

February 8, 2016

Via Electronic Mail: OIRA_submission@omb.eop.gov

Office of Information and Regulatory Affairs
Attn: OMB Desk Officer for DOL-OFCCP
Office of Management and Budget, Room 10235
725 17th Street NW
Washington, DC 20503

Re: Comments of the Equal Employment Advisory Council on the Office of Federal Contract Compliance Programs' Information Collection Request Revision Titled, "Agreement Approval Process for Use of Functional Affirmative Action Programs" (OMB Control Number 1250-0006)

Dear OMB Desk Officer:

The Equal Employment Advisory Council ("EEAC") respectfully submits these comments in response to the Office of Federal Contract Compliance Programs' ("OFCCP" or "the agency") proposed information collection request (ICR) revision regarding the agency's Agreement Approval Process for Use of Functional Affirmative Action Programs, notice of which was published in the Federal Register on January 8, 2016. 81 Fed. Reg. 970.

This ICR covers the recordkeeping and reporting obligations imposed upon those federal contractors that seek OFCCP's approval to implement a functional affirmative action program ("FAAP") structure, as well as those that seek to update, modify, and certify an existing FAAP agreement. Importantly, EEAC is a strong proponent of the FAAP structure option, and believes that it enhances affirmative action compliance to the benefit of all parties involved. Accordingly, the recommendations we make below are offered in the spirit of improving a program that EEAC supports.

STATEMENT OF INTEREST

EEAC is the nation's largest nonprofit association of employers dedicated exclusively to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC's membership includes approximately 270 of the nation's largest private-sector corporations, who collectively employ more than 10 million workers in the United States alone. Nearly all EEAC member companies are subject to the nondiscrimination and affirmative action requirements of Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations. As major federal contractors and subcontractors, our members have a significant stake and interest in ensuring that OFCCP's regulations and paperwork requirements, including those triggered by the agency's FAAP request-and-approval process, efficiently and effectively accomplish their underlying policy objectives.

BACKGROUND

OFCCP's ICR reflects the agency's proposed changes to the application and approval process which federal contractors must follow to be able to structure their affirmative action programs ("AAPs") by function or business unit rather than by physical location.¹ More specifically, the ICR pertains to documents and information that OFCCP would require federal contractors to prepare and disclose in advance of, and during, a FAAP approval "conference" with the OFCCP, ostensibly to allow the agency to reasonably determine whether the contractor's structure and business operations are suitable for FAAP approval. These documents and information are detailed in Attachments B and C to the proposed revised FAAP Directive OFCCP has submitted to OMB for approval.

This proposed directive and its accompanying attachments reflect several minor changes, clarifications, and formal codification of certain standard FAAP-related practices that have evolved over time. EEAC's pre-clearance comments to OFCCP² offered suggestions that we believed would help make the FAAP request-and-approval process more efficient for both contractors and OFCCP. Specifically, EEAC recommended that OFCCP remove the current requirement that contractors submit copies of personnel policies and procedures and a copy of at least one qualifying federal contract (or subcontract) as part of their FAAP application. In addition, we recommended that the agency grant conditional approval to any contractor that submits a timely and complete FAAP application.

Acknowledging that it is unlikely that an employer would apply for FAAP approval if the company was *not* a covered federal contractor, OFCCP has now agreed to remove the requirement that contractors submit a copy of a qualifying federal contract or subcontract, a change that we strongly support. In the same spirit, we also believe that three additional and relatively minor revisions to the final FAAP directive, discussed below, would further enhance the FAAP request-and-approval process consistent with OFCCP's stated goal of making it "simple and fluid," as well as reduce the burden on federal contractors seeking FAAP approval.

