



THE MANAGEMENT ADVANTAGE, INC.

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*William H. Truesdell, SPHR*  
President

October 10, 2011

Office of Information and Regulatory Affairs  
Attn: OMB Desk Officer for the Department of Labor,  
Office of Federal Contract Compliance Programs (OFCCP)  
Office of Management and Budget, Room 10235  
Washington, DC 20503

Dear OMB Desk Officer:

RE: OFCCP Request for Approval of New Scheduling Letter and Itemized Listing  
OMB Control Number 1250-0003

We are a consulting firm, actively involved with government contractor clients. We assist them with preparing and annually updating their affirmative action plans, assessing their employee movement data and responding to compliance evaluation demands of the Office of Federal Contract Compliance Programs (OFCCP). Our clients range in size from under 100 employees to over 10,000 employees.

OFCCP has published its plans for the Compliance Evaluation Scheduling Letter and appendix known as the Itemized Listing (of required audit submission information). Following that, public comments were received by OFCCP and analyzed. The agency did make some small adjustments prior to the current publication of its final proposal and request for Office of Management and Budget (OMB) approval of the data collection document requirements under the *Paperwork Reduction Act* (PRA).

OFCCP's analysis of public comments it received rejects each of the major substantive points made by comment authors within the contractor community. Multiple times throughout the summary of the agency's rationale for proceeding with its own wishes, it uses the phrase, "OFCCP believes that..."

Contractors have put forth in their responses specific empirical data about their experience of compliance burden with OFCCP regulations. Yet the agency response is, "OFCCP believes that...", wiping away any consideration of the detailed cost figures offered by contractors.

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OFCCP has been in existence for more than four decades. In all that time it has failed to collect information about its contractor community that would permit it to say unequivocally how many contractors exist, how many hours they actually spend on compliance efforts and precisely how much additional burden will be born by contractors under this latest proposal.

The government should have the responsibility for collecting demographics on its subject citizenry. When experts in the regulated community submit well thought out and detailed computations for the extra burden they will face if forced into compliance with the new requirements, the government should acknowledge credibility of those submissions. After all, the government has no study-based figures with which to dispute the contractor data. It has only "OFCCP beliefs."

OMB has requested specific input on this OFCCP scheduling letter update. We offer the following based on our nearly 25 years of consulting in this area of compliance specialty. We shall speak only to the major changes in the Itimized Listing attachment to the scheduling letter proposal.

One presumption OFCCP has made in each of its recent proposals for regulatory change is that every federal contractor is equipped with computer technology, both hardware and software, that permit the contractor to submit a query and produce a report with little time or effort requirement. That would be magical. And, unfortunately, it is a totally false assumption. We estimate, as much as ten percent of the federal contractor community has either a rudimentary computer system or no computer system at all that can assist in preparing reports demanded by OFCCP in these Scheduling Letter updates. And, approximately the top 5% of the contractor community, measured by employee count, is equipped with all the technology required to respond, but even they are faced with the need to reprogram systems to allow for different output reports than have been needed in the past. OFCCP has failed to consider either of these conditions in its burden estimates. OFCCP projects a belief that all contractors are the same in their capabilities to comply with demands made by the government. Their assumptions are quite misleading. Politics has superseded facts. The great number of contractors in the middle size range use both electronic and manual records to construct OFCCP documents.

OMB has asked for help in determining if the proper performance of the OFCCP depends upon collection of the data it seeks in this submission. It also wonders if the information will have practical utility. Here are some considerations:

- OFCCP issued a secret, non-public, directive #289 on June 4, 2010, requiring its Compliance Staff to abandon the former threshold test for compensation discrimination known as the 5-30-3 test (among other designations), and use a new test (2% difference or \$2,000 difference). (OFCCP officials will not even acknowledge the existence of this directive.) Yet, for 16 months, OFCCP has been collecting massive data files from thousands of contractors that have not been authorized by OMB. Since then, nearly all contractors undergoing compliance evaluations have failed this new compensation “test.” That’s because OFCCP designed it as a test that would always be failed by the contractor. The consequence is that OFCCP immediately demands a set of between 12 and 22 additional data items for every employee in the workforce, not just those employees in the group failing the new threshold trigger test. This effort has resulted in all contractors undergoing audits to have to generate large to massive spreadsheets containing data that in many cases is not kept electronically by even the largest of employers. In many instances, data demanded by the OFCCP is not maintained by the Human Resources Management staff, but by payroll or some other party. For example, “All factors that impact compensation in your company;” “Prior job related experience;” “Performance reviews.” These are not objective data items. These data are often only found in personnel files on paper records. In some cases, such as prior job related experience, the information is only contained on paper resumes that are in an employment requisition or personnel file. If resumes are retained electronically, they must still be read one at a time and ratings coded for OFCCP reports. All these different records must be combed manually and assigned quantitative values to build the matrix of data demanded by OFCCP. The effort is an order of magnitude more difficult than suggested by OFCCP. All of this time and effort is demanded by OFCCP without any “valid,” scientifically-based, reliable screen to “prove” the effort is really necessary. The contractor is expected to spend resources to generate a data file that will most always be unable to show any discrimination. It is an exercise in government bullying and shows how out-of-touch OFCCP really is with reality in the private sector.
- OFCCP is demanding to double the amount of information it collects about job applicants and new hires. It wants to have contractors submit detailed race/ethnic & sex breakdowns for “each job group and job title.” The agency also wants an escalation in the applicant pool data volume. “...if some of your job groups or job titles...are filled from the same applicant pool, you may consolidate your applicant data (but not hiring

data) for those job groups or titles.” It sounds like the “consolidation” equals reduction, when in fact it will represent a huge increase in reporting categories.

- In Item 12 of the Itemized Listing, OFCCP has created an entirely new, never before seen, demand for a report about each employee in the workforce to be developed and submitted to the agency as of February 1<sup>st</sup>. For each person, the demand requires listing “base salary, wage rate, hours worked, bonuses, incentives, commissions, merit increases, locality pay or overtime, education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.” If the contractor has 50 workers that is 800 data items. If the contractor has 10,000 employees, that is 160,000 data items. And, half or more of them will need to be manually collected and added to the file. This will cost each audited contractor from \$3,750 to \$750,000. We conservatively estimate 1.5 hours per employee for data collection at a benefit-loaded rate of \$125 per hour. OFCCP has not explained what it will do with the report or what makes this requirement important to its mission. Total contractor burden for this one item alone will be an estimated \$468,750,000.

#### **Our Estimate of Audit Burden Hours**

• Produce Data File of 12-22 Items for Compensation Test	(\$125,000/contractor)	\$625 Million
• Applicant & Hire Data by Job Group & Job Title	(\$36,000/contractor)	\$180 Million
• Preparation of February 1 <sup>st</sup> Status Report	(\$93,750/contractor)	\$469 Million
• Existing Recordkeeping & Report Burden	(\$45,000/contractor)	\$225 Million
<b>Total Contractor Burden</b>	<b>(\$299,750/contractor)</b>	<b>\$1.3 Billion</b>

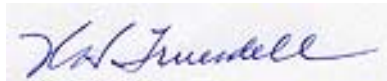
\* 5,000 audits per year, benefit-loaded salary of \$125/hour

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The OFCCP is so far off in its estimate of contractor burden that it isn't dealing with reality. The agency claims it will only cost \$8.8 Million per year. Our total estimate is over \$1 Billion. OFCCP cannot be allowed to proceed with its secret directives, its secret agendas, and its unapproved collection of information at contractor expense. At the least, OMB should demand the agency produce a report of justification based on the data it has already collected since June last year under its Directive 289. That experiment should have gathered ample information to support OFCCP's "belief" it has found value in the collection and use of the information. How many compensation discrimination cases has it discovered from that data? How many dollars of remedy has it negotiated? How many contractor dollars had to be spent in response to OFCCP demands for more and more data without justification? **If there is no empirical value then the practice should not be authorized for future use.**

On behalf of all federal contractors, we ask that OMB deny OFCCP's request for approval and demand that the agency develop specific empirical study data that will firmly determine the burden placed on federal contractors and subcontractors by its compliance evaluation requirements.

Most sincerely,



William H. Truesdell, SPHR  
President