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April 1, 2016

Bernadette Wilson, Acting
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street NE.
Washington, DC 20507

Re: Equal Employment Opportunity Commission's (EEOC's or Commission's) Proposed Revisions to the Employer Information Report.

Dear Ms. Wilson:

The U.S. Chamber of Commerce ("Chamber") submits these comments responding to the Equal Employment Opportunity Commission's ("EEOC's" or "Commission's") Proposed Revisions to the Employer Information Report (EEO-1) ("Proposed Revisions"). The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. The Chamber's mission is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility.

The Chamber is a long-standing supporter of reasonable and necessary steps designed to achieve the goal of equal employment opportunity for all -- including equal pay for equal work and non-discriminatory compensation practices.[1] It was in large part through the efforts of the Chamber and other employer organizations that the 2008 Americans with Disabilities Amendments Act was enacted with bi-partisan support, and with the active involvement of all stakeholders. That is why the Chamber is so concerned with the current attempt to revise the EEO-1 form without prior input from the employer community regarding its real costs and lack of benefit, and in a process so violative of the Paperwork Reduction Act ("PRA").

The Proposed Revisions fail to further the purposes of Title VII and the EPA, and fails to meet the PRA's requirements. The Proposed Revisions are not reasonable, necessary, or appropriate as required by Title VII. The PRA imposes certain mandatory requirements on the

[1] The Chamber and its member-employers have always been supportive of non-discrimination laws including the Equal Pay Act ("EPA"), Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), Section 1981 of the Civil Rights Act of 1866 ("Section 1981"), and the Americans with Disabilities Act ("ADA"). The Chamber has held many seminars and meetings in which the requirements of the laws have been explained and which afford members the latest information regarding compliance.

EEOC. The PRA requires the EEOC to: minimize the burden on those required to comply with government requests, maximize the utility of the information being required, and ensure information provided is subject to appropriate confidentiality and privacy protections. The EEOC's Proposed Revisions fail to meet the statutory requirements of the PRA:

- First, the Proposed Revisions do not minimize the employer's burden. Rather, they impose substantial additional compliance burdens on employers. And the Proposed Revisions improperly suggest that the vast increase in data collection will be accomplished with a significant *decrease* in cost and burden compared to prior years.

- Second, the Proposed Revisions do not maximize the utility of collected data. Rather, they aggregate the compensation of employees performing vastly dissimilar work, leading to both false negatives and false positives for discrimination, and not otherwise yielding any information to permit the EEOC or OFCCP to undertake an investigation. This wastes valuable time and resources for both employers *and* EEOC.

- Third, the Proposed Revisions fail to propose a mechanism to adequately protect the confidentiality of sensitive employee compensation information.

The burden of the Proposed Revision would be substantial; both in the millions of hours that private employers would be required to spend completing the proposed EEO-1 Report and in the false results that are likely to be generated. For example, based on the 307,103 total reports filed in the most recent year (according to the EEOC), Economist Ronald Bird estimates that the actual national annual cost burden of the *current* format EEO-1 form is $427.3 million, which is about 21 times greater than the $19.8 million annual total that the EEOC estimated in its 2015 information clearance request supporting statement for the current format EEO-1 form (see Exhibit 2, p. 2, Declaration of Ronald Bird) and $421.8 million more than its current estimate of $5.5 million. This is before factoring in the burden associated with the Proposed Revisions.

The Proposed Revisions, allegedly borne out of a laudable desire to ensure that employees are paid fairly, will not accomplish this goal. Instead, in practice, it would impose enormous burdens and risks on employers who base complex compensation decisions on various factors other than membership in a particular EEO-1 category (factors which the EEOC does not contemplate considering under the Proposed Rule's suggested use of the collected data).

As Economists DuMond and Speakman detail in their attached Declarations, based on actual results generated from tabulations run in mock tests of the Proposed Revisions to the EEO-1 Form, any resulting analyses from the data collected by the Proposed Revisions will be of *no value* in ascertaining whether there are disparities in pay between individuals performing the

same or substantially similar work. See Declaration of Dr. J. Michael DuMond and Dr. Robert Speakman, Exhibits 1 and 4. According to Dr. Speakman, "…analyses using the EEOC's proposed pay data and suggested tests will result in a high error rate – firms that pay fairly will be investigated too often and firms that underpay women or minorities will often go undetected. Simply put, the recommended tests and data will lead to many false-positive and false-negative conclusions, negating any utility from this proposal. In fact, it appears that at best the targeting mechanisms suggested by the EEOC will do only negligibly better than selecting firms at random."[2]

For all the reasons set forth below and in the attached supporting Declaration of Economist Ronald Bird (Exhibit 2), Declaration of Economist J. Michael DuMond (Exhibit 1), Declaration of Economist Robert Speakman (Exhibit 4) and Declaration of Attorney Annette Tyman (Exhibit 3), as well as the Chamber's prior testimony submitted March 9, 2016 to the EEOC, and the oral testimony and responses provided by Camille Olson on behalf of the Chamber at the EEOC Hearing on the Proposed Revision on March 16, 2016, the Chamber asks that the EEOC withdraw the Proposed Revisions to revise the EEO-1 Employer Information Report.

Summary of Comments

On February 1, 2016, without any prior notice to the regulated community, the EEOC published a proposed revision to the EEO-1, Employer Information Report. This data request, to which every employer with 100 or more employees and every government contractor with 50 or more employees must respond annually, has been in existence for 50 years. The authorization for the EEOC to require this report is found in Title VII at 42 USC § 2000e-8(c)(3) where such reports are authorized only if they are " reasonable, necessary, or appropriate…" However, for the first time, the EEOC is proposing that all employers with more than 100 employees submit data showing the W-2 wages and hours worked of all of their employees grouped by broad job categories and subdivided into 12 arbitrary pay bands, in addition to the demographic makeup of their employment rosters. The magnitude of the proposed revision cannot be overstated. The existing EEO-1 report requires 140 data points. Pursuant to the changes proposed by the EEOC, covered employers will have to submit forms for each establishment, and each establishment report would consist of 3,660 data points.

