

## NOTE TO REVIEWER

The Office of Federal Contract Compliance Programs (OFCCP) requests Office of Management and Budget (OMB) approval for 9,559,739 hours in combined recordkeeping, reporting and third party disclosure burden hours for compliance with Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended (Section 503), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212) (VEVRAA) by non-construction (supply and service) Federal contractors. This compares with 8,114,628 hours in the most recently approved clearance request in 2014, an increase of 1,445,112 (9,559,739 – 8,114,627 = 1,445,112) hours.

OFCCP will not be collecting any new or different information. Rather, OFCCP proposed minor clarifying edits to the Scheduling Letter and Itemized Listing to ensure contractors understand the information being requested and to strengthen the agency's assurances of confidentiality for the information provided. The notice proposing renewal of the information collection appeared in the Federal Register on October 29, 2015 (80 FR 66572) for a 60-day public comment period. The authorization for this information collection (OMB Control Number 1250-0003) expires on March 31, 2016.

The burden hours accounted for in that proposal primarily represent those Federal contractors that are required to develop, update, and maintain an affirmative action program (AAP) under Executive Order 11246 (EO 11246). The hours also represent Federal contractor reporting requirements under EO 11246 as well as Section 503 and VEVRAA. Recordkeeping requirements under Section 503 and VEVRAA are not included in this information collection. As explained in this supporting statement, OFCCP attributes the increase in burden hours for this information collection to a higher percentage of large Federal contractors and subcontractors that must develop, update, and maintain the EO 11246 AAP, when compared to the percentage of large Federal contractors and subcontractors accounted for in the clearance request approved in 2014.

In this proposed Scheduling Letter and Itemized Listing ICR, OFCCP considers the public comments it received during the 60-day comment period. As a result of this consideration, OFCCP has revised parts of the document to address commenters' concerns and suggestions. The revisions did not affect the estimated burden. OFCCP provides summaries of and responses to the public comments under paragraph 8 of this Supporting Statement.

**SUPPORTING STATEMENT**  
**SUPPLY AND SERVICE PROGRAM**

**OMB NO. 1250-0003**

**A. JUSTIFICATION**

The Office of Federal Contract Compliance Programs (OFCCP) is responsible for administering three equal opportunity mandates that prohibit federal contractors and subcontractors from discriminating against applicants and employees based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability, status as a protected veteran, and, under certain circumstances, taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers. Additionally, OFCCP's legal authorities, as listed below, require affirmative action to provide equal employment opportunities:

- Executive Order 11246, as amended (EO 11246),<sup>1</sup>
- Section 503 of the Rehabilitation Act of 1973, as amended (Section 503),<sup>2</sup> and
- Vietnam Era Veterans' Readjustment Assistance Act of 1974,<sup>3</sup> as amended, 38 U.S.C. 4212 (VEVRAA).

OFCCP promulgated regulations implementing these programs consistent with the Administrative Procedure Act. These regulations are found at Title 41 of the Code of Federal Regulations (CFR) in Chapter 60 and are accessible on the Web at [http://www.dol.gov/dol/cfr/Title\\_41/Chapter\\_60.htm](http://www.dol.gov/dol/cfr/Title_41/Chapter_60.htm).

EO 11246 prohibits Federal contractors from discriminating against applicants and employees based on race, color, religion, sex, sexual orientation, gender identity, and national origin. EO 11246 also prohibits contractors from taking discriminatory actions, including firing, against applicants and employees for attempting to learn if they are victims of compensation discrimination and, in certain instances, sharing pay information with their co-workers.<sup>4</sup> EO

<sup>1</sup> The regulations implementing Executive Order 11246 applicable to supply and service contractors are found at 41 CFR Parts 60-1, 60-2, 60-3, 60-20, and 60-50.

<sup>2</sup> The regulations implementing Section 503 applicable to supply and service contractors are found at 41 CFR Part 741 (2014).

<sup>3</sup> The regulations implementing VEVRAA applicable to supply and service contractors are found at 41 CFR Part 60-300 (2014).

<sup>4</sup> EO 13665 amended EO 11246 to include discrimination against any employee or applicant for inquiring about, discussing, or disclosing her compensation or the compensation of another employee or applicant. Executive Order 13665, Non-Retaliation for Disclosure of Compensation Information, 79 FR 20749 (April 11, 2014). The final rule

11246 applies to Federal contractors and subcontractors, and to federally assisted construction contractors holding a Government contract in excess of \$10,000, or Government contracts, that have, or can reasonably expect to have, an aggregate total value exceeding \$10,000 in a 12-month period. EO 11246 also applies to Government bills of lading, depositories of Federal funds in any amount, and to financial institutions that are paying agents for U.S. Savings Bonds.

Section 503 prohibits employment discrimination against applicants and employees based on disability and requires contractors to take affirmative action to employ, advance in employment, and otherwise treat qualified individuals without discrimination based on physical or mental disabilities. Its requirements apply to Federal contractors and subcontractors with a Government contract in excess of \$15,000.<sup>5</sup>

VEVRAA prohibits employment discrimination against protected veterans, namely disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces service medal veterans, and requires contractors to take affirmative action to employ, advance in employment, and otherwise treat qualified individuals without discrimination based on their status as a protected veteran. Its requirements apply to Federal contractors and subcontractors with a Government contract of \$150,000 or more entered.<sup>6</sup>

For purposes of OFCCP's recordkeeping and reporting requirements, the agency divides the obligations under these authorities into multiple information collection requests (ICRs).<sup>7</sup> These divisions are based on OFCCP's distinct enforcement authorities (e.g., VEVRAA and Section 503 each has its own recordkeeping ICR), programs, and related regulatory requirements.

Therefore, this ICR does not include recordkeeping burden estimates for compliance with the information collections in VEVRAA and Section 503 because Control Numbers 1250-0004 and 1250-0005, respectively, account for that burden. However, OFCCP references these statutes in this ICR because provisions in the Scheduling Letter and Itemized Listing require contractors to report information they have collected relevant to their compliance with VEVRAA and Section 503. This ICR also does not include the recordkeeping burden associated with OFCCP's two

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published on September 11, 2015 and becomes effective on January 11, 2016. 80 FR 54934 (Sept. 11, 2015).

<sup>5</sup>Effective October 1, 2010, the coverage threshold under Section 503 increased from \$10,000 to \$15,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See*, Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 75 CFR 53129 (Aug. 30, 2010).

<sup>6</sup>Effective October 1, 2015, the coverage threshold under VEVRAA increased from \$100,000 to \$150,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. *See*, Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 80 FR 38293 (July 2, 2015).

<sup>7</sup>OFCCP's other current ICRs include: Construction Recordkeeping Requirements (OMB No. 1250-0001), Complaint Procedures (OMB No. 1250-0002), VEVRAA Recordkeeping Requirements (OMB No. 1250-0004), Section 503 Recordkeeping Requirements (OMB No. 1250-0005), Functional Affirmative Action Program Agreement Procedures (OMB No. 1250-0006), Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions (OMB No. 1250-0008), and Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors (OMB No. 1250-0009). In the future, and as appropriate, OFCCP proposes to consolidate several of these ICRs.

recent final rules that implemented Executive Order 13672<sup>8</sup> and Executive Order 13665. OFCCP accounted for the recordkeeping and reporting burden hours associated with these final rules in separate ICRs that coincided with publication of the two rules.

This ICR does include the time contractors spend responding to the Scheduling Letter and Itemized Listing when calculating the reporting burden hours. Due to the nature of their use, OMB considers the Scheduling Letter and the Itemized Listing reporting requirements. This ICR also includes a burden hour calculation for the time spent collecting records for OFCCP's compliance check.

Annually, OFCCP identifies approximately 3.3 percent of the 104,545 contractor establishments for a compliance evaluation, or about 3,471 contractor establishments.<sup>9</sup>

Due to the pending expiration of OMB No. 1250-0003, OFCCP is seeking a renewal, with only minor clarifying revisions, of the Scheduling Letter and Itemized Listing, and the Compliance Check Letter, for OFCCP's supply and service (non-construction) enforcement program for EO 11246, VEVRAA and Section 503.

## **1. LEGAL AND ADMINISTRATIVE REQUIREMENTS**

### Executive Order 11246

41 CFR Part 60-1 - Obligations of Contractors and Subcontractors.

This part sets out the nondiscrimination and affirmative action requirements under EO 11246. It defines coverage, specifies clauses to be included in contracts, provides a procedure to ensure compliance by covered contractors, specifies certain reporting and recordkeeping requirements, and establishes the basic requirements for AAPs under EO 11246. AAPs are required under OFCCP regulations to demonstrate contractors' efforts to ensure a diverse workforce. Part 60-1 also contains recordkeeping, reporting and third party disclosure requirements for the supply and service program. OFCCP discusses specific sections of this part below.

Section 60-1.4 describes the equal opportunity clause in Government contracts. Section 60-1.4(a)(3) requires a contractor to notify labor organizations of their obligations under EO 11246 and its implementing regulations. OFCCP explains third party disclosure requirements below.

