

August 15, 2016

Joseph B. Nye, Policy Analyst
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th St., N.W.
Washington, D.C. 20503

Re: Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), OMB Control Number 3046-0007, Docket ID EEOC-2016-0002-0340

Dear Mr. Nye:

Thank you for the opportunity to comment on the Equal Employment Opportunity Commission's (EEOC) proposal to require large employers to submit summary compensation data as part of the annual EEO-1 reporting process. The National Women's Law Center (the Center) has worked for over 40 years to advance and protect women's equality and opportunity—with a focus on women's employment, education, income security, health, and reproductive rights—and has long worked to remove barriers to equal treatment of women in the workplace, particularly those that suppress women's wages. The proposed collection of pay data will be critically important in helping to identify compensation discrimination and improving enforcement of pay discrimination laws, and will benefit businesses, individual workers, and the economy. Collecting pay data as part of an existing instrument such as the EEO-1 will also reduce the burden on employers and avoid duplicative or unnecessary efforts and costs, particularly in light of the changes proposed in the Notice of Submission for OMB Review, Final Comment Request ("30-Day Notice"). We commend EEOC for its efforts to address employer concerns and urge the swift approval and implementation of the proposed revisions.

I. The Proposed EEO-1 Revision Will Help Identify and Address Pay Discrimination, a Crucial Driver of the Gender Pay Gap.

The Center strongly supports EEOC's proposal to revise the EEO-1 to collect compensation data from private employers and federal contractor workplaces with more than 100 employees. This data collection will play an important role in uncovering and combating pay discrimination. Women working full time, year round continue to confront a stark wage gap, typically making only 79 percent of the median annual wages made by men working full time, year round.¹ The wage gap is even worse when we look specifically at women of color: African American women typically are paid only 60 percent, Latinas only 55 percent, and Native American women only 59 percent of the wages typically paid to white, non-Hispanic men for full-time, year-round work.²

¹ NAT'L WOMEN'S LAW CTR., THE WAGE GAP IS STAGNANT FOR NEARLY A DECADE 1 (2015), *available at* <http://nwlc.org/resources/wage-gap-stagnant-nearly-decade/> [THE WAGE GAP IS STAGNANT].

² NAT'L WOMEN'S LAW CTR., THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Apr. 2016), *available at* <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/> [THE WAGE GAP: THE WHO].

This wage gap has remained stagnant for nearly a decade,³ and translates into \$10,762 less in median annual earnings for women and the families they support.⁴ The result is that a woman working full time, year round stands to lose \$430,480 over a 40-year period due to the wage gap.⁵ To make up this lifetime wage gap, a woman would have to work more than eleven years longer than her male counterpart.⁶

A range of factors contributes to the pay gap, including pay discrimination between employees of different genders who are doing the same job.⁷ Women are still paid less than men in nearly every occupation,⁸ and studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38 percent of the pay gap unexplained.⁹ Conscious and unconscious stereotypes about working women remain a driver of this unexplained gap. For example, a recent experiment revealed that compared to an identical female applicant, science professors offered a male applicant for a lab manager position a salary of nearly \$4,000 more as well as additional career mentoring, and judged him to be significantly more competent and hireable.¹⁰

Yet pay discrimination remains difficult to detect in the first instance. Because pay often is cloaked in secrecy, when a discriminatory salary decision is made, it is seldom as obvious to an affected employee as a demotion, a termination, or a denial of a promotion.¹¹ Moreover, about

³ THE WAGE GAP IS STAGNANT, *supra* note 1.

⁴ THE WAGE GAP: THE WHO, *supra* note 2.

⁵ *Id.* Lifetime wage gaps for women of color are significantly larger: African American women lose \$877,480, Native American women \$883,040; and Latinas \$1,007,080. NAT'L WOMEN'S LAW CTR., THE LIFETIME WAGE GAP, STATE BY STATE

(Apr. 2016), available at <https://nwlc.org/resources/the-lifetime-wage-gap-state-by-state/>; NAT'L WOMEN'S LAW CTR., THE LIFETIME WAGE GAP BY STATE FOR NATIVE AMERICAN WOMEN (2014) (Apr. 2016), available at <https://nwlc.org/resources/the-lifetime-wage-gap-by-state-for-native-american-women/>.

⁶ THE WAGE GAP: THE WHO, *supra* note 2.

⁷ Blau, F. D. & Kahn, L.M., *The Gender Wage Gap: Extent, Trends and Explanations*, NAT'L BUREAU OF ECONOMIC RESEARCH (Jan. 2016), available at <http://www.nber.org/papers/w21913.pdf>; see NAT'L WOMEN'S LAW CTR., FIFTY YEARS AND COUNTING: THE UNFINISHED BUSINESS OF ACHIEVING FAIR PAY (2015), available at <http://nwlc.org/resources/50-years-counting-unfinished-business-achieving-fair-pay/>.

⁸ Hegewisch, A. & Matite, M., *The Gender Wage Gap by Occupation*, INST. FOR WOMEN'S POLICY RESEARCH (Apr. 2013), available at <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-2>; Schieder, S. & Gould, E., "Women's work" and the gender pay gap 3, ECONOMIC POLICY INST. (July 2016), available at <http://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/>.

⁹ Blau & Kahn, *supra* note 7.

¹⁰ Moss-Racusin, C.A. et al., *Science faculty's subtle gender biases favor male students*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA (Aug. 2012), available at <http://www.pnas.org/content/109/41/16474.abstract#aff-1>.

¹¹ As Justice Ginsburg has noted:

Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves. Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, ...or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (Ginsburg, J. dissenting).

60 percent of workers in the private sector nationally are either forbidden or strongly discouraged from discussing their pay with their colleagues.¹² As a result, employees face significant obstacles in gathering the information that would suggest that they have experienced pay discrimination, which undermines their ability to challenge such discrimination. Punitive pay secrecy policies and practices allow this form of discrimination not only to persist, but to become institutionalized. Consequently, government enforcement and employer self-evaluation and self-correction are critical to combat compensation discrimination.

