



February 8, 2016

VIA EMAIL

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

**Re: National Industry Liaison Group’s Comment on
OFCCP’s Proposed Renewal of Information
Collection Requirements**

Control Number 1250-0006

The National Industry Liaison Group (“NILG”) welcomes the opportunity to comment on the Office of Federal Contract Compliance Programs’ Proposed Revision to the Agreement Approval Process for Use of Functional Affirmative Action Programs, published in the Federal Register on January 8, 2016.

By way of background, federal contractors began forming local Industry Liaison Groups (“ILGs”) over thirty years ago as a unique partnership of public and private sector cooperation to advance workplace equal employment opportunity and affirmative action. To further enhance the partnership, the NILG was developed as a forum for the Office of Federal Contract Compliance Programs (“OFCCP” or “Agency”) and federal contractors to proactively advance workplace equal employment opportunity. The NILG Board is comprised of elected members representing the local ILGs from across the country. Over the years, the NILG and the ILGs, which are comprised of thousands of small, mid-size, and large employers, have reached out to OFCCP and other agencies, such as the Equal Employment Opportunity Commission, with mutual goals of fostering a non-discriminatory workplace. In response to the proposal, the NILG seeks to present the views of its constituency and has gathered their input and guidance in preparing these comments.

We commend OFCCP for, and share its ongoing commitment to, promoting equal employment opportunity and fair pay – particularly in regard to the functional affirmative action program (“FAAP”). FAAPs have enabled our members to continue to run their organizations as

they see fit while also meeting the compliance requirements of OFCCP, leading to efficient data collection and analysis, as well as effectuation of equal opportunity in the workplace. We further commend OFCCP's commitment to providing contractors the time- and cost-saving option to prepare and submit compliance materials electronically wherever possible, and to recognize that such flexibility is a benefit to OFCCP as well. In our comments below, we offer observations and suggestions designed to ensure all individuals are provided equal employment opportunity while, at the same time, balancing the contractor community's legitimate interest in ensuring that information collected by the Agency is necessary and based upon valid assumptions and minimal administrative burdens.

I. General Response to OFCCP's Proposed Revision to the Agreement Approval Process for Use of Functional Affirmative Action Programs

As noted above, the NILG shares OFCCP's commitment to equal opportunity in all terms of employment. NILG recognizes OFCCP's need and right to collect information for purposes of the pursuit of equal opportunity. NILG does not take issue with the Agency's ability to collect information, but encourages OFCCP to limit such requests to necessary and relevant information.

The most meaningful change proposed in OFCCP's revision to the Agreement Approval Process for Use of Functional Affirmative Action Programs would appear to be the transition from FAAP renewal to FAAP certification. The effect of certification is essentially the same as renewal: once approved by OFCCP, contractors are entitled to another three years of FAAP classification. The *process* of certification, however, is materially different and significantly more burdensome to contractors.

OFCCP also updated and increased the number of hours it estimates it will take contractors to comply with the information requests – without explanation as to what utility the additional information will provide.

As discussed below, the NILG respectively questions the scope of OFCCP's additional information requests and related FAAP-specific compliance procedures.

II. Responses to Specific Sections in the ICR

A. Attachment B Should Require Only Specific Materials Necessary to Determine Whether the Proposed FAAP Structure is Appropriate.

The information requested in Item 6 in the new Attachment B is irrelevant to OFCCP's evaluation of an FAAP agreement application. Item 6, for example, calls for the submission of:

The 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.

This request is overbroad and beyond the purpose of Attachment B documents, which are submitted in support of a contractor's request for a FAAP agreement. Consideration of these documents may be appropriate in the course of evaluating a subsidiary's affirmative action obligations; however, they are premature at the FAAP request stage. Forcing a contractor to prepare these documents before the FAAP agreement is even approved is burdensome and excessive. NILG recommends eliminating Item 6 as a required element of the FAAP request process.

Similarly, a draft of OFCCP's FAAP Directive suggests OFCCP may seek to collect unspecified information beyond what is set forth in the current Information Collection Request ("ICR"). At paragraph 7.E.1(e), the draft Directive states:

Every effort will be made to gather **sufficient information regarding the contractor's corporate structure** to process the FAAP agreement request. This information enables OFCCP to make informed decisions when evaluating requests for FAAP agreements. Nonetheless, **additional information may be necessary** for OFCCP to make a final determination on the contractor's request.