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<sup>8</sup>EO 13672 amended EO 11246 to prohibit federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity. Executive Order 13672, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 FR 42971 (July 21, 2014). The final rule was published on December 9, 2014, and took effect on April 8, 2015, 79 FR 72985 (Dec. 9, 2014).

<sup>9</sup>This percentage is based on the total number of compliance evaluations conducted in FY 2013 (3,471) divided by the total number of contractor establishments (104,545). OFCCP based the number of supply and service contractor establishments on the 104,545 Federal contractor and subcontractor establishments that filed EEO-1 Reports in 2013. OFCCP believes that this number includes all contractor companies that are required to develop AAPs under its legal authorities.

Section 60-1.7 requires specified Federal prime contractors and subcontractors to file an Employer Information Report EEO-1 (EEO-1 Report) annually. The U.S. Equal Employment Opportunity Commission (EEOC) and OFCCP use EEO-1 Report data to analyze employment patterns for women and minorities and as a civil rights enforcement tool. OMB approved the EEO-1 Report information collection under OMB No. 3046-0007. The EEO-1 Report requires reporting in seven racial and ethnic categories:

- Hispanic or Latino,
- White not Hispanic or Latino,
- Black or African-American not Hispanic or Latino,
- Native Hawaiian or Other Pacific Islander not Hispanic or Latino,
- Asian not Hispanic or Latino,
- American Indian or Alaska Native not Hispanic or Latino, and
- Two or More Races not Hispanic or Latino.

The information collection can be viewed at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201412-3046-001](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201412-3046-001).

Section 60-1.12 requires contractors to preserve any personnel or employment record made or kept for a period of not less than two years. However, if the contractor has fewer than 150 employees or does not have a contract of at least \$150,000, this retention period is one year. Section 60-1.12 provides that the contractor must be able to identify the gender, race and ethnicity of each employee for any record the contractor maintains. Where possible, the contractor must also identify the gender, race and ethnicity of each applicant or Internet applicant.

Section 60-1.20 addresses the investigative methods OFCCP uses to evaluate a contractor's compliance with the agency's regulations. These methods include an in-depth comprehensive evaluation of the contractor's employment practices (i.e., compliance review) and a narrowly focused analysis of a selected employment practice or policy (i.e., compliance check), among others.

This section also requires contractors selected for a compliance evaluation to submit their AAPs and supporting documentation to OFCCP within 30 days of the request. OFCCP uses a Scheduling Letter, which includes the Itemized Listing, to make this document request.

Section 60-1.40 requires the development and maintenance of an EO 11246 AAP. This section requires each contractor and subcontractor with 50 or more employees that meets the following criteria to develop an AAP for each of its establishments:

- has a contract of \$50,000 or more; or
- has Government bills of lading which in any 12-month period total or can reasonably be expected to total \$50,000 or more; or
- serves as a depository of Government funds in any amount; or

- is a financial institution that is an issuing and paying agent for U.S. Savings Bonds and savings notes in any amount.

#### 41 CFR Part 60-2 – Affirmative Action Programs

Part 60-2 defines the scope of the AAP requirements under EO 11246, as well as the purpose and contents of the EO 11246 AAP and coverage requirements.

Section 60-2.1 describes which contractors must develop AAPs and provides instructions for including employees in AAPs, requires contractors to develop an AAP for each establishment, and requires that employees be included in the AAP for the establishment at which they work. Section 60-2.1 outlines alternatives for AAP development, such as cases where an establishment has less than 50 employees or where the contractor makes employee selection decisions for an establishment at a higher-level establishment. Section 60-2.1(d)(4) also permits contractors, with the agreement of OFCCP, to develop and maintain AAPs based on functional or business units rather than establishments.

Section 60-2.11 requires that contractors use either an organizational display or workforce analysis as their organizational profile. An organizational profile depicts an establishment's staffing pattern and contractors use it to determine whether barriers to equal employment opportunity exist in their organizations. The organizational profile also provides an overview of the demographic composition of the workforce at the establishment level; this may help identify organizational units where women and minorities are underrepresented or concentrated.

An organizational display is a detailed graphical, tabular chart, text, spreadsheet or similar presentation of a contractor's organizational structure. For each organization unit, the organizational display contains the name of the unit, the job title, gender, race and ethnicity of the unit supervisor, the total number of male and female employees, and the total number of male and female incumbents in each of the below listed groups.

- Black
- Hispanic
- Asian/Pacific Islander
- American Indian/Alaskan Native

A workforce analysis is a listing of each job title as it appears in applicable collective bargaining agreements or payroll records ranked from the lowest to highest paid within each department or other similar organizational unit, including departmental or unit supervision. The workforce analysis must show the total number of employees, the total number of male and female employees, and the total number of male and female employees in the specified race or ethnic categories for each job title. The wage rate and salary range for each job title are also required.

Section 60-2.12 describes what is required for a job group analysis. A job group analysis is a method of combining job titles within a contractor's establishment. Contractors with 150 or more employees must group jobs by similarity of content, wage rates, and

opportunities. However, contractors with fewer than 150 employees have the option of using the nine occupational groups used in the EEO-1 Report as job groups. The job group analysis must include a list of job titles that comprise each job group. Generally, job group analysis includes all jobs located at an establishment. Jobs located at another establishment are annotated to identify their actual location.

Section 60-2.13 addresses incumbency in job groups and requires the contractor to record separately the percentage of minorities and women it employs within each job group.

Section 60-2.14 applies to determining availability, and requires the contractor to estimate the number of qualified minorities or women available for employment in a given job group. Availability is expressed as a percentage of all qualified persons available for employment in that job group.

Section 60-2.15 compares incumbency to availability by requiring the contractor to compare the representation of minorities and women in each job group with their representation among those available for employment in the group. The contractor is required to establish placement goals for any job group with fewer women or minorities than would reasonably be expected by their availability.

Section 60-2.16 contains the parameters and criteria for setting placement goals and requires the contractor to establish placement goals for any job group with fewer women or minorities than would reasonably be expected by their availability.

Section 60-2.17 sets forth additional required elements of an AAP. These elements are the designation of a responsible official for implementing equal employment opportunity and the AAP, the identification of problem areas in the employment process, the creation of action-oriented programs designed to correct identified problem areas, and the use of an internal auditing and reporting system to measure the effectiveness of the AAP.

Of particular note are the steps required to identify problem areas. The contractor must conduct in-depth analyses of its employment practices to determine whether impediments to equal employment opportunity exist. As part of these analyses, the contractor must evaluate:

- employment activity (applicant flow, hires, terminations, promotions and other personnel actions) to determine whether there are selection disparities;
- compensation systems to determine whether there are gender, race, or ethnicity-based disparities; and
- selection, recruitment, referral, and other personnel procedures to see if they result in disparities in the employment and advancement of minorities or women.

Taken together, Sections 60-2.11 through 2.17 describe the required recordkeeping elements of developing, maintaining, and updating an AAP. Numbered paragraph 12a

(below), Estimate of Information Collection Burden – Recordkeeping Burden, reviews the burden associated with complying with the recordkeeping requirements. When contractors respond to the Scheduling Letter and Itemized Listing, they provide their AAPs and specific supporting documentation.

#### 41 CFR Part 60-3 - Uniform Guidelines on Employee Selection Procedures

The EEOC, the U.S. Office of Personnel Management (OPM), the Department of Labor (DOL), and the Department of Justice (DOJ) adopted the Uniform Guidelines on Employee Selection Procedures (UGESP or Guidelines) in 1978. The Guidelines apply to tests and other selection procedures used to make employment-related decisions. The Guidelines are consistent with the purpose of EO 11246 and have the full force and effect of the law. Under the Guidelines, each contractor maintains records and other information for each job sufficient to permit analyses of the impact of its selection procedures on the employment opportunities of people based on race, sex, or ethnic group.<sup>10</sup> Using this information, the contractor and OFCCP identify and evaluate the contractor's selection procedures for adverse impact. It is one of the tools used by contractors in identifying problem areas in an EO 11246 AAP.

When a test or other selection procedure is determined to have an adverse impact, the Guidelines require the contractor to validate the test or procedure (41 CFR 60-3.4) and to retain its validation study documentation. In addition, section 60-3.15 requires a contractor with 100 or more employees to keep records for each job that are sufficient to allow the contractor to make an adverse impact determination. The contractor makes this determination at least annually and makes it for each racial or ethnic group constituting at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce.

Section 60-3.15 requires a contractor with less than 100 employees to keep records on the number of persons hired, promoted, and terminated for each job by sex and, where appropriate, by race and national origin. Section 60-3.15 also requires the contractor to keep records showing the number of applicants for hire and promotion by sex and, where appropriate, by race and national origin, as well as records showing the selection procedures utilized.

OMB approved the Guidelines under OMB No. 3046-0017. This information collection can be viewed at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201503-3046-001](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201503-3046-001) .

#### VEVRAA

41 CFR Part 60-300 –Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors Regarding Disabled Veterans, Recently Separated

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<sup>10</sup> Section 60-3.4 requires recordkeeping and analyses on the following race and ethnic groups: Black, Hispanic, Asian/Pacific Islander, American Indian, and White. A total is also provided for each group.



## Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans

These regulations establish the basic nondiscrimination and affirmative action requirements under the VEVRAA program. They define coverage, specify clauses to be included in contracts, provide procedures to ensure compliance by covered contractors, specify reporting and recordkeeping requirements, establish a benchmark for veteran representation in the workforce, and outline the basic requirements for AAPs under VEVRAA.

Section 60-300.5 describes the equal opportunity clause in Federal contracts.

Section 60-300.40 requires contractors with 50 or more employees and a contract of \$150,000 or more entered into or modified after December 1, 2003 to develop a VEVRAA AAP.

Section 60-300.44 identifies required the elements of an AAP, including those listed below.

- Develop and include an equal opportunity policy statement in the AAP.
- Review personnel processes to ensure that qualified protected veterans are provided equal opportunity and that the contractor is engaged in outreach to recruitment resources.
- Review all physical and mental job qualification standards to ensure that those that screen out or tend to screen out qualified disabled veterans are job-related and are based on business necessity.
- Provide reasonable accommodations for physical and mental limitations.
- Develop procedures to ensure that employees are not harassed because of their veteran status.
- Develop procedures and practices to disseminate affirmative action policies, both internally and externally.
- Establish an audit and reporting system to measure the effectiveness of the AAP.
- Designate a responsible official to implement and oversee the AAP.
- Provide training to all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes to ensure that the commitments in the contractor's affirmative action program are implemented.
- Conduct data collection analysis on the total number of job openings and total number of jobs filled; the total number of applicants for all jobs; the number of protected veteran applicants hired; the total number of applicants hired; and the number of applicants who self-identified as protected veterans pursuant to §60-300.42(a), or who are otherwise known as protected veterans pertaining to applicants and hires on an annual basis and maintain them for a period of three (3) years.

Section 60-300.45 requires contractors to either adopt the national hiring benchmark or establish a hiring benchmark for protected veterans using five factors.

Section 60-300.60 identifies the investigative methods OFCCP uses to evaluate a contractor's compliance with the agency's regulations. These methods range from an in-depth comprehensive evaluation of the contractor's employment practices (i.e., compliance review) to a narrowly focused analysis of a selected employment practice or policy (i.e., compliance check), among others. Evaluation of compliance with VEVRAA is concurrent with evaluation of the contractor's compliance with EO 11246 and Section 503.

### Section 503

#### 41 CFR 60-741 – Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors Regarding Individuals with Disabilities

These regulations address the affirmative action and nondiscrimination obligations of contractors and subcontractors related to individuals with disabilities. They define coverage, specify clauses to be included in contracts, provide a procedure to ensure compliance by covered contractors, and specify certain reporting and recordkeeping requirements, establish an aspirational utilization goal of 7 percent, and specify the basic requirements for AAPs under Section 503.

Section 60-741.5 describes the equal opportunity clause in Federal contracts.

Section 60-741.40 requires the development and maintenance of a Section 503 AAP. This regulation requires each contractor and subcontractor that has 50 or more employees, and a contract of \$50,000 or more, to develop an AAP for each establishment.

Section 60-741.44 identifies the required elements of an AAP, including those listed below.

- Develop and include an equal opportunity policy statement in the AAP.
- Review personnel processes to ensure that qualified individuals with disabilities are provided equal opportunity and that the contractor is engaged in outreach to recruitment resources.
- Review all physical and mental job qualification standards to ensure that those that screen out qualified individuals with disabilities on the basis of disability are job-related and are based on business necessity.
- Provide reasonable accommodations for physical and mental limitations.
- Develop procedures to ensure that employees are not harassed because of their disability.
- Develop procedures and practices to disseminate affirmative action policies, both internally and externally.
- Establish an audit and reporting system to measure the effectiveness of the AAP.
- Designate a responsible official to implement and oversee the AAP.

- Provide training to all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes to ensure that the commitments in the contractor's affirmative action program are implemented.
- The contractor shall conduct data collection analysis pertaining to applicants and hires on an annual basis and maintain them for a period of three (3) years, including, the number of applicants who self-identified as individuals with disabilities pursuant to §60-741.42(a), or who are otherwise known to be individuals with disabilities; the total number of job openings and total number of jobs filled; the total number of applicants for all jobs; the number of applicants with disabilities hired; and the total number of applicants hired.

Section 60-741.45 requires contractors to apply a 7 percent utilization goal to each of their job groups or to their entire workforce if the contractor has 100 or fewer employees.

Section 60-741.60 identifies the investigative methods OFCCP uses to evaluate a contractor's compliance with the agency's regulations. These methods range from an in-depth comprehensive evaluation of the contractor's employment practices (i.e., compliance review) to a narrowly focused analysis of a selected employment practice or policy (i.e., compliance check). Evaluation of compliance with Section 503 is concurrent with evaluation of a contractor's compliance with EO 11246 and VEVRAA.

## 2. USE OF MATERIALS

### EEO-1 Report Data

OFCCP develops its list of contractors for scheduling compliance evaluations by using multiple sources of information such as Federal acquisition and procurement databases, EEO-1 Reports, Dun & Bradstreet (D&B) data, and the U.S. Census Bureau tabulations. Statistical thresholds such as industry type and employee counts of Federal contractor establishments are also used. The list may be further refined by applying a number of neutral factors such as contract expiration date and contract value on the number of establishments per contractor that will be scheduled in any one cycle. The Joint Reporting Committee, comprised of OFCCP and EEOC, promulgates the EEO-1 Report. Employers use the EEO-1 Report (question 3) to self-identify as Federal contractors and subcontractors and indicate whether they meet the thresholds for AAP coverage: 50 or more employees and \$50,000 or more contract value.<sup>11</sup> Failure to file and/or produce the EEO-1 report may subject a contractor to sanctions by OFCCP.<sup>12</sup>

### Affirmative Action Programs – 41 CFR 60-1.40, 41 CFR 300.40, and 41 CFR 741.40

The AAP is the contractor's plan for ensuring nondiscrimination and equal employment opportunity. OFCCP does not impose a detailed master format for AAPs. This approach allows each contractor to design a format that suits its particular business circumstances.

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<sup>11</sup> 41 CFR 60-1.7 – Reports and other required information.

<sup>12</sup> See 41 CFR 60-1.7(a).

The structure and complexity of an AAP may vary considerably depending on the size and complexity of the contractor's organization.

Therefore, contractors are free to utilize information technology as they see fit when designing and developing their AAPs. The only requirement is that they must be capable of retrieving and providing to OFCCP the data required by our regulations.

During a compliance evaluation, OFCCP examines the contractor's written EO 11246 AAP, supporting documentation, compensation data, and documents related to personnel actions, employment policies and practices to determine whether the contractor is complying with its obligations not to discriminate in employment and to take affirmative action to ensure equal employment opportunity. Section 60-2.10(b) outlines the contents of an AAP under Executive Order 11246, as listed below.

- Organizational profile
- Job group analysis
- Placement of incumbents in job groups
- Determining availability
- Comparison of incumbency to availability
- Placement goals
- Designation of responsibility for AAP implementation
- Identification of problem areas
- Action-oriented programs
- Periodic internal audits

Sections 60-741.44, 60-741.45, 60-300.44 and 60-300.45 describe the required contents of a contractor's written AAPs under Section 503 and VEVRAA, respectively. During a compliance evaluation, OFCCP reviews the contractor's AAPs to determine whether the contractor is complying with its obligations not to discriminate in employment and to take affirmative action to ensure equal employment opportunity. This review entails examination of the various support documentation listed including the records listed below.

- Assessments of personnel processes
- Assessments of physical and mental qualifications

- Assessment of the effectiveness of outreach and recruitment efforts
- Records of activities to comply with audit and reporting system requirements
- Details of computations and calculations contained in the data collection analysis
- Utilization analysis evaluating the representation of individuals with disabilities
- Documentation of the veterans hiring benchmark adopted and the results showing whether the contractor met its hiring benchmark

### **3. IMPROVED INFORMATION TECHNOLOGY**

In general, under OFCCP regulations each contractor develops its own methods for collecting and maintaining information. Contractors have the option to use methods that best suit their needs as long as they can retrieve and provide OFCCP with the requested data upon request during a compliance evaluation.

The majority of Federal contractors and subcontractors are repeat contractors. Since they are subject to OFCCP's regulatory requirements year after year, most have developed their information technology systems to generate the data required by OFCCP regulations.

Information technology systems used to comply with data requirements under OFCCP's regulations should be capable of performing the below functions.

- Conducting workforce analysis
- Conducting job group analysis
- Facilitating calculation of availability
- Conducting EO 11246 utilization analysis
- Collecting employment activity data related to EO 11246, section 503 and VEVRAA
- Conducting Section 503 utilization analysis
- Analyzing outreach and recruitment
- Tracking self-identification
- Disseminating EO policies
- Providing notice to subcontractors and vendors

- Facilitating calculation of VEVRAA benchmarks

In addition, OFCCP provides compliance assistance to all contractors, including smaller contractors, that is, those with fewer than 150 employees, by leveraging information technology. For example, OFCCP's Web site provides access to compliance resources and information, including the following.

