

August 15, 2016

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Office of Management and Budget
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Via email: oir_submission@omb.eop.gov

Dear Mr. Nye,

I am writing to provide comments on the 30-day Notice published by the U.S. Equal Employment Opportunity Commission on its proposal to expand the Employer Information Report (EEO-1) to include summary pay data for certain covered employers.¹

My own experience working in private and public civil rights enforcement and my understanding of social science research findings inform my perspective on the value of regularly collecting pay data. I write in support of the EEOC's proposed information collection and concur with the Commission's conclusions. Below are some comments that address a few specific issues raised by the proposal and prior comments submitted to the Commission.

My comments focus on the utility of this data collection for enhancing voluntary compliance and for enforcement, how to address potential challenges and limitations of the proposed data collection, and opportunities presented by the Commission's proposal to make aggregate data available for voluntary compliance and research. In particular:

1. Collecting this data should foster increased voluntary compliance, independent of any specific enforcement use, because it creates a formal mechanism to institutionalize the regular collection and review of pay equity data.
2. Collecting this data should have important enforcement benefits, despite its limited nature, because the proposed methodology permits more robust comparisons and because the Commission proposes to apply this data as one piece of information in the context of a broader assessment.
3. The Commission should consider adopting specific mechanisms to ensure the quality and integrity of pay data reporting, including comparisons to other data sources,

¹ 81 F.R. 45479, Agency/Docket Number 3046-007, Document Number 2016-16692.

periodically collecting supplemental data from a smaller sample, and partnering with OFCCP to cross-check reported data against the underlying microdata provided during regular audits.

4. The Commission should move forward with its plan to make data publicly available, using a format and interface that would allow employers to compare themselves with reasonable peer benchmarks, and that would also facilitate academic research into pay equity issues and trends.

Value of Data Collection

If the government requires employers to report summary pay data on a regular basis, it can support and enhance voluntary compliance above and beyond any specific enforcement use of the data. A new requirement to report pay data to the government should motivate employers to establish or improve their systems and practices to collect and review compensation data. The employers covered by the new rule will need to review their pay data by demographics at least at a summary level every year. By formalizing and institutionalizing pay data reporting, this proposal makes it more likely that employers will identify and address pay equity on their own – increasing its positive impact.

While one might assume that most employers regularly collect and analyze pay data by demographics for potential disparities, in my experience too many organizations still have inconsistent or non-existent formal reviews. A strong pay equity program requires the infrastructure to sustain it. This area is widely viewed as technically and legally complex. Human Resources and EEO staff may need additional training or capacity or may rely on outside experts to conduct compensation analysis. Compensation may be handled by a different team than EEO compliance and they may each have different priorities and frameworks. Frequently, existing data systems and practices need improvements and updates so that management can understand and track the impact of its compensation decisions effectively. Even employers who seek in good faith to comply with fair pay legal mandates and social norms face challenges in integrating regular self-analysis into their EEO compliance functions.

Although existing laws and regulations either require companies to implement regular pay equity analysis, or create strong risk management incentives to do so, these practical limitations mean progress remains uneven.² Social scientists who study the workplace have found that formal legal requirements may not matter as much as the structures, systems and practices companies establish to comply with those rules – and without strong and substantive programs those formal rules may not in practice lead to meaningful diversity improvements.³ A

² Covered federal contractors must include regular self-analysis of compensation by race and gender as part of their EEO programs, *see* 41 C.F.R. §60-2.17, and all employers are potentially subject to public or private enforcement actions under federal or state laws banning pay discrimination.

³ *See generally* Lauren B. Edelman, *Working Law: Courts, Corporations and Symbolic Civil Rights* (forthcoming 2016).

new reporting requirement should increase the incentives to allocate the resources needed, break down silos, and build capacity.