Collecting and making publicly available compensation data from larger private employers and federal contractors will improve the effectiveness of enforcement efforts and increase the likelihood of employer self-correction, thus targeting pay discrimination on multiple fronts. First, the revised EEO-1 will help both EEOC and the Office of Federal Contract Compliance Programs of the Department of Labor (OFCCP) tackle discrimination by private employers and large federal contractors. This data collection will empower the agencies to target their limited enforcement resources toward more detailed oversight of those employers who are most likely to be engaging in pay discrimination, greatly enhancing the effectiveness and efficiency of EEOC's and OFCCP's pay discrimination enforcement efforts.

The proposed pay data collection also will help uncover other forms of gender and racial discrimination beyond pay-setting practices that can contribute to compensation disparities. Bias and discrimination, whether overt or implicit, can impact employer decisions at critical points – recruitment, hiring, performance evaluations and promotions, allocation of assignments and opportunities, and opportunities for advancement and leadership development – which not only create pay disparities, but perpetuate and magnify them over time. Stereotypes about the needs, abilities and priorities of women, particularly those with families and caregiving responsibilities, or assumptions that only men are family breadwinners, contribute to women being denied promotions, or assignments or opportunities that would lead to career-track, high-paying jobs. Hiring discrimination that keeps women out of higher paying jobs in a company, or harassment that systematically pushes women out of male-dominated, highly paid jobs may result in race or gender pay gaps within the firm. If African American employees, for example, are scheduled for fewer work hours, or Asian-American women are not promoted to senior level positions, this also would be reflected in pay gaps. Collecting compensation data allows for more targeted enforcement of a range of antidiscrimination protections.

In addition, both the process of responding to the data collection tool and the more effective and targeted approach to enforcement that the tool permits will spur more employers to proactively review and evaluate their pay practices and to address any unjustified disparities between employees. By incentivizing and facilitating such employer self-evaluation, the revised EEO-1 Report will increase voluntary employer compliance with discrimination laws. Employees and employers alike will benefit from the elimination of discrimination in pay practices absent litigation or other formal enforcement mechanisms, which can be expensive and time-consuming.

¹² INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (Jan. 2014), *available at* http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file.

II. The Proposed Pay Data Collection Will Benefit Businesses, Individual Workers and the Economy.

As further discussed in Part IX, below, EEOC has taken significant steps to ensure that employers will face a minimal burden in compiling and reporting largely pre-existing information about compensation and hours worked pursuant to the proposed EEO-1 revision. At the same time, business, workers and the economy will accrue important benefits from the proposed data collection.

Self-evaluation engendered by the proposed pay data collection is likely to encourage employers to proactively implement practices to help prevent pay disparities in the first instance and to develop a diverse workforce, both of which are good for business. A diverse workforce and equitable employment practices can confer a wide array of benefits on a company, including decreased risk of liability, access to the best talent, increased employee satisfaction and productivity, increased innovation, an expanded consumer base, and stronger financial performance.¹³ Competitive -- and thus equal -- pay is critical for recruiting and retaining a diverse workforce and high performers, particularly for younger women workers.¹⁴ And when workers are confident they are being paid fairly, they are more likely to be engaged and productive.¹⁵ Significantly, shareholders and potential investors are recognizing these benefits and are increasingly interested in companies' commitment to diversity and equal employment opportunity. They see compliance with antidiscrimination laws -- particularly with regard to equal pay -- as an important factor impacting risk and profitability, and therefore relevant to investment decisions.¹⁶

Furthermore, addressing discrimination and closing the gender wage gap would have a significant positive impact on the economy. A recent study found that if women received the same compensation as their comparable male co-workers, the poverty rate for all working

¹³ Hunt, V., Layton, D. & Prince, S., *Diversity Matters* 9-13, MCKINSEY & CO. (Feb. 2015) (finding diverse workforces correlate with better financial performance, because diversity helps to recruit the best talent, enhance the company's image, increase employee satisfaction, and improve decision making, including fostering innovation); Hewlitt, S.A., Marshall, M. & Sherbin, L., *How Diversity Can Drive Innovation*, HARVARD BUS. REV. (Dec. 2013), available at <https://hbr.org/2013/12/how-diversity-can-drive-innovation>. Conversely, companies that fail to address gender wage disparities and discriminatory employment practices could damage their reputation and brand among consumers, leading to a loss of profits and shareholder value. Lamb, N. & Klein, W., *A Proactive Approach to Wage Equality is Good for Business*, EMPLOYMENT RELATIONS TODAY (Summer 2015), available at <http://arjuna-capital.com/news/a-proactive-approach-to-wage-equality-is-good-for-business/> [*Proactive Approach*].

¹⁴ A recent study found that "pay and financial benefits drive Millennials' choice of organization more than anything else." THE 2016 DELOITTE MILLENNIAL SURVEY: WINNING OVER THE NEXT GENERATION OF LEADERS 19 (2016), available at <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-millennial-survey-2016-exec-summary.pdf>; Noel, L. & Hunter Arscott, C., *Millennial Women: What Executives Need to Know About Millennial Women* 4, ICEDR (2015), available at http://www.icedr.org/research/documents/14_millennial_snapshot.pdf (Millennial women leave jobs primarily for more compensation).

