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Submitted Electronically

Re: Notice of information collection—request for new control number and approval of collection: Employer Information Report (EEO-1) Component 1; revision of existing approval for EEO-1 Component 2, EEOC-2020-0002-0001

Dear Ms. Wilson:

The National Women's Law Center ("the Center") is writing to comment on the Equal Employment Opportunity Commission's ("EEOC") March 23, 2020 "Notice of information collection—request for new control number and approval of collection: Employer Information Report (EEO-1) Component 1; revision of existing approval for EEO-1 Component 2" ("30-Day 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 women with low incomes 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 30-Day Notice announces that while EEOC seeks to submit a request for a three-year approval of Component 1 of the EEO-1, the "EEOC is not submitting a request to approve Component 2 of the EEO-1 collection." Component 2 of the EEO-1, which was originally approved in September 2016, requires covered employers to submit data on employees' W-2 earnings and hours worked by pay band, as well as sex, race, ethnicity and job category. The Center strongly urges EEOC to reconsider and immediately request renewal of Component 2 pursuant to the Paperwork Reduction Act ("PRA").

As a preliminary matter, EEOC's decision to pursue rulemaking in the middle of a national emergency, and to provide only 30 days for public comment, is troubling and casts a shadow on the integrity of the comment process.

The COVID-19 global pandemic has created an unprecedented public health crisis and widespread economic instability. Quarantine, social distancing, and widespread closures, combined with illness, economic insecurity, relocation, and loss of internet access create substantial barriers to the ability of members of the public—including working people affected by the change sought by the 30-Day Notice—to submit comments at all, let alone in a timely manner. EEOC is well aware of these barriers but nevertheless seeks to continue this rulemaking process.

Moreover, the pandemic and its economic repercussions are disproportionately impacting women, people of color, and other historically marginalized communities. Civil rights agencies such as the EEOC should be taking affirmative steps to protect workers from these communities from the immediate and long-term impacts of COVID-19. EEOC's efforts to discontinue the Component 2 pay data collection—an initiative that helps uncover pay discrimination and address gender and racial wage gaps—does the opposite. In a time of economic crisis, amidst a wave of anti-Asian bias, workers now face heightened risks of workplace discrimination, including discrimination based on age and disability, and the crisis has made concrete the ways in which the wage gap harms women of color. Lost earnings due to the wage gap are exacerbating the devastating effects of COVID-19 for many women and women of color on the front lines of this crisis, who make up the majority of workers providing essential services, as well as those in the industries shedding low-paid jobs as a result of the pandemic. Ensuring equal pay, and women and families' economic security, is more important than ever; pay data collected through Component 2 will play a critical role in uncovering and combating pay discrimination, a crucial factor driving the gender wage gap.

EEOC's insistence that the utility of Component 2 pay data is outweighed by burden to employers is unsupported by information in the 30-Day Notice. The 30-Day Notice also contains no discussion of the benefits of Component 2 pay data collection, or a response to comments raised by equal pay advocates about the data's utility. Instead, EEOC conclusorily states that the pay data is of "unproven utility," ignoring the fact that by its own actions EEOC seeks to foreclose any opportunity for the agency, other enforcement agencies, or the public to evaluate in a transparent manner the utility of the two years of pay data EEOC *has already collected*. Moreover, while EEOC spends a considerable amount of time in the 30-Day Notice discussing the burden to employers of collecting and reporting the data through Component 2, there is no discussion of the significant burden the wage gap imposes on women of color and the economy.¹

The Component 2 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—all of which are particularly relevant during this national health and economic crisis. Without a good faith analysis of the benefit of the two years of pay data that EEOC has already collected, the EEOC has failed to undertake a responsible

¹ See Testimony of Jocelyn Frye, U.S. Equal Employment Opportunity Commission, *Hearing of November 20, 2019 - Public Hearing on the Proposed Revisions of the Employer Information Report (EEO-1)*, <https://www.eeoc.gov/eeoc/meetings/11-20-19/frye.cfm>.

analysis to determine whether any burden to employers associated with the pay data collection outweighs the utility of the data.