Overcoming these barriers to regular self-analysis is critical, because research suggests that measurement and accountability are particularly important to improving diversity and EEO outcomes. One of the most interesting current diversity research questions focuses on what works. Social scientists are finding that many popular interventions, like training, appear to be far less effective than other approaches focused on measurement, transparency and accountability.⁴ Measuring and reporting on progress can help interrupt common biases and in-group favoritism by making outcomes more visible.⁵ Collecting data and reviewing results seems to be particularly salient.⁶

Research on other similar regulatory schemes also suggests that the existence of formalized reporting and compliance mechanisms are linked to better diversity and EEO performance. For example, research on federal contractors has identified a relationship between affirmative action programs -- which require companies to establish written plans, review data, set goals and monitor progress -- and progress in the workplace for women and workers of color.⁷

These research findings suggest that including pay data in the EEO-1 could improve voluntary compliance in addition to any potential use for enforcement. The requirement to report should cause employers to pay much closer attention to their own pay data and practices at the time they prepare and file reports. Further, this requirement should also create stronger incentives to adopt regular self-analysis programs, including improving data collection and organizational capacity. Both of these effects reflect the kinds of interventions that seem more likely to lead to meaningful EEO and diversity progress. And they make it much more likely that an employer can find – and resolve – any pay equity issues without the need for enforcement.

Potential Enforcement Applications of Summary Data

In addition to the potential improvements in voluntarily compliance, the EEOC and OFCCP could use this summary data to support more focused and efficient enforcement. As the 30-day

⁴ Frank Dobbin, Alexandra Kalev and Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, *American Sociological Review* (2006); Iris Bohnet, *What Works: Gender Equality by Design* (2016); Michele E. A. Jayne and Robert L. Dipboye, *Leveraging Diversity to Improve Business Performance: Research Findings and Recommendations for Organizations*, *Human Resource Management* (Winter 2004); Frank Dobbin and Alexandra Kalev, *Why Diversity Programs Fail, And What Works Better*, *Harvard Business Review* (July-August 2016).

⁵ Barbara Reskin, *The Proximate Cause of Employment Discrimination*, *Contemporary Sociology* (2000); Christine Jolls and Cass Sunstein, *Debiasing Through Law*, *Journal of Legal Studies* (2006); Joel Nadler, et al, *Aversive Discrimination in Employment Interviews: Reducing Effects of Sexual Orientation Bias with Accountability*, *Psychology of Sexual Orientation and Gender Diversity* (2014).

⁶ Bohnet (2016); Dobbin & Kalev (2016), *supra* note 4.

⁷ See, e.g., Fidan Ana Kurtulus, *Affirmative Action and the Occupational Advancement of Women and Minorities 1973-2003*, *Industrial Relations* (2012); Jonathan S. Leonard, *The Impact of Affirmative Action on Employment*, *Journal of Labor Economics* (1984).

notice and the Commission's other rulemaking documentation explain, the Commission anticipates reviewing pay data provided in the EEO-1 report in evaluating whether and how to proceed with discrimination complaints. OFCCP could also use the data for purposes of prioritizing federal contractors for regular compliance evaluations. Both of these potential uses are consistent with how the agencies have used EEO-1 representation data in the past – as one piece of information that adds value in the context of broader enforcement decisions.

Some have objected to any potential enforcement use on the grounds that pay disparities at the EEO-1 group level are virtually meaningless, without incorporating more detailed measures of occupation or position, qualifications, or performance. Similar objections have been raised against aggregate W-2 data that may include different measures of compensation driven by different factors. These objections overlook key elements of the Commission's plan to use the data for enforcement.

When analyzing data for discrimination, the threshold question is always “compared to what?” Compared to equality? Compared (statistically) to the outcomes expected under a race or gender-neutral practice? Compared to specific similarly situated individuals?

As a threshold legal matter, comparisons may differ depending on whether the inquiry is individual or systemic and depending on whether it is based on the Equal Pay Act or Title VII.⁸ For example, determining whether African-American and Hispanic workers have the same opportunity to get hours on higher paying construction projects, or whether women are steered into lower paying positions at hire, requires different comparisons than an analysis of whether a particular female engineer's compensation is lower than a male comparator performing substantially similar work. In many cases it is perfectly appropriate to consider differences across individual jobs, locations, work units or levels as part of the analysis.