¹⁵ Courtney Seiter, "The Counterintuitive Science of Why Transparent Pay Works," *Fastcompany.com*, Feb. 26, 2016, available at <http://www.fastcompany.com/3056975/the-future-of-work/the-transparent-pay-revolution-inside-the-science-and-psychology-of-open->

¹⁶ *Proactive Approach*, *supra* note 13; Natasha Lamb, "Closing the pay gap: Silicon Valley's gender problem," *Ethical Boardroom*, June 7, 2016, available at <http://ethicalboardroom.com/leadership/diversity/close-the-pay-gap/>; Trillium Asset Mgm't, *Letter to Citigroup Shareholders*, Apr. 16, 2016, available at <https://www.sec.gov/Archives/edgar/data/831001/000121465916010905/j415160px14a6g.htm>.

women would be reduced by half, from 8.1 percent to 3.9 percent.¹⁷ Moreover, nearly 60% of women would earn more if working women were paid the same as men of the same age with similar education and hours of work.¹⁸ Increased wages would augment these workers' consumer spending power and benefit businesses and the economy.¹⁹ Another recent study estimates that by closing the wage gap entirely, women's labor force participation would increase and \$4.3 trillion in additional gross domestic product could be added in 2025, about 19 percent more than would otherwise be generated in 2025.²⁰

III. The EEO-1 Report Is the Appropriate Vehicle for Collecting Pay Data.

The EEO-1 Report is well suited for efficiently collecting meaningful data related to pay, for multiple reasons.

First, the decision to collect this pay information through the EEO-1 Report and to share it with OFCCP minimizes the compliance burden for regulated employers, in direct response to concerns previously raised by the employer community. When OFCCP previously proposed collecting compensation data from federal contractors through a separate tool on a different reporting schedule from the EEO-1,²¹ employer representatives urged in the strongest terms that instead EEOC and OFCCP coordinate their data collection through use of a single, unified instrument.²² The proposed EEO-1 revision accomplishes this goal, avoiding duplication of effort or wasted costs for either employers or enforcement agencies. For these reasons, the National Academy of Sciences' study regarding the collection of compensation data (NAS Study)²³ concluded that use of the EEO-1 for pay data collection would be "quite manageable for both EEOC and the respondents."²⁴

¹⁷ Hartmann, H., Hayes, J. & Clark, J., *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy* 1, INST. FOR WOMEN'S POLICY RESEARCH (2014), available at <http://www.iwpr.org/publications/pubs/how-equal-pay-for-working-women-would-reduce-poverty-and-grow-the-american-economy/>

¹⁸ *Id.*

¹⁹ *See id.* (finding that the U.S. economy would have produced additional income of more than \$447 billion in 2012 if women received pay equal to their male counterparts).

²⁰ Ellingrud, K., et al., *The power of parity: Advancing women's equality in the United States* 1-2, MCKINSEY GLOBAL INST. (Apr. 2016), available at <http://www.mckinsey.com/global-themes/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states>. The same study estimates that even if the wage gap was only partially closed, \$2.1 trillion in additional GDP could be added in 2025.

²¹ U.S. Department of Labor, Office of Federal Contract Compliance Programs, Non-Discrimination in Compensation; Compensation Data Collection Tool, Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. 49398 (Aug. 10, 2011); U.S. Department of Labor, Office of Federal Contract Compliance Programs, Government Contractors, Requirement to Report Summary Data on Employee Compensation, Notice of Proposed Rulemaking, 79 Fed. Reg. 46561 (Aug. 8, 2014).

²² *See* SAGE COMPUTING, INC., EEOC SURVEY SYSTEM MODERNIZATION WORK GROUP MEETING 2 (Mar. 2012), available at <http://www.eeoc.gov/employers/eeo1survey/survey-modernization.pdf>; *see also, e.g.*, Equal Employment Advisory Council, *Comments on the Office of Federal Contract Compliance Programs' Proposed Requirement to Report Summary Data on Employee Compensation* (Jan. 5, 2015); Society for Human Resource Management and the College and University Professional Association for Human Resources, *Comment on Advanced Notice of Proposed Rulemaking Related to Non-Discrimination in Compensation* 3-4 (Oct. 11, 2011).

²³ NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, COLLECTING COMPENSATION DATA FROM EMPLOYERS (2012), available at <http://www.nap.edu/catalog/13496/collecting-compensation-data-from-employers> [NAS STUDY].

²⁴ NAS STUDY, *supra* note 23 at 60.

Second, by utilizing the long-established EEO-1 job categories, reliance on the EEO-1 Report allows employers to report pay data without requiring them to master and implement new methods of categorizing job titles within their workplace. Instead, employers can make use of the existing systems by which they associate job titles with EEO-1 job categories, thus simplifying reporting.

Third, use of the EEO-1 enables the calculation and comparison of compensation data by gender within racial/ethnic groups, and by racial/ethnic groups within genders. The substantial pay gaps experienced by women of color compared to their white, non-Hispanic male and female counterparts demonstrate that unequal pay is a problem that has both gender and racial/ethnic dimensions. Reporting pay data through the EEO-1 Report will capture these interacting impacts.

Fourth, use of the EEO-1 as a reporting tool will facilitate analysis of compensation data both company-wide and within each employer's establishment, given that a separate EEO-1 Report must be filed for each physical location in a multi-establishment company. Company-wide analysis will help to draw attention to potential systemic discrimination that can affect many workers across an organization and enable meaningful analysis of the company's pay practices even where the number of workers at each individual establishment is relatively small. On the other hand, establishment-level analysis will ensure that individual establishments that engage in pay discrimination cannot evade detection if the company as a whole has pay that is closer to equal.

Finally, and most importantly, reporting of compensation data by gender and racial/ethnic groups within each of the ten job categories from the EEO-1 (rather than by an employer's own job titles or job classification system) will facilitate the consistent comparison of pay disparities in each job category among employers in a given industry and geographic area. Specifically, it will help EEOC and OFCCP identify firms with racial or gender pay gaps within each job category that significantly diverge from their regional industry peers for potential further detailed assessment. That is, it will allow analysis and comparison of wage data for firms employing workers in the same job class, in the same industry, in the same location, in the same year. In addition, it will help EEOC and OFCCP develop a better understanding of which industries have the most significant pay disparities, and to target enforcement resources accordingly. These data will also enable EEOC and OFCCP to better assess the extent to which sex-based compensation discrimination affects women's entry into non-traditional industries, and more generally to better understand the relationship between gender segregation in the workforce and pay discrimination.

