

October 11, 2011

Submitted Via Federal eRulemaking Portal

Debra A. Carr, Director
Division of Policy, Planning, and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue, NW, Room C-3325
Washington, DC 20210

Re: Comments on *Non-Discrimination in Compensation; Compensation Data Collection Tool*, RIN 1250-AA03.

Dear Ms. Carr:

The National Women's Law Center (the Center) appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking (ANPRM) issued by the Office of Federal Contract Compliance Programs (OFCCP) to solicit information on the development and implementation of a new compensation data collection tool.¹ The Center is a nonprofit organization that has worked since 1972 to expand the possibilities for women and girls in the areas of education and employment, family economic security, and health. Most relevant to this proceeding, the Center has long worked to remove barriers to equal treatment of women in the workplace, particularly those that suppress women's wages.

The Center strongly supports the Department's proposal for a new compensation data collection tool to combat pay discrimination in federal contractor workplaces. Such a tool could play an important role in promoting OFCCP's mission to ensure nondiscrimination and equal opportunity in the workplace. When Congress enacted Title VII of the Civil Rights Act of 1964, women working full-time earned approximately 59 cents for every dollar earned by men.² Although this wage gap has narrowed, it persists and has remained largely stagnant over the last decade and has increased by only five cents since 1990.³ According to the most recent data

¹ See U.S. Department of Labor, Office of Federal Contract Compliance Programs, *Non-Discrimination in Compensation; Compensation Data Collection Tool*, 76 Fed. Reg. 49398 (Aug. 10, 2011).

² NWLC calculations from U.S. Census Bureau, Census Bureau CPS Data (ASEC), Historical Tbl. P-38: Full-Time, Year-Round Workers by Median Earnings and Sex in 1964, *available at* <http://www.census.gov/hhes/www/income/data/historical/people/index.html> (last visited Oct. 4, 2011).

³ NWLC calculations from U.S. Census Bureau, Census Bureau CPS Data (ASEC), Historical Tbl. P-38: Full-Time, Year-Round Workers by Median Earnings and Sex in 1990, *available at* <http://www.census.gov/hhes/www/income/data/historical/people/index.html> (last visited Oct. 4, 2011).

available from the U.S. Census Bureau, the typical woman working full-time made only 77 percent of male full-time workers' earnings.⁴ Compared to each dollar earned by the average white male, a white woman makes 77.6 cents, a black woman makes 62.3 cents, and a Hispanic woman makes 54 cents.⁵

Moreover, study after study shows that this pernicious wage gap is not simply the effect of women's choices or legitimate factors that influence pay.⁶ For example, a study by the U.S. General Accounting Office found that, even after accounting for all relevant career and family attributes for which measures were available, there was still a significant unexplained gap in men's and women's earnings.⁷ Another study of college graduates one year after graduation determined that women earned only 95 percent of what men earned, even after accounting for variables such as "job and workplace, employment experience and continuity, education and training, and demographic and personal characteristics."⁸

Given that one-fourth of the labor force works for employers that contract with the federal government,⁹ OFCCP has tremendous responsibility and opportunity to help address barriers to workplace equality. The Center applauds OFCCP's proposal for a new compensation data collection tool and, in response to the request, offers the following specific comments for OFCCP's consideration.

I. OFCCP CAN SATISFY ITS NEED FOR ADDITIONAL DATA WITH A TOOL THAT UNREASONABLY BURDENS NEITHER CONTRACTORS NOR THE AGENCY.

OFCCP has requested general comments on how "to maximize the potential value of th[e] data collection tool while taking into account the reporting burden created for contractors and the technology and/or analytic burdens placed on the agency."¹⁰ The Center would like to emphasize at the outset (1) the great need for the type of information that might be collected by

⁴ NATIONAL WOMEN'S LAW CENTER, POVERTY AMONG WOMEN AND FAMILIES, 2000-2010: EXTREME POVERTY REACHES RECORD LEVELS AS CONGRESS FACES DIFFICULT CHOICES 10 (September 2011), *available at* <http://www.nwlc.org/sites/default/files/povertyamongwomenandfamilies2010final.pdf>.

⁵ *Id.*

⁶ *See, e.g.,* Cheryl Travis, et al., *Tracking the Gender Pay Gap: A Case Study*, 33 PSYCHOL. WOMEN Q. 410, 410-11 (2009) (citing studies).