Further, not every possible factor or explanation is relevant to a particular discrimination analysis. It is certainly correct that aggregate data obscures important individual variation. It is also correct that any individual's compensation is a function of a broad range of individual characteristics, choices and constraints, along with organizational and broader economic factors. But these individual-level differences are not always untainted and not always relevant to explain gender- or race-based disparities. If they do not systematically vary on the basis of race/ethnicity and/or gender they may represent much more noise than signal. In addition, explaining an absolute difference in pay is a different inquiry than considering relative levels of difference.

⁸ See Office of Federal Contract Compliance Programs, *Notice of Final Rescission, Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination*, 78 F.R. 13508 (2013).

In this case, the Commission proposes to consider a particular firm's EEO-1 pay data in comparison to peers in the same industry and area, and specifically with respect to race/ethnicity or gender-based pay differences. In addition, the Commission proposes to use this information as one piece of information in a broader assessment. This reduces the potential problems with relying on relatively broad aggregations of job or compensation.

EEO-1 categories do include a broad mix of occupations in the aggregate. However, conducting comparisons with peers by industry reduces the degree of variation within these categories. The occupational mix for management positions in healthcare is likely more similar across individual firms, and more distinct from the occupational mix for management positions in IT, education, hospitality or manufacturing. Factors that drive compensation decisions, and the relative mix of compensation components – such as bonuses, overtime, commission shift pay or piecework – should also align to some degree with industry as well as with EEO-1 category.

The Commission is essentially making the reasonable assumption that larger gender- or race/ethnicity-based disparities among peer employers are less likely to be explained entirely by the kinds of factors or information that are not included in the basic report. So there is less need to collect specific detailed occupation, or variation at the individual worker level, such as qualifications, interests or constraints – bearing in mind that those explanations while important, are not always measurable and may themselves be affected by discrimination. Larger labor market trends, like levels of education, occupational differences or rates of part time work by demographics, should operate in a broadly similar fashion to affect pay differences at similar firms. Those with larger disparities may be more worth assessing for potential discrimination. Further, the Commission recognizes these are at most general propositions and proposes to test these assumptions in each individual case, by considering specific data and evidence. Adding measures of size (larger, medium and smaller employers) could further refine the initial comparisons.

The use of the data for enforcement also has the potential to increase voluntary compliance by deterring violations.⁹ This enhances the other voluntary compliance benefits described above.

Ideas for Addressing Potential Data Quality and Integrity Issues

One challenge with any major data collection is balancing competing imperatives of limiting response burden and maximizing the quality of the information obtained. For example, collecting data in broader pay bands reduces burden and protects the confidentiality of individual pay records, but also might in some circumstances obscure inequality. In an organization where women cluster consistently on the bottom half of each pay range, but are distributed similarly to men across pay bands, a disparity may be harder to identify. In addition, the Commission will not be able to verify the accuracy of the reports against actual pay records, and reporting errors or other problems could compromise the analysis.

⁹ See Office of Federal Contract Compliance Programs, *Notice of Proposed Rule Making, Government Contractors, Requirement to Report Summary Data on Employee Compensation*, 79 F.R. 46562 (2014).

There are, however several options that could provide some checks on data integrity, and allow the Commission to monitor reporting. First, the Commission already uses mechanisms to identify outliers or potential inconsistencies and reporting errors for the EEO-1 representation data (such as divergence between establishment and consolidated reports). Presumably the Commission would develop a similar system for the pay data collection. Second, the Commission could periodically test the aggregate reported data by location and industry against existing labor market data to see whether it diverges substantially. Third, the Commission could consider periodic sampling to collect more refined pay data, or average and quartile W-2 amounts by EEO-1 group and demographics, or other data to assess how well the pay band reports align with the underlying pay records. Finally, the Commission could work with OFCCP to ensure that during regular compliance evaluations, OFCCP compares the individual pay records it receives against the EEO-1 reports for accuracy.

