



October 11, 2011

VIA: <http://www.regulations.gov>

Ms. Debra A. Carr

Director, Division of Policy, Planning and Program Development

Office of Federal Contract Compliance Programs

U.S. Department of Labor

Room C-3325

200 Constitution Avenue, NW

Washington, DC 20210

**RIN: 1250-AA03**

**RE: Non-Discrimination in Compensation; Compensation Data Collection Tool**

Dear Ms. Carr:

The Center for Corporate Equality (CCE)<sup>1</sup> is submitting this comment in response to the Advanced Notice of Proposed Rulemaking (ANPRM, RIN: 1250-AA03) on a compensation data collection tool. The Notice, which was published on Wednesday, August 10, 2011, asks the federal contractor community to provide insight on a compensation data collection tool that could be used for a broad range of activities, including investigating compensation discrimination at the establishment level.

CCE is a nonprofit equal employment opportunity (EEO) research and think tank organization that was established in 2007 to help organizations proactively respond to a new generation of complex and technology-based affirmative action and non-discrimination compliance issues. CCE is designed to carry out the mission of creating workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and by promoting affirmative action and equal employment regulatory compliance.

OFCCP should be commended for their proactive stance on identifying and remedying instances of compensation discrimination. However, based on this agency request, CCE recommends that OFCCP consider the precise purpose of such a tool and provide the contractor

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<sup>1</sup> Portions of this comment were written by the following CCE staff: David Cohen, Fred Satterwhite, Eric Dunleavy, Amanda Shapiro, Joanna Colosimo, David Morgan, Eileen Curtayne and Michael Aamodt.

community with guidance on that purpose before asking the contractor community to critically evaluate the merit, scope and details of the tool.

In addition to the ambiguity around the purpose of the tool, CCE is also concerned about the implied scope of the variables that may be included as part of the data tool submission. In particular, the number of variables the agency may seek to collect with this tool would place tremendous time and financial burdens on contractors. CCE is concerned that the agency has not seriously considered the consequences of such an all-encompassing data collection tool on contractors during a period of daunting economic uncertainty in the United States.

The scope of the data request also suggests that the OFCCP may not have meaningfully considered or may not be familiar with the intricacies of Human Resource Information Systems (HRIS) and compensation systems as they exist in private industry. The scope of the data request also suggests that the OFCCP may not be considering critical legal principles in the construction of the tool or the possible redundancy both within different OFCCP tools (e.g., data requirements of the proposed new scheduling letter) and across tools used by other EEO agencies (e.g., EEOC initiatives). For these reasons, CCE strongly suggests that OFCCP seriously consider these and other public comments.

In the following comment, CCE has provided in depth responses to those questions that would either substantially increase the burden of the collection of information on federal contractors or would collect information with minimal practical utility to the agency in its compliance and enforcement functions.

### **Some Relevant Historical Context**

As noted in the ANPRM, eliminating compensation discrimination by federal contractors has been, and continues to be, a priority for OFCCP. This priority is based upon national statistics indicating that the typical woman earns less than the typical man, although the exact size of and reasons for this gender wage gap can be difficult to pinpoint.<sup>2</sup> The cause of the gender wage gap has been studied extensively; however, it is still unclear as to whether life choices and/or discriminatory factors contribute to the difference in pay between men and women.<sup>3</sup>

In its ANPRM, OFCCP briefly discussed the history of the now rescinded Equal Opportunity (EO) Survey (2000-2006). The EO Survey was originally envisioned as a tool that would assist OFCCP in identifying contractors that were likely to be out of compliance. The EO Survey included a section requiring federal contractors to report summarized compensation data

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<sup>2</sup> For example, OFCCP's ANPRM, dated August 10, 2011, stated, "Women still earn only 77 cents for each dollar earned by a man," while an e-mailed U.S. Department of Labor newsletter, dated September 22, 2011, noted, "In America, women are paid an average of 80 cents for every dollar paid to men."

