

November 12, 2019

Ms. Bernadette B. Wilson
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

By electronic submission: www.regulations.gov

Re: EEOC Notice of Information Collection--Request for New Control Number for a Currently Approved Collection: EEO-1 Component 1; Revision of Existing Approval for EEO-1 Component 2, 84 Fed. Reg. 48138 (September 12, 2019)

Dear Executive Officer Wilson:

The undersigned representatives of employers are responding to the Equal Employment Opportunity Commission's ("EEOC" or "the Commission") request for public comments contained in the 2019 Notice of Information Collection ("2019 Notice") pursuant to the Paperwork Reduction Act (PRA). In particular, these employer representatives wish to express support for EEOC's decision to not seek renewal of OMB clearance for the EEO-1 Component 2 form and to request a new OMB clearance number to be associated specifically with EEO-1 Component 1.¹

The Component 2 collection requires employers with 100 or more employees to complete and submit a form with 3,660 data fields for each of the employer's locations encompassing pay and hours worked data on all employees broken out by EEOC-defined job classifications and income bands. By contrast, the Component 1 collection requires employers to complete and submit, for each employer location, a form comprised of only 180 data points on the gender, race, and ethnicity of employees at that location.

The employer representatives agree with EEOC's decision to discontinue collection of Component 2 data, based on its conclusion that the degree of utility does not justify the burden imposed. The employer representatives also believe the sensitive nature of Component 2 data warrants heightened attention to protecting its confidentiality and that EEOC has not developed and confirmed adequate procedures to ensure the confidentiality of the data required to be submitted, especially if EEOC shares this data with other agencies and interested parties.

The Employer Representatives Support EEOC's Decision No Longer To Collect EEO-1 Component 2 Data.

As the EEOC stated in the current notice, the 2016 proposal to collect Component 2 data was based on an "extremely low estimate of the burden on employers."² Furthermore, the EEOC correctly acknowledges what the employer representatives have long said to be true, that the

¹ 84 Fed. Reg. 48141 (September 12, 2019).

² *Id.* at 48140.

“unproven utility to its enforcement program of the pay data as defined in the 2016 Component 2 is far outweighed by the burden imposed on employers that must comply with the reporting obligation.”³ Additionally, the employer representatives believe strongly that EEOC has not satisfied the mandate of the Paperwork Reduction Act to ensure and demonstrate that the confidentiality of any Component 2 data would be protected.⁴

A. EEOC’s Revised Burden Estimate for Component 2 Is More Accurate than Previous Estimates.

The employer representatives agree with the EEOC’s conclusion that the methodology previously used to calculate the EEO-1 data collection burden “did not adhere to the standard approach for estimating burden in federal data collections.”⁵ The prior methodology used to calculate both the Component 1 and Component 2 burdens included in the 2016 Proposals “estimated burden at the individual employer level...and not at the individual form level.”⁶ This method of calculating burden assumed, contrary to its own reporting instructions, that the number of filers and number of reports filed would be equal, and therefore drastically underestimated both the aggregate filing burden and the individual burden borne by filers who were required to report on each one of their establishment locations. The EEOC’s revised methodology, reflected in the current request for estimating the filing burden “deconstructs the total number of reports submitted by report type and by filer type, and then estimates an average burden based on the number and types of reports submitted.”⁷ This new methodology more accurately accounts for the difference in time required for different types of EEO-1 reports.

The lower burden articulated in the EEOC’s 2015 and 2016 submissions reflected artificial assumptions unsupported by any empirical evidence that yielded dramatically understated burdens imposed by Component 2. As the employer representatives previously argued, conducting estimates based on real survey data would have yielded a more reliable burden estimate. In its current Notice, the EEOC based its burden estimate on more realistic economic factors, resulting in estimates that more accurately reflect the true burden which would be imposed by Component 2. For instance, the EEOC used: 1) Component 1 2017 data as the basis for the number of filers and reports which drove its burden calculation; and 2) U.S. Department of Labor’s Bureau of Labor Statistics median pay data to estimate the cost burden for Component 2 data collection for 2017 and 2018.⁸ As a result, the EEOC’s most recent burden estimates are more aligned with those resulting from employer surveys conducted by the U.S. Chamber of Commerce in 2016 during the PRA process that produced the Component 2 form, as well as testimony provided by the Society for Human Resource Management in response to the EEOC’s request for public input in March 2016, and the Equal Employment

³ *Id.* at 48141.