Ironically, EEOC advances this brand new and burdensome data request pursuant to, of all laws, the Paperwork Reduction Act.[3] As previously noted, the PRA requires that any request for data by a government agency meet three basic criteria: (1) the request minimizes the burden

[2] Ex. 4, Dr. Robert Speakman Declaration at p. 3.
[3] For underlying authority to require employers to submit the EEO-1 form, EEOC relies on the recordkeeping provisions of 42 U.S.C. § 2000-e8(c) and 29 CFR 1602.7. *See* 81 Fed. Reg. 5113. Nothing in the authorizing statute exempts the EEOC from complying with the PRA.

on responders to reply; (2) the request results in data which is meaningful to the government for policy and enforcement purposes; and (3) the data request is designed to ensure that the data is securely and confidentially obtained and retained. The OMB is charged with reviewing the data request to ensure that the requesting agency complies with the PRA and by approving the request the OMB must certify that the agency has met its requirements under the PRA and OMB directives. And of course the EEOC must also assure that the reports it is requiring a significant number of employers to collect and submit to the agency meets the standards set by Title VII.

Although the EEOC notes that it began working on this project at least four years ago, it permitted employers only five weeks to prepare comments for submission at a public hearing in which selected employer representatives were permitted five minutes each to "testify" about the proposal, and only 60 days to submit these written comments. The Chamber nevertheless retained noted labor economists identified above to review the EEOC's Proposed Revisions and two law firms, Seyfarth Shaw LLP and Crowell & Moring LLP, to further analyze the legal compliance of the EEOC with the PRA and the new requirements it is proposing to impose on employers. The conclusions of these reviewing economic experts and law firms is stunning:

The EEOC has cavalierly refused to comply with its obligations under Title VII and the Paperwork Reduction Act in the following ways:

The EEOC has produced an "analysis" of the burden its proposal will impose which is completely lacking in any substance, has no basis in fact, and is contrary to the attached economic analyses of three economists and the results of the Chamber's survey of a significant sampling of its members.

- The EEOC suggests that a "revised form" with almost 26 times the number of data points to complete will impose *no* additional burden and cost 50% *less* than the previous form which was approved in 2015.

- The EEOC and its consultant admit that there was no testing of the form or the time that would take to complete it, but rather that it used "synthetic data" compiled from fictitious companies to produce an estimate of the time required to complete the new forms. While the EEOC admits it did nothing to quantify the burdens attendant to its new data requests, and certainly did nothing to minimize the burden, the Chamber, in the eight short weeks allotted to responding entities to comment on the EEOC's Proposed Revisions, conducted a survey of 35 of its members, received in excess of twenty replies to its questionnaire and in fact determined that the burdens imposed by the new requirement were excessive, costly and, in some instances, not feasible.

- The EEOC, apparently in an effort to show a non-existent burden reduction, arbitrarily eliminated from its analysis the burden of time and effort required to submit data relating to more than 250,000 employer establishments. Under the EEOC's proposal, employers will still be required to submit data for the 250,000 establishments that have been omitted from the Commission's burden analysis. The EEOC simply ignores this fact. The PRA did not intend that its requirement to reduce reporting burdens be addressed by an agency simply ignoring or air-brushing reporting requirements to make its burden numbers look better.[4] This failure alone requires that the agency rescind its proposal and undertake the necessary burden analysis the statute commands and meet the Title VII command that the required report be reasonable, necessary and appropriate.

- The EEOC also attempts to sustain its estimate of burden by referring to proposals by other agencies which have never been completed and which have never been published.

- As shown in the analysis of the Chamber Survey performed by Dr. Bird (Exhibit 2), employers who employ almost 4.5% of the employees who would be included in the revised EEO-1 report will experience a vast increase in the cost of implementing and completing the revised form and will encounter severe operational difficulties in even formulating their HR systems to meet the new obligations.

The EEOC offers no rationale to support its claim that the mass collection of data will be useful for any law enforcement or policy enhancement.

- The laws that the EEOC enforces do not permit aggregating dissimilar jobs into artificial groupings for purpose of analyzing pay. There can be no legal or enforcement-related use for this data. Indeed, the EEOC's own compliance manual and its consultant recognize that these broad aggregations of data are essentially useless. Myriad federal courts have reached the same conclusion.

- The EEOC is requiring the combining of completely dissimilar jobs into arbitrary pay bands to determine if there is pay discrimination. For instance, the proposed revised forms will require a reporting hospital to combine lawyers, doctors, nurses and dieticians - all grouped as "professionals" - to somehow determine whether

[4] The PRA does not recognize the concept of *Ipse Dixit.* In *National Tire Dealers & Retreaders Association, Inc. v. Brinegar*, 491 F.2d 31, 40 (D.C. Cir. 1974), Circuit Judge Wilkey considered that the Secretary of Transportation's "statement of the reasons for his conclusion that the requirements are practicable is not so inherently plausible that the court can accept it on the agency's mere ipse dixit."

there are pay disparities based on gender, race or ethnicity. No law permits comparisons of such diverse workers to prove discrimination or even to provide enough evidence to commence an investigation.

- In order to meet its own bureaucratic timetable, the EEOC will require employers to combine two distinct years of W-2 data to create a fictitious W-2 amount for employees. This combined W-2 amount over a two year period will yield completely useless information. It does not take into account job changes, promotions, annual pay adjustments, different working conditions or locations or the many other factors that go into compensation. And the components of W-2 income are so diverse that there can be no viable analysis of the reported W-2 income to ascertain disparities of treatment.

