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131 M Street NE  
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Submitted Electronically

**Re: Notice of Information Collection – Request For New Control Number For a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2, EEOC-2019-0003-0001**

Dear Ms. Wilson:

The National Women's Law Center ("the Center") is writing to comment on the Equal Employment Opportunity Commission's ("EEOC") September 12, 2019 "Notice of Information Collection – Request For New Control Number For a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2" ("the Notice"). Since 1972, the Center has worked to protect and advance the progress of women and their families in core aspects of their lives, including income security, employment, education, and reproductive rights and health, with an emphasis on the needs of low-income women and those who face multiple and intersecting forms of discrimination. To that end, the Center has long worked to remove barriers to equal treatment of women in the workplace, particularly those that suppress women's wages.

The Notice announces that while EEOC seeks to submit a request for a three-year approval of Component 1 of the EEO-1, "EEOC does not intend to submit to OMB a request to renew Component 2 under OMB control number 3046-0007." The Center strongly urges EEOC to reconsider and immediately request renewal of Component 2 pursuant to the Paperwork Reduction Act ("PRA").

While the Notice invites public comment on EEOC's intent to seek PRA approval of Component 1 under a new OMB control number, it does not similarly explicitly invite public comment on EEOC's decision not to seek approval of Component 2. This is consistent with this Administration's lack of transparent decisionmaking regarding the Component 2 pay data collection, including the failure to provide public notice or opportunity for comment on the abrupt decision to indefinitely stay Component 2 in August 2017.<sup>1</sup> Nevertheless, because the

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<sup>1</sup> See Memorandum from Neomi Rao, Adm'r, OIRA, to Victoria Lipnic, Acting Chair, EEOC (Aug. 29, 2017), [https://www.reginfo.gov/public/jsp/Utilities/Review\\_and\\_Stay\\_Memo\\_for\\_EEOC.pdf](https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf) [Rao Memo].

Notice concludes that “the unproven utility to its enforcement program of the pay data as defined in the 2016 Component 2 is far outweighed by the burden imposed on employers,” purports to explain EEOC’s methodology for estimating the burden of the proposed collection, and invites comment on “the accuracy of the Commission’s estimate of the burden of the proposed collection” and the validity of its methodology and assumptions, the Center’s comment includes discussion of EEOC’s decision not to seek renewal of Component 2.

The Notice is the latest in a series of attempts to block efforts to collect pay data from employers since Component 2 was approved by OMB in September 2016. The Notice purports to present more accurate estimates of employers’ burden in completing the EEO-1, pursuant to a revised and improved methodology. But the timing of the Notice -- in the middle of EEOC’s first, court-ordered pay data collection -- combined with EEOC’s faulty and unexplained assumptions underlying its burden estimate, demonstrate the lack of sound basis for EEOC’s conclusion that Component 2 should not be renewed because the utility to enforcement of the pay data is outweighed by the burden to employers.

Significantly, the Notice contains no discussion of the benefits of Component 2 pay data collection, which is critically important in helping to identify compensation discrimination, improving enforcement of pay discrimination laws, and promoting self-analysis and compliance by reporting employers. Without analysis of the benefit of the pay data, it is impossible to determine whether any burden to employers associated with the pay data collection is justified.

**I. EEOC’S CONCLUSION THAT COMPONENT 2 PAY DATA’S UTILITY IS OUTWEIGHED BY EMPLOYER BURDEN IS QUESTIONABLE AND UNSUPPORTED BY INFORMATION IN THE NOTICE.**

**A. Before It Had Completed, Much Less Analyzed, the Current Pay Data Collection, EEOC Concluded That the Burden Outweighed Its Utility.**

EEOC’s justification for its decision not to renew Component 2 is that “the unproven utility to its enforcement program of the pay data as defined in the 2016 Component 2 is far outweighed by the burden imposed on employers.” This decision rests on the assumption that its methodology for calculating the burden is correct, which, for reasons discussed below, is suspect. Moreover, EEOC’s justification is undermined both by the timing of its announcement about the utility of the pay data collected pursuant to Component 2, and EEOC’s failure to provide *any* discussion, much less any information about its assumptions, regarding the utility of the data to enforcement and employer self-evaluation.

EEOC issued the Notice on September 12, 2019. At that time, EEOC was in the process of collecting pay data for calendar years 2017 and 2018 pursuant to a federal court’s order, with a September 30, 2019 deadline for employer submissions.<sup>2</sup> Therefore, at the time EEOC concluded that the utility of Component 2 pay data was outweighed by the burden of collecting

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<sup>2</sup> Nat’l Women’s Law Ctr. v. Office of Mgm’t & Budget, Civ. Action No. 17-cv-2458 (D.D.C. Mar. 4, 2019), <https://nwlcl-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/03/EEO-1-Opinion.pdf>. The court recently ordered EEOC to “take all steps necessary to complete the EEO-1 Component 2 data collection” for 2017 and 2018 by January 31, 2020. Nat’l Women’s Law Ctr. v. Office of Mgm’t & Budget, Civ. Action No. 17-cv-2458 (D.D.C. Oct. 29, 2019).

it, EEOC had not yet finished collecting the data in question from employers. Employers still had at least two weeks to submit their data.