- Small Business Guide  
<http://www.dol.gov/ofccp/TAGuides/sbguide.htm>
- New Contractors' Guide  
[http://www.dol.gov/ofccp/TAGuides/new\\_contractors\\_guide.htm](http://www.dol.gov/ofccp/TAGuides/new_contractors_guide.htm)
- Section 503 and VEVRAA Contractor Resources  
<http://www.dol.gov/ofccp/regs/compliance/Resources.htm>
- Fact Sheets, Frequently Asked Questions and Webinar training  
<http://www.dol.gov/ofccp/regs/compliance/section503.htm> and  
<http://www.dol.gov/ofccp/regs/compliance/vevraa.htm>
- 2006-2010 EEO Tabulation for Determining Availability of Women and Minorities  
<http://www.dol.gov/ofccp/regs/compliance/Census.html>
- Sample AAPs  
<http://www.dol.gov/ofccp/regs/compliance/AAPs/AAPs.htm>
- Contractors' VEVRAA Hiring Benchmark Database  
<http://www.dol-esa.gov/errd/VEVRAA.jsp>
- Disability and Veterans Community Resources Directory  
<http://www.dol-esa.gov/errd/Resources.503VEVRAA.html>
- Employment Resource Referral Directory  
<http://www.dol-esa.gov/errd/index.html>
- Checklist for Compliance with Section 503  
[http://www.dol.gov/ofccp/regs/compliance/ChecklistforCompliancewithSection503\\_JRF\\_QA\\_508c.pdf](http://www.dol.gov/ofccp/regs/compliance/ChecklistforCompliancewithSection503_JRF_QA_508c.pdf)

OFCCP believes that advances in technology make contractor compliance with the recordkeeping and reporting requirements easier and less burdensome. However, in the absence of empirical data, OFCCP is unable to quantify the impact of improved information technology and thus, OFCCP does not include it in the calculation of burden hours.

According to the Government Paperwork Elimination Act (GPEA, P.L. 105-277, 1998), by October 2003, Government agencies must generally provide the option of using and accepting electronic documents and signatures, and electronic recordkeeping, where practicable. OFCCP fulfills its GPEA requirements by permitting contractors to submit AAPs and supporting documentation via e-mail or other electronic format.

#### **4. DESCRIPTION OF EFFORTS TO IDENTIFY DUPLICATION**

The reporting and recordkeeping requirements in this request result exclusively from the implementation of EO 11246, Section 503, and VEVRAA. These authorities uniquely empower the Secretary of Labor, and by a Secretary's Order, the OFCCP, to require the collection, analysis, and reporting of data and other information in connection with the enforcement of the laws and regulations requiring Government contractors to take affirmative action to ensure equal employment opportunity. No duplication of effort exists because no other Government agencies have these specific data collection requirements.

Where possible, OFCCP participates in information sharing and standardized requirements. Examples are the joint collaboration on and use of EEOC's EEO-1 Report and the use of the Guidelines created with EEOC, OPM, DOJ and DOL.

While contractors maintain other employment data as a normal course of business, AAPs are unique in that contractors create them specifically to meet the requirements of OFCCP regulations. These AAPs are not available from any other source.

#### **5. COLLECTION FROM SMALL ORGANIZATIONS**

OFCCP's information collection does not have a significant economic impact on a substantial number of small entities. OFCCP minimizes the information collection and recordkeeping burden on a significant number of small businesses by exempting contractor establishments with fewer than 50 employees from the AAP requirement. However, once OFCCP's authority covers one contractor's establishment, all of its employees must be accounted for in an AAP whether or not each of the contractor's establishments meet the minimum 50 employees threshold.<sup>13</sup>

#### **6. CONSEQUENCES FOR FEDERAL PROGRAMS IF THIS INFORMATION IS COLLECTED LESS FREQUENTLY**

Maintaining and collecting the information requested by the Scheduling Letter and Itemized Listing less frequently would negatively affect OFCCP's mission to enforce, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity required of those who do business with the Federal government. To carry out its mission, the agency must continuously verify that Federal

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1341 CFR 60-2.1 – Scope and application.

contractors and subcontractors maintain annual AAPs, personnel records and other supporting data. OFCCP initiates compliance evaluations on an ongoing basis to carry out its mission using the Scheduling Letter and Itemized Listing and reviews roughly 3,500 establishments annually. Without the recordkeeping accounted for by this ICR, these establishments' employment data could become stale, discrimination could be undetected for longer periods, and victims might not be timely provided remedy for discrimination.

## **7. SPECIAL CIRCUMSTANCES FOR THE COLLECTION OF INFORMATION**

There are no special circumstances for the collection of this information.

## **8. CONSULTATION OUTSIDE THE AGENCY**

On October 29, 2015, OFCCP published a 60-Day Federal Register notice (80 FR 66572) soliciting comments from the public on this information collection request, including the proposed revisions to the Scheduling Letter and Itemized Listing.<sup>14</sup> OFCCP reviewed each of the submissions it received from consultants, non-profit groups and one industry organization during the 60-day comment period. Through careful consideration, OFCCP determined that clarifying certain information requested in the Scheduling Letter and Itemized Listing and editing some of the proposed modifications are beneficial to enhanced contractor understanding of what information OFCCP is requesting, how OFCCP treats and shares contractor information, and the scheduling of a functional affirmative action program (FAAP) review. Particularly, OFCCP edited the Scheduling Letter, as recommended by commenters, to clarify federal agencies with which OFCCP may share contractor information. In addition, under current law and regulations, OFCCP is required to comply with Freedom of Information Act, the Trade Secrets Act, the Privacy Act, and the 1987 Executive Order governing the disclosure of confidential commercial information. Finally, OFCCP clarified the information request related to the VEVRAA hiring benchmark and edited the first paragraph to schedule FAAP compliance reviews based on the unit as opposed to geographic location since functional units may be spread across several contractor establishments. Below are summaries of and responses to the comments received during the 60-day comment period.

### Interagency Coordination and Collaboration (Scheduling Letter)

In its proposed renewal of the supply and service Scheduling Letter, OFCCP proposed including the following language: "Please also be aware that OFCCP may use the information you provide during a compliance evaluation in an enforcement action and may share such information with other federal government agencies to promote interagency coordination and collaboration." Commenters stated that such information sharing may violate the contractor's Fourth Amendment rights and "expands OFCCP's

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<sup>14</sup> Proposed Renewal of Information Collection Requirements; Comment Request, (80 FR 66572) on October 29, 2015, available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2015-0003-0001> (last accessed January 26, 2016).



use of information collected ... and public disclosure of contractor information” such that notice-and-comment rulemaking is necessary.

OFCCP’s proposed language is not a change in policy as commenters suggested. Rather, OFCCP proposed adding this statement to the Scheduling Letter simply to enhance transparency to contractors about OFCCP’s information sharing with other federal agencies to promote coordination among agencies.

To address commenters’ concerns about the potential use of information provided pursuant the Scheduling Letter, OFCCP has revised its proposed language to state “Please also be aware that OFCCP may use the information you provide during a compliance evaluation in an enforcement action. We may also share that information with other enforcement agencies within DOL, as well as with other federal civil rights enforcement agencies with which we have information sharing agreements.”

In this proposed renewal of the Scheduling Letter, OFCCP provides a more complete description of its investigatory and enforcement processes. As stated in this revised language, OFCCP uses memoranda of understanding (MOUs) to govern the interagency sharing of information. These MOUs typically establish the scope or terms for sharing information, and how that information may be protected from public disclosure. Under current law and regulations, OFCCP is required to comply with any restrictions in FOIA, the Trade Secrets Act, the Privacy Act, and the 1987 Executive Order governing the disclosure of confidential commercial information. Further, pursuant to FOIA, any agency receiving a request for information provided to it by another agency must refer the request to originating agency for a response. For example, if data EEOC originally received from OFCCP is responsive to a FOIA request sent to the EEOC, the EEOC will forward that request to OFCCP for a response.

This revised language also makes it clear that, during the course of an OFCCP compliance evaluation, circumstances may arise that make it necessary for OFCCP to share information with another DOL enforcement agency. That is, there may be instances where OFCCP’s lawful request for information yields indicators of a potential violation of another enforcement agency’s laws. In such a circumstance, the scope of the information shared by OFCCP is narrowly tailored to the potential violation at issue. OFCCP does nothing more than refer the matter. The agency or office in receipt of the information conducts its own analysis of the information and makes an independent merit determination as to whether there is a likely violation or whether to initiate its own investigation. Finally, the same FOIA referral process discussed above applies to information OFCCP shares with other DOL enforcement agencies. The other DOL agency must refer all FOIA requests seeking documents or data provided by OFCCP to OFCCP for a response.

Therefore, the proposed language at issue does not “expand public disclosure,” and does not constitute a “sweeping expansion of OFCCP’s use of information collected,” as one commenter claimed. Nonetheless, in response to such concerns, OFCCP has revised the proposed language to clarify the scope of its information sharing. Sharing information

with other DOL agencies, and with other federal agencies through MOUs, has long been a part of the agency's investigative and enforcement processes. And, as stated above, the current proposal simply provides a description of these investigative processes. Given that the proposed language simply articulates that OFCCP will continue to share limited information for enforcement purposes, there is no requirement that the agency undertake notice-and-comment rulemaking.