- The EEOC will also require employers to collect and report the hours worked for all employees. While the EEOC suggests that it will not require collection of new information from employers, it has not addressed the critical fact that employers do not currently collect hours information for exempt employees. The EEOC suggests that employers may use a "default" number of 40 hours for each exempt employee. In the private sector, exempt employees regularly work more than 40 hours; thus, the hours information would be inaccurate and, therefore, of limited use. A legitimate study before this proposal was published would have revealed that fact, but no such study was done.

- The EEOC's Proposed Revisions therefore again fails the Title VII requirement that it be "reasonable, necessary or appropriate" and the PRA requirement that it maximize the practical utility from the information collected.

The EEOC offers absolutely no discussion of the threats to confidentiality or privacy of the information it is requiring employers to submit.

- The PRA requires that the requesting agency and the OMB ensure that data collected will be treated with complete confidentiality. The EEOC did not even attempt to take this responsibility seriously. When the Office of Personnel Management (OPM) cannot even protect the personnel data of 21 million federal employees or applicants, the EEOC should at least be cognizant that confidentiality of the pay data of more than 70,000 employers – encompassing millions of employees – deserves significant consideration. It offers none.

- These data, once shared with the Department of Labor, are subject to demand for production under the Freedom of Information Act. The EEOC states that the data will be protected to the extent permitted by law. Of course, employers will have to

> expend significant resources to assert their right under law to protect this data. And for some of the smaller employers, the identity and the compensation of individual employees will be easily ascertained; the same is true for larger employers with small establishments. The EEOC devotes only two paragraphs to discuss these privacy and confidentiality issues.

In short, the EEOC has sprung upon employers a proposal that would (1) impose significant new, costly administrative burdens; (2) yield data of no utility; and (3) fail to protect confidential information. The EEOC has proposed these revolutionary revisions without meeting any of its obligations under the PRA. For these reasons, the Chamber submits that EEOC should withdraw this proposed data collection and, if it refuses to do so, the OMB should exercise its authority and refuse to approve the revised form.

Comments

I. PAPERWORK REDUCTION ACT

As previously noted, the EEO-1 Revision process is being conducted pursuant to the PRA. The PRA, which was reauthorized in 1995, was promulgated in order to bring a degree of coherence and prudence to the Government's rather voracious quest to collect data from responding employers (and other responders). *See Dole v. United Steelworkers of America*, 494 U.S. 26 (1990) (recognizing that the PRA was enacted in response to the federal government's "insatiable appetite for data."). The purposes of the PRA set forth in direct terms what the Act was designed to accomplish:

> The purposes of this chapter are to--
>
> (1) minimize the paperwork burdens for individuals, small businesses…Federal contractors…and other persons resulting from the collection of information by or for the Federal Government;
>
> (2) ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the federal Government.
>
> (4) improve the quality and use of Federal information to strengthen decisionmaking, accountability and openness in Government and society;
>
> 8) ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws, including laws relating to--(A) privacy and confidentiality, including section 552a of title 5;

The PRA established within the Office of Management and Budget ("OMB") the Office of Information and Regulatory Affairs ("OIRA") whose Director is charged with the administration of the PRA. *Livestock Marketing Ass'n v. U.S. Dept. of Agr.*, 132 F. Supp. 2d 817, 830 (D.S.D. 2001) ("Among other things, the Act establishes the Office of Information and Regulatory Affairs within the Office of Management and Budget, with authority to" facilitate and manage the PRA). OIRA has a substantial role in the federal regulatory process. No data collection instrument which is directed to more than nine responders can be issued without first receiving the approval of OMB and OIRA. *CTIA-The Wireless Ass'n v. F.C.C.*, 530 F.3d 984, 987 (2008) ("The need for OMB approval of information collections derives from the Paperwork Reduction Act"); *Gossner Foods, Inc. v. E.P.A.*, 918 F. Supp 359, 361-62 (D. Utah 1996) ("The Act institutes a second layer of review by the OMB for new paperwork requirements.") (quoting *Dole*, 494 U.S. at 32-33). In addition to the actual review of agency data requests, the Director is charged with the responsibility to oversee the use and collection of information. In fulfilling this oversight responsibility, OMB issued Circular A-130 which directs federal agencies to establish mechanisms and procedures to meet the PRA's mandate to reduce the collection burden and insure that the information being collected has significant public utility. The EEOC does not have the discretion to ignore the PRA or Circular A-130. Nevertheless it has done so.

The Director, in turn, is mandated to review data collection requests in accordance with the direction of the PRA to (1) minimize the burden on those individuals and entities most adversely affected and (2) maximize the practical utility of and public benefit from information collected by or for the Federal Government and establish standards for the agencies to estimate the burden of data collection. *See Dole*, 494 U.S. at 32 (explaining that the PRA charges the OMB with responsibility for minimizing the burden on individuals and establishing standards to reduce federal collection of information). *See also Tozzi v. U.S. E.P.A.*, No. Civ. 98 - 0169 (TFH), 1998 WL 1661504, *1 (D.D.C. April 21, 1998). The Director is also charged with developing and promulgating standards to insure the privacy, confidentiality and security of information collected or maintained by agencies. *In re French*, 401. B.R. 295 (E.D. Tenn. 2009) (noting that, amongst other things, the PRA's purpose is to ensure that information is collected consistent with privacy and security laws) (quoting 44 U.S.C. § 3501).

It is under this specific statutory framework that the proposal to revise the EEO-1 form and collection procedures must be reviewed. There is no exemption from the mandates of the PRA and neither the agency head nor the Director of OIRA may exempt data collection efforts from the constraints and mandates of the PRA. Simply put, data collection efforts of the size and scope of the proposed EEO-1 revision must be reviewed independently to insure that the burdens placed upon responders is minimized, the information collected has the maximum utility, and that the security and confidentiality of the information is assured. *See Dole*, 494 U.S. at 32-33 (explaining that all federal agency regulations that require the collection of paperwork must be reviewed by the OMB in accordance with the goals and purpose of the PRA).