This raises two important concerns. First, if EEOC had not yet finished collecting the pay data, it was not in a position to reach a reasoned and valid conclusion about the utility of the data, or assess how simple or difficult it was for employers to collect and report it. The Notice suggests EEOC is predisposed to discount the utility of the pay data, and to capitulate to the business community's calls to eliminate pay data collection by the agency. Moreover, EEOC's decision to calculate burden based on a new set of assumptions, without taking into account employers' actual experience submitting the pay data as part of the court-ordered collection in progress at the time of the Notice, including an analysis of software supports and human resource information system ("HRIS") products that were made available for reporting pay data, is difficult to justify.

Second, if EEOC did nevertheless conduct some form of analysis or evaluation of the utility of pay data collected through September 12, 2019, it chose not to provide any information about its methodology or assessment in the Notice, thereby preventing public notice and comment on that critical information. Both the timing of EEOC's conclusion about utility weighed against burden, and its failure to provide any information about how it reached that conclusion, call into serious question EEOC's decisionmaking, methodology, and motivations regarding its decision not to seek PRA renewal of Component 2.

## **B. The Burden Estimates in the Notice Are Based on Questionable Methodology and Assumptions.**

The Notice concludes that the methodology EEOC employed in 2016 to calculate the burden of reporting pay data through the EEO-1 "did not adhere to the standard approach for estimating burden in federal data collection," and "resulted in an extremely low estimate of the burden on employers." EEOC argues that its current approach, which estimates burden based on the number of reports or forms filed, rather than on the number of employers reporting, is a "more accurate methodology." EEOC's current approach is problematic for a number of reasons.

The Notice states that EEOC revisited the 2016 methodology for estimating burden taking "into consideration Government Accountability Office (GAO) and OMB guidance on the appropriate methodology for calculating burden estimates in federal information collections." As an initial matter, the OMB and GAO documents at issue<sup>3</sup> were not published until April 2017 and July 2018, respectively. It is not credible to suggest EEOC's 2016 burden estimate was improper because should have been based on recommendations in documents that did not exist at that time. In addition, the GAO report does not specifically direct agencies to calculate burden hours based on the number of forms instead of the number of respondents. The report establishes a standard formula for calculating total annual burden hours: "number of respondents x frequency

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<sup>3</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *Paperwork Reduction Act, Agencies Could Better Leverage Review Processes and Public Outreach to Improve Burden Estimates* (Jul. 2018), <https://www.gao.gov/assets/700/693057.pdf> [Agencies Could Better Leverage]; GENERAL SERV. ADMIN., *ROCIS HOW TO Guide for Agency Users of the Information Collection Request (ICR) Module* (Apr. 2017), [https://www.rocis.gov/rocis/jsp3/common/ROCIS HOW TO Guide for AGENCY Users of ICR Module-04052017.pdf](https://www.rocis.gov/rocis/jsp3/common/ROCIS%20HOW%20TO%20Guide%20for%20AGENCY%20Users%20of%20ICR%20Module-04052017.pdf).

of response x average burden time per response.”<sup>4</sup> While the GAO and OMB documents instruct that the total annual burden hour estimate is the sum of all individual burden hour estimate formulas – including for different forms or different types of respondents – the guidance documents do not require the result and the various assumptions driving the result here.

EEOC’s burden estimate appears to be inflated and is based on several faulty or unexplained assumptions. The Notice indicates that single establishment (Type 1) filers have an average estimated burden of 45 minutes, and that the average estimated burden for multi-establishment (Type 2) filers would range from 3.5 hours to 9.5 hours cumulatively depending on the number and type of reports submitted.<sup>5</sup> This results in an average estimated burden per filer of five hours.<sup>6</sup> First, there is no explanation in the Notice for the basis of these time estimates.<sup>7</sup> Second, even assuming these estimates are correct, EEOC has incorrectly used them to calculate its overall burden estimate. EEOC estimates 90,000 filers will submit Component 1 data through 1,915,345 reports, and “that it will take a filer [whether single or multi-establishment], on average, under 5 hours to complete their Component 1 EEO-1 report.”<sup>8</sup> Per the Notice, the five-hour burden estimate already takes into account that multiple forms of different types may be submitted by a filer. Therefore, if each of the 90,000 filers takes five hours to complete their report (including multiple forms), the conservative result is only 450,000 burden hours per year. EEOC seems to be applying the five-hour estimate to each *form*, not each *filer*. Third, a multi-establishment firm is allowed to file the same information fields for each of its establishments as a single-firm establishment, and submit it as a single data file if it chooses. EEOC’s burden estimate in the Notice appears to assume filers will choose the more burdensome method of submission.