⁷ *See* U.S. GENERAL ACCOUNTING OFFICE, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS (2003), *available at* <http://www.gao.gov/new.items/d0435.pdf>.

⁸ *See* AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, BEHIND THE PAY GAP 17, 18 (2007), *available at* <http://www.aauw.org/learn/research/behindPayGap.cfm>.

⁹ I ABA SECTION OF LABOR & EMPLOYMENT LAW, EMPLOYMENT DISCRIMINATION LAW 1082 (Barbara Lindemann & Paul Grossman, eds., 3rd ed., 1996).

¹⁰ Non-Discrimination in Compensation, 76 Fed. Reg. at 49400.

the data tool, and (2) the minimal burden that greater information collection will impose on employers or the agency.

To begin with, as described above, the wage gap for women remains large, and compelling evidence suggests that at least a portion of that gap is caused by discrimination in the workplace. Moreover, nearly half of all workers nationally are either contractually forbidden or strongly discouraged from discussing their pay with their colleagues.¹¹ These formal and informal policies discourage workers from gathering information that would suggest that they have experienced wage discrimination and, consequently, undermine attempts to reduce the gender wage gap. As a result, employer self-evaluation and government enforcement are critical to combat compensation discrimination. OFCCP has limited resources, and given the size of the federal contractor workforce, some method of evaluating employers is necessary to ensure that employers who are most likely to engage in pay discrimination will attract scrutiny.

Second, use of a data collection tool as contemplated by OFCCP would not impose an undue burden on employers. Federal supply and service contractors and subcontractors are already required to preserve all “personnel or employment record[s],” including those involving “hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship,” for at least one year.¹² These records for employees must be identifiable by “[t]he gender, race, and ethnicity of each employee.”¹³ Supply and service contractors with contracts of \$50,000 or more and with 50 or more employees must also keep on file copies of written affirmative action plans.¹⁴ All of these records are subject to OFCCP’s review if the agency conducts a compliance review.¹⁵ Furthermore, prospective supply and service contractors are required, as a condition of bidding on a federal contract or subcontract, to state whether they have developed and kept on file an affirmative action plan.¹⁶ In short, federal law already requires employers to maintain much if not all of the information that OFCCP would require under a new data collection tool. A tool would simply require contractors, even absent a compliance review, to report some of the pay-related information that they already have on hand.

In addition, the data collection tool may reduce the existing administrative burden on law-abiding employers and OFCCP. The tool could provide OFCCP a strong predictive method to highlight within the agency’s evaluation system those employers most likely engaged in compensation discrimination. Law-abiding employers would be less likely in the future to be

¹¹ Institute for Women’s Policy Research (IWPR), Fact Sheet: Pay Secrecy and Wage Discrimination (June 2011), available at <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination>.

¹² 41 C.F.R. § 60-1.12(a) (2011).

¹³ *Id.* § 60-1.12(c)(1).

¹⁴ *Id.* § 60-1.12(b).

¹⁵ *Id.* § 60-1.20.

¹⁶ *Id.* § 60-1.7(b).

subjected to in-depth review of their compensation and other hiring practices because analysis made possible by the data collection tool would suggest such employers have a low probability of non-compliance with the nondiscrimination mandate of Executive Order 11246. In addition, OFCCP could use its resources more efficiently by making its investments in compliance reviews on employers that are out of compliance with the law.

Finally, a new data collection tool may be of significant value to federal contractors because of the self-evaluation that it would encourage. The process of responding to the data collection tool may raise important issues for employers, spurring them to analyze their pay and related practices and ensuring that employees are treated equitably.

In Question 15, OFCCP specifically requests comment on “the impact of any proposed rule on small entities, including small businesses, small nonprofit organizations and small governmental jurisdictions with populations under 50,000.”¹⁷ The Center urges OFCCP to develop a mechanism to allow even the smallest federal contractor to provide compensation information, especially since this information is not collected by any other federal agency. Furthermore, a high percentage of federal contractors are small entities, underscoring the need for OFCCP to ensure that compensation discrimination does not persist within these contractors.

Finally, with regard to Question 11,¹⁸ the Center strongly supports electronic submission of data. Most contractors maintain their personnel data electronically, so electronic submission of this data would minimize the burden on contractors. And it would further minimize burdens on OFCCP by facilitating the manipulation and use of this data.