⁴ *See* Letter from Chamber of Commerce of the U.S. to John M. Mulvaney, Dir. OMB (Feb. 27, 2017); Written Testimony on behalf of Society for Human Resource Management, EEOC Hearing of March 16, 2016 - Public Input into the Proposed Revisions to the EEO-1 Report; Letter from Equal Employment Advisory Council to Mick Mulvaney, Dir. OMB (Mar. 20, 2017); Letter from Mark Wilson, HR Policy Ass’n to John Mulvaney, Dir. OMB (Apr. 13, 2017).

⁵ 84 Fed. Reg. 48140 (Sep. 12, 2019).

⁶ *Id.*

⁷ *Id.*

⁸ 84 Fed. Reg. 48140, FN 12 (Sep. 12, 2019).

Advisory Council's letter to OMB in March 2017 and HR Policy Association's letter to OMB in April 2017.⁹

1. Evidence in the Record From Prior Submissions In 2016 Supports The EEOC's Statement That It Inaccurately Calculated The Burden Of Collecting Component 2 Data.

In its February 2016 Notice, the EEOC estimated that the aggregate burden on filers associated with preparing the EEO-1 Component 1 Report for 2016 would only be \$5.5 million and that the cost burden for preparing Component 1 and Component 2 data for both 2017 and 2018 would be \$9.7 million.¹⁰ The business community submitted comments in response to the proposal demonstrating how the Commission had based those estimates on several flawed assumptions.¹¹

For example, the Chamber, HR Policy Association, the Center for Workplace Compliance, Institute for Workplace Equality, National Association of Manufacturers, National Retail Federation, Associated Builders and Contractors, and Society for Human Resource Management as well as other employer representatives provided detailed information to OMB and the EEOC in 2016 describing monetary burdens, and payroll and HRIS system challenges employers faced in light of the significantly expanded data collection requirements of Component 2 that far exceeded the EEOC's 2016 estimates. Testimony on behalf of the Society for Human Resource Management explained that for one employer—even after conducting internal validation and utilizing a third-party vendor to test their data file before submission—20% of the employer's individual establishment reports had to be manually reviewed, contrary to the EEOC's assumptions that it would all be electronically uploaded with the press of a button.¹²

In support of its 2016 comments, the Chamber surveyed 50 of its members to gather empirical data regarding the time and cost associated with the collection and tabulation of data for both the existing EEO-1 (Component 1) and the proposed revised EEO-1 (Component 2) that would include compensation and hours worked data. The preliminary findings of the study, developed by noted labor economists, confirmed that the EEOC's assumptions were

⁹ Despite Title VII's requirement that the EEOC impose such reporting by regulation, which includes the notice and comment requirements mandated by the Administrative Procedure Act ("APA"), the EEOC opted not to follow these requirements in adopting Component 2 and instead simply followed the Paperwork Reduction Act. As a result, the initial Component 2 proposal was shielded from judicial review. The employer representatives appreciate EEOC's commitment that any future proposal will be conducted under the APA (see FN 11, 84 Fed. Reg. 48141) and therefore subject to judicial challenge. Any such new collection would also be subject to the PRA requiring that it will minimize the burden, maximize the utility, and ensure that any data collection will be conducted in a manner to ensure the confidentiality of the data collected.

¹⁰ 81 Fed. Reg. 5113 (Feb. 1, 2016).

¹¹ U.S. Chamber of Commerce April 1, 2016 Submission; U.S. Chamber of Commerce Aug. 15, 2016 Submission; Equal Employment Advisory Council April 1, 2016 Submission; The OFCCP Institute April 1, 2016 Submission; NAM April 1, 2016 Submission; SHRM April 1, 2016 Submission; National Retail Federation April 1, 2016 Submission; Associated Builders and Contractors April 1, 2016 submission; Associated Builders and Contractors Aug. 15, 2016 submission.

¹² *Id.*

unsupportable and lacked any attachment to reality, which the Chamber detailed in its comments on the February 2016 Notice.

After receiving public comments, including those submitted by the representatives of those employers who would have to submit Component 2, the EEOC recognized that its initial burden estimates were too low and adjusted the methodology for calculating the burden in the July 2016 Notice to reflect a significantly increased estimated cost of compliance. While improved, these revised burden estimates still suffered from a lack of factual support and still underestimated the filing expense by a significant amount.