<sup>3</sup> OFCCP noted several sources published between 1998 and 2007 that analyzed various factors (including differences in skills and job characteristics, education, and prior labor market experience) and found that although these factors explained some of the difference in pay between women and men, some degree of unexplained difference still remained. A 2009 report commissioned by the U.S. Department of Labor and including a foreword by the Director of OFCCP found that including factors such as career interruptions, fringe benefits, insurance, and overtime explained almost all of the gender pay gap, concluding that the difference in raw wages may be the result of individual choices by both male and female workers. See *An Analysis of the Reasons for the Disparity in Wages Between Men and Women*, CONSAD Research Corporation (January 2009).

by either affirmative action plan (AAP) job group or EEO-1 category. The EO Survey was rescinded because it demonstrated little utility in identifying contractors who were not in compliance.

In its September 8, 2006 final rule rescinding the EO Survey requirement, OFCCP stated that it wanted to “more effectively focus enforcement resources and eliminate a regulatory requirement that fails to provide value to either OFCCP enforcement or contractor compliance” and “better direct its resources for the benefit of victims of discrimination, the government, contractors, and taxpayers.” The agency concluded that the EO Survey “failed to provide the utility anticipated when the regulation was promulgated in 2000...and is no longer of value to accomplish the objectives it was designed to address.” OFCCP estimated that eliminating the EO Survey would reduce contractors' costs by almost \$5.5 million per year, in addition to saving the agency \$356,000 per year in processing costs.<sup>4</sup>

In evaluating the utility of the EO Survey, OFCCP relied on two studies: the Bendick & Eagan Report and the Abt Report. OFCCP concluded the Bendick & Eagan Report “did not demonstrate that the EO Survey is a good predictor of noncompliance.” OFCCP referenced data problems and other methodological issues that prevented Bendick & Eagan from conducting a full-scale analysis of the pilot EO Survey’s predictive power. The Abt Report analyzed whether EO Survey data could be used to develop a model to more effectively target those contractors engaged in “systemic discrimination.” OFCCP concluded from Abt’s study that EO Survey data could not be used to develop such a model, because the study found the model’s predictive power to be only slightly better than chance, and found the EO Survey model wrongly classified a significant portion of true discriminators as non-discriminators, and thus would not target them for compliance evaluations.<sup>5</sup>

OFCCP stated that because the EO Survey compensation data was reported by EEO-1 category or AAP job group, it could not be used to predict systemic discrimination and was not an effective enforcement tool. The agency stated that any marginal utility to EO Survey compensation data was outweighed by the burden on contractors to complete the survey, and on OFCCP to process and utilize the survey. The agency stated that using the EO Survey could “divert scarce OFCCP resources from more vigorously enforcing equal employment laws in a more effective manner,” and that “the obligation to expend resources to complete the EO Survey could discourage contractors from conducting a more thorough and useful evaluation of their personnel data.”<sup>6</sup>

According to the supplementary information in the final rule, OFCCP received a total of 2,736 comments on their proposal to eliminate the survey, which was published on January 20, 2006. A majority (62%) of those comments supported the proposal to discontinue the EO Survey.<sup>7</sup> In our experience, the weaknesses of the EO Survey included the following:

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<sup>4</sup> See 71 FR 53032 (Sept. 8, 2006)

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

- The format for reporting the compensation information was not conducive to a meaningful analysis. As OFCCP noted in the final rule, EEO-1 category and AAP job group are too broad to evaluate compensation data for similarly situated employees. Thus, the data could not be used to meaningfully assess potential discrimination.
- The EO Survey was burdensome. Contractors reported that the amount of time they spent responding to the surveys they received far exceeded the burden estimate of 21 hours to complete the survey.<sup>8</sup> Further exacerbating this burden were the 45-day submission deadline and the fact that contractors with multiple establishments often received multiple surveys at the same time.
- The EO Survey required data for full-time employees only, rather than the entire workforce included in the contractor's AAP. This requirement created an additional burden for contractors when gathering the necessary data. Also, this requirement unnecessarily limited the survey's ability to identify non-compliant contractors, as contractors with potential pay disparities related to part-time positions would not be discovered.