II. THE DATA COLLECTION TOOL MUST BE ROBUST BY MEASURING MULTIPLE INDICATORS LIKELY TO HAVE PREDICTIVE VALUE OF COMPENSATION DISCRIMINATION.

In Questions 1 and 3, OFCCP requested specific comments on the types of information it should collect, reported by gender and race/ethnic groups, to effectively identify compensation discrimination.¹⁹ The agency has suggested eight potential categories: average starting or initial total compensation, average pay raises, average bonuses, the minimum and maximum salary, the standard deviation or variance of salary, the number of workers in each gender and race/ethnicity category; average tenure; and average compensation data by job series.²⁰ The Center supports the collection of each of these enumerated data categories, which are likely to predict which contractors are out of compliance with Executive Order 11246’s mandate.

The Center strongly supports the development of a data collection tool that provides a true picture of workers’ compensation, which necessarily includes pay that exceeds base salary, and

¹⁷ Non-Discrimination in Compensation, 76 Fed. Reg. at 49401.

¹⁸ *Id.*

¹⁹ *Id.* at 49400.

²⁰ *Id.*

that solicits data capable of both aggregation and disaggregation. Studies have shown a gender gap in wages, even during the first year of work for individuals in a field characterized by standardized compensation structures: On average, female associates earn \$2,000 less per year than male associates.²¹ This disparity demonstrates the need to explore take-home compensation in its entirety.

Although compensation discrimination may manifest itself in workers' base salaries, it may also occur through non-traditional earnings less frequently measured, such as commissions, stock options, and opportunities for overtime. For instance, even when base salaries between comparable male and female workers are equal in a given company, overall compensation could be significantly disparate between the genders based on the discriminatory, discretionary allocation of compensation types such as bonuses and stock options. In fact, "female and minority employees have been virtually locked out of wealth-creating opportunities in most companies."²² Studies show that men receive stock options and bonuses at a rate twenty to thirty times that of women.²³ Studies also indicate that compensation for men consist of 85% salary and 15% stock options, profit sharing, and other bonuses, while compensation for women consist of 91% salary and 9% stock options, profit sharing, and other bonuses.²⁴ Data about salaries alone cannot capture instances when stock options and bonuses drive gender-based disparities in compensation. Therefore, the collection of data regarding compensation types such as bonuses and stock options is essential to identifying compensation discrimination in the workplace.

Collecting information only on base salaries would permit contractors that discriminate using other forms of compensation to evade detection. As a result, the Center supports collection of all forms of compensation specified in the ANPRM: total W-2 earnings, base salary, holiday pay, hourly wage, shift differentials, commissions, stock options, paid leave, and health and retirement benefits.²⁵ It also encourages OFCCP to collect data on other financial incentives, merit increases, overtime, and locality pay.

The agency invited suggestions for other categories of data not explicitly identified. To better enable the agency to focus its enforcement resources on those contractors not complying with Executive Order 11246's mandate, the agency should consider incorporating variables to "differentiate establishments likely to have non-compliance findings from those not likely to

²¹ Letter from American Bar Association, Commission on Women in the Profession (June 23, 2010), *available at* <http://www.attorneyretention.org/Publications/SameGlassCeiling.pdf>.

²² CYRUS MEHRI AND ELLEN EARDLEY, 21ST CENTURY TOOLS FOR ADVANCING EQUAL OPPORTUNITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION 7 (2008).

²³ Alys Lebeau, The New Workplace Woman: "Are We There Yet?," BUSINESS WOMAN, Fall 2001.

²⁴ *Id.*

²⁵ Non-Discrimination in Compensation, 76 Fed. Reg. at 49400.

have such outcomes.”²⁶ These variables include: (1) the contractor’s assertion that it is not required to respond to the survey; (2) survey responses dated after the due date; (3) the failure to report race or another required classification for greater than 5% of the applicants; (4) reporting more hires than applicants; and (5) the failure to report the total number of workers.²⁷ The inclusion of these variables would allow the agency to better determine how to effectively direct its enforcement resources.

III. OFCCP SHOULD REQUIRE COMPENSATION DATA FOR ALL EMPLOYEES, INCLUDING FULL-TIME, PART-TIME, CONTRACT, PER DIEM OR DAY LABORERS, AND TEMPORARY WORKERS.