Employers with at least 100 employees have approximately 50 employees per establishment on average.<sup>9</sup> Since firms with at least 100 employees must file, single-establishment firms must have at least twice as many employees per establishment as this large-firm average. Therefore, on a per establishment basis, single establishment firms would be collecting and reporting at least twice as much data than average multi-establishment firms. The Notice provides no basis for EEOC’s assumption that submitting otherwise identical information for smaller sets of employees at each establishment requires significantly more time.

These assumptions also appear to ignore the centralized automation that characterizes most large employers’ HRIS and payroll systems, and the fact that the information required by Component 2 would be readily available to employers through these systems. Additionally, this explanation also does not appear to account for the possibility that many multi-establishment filers would choose to file through a digital file upload instead of manually completing multiple forms online.

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<sup>4</sup> See *Agencies Could Better Leverage*, *supra* note 3 at 8, note a.

<sup>5</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *Notice of Information Collection – Request For New Control Number For a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2*, 84 Fed. Reg. 48138, n.9, 21 (Sept. 12, 2019) [*September 2019 Notice*].

<sup>6</sup> *Id.* at n.21.

<sup>7</sup> Footnote 12 of the Notice also asserts that the respondent burden hour cost was calculated based on BLS median pay data for various types of occupations that would be involved in EEO-1 reporting, and the percentage of the estimated hourly wage for which they would account. But there is no explanation of the basis for these assumptions. *Id.* at n.12.

<sup>8</sup> *Id.* at 48142.

<sup>9</sup> See U.S. CENSUS BUREAU, *2016 County Business Patterns* (Apr. 2018), <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t>.

As described in the Notice, EEOC's burden estimate also fails to account for the fact that with each subsequent year of reporting, the burden will be reduced because employers will have the appropriate systems in place, and will be familiar with the process for reporting pay data. Indeed, covered employers just completed reporting two years of pay data through the EEO-1, and EEOC did not address the impact of such reporting on its new burden estimate. There is no evidence in the Notice that EEOC's burden estimate was informed by a review of employers' experience of collecting and reporting the pay data, or that EEOC plans to conduct such an evaluation. The first time providing such data is likely to be the most difficult for employers, as they put systems in place -- including those allowing centralized reporting -- that they would rely on for providing the data in the future, yet EEOC's decision not to seek renewal of Component 2 prevents future collection of data using these systems. It also increases the burden for employers if EEOC subsequently develops different pay data reporting collection requirements.

### **C. The 2016 Burden Estimates Were Based on Careful, Rigorous, and Transparent Analysis.**

In contrast to the assertions about its burden methodology in the Notice, EEOC's 2016 burden estimate was based on rigorous, transparent analysis. The Component 2 pay data collection was adopted after an extensive and public process, including a public hearing, a vote by the EEOC Commissioners, and two rounds of notice and public comment ("60-Day Notice" and "30-Day Notice"). As that process made clear, in estimating burden and concluding that the revised EEO-1 would not unduly burden employers, EEOC collected data from multiple sources. As set out in its July 2016 30-Day Notice,<sup>10</sup> EEOC's proposal was informed by the 2012 National Academy of Sciences' study regarding the collection of compensation data ("NAS Study"), which concluded that use of the EEO-1 for pay data collection would be "quite manageable for both EEOC and the respondents."<sup>11</sup> EEOC then commissioned an independent Pay Pilot Study ("Pilot Study") to identify the most efficient means of collecting pay data, with a specific focus on the most efficient and least costly methods for employers to transmit pay data.<sup>12</sup> This Pilot Study was completed in 2015 and also informed EEOC's analysis.<sup>13</sup>

In addition, EEOC held a two-day meeting in March 2012 on data collection procedures with employer representatives, statisticians, human resources information systems experts, and information technology specialists, which included a discussion of pay data collection and estimated burdens; the recommendations provided in that meeting included a recommendation that reporting requirements be aligned with other agencies but concluded that the cost burden of reporting pay data to EEOC would be minimal.<sup>14</sup>

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<sup>10</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Agency Information Collection Activities, Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1)*, 81 Fed. Reg. 45479, 45480 (Jul. 14, 2016) [30-Day Notice].

<sup>11</sup> NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, *Collecting Compensation Data From Employers* 60 (2012), <http://www.nap.edu/catalog/13496/collecting-compensation-data-from-employers> [NAS Study].