With all of the flaws described above, it seemed that retiring the EO Survey in 2006 was justifiable. However, the looming specter of the EO Survey's return surfaced in 2009, when the Paycheck Fairness Act (PFA) was introduced in both the U.S. Senate and U.S. House of Representatives. The PFA included a provision to reinstate the EO Survey and require OFCCP to use it to collect pay information from federal contractors on a regular basis. Despite several months of lobbying for its passage by the Obama administration, the PFA fell two votes shy of moving to consideration by the Senate on November 17, 2010, effectively killing the bill for at least the near future. Thus, the House of Representatives chose not to pass a bill where a new EO Survey would be designed.

OFCCP's ANPRM appears to indicate that the agency is planning to pick up where the rescinded EO Survey and the defeated PFA left off with regard to systematically collecting compensation information from federal contractors. As this section has documented, there were compelling reasons why OFCCP abandoned the original EO Survey and why Congress chose not to pass a bill that included the development of a new EO Survey. CCE urges OFCCP to carefully consider the historical points of failure described above when considering the development and implementation of a similar tool for the future.

### **Understanding the Purpose of a Compensation Data Collection Tool**

For the public to effectively provide input about a compensation data collection tool, there must be a specific purpose for the development and implementation of such a tool.

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<sup>8</sup> When the EO Survey was first introduced, OFCCP estimated that it would take 12 hours to complete the survey. After receiving additional feedback from contractors after the pilot, the agency revised this estimate to 21 hours. However, many contractors reported that the revised number still underestimated the number of hours needed to compile and report the data in the format required by the survey.

Unfortunately, the ANPRM does not clearly describe the tool's purpose, and instead offers a plethora of possible uses, including: (1a) the identification of potential compensation discrimination at the establishment level warranting further review or evaluation by OFCCP, (1b) the identification of potential compensation discrimination at the establishment level warranting contractor self-audit, (2) use of the data by OFCCP to conduct analyses at the establishment level, and (3) use of the data by OFCCP to identify and analyze industry trends in federal contractors' compensation practices. Each of the above goals is very different. As such, tools meeting each potential use would require different developmental approaches, analytic frameworks, and implementation strategies. It would be extremely difficult to create a stand-alone tool that is able to effectively take on all of the possible uses mentioned in the ANPRM.

CCE is concerned that this invitation to the federal contractor community for input on a compensation data collection tool oversimplifies an enormous amount of forethought related to clearly defining the purpose of the tool. The end-purpose for the tool must be specific, and the need for a tool must be clear. For example, if the purpose of the tool is to allow OFCCP to identify compensation discrimination at the establishment level because the agency is not currently able to do that successfully via audits, then the public should be given the opportunity to comment on that specific purpose accordingly. If the end-purpose of the tool is to conduct research to identify and analyze industry trends, then the need for such a tool should be similarly demonstrated. These issues should drive and shape an ANPRM, so as to avoid unnecessary rule-making ambiguity, and allow interested parties to flesh out focused ideas, comments or concerns with design, data, or practical implementation issues and burdens. A useful compensation data collection tool is predicated on a transparent rule-making process with input from all invested parties; however, that input can only be as clear as the directions, goals, and identified needs provided by the rule-making entity.

### **Inconsistencies with OFCCP's Proposed Notice of Rescission**

It is important to note that in January 2011 OFCCP released a notice to rescind the Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Pay Practices (<http://origin.www.gpo.gov/fdsys/pkg/FR-2011-01-03/pdf/2010-32602.pdf>). In the notice to rescind, OFCCP makes the argument that the compensation standards are too rigid and that a one-size-fits-all model for evaluating compensation is not appropriate.<sup>9</sup> More specifically, the notice states the following:

*Investigations of systemic compensation discrimination are complex and nuanced. During the conduct of compliance evaluations, OFCCP has traditionally focused on identifying compensation discrimination through the development of a variety of investigative and analytical tools. The use of a particular tool, or combination of tools, depends upon the facts of a specific case, and includes consulting with labor economists and other experts, as appropriate.*

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<sup>9</sup> CCE does not agree with OFCCP's assessment that the standards are too rigid and inflexible. The standards require that the agency utilize multiple regression analysis (or any other professionally accepted statistical methodology) to determine whether a statistically significant difference exists between groups. On the contrary, multiple regression analysis is an extremely flexible statistical tool that allows you to specifically model the nuances of each contractor's compensation practice. These standards are consistent with Title VII's most probative principles.