In Question 1, OFCCP requested specific comments on the data that OFCCP should collect that would help it to effectively identify potential compensation discrimination.²⁸ OFCCP should require contractors to provide compensation information on *all* employees. Requiring contractors to include temporary and part-time employees in their affirmative action plan data is particularly vital to the agency’s efforts to combat gender discrimination. Ensuring equal treatment of part-time and temporary workers is critical to combating gender inequity in the workforce: Women constitute over two-thirds of American workers working part-time,²⁹ and, in 2001, women constituted almost sixty percent of temporary services workers.³⁰

In addition, OFCCP has rightly recognized that misclassification of workers as independent contractors has become a pervasive problem in its efforts to enforce Executive Order 11246.³¹ First, workers who are misclassified as independent contractors “do not receive the protections and benefits to which they are entitled, including protections under the nation’s civil rights law.”³² Furthermore, federal contractors may misclassify their workers in order to mask discriminatory employment practices, hindering OFCCP’s investigative and enforcement capabilities.³³ The inclusion of all workers is therefore necessary if OFCCP is to ensure that

²⁶ MARC BENDICK, JR., ET AL., BENDICK AND EGAN ECONOMIC CONSULTANTS, INC., THE EQUAL OPPORTUNITY SURVEY: ANALYSIS OF A FIRST WAVE OF SURVEY RESPONSES 23 (2000).

²⁷ *Id.* at 24.

²⁸ Non-Discrimination in Compensation, 76 Fed. Reg. at 49400.

²⁹ U.S. Department of Labor, US Bureau of Labor Statistics, Report 1025, at 39-41 (June 2010), *available at* <http://www.bls.gov/cps/cpswom2009.pdf>.

³⁰ Carolyn J. Heinrich, Peter R. Mueser, & Kenneth R. Troske, *Temporary help employment and disadvantaged workers*, in FOCUS (Winter 2004), at 1.

³¹ OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, FY 2012: CONGRESSIONAL BUDGET JUSTIFICATION 20, *available at* <http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-04.pdf>.

³² *Id.*

³³ *Id.*

federal contractors are complying with their contractual obligations under Executive Order 11246.

In keeping with this goal, the Center suggests that OFCCP make clear that contractors are required to provide information on all workers by using the term “worker(s)” rather than “employee(s).” This revision will clarify that a contractor’s own (mis)classification of a given worker as an independent contractor does not excuse it from providing OFCCP with compensation data on that worker.

IV. OFCCP SHOULD SOLICIT COMPENSATION INFORMATION BY MORE THAN ONE SET OF JOB CATEGORIES

In Question 2, OFCCP requested specific comments on the set of job categories that should be used to collect pay data.³⁴ As a guiding principle, the Center urges OFCCP to consider equally whether the job categories used are sufficiently broad to permit comparisons among different employees by race and gender yet narrow enough to ensure that such employees are similarly situated with respect to the nature and demands of their jobs. The Center supports the use of Affirmative Action Plan (AAP) job groups, rather than EEO-1 categories. OFCCP should further require employers to maintain data by job titles within AAP job categories.

Requiring that compensation data be organized by AAP job categories will permit OFCCP access to aggregate data by categories that reflect similar job duties and skills, regardless of title. Maintaining compensation data by AAP job group and by job title will not pose an unreasonable burden to contractors. Contractors are already required to maintain personnel data by AAP job groups, and a recent survey showed that 70 percent of federal contractors group their employees by job title for compensation analyses.³⁵ We also urge OFCCP to require contractors to maintain individual employee data to ensure that OFCCP will have access to detailed information about potentially discriminatory practices – systematic and individualized – that is otherwise concealed when data are delivered in an aggregated format during its investigations.

V. OFCCP SHOULD ASK ADDITIONAL QUESTIONS TO UNDERSTAND THE UNIQUE NATURE OF A CONTRACTOR’S COMPENSATION SYSTEM.

In Question 4, OFCCP requested suggestions for “questions that would capture information that would be helpful in understanding a contractor’s compensation system, such as policies relating to promotion decisions, bonuses, shift pay, setting of initial pay, etc.”³⁶ At a minimum, OFCCP should ask contractors to provide the agency with any policies, formal or informal, on the assignment of starting pay, decisions to provide pay raises and promotions, and the criteria used to determine whether to grant bonuses, overtime, or like rewards. Although policies on

³⁴ *Id.*

³⁵ AFFIRMATIVE ACTION SERVS., BACK TO THE FUTURE AND INTO THE PAST: WHAT TO EXPECT FROM THE OFCCP IN 2011 30 (2011), *available at* <http://affirmativeactionservices.com/OFCCPin2011June.pdf>.