2. The Commission's 2016 Revised Burden Estimates For Component 2 Data Collection Were Based on Speculation.

Based on its revised calculations, the EEOC estimated that 60,866 companies would be required to generate EEO-1 Component 2 reports, and it claimed that the *total* annual burden to such companies would be 1.893 million hours, at a cost of \$53.5 million, or \$880 per company filer.¹³ Although the updated estimate represented a drastic increase from the Commission's initial burden estimate of \$9.7 million, the EEOC's estimates were still devoid of factual support and greatly underestimated the burden associated with collection, analysis, and filing of the proposed EEO-1 Component 2 form containing earnings and hours worked information.¹⁴

In its 2016 Comments to OMB, the Chamber argued that the EEOC's calculations were based on unrealistic and inaccurate assumptions regarding the extent to which: 1) employers maintain centralized human resources information systems ("HRIS"); 2) employers' HRIS contain fully integrated data from relevant personnel records; and 3) automation reduces the time and cost associated with compiling and tabulating relevant information.¹⁵ In support of its overly optimistic assumptions, the EEOC cited a single report in the International Public Management Association for Human Resources journal for the proposition that "90% of human resources departments use some form of HRIS."¹⁶ The Chamber's comments pointed out that even if that were accurate, it did not speak to whether the information systems referenced contained all the information necessary to generate the current and proposed EEO-1 reports, nor whether companies utilized multiple HRIS for separate establishments which may or may not be interconnected or compatible with one another. Indeed, employers have reported that substantial amounts of manual data entry were required to supply the data required by the Component 2 form. Moreover, certain categories of employees, including part-time employees and those who transitioned from full-time to part-time (or vice versa), posed particular challenges for employers since they were required to submit annualized pay figures for part-time workers. The Chamber's comments also criticized the EEOC's burden estimates for failing to account for overhead costs and using artificially low wage rates.

In contrast, the Chamber's member survey showed that most of the responding companies had HRIS software, but it was not always standardized across the company.

¹³ 81 Fed. Reg. 45494 (July 14, 2016).

¹⁴ 81 Fed. Reg. 45494 (July 14, 2016).

¹⁵ U.S. Chamber of Commerce Aug. 15, 2016 Submission, at 3-4, 11-21.

¹⁶ 81 Fed. Reg. 5120, FN 61 (Feb. 1, 2016).

Additionally, many systems were not linked directly to the companies' headquarters. The survey, which was further supported by testimony given to the EEOC by employer representatives, showed that in many instances each of the companies' local establishments were currently tasked with generating their own EEO-1 reports in spreadsheet form, which were then forwarded to the companies' headquarters where they were reviewed and compiled for submission.¹⁷ The Chamber pointed out that the EEOC could have obtained this type of data independently in a variety of ways (such as through surveys of past EEO-1 filers or by conducting field pilot studies) prior to preparing its burden estimates. Based on their current HRIS tools, the 50 employers included in the Chamber's survey estimated that, on average, it would take them 1.8 times longer to prepare the proposed EEO-1 Component 2 report with the wage and earnings data, than estimated by EEOC.¹⁸

Applying the Chamber's 2016 survey results to the 67,146 filers cited in the EEOC estimates demonstrated that the *total* annual burden to generate EEO-1 Component 2 reports with earnings and wage data in 2017-2018, would be approximately 8 million hours, at a cost of \$400 million. Stated differently, the 2016 survey showed that the *actual* cost of completing the EEO-1 in its expanded Component 2 format in 2017-2018 was likely to be more than seven times the figure identified by the EEOC in the July 2016 Notice. The current Notice estimates of \$614 million in 2017 and \$622 million in 2018 are, therefore, more in line with the Chamber's estimate from its empirical survey conducted in 2016.¹⁹ The EEOC's most recent methodology clearly accounts for more of the economic realities associated with submitting the Component 2 form than EEOC captured in its earlier estimates.

B. The Employer Representatives Agree That Component 2 Data's Lack of Utility Is Well Established.

The EEOC's decision not to seek renewal of OMB clearance for Component 2 data collection is also supported by the lack of utility that could be derived from such data. As repeatedly set forth by the employer representatives, collecting W-2 data and hours data (including "proxy" hours) serves no purpose under the laws administered by the Commission. The EEOC now acknowledges the "unproven utility"²⁰ of collecting Component 2 data—a conclusion supported by the submissions of the employer representatives and several labor economists since 2016.²¹

¹⁷ See Written Testimony on behalf of Society for Human Resource Management, EEOC Hearing of March 16, 2016 - Public Input into the Proposed Revisions to the EEO-1 Report, available at: <https://www.eeoc.gov/eeoc/meetings/3-16-16/murray.cfm> (last visited Oct. 29, 2019); Written Testimony of David S. Fortney, Esq. on behalf of The OFCCP Institute, available at: <https://www.eeoc.gov/eeoc/meetings/3-16-16/fortney.cfm> (last visited Oct. 29, 2019).