I. EEOC’S CONCLUSION THAT THE BURDEN OF COLLECTING COMPONENT 2 PAY DATA OUTWEIGHS THE DATA’S UTILITY IS DUBIOUS.

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.” But EEOC’s justification is undermined by the premature rush to judgment about the burden and utility of the pay data collected pursuant to Component 2—a decision made prior to conducting any meaningful analysis of the data actually collected and employers’ actual experiences submitting it. Additionally, EEOC’s assumptions and methodology for calculating burden are suspect, for reasons previously discussed in our response to the 60-Day Notice.

A. EEOC Prematurely Concluded That the Burden of Collecting Component 2 Pay Data Outweighed the Utility of the Data.

EEOC issued the 60-Day Notice on September 12, 2019, when 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.² (The court subsequently ordered EEOC to continue to collect data through January 31, 2020, and declared the collection complete in February 2020).³ Therefore, at the time EEOC concluded that the utility of Component 2 pay data was outweighed by the burden of collecting it, EEOC had not yet finished collecting the data in question from employers. If EEOC had not yet finished collecting the pay data, it was not in a position to reach a reasoned conclusion about the burden or the utility of the data based on all available evidence; it could only rely on presumptions to evaluate burden, and not an analysis of employers’ actual experience submitting the pay data as part of the court-ordered collection in progress at the time.

The 60-Day Notice concluded 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.” The 2016 30-Day Notice calculated burden based on the number of firms filing, and estimated a burden of 15.2 hours per filer to submit Components 1 and 2 in 2017, plus an additional 1.9 hours per report for tasks performed at the establishment level, based on

² Nat’l Women’s L. Ctr. v. O.M.B., et al., 358 F.Supp.3d 66 (D.C. Cir. Mar. 4, 2019) *appeal filed* May 3, 2019, *argued* Jan. 24, 2020 (D.C. Cir.), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/03/EEO-1-Opinion.pdf>.

³ Nat’l Women’s Law Ctr. v. Office of Mgm’t & Budget, Civ. Action No. 17-cv-2458 (D.D.C.), Order dated Oct. 29, 2019; Order dated Feb. 10, 2020.

electronic filing.⁴ The 2019 60-Day Notice purported to establish a more accurate methodology based on the number and type of reports submitted, but it vastly inflates the burden estimate. EEOC estimated an average burden per filer of five hours to complete a Component 1 report⁵—and this appears to be *per form filed* (“9,167,393 annual burden hours for 1,915,345 Component 1 reports”). The 30-Day Notice indicates EEOC estimated “it would take a filer, on average, 7.4 hours to complete Component 2 data for 2017” and that “it would take a filer, on average, 7.3 hours to complete Component 2 data for 2018.”⁶ But it not clear if this estimate is again per filer per form filed.

EEOC presents no justification for the assumptions underlying its per-form burden estimates. Many of the form types require virtually the same information, but EEOC assumes vastly larger per-form burdens for some of them. Furthermore, EEOC does not appear to have relied on employers’ actual experiences reporting 2017 and 2018 data to provide a more accurate burden estimate. For example, it could have based its burden estimate on the number of firms using the data upload process to file their reports. 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, instead of manually completing multiple forms online. EEOC’s burden estimate appears to assume filers will choose the more burdensome method of submission, instead of relying on what employers actually did. 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. The self-serving anecdotes EEOC chose and summarized from employer comments on the 60-Day Notice do nothing to change that.

B. The 2016 Burden Estimates Were Based on Careful, Rigorous, and Transparent Analysis.

In contrast to the assertions about its burden methodology in the 60-Day and 30-Day Notices, 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 (“2016 60-Day Notice” and “2016 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,⁷ EEOC’s proposal was

⁴ 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, 45496 (Jul. 14, 2016) [2016 30-Day Notice].

