the quality, utility, and clarity of the information to be collected?**

**No.** Significant analytical flaws exist in the OFCCP’s methodology for gathering and computing data. These unscientific methods will not reveal the statistical indicators of disparate impact, or anything else related to either compliance or “likely noncompliance.” The lack of clarity in the request for information and the OFCCP’s use of inappropriate underlying data may lead to serious errors of enforcement and policy. Here are several examples.

**Mis-use of EEO-1 Categories:** We’ve already addressed the mis-match between collecting data by EEO-1 categories and private sector practices which vary widely from one company to the next. Although the OFCCP appears to be trying, it is highly improbable that the agency can ever develop a simple, one-size-fits-all method to analyze contractor pay practices. Not one of our clients uses the EEO-1 categories for anything other than reporting their employee population to the federal government on an annual basis. We have never seen nor heard of any company designing a compensation program by EEO-1 categories.

**Applicant Definition:** The ambiguities inherent in the shifting definitions of “applicant” (already referred to above) are a prime example of the lack of clarity with regard to the OFCCP’s enforcement responsibilities.

**Definition for “Hires”:** In its request for data on “hires,” the EO Survey fails to account for those selection decisions made by an employer which do not result in a “hire.” Not accounting for such data appropriately will give the OFCCP an erroneous selection rate and will lead inevitably to false conclusions about a contractor’s hiring practices. For example, persons who decline an offer, fail the drug screen, or don’t show up for the first day of work will be in the OFCCP’s computation for the “applicant” count (the denominator) but will not be in the computation for the “hire” count (the numerator). The mathematical consequence of this error in computing a selection rate will be to count such applicants as “rejected” by the employer when in fact that has not been the case. If granted an extension, the EO Survey needs to change the terminology from “Hires” to “Offers Extended.”

**Definition of “Promotion”:** The survey instructions provide a three-prong definition for the term “promotion.” Included in the definition are employees who move into “a position requiring greater skill or responsibility” and employees who “move into a position *with the opportunity* to attain increased pay, rank, skill or responsibility.” Most employers’ automated record keeping systems only track promotions when the movement is to a higher job or grade level. Counting the activity associated with the opportunity to attain increased pay as promotions will skew any results because there may be “non-competitive” moves counted and a variety of other job change situations which are too subjective to count and classify accurately. The OFCCP’s own compliance manual is out of date and provides no legal authority from which contractors must or should define promotions.

**Other Confusing EO Survey Elements and/or Terminology:** In addition to the inappropriate definitions just described, the EO Survey also:

- uses the terms “facility” and “establishment” without describing the differences between the two.
- erroneously assumes that information on the gender of applicants is never “missing or unknown.” Contractors should not be forced to guess at either race/ethnicity or gender.
- erroneously assumes that tenure with a company is the only pay variable important enough on which to gather data.
- erroneously assumes that local “establishments” of multi-tiered organizations can identify the company’s information on federal government contracts. Most cannot.

Poor quality and lack of clarity in the data being requested obviously cannot be useful, and may lead to serious errors in OFCCP enforcement and policy.

**4. Does the EO Survey lend itself to efficient and cost-effective information technology data collection methods?**

**Yes, but...** Any cost efficiencies would occur only after the initial reprogramming and start-up costs that contractors will encounter. One question that should be asked is "will the next administration decide it wants to request contractor data in yet another manner?" In which case, the cost efficiencies would be wiped out as additional reprogramming and start-up costs would be encountered once again.

Furthermore, we understand there may be changes in addition to those already addressed due to the new Census 2000 procedures. With individuals able to check more than one race/ethnicity code and with talks ongoing about how this will affect affirmative action statistics, we think further EO Surveys should be put on hold until these issues are ironed out.

Regardless of the burden or cost associated with this OFCCP request, if the underlying data produce poor and useless results, the agency should not be given the permission to request them.

**Summary and Conclusion**

The EO Survey is best understood as yet another in a long series of inconsistent, overlapping, redundant, and confusing reporting obligations imposed on the contracting community by the OFCCP and other federal agencies. Each of the four areas of concern have led to new and burdensome costs for federal contractors, while providing little, if any, useful new information for the OFCCP. The OFCCP's request for an extension of approval for the EO Survey should be rejected, and a thorough review of the entire employee reporting and record keeping process should be required instead.

Sincerely yours,

Anna Mae Maly  
Founder/Consultant

AMM/ETC/SA/GS/etc