Regarding the Fourth Amendment concerns, OFCCP's Scheduling Letter requests only information necessary for OFCCP to determine a contractor's compliance with OFCCP's nondiscrimination and affirmative action laws. Further, the information requested in the Scheduling Letter is information that the contractor is already legally obligated to develop, maintain, and provide to OFCCP. OFCCP is proposing to renew its Scheduling Letter and has not added any additional information requests, let alone requests for information and data unrelated to its authority pursuant to EO 11246, Section 503 and VEVRAA.

OFCCP's off-site information requests, such as those requests contained in its Scheduling Letter, are akin to administrative subpoenas and are treated as such. See *United Space Alliance v. Solis*, 824 F. Supp. 2d 68, 92 (D.D.C. 2011). In the context of administrative subpoenas, the Fourth Amendment requires that requests for information are "limited in scope, relevant in purpose, and specific in direction so that compliance will not be unreasonably burdensome." *Donovan v. Lone Steer*, 464 U.S. 408, 315 (1983), citing *See v. City of Seattle*, 387 U.S. 541, 544 (1967). OFCCP's Scheduling Letter limits its requests to information that contractors are already legally required to develop, maintain, and provide to OFCCP, and information that is necessary for OFCCP to fulfill its legal mandate – determining compliance with its nondiscrimination and affirmative action laws. Accordingly, the requests for information contained in the Scheduling Letter satisfy the relevant Fourth Amendment standard.

To the extent that information is shared with another enforcement agency, the receiving enforcement agency would independently have to satisfy any applicable Fourth Amendment standards if the agency chooses to proceed with its own investigation or enforcement action. At all times, the federal contractor maintains all applicable protections and safeguards afforded under the Fourth Amendment.

#### Freedom of Information Act Assurance (Scheduling Letter)

OFCCP received two comments on the modified statement regarding the release of information provided by contractors under the Freedom of Information Act (FOIA). One commenter suggested with regard to the modified FOIA statement that the proposed modification is unnecessary and could lead to needless concern among federal contractors. The other commenter advised that the modified FOIA statement might hinder OFCCP's information collection as some contractors may hesitate to provide sensitive information, such as requests for personal accommodations.

OFCCP did not intend nor did it consider the proposed language to signal a policy change, as suggested by one of the comments. In the currently approved Scheduling Letter, OFCCP states, “Rest assured that OFCCP considers the information you provide in response to this Scheduling Letter as sensitive and confidential. Therefore, any disclosure we may make will be consistent with the provisions of [FOIA].” In the currently proposed letter, OFCCP modified the language to state, “Under current law and regulations, OFCCP is required to comply with any restrictions in FOIA, the Trade Secrets Act, the Privacy Act, and the 1987 Executive Order governing the disclosure of confidential commercial information.”

The revised statement in the Scheduling Letter acknowledges that OFCCP receives FOIA requests from members of the public and clarifies that the agency may release information in certain circumstances in response to a FOIA request. OFCCP does not release data when a contractor indicates, and the agency determines through review, that the data are confidential and sensitive, and that a disclosure of the data subjects the contractor to commercial harm. Moreover, OFCCP does not release data obtained during the course of a compliance evaluation until the investigation is complete. When OFCCP receives a FOIA request for contractor information, it sends written notification to the submitter of the information to provide the contractor an opportunity to submit objections to the release of the data. In response to this notice, the submitter must provide a statement indicating why the information is privileged or confidential and should not be disclosed to the public under FOIA. As the proposed language does not signal a policy shift or change the protections afforded to contractors under FOIA, the Privacy Act, or the Trades Secret Act, OFCCP sees no need to alter it. Nonetheless, OFCCP revised the language to clarify what it intended. OFCCP’s intention was to give clear notice to contractors who may not be aware that the agency receives public requests for information and reassure contractors that the agency follows the law if and when a disclosure is required. To the extent that contractors have questions about the content of the Scheduling Letter and Itemized Listing, they are encouraged in the next line of the letter to contact OFCCP staff who will be able to address their inquiries.

#### Section 503 and VEVRAA (Itemized Listing, Items 9, 10, 13, and 14)

OFCCP received three comments on items 9, 10, 13, and 14 in the Itemized Listing, which all request data collected by the contractor under Section 503 and VEVRAA. Particularly, the comments objected to the request that contractors provide information for at least the first six months of the contractor’s current AAP year, if the contractor is six months or more into that AAP year when they receive the scheduling letter. The comments objected to this requirement for various reasons and suggested that OFCCP remove the language requesting six months of data for the current AAP year on these items. The primary reason asserted in the comments stems from the Section 503 and VEVRAA regulations, which require contractors to perform an annual data collection analysis, conduct an annual utilization analysis of individuals with disabilities, and set an annual hiring benchmark for protected veterans.

One comment also claimed that providing the six months of data necessitates additional work on the part of the contractor, which was not part of the burden calculations. Another commenter particularly focused on item 14, stating that OFCCP's regulations do not anticipate that the benchmark will change during the contractor's AAP year and that asking for six months or more of information that reflects current year results is confusing. This comment added that the six-month request in item 14 conflicts with guidance OFCCP previously issued. The guidance stated, "if the contractor is six months or more into its current AAP year, the contractor need only provide documentation of the benchmark it adopted for the current AAP year; the contractor does not have to analyze or compare hiring of protected veterans to the adopted benchmark."

The commenters are correct to state that OFCCP's regulations at 41 CFR 60-741.44(k) and 60-300.44(k) require a contractor to document computations and comparisons of the number of job openings, applicants, jobs filled, and hires who self-identified as individuals with disabilities, and the number of applicants and hires who self-identified as protected veterans on an annual basis. However, to compute the annual totals for Section 503 and VEVRAA, contractors must continuously collect and keep records on the number of applicants, hires, job openings, job filled, and the number of those applicants and hires who self-identify as protected veterans and individuals with disabilities. Similarly, contractors must continuously maintain records on the number of employees who self-identify as a protected veteran or as an individual with a disability. This information on the Section 503 utilization goal and VEVRAA hiring benchmark is similar to the six months of current-year information on Executive Order 11246 placement goals. Contractors are accustomed to submitting that information, currently requested in Item 17.

Based on these recordkeeping requirements, contractors could provide computations, comparisons, or analysis on the employment activity described above for individuals with disabilities and for protected veterans during the first six months of the current AAP year and submit that information in response to the items 9, 10, 13, and 14 on the Itemized Listing. However, covered contractors are not required to complete computations, comparisons, and analysis of the totals for the first half of the current AAP year in response to the Scheduling Letter and Itemized Listing, as clarified in guidance on OFCCP's Web site.<sup>15</sup> If a contractor has not computed, or is unable to compute, the totals requested in items 9 and 13 for the first half of the current AAP year, the contractor must provide the records showing the number of jobs openings, applicants, jobs filled, and hires that would permit OFCCP to compute the totals. Item 10 is consistent with the regulations at 41 CFR 60-741.45, which require contractors to analyze whether they are meeting a 7 percent utilization goal of individuals with disabilities. Item 14 is consistent with the regulations at 41 CFR 60-300.45, which require contractors to establish a hiring benchmark for veterans and to document the benchmark it established. If the contractor is six months or more into its current Section 503 or VEVRAA AAP year, it is not required to analyze or compare hiring of protected veterans to the adopted benchmark or analyze whether it is meeting the 7 percent utilization goal – even though OFCCP

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<sup>15</sup> Frequently Asked Questions – Scheduling Letter and Itemized Listing, available at [http://www.dol.gov/ofccp/regs/compliance/faqs/SchedulingLetter\\_FAQs.html](http://www.dol.gov/ofccp/regs/compliance/faqs/SchedulingLetter_FAQs.html) (last accessed January 26, 2016).

encourages contractors to do so. However, if a contractor does not provide such an analysis or comparison in response to the Scheduling Letter and Itemized Listing, it must provide information maintained pursuant to Section 503 and VEVRAA so that OFCCP can conduct the current year utilization analysis and measure current year hiring results against the VEVRAA hiring benchmark. Having this additional six months of data enables OFCCP to assess a contractor's most recent results with regard to utilizing individuals with disabilities and hiring protected veterans. Such an assessment could inure to the benefit of contractors who have not yet achieved the Section 503 utilization goal or VEVRAA hiring benchmark in the current AAP year, as OFCCP could provide technical assistance to contractors on conducting effective outreach and recruitment and identifying problem areas.

#### First Paragraph Revisions (Scheduling Letter)

OFCCP received two comments on the first paragraph of the Scheduling Letter. One commenter applauded OFCCP's effort to specify the type of compliance review initiated by the Scheduling Letter but expressed concern that the proposed change may be confusing. The commenter noted that when OFCCP initiates a review of a contractor's functional unit, the current and the proposed Scheduling Letters do not specify the functional unit under review although they include an address. The commenter pointed out that functional units are not necessarily located at one physical address and recommended that instead of adding "functional affirmative action program (FAAP) compliance review," OFCCP should specifically identify the functional unit under review as described in the FAAP agreement. One commenter stated that the revision of "compliance evaluation" to "compliance review" on the first page of the Scheduling Letter is confusing because OFCCP's regulations at 41 CFR 60-1.20 identify a compliance review to be only one type of compliance evaluation. Therefore, the commenter claimed that this edit appears to limit OFCCP's actions.