³⁶ Non-Discrimination in Compensation, 76 Fed. Reg. at 49400.

these factors and decisions are likely to reveal both conscious and unconscious discrimination, access to this valuable information will also allow contractors to provide legitimate explanations for what might otherwise appear to be questionable disparities. In addition, OFCCP's request of such information may encourage employers to review their policies, or lack thereof, on important decisions that affect workers' total compensation and make changes to such policies where warranted.

The Center also strongly encourages OFCCP to require contractors to submit information on their formal and informal policies relating to pay secrecy and adverse employment actions taken as a result of violations of their pay secrecy policies. As noted above, nearly half of all workers nationwide are either contractually forbidden or strongly discouraged from discussing pay with their colleagues. Evidence suggests that pay transparency would reduce the gender wage gap, since the federal wage gap for all full-time workers is 23%, while the gender wage gap in the federal government—where pay rates are more transparent—is only 11%.³⁷ Pay secrecy policies frustrate workers' attempts to determine whether a gender-based wage gap exists in their workplaces. In both *Ledbetter v. Goodyear Tire & Rubber Co.*³⁸ and *Wal-Mart v. Dukes*,³⁹ for instance, employers' formal and informal pay secrecy policies prevented women from discovering and addressing gender-based pay discrimination. Furthermore, data about adverse employment actions taken as a result of violations of pay secrecy policies could help the OFCCP to focus resources on enforcement efforts where workers are most strongly discouraged from obtaining information that would allow them to combat pay discrimination.

Finally, the Center encourages OFCCP to require contractors to provide information on any formal policies that require employees to arbitrate any employment discrimination claims. To be sure, arbitration clauses are not necessarily suspect. However, an employer may also use mandatory agreements to arbitrate to discourage workers' vindication of their workplace rights, including the right to be free of unlawful compensation discrimination. Collection of information on the use of such arbitration policies is particularly important in light of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepción*.⁴⁰ The holding of that case permitted a company to elicit a waiver of consumers' rights to class arbitration as a condition of sale, but it could also allow companies to require workers to sign agreements that waive workers' right to class arbitration. OFCCP's scrutiny is crucial where contractors have required their employees to give up their right to join together to enforce anti-discrimination laws not only in a judicial forum, but also in arbitration.

³⁷ IWPR, Fact Sheet, *supra* n.11, at 3.

³⁸ 550 U.S. 618 (2007).

³⁹ 564 U.S. ____ (2011).

⁴⁰ 131 S. Ct. 1740 (2011).

VI. THE NEW DATA COLLECTION TOOL SHOULD FACILITATE INDUSTRY-WIDE ANALYSES.

In Questions 5 and 6, the ANPRM indicates that OFCCP may use any new data collection tool “to conduct industry-wide compensation trend analyses”⁴¹ and “to identify contractors in specific industries for industry-focused compensation reviews.”⁴² Given OFCCP’s scarce resources, the Center strongly supports use of the new tool for industry-wide analyses, which will identify industries in which pay disparities are most widespread and thus most deserving of OFCCP’s attention. As noted above, the wage gap nationwide is large and persistent, and it varies substantially by industry and occupation. For example, in sales and retail, women make only 64 cents to each dollar earned by a comparable male.⁴³ Moreover, sex-based compensation discrimination is of particular concern in industries that are non-traditional for women and may be indicative of broader discriminatory practices that discourage women’s entry into certain occupations, such as in construction.

More importantly, within industries that OFCCP decides to target for further inquiry, industry-wide data will enable the agency to compare an individual contractor to comparable employers in the same industry, and perhaps the same geographic area. Such comparisons will highlight contractors whose compensation data are outliers, even in fields where there are great disparities. Conversely, it would identify contractors with large gaps in wages in fields where the overall disparities are small, and who consequently may be more likely to be engaged in compensation discrimination.

VII. THE CENTER SUPPORTS THE USE OF THE DATA COLLECTION TOOL TO FACILITATE MULTI-ESTABLISHMENT COMPENSATION REVIEWS.

In Question 7, the ANPRM indicates that “OFCCP is exploring the possibility of using the data collected through the tool to identify opportunities for nationwide multi-establishment compensation reviews.”⁴⁴ The Center strongly supports such an endeavor.

