

March 15, 2021

Affirmative Action Program Verification Interface (AAP-VI) Information Collection Request Response to OMB

Comment:

In further consideration of a less burdensome alternative, OFCCP claims in its supporting statement that “[w]ithout the data collection being proposed in this ICR, OFCCP will continue to lack the ability and resources to ensure AAP compliance by all contractors.” We respectfully disagree. As we pointed out in CWC’s original comments to OFCCP, the agency’s historical focus on the two percent reflects OFCCP’s past practices and policies, not a lack of data sources. Indeed, there are a number of data sources already available to the federal government, and to OFCCP in particular, that weigh against the imposition of a new and overly burdensome information collection.

Federal contractors that are required to prepare affirmative action programs (AAPs) under E.O. 11246, Section 503, and VEVRAA already are required to engage in no less than three other compliance certifications. Indeed, these are the same contractors that:

- Identify themselves as federal contractors subject to E.O. 11246 on Section C, Question 3, of the Employer Information (“EEO-1”) Report, which is filed each year with a federal “Joint Reporting Committee” consisting of OFCCP and the Equal Employment Opportunity Commission (EEOC);*
- File annually one or more VETS-4212 Reports with the Department of Labor’s Veterans’ Employment and Training Service (“DOL-VETS”); and*
- Voluntarily affirm their compliance with these laws and regulations through the General Service Administration’s (“GSA”) System for Award Management (“SAM”).*

Furthermore, each of these databases is either: (1) currently available to OFCCP (EEO-1 and VETS-4212); or (2) should be available through normal government channels (SAM). OFCCP does note in its supporting statement that GSA and OFCCP “were not able to come to an agreement on sharing [SAM] data.” Regardless, the contractor names, locations, and addresses that OFCCP is most interested in are readily available to the agency through the EEO-1 and VETS-4212 databases.

We further submit that there is no reason to believe that OFCCP’s new AAP-VI will reach an audience materially different than the federal contractors that already certify their compliance with federal laws and regulations each year through the means listed above. Indeed, we respectfully submit that if a covered federal contractor is not already complying with the certifications listed above, there is no reason to believe that it would comply with the AAP-VI.

In conclusion, CWC recommends that the AAP-VI’s certification requirement occur every two years, rather than annually. There is no reason to believe that biennial certification—rather than annual certification—would produce a materially different group of federal contractors, and it would still give OFCCP the broader reach it is seeking through the AAP-VI, with the added benefit of reducing by half the burden on federal contractors.

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OFCCP Response:

The Office of Federal Contract Compliance Programs (OFCCP) assessed the Center for Workplace Compliance's (CWC) comment on the 30-day Federal Register Notice for the Affirmative Action Program Verification Interface (AAP-VI) and will still require all covered federal contractors and subcontractors to annually certify that they have developed and maintained affirmative action programs (AAPs) at each establishment, as applicable, and/or for each functional or business unit. The Government Accountability Office (GAO) 2016 *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance* report's recommendation was for OFCCP to, "Develop a mechanism to monitor AAPs from covered federal contractors on a regular basis. Such a mechanism could include electronically collecting AAPs and contractor certification of annual updates."

The GAO report's recommendation has been given priority status and is still open because AAP-VI has not received Office of Management and Budget approval. Implementing the annual certification requirement is necessary for OFCCP to complete work on the open GAO recommendation, to meet OFCCP's responsibility to monitor the development and maintenance of AAPs, and to allow OFCCP to schedule noncompliant contractors more efficiently at a minimum burden to contractors. While contractors already submit information through the EEO-1 Report, VETS-4212, and the General Services Administration's (GSA) System for Award Management (SAM) database, GAO specifically recommended OFCCP develop a mechanism to monitor contractors' AAPs independently. Further, neither the EEO-1 Report nor the VETS-4212 report certify whether contractors have complied with the entire scheme of affirmative action program requirements enforced by OFCCP. The AAP-VI certification will also allow OFCCP, the agency responsible for ensuring compliance with federal contractor AAP requirements, to run a comprehensive and informative report identifying the AAP compliance status of covered federal contractors. OFCCP does not have access to receive comprehensive and informative reports through the SAM system.

OFCCP emphasizes that the annual certification only requires contractors to check one of three boxes describing their compliance status. OFCCP disagrees that this minimal requirement is "overly burdensome." This is further emphasized through the current requirement for contractors to answer a highly similar certification question for GSA about whether they have developed and maintained AAPs at their establishments. Reporting the same information directly to OFCCP by checking one of three boxes on a single form takes a nominal amount of additional time (.1 hours or 6 minutes).¹ Furthermore, OFCCP pre-populates information in each contractor's AAP-VI account regarding the contractor's establishment(s) using information from EEO-1 filings. This further reduces the burden on contractors and reduces redundant reporting between the EEO-1 Report and AAP-VI.

In response to CWC's recommendation that OFCCP seek certification every two years, as opposed to every year, this option would not meet OFCCP's goals to help ensure contractors maintain and develop AAPs on an annual basis. If existing contractors are complying with their obligations, they would have developed or updated their AAP within the past 12 months and can

¹ OFCCP notes that CWC did not contest the 6 minute estimate that OFCCP provided for annual certification.

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certify on an annual basis. New contractors that are in the process of developing an AAP at the time of certification can select the option in AAP-VI stating they are a new entity within the past 120 days and are still in the process of developing one. Furthermore, the additional burden on contractors to certify on an annual basis is minimal, especially in light of the benefits provided by the enhanced compliance monitoring that is possible with annual certification.

Finally, CWC expressed a concern that the implementation of AAP-VI will not reach an audience materially different from the federal contractors that already certify their compliance with federal laws and regulations each year through the means listed above, and that if a covered federal contractor is not already complying with other required certifications, there is no reason to believe that it would comply with the AAP-VI. CWC's concern provides all the more reason for OFCCP to execute the open GAO recommendation to monitor AAPs from federal contractors on a regular basis, to help ensure contractors are in compliance, and to identify more likely violators.