The current ANPRM seems to fly in the face of the position that the agency took for rescinding the compensation standards. It is unclear how OFCCP can make an argument that the compensation standards are too rigid and at the same time make an argument that a one-size-fits-all compensation data collection tool would be useful across different contractor industries (e.g., blue collar, high-tech) and job categories as a predictor of compensation discrimination.

As described earlier in this comment, OFCCP states that this single compensation data collection tool would likely achieve multiple goals. Once again, CCE is unsure how OFCCP can make the case that the standards are too rigid for purposes of evaluating compensation data, and at the same time make the case that a single compensation data collection tool will be useful as a one-size-fits-all self-assessment, research and screening tool.

One other point worth noting is the issue of redundancy. Many of the data points under consideration for this new compensation tool may already be collected from federal contractors as part of traditional OFCCP audits. In fact, the latest proposed scheduling letter published in the *Federal Register* (dated September 28, 2011) includes the following data components as part of item 12:

*Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of February 1st (i.e., the data as it existed on the most recent February 1st date). Provide gender and race/ethnicity information and hire date for each employee by job title, EEO-1 Category and job group, preferably in a single file. Provide all requested data electronically via email or computer disc in Excel or PDF format, if available.*

*a. For all employees, compensation includes base salary, wage rate, and hours worked. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.*

*b. You may provide any additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.*

If this new scheduling letter is approved, OFCCP will already be collecting individual level employee compensation data and legitimate factors related to compensation as part of their audits. Why the agency needs a separate tool to collect redundant information is unclear. If the purpose of this new tool is to conduct local pay equity analyses, the data submitted under this new item 12 of the scheduling letter seems to meet this objective.

### **A Practical Approach to Burden Estimates**

The ANPRM requests feedback on the collection of various compensation data elements, including tenure, total W-2 earnings, stock options, holiday pay, and retirement benefits. In estimating the burden for federal contractors to collect this information as a part of the compensation data collection tool, it is important to note that some of the aforementioned

variables may not be tracked in an organization's HRIS, or otherwise electronically maintained. In some instances, the information related to pay and benefits may be housed in separate systems, or may require extensive manual hours to provide the information in a concise and usable electronic format.

As an example, some federal contractors' HRIS store the total compensation for an organization's workforce, yet the contractor may use a third party vendor to maintain information relevant to health benefits information. Moreover, the contractor may also utilize a different third party vendor to maintain retirement benefits information that is completely separate from the vendor that stores health benefit information. The contractor would not only have to utilize internal resources to collect base pay information, but would have to coordinate and possibly pay for supplementary services from various third party vendors to obtain additional information related to health and retirement benefits. In this scenario, it would require manual hours and resources on behalf of both federal contractors and their vendors to provide the necessary information for the data collection tool.

In addition to considerations of accessibility, it is important to consider whether the data would allow OFCCP to conduct meaningful analyses. Although accessible, many of the data points OFCCP lists in the ANPRM are not inherently meaningful for investigating compensation disparities. Several variables OFCCP proposes to collect are meaningless for pay equity analyses because they are dependent on employee choice (e.g., health and retirement benefits, shift differentials, etc.) or require employee eligibility (e.g., paid leave) and are not actual pay-related decisions made by an employer.

#### *CCE Data Collection Focus Group*

To accurately assess the burden of data collection for federal contractors, CCE conducted a focus group session and a survey of several federal contractors to determine the availability and storage of compensation information. The focus group was facilitated by two Industrial-Organizational Psychologists, who reviewed the ANPRM, organized a discussion of contractor reactions, and considered what questions would be useful to ask to better understand contractor burdens. The subject matter expert group was comprised of eight federal contractor organizations, all of which were Fortune 500 companies. These companies represented a wide range of industries, representing approximately 660,000 employees across 2,000 establishments.