<sup>12</sup> SAGE COMPUTING, INC., *Final Report* 8, 101 (Sept. 2015), <http://eeoc.gov/employers/eo1survey/pay-pilot-study.pdf>.

<sup>13</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1)*, 81 Fed. Reg. 5113 (Feb. 1, 2016) [60-Day Notice].

<sup>14</sup> See SAGE COMPUTING, INC., *EEOC Survey System Modernization Work Group Meeting 2* (Mar. 2012), <https://www.eeoc.gov/employers/eo1survey/survey-modernization.pdf>.



EEOC also reviewed the burden analysis the Office of Federal Contract Compliance Programs (“OFCCP”) of the Department of Labor had previously conducted on a compensation data collection tool focused narrowly on federal contractors in 2014, and the public comments submitted to OFCCP regarding burden estimates based on that proposal.<sup>15</sup> In March 2016, EEOC held a public hearing on the proposed revisions where it heard testimony from employer representatives, among others.<sup>16</sup>

EEOC also received and considered hundreds of public comments on its February 2016 60-Day Notice, including numerous comments from the employer community. Based on its consideration of these comments, EEOC made multiple revisions to the burden analysis between the 60-Day Notice and 30-Day Notice. For example, based on comments, EEOC lowered its estimate of the level of automation typical for employer completion of the EEO-1. While the 60-Day Notice assumed that EEO-1 forms would all be submitted in one data upload filed by a firm on behalf of all of the firm’s establishments, in the 30-Day Notice, EEOC based its estimate of the number of firms who would rely on an automated data upload on the number of firms using this method in 2014<sup>17</sup>—a conservative estimate given that from year to year, more firms automate this process. It also increased its estimate of the number and variety of professional staff who would spend time gathering the relevant data and submitting the report at both the firm and the establishment level, based on employer input.<sup>18</sup>

In 2016, EEOC calculated that to complete the revised EEO-1, 60,886 firms would file 674,146 establishment reports, taking 15.2 burden hours per firm and 1.9 burden hours per establishment, for a total 1,892,979.5 hours--approximately 31 hours per firm.<sup>19</sup> This conclusion was consistent with the burden estimate offered by some in the business community, including the Society for Human Resources Management (“SHRM”), which reported in its comments in 2016 that in its survey of members, 80 percent estimated that the revised EEO-1 form would require 30 hours of time or less to file.<sup>20</sup> This survey of the employer community actually suggests a lighter burden than does the final EEOC conclusion that on average a firm would be able to complete the revised EEO-1 form in 31 hours. SHRM surveyed 262 of its members in reaching this conclusion.<sup>21</sup> By contrast, the U.S. Chamber of Commerce’s assertion in its February 27, 2017, letter to OMB that completing the revised EEO-1 form will take 132 hours per firm was based on a survey of only 50 employers. EEOC’s 2016 estimate, consistent with SHRM estimates, was further informed by its own experience working with EEO-1 stakeholders over many years.<sup>22</sup>

EEOC also undertook its own analysis regarding the burden of bridging HRIS and payroll systems for reporting pay data on the EEO-1 form in the face of the broad variety of employer estimates of the cost and burden of providing such data. As it stated in the 30-Day Notice, it determined that major HRIS vendors already allow for the collection of EEO-1 demographic

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<sup>15</sup> 60-Day Notice, 81 Fed. Reg. 5113.

<sup>16</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *Public Hearing: Public Input into the Proposed Revisions to the EEO-1 Report* (Mar. 16, 2016), <https://www.eeoc.gov/eeoc/meetings/3-16-16/index.cfm>.

<sup>17</sup> 30-Day Notice, 81 Fed. Reg. at 45493-5.

<sup>18</sup> *Id.* at 45493.

<sup>19</sup> *Id.*

<sup>20</sup> Society for Human Resource Mgmt, *Comment on the Equal Employment Opportunity Commission’s Proposed Revision of the Employer Information Report (EEO-1)*; ID: EEOC-2016-0002-0001, 81 Fed. Reg. 5113 (Feb. 1, 2016) 22 (Apr. 1, 2016).

<sup>21</sup> *Id.* at 8.

<sup>22</sup> 30-Day Notice, 81 Fed. Reg. at 45493.

data and offer the capacity to record year-to-date gross and paid earnings. EEOC thus reasonably concluded that “creating software solutions for the EEO-1, components 1 and 2, may not be as complex or novel as some comments suggested.”<sup>23</sup> Indeed, compensation management systems and software are specifically 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 and can be expected to provide off-the-shelf solutions to allow this bridging of systems.<sup>24</sup>

Finally, EEOC provided employers with over a year to prepare to submit this data and extended the reporting deadline in response to employer feedback. At numerous points the business community was invited to, and did submit, feedback about methodology and burden, which was incorporated into the final Component 2 proposal. This Notice is an attempt to circumvent what should be a thorough and transparent process to renew a data collection.