The EEO-1 categories are relatively broad, and a single category can comprise multiple jobs in an establishment. Some have objected that as a result the pay gap measured in a particular EEO-1 job category for a particular employer will not necessarily measure disparities in pay for "equal work." This objection ignores the fact that the EEO-1 was never intended to act as an instrument precise enough to establish or prove violations of law without more investigation. Rather, what the EEO-1 has historically done, and what compensation data collection will strengthen its capacity to do, is aggregate millions of data points to establish gender and racial patterns within these job categories, thus allowing identification of firms that sharply depart from these patterns

for further analysis.²⁵ For example, the EEO-1 has been used by OFCCP to aid in the selection of federal contractors for enforcement activities, by academics to study the impact of affirmative action on women and people of color, and by the U.S. Government Accountability Office to assess the effectiveness of antidiscrimination programs.²⁶ The revised EEO-1 Report will provide EEOC and OFCCP a critical tool for focusing investigatory resources to identify pay discrimination within equivalent jobs, and will also flag deviations from compensation patterns that may be driven by other forms of discrimination that shut women or people of color out of higher-paying roles within a given job category.

IV. W-2 Pay Is the Best Readily Available Measure of Compensation for Data Collection Purposes.

We support the collection of data that provides a true picture of employees' compensation, which necessarily includes pay that exceeds base salary. Indeed, for Equal Pay Act purposes, relevant compensation

includes all payments made to [or on behalf of] an employee as remuneration for employment. The term includes all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. Fringe benefits are deemed to be remuneration for employment. . . . [V]acation and holiday pay, and premium payments for work on Saturdays, Sunday, holidays, regular days of rest or other days or hours in excess or outside of the employee's regular days or hours of work are deemed remuneration for employment and therefore wage payments that must be considered in applying the EPA²⁷

Requiring employers to report W-2 earnings from Box 1²⁸ will provide a comprehensive picture of compensation, in line with EEOC's and OFCCP's enforcement mandates. Moreover, since employers already collect and report W-2 wage data pursuant to federal law, inclusion of this information in the revised EEO-1 Report will impose a minimal additional burden.

A. W-2 Earnings Provide a Comprehensive Picture of Compensation

The Center agrees with EEOC and the conclusions of the independent Pay Pilot Study (Pilot Study)²⁹ that among readily available compensation measures, the W-2 provides the most comprehensive picture of earnings, with a minimal associated burden for employers. The NAS

²⁵ For instance, OFCCP has analyzed EEO-1 data to indicate the probability that a review will find a significant violation of federal requirements, and to target enforcement activities accordingly. Public Hearing before the U.S. Equal Employment Opportunity Commission, July 18, 2012 (testimony of Dr. Marc Bendick, Jr.), *available at* <http://www.eeoc.gov/eeoc/meetings/7-18-12/bendick.cfm>. EEOC itself has published public reports analyzing data from the EEO-1 and highlighting trends in particular industries. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SPECIAL REPORTS, *available at* <http://www.eeoc.gov/eeoc/statistics/reports/index.cfm>.

²⁶ NAS STUDY, *supra* note 23 at 17-25.

²⁷ 29 C.F.R. § 1620.10.

²⁸ The 30-Day Notice clarifies that the revised EEO-1 would use the measure of compensation reported in Box 1, wages, tips and other compensation. 81 Fed. Reg. 45479, 45486 (July 14, 2016).

²⁹ SAGE COMPUTING, INC., FINAL REPORT (Sept. 2015), *available at* <http://eeoc.gov/employers/eeo1survey/pay-pilot-study.pdf> [PILOT STUDY].

Study and the subsequent Pilot Study considered both the compensation definitions used by the Bureau of Labor Statistics' Occupation Employment Statistics (OES) and by the W-2, among others, as a compensation measure for EEOC pay data collection, because these measures are the most widely known to employers and include various forms of compensation data.³⁰ The OES compensation definition includes base rate of pay, hazardous duty pay, cost of living allowances, guaranteed pay, incentive pay, tips, commissions and production bonuses.³¹ But it does not account for certain some categories of compensation including overtime pay, severance pay, shift differentials and nonproduction, year-end and holiday bonuses.³² Though these categories may only account for a small portion of overall employee compensation, they are particularly relevant in certain industries. For example, as noted in the Pilot Study, in management and business and financial operations bonuses account for more than 11 percent of cash compensation, and in healthcare shift differentials account for substantial differences in compensation.³³

The W-2 definition includes all earned income, including supplemental pay components (such as overtime pay, shift differentials, and nonproduction bonuses) and therefore offers a more comprehensive picture of earnings than the OES.³⁴ This comprehensive picture is critical because although compensation discrimination may manifest in workers' base salaries, it may also occur through discrimination in other less frequently measured forms of compensation such as bonuses,³⁵ commissions,³⁶ stock options, differential pay, 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.³⁷ In fact, "female and minority employees have been virtually locked out of wealth-

³⁰ The NAS Study reviewed the wage definitions in the Occupational Employment Statistics survey (OES) and the National Compensation Survey (NCS) and concluded that the OES definition should be considered for use because it was widespread, and because of a substantial overlap in the employers who report data to the OES and EEOC. NAS STUDY, *supra* note 23 at 58. The Pilot Study also recommends the use of W-2 data because such data provide the most comprehensive measure of compensation readily available to businesses. PILOT STUDY, *supra* note 29 at 108.

³¹ NAS STUDY, *supra* note 23 at 56.

³² *Id.*; PILOT STUDY, *supra* note 29 at 7.

³³ PILOT STUDY, *supra* note 29 at 7 & n.16.

³⁴ *Id.* at 7, 8. While reported W-2 wages include taxable benefits and pre-tax deductions driven by an individual employee's choices - such as mass transit and parking stipends/elections, 401(k) or retirement account contributions, and deferred compensation - these optional elements likely would not constitute a large enough part of compensation for most workers so as to create a disparity for the purposes of enforcement, nor is there reason to believe that men and women, or individuals of different races, would consistently make different choices in this regard and thus create gender or race pay disparities.