Compliance and compensation experts from each company completed a short survey on compensation data and burden/cost estimates, based on the items listed in the ANPRM. Each participant had experience collecting and analyzing compensation information in an EEO context and many of the respondents also had experience with a nationwide data collection survey, as five of the eight respondents were involved in collecting and responding to the now rescinded 2000 EO Survey.

Subject matter experts were asked about a series of items from OFCCP's ANPRM. The first set of questions focused on whether the item was currently accessible in a HRIS as an Available/Unavailable response. Results can be found in Table 1. As these data show, many of

the variables listed in the ANPRM (e.g., shift differentials, commissions, health benefits, retirement benefits, leave pay, stock options) were not available in the majority of HRIS systems.

**Table 1. Count and percent of availability of items from an HRIS**

	<u>Available</u>		<u>Unavailable</u>		<u>Total Responses</u>
	<u>Count</u>	<u>%</u>	<u>Count</u>	<u>%</u>	
A. Starting or initial total compensation (including paid leave, health and retirement benefits, etc.)	5	62.50%	3	37.50%	8
B. Pay raises	8	100.00%	0	0.00%	8
C. Bonus information	6	75.00%	2	25.00%	8
D. Tenure	8	100.00%	0	0.00%	8
E. Total W-2 earnings	4	57.14%	3	42.86%	7
F. Base salary	8	100.00%	0	0.00%	8
G. Holiday pay	2	28.57%	5	71.43%	7
H. Hourly wage	7	87.50%	1	12.50%	8
I. Shift differential	3	37.50%	5	62.50%	8
J. Commissions*	2	25.00%	4	50.00%	8
K. Stock options	1	12.50%	7	87.50%	8
L. Paid leave	2	25.00%	6	75.00%	8
M. Health benefits	1	12.50%	7	87.50%	8
N. Retirement benefits	1	12.50%	7	87.50%	8

\*Two survey respondents indicated that commissions were not applicable to their organization.

If respondents reported that an item was not readily available in an HRIS, they were then asked to indicate where the item was maintained, if at all. When an item was not maintained in the HRIS, survey respondents indicated that it was accessible from several different systems, ranging from another automated electronic format to paper files. One would be able to conclude from these results that although some of the variables could be found *somewhere* by the federal contractor, many were not easily accessible from an HRIS.

Survey respondents were also asked to estimate the amount of time it would take (per item) to compile a database that has each of the data points listed in Table 1 for each employee. Survey respondents were asked to consider an establishment of 500 employees when providing time estimates. In considering the time reported for each item, the median hours estimated for all items was 40.5 hours, with a minimum of 15 hours and maximum of 1080 hours. One respondent indicated that it was impossible to estimate these hours because an entirely new system would have to be developed to coordinate with 5 or 6 other systems and that system would require daily maintenance for accuracy. Survey respondents were then asked to assume that a data collection tool would require them to make calculations, including averages, standard deviations, and variances for several comparisons (male/female, minority/non-minority, and individual races) by some job category. Assuming that all data points listed in Table 1 were collected and populated in a database for their hypothetical establishment of 500 employees, survey respondents estimated that it would take a median of 20.5 hours to perform these calculations, with a minimum of 10 hours and maximum of 140 hours. Thus, the development and maintenance of systems to collect these data and the calculation of some basic descriptive analyses would both need to be considered in estimating burden.

In addition to time, survey respondents were asked to estimate the cost burden for the items mentioned above, taking into account legal, HRIS, compliance, and compensation expenses. Survey respondents estimated that the cost would range from \$900 to \$90,000. One survey respondent estimated that the first year would cost \$250,000 due in large part to the major changes that would be needed to program systems (HRIS, Data Warehouse, etc.), but future years were estimated to cost less. As mentioned, these estimates are based on completing the tool for an establishment of 500 employees, and estimates would obviously fluctuate as a function of establishment size. It is also important to note that respondents provided time and cost estimates based on the assumption that the tool would only request information from a certain point in time and going back two years.<sup>10</sup>

Many of the participants also provided anecdotal evidence via survey comments and focus group discussion confirming the notion that accessibility and usability burdens related to many of the items outlined in the ANPRM would be heavy. Taking into account the evidence collected by CCE, it is recommended that OFCCP revisit the contractor burdens associated with this type of wide-scale data collection.

