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Via Email (oira_submission@omb.eop.gov) and eRulemaking Submittal

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RE: Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report

Dear Mr. Nye,

The undersigned associations (together "the Associations") submit these comments in response to the Equal Employment Opportunity Commission's ("EEOC" or "the Commission") proposal to revise the Employer Information Report (EEO-1) as published in the *Federal Register* on July 14, 2016 (hereinafter "the proposal" or "30-day notice").[1] The proposal represents EEOC's response to public commentary on the initial changes to the EEO-1 report which the EEOC proposed on February 1, 2016.[2] Many of the undersigned associations submitted comments to the EEOC on April 1.

A large majority of the Associations' members are responsible for complying with recordkeeping and reporting requirements established by federal anti-discrimination laws and policies, including Title VII of the Civil Rights Act of 1964 and Executive Order 11246. Members of the Associations file thousands of EEO-1 reports each year in compliance with these laws, policies, and their implementing regulations. Changing EEO-1 reporting would therefore have a considerable impact on these members companies.

The Associations' members are committed to maintaining workplaces which are free from discrimination, and in particular discrimination relating to compensation. But while the Associations support the overall goal of combating

[1] 81 Fed. Reg. 45479.
[2] 81 Fed. Reg. 5113.

compensation discrimination, we do not support the changes to the EEO-1 report as proposed in the 30-day notice. This is because if finalized, the proposal will violate the Paperwork Reduction Act (PRA) by: (1) placing tremendous and costly burdens on employers; (2) yielding data of little utility; and (3) jeopardizing the confidentiality of sensitive compensation data. We therefore respectfully request that Office of Information and Regulatory Affairs (OIRA) return the proposed revisions to the Commission so that it can conduct a proper analysis of these vital PRA requirements.

I. Overview of the EEOC's Proposal

Pursuant to the proposal, beginning in 2018, employers with 100 or more employees[3] would be required to compile and submit data regarding employees' W-2 earnings and hours worked for each of its establishments.[4] For each of the 10 EEO-1 job categories, by location, employers would be required to report the number of employees by ethnicity, race, and gender that fall within 12 prescribed pay bands. According to the EEOC, this "data would support EEOC data analysis at the early stages of an investigation, using statistical tests to identify significant disparities in reported pay."[5] EEOC also states that "employers would be able to use the summary pay data that the EEOC intends to publish to generally assess their own pay practices."[6]

The PRA requires the Commission to ensure that the proposed information request minimizes the burden on employers, maximizes the utility of the data being collected and ensures the privacy and confidentiality of the information. Additionally, Section 709 (c) of Title VII requires that the reports required by the Commission be "reasonable, necessary or appropriate" for the enforcement of Title VII. Despite significant feedback detailing the proposal's legal shortcomings, EEOC has failed to satisfy these statutory requirements. As set forth in further detail below, the revised EEO-1 report is not reasonable, necessary or appropriate for the enforcement of Title VII. Further, contrary to the requirements of the PRA, the proposal is unduly burdensome, will not provide data that will be useful in combatting discrimination and fails to ensure that sensitive employer data will remain confidential. As the agency which is uniquely tasked with ensuring that agency information collections

[3] We must stress that the EEOC's proposal to add pay data to the EEO-1 applies only to employers with 100 or more employees. Accordingly, the EEOC cannot enforce the requirement to provide such data on small employers with less than 100 employees simply because they are part of a larger system or business model. To protect all small businesses, the proposed requirements must clarify that independent small businesses, even if they are part of a larger system or business model, such as franchise businesses, do not fall within the reporting requirements.

[4] EEOC proposes a filing deadline of March 31 of the year following the reporting year. Thus, the first EEO-1 reports with the proposed additional data – the 2017 EEO-1 reports - will be required to be filed in 2018.

[5] 81 Fed. Reg. 45489.

[6] 81 Fed. Reg. 45489.

satisfy the PRA, it is incumbent upon OIRA to return the proposal back to the EEOC so that a proper PRA analysis may be performed.

II. The Proposal Does Not Minimize the Burden on Employers

EEOC's proposal would expand the EEO-1 form from 180 to 3660 cells. This incredible expansion of the EEO-1 form remains entirely unaddressed in the 30-day notice. Yet if covered employers continue to file EEO-1 Reports in the same number and in the same manner as they did in 2014, in 2017, employers will report on up to 2,966,027,400 data fields.[7] By itself, this exponential increase in the amount of solicited data speaks volumes with regard to the burdensome nature of EEOC's proposal.

While EEOC did make some revisions to its burden calculation in its 30-day notice, these new calculations are made without any basis and are still woefully low. The EEOC should have based its burden calculations on surveys of actual companies who submit EEO-1 forms, pilot studies, or other reliable experiments. Instead, the EEOC bases its estimate on *assumptions* about employers' processes for submitting EEO-1 data, who is involved in these processes, their wages/salaries and the time needed to complete the processes.