³⁵ See *King v. Univ. Health Care Sys.*, 645 F.3d 713 (5th Cir. 2011) (upholding a jury's conclusion that the employer violated the Equal Pay Act when it failed to pay plaintiff anesthesiologist a bonus that it paid her male colleague).

³⁶ See *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1027 (6th Cir. 1983) (finding a compensation disparity under Equal Pay Act where the employer paid higher commission rate to males than females, even though total remuneration was substantially equal).

³⁷ See MERCER, GENDER EQUITY REPORT (Nov. 2015), available at https://www.imercer.com/uploads/Aust/pdfs/Marketing/gender_pay_executive_summary.pdf (survey of Australian companies finding that women receive lower variable reward/incentive pay despite receiving the same performance ratings as their male counterparts; males who only partially met their objectives received bonuses that were 35 percent larger (as a percentage of employment cost) than their female counterparts).

creating opportunities in most companies.”³⁸ Studies show that men receive stock options and bonuses at a rate twenty to thirty times than of women.³⁹ Studies also indicate that compensation for men consists of 85 percent salary and 15 percent stock options, profit sharing, and other bonuses, while compensation for women consists of 91 percent salary and 9 percent stock options, profit sharing, and other bonuses.⁴⁰

For all these reasons, the base rate of pay is not an appropriate alternative measure of compensation for the purposes of the revised EEO-1 Report. The base rate of pay is an employee’s initial rate of compensation, excluding extra compensation such as for overtime, bonuses, or an increase in the rate of pay for a shift differential. It does not reflect the full measure of an employee’s compensation.⁴¹ While some employers might easily be able to report base rate of pay, if it is the compensation data currently captured by their human resource information management systems (HRIS),⁴² it is not a dynamic or complete picture of an employee’s compensation and would not serve the purposes of the EEO-1 Report. Data about base pay alone cannot capture instances where other types of compensation -- such as stock options and bonuses -- drive gender-based disparities in compensation, and would permit employers that discriminate using other forms of compensation to evade detection. Conversely, collecting data on W-2 pay will help root out disparities across the spectrum of take-home compensation. Accordingly, the Center supports collecting W-2 pay data, as the measure of earnings that collects as many forms of compensation as possible.

B. *Reporting W-2 Earnings Will Not Be Unduly Burdensome for Employers*

Requiring covered employers to report W-2 data in addition to the already-required ethnicity, race and gender of employees via the EEO-1 Report will not be unduly burdensome. First, federal law already requires employers to maintain and generate the information in W-2 forms that will be required for the revised EEO-1.⁴³ HRIS experts consulted for the Pilot Study reported that most major payroll software systems are preprogrammed to compile the data for generating W-2 forms. This led the Pilot Study to conclude that employers using such software to manage payroll and generate W-2 forms could report the proposed data with minimal additional burden.⁴⁴

Second, EEOC’s proposal in the 30-Day Notice to move the 2017 report’s filing deadline from September 2017 to March 31, 2018, addresses a key concern raised by employers. Employers argued that because W-2 earnings data usually are generated at the end of the calendar year, the EEO-1’s September deadline would require employers to generate an additional, noncalendar

³⁸ Mehri, C. & Eardley, E., *21st Century Tools for Advancing Equal Opportunity: Recommendations for the Next Administration 7*, AMERICAN CONSTITUTION SOCIETY (2008), available at <https://www.acslaw.org/files/Mehri%20FINAL.pdf>.

³⁹ Alyssa Lebeau, *The New Workplace Woman: “Are We There Yet?”* BUSINESS WOMAN, Fall 2001.

⁴⁰ *Id.*

⁴¹ PILOT STUDY, *supra* note 29 at 8.

⁴² *Id.*

⁴³ 26 C.F.R. § 31.6051-1.

⁴⁴ PILOT STUDY, *supra* note 29 at 8, 103. The majority of employers use automated payroll systems. Optimal Benefit Strategies, LLC, *Most Small Employers Face Low Cost to Implement Automatic IRAs*, AARP (Aug. 2009) (“97 percent of employers with 10 or more employees use automated systems and do not process payroll manually”), available at http://assets.aarp.org/rgcenter/econ/auto_iras.pdf. The Pilot Study acknowledged that some companies that outsource their payroll may need to make a one-time capital investment to write a software program to import data from payroll programs into the HRIS system.

year W-2 that would not fully reflect annual compensation. EEOC's proposal will allow employers to utilize, for the purposes of the EEO-1, the calculation and reporting of W-2 data for the calendar year that is already required by federal law. The proposed change would also allow employers more time to adapt their payroll and HRIS systems to prepare for the new data collection.

V. Reporting of Total Hours Worked Will Greatly Enhance the Usefulness of the Pay Data Collected and Will Not Be Unduly Burdensome for Employers.

EEOC's proposal to collect the total number of hours worked⁴⁵ by the employees included in each EEO-1 pay band will allow the calculation and comparison of mean compensation both per person and per hour for each gender and racial/ethnic group within each job category. As the Pilot Study recognized, collection of total hours worked by each employee in addition to wages is critical to an analysis of pay differences.⁴⁶ Collecting this data will allow OFCCP and EEOC to account for pay differences due to variation in the number of hours worked among employees in a pay band, sharpening pay comparisons both between different groups in an employer's workforce and between different employers. Collection of total hours worked also will permit an analysis that accounts for periods of unemployment or less than full-time work, including part-time, temporary and seasonal work. This is especially important because women constitute two-thirds of part-time workers in the U.S.,⁴⁷ and because part-time workers are often paid less, per hour, than their full-time counterparts.⁴⁸ Additionally, women are almost half of all temporary workers.⁴⁹

Hours worked data is also readily available to employers. Employers must keep records of hours worked for all employees not exempt from the overtime provisions of the Fair Labor Standards Act.⁵⁰ Accordingly, reporting actual hours worked for each nonexempt employee, as the 30-Day Notice proposes, will not create an additional burden for employers. With regard to the collection of total hours worked by exempt employees, the 30-Day Notice suggests employers report either hours actually worked, or report 40 hours per week for full-time employees and 20 hours per week for part-time employees as a standardized substitute to reduce the reporting burden. The Center supports this approach, which permits an employer to select the reporting option that is consistent with its current recordkeeping.