These are simple precepts and should be reviewed independently. In other words, the burden placed upon responders must be determined only with respect to the efforts necessary to collect and report the data. The obligation to minimize the burden should be reviewed in relevance to the purposes and utility of the data to be collected. The PRA requires each standard to be reviewed on its own terms. Similarly, the benefit to be derived from the data collection requirement is not dependent upon the degree of burden the effort creates, but rather the utility of the data collected. The government is not permitted to require the collection of data with no utility regardless of the extent of the burden imposed to collect the data. Nor is the government permitted to require an excessively burdensome collection effort in the face of a complete lack of utility of the data collected. In short, there is no license for the Government to simply collect data without a clearly articulated purpose and legitimate use. Finally, in conjunction with the type and sensitivity of the data being collected, OIRA and the requesting agency must insure that the requested data be collected and retained in a manner to insure its confidentiality and privacy.

These requirements are neither difficult nor complex. Indeed, they establish a commonsense framework by which the requesting agency in the first instance and Director of OIRA must review requests for authorization to collect data. As will be shown in this submission, the EEOC has <u>not met any of the statutory requirements</u>. Rather, it has proposed a data collection protocol which will place a significant burden upon responding employers and which the EEOC has remarkably understated or ignored. Indeed, the EEOC has ignored its obligation to analyze and minimize the burden its new proposal will create. <u>The EEOC is proposing to collect extensive data heretofore never collected by the federal government without any developed framework to review the data, or use the data for any legally authorized or recognized purpose. In addition, the EEOC has totally ignored the obvious security and confidentiality issues which it is directed to consider</u>.

II. THE EEOC'S PRA BURDEN ESTIMATE IS INSUFFICIENT AND UNSUPPORTED

The EEOC should rescind its Proposed Revisions because its PRA burden estimate is wholly deficient in three critical ways: (1) it underestimates the employer burden associated with generating the EEO-1 Report *in its current form* and is inconsistent with prior EEOC estimates of the burden associated with generating the EEO-1 Report; (2) it underestimates the employer burden associated with compiling, analyzing, and reporting the W-2 information the Proposed Revisions would require; and (3) it vastly underestimates the burden associated with compiling, analyzing and reporting the hours information that would be required, particularly as to exempt employees.

A. The EEOC's Estimate of the Burden Associated with Completing the *Current* EEO-1 Report is Inconsistent with its Prior Burden Analyses and Otherwise Lacks Factual Support

1. The EEOC's PRA Assumptions

The EEOC makes the following claims and assumptions in connection with its estimate of the burden associated with generating the EEO-1 Report in its current form:

- There are 67,146 employers who file EEO-1 Reports ("EEO-1 Filers"), based on 2014 filing figures. [5]

- Each EEO-1 Filer spends just 3.4 hours generating its EEO-1 Reports each year, across all establishments, with 30 minutes dedicated to reading the instructions and 2.9 hours dedicated to generating the data required to be reported and populating the cells in the Form itself. Thus, total hourly burden incurred by employers filing the EEO-1 Report is 228,296.4 hours.

- All work done to complete the EEO-1 Report is performed by "Administrative Support" personnel who are paid, according to the Bureau of Labor Statistics ("BLS") publication "Employer Costs for Employee Compensation," on average, $24.23 per hour.

Based on these assumptions, the EEOC estimates that the total annual cost burden incurred by employers filing the current EEO-1 Report is just over ***$5.5 million***. This figure represents the number of EEO-1 Filers (67,146) multiplied by 3.4, then multiplied by $24.23.

2. The EEOC's Unexplained Decision to Abandon Its Prior "Response-Based" Approach is Fatal to the Agency's PRA Analysis

The EEOC's approach for assessing the actual *current* burden imposed on EEO-1 Filers is deficient for several reasons.

First, and perhaps most importantly, the "EEO-1 Filer"-based approach adopted by the EEOC in its Comment Request is contrary to the approach the EEOC has used to quantify the burden associated with EEO-1 filings since at least 2009. From at least 2009 through 2015, the EEOC, when estimating the burden associated with filing EEO-1 Reports, based its assessment on the number of ***responses*** filed by the employer community, ***not*** on the number of EEO-1

[5] This figure underestimates by 40% the number of private employers with 100 or more employees. Ex. 2, Ronald Bird Decl., Appendix A, p. 18.

Filers. *See* Exhibits 5 -8 (EEOC OIRA filings). The EEOC's approach over at least the last six years appropriately accounted for the fact that many EEO-1 Filers are required to generate multiple "responses" or reports: one for each physical establishment with 50 or more employees and one consolidated report. As a result, the EEOC burden estimates for the years 2009 through 2015 are significantly higher than the burden estimate identified in the Proposed Revisions. *See* Exhibits 5 - 8 (EEOC OIRA filings). For instance, in 2015, the EEOC estimated the annual employer burden associated with the EEO-1 filings as follows:

- 307,103 EEO-1 reports filed, based on actual 2013 filings.
- 3.4 hours per report, which yields 1,044,150 total burden hours.
- Average cost per hour estimated to be $19.00 per hour, based on the hourly rate paid to "Human Resources Assistants" according to the BLS publication "Occupational Employment Statistics, Occupational Employment and Wages, May 2010" – $18.22 – "rounded to $19.00 to account for instances where higher paid staff perform this work."