⁵ 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, 48142 n.21 (Sept. 12, 2019) [2019 60-Day Notice].

⁶ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *Notice of information collection—request for new control number and approval of collection: Employer Information Report (EEO-1) Component 1; revision of existing approval for EEO-1 Component 2*, 85 Fed. Reg. 16340, 16346 n.28 (Mar. 23, 2020) [2020 30-Day Notice].

⁷ 2016 30-Day Notice, 81 Fed. Reg. at 45480.

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.”⁸ 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.⁹ This Pilot Study was completed in 2015 and also informed EEOC’s analysis.¹⁰

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.¹¹ And unlike the current situation, in 2016 EEOC revised its burden estimates in response to feedback from stakeholders, such as industry comments on the 2016 60-Day Notice and at the EEOC’s 2016 public hearing, and clearly explained the basis for the revision in the 2016 30-Day Notice.¹²

II. THE BENEFIT OF THE PAY DATA COLLECTED THROUGH COMPONENT 2 IS UNDERSCORED BY THE CURRENT NATIONAL CRISIS.

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. EEOC’s effort to discontinue the Component 2 pay data collection, at a time when race and gender wage gaps are especially harmful against the backdrop of the COVID-19 pandemic, is particularly misguided and short-sighted.

The Component 2 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 affirmed that “transparency of pay data” is a useful tool for addressing pay discrimination,¹³ but the 30-Day Notice contains no such acknowledgement, and instead reiterates that Component 2 pay data is of “unproven

⁸ 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].

⁹ SAGE COMPUTING, INC., *Final Report* 8, 101 (Sept. 2015), <http://eeoc.gov/employers/eo1survey/pay-pilot-study.pdf>.

¹⁰ 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) [2016 60-Day Notice].

¹¹ See SAGE COMPUTING, INC., *EEOC Survey System Modernization Work Group Meeting 2* (Mar. 2012), <https://www.eeoc.gov/employers/eo1survey/survey-modernization.pdf>.

¹² *2016 30-Day Notice*, 81 Fed. Reg. at 45493-5.

¹³ 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].

utility” to enforcement. EEOC allocates a substantial portion of its 30-Day Notice to defending its burden calculations and justification for refusing to seek renewal of Component 2. But it gives short shrift to arguments addressing the utility of the Component 2 data, despite access to information in comments responding to the 60-Day Notice, testimony from the EEOC’s November 2019 public hearing, and new information about the economic impact of the COVID-19 pandemic on women of color, who already faced substantial gender and race wage gaps.

The 30-Day Notice does not provide a substantive response to comments or testimony about the benefits of the pay data, and EEOC again failed to produce any explanation about whether or how the agency analyzed the 2017 and 2018 pay data it has collected and evaluated its utility – or whether it plans to in the future.¹⁴ EEOC could address the utility of the pay data by analyzing it, and subject its methodology and aggregated, anonymized results to public review and comment.

Moreover, to the extent that the utility of pay data is “unproven” to EEOC’s satisfaction, that is an issue created entirely by EEOC’s actions. EEOC claims it “should consider information from the ongoing Component 2 data collection before deciding whether to submit another pay data collection request to OMB,” and that without this assessment the “practical utility” of the pay data was far outweighed by the burden to employers.¹⁵ But EEOC had time to complete the court-ordered pay data collection and analyze the data before seeking renewal of Components 1 or 2; the court extended the expiration date of the final 2016 PRA notice to April 5, 2021.¹⁶ EEOC simply chose not to wait, in an effort to undermine the future of Component 2.

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.¹⁷ The wage gap is even worse when we look specifically at women of color: Black women typically are paid only 62 percent, Native American women 57 percent, and Latinas 54 percent of the wages typically paid to white, non-Hispanic men for full-time, year-round work.¹⁸ While Asian American and Pacific Islander (“AAPI”) women typically are paid 90 cents, that number masks larger disparities among

¹⁴ 2020 30-Day Notice, 85 Fed. Reg. at 16343.