⁴⁵ We support EEOC's proposal in the 30-Day Notice to adopt the definition of "hours worked" in the Fair Labor Standards Act (FLSA). 81 Fed. Reg. at 45488. It provides a clear definition of the relevant hours, and employers covered by the proposal are already familiar with the FLSA and its requirements.

⁴⁶ See PILOT STUDY, *supra* note 29 at 42-43, 59.

⁴⁷ NAT'L WOMEN'S LAW CTR., PART-TIME WORKERS ARE PAID LESS, HAVE LESS ACCESS TO BENEFITS—AND TWO-THIRDS ARE WOMEN 1 (2015), available at <http://nwlc.org/resources/part-time-workers-are-paid-less-have-less-access-benefits%E2%80%94and-two-thirds-are-women/>. See also U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *Women of Working Age*, Chart 22 (2015), http://www.dol.gov/wb/stats/latest_annual_data.htm (last visited Aug. 10, 2016).

⁴⁸ NAT'L WOMEN'S LAW CTR., PART-TIME WORKERS ARE PAID LESS, HAVE LESS ACCESS TO BENEFITS—AND TWO-THIRDS ARE WOMEN 1, 3 (2015), available at <http://nwlc.org/resources/part-time-workers-are-paid-less-have-less-access-benefits%E2%80%94and-two-thirds-are-women/>.

⁴⁹ Nicholson, J., *Issue Brief: Temporary Help Workers in the U.S. Labor Market*, U.S. DEP'T OF COMMERCE ECONOMICS AND STATISTICS ADMIN. (July 2015), available at <http://www.esa.doc.gov/sites/default/files/temporary-help-workers-in-the-us-labor-market.pdf>.

⁵⁰ 29 C.F.R. § 516.2.

Where an employer does track exempt employees' hours, the employer can report that number. Indeed, the Pilot Study noted that most payroll systems maintain the total hours worked by *each* employee, so reporting such information would impose a minimal burden on employers that use those systems. In the absence of actual data regarding hours worked by exempt employees, employers can rely on the EEOC-sanctioned assumption of a full-time 40-hour workweek. The 40-hour workweek is a widely accepted definition⁵¹ and is a reasonable approximation of full-time work, with the understanding that not all full-time salaried exempt employees work precisely 40 hours per week.⁵² The proposal appropriately seeks to minimize the burden on employers by not requiring them to collect additional data where they do not already.

EEOC's suggestion is responsive to critiques from employers, who objected to OFCCP's 2014 proposal⁵³ that contractors use across-the-board estimates of hours worked by exempt employees by reporting 2080 hours annually worked for all full-time, salaried exempt employees, and 1080 hours annually worked for all part-time employees. This option would permit employers who collect more detailed data, or who wish to begin to collect more detailed data, to report more precise calculations.

VI. The Pay Data Collection Should Be Strengthened Further.

The compensation data collected by the proposed revised EEO-1 Report will fill an important gap in the information currently available to EEOC and OFCCP, enhancing the enforcement of discrimination prohibitions. However, we urge further strengthening of the pay data collection in a few key ways:

- Extension of the requirement to submit Component 2 of the EEO-1 to federal contractors that have between 50 to 99 employees and are otherwise required to submit the EEO-1.⁵⁴ Although EEOC indicated in the 30-Day Notice that it would retain the same employee thresholds, we urge reconsideration of this position given the heightened importance of ensuring that recipients of public funds do not discriminate in pay practices. Many of these smaller entities already maintain the relevant information. For instance, 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.⁵⁵ These

⁵¹ Although the FLSA's overtime requirements do not apply to the exempt workers at issue here, the overtime rule does establish a useful benchmark of a 40-hour workweek as a standard measure of full-time work. 29 U.S.C. § 207(a).

⁵² A 2014 Gallup poll of full-time, salaried workers indicated that of the workers surveyed, 37 percent worked 40 hours a week, and 59 percent worked 41 hours or more per week. The average workweek of the employees surveyed was 47 hours. GALLUP, WORK AND EDUCATION POLL (2014), available at <http://www.gallup.com/poll/175286/hour-workweek-actually-longer-seven-hours.aspx>. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION – JULY 2016, Table B-2 (Aug. 5, 2016), available at <http://www.bls.gov/news.release/empsit.t18.htm> (average weekly hours and overtime of all employees on private nonfarm payrolls in July 2016 was 34.5 hours).

⁵³ U.S. Department of Labor, Office of Federal Contract Compliance Programs, Government Contractors, Requirement to Report Summary Data on Employee Compensation, Notice of Proposed Rulemaking, 79 Fed. Reg. 46561 (Aug. 8, 2014).

⁵⁴ 41 C.F.R. § 60-1.7.

⁵⁵ 41 C.F.R. § 60-1.12(a).

records for employees must be identifiable by “[t]he gender, race, and ethnicity of each employee.”⁵⁶ Supply and service contractors with contracts of \$50,000 or more and with 50 or more employees also must keep on file copies of written affirmative action plans.⁵⁷

- Revision of the proposed EEO-1 Report to require employers to report their pay data using additional, narrower pay bands. We support the decision to collect compensation data by counting and reporting the number of employees from each demographic group in each identified pay band, as a means of reporting that minimizes the burden on the employer while still capturing reliable and useful data.⁵⁸ We also agree that in order to be useful, pay data must be collected in a larger number of bands than used by the EEO-4, as the EEO-4 includes all pay of \$70,000 or more in a single band, thus rendering invisible any pay disparities experienced by employees earning \$70,000 or more annually. The OES pay bands upon which EEOC proposes to rely are a distinct improvement over the EEO-4 bands, in that the OES pay bands go up to \$207,999, with the final pay band including all pay of \$208,000 or above.