¹⁸ Employer representative EEAC also explained how the EEOC's 2016 burden estimates did not account for the programming changes that would be necessary such as queries to payroll systems for W-2 data and the ability to link that data with employee lists generated from separate HRIS. See Letter from Equal Employment Advisory Council to Mick Mulvaney, Dir., OMB (Mar. 20, 2017).

¹⁹ 84 Fed. Reg. 48140-41 (Sep. 12, 2019).

²⁰ 84 Fed. Reg. 48141 (Sep. 12, 2019).

²¹ It is also consistent with the testimony of EEOC Chief Data Officer, Dr. Samuel C. Haffer in *NWLC v. OMB*, et al, Case No. 17-cv-2458 on April 16, 2019, where Dr. Haffer testified that: EEOC is not prepared to collect or

The EEOC's most recent conclusion that the Component 2 data is of "unproven utility" is not a new revelation. Rather, it is entirely consistent with the statement in the July 2016 Notice that the data would not "establish pay discrimination as a legal matter."²² The laws which the EEOC is charged with enforcing do not permit the aggregation of dissimilar jobs into artificial groupings for the purpose of analyzing pay. Nor do they allow the combining of dissimilar jobs into arbitrary pay bands to determine pay discrimination. Employers have an inherent right to value jobs differently and make pay decisions based on legitimate, non-discriminatory reasons.²³ The data collected under Component 2 (i.e., W-2 and "hours worked") and the methodology for organizing the data (i.e., EEO-1 job categories and pay bands), in addition to the data that was *not* collected (i.e., legitimate pay influencing factors), renders the data useless for purposes of evaluating an employer's pay practices, or identifying inappropriate compensation dissimilarities.

During the PRA process to produce Component 2, employer representatives detailed the significant flaws with using the Component 2 collection to advance investigations of compensation discrimination allegations under Title VII, Executive Order 11246 and the Equal Pay Act which further undermine any possible utility of the collected data.²⁴ The data flaws began with the collection of W-2 Box 1 wage data which is not an appropriate way to compare pay, given that it includes deductions (e.g., 401(k), flexible spending, and health savings accounts) and components of pay (e.g., overtime) that reflect employee choice.²⁵ W-2 wage data also fails to account for the fact that some types of pay, specifically commissions and tips, are a greater reflection of employee skill and effort than employer pay policies.²⁶ Similarly, collecting "hours worked" and "proxy hours" for exempt workers renders any analysis meaningless because such hours have no bearing on the wages included in Box 1 of the W-2.

Additional flaws with regard to the methodology for organizing the data were outlined in the declarations and statistical analyses presented by economists Drs. J. Michael DuMond and Rob Speakman. As Dr. DuMond observed, one of the most serious deficiencies with the Component 2 data was the "very broad occupational group[ings]" that would "result in comparisons of employees who work in very different jobs and who may perform different work."²⁷ Dr. Speakman expressed similar concerns, stating "it is my experience [employers] don't use the EEO-1 job classification for any type of review or planning or comparison purposes, much less for compensation-related determinations, outside the scope of providing data to the government. *It's an artificial and meaningless conglomeration of dissimilar workers*

analyze Component 2 data; Component 2 data has little to no utility (Haffer explained that Component 2 pay band data previously collected in the EEO-4 context is being ignored by the EEOC); and EEOC's IT systems and data analytics activities were outdated and antiquated (as concluded by OIG Report dated 9/5/2018 available at <https://oig.eeoc.gov/reports/audit/2017-002-eoig>).

²² 81 Fed. Reg. 45489 (July 14, 2016).

²³ *Id.*

²⁴ U.S. Chamber of Commerce April 1, 2016 Submission, at 23-40.

²⁵ U.S. Chamber of Commerce August 15, 2016 Submission, at 27 and Ex. 2 J. Michael DuMond ¶¶7-8.

²⁶ *Id.*, at 28.