Based on those assumptions, the EEOC estimated in 2015 – less than one year ago – that EEO-1 Filers would incur costs of *$19.8 million* annually to generate the EEO-1 filings. That cost figure is *350% higher than the EEOC's new estimate* of what the current burden is *without* any of the proposed changes.[6]

Attempting to explain this *$14.3 million reduction* in the estimated burden, and perhaps anticipating criticism of this change, the EEOC includes only the following statement in its Proposed Revisions:

> The reporting hour burden calculations in this notice reflect a departure from the manner in which EEOC traditionally estimated reporting burden. In the past, the EEOC estimated the reporting hour burden based on the number of total cells in the report(s) that a firm had to complete. This approach viewed each report filed by a firm as a separate reporting requirement, *analogous to a paper report*. In reporting year 2014, however, the number of paper reports declined to just three. In addition, employers now rely extensively on automated HRIS to generate the information they submit on the EEO-1 report. As a result, each additional report

[6] In 2009, the EEOC used this approach and estimated 599,000 burden hours. Ex. 5. That figure rose to 987,394 burden hours in both 2011 and 2014. Exs. 6 and 7. Using the $19.00 per hour rate used by the EEOC in 2015, those estimates would have identified annual burdens of $11.3 million in 2009 and $18.8 million in both 2011 and 2014.

> filed has just a marginal additional cost. To accurately reflect the manner in which employers now collect and submit the data for filing, the estimated reporting burden set forth in this notice is calculated per firm, rather than per report. This burden calculation is based on the time spent on the tasks involved in filing the survey, rather than on 'key strokes' or data entry."

81 Fed. Reg. 5120 (February 1, 2016) (emphasis added).

The EEOC's explanation rings hollow, as it is contradicted by its 2015 OIRA filing and is wholly inconsistent with the experience of EEO-1 Filers. The burden estimate reached by the EEOC in 2015 expressly noted that "98%" of the 70,070 respondents in 2013 "file [their EEO-1 Reports] on-line." Ex. 8 at Paragraph 3. Thus, the claim that the shift from a *response-based approach* that takes into account the number of establishments on which reports are filed to an *EEO-1 Filer-based approach* was prompted by a sudden shift from paper filings to online filings is not supported by the EEOC's own submissions. The PRA requires that the imposed burden be accurately computed. It does not countenance fictitious assertions of burden bereft of factual support or historical experience.

Second, the assumption that "each additional report" for those employers with multiple establishments "has just a marginal cost" is based on no analysis whatsoever. The EEOC seems to assume that the electronically fillable PDF format relieves employers of the necessity of manually entering data when filing their EEO-1 Reports. That assumption is contrary to fact.[7] Even when using the EEOC's on-line system, EEO-1 Filers must manually enter the data for each cell and for each establishment.[8] Notably, the EEOC's Proposed Revisions acknowledge that only 2% of EEO-1 Filers (1,449 of 67,146) submitted their data by uploading a data file in 2014 rather than manually completing the online submission. Thus, the process remains a manual one for most employers, even if the EEO-1 Report is submitted electronically, and the actual burden remains unchanged from recent years.[9]

3. The EEOC's PRA Analysis of the Current Reporting Burden is Fundamentally Flawed in Other Respects

There are two other glaring flaws to the EEOC's PRA analysis. First, the EEOC nowhere explains its estimate that EEO-1 Filers spend a total of just 2.9 hours collecting, verifying,

[7] Ex. 3, Annette Tyman, Decl., generally describing the EEO-1 submission process.
[8] Ex. 3, Annette Tyman Decl. ¶7.a.
[9] The EEOC's suggestion that uploading a data file means that "the information goes nearly directly from an electronic file generated by the HRIS to the survey data base" is a gross misunderstanding of the process required for gathering and validating data for submission to the EEO-1 survey. Ex. 3, Annette Tyman Decl. ¶11.

validating, and reporting" their current EEO-1 data. As part of its burden under the PRA, the EEOC should identify its current basis for this estimate. [10]

Second, the EEOC bases its cost estimate on an improper assumption that EEO-1 data and the ultimate reports are developed by "Administrative Support" personnel alone, at a cost of $24.23 per hour, without any internal or external assistance, and without any consideration of overhead costs associated with those personnel. The EEOC's assumption is flatly contradicted by employer experience. In fact, personnel ranging from HRIS and information technology personnel to senior human resources officials and legal professionals often assist in the development of the data, the compilation of the EEO-1 Report, review of the Report, and the submission of the Report. Because the EEO-1 Report requires certification by a company official, subject to penalties for false reporting, the EEOC's assumption that the entire EEO-1 filing process is left to clerical personnel is simply false. Because the EEOC has not included the wage rates of senior human resources, HRIS and information technology personnel, or legal professionals in the development, compilation, review, certification, and submission of the report, the assumption that the wage rate of an Administrative Support personnel alone, is flawed. The EEOC's additional failure to consider overhead costs only undermines further its PRA analysis.

4. The Chamber's Survey of Member Companies Contradicts the EEOC's Estimate of the Burden Associated with the Current EEO-1 Report

The Chamber developed[11] and issued a survey instrument ("Survey") to 35 of its members during the 60-day comment period. Ex. 2 (Appendix B to Bird Declaration). While the cribbed comment period and the Commission's rejection of the Chamber's request for an extension of time to file comments impacted the Chamber's ability to gather as much survey data as it would have liked, a total of 22 companies responded to the Survey by March 25, 2016. Information gleaned from those 22 respondents is set forth below.[12]

Responses were received from employers with as few as approximately 400 employees, 90% of whom are housed in a single establishment, and from an employer with more than 200,000 employees housed in more than 2,000 EEO-1 reportable establishments. Ex. 2, p. 2. Respondents to the Survey filed a total of 12,982 EEO-1 reports in 2015, comprising

[10] Ex. 2, Ronald Bird Decl. p. 4.
[11] Nine experienced Human Resources professionals participated in the development of the Survey. Ex. 2, p. 2 (Bird Declaration).
[12] Since March 25, 2016, the Chamber has received additional responses from the original group of 35 member employers and we anticipate all 35 recipients will respond in the coming weeks. The Chamber is also distributing the Survey to additional employers and anticipates having a larger sample of results in time for comments to OIRA.

approximately 4.2% of the total number of reports filed annually, according to the EEOC's most recent tabulation. *Id.*

The Survey responses reveal the following deficiencies in the EEOC's estimate of the burden associated with filing the current EEO-1 Reports:

- The total costs of compiling and submitting EEO-1 data was significantly dependent upon the number of establishments covered by the report and by the number of reports filed. This finding undermines the EEOC's decision to abandon the "Response-Based" approach and invalidates the "EEO-1 Filer-Based Approach."