However, even the OES pay bands will be unable to provide data on pay disparities for employees earning more than \$208,000. In the 30-Day Notice, EEOC declined to adopt narrower pay bands or additional pay bands at the top end of the wage scale, stating that the proposed pay bands would maximize the collection of data since the majority of wages in the United States are well below \$208,000. But data show that women up and down the income scale experience pay gaps compared to their male counterparts, including in highly paid roles such as attorneys, executives, and surgeons.⁵⁹ For example, about half of physicians and surgeons make more than \$194,500 annually—a profession in which women typically make only 71 cents for every dollar paid to their male counterparts.⁶⁰ About half of lawyers make more than \$121,000 annually—a profession in which women typically make only 78 cents for every dollar paid to their male counterparts.⁶¹ Among equity partners, generally the highest compensated individuals at law firms, the typical female equity partner earns 80 percent of what a typical male equity partner earns.⁶² In the typical state, the average wage and salary of the top 0.5 percent is nearly \$360,000 a year.⁶³ We therefore urge the inclusion of

⁵⁶ 41 C.F.R. § 60-1.12(c)(1).

⁵⁷ 41 C.F.R. § 60-1.40(a).

⁵⁸ The Pilot Study recommended collecting aggregate pay information for the occupational categories in pay bands. PILOT STUDY, *supra* note 29 at 9, 10, 108.

⁵⁹ U.S. CENSUS BUREAU, 2014 AMERICAN COMMUNITY SURVEY, Table 1 (Full-Time, Year-Round Workers and Median Earnings in the Past 12 Months by Sex and Detailed Occupation: 2014), *available at* http://www.census.gov/people/io/publications/table_packages.html [ACS]; Schieder & Gould, *supra* note 8 at 6 (“Women in the top 95th percentile of the wage distribution experience a much larger gender pay gap than lower-paid women).

⁶⁰ ACS, *supra* note 59.

⁶¹ *Id.*

⁶² NAT’L ASS’N OF WOMEN LAWYERS, NINTH ANNUAL SURVEY (2015), *available at* <http://www.nawl.org/p/cm/ld/fid=506>.

⁶³ Figures are for all individuals 16 and older. The American Community Survey top codes data for wage and salary income at the 99.5th percentile of each state. Wages above this level all are coded at the state mean of wage and salary income. See IPUMS USA, INCWAGE Codes, *available at* https://usa.ipums.org/usa-action/variables/INCWAGE#codes_section (last visited Aug. 10, 2016). In 2014, the median value of the state mean wage and salary income of the top 0.5 percent was \$359,000 with a range between \$237,000 and \$642,000.

additional pay bands to collect pay data up to at least \$360,000, to ensure that meaningful pay data is captured as to virtually all of the workforce. We also note that the top OES pay bands cover extremely wide pay ranges of \$34,839 and \$44,199. In order to provide more meaningful information regarding pay disparities, reflecting the EEO-1's distinct purpose, we urge that pay data be collected in narrower pay ranges, and recommend for those pay bands whose upper limit is more than \$19,329, no single pay band cover a range of more than 20 percent of the lowest pay captured by that band, thus allowing for more granular analyses.

- Whether the EEO-1 ultimately relies on OES pay bands or a modified version of the OES pay bands, it is critical that these bands be regularly adjusted by continuing to track the OES, in order to provide the most relevant data reflecting the distribution of pay in the economy.

VII. EEOC and OFCCP Must Ensure That Pay Discrimination Is Not Insulated From Review Because it Is Commonplace Within an Industry.

The success of the collection of pay data in helping end pay discrimination depends on EEOC's and OFCCP's consistent incorporation of the data's predictive information into their ongoing decisions about where to target enforcement. This focus will not only increase the effectiveness of enforcement activities in rooting out discrimination, but also enhance the incentives for employers to engage proactively in self-evaluation of their pay practices and improve their compliance with equal pay standards. We therefore commend and strongly support the proposal to establish industry-level standards for pay disparities, use deviation from these standards to identify potential pay discrimination, and determine which employers to prioritize for investigation. However, given the persistence of gender and racial pay gaps across the economy, being above or close to an industry standard does not demonstrate an absence of pay discrimination exists within an employer's workforce. The promulgation of the final pay data collection instrument should recognize that while deviation from industry standards will be incorporated into decisions about conducting and prioritizing enforcement activities, other important considerations can and will come into play. For example, in some instances, enforcement attention appropriately may be focused on entire industries with sizeable gender pay gaps (rather than just the worst performing employers within those industries). Such attention is critical, as research reveals industry patterns of discrimination. For example, in the retail industry, women and people of color disproportionately fill the lowest paid positions, while white men disproportionately fill the most well-compensated jobs.⁶⁴ Similarly, in the restaurant industry there is evidence of both racial⁶⁵ and gender discrimination⁶⁶ in hiring and pay.

Figures include D.C. but exclude Puerto Rico. 2014 ACS and PRCS Minimum and Maximum Codes, *available at* https://usa.ipums.org/usa/volii/2014acs_topcodes.shtml (last visited Aug. 10, 2016).

⁶⁴ CTR. FOR POPULAR DEMOCRACY, DATA BRIEF: RETAIL JOBS TODAY (Jan. 2016), *available at* <http://static1.squarespace.com/static/556496efe4b02c9d26fdf26a/t/56a0f00f3b0be3bde90e9363/1453387792311/RetailJobsToday1.pdf>.

⁶⁵ RESTAURANT OPPORTUNITIES CENTERS UNITED, THE GREAT SERVICE DIVIDE (Oct. 2014), *available at* <http://rocunited.org/the-great-service-divide-national/>.

⁶⁶ RESTAURANT OPPORTUNITIES CENTERS UNITED, TIPPED OVER THE EDGE (Feb. 2012), *available at* <http://rocunited.org/tipped-over-the-edge-gender-inequity-in-the-restaurant-industry/>.

VIII. Making Summaries of Compensation Data Available to the Public Is an Essential Complement to the Compensation Data Collection.