## **II. THE PAY DATA TO BE COLLECTED THROUGH COMPONENT 2 WILL GENERATE SUBSTANTIAL BENEFIT.**

Pay inequality continues to be a pressing problem for women and people of color despite federal laws protecting against pay discrimination, including by race, ethnicity, and gender. While the Notice examines at length the projected burden to employers of submitting information through the EEO-1, it contains no discussion of the benefits of pay data collection through Component 2. The pay data is critically important in helping to identify compensation discrimination, improving enforcement of pay discrimination laws, and promoting self-analysis and compliance by reporting employers. EEOC Chair Dhillon herself recently affirmed that “transparency of pay data” is a useful tool for addressing pay discrimination,<sup>25</sup> but the Notice contains no such acknowledgement, and instead summarily concludes that Component 2 pay data is of “unproven utility” to enforcement.

### **A. The Component 2 Pay Data Will Help Identify and Address Pay Discrimination, a Crucial Driver of the Gender Pay Gap.**

The Component 2 pay data collection will play an important role in uncovering and combating pay discrimination, a major driver of the gender wage gap. Women working full time, year round continue to confront a stark wage gap, typically making only 82 percent of the median annual wages made by men working full time, year round.<sup>26</sup> The wage gap is even worse when we look specifically at women of color: Black women typically are paid only 62 percent, Native

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<sup>23</sup> *Id.* at 45487.

<sup>24</sup> Sage and Oracle provided EEO-1 Component 2 reporting enhancements to their software in the fall of 2019. See KathleenF, *Sage 100: Announcing Sage 100 Payroll 2.19.4* (Sept. 5, 2019), [https://www.sagecity.com/support\\_communities/sage100\\_erp/f/sage-100-announcements-news-tips/132303/sage-100-announcing-sage-100-payroll-2-19-4](https://www.sagecity.com/support_communities/sage100_erp/f/sage-100-announcements-news-tips/132303/sage-100-announcing-sage-100-payroll-2-19-4); Oracle, *EEO-1 Component 2 Reporting Enhancement Is Now Available* (Sept. 9, 2019), <https://www.oracle.com/webfolder/community/peoplesoft/4290125.html>.

<sup>25</sup> U.S. HOUSE OF REPRESENTATIVES, EDUCATION & LABOR COMMITTEE, CIVIL RIGHTS AND HUMAN SERVICES SUBCOMMITTEE, *Hearing: Examining the Policies and Priorities of the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Programs (OFCCP)* (Sept. 19, 2019), <https://www.youtube.com/watch?v=Ju5bfvdOGrM> [September 2019 Oversight Hearing].

<sup>26</sup> NAT'L WOMEN'S LAW CTR., *The Wage Gap: The Who, How, Why, and What To Do* (Sept. 2019), <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/> [*The Wage Gap: The Who, How*].

American women 57 percent, and Latinas 54 percent of the wages typically paid to white, non-Hispanic men for full-time, year-round work.<sup>27</sup> While Asian American and Pacific Islander (“AAPI”) women typically are paid 90 cents, that number masks larger disparities among different communities of AAPI women.<sup>28</sup> This wage gap has barely changed in a decade, and translates into \$10,194 less in median annual earnings for women and the families they support.<sup>29</sup> The result is that a woman working full time, year round stands to lose \$407,760 over a 40-year period due to the wage gap.<sup>30</sup> To make up this lifetime wage gap, a woman would have to work more than nine years longer than her male counterpart.<sup>31</sup>

A range of factors contributes to the pay gap, including pay discrimination between employees of different genders who are doing the same job.<sup>32</sup> Women are still paid less than men in nearly every occupation,<sup>33</sup> and studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38 percent of the pay gap unexplained.<sup>34</sup> Conscious and unconscious stereotypes about working women remain a driver of this unexplained gap. For example, a salient 2012 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.<sup>35</sup>

Men of color experience similar dynamics compared to white, non-Hispanic men. For every dollar earned by White men, African American men earn 72 cents and Hispanic men earn 62 cents.

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.<sup>36</sup> Moreover, about

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<sup>27</sup> *Id.*

<sup>28</sup> See NAT’L WOMEN’S LAW CTR., *Equal Pay for Asian and Pacific Islander Women* (Mar. 2019), <https://nwlc.org/resources/equal-pay-for-asian-pacific-islander-women/>.

<sup>29</sup> *The Wage Gap: The Who, How*, *supra* note 26.