EEOC takes a similar approach in its response to public feedback regarding the difficulty that employers may have in "bridging" HRIS and payroll software. EEOC claims that because certain HRIS software systems "offer the capacity" to record compensation information, then the issue "may not be as complex or novel as some comments suggested."[8] Yet, just because a task is *capable* of being performed is an entirely different question of the *effort and cost* associated with completion of the task. EEOC does not bother to address how much it might cost employers to upgrade their HRIS systems or how long this may take. Moreover, EEOC fails to consider costs associated with integrating time management systems into the reporting process as well as the burden on employers who must compile the varied and multiple data sources that arise as a result of mergers and acquisitions. This guesswork approach leads to an overall inaccurate and artificially low burden estimate in the 30-day notice. Such conclusory explanations are insufficient to meet the standards of the PRA.

[7] *See* EEOC Office of Legal Counsel "informal discussion letter" noting number of EEO-1 reports filed in 2014, https://www.eeoc.gov/eeoc/foia/letters/2016/title_vii_revision_eeo1_report_2_18.html

[8] 81 Fed. Reg. 45487.

III. The Proposal is of No Utility and Will Not Further the EEOC's Anti-Discrimination Goals

The Associations support efforts to eliminate discrimination in the workplace, including discriminatory compensation practices, but the proposal will not further these goals. The proposal purports to gather broad aggregates of data from dissimilar jobs, which cannot be used to demonstrate discrimination under the Equal Pay Act or Title VII. The EEOC's 30-day notice itself acknowledges as much when it states: "The EEOC does not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter."[9] Thus, by its own admission, the proposed EEO-1 revisions will do nothing to assist EEOC in its mission "to stop and remedy unlawful employment discrimination."[10] As we explain below, there are several reasons why the proposal fails the "utility" standard of the PRA.

A. W-2 Box 1 Data Is an Unreliable Indicator of Discrimination

The 30-day notice proposes collecting employee compensation as recorded in Box 1 of the W-2 form. Differences in W-2 Box 1 data should not be used as a proxy for discrimination. W-2 Box 1 wages reflect numerous components driven primarily by the choices of individual employees and other factors that have no bearing on the employer's decision as to how much an employee earns. The 30-day notice references the role that individual choice plays in setting W-2 data, but fails to address the issue in any meaningful way. For example, the 30-day notice entirely ignores the impact that the following factors have on W-2 earnings:

- Healthcare contributions;
- 401(k) contributions;
- Parking and mass transit stipends;
- Relocation and travel stipends;
- Military stipends;
- Expense reimbursements;
- Certain insurance premiums;
- Sick pay;
- Severance payments; and
- Deferred compensation.

[9] 81 Fed. Reg. 45489.
[10] 81 Fed. Reg. 45483.

Moreover, the proposal does not account for the dynamic nature of employment. Employees are hired, promoted and demoted throughout the year. Some employees change jobs within the same employer. Others switch from part time to full time or vice versa; still others take leaves of absence. All of these actions impact W-2 Box 1 earnings but are neither discriminatory in nature nor do they lead to any indication that these decisions reflect illegal pay or employment practices.

Further, the factors that EEOC does address – such as commission pay or overtime pay – are not even distinguished in Box 1 of the W-2. So even if the EEOC wished to determine whether some employees were discriminatorily denied overtime, as specifically mentioned in the 30-day notice, reporting W-2 Box 1 data will not enable a meaningful examination of overtime policies. Thus, the reporting of W-2 Box 1 data, which aggregates many employment or compensation situations, is not useful for detecting compensation discrimination.

B. Broad Job Categories Do Not Allow for Proper Employee Comparisons

Because there are only 10 EEO-1 job categories or groupings of jobs, the proposal would force employers to categorize employees who perform considerably different work into these groupings.[11] The job groupings are exceedingly broad, and will necessarily capture a wide range of positions that are not capable of meaningful compensation comparisons. For example, a hospital would include accountants, computer programmers, dieticians, physicians and surgeons all within the "professionals" job category. Clearly these jobs are not comparable under any discrimination analysis.