Contrary to the ICR, this paragraph suggests OFCCP has open-ended authority to request unspecified, additional information at its discretion – beyond what is set forth in Attachment B. This type of open-ended request does not appear to be addressed in the ICR Supporting Statement. To the contrary, the Supporting Statement under the heading "Reporting Burden" on page 11 states:

In addition to this explanation [of what FAAPs are appropriate], OFCCP needs **specific** documents and information from the contractor in order to determine whether FAAPs are appropriate for the contractor's organization. Thus, the reporting burden assessed below accounts for the written submission requesting approval for an agreement and the retrieval and copying of information needed by OFCCP to make its determination.

See also page 5: "specific items of information."

This paragraph is potentially significant because, under the prior Directive, a contractor seeking FAAP approval need only make a written request and provide the documents listed in Attachment B. Under the proposed Directive, a contractor would apparently need to make the written request but would also be required to respond to unspecified, additional requests for information beyond what is set forth Attachment B or the ICR.

The NILG also requests clarification of another inconsistency. In the ICR Supporting Statement at page 6, OFCCP suggests that Attachment B would require contractors to provide information regarding equal employment opportunity violations. This proposed requirement is not set forth in Attachment B and would be an inconsistent new requirement adding to contractor burdens.

B. The Proposed Certification Process Creates Unnecessary Administrative Burdens and Costs for Contractors.

Pursuant to OFCCP Directive 305, FAAP agreements automatically expire after three years unless the contractor completed the renewal process. While the three-year renewal process has always presented an administrative burden – creating uncertainty for future AAP development and internal employer planning – that burden was mitigated by as-needed submission requirements. Directive 305 provided that “[d]uring the renewal process, the FAAP Unit will confirm information regarding the structure of the functional units and may request updated information where changes have been made.” That is to say, *only* in the event of change *might* OFCCP request additional information, and even then *only* as needed.

The proposed certification process would eliminate this qualifying language and make mandatory additional and burdensome procedural requirements:

The contractor *must* certify in writing every three years (at least 120 calendar days prior to the expiration of the existing agreement) that there have been no changed circumstances in its business structure affecting the existing FAAP agreement. The certification *must* include updated information regarding employee counts, facility names, and facility addresses included in each functional unit.

Every contractor, therefore, would be automatically required to submit additional information every three years, whether its circumstances have changed or not, simply to maintain the status quo of their already-approved FAAP. This requirement is unnecessary and would only increase the pressure on human resources.¹ Indeed, OFCCP estimates that the certification process will require 300 hours of contractor time – nearly the same amount of time previously required by the modification, update, and renewal steps *combined*. Contractors will also be forced to absorb the cost of these additional administrative tasks. By OFCCP’s own calculations, contractors will incur an additional \$12,137 attributable to the certification process.² These time and cost expenditures are in addition to and very likely redundant of the efforts associated with the mandatory compliance reviews.

NILG recommends OFCCP eliminate the mandate for updated information, particularly because that same information will already have been provided in the ordinary course of the AAP process and the mandatory compliance evaluations.

C. OFCCP Underestimates the Burden of the Information Collection Request on Contractors.

The NILG has concerns with OFCCP’s revised burden estimates associated with the new certification process. OFCCP’s Notes to Reviewer explains that OFCCP is requesting approval for an increase from 926 contractor hours to 1,427 contractor hours, primarily attributable to the

¹ The certification process will be equally inefficient for OFCCP. In its Note to Review, OFCCP acknowledges that the request for approval of additional burden hours – increased from 926 hours to 1,427 hours – is “primarily attributed to the addition of a certification requirement.”

² Likewise, the additional cost to the federal government arising from the proposed certification process is estimated by OFCCP to be \$22,699.44.

addition of the certification requirement discussed above. However, contractors seeking FAAP participation tend to be larger in size, so the burden of compliance evaluations would inevitably be “above average.” Further, OFCCP’s burden estimate does not account for the time and cost imposed by mandatory compliance reviews once every three years, which will reliably dwarf those burdens included in OFCCP’s summary of annualized burden hours and associated cost.

As a result, the NILG requests OFCCP review and revise its burden estimates to more accurately reflect the burden imposed by the certification and mandatory compliance review processes – or, more preferably, eliminate the mandatory components of those processes as discussed above.

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As always, we thank OFCCP for its consideration of our comments and suggestions. If the Agency should wish to discuss this Commentary Letter or any other related matter, please contact Mickey Silberman, NILG Board counsel, at (303) 225-2400 or silbermanm@jacksonlewis.com.

Respectfully submitted,

The National Industry Liaison Group Board



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