

April 1, 2016

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

**RE: Comments on Revision of the Employer Information Report**

Dear Ms. Wilson,

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 February 1, 2016 (hereinafter, “the proposal”).

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 compensation discrimination, we do not support the changes to the EEO-1 report as proposed. This is because if finalized, the proposal will (1) place tremendous and costly burdens on employers; (2) yield data of little utility; and (3) jeopardize the confidentiality of sensitive compensation data. We therefore respectfully urge the Commission to withdraw the proposed changes.

## **I. Overview of the EEOC's Proposal**

Pursuant to the proposal, beginning in 2017, employers with 100 or more employees would be required to compile and submit data regarding employees' W-2 earnings and hours worked for each of its establishments.<sup>1</sup> 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, both the Commission and the Office of Federal Contract Compliance Programs (OFCCP) will use this data "to more effectively focus agency investigations, assess complaints of discrimination, and identify existing pay disparities that may warrant further examination." EEOC has also stated that in conjunction with the OFCCP, it will develop statistical software to analyze the EEO-1 data, as well as guidance to be used by their staff when reviewing such data.

## **II. The Proposal Process Has Been Flawed and Should Be Reconsidered**

### *A. Extension of Comment Period Would Result in a More Thorough and Accurate Record*

At the outset, we must respectfully note our disappointment in the Commission's refusal to grant an extension to today's comment deadline. The Commission's public comment period is 60 days, the bare minimum required under the Paperwork Reduction Act (PRA). The U.S. Chamber of Commerce requested an extension via letter dated February 8, 2016, WorldatWork requested an extension on February 18, and the National Association of Manufacturers made its extension request on March 8, 2016. These requests were summarily denied. Subsequently, Senator Lamar Alexander (R-Tennessee) and nine other U.S. Senators made a request on March 22, 2016, to extend the comment period an additional 30 days. Considering that the business community had absolutely no notice of this proposal, an extension of the comment period would have been wholly appropriate.

Perhaps more importantly, a lengthier comment period would have benefited EEOC. Indeed, allowing for extra time within which to submit comments would have allowed the Associations more time to consult with and gather feedback from their members on the "utility and burden of collecting pay and hours-worked data through the EEO-1 data collection process." In turn, this information would provide

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<sup>1</sup> 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.

EEOC with a thorough and robust record reflecting *actual data* from the employer community. Many of the Associations are nevertheless trying to provide the Commission with this direct feedback from their members on the true costs of the proposal.

*B. The Relevant Inquiry is Whether the EEOC Has Complied With the Paperwork Reduction Act*

EEOC must not disregard what it is explicit in its proposal, but was too often forgotten at the March 16 hearing: 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. A great number of proponents at the March 16 testimony failed to mention the PRA's statutory requirements. Additionally, the March 16 hearing was apparently conducted pursuant to Section 709 (c) of Title VII which requires that the reports required by the Commission be "reasonable, necessary or appropriate" for the enforcement of Title VII. 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.

### **III. The EEOC Underestimates the Employers' Reporting Burden**

*A. EEOC Ignores How Employers Actually File EEO-1 Reports*

EEOC proposes expanding the EEO-1 form from 180 to 3660 cells. EEOC attempts to downplay the burden of this expansion by claiming that employers are able to rely "on automated HRIS to generate the information they submit on the EEO-1 report." In reality, this "automated" reporting process means that almost 98 percent of employers manually enter data into each cell in an on-line fillable report. By itself, this exponential increase in the amount of solicited data speaks volumes with regard to the burdensome nature of EEOC's proposal.

Worse, EEOC calculated the employer burden in a way that disguises the true economic costs of its proposal. In the past, the EEOC estimated the burden by the time it takes an employer to complete each of its EEO-1 reports, which includes the reports for its individual establishments as well as the consolidated employer report. But in the current proposal, the EEOC acknowledges that it is changing its methodology from a "per report" analysis to a "per employer" analysis. The EEOC

gives no justification for this change in its historic burden analysis other than the obvious attempt to artificially reduce the burden calculation. It should be emphasized that some employers file not just one or two EEO-1 Reports, but thousands. So according to the EEOC, an employer spends the same amount of time filing only one EEO-1 report as a different employer spends filing thousands of reports. This is not credible and does not satisfy the requirements of the PRA. Nor does this meet the Title VII requirement of being a “reasonable” obligation. EEOC should recalculate the proposal’s employer burden under its established “per report” approach.

*B. The Proposal Requires Employers to Create W-2 Data*

EEOC underestimates the burden associated with generating W-2 data because it ignores the fact that the W-2 data to be submitted is different from the W-2 data generated annually by employers for income tax reporting purposes. Because the 12-month reporting period proposed by the EEOC spans two tax years, employers cannot simply rely on the data they already generate for the IRS each year. Instead, employers will be required to generate data spanning two different tax reporting years and will be required to make one-time changes to their systems in 2016 to permit such reporting – no small task for many employers, as this is not a simple computer-driven process. Changes in employee EEO-1 status, changes in compensation which might move an employee to another EEO-1 pay band or other normal employment adjustments will have to be addressed. The EEOC gives no guidance as to how these issues are to be addressed. The proposal’s W-2 reporting requirement is out-of-sync with federal and local tax filing periods. Surely this aspect of the proposal does not minimize employer burdens as required under the PRA.