<sup>30</sup> Lifetime wage gaps for women of color are significantly larger. For instance, Black women lose \$941,600 and Latinas \$1,121,440. NAT’L WOMEN’S LAW CTR., *The Lifetime Wage Gap, State By State* (Oct. 10, 2019), <https://nwlc.org/resources/the-lifetime-wage-gap-state-by-state/>.

<sup>31</sup> *The Wage Gap: The Who, How*, *supra* note 26.

<sup>32</sup> Francine D. Blau. & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, NAT’L BUREAU OF ECONOMIC RESEARCH (Jan. 2016), <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), <http://nwlc.org/resources/50-years-counting-unfinished-business-achieving-fair-pay/>.

<sup>33</sup> Ariane Hegewisch & Adiam Tesfaselassie, *The Gender Wage Gap by Occupation 2018*, INST. FOR WOMEN’S POLICY RESEARCH (Apr. 2019), <https://iwpr.org/publications/gender-wage-gap-occupation-2018/>; Jessica Schieder & Elise Gould, “Women’s work” and the gender pay gap 3, ECONOMIC POLICY INST. (Jul. 2016), <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/>.

<sup>34</sup> Francine D. Blau. & Lawrence M. Kahn, *supra* note 32.

<sup>35</sup> Corinne A. Moss-Racusin 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), <http://www.pnas.org/content/109/41/16474.abstract#aff-1>.

<sup>36</sup> 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



60 percent of workers in the private sector nationally are either forbidden or strongly discouraged from discussing their pay with their colleagues.<sup>37</sup> 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.

Collecting 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.

## **B. Availability of Component 2 Pay Data Will Enhance Enforcement Efforts.**

Component 2 pay data will help both EEOC and 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.

Collection of pay data will provide EEOC and OFCCP with a critical tool for focusing investigatory resources to identify pay discrimination within equivalent jobs at an employer. As EEOC noted in the July 2016 30-Day Notice, EEOC currently lacks employer and establishment level pay data that would be useful to enforcement staff in investigating potential pay discrimination before issuing a subpoena or detailed request for information.<sup>38</sup> Component 2 data would help EEOC with the initial assessment of discrimination charges.<sup>39</sup> It would also provide statistical evidence EEOC could use to support allegations in litigation initiated by EEOC.

Contrary to some employers' claims, 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 usefully informing EEOC's investigation and enforcement activities and allowing identification of firms that sharply depart from these patterns for further analysis.<sup>40</sup>

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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).

<sup>37</sup> INST. FOR WOMEN'S POLICY RESEARCH, *Pay Secrecy and Wage Discrimination* (Jan. 2014), [https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q016%20\(1\).pdf](https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q016%20(1).pdf).

<sup>38</sup> 30-Day Notice, 81 Fed. Reg. 45479, 45483.

<sup>39</sup> *Id.* at 45490.

<sup>40</sup> 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* (Jul. 18, 2012) (testimony of Dr. Marc Bendick, Jr.), <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 COMM'N, *Special Reports*, <http://www.eeoc.gov/eeoc/statistics/reports/index.cfm>.

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.<sup>41</sup>

Additionally, 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 industry and regional 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.

Component 2 pay data will also aid enhance enforcement by flagging deviations from compensation patterns that may be driven by 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.

### **C. Pay Data Collection and Reporting Through Component 2 Will Promote Employer Self-Evaluation and Compliance.**

Both the process of responding to Component 2 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.<sup>42</sup> Reporting pay

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<sup>41</sup> *NAS Study, supra* note 11 at 17-25; see U.S. DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *Methodology for Developing the Supply and Services Scheduling List FY 2019, Release-1*, <https://www.dol.gov/ofccp/scheduling/>.

<sup>42</sup> See HARV. BUS. REV. ANALYTIC SERV., *Pulse Survey: Navigating the Growing Pay Equity Movement: What Employers Need to Know About What To Do* 3 (2019), <https://hbr.org/sponsored/2019/10/why-your-company-needs-to-implement-pay-equity-audits-now> (“54% of U.K. respondents cite pay data reporting requirements from

data by gender and race within job categories ensures that employers are collecting and evaluating it. A regulatory requirement for collection and reporting pay data also can be an important tool for smaller companies, who may not have the resources to retain staff or consultants with the expertise to conduct more detailed analysis. By incentivizing and facilitating such employer self-evaluation, Component 2 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.

Self-evaluation engendered by Component 2 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.<sup>43</sup> Competitive -- and thus equal -- pay is critical for recruiting and retaining a diverse workforce and high performers, particularly for younger women workers.<sup>44</sup> And when workers are confident they are being paid fairly, they are more likely to be engaged and productive.<sup>45</sup> 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.<sup>46</sup>

Moreover, making aggregate EEO-1 data publicly available can promote employer compliance with equal pay standards in a number of important ways. Employers can use the aggregate data

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federal/national and regional governments as external drivers for them to perform pay equity analyses, versus 28% for their U.S. counterparts”).