RECOMMENDATIONS FOR REVISIONS TO THE ICR

INFORMATION REGARDING FEDERAL CONTRACTS

When EEAC suggested that OFCCP remove the requirement that contractors applying for a FAAP agreement submit a copy of a qualifying federal contract or subcontract, we neglected to recommend that OFCCP also remove the similar requirement that contractors provide information regarding their federal contracts or subcontracts. Perhaps accordingly, OFCCP agreed to remove the former requirement, but not the latter. However, we

¹ OFCCP regulations require that contractors seeking to prepare AAPs in a manner other than by physical location (e.g., on a functional basis), must seek OFCCP's advance permission. 41 C.F.R. § 60-2.1(d)(4). In the absence of an approved FAAP agreement, the regulations require contractors to develop, implement, and maintain a separate AAP for each physical location of an establishment with 50 or more employees.

² We have attached our preclearance comments to this letter for your convenience.

respectfully submit that the reasoning behind the removal of one requirement applies equally to the other, and the burden on federal contractors is the same for both.

Attachment B requires applicants to provide a statement that the company is a covered federal contractor and include “information regarding at least one federal contract or subcontract of \$50,000 or more, identifying the name of the federal contracting agency, the contract number, the contract period, and the name of the prime contractor if the contractor is a subcontractor.” Moreover, when a company seeks to renew a FAAP agreement (or “certify” under the proposed ICR), the company is required to provide *updated* federal contract information to the same level of specificity as the Attachment B requirement.

While this request may sound simple enough, the FAAP application itself makes the required statement as to the company’s federal contractor status redundant. Further, as a practical matter the human resources and compliance professionals assigned the responsibility of managing the FAAP request-and-approval process rarely if ever have direct access to the company’s federal contracts. Even for the contract/procurement professionals at the types of large, complex organizations that benefit most from the FAAP program, identifying and producing for OFCCP’s review one or more “qualifying” federal contracts can be a burdensome and time-consuming task.

The submission of these documents, or information about them, simply is not a necessary component of the FAAP approval process. First, no company would submit to this process and disclose confidential business information to OFCCP if the company was not already a federal contractor.

Second, and perhaps most importantly, OFCCP carries out its enforcement responsibilities on an ongoing basis without these documents, including conducting approximately four thousand compliance evaluations annually of federal contractor establishments without asking these contractors for a copy of, or information about, a “qualifying” federal contract. In other words, OFCCP has no trouble establishing jurisdiction without requiring contractors who prepare establishment-based AAPs to do it for them.

In order to produce information about a contract, of course, companies would still need to identify and retrieve the contract itself, so the burden is the same. The FAAP community gains nothing from the elimination of one requirement but not the other. If the production of an actual qualifying contract is unnecessary, it stands to reason that the production of information regarding a qualifying contract is unnecessary as well.

For these reasons, OFCCP agreed to drop the requirement that applicants produce copies of these contracts. And for these same reasons, we respectfully submit that it is both burdensome and unnecessary for the agency to continue to require contractors to submit information regarding qualifying federal contracts in either the FAAP application or renewal/certification process.

COPIES OF PERSONNEL POLICIES AND PROCEDURES

EEAC also recommended to OFCCP that it remove from Attachment B the required submission of personnel policies, while retaining the provision in Attachment C that would require their discussion. Although OFCCP declined to do so, we are renewing this request to OMB.

Attachment B currently requires that in advance of the FAAP conference with OFCCP, the contractor must prepare and submit “[c]opies of personnel policies relevant to evaluating the proposed functions or business units, including organizational and unit-specific policies related to recruitment; hiring; promotion; compensation; and termination.” OFCCP’s proposed revision retains this requirement, but substitutes the broader term, “discipline” for “termination.”

Attachment C requires that, during the FAAP approval conference, the contractor be prepared to discuss “[p]ersonnel procedures including recruitment; hiring; promotion; compensation; termination; record retention and data analysis as they apply to each functional or business unit, including identification of units that have differing personnel or compensation practices.”

EEAC acknowledges that each functional unit’s ability to efficiently manage and monitor its personnel actions is certainly relevant to an assessment of a company’s FAAPs. However, we respectfully submit that ability rarely would exhibit itself in any definitive way through company documents. Moreover, for the types of large, complex organizations that benefit most from the FAAP program, this requirement often entails the copying and printing of possibly hundreds of pages of confidential company policies. The utility of such an exercise is unclear.