Proposed Publicly-Available Data

In the 30-day notice, the Commission explains that it intends to publish periodic reports on pay differences by demographics, summarized by occupation, industry, and MSA. The Notice anticipates these reports relying on the EEO-1 pay data, potentially in conjunction with other labor market data. This information could be particularly useful for employers seeking to make preliminary assessments of their average pay disparities when compared with their peers – and particularly for employers with limited resources. Other stakeholders – including workers and worker advocates – could potentially use this information to advocate for fair pay. Academic researchers could also use it to assess issues and trends by occupation, industry and MSA.

This information would be more useful if the Commission provided an interface that allows an individual or employer to quickly identify benchmark values of interest – for example lookup tools or tables that display the median, 25th and 75th percentile measures for an industry, location, and/or occupation. In cases where sufficient data exists to cross-tab these values, the Commission should incorporate that option. An organization could do a preliminary risk assessment knowing not just what the average value is, but where they fall within quartile ranges, similar to how traditional compensation benchmarks work. A company in the bottom quartile for its industry or size might be at a higher relative risk compared with a company in the top quartile. (Below is a sample concept for this kind of table.)

Finally, the Commission should consider also incorporating organization size into any reporting or benchmark data, as organizations of similar size are likely to have more similarity in terms of Human Resources capacity and statistical power.

Coukos/Working IDEAL Comment on EEOC Pay Data Collection

Finance	Healthcare	Retail	Legal Services	
Top 25%	Top 25%	Top 25%	Top 25%	High Performance
25-50%	25-50%	25-50%	25-50%	Higher than Median Performance
50-75%	50-75%	50-75%	50-75%	Higher than Median Risk
Bottom 25%	Bottom 25%	Bottom 25%	Bottom 25%	High Risk

Respectfully Submitted,

/s/
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Founding Principal
Working IDEAL

About Working IDEAL

Working IDEAL. Working IDEAL provides trusted, effective and innovative advice on inclusive workplaces, diverse talent and fair pay to large and small companies, universities, non-profits, unions and other organizations across the nation. We specialize in evidence-based diversity assessments and pay equity audits for clients with serious commitments to equal employment opportunity and affirmative action. Our expertise includes leadership development, employee engagement, and strategic human capital – and how to deploy those tools to support stronger workplace inclusion, diversity, equity and access.

Founding Principal Cyrus Mehri is also a founding partner of the law firm Mehri & Skalet, PLLC. Cyrus has served as co-lead class counsel in some of the largest and most significant race and gender cases in U.S. history: *Roberts v. Texaco Inc.*, (\$176 million; S.D.N.Y.1997); *Ingram v. The Coca-Cola Company* (\$192 million; N.D. Ga. 2001); *Robinson v. Ford Motor Company* (\$10 million and 279 apprentice positions; S.D. Ohio 2005); *August-Johnson v. Morgan Stanley* (\$47 million; D.D.C. 2007); *Amachoev v. Smith Barney* (\$34 million; N.D. Cal. 2008); *Norflet v. John Hancock Life Insurance Co.* (\$24 million; D. Conn. 2009), and *Carter v. Wells Fargo Advisors, LLC* (\$32 million; D.D.C. 2011). The hallmark of these settlements is innovative programmatic relief. Cyrus also helped create the “Rooney Rule” which has resulted in a record number of minority head coaches and general managers in the National Football League.

Founding Principal Pamela Coukos, JD, PhD, is an advisor and expert with more than 20 years of experience in equality law, policy and research. Pam recently completed five years as a Senior Advisor at the U.S. Department of Labor’s Office of Federal Contract Compliance Programs, where she worked on pay equity, civil rights enforcement, and paid leave. Her career spans civil rights litigation, research, policy analysis, teaching and training, and advocacy – and the government, private and nonprofit sectors. Pam is currently advising companies and organizations on gender equity, pay equity, diversity and inclusion, and affirmative action.