<sup>43</sup> *Id.* at 8. See Vivian Hunt, Dennis Layton, & Sara Prince, *Why Diversity Matters*, MCKINSEY & CO. 9-13 (Jan. 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); Sylvia Ann Hewlitt, Melinda Marshall & Laura Sherbin, *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2013), <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. Natasha Lamb & Will Klein, *A Proactive Approach to Wage Equality is Good for Business*, EMPLOYMENT RELATIONS TODAY (Summer 2015), <http://arjuna-capital.com/news/a-proactive-approach-to-wage-equality-is-good-for-business/> [*Proactive Approach*].

<sup>44</sup> A recent survey found that the top reasons Millennials and Gen Zs plan to leave their current employment in the next two years are “[d]issatisfaction with pay and lack of advancement and professional development opportunities.” THE DELOITTE GLOBAL MILLENNIAL SURVEY 2019 (2019), <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html>; Lauren Noel & Christie Hunter Arscott, *Millennial Women: What Executives Need to Know About Millennial Women 4*, ICEDR (2015), [http://www.icedr.org/research/documents/14\\_millennial\\_snapshot.pdf](http://www.icedr.org/research/documents/14_millennial_snapshot.pdf) (Millennial women leave jobs primarily for more compensation).

<sup>45</sup> Courtney Seiter, *The Counterintuitive Science of Why Transparent Pay Works*, Fastcompany.com (Feb. 26, 2016), <http://www.fastcompany.com/3056975/the-future-of-work/the-transparent-pay-revolution-inside-the-science-and-psychology-of-open->

<sup>46</sup> *Proactive Approach*, *supra* note 43; Natasha Lamb, *Closing the pay gap: Silicon Valley's gender problem*, ETHICAL BOARDROOM (Jun. 7, 2016), <http://ethicalboardroom.com/leadership/diversity/close-the-pay-gap/>; Trillium Asset Mgm't, *Letter to Citigroup Shareholders* (Apr. 16, 2016), <https://www.sec.gov/Archives/edgar/data/831001/000121465916010905/j415160px14a6g.htm>.

to evaluate their own metrics and pay practices, and set industry benchmarks within a specific geographic area. 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.

Recent legislation in other countries demonstrates the positive impact of pay data and wage gap reporting laws. The United Kingdom requires public and private employers with at least 250 employees to annually submit to a government agency, and publish on a publicly accessible website, information designed to show whether there is a difference in the average pay of their male and female employees, including the mean and median hourly rate of pay; bonus pay paid to male and female employees; proportions of male and female employees who were paid bonus pay; and the proportions of male and female employees in preset pay bands by quartiles.<sup>47</sup> The data is publicly available and searchable on both a U.K. government website and various media websites.<sup>48</sup>

Two cycles of reporting have started driving change in the U.K. Media organizations also analyzed the data by employer, industry, and pay quartile and published the results, publicly revealing the companies with the largest disparities.<sup>49</sup> Many companies also filed publicly accessible action plans, demonstrating that the reporting requirement spurred companies to explain their data and develop a plan to address disparities.<sup>50</sup> Companies are also creating public-facing webpages with their metrics, and publicly acknowledging the importance of gender equality for the overall good of the workforce.<sup>51</sup>

Additionally, a recent study showed that the gender wage gap shrank in the wake of Denmark's 2006 Act on Gender Specific Pay Statistics, which mandates that companies with over 35

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<sup>47</sup> The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, 2017 No. 172, (U.K.), [http://www.legislation.gov.uk/ukxi/2017/172/pdfs/ukxi\\_20170172\\_en.pdf](http://www.legislation.gov.uk/ukxi/2017/172/pdfs/ukxi_20170172_en.pdf); *What is the Equality Act?*, Equality and Human Rights Commission (Oct. 30, 2017), <https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>; *Gender Pay Gap Reporting*, GOV.UK (Jan. 28, 2017), <https://www.gov.uk/government/news/gender-pay-gap-reporting>.

<sup>48</sup> See Lucy Meakin and Hayley Warren, *Second Year of U.K. Gender Pay Gap Reporting Indicates Little Has Changed So Far*, BLOOMBERG (Apr. 4, 2019), <https://www.bloomberg.com/graphics/2019-uk-gender-pay-gap/>.