¹⁵ *Id.*

¹⁶ Nat’l Women’s Law Ctr. v. Office of Mgm’t & Budget, Civ. Action No. 17-cv-2458 (D.D.C.), Order dated Apr. 25, 2019.

¹⁷ 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*].

¹⁸ *Id.*

different communities of AAPI women.¹⁹ 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.²⁰ 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, and for some women of color, the 40-year loss is near or over \$1 million.²¹ To make up this lifetime wage gap, a woman would have to work nine years longer than her male counterpart.²²

A range of factors contributes to the pay gap, including pay discrimination between employees of different genders who are doing the same job.²³ Women are still paid less than men in nearly every occupation,²⁴ and studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38 percent of the pay gap unexplained.²⁵ Conscious and unconscious stereotypes about working women remain a driver of this unexplained gap.²⁶

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.²⁷ Moreover, about 60

¹⁹ See NAT'L WOMEN'S LAW CTR., *Equal Pay for Asian and Pacific Islander Women* (Jan. 2020), <https://nwlc.org/resources/equal-pay-for-asian-pacific-islander-women/>.

²⁰ *The Wage Gap: The Who, How*, *supra* note 17.

²¹ Black women lose \$941,600 and Latinas \$1,121,440 over a 40-year career. Amanda Fins, *Women and the Lifetime Wage Gap: How Many Woman Years Does It Take To Equal 40 Man Years?*, NAT'L WOMEN'S LAW CTR. (Mar. 2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/03/Women-and-the-Lifetime-Wage-Gap.pdf>.

²² *Id.*

²³ 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/>.

²⁴ 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/>.

²⁵ Blau & Kahn, *supra* note 23.

²⁶ 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. 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>.

²⁷ 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

percent of workers in the private sector nationally are either forbidden or strongly discouraged from discussing their pay with their colleagues.²⁸ 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.

COVID-19 and the unemployment crisis it has ushered in have exposed and exacerbated existing inequities and economic insecurities that increase risk of workplace discrimination, including pay discrimination. Now, workers are more desperate to keep a paycheck at any cost and are less willing to uncover and challenge discrimination and workplace abuses and face retaliation for doing so.

Women, and particularly women of color, are on the frontlines of defense against COVID-19 and its devastating consequences, whether as the first responders and people providing essential services—like those in child care, health care, and grocery stores—as well as over-represented in the industries shedding jobs as a result of the public health crisis—like restaurants, retail, and hotels.²⁹ The over-representation of women and women of color in these jobs means women on the frontlines of COVID-19 defense are being consistently undervalued as they do the work that the rest of the country now deems essential. For instance, women who work as home health and personal care aides—the majority of whom are women of color—are losing \$417 per month due to the gender wage gap.³⁰ Conversely, the women and women of color on the frontlines of COVID-19 job loss not only are getting hit by the economic impacts of the pandemic, but also are less able to absorb those costs because they have lost earnings due to the gender wage gap. Waitresses, for instance, have typically lost \$500 per month to the gender wage gap.³¹ These lost earnings due to the gender wage gap mean that women of color in particular have no financial

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).

²⁸ 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).

²⁹ Maya Raghu & Jasmine Tucker, *The Wage Gap Has Made Things Worse for Women on the Front Lines of COVID-19*, NAT’L WOMEN’S LAW CTR., Mar. 30, 2020, <https://nwlc.org/blog/the-wage-gap-has-made-things-worse-for-women-on-the-front-lines-of-covid-19/> [*The Wage Gap Has Made Things Worse*]; Jasmine Tucker & Julie Vogtman, WHEN HARD WORK IS NOT ENOUGH: WOMEN IN LOW-PAID JOBS, NAT’L WOMEN’S LAW CTR. (Apr. 2020), <https://nwlc.org/resources/when-hard-work-is-not-enough-women-in-low-paid-jobs/>; Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES, Apr. 18, 2020, <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html?searchResultPosition=1>.