*C. The Proposal Requires Hours Worked Data that Does Not Exist*

EEOC’s proposal will also require employers to submit hours worked data. While hours worked data exists with regard to non-exempt employees, the vast majority of employers do not keep timesheets on actual hours worked by exempt employees. Tracking hours worked by exempt employees is not currently needed because their salaries are based on job duties and job performance, rather than hours worked. Should employers have to track hours worked for exempt employees, the costs would skyrocket, as employers would have to develop tracking systems and train employees on how to record their hours worked.

*D. The Proposal Will Require a Significant Undertaking to Marry Data from Different Systems*

EEOC incorrectly assumes that a single Human Resources Information System (HRIS) houses all the data necessary to generate the W-2 and hours worked data. Most employers maintain gender, race, and ethnicity data in an HRIS that is different from the system that houses payroll information, including W-2 wage information. Hours worked data for non-exempt employees are likewise captured outside of the HRIS and hours worked data for exempt employees simply do not exist for most employers. Determining how to marry gender, race, and ethnicity data housed in an HRIS with W-2 wage data housed in a payroll system, often by a third party, in and of itself, will be a costly and time-consuming exercise. Particularly vulnerable will be smaller employers who meet the filing threshold but lack the expertise or resources to upgrade their existing payroll and accounting systems.

**IV. The Proposal Will Not Further the EEOC’s Anti-Discrimination Goals**

The Associations generally 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. Even the EEOC’s own Sage Report, described in the proposal, recognized that “[s]ummary data at the organization level will likely be of very limited use in EEOC practice.” As we explain below, there are several reasons why the proposal is fatally flawed.

First, differences in W-2 data should not be used as a proxy for discrimination. W-2 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. These include, but are not limited to, the following:

- Healthcare contributions
- 401(k) contributions;
- Voluntary overtime;
- Length of employment;
- Performance-related incentive pay;
- Parking and mass transit stipends;
- Relocation and travel stipends;
- Military stipends;

- Expense reimbursements;
- Certain insurance premiums;
- Sick pay;
- Severance payments;
- Deferred compensation; and
- Profit sharing.

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 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 W-2 does not distinguish these factors so even if the EEOC wished to determine whether some employees were denied overtime, as was mentioned at the March 16 hearing, reporting W-2 data will not enable a meaningful examination of overtime policies. Thus, the reporting of W-2 data, which aggregates many employment or compensation situations, is not useful for detecting compensation discrimination.

Second, because there are only ten EEO-1 job categories or groupings of jobs, employers would be forced to categorize employees who perform considerably different work into these groupings.<sup>2</sup> 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.

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 be useful to the EEOC as a tool to identify or target employers for further investigation. Instead, the data 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. Even beyond the perspective of government

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<sup>2</sup> 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.

enforcement programs, the proposal's resulting data would not help employers to internally evaluate their compensation practices, for the reasons described above.

## **V. EEOC Fails to Ensure that Sensitive Data will be Kept Private and Confidential**

The Commission's proposal notes that Title VII prohibits disclosure of any information contained in the EEO-1 report "prior to the institution of any [Title VII] proceeding," and that the OFCCP will hold the information contained in the EEO-1 confidential "to the extent permitted by law, in accordance with Exemption 4 of the Freedom of Information Act and the Trade Secrets Act." While these assertions state the law as codified and practiced, they understate the significant privacy and confidentiality concerns raised by the proposal. Many employers consider the data reported on the current EEO-1 Report to be highly sensitive and proprietary. Inclusion of compensation data will only heighten this concern.

### *A. More Robust Privacy Protections are Warranted*

For example, 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 inadvertently or negligently releasing EEO-1 reports. All of these issues are further compounded given the proposed inclusion of sensitive compensation information.<sup>3</sup>

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.

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<sup>3</sup> 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.

*B. EEOC and OFCCP Must Limit Disclosure From Third Parties*

As revealed during the Commission hearing on March 16, the EEOC 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.<sup>4</sup> 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, 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. The National Academies of Sciences' (NAS) panel recommended that the EEOC seek legislation to extend Title VII's penalties to those with whom it shares data.

*C. EEOC and OFCCP Must Protect Against Data Breaches*

The NAS Report underscored that “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 . . . 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.”

This has most recently been seen with the data breach experienced last year by the Office of Personnel Management (OPM). This massive data breach 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.

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<sup>4</sup> 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 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.”

## V. Conclusion

The undersigned Associations have serious concerns with the proposed EEO-1 Revisions. 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 the EEOC withdraw the proposed revisions and commence a cooperative effort with all stakeholders to deal with the issues.

Sincerely,

American Benefits Council  
American Gaming Association  
American Institute of CPAs  
American Road and Transportation Builders Association  
Associated Builders and Contractors, Inc.  
Food Marketing Institute  
HR Policy Association  
International Franchise Association  
National Association of Home Builders  
National Association of Manufacturers  
The National Association of Professional Employer Organizations  
National Automobile Dealers Association  
National Council of Chain Restaurants  
National Federation of Independent Business  
National Retail Federation  
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