- The internal resource time reported to complete an EEO-1 Report for a single establishment ranged from 2.6 hours per report to 42.5 hours per report, and the average *was 8.1 hours per report*, or 2.4 times greater than the EEOC's estimate.

- Multiplying the 8.1 hours per report by the EEOC's most recent tabulation of 307,103 reports filed by 67,146 distinct companies yields a total burden of *2,479,156* hours, or 36.9 hours per employer, to complete the EEO-1 Report in its current form. This figure is more than ten times greater than the 3.4 hours the EEOC identifies as the baseline estimate for its current proposal.

- Of the 22 respondents, 20 provided their estimate of the hourly rate paid to the internal employees who would gather the information, prepare and submit the EEO-1 Reports. The average hourly rate reported from these 20 respondents was *$45.00*.

- The Chamber's expert, Dr. Bird, identified a multiplier of 3.25 for the overhead cost of internal labor used, a figure that was drawn from an examination of the fully loaded labor cost reimbursement rates paid by government agencies for administrative, professional, technical and managerial services under the GSA government-wide services contracts. Applying this overhead plus profit factor to the $45 per hour average hourly rate yields an opportunity cost value of $146 per hour. Applying this fully loaded labor cost to the average hours required per report (8.1) yields a cost per report for internal labor of *$1,175*.

- Respondents were also asked to address the extent to which they retained outside consultants and service providers to complete their EEO-1 filings. Fourteen of the 22 respondents reported they did not use such consultants or

service providers. Across all 22 respondents (including $0 for the 14 who reported that all work is done internally), the average external cost was *$8,307 per respondent and $215 per report.*

- Adding the per report cost for internal labor ($1,175) to the per report cost for outside services ($215) yields a total current annual cost for completing each report of $1,391. Based on the 307,103 total reports filed in the most recent year, the total annual cost burden of the EEO-1 Report, in its current format, is *$427.3 million,* a figure that is $421.8 million higher than the EEOC's estimate.

Exh. 2, pp.3-5 (Bird Declaration).

As these figures demonstrate, the EEOC's estimate that EEO-1 Filers will incur costs of just $5.5 million in 2016 to complete the EEO-1 Report as currently configured – representing a 350% reduction in the EEOC's *own* estimated total costs of $19.8 million incurred in 2015 – is absurd. The actual burden, based on the Chamber's Survey, is more than $425 million. Because the EEOC's erroneous estimate impacts the Agency's estimate of the anticipated costs of completing the proposed revised EEO-1 Report in 2017 and 2018, the EEOC's entire burden estimate associated with the Proposed Revisions is inaccurate, misleading, and inadequate under the PRA.

B. The EEOC's Analysis of the Burden Associated with Completing the Proposed Revised EEO-1 Report Lacks Factual Support

1. The EEOC's PRA Analysis

The EEOC's Comment Request includes the PRA-required estimate of both the one-time burden of complying with the proposed revisions and the annual burden of complying with those revisions. As for the "One-Time Implementation Burden," the EEOC's analysis consists of three sentences, one of which is contained in a footnote. The EEOC estimates a one-time burden of *$23,000,295*, which is based on the following assumptions:

- Eight (8) hours of time "per filer" to "develop[ ] queries . . . in an existing human resources information system."

- An hourly wage rate of $47.22, which is the average compensation for a Professional as identified in the BLS publication "Employer Costs for Employee Compensation," issued in 2013.

The EEOC's total estimate for the one-time burden is calculated by multiplying the number of EEO-1 Filers that would be required to submit W-2 and hours information (60,886) by eight hours, and multiplying that total by $47.22.

As for the recurring, annual burden employers will incur completing the proposed revised EEO-1 Report, the EEOC restates its current burden analysis for the estimated 6,260 EEO-1 Filers that have 50-99 employees. For that group of employers, the EEOC maintains its estimate that each filer will spend just 3.4 hours completing and submitting its EEO-1 Report, that those 3.4 hours will be spent by Administrative Support personnel at a cost of $24.23 per hour, and that the total cost burden to the 6,260 EEO-1 Filers who need not submit W-2 wage and hours data will be $515,711. That estimate is flawed, for the reasons identified above.

For employers with 100 or more employees, the EEOC estimates that each EEO-1 Filer will spend 30 additional minutes reviewing the instructions and *just 2.7 additional hours per year* "collecting, verifying, validating, and reporting" the W-2 wage data and the hours data for its employees. The EEOC continues to assume that all of these tasks will be performed by Administrative Support personnel, again at a cost of $24.23 per hour. In total, the EEOC's annual burden estimate for employers with 100 or more employees is as follows:

- 6.6 hours per EEO-1 Filer to collect, verify, validate, and report both the representational data currently reported and the W-2 wage data and hours data that would be required beginning in 2017.

- An hourly rate of $24.23.

Based on these assumptions, the EEOC estimates that the total annual cost burden on EEO-1 Filers with 100 or more employees will be $9,736,767, which is the number of such filers (60,886) multiplied by 6.6, then multiplied by $24.23. When coupled with the estimated cost burden for EEO-1 Filers with 50-99 employees, the total annual estimated cost identified by the EEOC for all EEO-1 Filers in 2017 is *$10,252,478*.