²⁷ U.S. Chamber of Commerce April 1, 2016 Submission, at 25.

used only for EEO-1 reports. . . . It's unclear why anyone or any agency would consider it an appropriate grouping for a meaningless analysis of employees' pay."²⁸ (Emphasis added.)

The “unproven utility” of Component 2 data was further evidenced by the failure to recognize that numerous non-discriminatory factors such as experience, performance, productivity, skills, responsibility, market, and education impact pay. The EEOC retains the authority to seek detailed compensation data that includes such data from employers against whom a charge of discrimination is filed. Thus, conducting a massive data collection from all employers across the country in a broad and aggregate format could not possibly aid agency investigations. On these facts, the employer representatives agree with the EEOC’s conclusion that the Component 2 data collection is of no better than “unproven utility” and more likely of no utility.

C. Compensation Data Are Highly Sensitive and Problems with Protecting Them Support EEOC’s Decision to Cease Collection.

The highly sensitive nature of compensation data means keeping it confidential is imperative and required by the PRA. Although the EEO-1 data has always been sensitive, the addition of pay data to the report increases the sensitivity of the information, and thus the security risk.²⁹ The aggregate data collected from the EEO-1 Component 1 reports is published and shared with other federal and state agencies and, as disclosed during the April 2016 hearing, with individual researchers. There are legitimate data security concerns that even this aggregated data could be reverse-engineered to locate an individual’s personal information.³⁰

EEOC engaged the National Academy of Sciences (“NAS”) to conduct a study addressing the confidentiality concerns of Component 2 data collection. The report found that the “employee compensation data are generally considered to be highly sensitive; they are even considered proprietary information by many private-sector employers.”³¹ The NAS report further stated “there will be a great demand on the part of other federal agencies, researchers, analysts, compensation-setting bodies and others for access to these powerful new data.”³² The NAS report further noted that the “EEOC provides [this] data to agencies that do not have the same level of confidentiality protections.”³³

For example, EEOC shares company specific EEO-1 data with DOL’s Office of Federal Contract Compliance Programs so that OFCCP can evaluate compensation practices of federal contractors. While EEOC is statutorily prevented, under Title VII, from releasing this data directly upon request, OFCCP has no such prohibition. Were Component 2 data to flow to

²⁸ *Id.*

²⁹ See Letter from Chamber of Commerce of the U.S. to Bernadette Wilson, Acting Executive Officer, Executive Secretariat, EEOC (Apr. 1, 2016); Letter from Equal Employment Advisory Council to Hon. Mick Mulvaney, Dir., OMB (Mar. 20, 2017)

³⁰ See Testimony of Samuel C. Haffer in *NWLC v. OMB, et al.*, Exh. 1., pp. 51 line 6 and 52 lines 7 - 11 Apr. 16, 2019 and Declaration of Samuel C. Haffer dated Apr. 3, 2019, Par. 21.

³¹ NATIONAL RESEARCH COUNCIL, COLLECTING COMPENSATION DATA FROM EMPLOYERS 84 (National Academies Press 2012), available at <http://www.nap.edu/catalog/13496> (last visited Oct. 21, 2019).

³² *Id.* at 90.

³³ *Id.*

OFCCP, employers would be at the mercy of OFCCP's assertion of exemptions under the Freedom of Information Act (FOIA) with regard to whether their sensitive data would be released. Such problems with protecting this most sensitive data further bolster EEOC's decision not to seek renewal of OMB clearance for the Component 2 form.

CONCLUSION

The burden estimate in the EEOC's current Notice is a substantial improvement from prior submissions and more accurately reflects employers' economic realities regarding EEO-1 Component 2 reporting. The employer representatives are in full support of the EEOC's decision not to renew OMB clearance to collect Component 2 data due to the excessive burden such collection would impose, its lack of commensurate utility and benefit, and strong concerns surrounding the highly sensitive nature of the data.

Sincerely,

American Bankers Association
Associated Builders and Contractors
Associated General Contractors of America
HR Policy Association
National Federation of Independent Business
National Retail Federation
Society for Human Resource Management
U.S. Chamber of Commerce

Outside Counsel
Camille Olson
Lawrence Lorber
Annette Tyman

Seyfarth Shaw LLP
233 S. Wacker Drive
Suite 8000
Chicago, Illinois 60606-6448

Seyfarth Shaw LLP
975 F Street, N.W.
Washington, DC 20004