The Center strongly supports the plan to make aggregate data gathered from the revised EEO-1 Reports available to the public. Making these data available to the public can promote employer compliance with equal pay standards in a number of important ways. With these aggregate data in hand, workplace equality advocates can more efficiently direct their own enforcement, outreach and public education activities to industries or regions where pay disparities are most egregious. Individual employees can find out if they are working in an industry or region where they are more at risk of experiencing pay discrimination, and be prompted to investigate further to ensure that they are being treated fairly. They also can better understand pay trends with their region and industries, thus empowering them to seek and negotiate fair pay. And making these aggregate data public will facilitate and incentivize voluntary employer compliance with equal pay protections, by providing benchmarks that employers can use to evaluate their own pay practices and to publicly promote their successes in achieving pay equity.

We further urge EEOC to not only provide average pay disparities by occupational category in given industries and/or regions, but also other relevant information such as the range of pay disparities. Unequal pay is a ubiquitous phenomenon in many industries and regions, and even the average performers within a group may still have problems with pay discrimination in their workforces. We therefore should be encouraging employers, in conducting self-evaluations of their pay practices, to strive to be even better than the average among their peers.

IX. The Proposed Data Collection Will Not Be Unduly Burdensome for Employers and the Revisions Proposed by the 30-Day Notice Further Minimize the Reporting Burden.

We commend EEOC for constructively addressing the concerns expressed by employers regarding the burden of the proposed pay data collection, and support its suggested changes. The proposal to collect pay information through the EEO-1 and to share it across agencies reduces a significant amount of the reporting burden for employers, and avoids duplication of effort or wasted costs in several ways. The relevant universe of employers is already required to submit EEO-1 reports that include information by gender, race/ethnicity, and job grouping categories.⁶⁷ These employers are familiar with the form, the job categories and the reporting requirements.

As noted above, federal law already requires private employers and contractors to maintain much of the information that would be required under the revised EEO-1, such as W-2 earnings as the measure of compensation. Likewise, federal law already requires employers to keep records of hours worked for nonexempt employees.⁶⁸ Accordingly, reporting actual hours worked for each nonexempt employee, or actual hours worked or a standard approximation for each exempt employee, as the 30-Day Notice proposes, will not create an additional burden for employers.

Compensation and total hours worked information is readily available to most employers in their computerized payroll systems, so the burden that compiling and reporting this largely pre-

⁶⁷ 29 C.F.R. § 1602.7 (private employers); 41 C.F.R. § 60-1.7 (federal contractors). *See also* nn.54-57, *supra*.

⁶⁸ 29 C.F.R. § 516.2.

existing information pursuant to the proposed rule will impose on employers would be minimal.⁶⁹ Completing the proposed revised EEO-1 would require employer adjustments at the preparation and the collection phases. Employers would be required to link their computerized payroll system, with the necessary information about compensation and hours worked, with the demographic and occupational information on each employee in the employer's HRIS. This would require a one-time redesign and reprogramming of software to generate the data in the new format. However, the burden and cost should be minimal, because compensation management systems and software are designed to be updated routinely to accommodate changes in federal, state or local income tax rules, new accounting rules, and employer changes in fringe benefits or compensation practices.⁷⁰ Once the payroll system software and HRIS system have been linked and reprogrammed to perform the required computations, collecting and reporting the new data for the revised EEO-1 would require minimal extra time or effort.

The additional revisions proposed in the 30-Day Notice will further diminish employers' reporting burden. As noted above, EEOC's proposal to move the 2017 report's filing deadline to March 31, 2018, would eliminate the need for employers to generate a separate, noncalendar year W-2. This change, which directly responds to employers' concerns, allows the use of the same calendar year W-2 data for the purposes of both the EEO-1 and federal law. In the 30-Day Notice EEOC also proposes moving the "workforce snapshot" period from the third quarter (July-September) to the fourth quarter (October-December) to address employer concerns. By counting and reporting its total number of employees in the fourth quarter, an employer can fully account for promotions that result in job category or pay band changes for employees during that calendar year. The proposed change, which would take effect for the 2017 reporting cycle, thus aligns the workforce snapshot period with the federally required W-2 reporting timeline as well, and should result in more accurate and less burdensome reporting.

Particularly given EEOC's responsive changes, the proposed collection and reporting of pay data will require minimal additional time and effort by employers. In comparison, great benefits will accrue for employees and employers because of this proposed rule. As discussed above, these data will be crucial to enhancing the effectiveness of enforcement activities on behalf of employees that are victims of pay discrimination and other forms of discrimination reflected in compensation. Further, the reporting requirement may actually reduce the ultimate burdens of enforcement on law-abiding employers because it will improve EEOC's and OFCCP's ability to direct their investigatory efforts toward employers most likely engaged in pay discrimination.

In sum, the National Women's Law Center strongly urges swift finalization of the proposed revisions to the EEO-1 Report in order to ensure this data collection begins with the 2017

⁶⁹ In response to employer comments, EEOC revised its methodology for calculating the estimated annual reporting burden to account for the time spent annually on EEO-1 reporting by all the relevant employees at the firm and establishment level, and the fact that some employers may collect and enter EEO-1 data manually and do not use centralized data uploads. 81 Fed. Reg. at 45494. Accordingly, EEOC increased the burden estimate.

⁷⁰ For example, Intuit provides regular updates for subscribers to its Quick Books Payroll service. *See* <http://payroll.intuit.com/support/kb/2000204.html>; Sage provides similar software updates to its subscribers. *See* https://support.na.sage.com/selfservice/microsites/msbrowse.do?UMBrowseSelection=SG_SAGE50_U_S_EDITIO_N_1.

reporting year. We have not seen any significant progress in closing the gender pay gap in this country in nearly a decade. Women cannot afford to keep waiting for change, nor can the families depending on women's earnings. The powerful enforcement tool proposed by EEOC promises to make a real difference in closing the pay gaps that have shortchanged women for far too long.

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