2. The EEOC's PRA Analysis Lacks Credibility

The EEOC's estimates of the burdens – one-time and recurring – associated with the proposed revised EEO-1 Reports are wholly unrealistic. As detailed below, absent from the EEOC's analysis of the burden associated with the Proposed Revisions is any explanation of the basis for its estimate of the hours that would be incurred by EEO-1 Filers. [13] As an initial matter, while the EEOC claims it reviewed "the public comments relating to the burden calculation for OFCCP's proposal to collect pay data and consulted with OFCCP about burden estimates," the

[13] Ex. 2, Ronald Bird Decl. pp. 5-6.

EEOC fails to state how it reconciled the information supplied to the OFCCP with the EEOC's current estimates. More importantly, the EEOC failed to identify any other basis for its hours estimates, noting that its Pilot Study sought data from private employers "about the possible cost of collecting pay information but few employers responded, and the employers that did respond did not provide quantitative feedback." 81 Fed. Reg. 5120. Without more, one can only conclude that the EEOC's estimate of the hours employers will spend "collecting, verifying, validating, and reporting" W-2 wage data was "pulled out of thin air."

To make matters worse, the EEOC provides no explanation for its estimate of the hours burden associated with supplying hours-worked data. The EEOC does not even address this issue in its Proposed Revisions, stating simply that it is seeking input from employers as to "the anticipated estimated burden to also submit . . . hours-worked data." As detailed below, this omission should sound the death knell for the EEOC's Proposed Revisions, given that the collection of hours-worked data for exempt employees who do not currently capture their hours worked would be staggering.

a. The EEOC's Estimate of the One-Time Burden Bears No Relationship to Reality

The EEOC's estimate of the one-time burden associated with the Proposed Revisions cannot withstand scrutiny. First, its assumption that employers will be able to generate W-2 and hours data after an HRIS professional spends just eight hours "developing queries . . . in an existing human resources information system" underscores how distant the EEOC's experience with employer HRIS systems is from reality.

The EEOC's underlying assumption – that a single HRIS houses all the data necessary to generate the W-2 and hours data – is plainly false. Most employers maintain gender, race, and ethnicity data in an HRIS that is different from the system that houses payroll information, including W-2 wage information. Hours data for non-exempt employees are likewise captured outside of the HRIS and hours data for exempt employees simply do not exist for most employers. In practice, once each reporting employer gathers the necessary earnings information, that data must be merged with each employee's EEO-1 occupational classification, gender, and race/ethnicity to complete the information needed for the proposed report. The number of employees in each unique combination of EEO-1 classification, gender, race/ethnicity, and membership in one of the twelve pay bands then would have to be computed and separately reported for each of the employer's establishments. Therefore, determining how to marry gender, race, and ethnicity data housed in an HRIS with W-2 wage data housed in a payroll system, often by a third party, in and of itself, will take more than eight hours.

Second, the EEOC's estimate is off-base because it ignores the fact that the W-2 data to be submitted is different from the W-2 data generated annually by employers for income tax reporting purposes. Because the 12-month reporting period proposed by the EEOC crosses tax years, employers cannot simply rely on the data they generate for the IRS each year. Instead, employers will be required to generate data spanning two different tax reporting years and will be required to make one-time changes to their systems in 2016 to permit such reporting.

Third, the EEOC's estimate of the one-time burden is inaccurate because the hourly rate on which it is based – $47.22 for a "Professional" – fails to account for the fact that senior information technology personnel, legal personnel, and others will be involved in any effort to develop the processes necessary to generate the required data. The identified hourly rate is not commensurate with the rates of pay provided to such individuals. [14]

Fourth, as detailed in Section II.B.3, below, the EEOC estimate fails to account for the one-time burden associated with requiring employers to develop, for the first time, a system that captures the hours worked by exempt employees and to train all exempt employees on any new system.[15] Those costs would be massive, and should be quantified by the EEOC before the Proposed Revisions are considered.

b. *The EEOC's Estimate of the* Annual *Burden of Compliance with the Proposed Revisions is Likewise Unrealistic*

The Commission's prediction that the Proposed Revisions will require only 3.2 hours of additional work per EEO-1 Filer – 30 additional minutes to read the instructions and just 2.7 hours to "collect, verify, validate, and report" all of the required W-2 and hours data for every establishment – is ludicrous.

First, the EEOC dramatically underestimates the time it will take each EEO-1 Filer to collect, verify, validate and report on data that must be pulled from various systems and sources. As noted above, often the required data is not housed in a single HRIS and cannot be generated with the push of a button. Once generated, a combination of HRIS professionals and HR professionals will have to expend time verifying and validating the data. Legal professionals will likewise be involved in the verification process, given that the EEOC's stated purpose for the collection is to target its, and the OFCCP's, enforcement efforts, and given the requirement that a company official certify the filing, subject to penalties.

[14] Ex. 2, Ronald Bird Decl. pp.17-18.
[15] As noted in Section III.C.2, any approach that assumes each exempt employee works 40 hours per week is not realistic and would only further undermine the efficacy of the data collected.

Second, the EEOC bases its burden estimate for the generation and reporting of W-2 data and hours data on the wage rate of $24.23, which is – again – the BLS wage for Administrative Support personnel. As detailed above, employees other than Administrative Support personnel would be engaged in the effort to collect, verify, validate, and report the W-2 and hours data – legal professionals and others are, and will continue to be, involved in the EEO-1 filing process.[16]

Third, the EEOC's annual burden estimate for filing the Revised Reports is improperly based on the number of EEO-1 Filers, rather than the number of EEO-1 Reports filed. The "per EEO-1 Filer" approach is inappropriate, for the reasons identified above, and the approach the EEOC used between 2009 and 2015 – in which the burden estimate takes into account the fact that many EEO-1 Filers must file reports on all of their establishments individually – remains the appropriate approach. If the per response approach were applied here, the EEOC's total cost estimate would jump from *$10,252,478* to *$49,111,297*, and that calculation assumes that the EEOC's hours estimates of 6.6 hours and cost estimate of $24.23 per hour are correct, which they clearly are not.

