August 27, 2020

The National Academies of Sciences, Engineering, and Medicine
Committee on National Statistics
Robert M. Groves, Chair
Brian Harris-Kojetin, Director
500 Fifth St., N.W.
Washington, D.C. 20001

Via email

Re: **CNSTAT Panel to Evaluate Pay Data Collected by EEOC: Recommendations for CNSTAT Panel Selection and Data Assessment**

Dear Dr. Groves and Dr. Harris-Kojetin:

The Center for American Progress and the National Women's Law Center, together with the undersigned women's, civil, and workers' rights organizations, write to urge you to take appropriate steps to ensure the forthcoming panel constituted to evaluate EEO-1 Component 2 data draws on appropriate expertise and arrives at a complete picture of Component 2 data utility and quality.

Vigorous enforcement of equal pay laws is critical to ensuring that women and people of color are paid fairly for the work that they perform. Women have been persistently underpaid for decades, with women of color experiencing the sharpest pay disparities. Unfortunately, pay discrimination is notoriously difficult to uncover: pay decisions are routinely made behind closed doors with little scrutiny and most workers are unaware of how much their colleagues are being paid unless they work in settings where salaries are publicly shared or collectively negotiated, such as many public sector or unionized workplaces. As a result, many victims of pay discrimination are unaware they are experiencing it. Precisely because of the prevalence of longstanding pay disparities, combined with the highly secretive nature of many workplace pay practices, there is a specific need to strengthen the investigatory tools used by enforcement agencies to root out illegal pay practices. One key priority has been to enhance the ability of enforcement agencies to access comprehensive pay data from employers to gain better insight into race and gender pay disparities.

Over the past decade, numerous public hearings and analyses have explored different ways to collect pay data while balancing the interests of employees and employers. After considering these many hours of testimony and analyses, including thousands of public comments, the Obama Administration finalized a revision to the EEO-1 reform, a form that has been used for more than 50 years to collect demographic data on employer workforces, to collect compensation data by race and ethnicity, gender, and job category, beginning in March 2018. In August 2017, the Trump Administration abruptly – and, as a court would later determine, illegally – halted implementation of the pay data collection.

In *National Women's Law Center v. Office of Management and Budget*, a lawsuit challenging the Trump Administration action, the court determined that the Administration violated the law when it blocked the collection of pay data by race, ethnicity and gender via the EEO-1 form. It is against this backdrop that the U.S. Equal Employment Opportunity Commission (EEOC) for the first time collected this data last year, for calendar years 2017 and 2018. The EEOC has commissioned the National Academies of Sciences, Engineering, and Medicine's Committee on National Statistics (CNSTAT) to conduct an

independent review of the quality and utility of this data. CNSTAT is charged with assembling a panel of experts to assess (1) the utility of pay band data in identifying pay gaps and (2) the potential of the Component 2 wage data to enhance EEOC enforcement efforts and employer self-assessment.

CNSTAT has announced that it will gather a panel of experts in survey methodology, statistics, labor economics, and those familiar with business payroll systems to undertake an assessment of data quality, utility, and future data collection efforts. It has stated it will consider existing data quality frameworks to evaluate the data. While thoughtful analysis of the ways in which the pay data can enhance enforcement efforts and employer self-assessment is valuable, we are painfully aware of the extensive analysis already undertaken over the course of many, many years, slowed by the vocal resistance of employers unwilling to have their pay practices scrutinized or questioned in any way.

We are deeply concerned that given this abundance of prior analysis and history, the CNSTAT review runs the risk of being used as yet another excuse for reopening past analyses and retreading old ground, to create a smokescreen to justify the EEOC's decision to abandon this critical data collection. It is key that the review focus specifically on the potential uses of this data for meaningfully forwarding the EEOC's enforcement mission, informed by how EEO-1 demographic data has been used effectively for years, rather than devolving into a more theoretical analysis of whether the data meets an entirely different objective of providing perfect, complete, and exact information regarding employers' compensation practices. The latter objective is not the purpose of the data collection, and criticism that it is not designed to meet this purpose is thus a purposeful distraction from the key questions regarding its effectiveness in improving enforcement of pay discrimination laws.