## Conclusion and Recommendations

CCE commends OFCCP for taking proactive steps to address pay discrimination. However, there are legitimate concerns regarding the purpose and utility of a data collection tool as it is conceptualized in the ANPRM. Compensation systems are complex and it is likely that there is no “one-size-fits-all” approach for all contractors. OFCCP has suggested as much by rescinding their own compensation standards and guidelines. The ANPRM suggests that OFCCP is considering a tool that would collect and measure the universe of potential variables related to compensation without thinking through what the goal of the tool is, how difficult it would be for federal contractors to collect all these data, and how this information will be used. Though this may appear to be a solution to the notion that not all compensation systems are created equally, this “catch-all” approach may provide little unique value in identifying and remedying pay discrimination, yet place enormous burdens on OFCCP and the federal contractor community.

The development of a compensation tool may be burdensome for OFCCP because:

- The development of a database like the one proposed will be time consuming and a cost burden for OFCCP to create and maintain;
- The compensation data collection tool may be substantially redundant with the data collected during a routine compliance evaluation (per the proposed scheduling letter which requests individual level compensation data);
- The compensation data collection tool may be less predictive than the data collected during a routine compliance evaluation;
- The absence of *a priori* standards for a compensation analysis means that OFCCP will likely be investing substantial resources in investigating and pursuing false positives.

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<sup>10</sup> 41 CFR 60-1.12 (a) requires records to be preserved for a period of not less than two years from the date of making of the record or the personnel action involved, whichever occurs later.

This approach is also burdensome for the federal contractor community because:

- The tool does not provide any guidance to the federal contractor on how to be in compliance before an audit commences. The majority of the federal contractor community believes in affirmative action and non-discrimination, and invests tremendous resources in ensuring that their organization is in compliance. Based on the ANPRM, it is unclear what ‘in compliance’ means, and given a “catch-all” database, it is unclear what standards would be used to interpret any analyses. CCE recommends that OFCCP consider generating compensation standards first, and then consider whether or not a compensation data collection tool is needed.
- The “catch-all” nature of the database could create an undue burden on the federal contractor community by creating another tool with little predictive value like the EO Survey.

CCE recommends that OFCCP take the following actions in order to meaningfully evaluate the proposed compensation data collection effort and its implications for identifying pay discrimination in the federal contractor community:

- (1) Take into consideration the rationale for (a) rescinding the EO Survey and (b) the proposed rescission of the Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Pay Practices when evaluating the utility and scope of the proposed data tool.
- (2) Determine whether a compensation data collection tool that collects data that has also been requested in the proposed Scheduling Letter is redundant and overly burdensome to contractors. In addition, OFCCP should also consider the possibility of redundancy across tools used by other EEO agencies (e.g., EEOC initiatives). If a tool is ultimately deemed necessary, consider minimizing the scope of the pay survey tool by clearly defining a purpose (e.g. screening device, research database or proactive analyses).
- (3) Host a Technical Advisory Committee (TAC) on the development of such a tool. TAC members should include experts on EEO law, compensation, HR data systems, and Statistics to provide guidance on all aspects of such a tool.
- (4) Hold public hearings on the findings of the TAC for additional feedback from stakeholders.

CCE thanks OFCCP and the Department of Labor for the opportunity to comment on the proposed compensation data tool. We hope that this submission has raised some important issues for OFCCP to consider. It is critical that requirements of federal contractors are attainable, fair, and grounded in data that mirrors reality and allows for meaningful inferences. We hope that OFCCP considers the challenges described in this submission and anticipate that this response will stimulate positive dialogue on a variety of important topics.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Cohen', written in a cursive style.

David B. Cohen  
Senior Vice President  
The Center for Corporate Equality