³⁰ *The Wage Gap Has Made Things Worse*, *supra* note 29.

³¹ *Id.*

buffer to deal with job loss and critical expenses—housing, health care, food—related to this crisis.

The current pandemic and its immediate and long-term economic impacts heighten the importance of proactive efforts to address gender and race wage gaps and pay discrimination. Collecting compensation data from larger private employers and federal contractors through Component 2 will improve the effectiveness of enforcement efforts and increase the likelihood of employer self-correction, thus targeting pay discrimination on multiple fronts. EEOC’s decision to reject this important enforcement tool at this time is deeply troubling.

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

Component 2 pay data will help EEOC tackle discrimination by private employers and large federal contractors. By utilizing the EEO-1 form, which is already known and used by employers, the Component 2 collection was intended to empower EEOC and the Office of Federal Contract Compliance Programs (“OFFCP”) 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 their pay discrimination enforcement efforts. Yet EEOC and OFCCP have chosen to repudiate Component 2 data in an apparently coordinated effort to undermine any future attempts to collect pay data regularly from large employers, to use that data for enforcement, or to allow other agencies to use the data.

Notwithstanding OFCCP’s recent rejection of EEO-1 pay data³² and its power to stimulate employer self-analysis and inform the deployment of investigatory resources, Component 2 will provide EEOC 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.³³ Charging parties also will typically lack this data. Component 2 data would thus help EEOC with the initial assessment of pay discrimination charges and related charges.³⁴ 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

³² See OFFICE OF FEDERAL CONTRACTOR COMPLIANCE PROGRAMS, *Intention Not to Request, Accept, or Use Employer Information Report (EEO-1) Component 2 Data*, 84 Fed. Reg. 64932 (Nov. 25, 2019), and Section III, *infra*.

³³ *2016 30-Day Notice*, 81 Fed. Reg. at 45483.

³⁴ *Id.* at 45490.

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.³⁵ 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 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 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 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. Racial and gender bias and stereotypes also can intersect to create additional barriers to the hiring and advancement of women of color in the workplace. Hiring discrimination that keeps women or people of color out of higher paying jobs in a company, or harassment that systematically pushes women or people of color out of highly paid roles may result in race or gender pay gaps within the firm. If African American employees, for example, are typically scheduled for fewer work hours, or Asian-American women are systematically excluded from promotion 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.

³⁵ EEOC 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>.

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.³⁶ Reporting pay 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 by job category also can be an important tool and prompt 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.³⁷ Competitive—and thus equal—pay is critical for recruiting and retaining a diverse workforce and high performers, particularly for younger women workers.³⁸ And when workers are confident they are being paid

³⁶ 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 federal/national and regional governments as external drivers for them to perform pay equity analyses, versus 28% for their U.S. counterparts”).

³⁷ *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 Hewlett, 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*].

³⁸ 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 (Millennial women leave jobs primarily for more compensation).

fairly, they are more likely to be engaged and productive.³⁹ 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.⁴⁰

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 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.⁴¹ The data is publicly available and searchable on both a U.K. government website and various media websites.⁴²

³⁹ 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->

⁴⁰ *Proactive Approach*, *supra* note 37; 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>.

⁴¹ 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; *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>.

⁴² See Lucy Meakin & 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/>. The U.K. government recently suspended reporting requirements due to the effects of the COVID-19 pandemic. Lucy Meakin & Jeremy Diamond, *Coronavirus Pauses U.K. Gender Pay Gap Reporting Ahead of April Deadline*, BLOOMBERG, Apr. 3, 2020, <https://www.bloomberg.com/news/articles/2020-04-03/britain-s-gender-pay-reporting-is-paused-because-of-pandemic>.

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.⁴³ 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.⁴⁴ 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.⁴⁵

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 employees report on gender pay gaps.⁴⁶ 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.