In leading this study, we urge CNSTAT to take the following steps to ensure they are drawing on appropriate expertise and arriving at a complete picture of Component 2 data use and quality:

- **Assemble a diverse interdisciplinary panel of experts with deep knowledge of the EEOC regulatory process, including complaint investigations, EEOC data sources, and the role of data analysis in enforcement.** As the purpose of collecting pay band data is to assist with complaint investigations and provide information about pay disparities (for the enforcement efforts of EEOC and state Fair Employment Practice Agencies (FEPAs) and employers' self-assessments), the study of pay data utility requires specific knowledge of the EEOC and FEPA enforcement processes. Panelists must understand how the EEOC uses data to inform complaint investigation and resolution. It is especially important that CNSTAT select for such enforcement expertise given that its commitment to include those with significant experience in payroll systems may otherwise result in a panel significantly slanted toward business interests. In 2012, CNSTAT similarly gathered experts to review wage data collection and produced a summary report. Although this committee was comprised of experts with extensive knowledge of establishment surveys, pay data collection, and statistical analysis, the committee lacked knowledge of the EEOC enforcement process and potential uses of wage data within the enforcement framework, and its conclusions were thus not sufficiently informed by this context. Thus, it is critical to enlist those who have used EEO-1 data and understand the role of data analytics in charge resolution.

- **Ensure racial, ethnic and gender diversity in panel members.** This diversity of identity and experience is particularly important given the questions presented and the context of this analysis.

- **Ensure that the panel has access to EEOC data sources, including the charge data, EEO-1 Component 1 (composition) data as well as Component 2 data.** Without pairing the Component 2 data with existing EEOC data sources, the panel will be unable to assess the utility of pay band data in assisting charge investigations and enhancing outreach to private employers. The Component 2 wage data must be examined in conjunction with existing EEOC data sources and data analysis processes to best understand how it can enhance charge processing, Commissioners' charges, outreach to private employers, EEOC industry reports.

- **Solicit input from a wide swath of stakeholders, including EEOC and OFCCP staff and leadership, women's rights and civil rights advocates, plaintiff-side litigators, and scholarly experts on sex and race discrimination in the workplace.** According to the EEOC's announcement of the CNSTAT panel, the panel will hold public meetings to collect input from stakeholders, including representatives of organizations or interest groups. These meetings must allow for input by those with relevant expertise in the promise of pay data collection as a tool to address discrimination, including EEOC charge investigators, EEOC data analysts, OFCCP compliance officers, FEPA representatives, and other enforcement agents who will be using the Component 2 data to guide enforcement efforts; advocates from the women's rights and civil rights communities; organizations representing different racial and ethnic communities; plaintiff-side litigators; and scholars from law, economics, sociology, and other disciplines with expertise on workplace discrimination and strategies to combat it.

Without such attention to assembling a panel with deep and diverse expertise of EEOC data and process, access to the 2017-18 Component 2 data as well as other EEOC data sources, and input from a wide array of stakeholders, the CNSTAT study will simply serve as ceremony and runs the risk of dampening the great potential of Component 2 data collection to fight pay disparities in U.S. private employers.

Thank you for your consideration of these issues.

Sincerely,

Center for American Progress
National Women's Law Center
9to5, National Association of Working Women
A Better Balance
American Association of University Women (AAUW)
AnitaB.org
Asian Pacific American Labor Alliance, AFL-CIO
Empowering Pacific Islander Communities (EPIC)
Equal Rights Advocates
Futures Without Violence
Justice for Migrant Women

KWH Law Center for Social Justice and Change
Lambda Legal
Methodist Federation for Social Action
NAACP
National Advocacy Center of the Sisters of the Good Shepherd
National Center for Law and Economic Justice
National Employment Law Project
National Employment Lawyers Association
National Organization for Women
National Partnership for Women & Families
National Workrights Institute
NewsGuild-CWA
The Leadership Conference on Civil and Human Rights
TIME'S UP Foundation
Women Employed
Women's Law Project
Women's All Points Bulletin, WAPB
Workplace Fairness