<sup>49</sup> See Aleksandra Wisniewska, et al., *Gender Pay Gap: women still short-changed in the UK*, FINANCIAL TIMES (Apr. 23, 2019), <https://ig.ft.com/gender-pay-gap-UK-2019/>; Lucy Meakin and Hayley Warren, *Second Year of U.K. Gender Pay Gap Reporting Indicates Little Has Changed So Far*, BLOOMBERG (Apr. 4, 2019), <https://www.bloomberg.com/graphics/2019-uk-gender-pay-gap/>. Analyses of the pay quartile data demonstrate that in most companies, women are underrepresented in higher paying jobs and overrepresented in low paying jobs. See Daniella McGuigan, *Gender Pay Gap Reporting—Happy Anniversary?*, NAT'L L. REV. (Apr. 5, 2019), <https://www.natlawreview.com/article/gender-pay-gap-reporting-happy-anniversary>.

<sup>50</sup> Hannah Murphy, *UK pay data force companies to mind the gender gap*, FINANCIAL TIMES (Sept. 26, 2017), <https://www.ft.com/content/dd21e03e-634a-11e7-8814-0ac7eb84e5f1> (e.g., "After digging into its pay data, Virgin Money drew up several initiatives to improve gender balance generally in its highest ranks.").

<sup>51</sup> See, e.g., J.P. Morgan, *2017 UK Gender Pay Gap Report 2017* (2017), <https://www.jpmorgan.com/global/disclosures/gender-pay-gap-uk>; McKinsey & Co., *UK Gender Pay Gap report 2018* (2018), <https://www.mckinsey.com/uk/our-people/uk-gender-pay-gap-report>; Cisco, *Cisco UK Gender Pay Gap Report* (2018), [https://www.cisco.com/c/dam/en\\_us/about/inclusion-collaboration/uk-gender-pay-gap-report.pdf](https://www.cisco.com/c/dam/en_us/about/inclusion-collaboration/uk-gender-pay-gap-report.pdf).

employees report on gender pay gaps.<sup>52</sup> The study showed from 2003 to 2008, the gender pay gap at mandatory reporting firms shrank seven percent relative to the pre-regulation wage gap.

### **III. THE NOTICE EVIDENCES EEOC'S WORRYING LACK OF COMMITMENT TO PAY EQUITY AND PAY DATA COLLECTION.**

Since OMB blocked the use of EEO-1 Component 2 in August 2017, EEOC has repeatedly tried to evade or curtail its obligation to collect such data. When OMB blocked the pay data collection, without offering an explanation or justification for its decision, it also instructed EEOC to submit a new proposal and justification for information collection through the EEO-1.<sup>53</sup> EEOC failed to do so. EEOC is currently collecting pay data via Component 2 only because it is compelled to do so by a federal court order. Then, in the midst of collecting Component 2 pay data required by the court, EEOC issued the Notice asserting it would no longer do so, and that the pay data was of “unproven utility,” without providing a foundation for that conclusion. The Notice further indicated that “*if* the EEOC seeks to pursue a pay data collection in the future it will do so using notice and comment rulemaking and a public hearing pursuant to Title VII of the Civil Rights Act of 1964.”<sup>54</sup>

During a September 19, 2019 House oversight hearing, EEOC Chair Dhillon indicated that EEOC was committed to undertaking a Title VII rulemaking process to develop a pay data collection that would be useful to EEOC enforcement efforts without imposing an “undue” burden on employers.<sup>55</sup> However, at the hearing she offered no details or timeline regarding such a process, and neither does the Notice. The only specific information that the Chair has offered is concern that the pay data collection is unduly burdensome for employers, despite the extensive stakeholder engagement and analysis underlying the final proposal approved in 2016. The decision to collect pay information -- W-2 earnings and hours worked that employers are already required to collect -- by using the EEO-1 form, with which employers were already familiar, and to share the data with OFCCP, minimizes the compliance burden for regulated employers, in direct response to concerns previously raised by the employer community. EEOC has not yet explained what information or alternative a Title VII rulemaking process will yield that was not available through the lengthy and transparent PRA approval process that included multiple opportunities for public comment (including by employer stakeholders), public hearings, and extensive explanation by EEOC of its analysis and its decision.

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<sup>52</sup> Morten Bennedsen, et al., *Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them*, HARV. BUS. REV. (Jan. 23, 2019), <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them>.

<sup>53</sup> *Rao Memo*, *supra* note 1.

<sup>54</sup> *September 2019 Notice*, *supra* note 5, n.11(emphasis added).

<sup>55</sup> *September 2019 Oversight Hearing*, *supra* note 25.



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Component 2 is a powerful enforcement tool that promises to make a real difference in closing the pay gaps that have shortchanged women for far too long. Women, who are losing thousands of dollars a year, cannot afford to keep waiting for change; nor can the families depending on their earnings. Accordingly, we strongly urge EEOC to reconsider its decision and renew Component 2 of the EEO-1.

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