

March 3, 2000

Mr. Stuart Shapiro
OMB Desk Officer for BLS, OSHA, ESA
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building, Room 10235
725 17th Street, N.W.
Washington, D.C. 20503

Dear Mr. Shapiro:

OFCCP's Request for Approval for Its "Equal Opportunity Survey"

This letter responds to the request for written comments on the Department of Labor's Office of Federal Contract Compliance Program's (OFCCP) proposed new Equal Opportunity Survey (EO Survey).

Background - Maly & Associates

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. Our clients are all federal government contractors and range in scope from large, multi-national corporations to smaller local California organizations of 100+ employees. 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 Plans (AAPs) over the almost 14 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 OMB 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.

In summary, our assessment of the EO Survey is that the cost and burden to federal contractors to comply with this new 10-page form will be much greater than any benefits the OFCCP is hoping to get from the survey's results. Indeed,

since the OFCCP has not yet developed the final analytical model it will use on those results, it seems a bit premature for the agency to be requesting approval. It is our understanding that at least one employer-sponsored organization, the Equal Employment Advisory Council, recommends that the survey be set aside pending an overall review of the entire process of already existing and often conflicting federal record keeping and reporting requirements. On behalf of our 80-plus clients, the consultants within our firm agree with that recommendation.

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

No. The OFCCP states 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. EEO-1 categories are far too general to help the OFCCP understand the personnel and compensation practices of any one particular contractor, because the categories lump together many highly diverse jobs. Furthermore, the agency says it will schedule compliance reviews based on "negative indicators" such as some unidentified degree of disparity in the compensation of men and women or minorities and non-minorities; in, for example, such utterly "unequal work" as a Board certified doctor of medicine and a meeting planner or recruiter of hourly personnel — all of whom are in the EEO-1 category of "Professionals."

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 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 will impose many new and burdensome costs on contractors, costs which, in our estimation, are grossly underestimated in the OFCCP's "Supporting Statement." Concurrently, 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 the new paragraph 8 of the OFCCP's compliance evaluation scheduling letter. Thus, contractors have to collect the same data in two differing formats, which will consume costly programming and employee time.

Applicant Issue: Much confusion still surrounds 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 "applicant" is defined, the more burdensome and costly it is for contractors to collect and report these data. Until the issue is settled (and we understand it is still being discussed among the OMB, the OFCCP, and the EEOC), accurate cost and burden figures cannot be estimated. Furthermore, the very ambiguous language (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 OFCCP's latest definition does nothing to help clarify this highly charged issue between the contractor community and the OFCCP.

Cost/Burden: In the OFCCP's Justification Statement, it estimates that the EO Survey will take an average of 12 hours to complete, at a cost of \$255 per contractor. This estimate is absurd and unrealistic. It ignores 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 OFCCP has greatly underestimated the amount of professional/managerial time that will be required to complete the survey. 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.

In the OFCCP's trial run of the survey, which went to 150 companies, only 23 companies chose to respond. We think this statistic — a mere 15% return rate — exemplifies the fact that the EO Survey is burdensome and costly to employers. If it were easy and simple, or perceived to add value to an employer's analysis of its personnel practices, the response rate would have been much higher.

Burden to Disclose Confidential Employee Pay Data: The EO Survey will force 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. It is true that salary information of the highest paid executives within a public company must already be disclosed in SEC filings and that wage data of employees covered by a collective bargaining agreement are also usually announced publically. 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, 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. When it becomes generally known that the OFCCP is collecting these data on upwards of 60,000 contractor establishments, we can assume that there will be an increased level of FOIA activity from journalists, competitors, potential plaintiffs and their counsel, unions, consultants, EEOC, headhunters, stockholders, and any other interested party.

3. Will 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 will 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. I have never seen nor heard of any company designing a compensation program by EEO-1 categories. It simply is not done. For the OFCCP to ask for and then attempt to analyze compensation data in this way is ludicrous. For example, if the Chairman of the Board is a white male and the manager of the mail room is a black female, the OFCCP will assert that the pay comparison between them provides proof of discrimination since both are reported in the EEO-1 category of "Officials and Managers."

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 in its mathematical computations 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 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 hasn't been the case at all. If adopted, 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." To be 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 third prong of the definition as promotions will greatly skew any results because there may be "non-competitive" moves counted and a variety of other job change situations which are very subjective to count and classify.

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 in fact will lead to serious errors of 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 should this proposal be adopted. One question the OMB should ask 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 the EO survey 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 — which it will — 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 OMB's four areas of concern will lead to new and burdensome costs for federal employers, while providing little, if any, useful new information for the OFCCP. OMB should reject the OFCCP's request for approval of the EO Survey, and require instead a thorough review of the entire employee reporting and record keeping process.

Sincerely yours,

Anna Mae Maly
Founder/Consultant