C. EEOC Acknowledges That its Proposal Will be of No Use in Identifying Potential Discriminators

While it is clear that the information proposed to be collected by EEOC will not be probative of discrimination, it must also be highlighted that this broad aggregated data will not even be useful to the EEOC as a tool to identify or target employers for further investigation. EEOC claims the information will be useful in enforcement proceedings because it will use the data generated from EEO-1 filing "in conjunction with allegations in the charge" to "decide how to focus the investigation and what information to request from the employer." Thus, the EEOC admits that

[11] The ten EEO-1 Job groups include: Executive/Senior Level Officials and Managers; First/Mid-Level Officials and Managers; Professionals; Technicians; Sales Workers; Administrative Support Workers; Craft Workers; Operatives; Laborers and Helpers; and Service Workers.

the EEO-1 data is most likely useless on its own and would only play a role when analyzed "in conjunction" with a charge. Contrary to EEOC's assertions, the new EEO-1 data will be irrelevant and useless in the course of an investigation because when EEOC receives a charge from an aggrieved employee it has the power to request – and subpoena – data from the employer that is much more detailed and relevant than what would be contained in its proposed EEO-1 report. Throughout the 30 day notice, EEOC only discusses how the EEO-1 will be useful when reviewed in conjunction with a charge. Never does the EEOC claim that the EEO-1 will help to identify potential discriminators.[12]

Moreover, the data sought by EEOC will generate a significant number of "false positives" that will waste EEOC resources and unfairly target non-discriminating employers, who will then need to spend significant time, money and resources defending themselves against meritless allegations. Furthermore, the data will generate "false negatives," with the effect of shielding potentially discriminatory compensation practices from scrutiny. EEOC's response to significant substantive evidence in the docket of these infirmities is to summarily state that the Commission is "confident" that such errors will not occur. This self-serving and conclusory response does not satisfy the strict requirements of the PRA.[13]

D. Market Comparisons Are Irrelevant

EEOC notes that another supposed use of the data is to "examine how the employer compares to similar employers in its labor market by using a statistical test to compare the distribution of women's pay in the respondent's EEO-1 report to the distribution of women's pay among respondent's competitors in the same labor market."[14] Of course, what other companies pay their employees is irrelevant when it comes to compensation discrimination analysis. Under the Equal Pay Act, the proper comparators are only those employees who perform "equal work" in the "same establishment." Under Title VII, compensation differences only matter if the comparators are "similarly situated." Simply put, providing for market comparisons cannot be useful or necessary under the Equal Pay Act, Title VII or PRA.

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[12] *See, e.g.*, 81 Fed. Reg. 45481 ("implementing the proposed EEO-1 pay data collection will improve the EEOC's ability to efficiently and effectively structure its *investigation of pay discrimination charges*.")(emphasis added)

[13] Even beyond the perspective of government enforcement programs, the proposal's resulting data would not help employers to internally evaluate their compensation practices, for the reasons described above.

[14] 81 Fed. Reg. 45490.

E. EEOC Has No Plan for The Collection of Information

The 30-day notice states that *when* W-2 and hours worked data is added to EEO-1, "the EEOC's EEO-1 analytic software tool *will be* expanded to allow for the examination of pay disparities based on job category, pay bands, and gender ethnicity and race." (emphasis added).[15] EEOC acknowledges that it does not yet have the capabilities to analyze this data in a meaningful way, despite the PRA's explicit requirement that the collecting agency have "a plan for the collection of the information."[16] When will EEOC's software tool be "expanded"? Will this new tool be capable of processing and analyzing the enormous amount of information EEOC proposes to gather? Of course, even if such analysis can be done, we have previously noted that such gross comparisons are not a basis of demonstrating discriminatory pay practices.

IV. EEOC Fails to Ensure that Sensitive Data will be Kept Private and Confidential

Many employers consider the data reported on the current EEO-1 Report to be highly sensitive and proprietary and inclusion of compensation data will only heighten this concern. Unfortunately, EEOC's 30-day notice does little more than reiterate its previous assertions regarding the law as codified and practiced. In an era where data breaches – in both the private and public sectors – occur frequently, employers deserve better protections from EEOC.

A. More Robust Privacy Protections are Warranted

For example, the 30-day notice relies on Freedom of Information Act (FOIA) exemptions as safeguarding disclosure. However, the Department of Labor's FOIA Regulations create a complex process through which employers can request that confidential information, such as EEO-1 reports, not be disclosed pursuant to third party FOIA requests. This process is costly and time consuming. Employers also face the risk that a FOIA notice to an employer could be received by the wrong contact or department at the employer, thereby resulting in an untimely response by the employer and, consequently, the subsequent release of the EEO-1 reports. We have also heard accounts from Association members of OFCCP officials

[15] 81 Fed. Reg. 45490.

[16] 44 U.S.C. 3506(c); 5 C.F.R. §1320.8. *See also*, National Research Council, 2012, *Collecting Compensation Data from Employers*, Washington D.C., National Academies Press, p. 2 (EEOC should "prepare a comprehensive plan for the use of earnings data before initiating any data collection"), available at http://www.nap.edu/catalog/13496.

inadvertently or negligently releasing EEO-1 reports. All of these issues are further compounded given the proposed inclusion of sensitive compensation information.[17]

Additionally, the proposed revisions would greatly increase the likelihood that the compensation and race/ethnicity of individual employees would be disclosed whenever there are only a few employees in a particular job category, race/ethnicity group, and pay band at an establishment. For example, if there is one Hispanic Female First / Mid-Level Official and Manager in a facility, her salary range, as well as her race and ethnicity, would be easily identified under the proposed reporting structure. It is critically important that any new data collection effort include robust new protections to ensure the privacy of personally identifiable information as well as information which employers rightly deem to be proprietary and confidential. In its 30-day notice, EEOC does not address this important privacy aspect of its proposal.