EEOC's claim that the burden to employers is too large to justify Component 2 rings hollow, given that some companies required to submit Component 2 data also have been submitting pay and wage gap data pursuant to these more extensive and public reporting requirements in the U.K. and other countries for last two years.

III. BY RESTRICTING OTHER ENTITIES' ACCESS TO AND USE OF EEO-1 DATA, EEOC FURTHER DELIBERATELY UNDERMINES THE PAY DATA'S UTILITY.

As the EEOC continues to undermine the Component 2 pay data collection, it has also taken steps to restrict access to EEO-1 data by other enforcement agencies—including OFCCP and state and local fair employment practices agencies (FEPAs)—and academics and researchers, who could utilize such information to enhance enforcement efforts, and to identify and analyze important patterns and trends within an industry or geographic area. The government's refusal to use pay data for enforcement, and to restrict other federal and state enforcement agencies' access

⁴³ 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 & 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>.

⁴⁴ 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.").

⁴⁵ 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.

⁴⁶ 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>.

to and use of the information, is not an appropriate basis for a determination that the data lack utility.

The 30-Day Notice responds to employer comments asserting concerns about data privacy by stating it is “reviewing and updating” current data sharing memoranda with other federal enforcement agencies such as the Department of Justice, but provides no other information about the timing of the process or the future availability of EEO-1 data. However, EEOC takes more drastic steps with regard to OFCCP. As EEOC notes, the final EEO-1 form approved in 2016 “reflected the contemporaneous expectation that EEOC would share some part of the Component 2 dataset with OFCCP.”⁴⁷ EEO-1 data has been used by OFCCP to aid in the selection of federal contractors for enforcement activities, and by academics to study the impact of affirmative action on women and people of color.⁴⁸ OFCCP also 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.⁴⁹ However, in November 2019, after the 60-Day Notice, and while the court-ordered collection of pay data by EEOC was still ongoing, OFCCP preemptively announced that it would no longer request, accept, or use Component 2 data from EEOC⁵⁰—and shielded this policy change from public review and comment. EEOC in turn states in the 30-Day Notice that it does not intend to provide any Component 2 data to OFCCP.⁵¹ Moreover, the 30-Day Notice states that EEOC is also revising its prior practice of sharing all employer Component 1 data with OFCCP, and instead now plans to provide OFCCP with Component 1 data only for federal contractors.⁵² But EEOC has not explained the circumstances under which it will provide this data to OFCCP, and it is not clear if it will only provide information about a contractor upon OFCCP’s request.

Of even greater concern is the assertion in the 30-Day Notice that EEOC’s “current practice is to share EEO-1 data with a contracted FEPA only upon request and to share only EEO-1 data for an employer within the FEPA’s jurisdiction and only when that employer is a respondent to a particular charge of discrimination cited by the FEPA in its data request.”⁵³ EEOC failed to note that this is a very recent (and previously unannounced) change from its long-established policy, pursuant to which a FEPA previously had broader access to a database of EEO-1 information for all covered employers within its jurisdiction. EEOC’s policy change makes it much harder for

⁴⁷ *2020 30-Day Notice*, 85 Fed. Reg. at 16345 n.23.

⁴⁸ *NAS Study*, *supra* note 8 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/>.

⁴⁹ See Testimony of Dr. Marc Bendick, Jr., *Public Hearing before the U.S. Equal Employment Opportunity Commission* (Jul. 18, 2012), <http://www.eeoc.gov/eeoc/meetings/7-18-12/bendick.cfm>.

⁵⁰ OFFICE OF FEDERAL CONTRACTOR COMPLIANCE PROGRAMS, *Intention Not to Request, Accept, or Use Employer Information Report (EEO-1) Component 2 Data*, 84 Fed. Reg. 64932 (Nov. 25, 2019).

⁵¹ *2020 30-Day Notice*, 85 Fed. Reg. at 16347.

⁵² *Id.* at 16347 and n.33.