OFCCP agrees with the first commenter that specifying the functional unit would be more appropriate for scheduling a FAAP compliance review, which may not be housed at only one geographic location. As such, OFCCP revised the first sentence as recommended by the commenter. However, OFCCP disagrees with the second commenter who suggested that changing the language from "compliance evaluation" to "compliance review" limits OFCCP's efforts. A compliance evaluation is "any one or combination of actions OFCCP may take to examine a Federal contractor or subcontractor's compliance" with its three legal authorities. OFCCP's regulations at 41 CFR 60-1.20, 60-300.60, and 60-741.60 state that a compliance evaluation may consist of one or any combination of the investigative procedures listed in those sections: "compliance review," "compliance check," "off-site review of records," and "focused review." The Scheduling Letter initiates a compliance review, which generally includes a desk audit, on-site review, and off-site analysis of information provided by the contractor or otherwise gathered in the course of an on-site review. Similarly, OFCCP uses the Compliance Check Letter to initiate a compliance check.<sup>16</sup> Other types of compliance

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<sup>16</sup> A Compliance Check Letter, although separate from the Scheduling Letter and Itemized Listing, is also included in this ICR.

evaluations include the off-site review of records and the focused review.<sup>17</sup> OFCCP does not routinely schedule off-site reviews of records, the investigative procedure at 41 CFR 60-1.20(a)(2). For focused reviews, OFCCP may investigate contractors when the agency has credible evidence of discrimination or schedule focused reviews through its neutral selection system, limiting the review in scope to one or more components of a contractor's organization or one or more aspects of the contractor's employment practices.<sup>18</sup> For instance, the reviews may be limited to investigating a contractor's compliance with VEVRAA. Given that "compliance evaluation" encompasses many types of investigatory procedures, OFCCP believes the change to "compliance review" more accurately describes the type of compliance evaluation initiated by the Scheduling Letter.

### Section 503 and VEVRAA AAP Submissions (Scheduling Letter)

OFCCP received one comment that did not agree with the proposed wording for requesting the two different AAP requirements under VEVRAA and Section 503. In the currently approved Scheduling Letter, OFCCP requests "a copy of your current Section 503 and [VEVRAA] AAPs" whereas in the proposed revisions, OFCCP requests "a copy of your current Section 503 AAP" and "a copy of your current VEVRAA APP." The commenter questioned the purpose of this change, as OFCCP permits contractors to prepare and maintain one combined Section 503 and VEVRAA AAP, and OFCCP has not released guidance suggesting that creation and maintenance of separate AAPs are required. The commenter suggested that if OFCCP keeps the language, the Scheduling Letter should expressly state that contractors may still combine Section 503 and VEVRAA AAPs.

The revised wording to request the VEVRAA and Section 503 AAPs in the Scheduling Letter is minimal. Both the currently approved and the proposed versions contemplate more than one AAP, as indicated by the pluralization of "AAP" in the currently approved version. OFCCP modified the language to emphasize that, though similar, the AAPs for Section 503 and VEVRAA contain different regulatory requirements (e.g., the Section 503 utilization goal and analysis is different from the VEVRAA hiring benchmark). Additionally, some contractors may only be subject to the Section 503 AAP regulations, as the threshold amount for developing, updating, and maintaining a Section 503 AAP is \$50,000 while the threshold amount for a VEVRAA AAP is \$150,000. OFCCP will still accept joint Section 503 and VEVRAA AAPs when a covered contractor submits them in a combined fashion.

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<sup>17</sup> OFCCP added the compliance check, off-site review of records, and focused review as types of compliance evaluations through regulatory amendments in 1997 and 2005. See, "Government Contractors, Affirmative Action Requirements, Executive Order 11246," 62 FR 44174 (1997) (adding these investigative procedures to EO 11246 and VEVRAA regulations) and "Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Compliance Evaluations in All OFCCP Programs," 70 FR 36262 (2005) (adding the investigative procedures to Section 503 regulations). OFCCP established these three abbreviated methods for evaluating contractor compliance, in addition to the comprehensive compliance review, to create a "flexible approach to monitoring compliance" to enable the agency to target enforcement resources more efficiently.

<sup>18</sup> See, 41 CFR 60-1.20(a)(4)

### EEO-1 Reports (Itemized Listing)

OFCCP received one comment on the requirement that contractors submit EEO-1 Reports for the last three years. The commenter stated that it appears unnecessary to request the last three years of EEO-1 Reports as OFCCP already possesses data for the last two years and questioned the general utility of the EEO-1 Reports to OFCCP. OFCCP believes that the EEO-1 Report is critical to its review process. Data currently available to OFCCP at the time of a compliance review can be up to two years old. Asking contractors to submit copies of their EEO-1 Reports assures OFCCP that it has the most current data. OFCCP finds no reason to reduce the number EEO-1 Reports it requests during a compliance review or to remove this item.

### 30-day Submission Period

OFCCP received one comment on the 30-day submission period. The commenter suggested that OFCCP revise the Scheduling Letter to allow contractors more than 30 days to submit the items requested in the Scheduling Letter, when necessary, because imposing such a deadline is not always appropriate or in OFCCP's best interests. The commenter stipulated that while 30 days may be an appropriate deadline to produce required documentation for one AAP, 60 or 90 days would be more appropriate to produce documentation for two or three AAPs. OFCCP declines to extend the 30-day submission period. Thirty days are generally sufficient for contractors to compile and submit data that they have maintained and analyzed. OFCCP generally offers extensions to contractors when requested even though the Executive Order 11246 regulations at 41 CFR 1.20(e) specify 30 days as the amount of time a contractor has to submit its AAP and provides for enforcement proceedings when covered contractors fail to submit the requested documents. Moreover, longer response periods may be detrimental to OFCCP's efforts because, in the agency's experience, some contractors wait until they receive the Scheduling Letter and Itemized Listing to comply with their obligation to develop and update their AAPs.

### Burden Analysis

OFCCP received two comments on its burden estimates under this ICR. Both comments noted that while OFCCP used the 104,545 contractor establishments who self-identified as federal contractors on their EEO-1 surveys as a basis for calculating burden, the supporting statement also mentioned that OFCCP reviews 4,000 establishments annually out of nearly 200,000 establishments. To clarify, establishments that self-identify on the EEO-1 survey as federal contractors check a box to indicate that they have a federal contract of \$50,000 or more and employ 50 or more people. Only contractor establishments who meet those thresholds would be required to develop, maintain, and update an AAP under Executive Order 11246.<sup>19</sup> Therefore, for calculating the burden on

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<sup>19</sup> Under Section 503, the thresholds are a contract of \$50,000 or more and 50 or more employees. Under VEVRAA, the thresholds are a contract of \$150,000 or more and 50 or more employees. However, the recordkeeping requirements for those two laws, including AAP creation, maintenance, and updates, are accounted for in other ICRs (OMB Nos. 1250-0004 and 1250-0005).

contractor establishments that are required to develop, maintain, and update AAPs, OFCCP relies on the more accurate data reported on the EEO-1 survey – 104,545 contractor establishments. To reduce confusion for reviewers, OFCCP has removed reference to the 200,000 estimate in section 6 of this supporting statement.

These comments also disagreed with OFCCP's recordkeeping burden hours related to the initial development and update of an AAP, stating that OFCCP incorrectly estimated 179.5 hours to prepare an initial AAP and 74.9 hours for the AAP's annual update. According to one comment, these burden estimates should be higher than the 1999 estimates because OFCCP promulgated several requirements since 1999 that would reasonably increase the burden. The commenter posited based on its experience as a consulting firm that contractors spend 80 hours more than OFCCP estimated to both develop and update their AAPs. The other commenter, a member organization of small, mid-size, and large employers, requested that OFCCP revise its burden estimates because "the burden may be up to five times or more."