B. EEOC and OFCCP Must Limit Disclosure From Third Parties

As revealed during the EEOC's hearing on March 16, 2016, the Commission has already been sharing confidential EEO-1 data with professors and researchers. In her written testimony, Professor Elizabeth Hirsh stated that she has access to EEO-1 data at the establishment level.[18] This came as quite a surprise to many employers. The EEOC has not shared with the regulated community the identities of other individuals, if any, who have access to this data. However, given the sensitive nature of this material and the additional information it proposes to include, EEOC has an obligation to be clear as to whom it permits access to EEO-1 data and the steps that it takes to ensure that these individuals maintain proper confidentiality.[19] Instead, the 30-day notice merely states that EEOC imposes confidentiality through agreements with contractors or federal agencies with which it shares data. This "just trust us" approach cannot satisfy the PRA's confidentiality requirement.

C. EEOC and OFCCP Must Protect Against Data Breaches

The National Academies of Science (NAS) Report underscored that "there will be a great demand on the part of other federal agencies, researchers, analysts,

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[17] We also note that the EEOC apparently gave no attention to OMB Circular A-130 by addressing confidentiality and privacy issues or the comments of its own working group in 2012.

[18] Ms. Hirsh appears to have been accessing employer data since as early as 2002. On her Curriculum Vitae – which is different from the biography she submitted for the EEOC's March 16 hearing – Ms. Hirsh notes that she has been a "Research Associate, U.S. Equal Employment Opportunity Commission, 2002-present," as well as an "Occasional Consultant, U.S. Equal Employment Opportunity Commission, 2006- present."

[19] Additionally, EEOC cannot claim that providing employee compensation and hours worked information to professors or researchers satisfies the "utility" requirement of the PRA because such information sharing is *not* "necessary to fulfill [the agency's] statutory mission…" *See* 81 Fed. Reg. at 45481.

compensation-setting bodies and others for access to these powerful new data . . . and the EEOC would be well advised to start taking steps now to develop policies to provide access in a protected environment." The NAS report further emphasized that "the consequences of a breach in the protection of data provided in confidence are, as other federal agencies have discovered, painful and of lasting consequence."

As an example, shortly after the close of the 60-day comment period with EEOC, the Federal Deposit Insurance Corporation (FDIC) reported to Congress that it experienced five "major incidents" of cybersecurity breaches since October 2015. Additionally, the data breach experienced last year by the Office of Personnel Management (OPM) was one of the largest in recent memory and was specifically targeted at employee, applicant and former employee information. OPM has now had to make major changes to its personnel and its policies and procedures in an attempt to earn the trust of the American public when it comes to the information entrusted to this agency.

The OPM breach holds lessons for all federal agencies and should inform how the EEOC handles the disclosure and transfer of employee pay data to third parties. The EEOC needs to assure employers that it has reviewed its information security protocols and that they can and will safeguard the pay data employers are providing. In the hands of the wrong people, the original pay data from the EEO-1 report could cause significant harm to a company and as previously noted subject employees to potential violation of their privacy.

V. Conclusion

The undersigned Associations have serious concerns with EEOC's proposal. As outlined above, the EEOC's proposal fails to minimize the burden on employers and maximize the utility of the data. EEOC has also failed to set forth appropriate actions to safeguard the confidentiality of sensitive employee data. These are prerequisites to PRA approval. Moreover, EEOC has not demonstrated, and cannot demonstrate, that this massive data request is reasonable, necessary or appropriate as required by Title VII. Accordingly, we respectfully request that OIRA return the proposal to EEOC so that the Commission can perform a proper analysis under the PRA.

Sincerely,

American Benefits Council
American Foundry Society
American Gaming Association
American Institute of CPAs
American Road & Transportation Builders Association
Associated Builders & Contractors, Inc.
Associated General Contractors
The ERISA Industry Committee.
Food Marketing Institute
HR Policy Association
International Franchise Association
National Association of Manufacturers
National Association of Professional Employer Organizations
National Automobile Dealers Association
National Council of Chain Restaurants
National Federation of Independent Business
National Restaurant Association
National Retail Federation
The Newspaper Association of America
Retail Industry Leaders Association
Securities Industry and Financial Markets Association
Society for Human Resource Management
U.S. Chamber of Commerce
WorldatWork