⁵³ *Id.* at 16347. Both the 2016 60-Day and 30-Day Notices expressed EEOC’s contemporaneous intention to share Component 2 data with FEPAs. See 2016 60-Day Notice, 81 Fed. Reg. at 5114-5 and n.5, *2016 30-Day Notice*, 81 Fed. Reg. at 45492.

state and local enforcement agencies to more proactively and robustly enforce antidiscrimination laws, which is especially necessary when EEOC fails to do so. A policy change with such significant implications should have been announced in a separate regulatory notice and should have been subject to public notice and comment. Worse, by affirmatively acting to limit the utility of the pay data by preventing other enforcement agencies' access to and use of it, EEOC is distorting the burden-utility analysis.

The 30-Day Notice also states that EEOC is revisiting its policies regarding EEO-1 data access by non-governmental users such as researchers.⁵⁴ Such individuals previously had access to EEO-1 for research purposes pursuant to confidentiality agreements. Now, OMB—the agency that illegally halted the pay data collection at issue here—must approve EEOC's Office of Enterprise Data and Analytics (OEDA) as a federal statistical agency so that EEOC may adopt standard federal procedures on confidential data access, and provide access to EEO-1 data through a secure data facility. The 30-Day Notice does not provide any details or information on the status of that process, further limiting analysis of the data by approved individuals for research purposes -- and consequently public access to research results that could enhance the utility of this data for closing gender and race wage gaps and addressing discrimination.

IV. EEOC'S COMMITMENT TO FUTURE PAY DATA COLLECTION PROPOSALS IS QUESTIONABLE.

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-1.⁵⁵ EEOC failed to do so. EEOC collected pay data via Component 2 only because it was 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 60-Day Notice asserting it would no longer do so as soon as it was no longer obligated to do so by court order, and that the pay data was of "unproven utility," without providing a foundation for that conclusion. OFCCP has also announced, unprompted, that it will no longer request or accept EEO-1 Component 2 pay data from EEOC.

The 60-Day Notice and the 30-Day Notice declare 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."⁵⁶ However, EEOC has offered few details regarding such a process despite numerous opportunities to do so, including Congressional oversight hearing in September 2019, the EEOC's public hearing in November 2019, the 60-Day Notice and the 30-Day Notice. The 30-Day Notice states only that the "EEOC believes that there should be a transparent and open process, aligning with the recommendations in the EEOC commissioned 2012 study from

⁵⁴ 2020 30-Day Notice, 85 Fed. Reg. at 16347.

⁵⁵ 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.

⁵⁶ 2019 60-Day Notice, 84 Fed. Reg. at 48141 n.11, and 2020 30-Day Notice, 85 Fed. Reg. at 16346.

the National Academy of Sciences (NAS), entitled “Collecting Compensation Data from Employers,” (NAS Study), that the EEOC “[d]evelops a plan for using pay data before initiating any data collection” and initiates a “scientifically sound pilot study.”⁵⁷ A notice in the agency’s fall 2019 regulatory agenda states that the EEOC plans to release an advance notice of public rulemaking (ANPRM) in September 2020.⁵⁸ At no point has EEOC indicated when this purported “transparent and open process” will begin, whether it will be informed by an analysis or evaluation of the pay data it has already collected, or whether it intends to share the results of that analysis and invite public engagement and comment before the ANPRM.

In sharp contrast, the final Component 2 proposal approved in 2016 was the product of extensive stakeholder engagement and transparent analysis. 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 2016 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.

* * *

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, particularly in light of the current economic crisis; 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. Please contact Emily J. Martin (emartin@nwlc.org) with any questions.

Sincerely,

Emily J. Martin
Vice President for Education & Workplace Justice

Maya Raghu
Director of Workplace Equality and Senior Counsel

⁵⁷ 2020 30-Day Notice, 85 Fed. Reg. at 16346.

⁵⁸ EEOC, *Amendments to the Regulations at 29 CFR Part 1602 to Provide for a Pay Survey*, RIN 3046-AB15 (Fall 2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3046-AB15>.