Neither the lack nor abundance of such documents sheds significant light on the extent to which the company’s functions or business units operate sufficiently independently to sustain a FAAP program. For instance, a company could impose uniform, organization-wide policies and procedures and still operate with distinct functions. Conversely, a company could have policies and procedures unique to each individual manager and not satisfy the requirements for a FAAP program.

That is not to say that a company’s various policies and procedures are irrelevant to the discussion, and we agree there could conceivably be a point in the FAAP request-and-approval process where OFCCP might need to see documentation to substantiate what is discussed during the FAAP approval conference. We recommend that such documentation be “situation specific,” however, and requested by OFCCP only where it is directly relevant to questions that arise during the FAAP conference.

Accordingly, EEAC respectfully requests that Attachment C’s provision requiring the discussion of personnel policies be retained, but that Attachment B be modified to eliminate the provision that would require their submission in advance for every FAAP application.

INFORMATION ON SUBSIDIARIES

The proposed Attachment B requires “[t]he names of all subsidiaries in the company’s family tree and an explanation of whether these companies are included in the contractor’s AAP structure. If these companies are included in any of the proposed functional units, they must be clearly identified on the employee location listing referenced in item 6 above. If they are not included in the proposed functional units, provide information concerning these companies consistent with item 9 below.” OFCCP’s current FAAP directive does not contain this requirement.

From a technical standpoint, we first note that OFCCP appears to have mis-numbered the references in this paragraph. We believe that the agency intends for the paragraph to refer to item 5 rather than item 6, and item 8 rather than item 9. EEAC respectfully requests that this paragraph be edited accordingly if it is included in the final revised directive.

From a practical standpoint, we submit that this requirement is both burdensome and unnecessary. The very purpose of the FAAP program is to allow contractors to develop AAPs that align with how the organization actually operates. Organizational functions can not only cross establishments, but can in fact cross related companies. It is not unusual for separate companies under the same corporate umbrella, such as subsidiaries, to share certain services. These shared service functions may in turn be ideal for a functional AAP. Detailed information about the various companies or subsidiaries served is simply irrelevant to the determination of whether or not a FAAP is appropriate.

Further, many of the large, complex organizations that benefit from FAAP arrangements often operate one or more legally separate entities that are not subject to OFCCP jurisdiction by virtue of a qualifying federal contract held by another organization. Information regarding “all subsidiaries in the company’s family tree” could mire the FAAP approval process in a dispute over whether or not OFCCP jurisdiction extends to certain companies, significantly slowing the process and discouraging federal contractors from seeking FAAP approvals.

Finally, we submit that the information OFCCP seeks is not as straightforward as it might initially seem. The human resources and compliance professionals assigned the responsibility of managing the FAAP request-and-approval process do not typically have access to the information necessary to meet this requirement. Moreover, even for the corporate and legal professionals who do, providing a list of “all subsidiaries in the company’s family tree” may be no easy task if the organization is regularly involved in mergers, acquisitions, divestitures, joint ventures, and other business transactions. The relationships among the various companies or subsidiaries can be incredibly complex. We believe that having to develop a comprehensive list in the manner OFCCP requests can be a burdensome and time-consuming task with no clear utility in the FAAP application process.

OFCCP’s burden statement does not provide a calculation specific to this new requirement. Rather, the agency generally estimates 51 hours per company to prepare the initial FAAP request and the additional information discussed during the approval process. We respectfully submit, however, that this one new requirement alone could easily exceed the total burden estimate for the entire process.

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For these reasons, EEAC requests that this requirement be eliminated from OFCCP's proposed Attachment B.

CONCLUSION

We appreciate the opportunity to make our views known to OMB, and would welcome any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt A. D. Nusbaum". The signature is stylized and cursive, with a long horizontal flourish extending to the right.

Matt A. D. Nusbaum
Senior Counsel and Director of
OFCCP Compliance Programs

cc: Department of Labor-OASAM