There are numerous reasons that a multi-establishment review for a given contractor makes sense. First, very large contractors that engage in pay discrimination are perhaps most deserving of attention, as their pay practices are likely to affect many workers. Multi-establishment reviews are a necessary component of addressing such discrimination, especially where it is caused by systemic factors emanating from the highest levels of management. Second, multi-establishment reviews may also identify contractors that leave excessive discretion to individual establishments. In *Velez v. Novartis Pharmaceuticals Corp.*, for instance, women sales representatives and managers at the pharmaceutical company successfully established at trial

⁴¹ Non-Discrimination in Compensation, 76 Fed. Reg. at 49400.

⁴² *Id.* at 49401.

⁴³ National Women’s Law Center, 36 Cents Short - Wage Gap in Sales and Related Occupations Higher Than Any Other Sector (January 2011), *available at* <http://www.nwlc.org/resource/36-cents-short-wage-gap-sales-and-related-occupations-higher-any-other-sector>.

⁴⁴ Non-Discrimination in Compensation, 76 Fed. Reg. at 49401

discrimination in pay, promotions, and personnel evaluations that worked through discretionary decision making at the company.⁴⁵ The collection of data at the multi-establishment level might also benefit employers with small individual establishment workforces but a large number of workers business-wide. Because disparities among small sample sizes are more likely due to chance, data at the multi-establishment level might provide another form of analysis to encourage contractors to self-evaluate their pay practices.

If OFCCP determines that it will collect multi-establishment data, it is imperative that it continue to collect data at the establishment level as well. Not doing so would allow individual establishments that engage in pay discrimination to evade detection so long as multi-establishment data is sufficiently positive to obscure discrimination in an individual establishment.

VIII. OFCCP SHOULD REQUIRE PROSPECTIVE CONTRACTORS TO PROVIDE COMPENSATION-RELATED DATA AS PART OF THE CONTRACT BIDDING PROCESS.

In Question 12, OFCCP requested comments on whether to require businesses that bid on federal contracts to submit their compensation data as part of the bidding process.⁴⁶ The Center strongly supports such a requirement for several reasons. First, it is a great privilege to contract with the federal government, and federal tax dollars should not be wasted on companies that unlawfully discriminate against its workers. Second, for longer-term federal contracts, it is imperative for trend analyses that OFCCP have an appropriate baseline available by which to compare a contractor's compensation behavior over time. The natural baseline for a contractor's pay practices is the point at which it requests federal contract money, and thus contemplates the requirements of Executive Order 11246 as they would apply. Third, pay-related data at the point of bidding will allow OFCCP to evaluate the effects of any later compliance reviews conducted with respect to particular contractors.

The Center does not believe that such data collection would create any significant burdens for potential contractors. As noted above, these companies are generally already required to collect and maintain pay data reported annually on EEO-1 forms.

IX. THE NEW DATA COLLECTION TOOL SHOULD COVER CONSTRUCTION CONTRACTORS.

The Center strongly supports extending the new data collection tool to construction contractors. In the event that OFCCP extends the scope of the new data collection tool to construction contractors, Question 13 in the ANPRM requested comment on the factors or issues that are particularly important for OFCCP's consideration with respect to this industry.⁴⁷ The Center offers several specific comments for the agency's consideration.

⁴⁵ *Velez v. Novartis Pharmaceuticals Corp.*, Case No. 04-9194 (S.D.N.Y. filed 2004)

⁴⁶ Non-Discrimination in Compensation, 76 Fed. Reg. at 49401.

⁴⁷ *Id.*

The wage gap in construction is smaller than the wage gap nationwide across all fields: In 2010, women in construction made 91 cents on the dollar compared to their male counterparts.⁴⁸ Construction therefore has the potential to provide women with better pay and career opportunities. Yet women are vastly underrepresented in this industry, composing only 2.7 percent of all workers.⁴⁹ The low rates of women in construction stem in part from barriers such as gender stereotypes in hiring, hostile work environments, and insufficient instruction and training.⁵⁰ Studies show that government contractors that were subject to legally mandated workplace participation goals for women and minorities failed to exhibit increases in diversity.⁵¹ However, 32% of government contractors subject to compliance reviews exhibited an increase in workforce diversity.⁵² OFCCP therefore has an essential role in developing enforcement mechanisms to ensure that women can enter and advance in the construction industry, and it should thus extend the scope of the data collection tool to construction contractors.