OFCCP took into account all of the recent regulatory requirements that pertain to the Scheduling Letter and Itemized Listing in the ICR renewal approved by OMB in 2014. OFCCP's burden estimate associated with this current renewal request reflects the methodology used in the 2014 ICR package. In that ICR, OFCCP determined that, despite requesting additional information in several key areas, the burden hours decreased from 28.35 hours to 27.9 hours per contractor. The primary reason for the decrease was the change in the request for compensation data included in the Itemized Listing from aggregated data to individual data, which led to a decrease of 3.36 hours per contractor. In considering whether larger contractors have a greater burden, OFCCP believes that the burden associated with gathering and producing an AAP and the supporting data does not primarily correlate to the size of the company, but rather the company's level of automation. As most large contractors are not first-time developers of annual AAPs, and have information technology systems to generate the data required by OFCCP regulations, OFCCP expects that the burden hours are not significantly different for large contractors. Additionally, OFCCP accounted for the burden of its new regulations implementing Executive Order 13665 (OMB No. 1250-0008) and Executive Order 13672 (OMB No. 1250-0009) in separate ICR packages.<sup>20</sup> OFCCP accounted for the burden for recent VEVRAA and Section 503 recordkeeping requirements in other ICRs as well (OMB Nos. 1250-0004 and 1250-0005, respectively).<sup>21</sup>

One of the comments also contested OFCCP's estimate on the 60-page average size of an AAP, asserting that the average AAP with supporting documents can total 150 to 300 pages, thereby increasing the estimated copying costs to contractors. OFCCP maintains that the average size of an AAP is approximately 60 pages, a number derived, in part, from a 2013 survey OFCCP conducted of its field offices, whose primary job is to review AAPs from contractors of all sizes. In the previous renewal of this information collection, which OMB approved in 2014, the number of AAP pages increased by 27 pages, based on the results of this survey. This increase also accounted for requirements

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<sup>20</sup> See *supra* note 7.

<sup>21</sup> *Id.*



under the revised Section 503 and VEVRAA regulations. None of the final rules OFCCP has issued since the previous renewal of this information collection require any changes to the AAPs required under Executive Order 11246, Section 503, or VEVRAA.

The same commenter also claimed that these costs preclude small businesses from being able to sustain federal contracts. However, OFCCP excludes from the AAP requirement contractors with less than 50 employees thereby lessening burden on small contractors. OFCCP does not believe that the burden is greater on small contractors compared to large companies, as OFCCP's regulations intentionally minimize the burden on small contractors. For instance, contractors with less than 150 employees or less than a \$150,000 contract are only required to retain personnel and employment records for one year under all of OFCCP's legal authorities.<sup>22</sup> To assist small contractors with their less burdensome recordkeeping and reporting requirements, OFCCP provides several compliance resources on its Web site and offers technical assistance workshops across the country on an ongoing basis.

## **9. GIFT GIVING**

OFCCP provides neither payments nor gifts to respondents.

## **10. ASSURANCE OF CONFIDENTIALITY**

Contractors who submit the required information may view it as sensitive information. OFCCP will evaluate all information pursuant to the public inspection and disclosure provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Department of Labor's implementing regulations at 29 CFR Part 70. OFCCP requires that a contractor affected by a FOIA disclosure request be notified in writing and no decision to disclose information is made until the contractor has an opportunity to submit objections to the release of the information. Furthermore, it is OFCCP's position that it does not release any data obtained during the course of a compliance evaluation until the matter is completed.

Of note for this clearance request, OFCCP inserted language into the Scheduling Letter to provide enhanced transparency to contractors about OFCCP sharing information with other Department of Labor agencies, and with other federal government agencies to promote enforcement of equal employment opportunity and related laws. This new language acknowledges OFCCP's regulatory mandate to refer some enforcement actions to DOJ as well as OFCCP's longstanding public agreements with other federal agencies outside the Department of Labor.<sup>23</sup> The new language also emphasizes that OFCCP may use information collected during a compliance evaluation in an enforcement action.

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22 41 CFR §§ 60-1.12, 60-300.80, 60-741.80. Less burdensome requirements for contractors with less than 100 employees are also found in the Uniform Guidelines on Employee Selection Procedures, at 41 CFR § 60-3.15, and in the Section 503 regulations on utilization goals, at 41 § CFR 60-741.45.

23 41 CFR § 60-1.26(c); *E.g.*, Memorandum of Understanding Between U.S. Department of Labor and Equal Employment Opportunity Commission, 76 FR 71029 (November 16, 2011).

## **11. SENSITIVE QUESTIONS**

Generally, OFCCP does not collect information of a personal nature, such as marital status, religious beliefs, or other matters commonly considered private during the course of a compliance evaluation. Compliance evaluations are initiated using the Scheduling Letter and Itemized List to request information necessary for evaluating whether employment discrimination exists and the results of the contractor's affirmative action efforts. The requested information and data necessarily includes the collection and analysis of data on the race, color, religion, sex, national origin, disability, veteran status, and the compensation of employees and job applicants of contractors. Moreover, during the course of the evaluation, OFCCP may seek evidence concerning the attitudes or biases of selecting officials, supervisors, managers and others. OFCCP has no set of standardized questions and the gathering of such data is unique to each investigation.

## **12. ESTIMATE OF ANNUAL INFORMATION COLLECTION BURDEN**

The estimate of the information collection burden is broken down into recordkeeping and reporting burdens. The following is a summary of the methodology for the calculation of the recordkeeping and reporting requirements for OFCCP's supply and service ICR.

As noted at the beginning of this supporting statement, the total in combined recordkeeping, reporting and third party disclosure burden hours for this ICR (9,559,739) is more than total number of hours approved in 2014 (8,114,627). As detailed below, this increase has occurred because the percentage of large federal contractors has doubled compared to the most recent approval of this information collection, and it takes larger federal contractors more time to develop, maintain, and update AAPs.

### **a. Recordkeeping Burden**

OFCCP's regulations impose a recordkeeping burden for developing, updating, and maintaining AAPs for racial and ethnic minorities and women.

The below calculations on hours needed to develop and update an AAP are based on contractor estimates of the hours required to update an AAP annually and information provided by OFCCP field staff. OFCCP bases the calculations on 104,545 total contractor establishments subject to its requirements.<sup>24</sup> OFCCP calculates recordkeeping hours for contractor professionals and support staff on the following three functions: initial development of an AAP, update of an AAP, and maintenance of an AAP.

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<sup>24</sup> OFCCP calculated the total number of contractor establishments using the most recent Employer Information Report EEO-1 data available to it from 2013. This information clearance request estimates that 46 percent of Federal contractors have 1-100 employees; 19 percent, 101-150 employees; 27 percent, 151-500 employees; and 8 percent, 501 or more employees. The information collection clearance request approved in 2014 estimated that 64 percent of Federal contractors and subcontractors had 1-100 employees; 17 percent, 101-150 employees; 15 percent, 151-500 employees; and 4 percent, 501 or more employees.

### **1) Initial Development of an AAP**

OFCCP estimates that only 1,045, or 1 percent, of its 104,545 contractor establishments are first-time contractors developing initial AAPs. OFCCP assumes that the hours required to develop an initial AAP vary based on the size of the contractor's workforce. OFCCP estimates that the number of hours required to develop an AAP initially increases based on the size of a contractor's workforce. OFCCP estimates the following burden hours for the initial development of an AAP.

- 73 hours for contractors with 1-100 employees;
- 91 hours for contractors with 101-150 employees;
- 144 hours for contractors with 151-500 employees; and
- 186 hours for contractors with more than 501 employees.

OFCCP calculates the total burden hours estimated for this activity by multiplying the number of contractor establishments in each size category by the number of hours needed to develop an AAP for that category. Then, OFCCP adds the totals for each size category. The weighted average<sup>25</sup> of an initial AAP development is 104.8 hours per contractor (109,459 total, weighted hours for initial AAP development/1,045 contractors = 104.8 hours per contractor).

### **2) Annual Update of an AAP**

OFCCP similarly calculates the total burden hours for annually updating AAPs with the remaining 103,499, or 99 percent, of existing contractor establishments. For this calculation, OFCCP uses the following burden hour estimates.

- 18 hours for contractors with 1-100 employees;
- 35 hours for contractors with 101-150 employees;
- 78 hours for contractors with 151-500 employees; and
- 105 hours for contractors with more than 501 employees.

The weighted average of an annual AAP update is 44.4 hours per contractor (4,597,669 total, weighted hours for annual AAP update/103,499 contractor establishments = 44.4 hours per contractor).

### **3) Maintenance of an AAP**

OFCCP estimates the total burden hours required to maintain an AAP for all 104,545 contractor establishments by using the same, weighted calculation method. For this calculation, OFCCP uses the following burden hours.

- 18 hours for contractors with 1-100 employees;
- 35 hours for contractors with 101-150 employees;

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<sup>25</sup> The weighted averages in this ICR take into consideration the number of contractors in each of the EEO-1 size categories and the related requirements.

- 78 hours for contractors with 151-500 employees; and
- 105 hours for contractors with more than 501 employees.

The weighted average of AAP maintenance for all contractors is 44.4 hours per contractor (4,644,131 total, weighted hours for AAP maintenance/104,545 contractor establishments = 44.4 hours per contractor).

#### **4) Uniform Guidelines on Employee Selection Procedures**

Four Federal agencies, in addition to OFCCP, use the Guidelines: OFCCP, EEOC, DOJ, and OPM.

The EEOC, under OMB Number 3046-0017, accounts for all employers with 15 or more employees. Federal contractors with 1 - 14 employees are subject to OFCCP's recordkeeping requirements. Using EEO-1 Reports, OFCCP determined that 3,254 contractors employ 1 - 14 employees, and based on the figures used by EEOC, OFCCP estimates that, on average, contractors expend 2.18 hours meeting this obligation. Thus, the recordkeeping burden for Federal contractors with 1 – 14 employees is 7,094 hours (3,254 contractors x 2.18 hours).