X. THE 2000 EO SURVEY WAS A STRONG AND USEFUL TOOL TO IDENTIFY DISCRIMINATION IN FEDERAL CONTRACTOR WORKPLACES, AND THE CENTER ENCOURAGES OFCCP TO BUILD ON THAT SURVEY.

The Center strongly supported the development, adoption, and implementation of the 2000 EO Survey and is thus well situated to comment, as the ANPRM requested in Question 10, on “the strengths and weaknesses of the compensation section of the 2000 EO Survey.”⁵³ The 2000 survey was a ground-breaking step forward because, for the first time, it required federal contractors to submit compensation data, broken down by sex, race, and ethnicity, thus enabling OFCCP to be far more effective in detecting and remedying wage discrimination. It also collected information on occupational segregation—a key cause of pay inequity—and on hiring, promotions, terminations, and other employment practices, all of which contribute to lower wages for women.

The 2000 EO Survey defined compensation to include base salary and earnings such as cost-of-living allowance, but it excluded compensation types such as benefits and overtime. As noted

⁴⁸ NWLC Calculations from U.S. Dep’t of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Table 39: Median weekly earnings of full-time wage and salary workers by detailed occupation and sex, *available at* <ftp://ftp.bls.gov/pub/special.requests/lf/aat39.txt>.

⁴⁹ UNITED STATES BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK. RETRIEVED SEPTEMBER 30, 2011, *available at* <http://www.bls.gov/cps/wlftable10-2010.pdf>.

⁵⁰ T. Shawn Taylor, The Pathway to Apprenticeship: Roadblocks to Registration of Minorities and Women in Building Trade Union Apprenticeship Training Programs in Northeastern Illinois 26 (2006), *available at* <http://www.napequity.org/pdf/Pathways%20Apprenticeship.pdf>.

⁵¹ SUSAN MOIR, MERYL THOMSON, & CHRISTA KELLEHER, UNFINISHED BUSINESS: BUILDING EQUALITY FOR WOMEN IN THE CONSTRUCTION TRADES 18 (2011).

⁵² *Id.*

⁵³ Non-Discrimination in Compensation, 76 Fed. Reg. at 49401.

above, the new compensation data collection tool should include compensation beyond base salary, such as bonuses and benefits, to ensure that OFCCP can detect pay discrimination that is driven through compensation measures other than base salary. Furthermore, the EO Survey compared all minority employees to non-minority employees. By aggregating data about members of different racial and ethnic groups, however, the Survey failed to indicate whether certain minority groups were subject to pay discrimination. As mentioned above, women of different racial backgrounds experience different wage gaps. The new tool should request compensation data divided by races and ethnicities so that OFCCP can identify compensation discrimination among minority employees.

Critically, we urge OFCCP to focus as much on the implementation of the new survey as on its development. The 2000 EO Survey had substantial predictive power to determine which contractors failed to comply with the nondiscrimination mandates of Executive Order 11246. The 2000 EO Survey was the culmination of a decades-long effort to address contractors' discriminatory employment practices. The Survey was developed over the course of at least three administrations and underwent a comprehensive review process. It enabled OFCCP to be far more effective in detecting and addressing compensation discrimination.

However, the previous administration failed to use the Survey for any purpose other than to discredit it. In the first five years of the Bush Administration, OFCCP sent out a smaller total number of surveys than the regulations anticipated would be sent in one year alone. Furthermore, to our knowledge, over these same five years, OFCCP *never once* used the Survey for civil rights enforcement as intended. Thus, any weakness of the 2000 EO Survey stemmed not from its design, but from its implementation.

The Center continues to believe that such data collection and oversight are necessary and that the previous administration's decision to eliminate the survey was wholly without factual support or justification, constituting an arbitrary and capricious reversal in policy. We thus applaud OFCCP's consideration of a new compensation data tool and hope that it will build on the agency's experience with the 2000 EO survey.

* * *

Thank you for the opportunity to comment on the ANPRM as OFCCP considers this important data collection tool. We would be happy to discuss these comments further or answer any questions you may have. Please contact Fatima Goss Graves, Vice President for Education and Employment, at (202) 588-5180.

Sincerely,



Fatima Goss Graves
Vice President for Education and Employment