#### **Recordkeeping Total**

The below summary of the recordkeeping burden hours includes AAP development, updates and maintenance, and UGESP as discussed in the section.

109,459	Initial Development of an AAP
4,597,669	Annual Update of an AAP
4,644,131	Maintenance of an AAP
<u>7,094</u>	UGESP Recordkeeping
9,358,353	Total Recordkeeping Burden Hours

#### **b. Reporting Burden**

In addition to recordkeeping hours, OFCCP calculated the reporting burden hours for its Scheduling Letter and Itemized Listing, and Compliance Check Letter. This calculation is based on the 3,471 supply and service compliance evaluations conducted by OFCCP in fiscal year 2014.

##### **1) Scheduling Letter and Itemized Listing**

The Scheduling Letter and Itemized Listing provide notice when OFCCP neutrally selects contractors for a compliance evaluation and requests submission of AAPs and supporting employment activity and compensation data.

OMB considers the assembling of the requested material and its submission to be a reporting requirement subject to the burden hour calculation required by the Paperwork Reduction Act. Although OFCCP slightly modified the Scheduling Letter and Itemized

Listing to clarify the information requests, strengthen confidentiality assurances, and explain sharing with other federal agencies, OFCCP will not be collecting any new or different information because of these changes. Because OFCCP proposes no new reporting requirements in the Scheduling Letter and Itemized Listing, the reporting requirement burden has not changed from the ICR approved in 2014, which assigned, on average, 27.9 hours per contractor for assembling and submitting the requested records. Therefore, the total reporting burden is  $3,471 \times 27.9 = 96,841$  hours.

## **2) Compliance Check Letter**

The Compliance Check Letter is a limited purpose evaluation of the contractor's establishment to determine whether the contractor has maintained records consistent with 41 CFR 60-1.12. Contractors have the option to provide the documents either during an on-site or off-site evaluation. OFCCP estimates that it will take contractors 0.5 hours to provide this documentation.

However, OFCCP has not scheduled any Compliance Checks in the past four years. Therefore, the burden hours are zero.

## **Reporting Total**

The below is a summary of the reporting burden hours for this ICR.

0	SF-100/EEO-1 Report
96,841	Scheduling Letter and Itemized Listing
0	Compliance Check
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96,841	Total Reporting Burden Hours

## **c. Third Party Disclosure Burden**

OFCCP's third party disclosure burden hours are based on 41 CFR 60-1.4(a)(3), 60-300.5(a) 10, 60-741.5(a)5, which require contractors to notify its labor organizations that it must comply with EO 11246, Section 503, and VEVRAA. Contractors may notify the organizations by mail, telephone, facsimile, or e-mail. Assuming it takes 30 minutes to compose and 30 minutes to distribute written notification by mail to its labor organizations. OFCCP estimates an average of 1 hour per contractor establishment or 104,545 hours for notifying labor organizations. This may be an overestimation because it assumes that all contractors are notifying unions and the notifications are sent by United States Postal Service mail, which takes longer than electronic distribution.

## **Third Party Disclosure Burden Total**

The total third part disclosure burden is 104,545 hours.

## **d. Total Recordkeeping, Reporting, and Third Party Disclosure Burden Hours**

The below is a summary of the total burden hours associated with this ICR, combining recordkeeping, reporting, and third party disclosure.

9,358,353	Total Recordkeeping Burden Hours
96,841	Total Reporting Burden Hours
<u>104,545</u>	Total Third Party Disclosure Burden Hours
9,559,739	Total Recordkeeping, Reporting, and Third Party Disclosure Burden Hours

#### **d. Annualized Cost of the Burden Hours to Contractors**

The contractors' estimated annualized cost is based on Bureau of Labor Statistics data in the publication, "Employer Costs for Employee Compensation" – December 2014, which lists total compensation for management, professional, and related occupations as \$54.95 per hour and administrative support as \$24.76 per hour. OFCCP estimates that 52 percent of the burden hours will be management, professional, and related occupations (Mgmt. Prof.) and 48 percent will be administrative support (Adm. Supp.). OFCCP has calculated the total estimated annualized cost as follows:

Mgmt. Prof.: 9,559,739 hours x .52 hours x \$54.95 = \$273,159,982

Adm. Supp.: 9,559,739 hours x .48 hours x \$ 24.76 = \$113,615,586

Total annualized cost estimate = \$386,775,568

Estimated average cost per establishment is: \$386,775,568/104,545 contractor establishments = \$3,700

### **13. ESTIMATE OF ANNUAL OPERATION AND MAINTENANCE COST TO RESPONDENTS**

OFCCP estimates that contractors will have some operations and maintenance costs associated with this collection. In OFCCP's experience, approximately 50 percent of contractors respond to the Scheduling Letter and Itemized Listing request by e-mail and 50 percent respond by mail. Thus, of the 3,471 compliance evaluations scheduled, 1,736 contractors will send their AAPs and supporting documentation by mail.

For those contractors that respond by mail, OFCCP estimates that they will copy their AAPs at an average cost of \$0.08 per page.

In addition, OFCCP estimates the average size of an AAP and supporting documentation to be 60 pages. The estimated total copying cost to contractors is \$8,333 (60 pages x \$.08 x 1,736 = \$8,333).

In addition, OFCCP estimates an average mailing cost of \$19.99 per contractor. The total mailing cost for contractors will be  $\$19.99 \times 1,736 = \$34,703$ . Moreover, OFCCP estimates an average mailing cost of \$.93 per contractor for notifying labor organizations. The total mailing cost to labor organizations is estimated at  $\$.93 \times 104,545$  contractor establishments = \$97,227.

The operation and maintenance cost to respondents is calculated as follows:  $\$8,333 + \$34,703 + \$97,227 = \$140,263$  or \$1.34 per contractor establishment ( $\$140,263/104,545$  contractor establishments).

**14. ESTIMATE OF ANNUAL COST TO FEDERAL GOVERNMENT**

OFCCP has estimated the cost to the Government as follows:

12	Hours per Compliance Check	X	0	Compliance Checks	=	0	Hours
32	Hours per Desk Audit	X	3,471	Compliance Evaluations	=	111,072	Hours
				<b>TOTAL HOURS</b>		<u>111,072</u>	

OFCCP determines the hourly federal pay rate at \$33.75 hourly or \$70,192 annually (GS-12, step 1), based on the Office of Personnel Management’s 2014 Salary Table (Locality Pay Area of Rest of U.S. consisting of the portions of the lower 48 United States not located within another locality pay area as defined by the Office of Personnel Management). The total cost is  $\$33.75$  per hour  $\times$  111,072 hours = \$3,748,680. This dollar amount is part of the normal cost of OFCCP’s enforcement work at the field level.

**15. CHANGES IN BURDEN HOURS**

OFCCP is requesting OMB approval of 9,559,739 burden hours. The 2014 clearance contained approval of 8,114,628 hours. The current estimate represents an average increase of approximately 13.8 hours per contractor. The increase in hours of the current request is attributable to an increase in the percentage of large contractors as compared to small contractors, which results in the increase of the average burden hours because it takes larger contractors more time to develop, update, and maintain AAPs. A summary of the change in hours is below.

**a. Recordkeeping Burden Hours**

**1) Initial Development of an AAP:**

The submission in 2014 included 106,429 hours. The current request is 109,459 hours for an adjustment increase of 3,030 hours.

**2) Annual Update of an AAP:**

The previous submission included 3,872,737 hours. The current request is 4,597,669 hours for an adjustment increase of 724,932 hours.

**3) Maintenance of an AAP:**

The previous submission included 3,911,862 hours. The current request is 4,644,131 hours for an adjustment increase of 732,269 hours.

**4) Uniform Guidelines on Employee Selection Procedures:**

The previous submission included 2,226 hours. The current request is 7,094 hours for an adjustment increase of 4,868 hours.

**b. Reporting Burden Hours**

**1) Standard Form 100**

The number of report filers chargeable to OFCCP was zero in the previous submission and remains at zero in the current submission. Therefore, OFCCP has no changes in this category.

**2) Scheduling Letter and Itemized Listing**

The previous submission included a total of 105,295 burden hours associated the scheduling letter and itemized listing based on 3,774 total compliance evaluations multiplied by 27.9 hours, which was determined to be the burden estimate per contractor. The current request is 98,841 hours (3,741 compliance evaluations multiplied by 27.9 hours) for an adjustment decrease of 6,454 hours.

**3) Compliance Check Letter**

As in the previous submission, the current request includes zero hours for burden associated with the compliance check letter.

**c. Third Party Disclosure Burden Hours**

The previous submission included 116,079 hours. The current request is 104,545 hours for an adjustment decrease of 11,534 hours.

**16. STATISTICAL USES AND PUBLICATION OF DATA**



OFCCP does not publish the data collected by way of the items contained in this request as statistical tables.

**17. APPROVAL NOT TO DISPLAY THE EXPIRATION DATE**

OFCCP is not seeking such approval. OFCCP displays the expiration date and OMB number on its scheduling letter.

**18. EXCEPTIONS TO THE CERTIFICATION STATEMENT**

OFCCP is able to certify compliance with all provisions.

**B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS**

This information collection does not employ statistical methods.