Fourth, the EEOC's assumption that filing on-line, through fillable PDFs, alleviates the burden of manual data entry is a false assumption. As detailed above, fillable PDFs still require the employer to manually enter the relevant data. With the addition of W-2 data and hours data, reported in twelve different pay bands within each EEO-1 category, each EEO-1 Filer will now be required to populate as many as 3,360 separate cells of data. The EEOC's burden estimate fails to account for this reality in any way.

Fifth, the EEOC does not account, in any way, for the costs employers will incur responding to investigations and enforcement actions that are prompted by "false positives" that flow from comparing employees within broad EEO-1 categories.[17] Because the EEOC and OFCCP intend to use the results of analyses of W-2 wages by EEO-1 categories to target their enforcement efforts and because those analyses will be fundamentally flawed, the substantial cost to employers who must respond to such investigations is not theoretical. Employers will be forced to expend resources producing additional data to the EEOC and/or OFCCP, retaining labor economists to run their own analyses of pay, and engaging legal counsel to correct the Agencies' presumption of discrimination.

[16] Ex. 2, Ronald Bird Decl. pp. 17-18.
[17] *See* Section III (describing lack of efficacy of any analysis that compares employee pay within broad EEO-1 categories); Ex. 1, Declaration of Dr. Michael DuMond (same).

c. The EEOC Ignores the Substantial Burden Associated with Collecting Hours Data for Exempt Employees

The EEOC proposes to collect "the total number of hours worked by employees" included in each of 12 pay bands within each EEO-1 category, to "allow analysis of pay differences while considering aggregate variations in hours." With respect to exempt personnel, the Commission "seeks employer input with respect to how to report hours worked for salaried employees" and states that "[o]ne approach would be for employers to use an estimate of 40 hours per week for full-time salaried workers." The Commission further states that it is "not proposing to require an employer to begin collecting additional data on actual hours worked for salaried workers," and the EEOC's "initial conclusion is that requiring employers to provide the total number of hours worked would impose a minimal burden."

As detailed in Section III.C.2, below, assuming that all full-time exempt employees work 40 hours per week is neither an accurate nor a fair assumption. Thus, to the extent the EEOC intends to consider "aggregate variations in hours," the only way for the EEOC to accurately capture hours for exempt employees would be to require employers to track hours of exempt employees. That option would be incredibly burdensome.

First, employers would be required to implement a time system to track all hours worked by exempt employees. Because there is no continuous workflow for exempt employees, and because they often work outside of normal business hours, any such system would be much more complex than the standard time-clock, punch-clock, or timesheet system currently used by employers for their non-exempt employees. The cost of developing such a system would be immense.

Second, the hours burden associated with exempt employees recording time would be substantial. Unlike non-exempt employees who may use a punch clock system or work regular hours, each exempt employee would be required to capture the "starts" and "stops" of his or her work. Even if that effort required just 15 minutes of time each day for each exempt employee, the result would be significant new burden for employers.

Finally, the EEOC has failed to abide by its obligation under the PRA, which is to propose a methodology for, and also assess the burden of, collecting hours for exempt employees. Because the EEOC has failed to do so, commenters – including the Chamber – are unable to examine the utility and burden of producing the hours report for exempt employees.

3. The EEOC's One-Time and Recurring Burden Estimates Relating to the Collection and Submission of W-2 and Hours Data is Wholly Contradicted by the Chamber's Survey

The Survey conducted by the Chamber sheds further light on the fundamental shortcomings of the EEOC's burden analysis under the PRA, both as to the one-time costs associated with collecting and reporting aggregate W-2 and hours data and as to the recurring costs associated with such efforts.

The Survey reveals the following with regard to the one-time costs that will be incurred by the 60,886 employers (estimated by the EEOC) who will be required to furnish aggregate W-2 and hours data:

- Ninety-five percent (21 of 22) of the respondents stated that they expected to incur one-time cost burdens associated with the proposed W-2 and hours reporting requirement.

- One respondent estimated its one-time cost of complying with the W-2 earnings requirement would range from $1,000 to $5,000. The remaining respondents estimated those costs to range from $50,799 to $58,254, which equates to $253 to $406 per report filed by each respondent.

- Estimates of the one-time costs associated with complying with the hours reporting requirement (including developing an hours tracking system) ranged from $37,535 to $57,563 per employer respondent, which equates to $174 to $242 per report filed by each respondent.

- Adding together the one-time costs associated with both new reporting requirements yields a total that ranges from $88,334 to $115,817 per respondent, or $427 to $648 per report.

- Applying the per report one-time cost ranges ($427 to $648) to the 307,103 reports that were filed most recently yields a lower bound

> for the one-time cost estimate that ranges from *$118.9 million to $180.4 million*.[18]

Exh. 2, p. 5-6 (Bird Declaration).

The Survey reveals the following with regard to the recurring costs that will be incurred by the 60,886 employers who will be required to furnish aggregate W-2 data[19]:

- Seventy-three percent (16 of 22) of the respondents stated that they expected to incur additional, ongoing, annual costs to implement the proposed expanded data collection.

- In response to the Survey request that respondents characterize their expectations for the ongoing, recurring costs of generating and submitting the W-2 wage data as a multiple of the current hours required and current outside services costs required, the average multiple reported was *1.9*.

- Mutliplying the average cost per report for the current EEO-1 Report (*see* Section II.A.4, above) by 1.9 yields cost per report that ranges from $2,488 to $2,619. Multiplying those figures by the 307,000 annual reports filed yields a recurring annual total cost for the proposed expanded EEO-1 report that ranges from *$692.9 million to $729.4 milion.*

Exh. 2, p. 6-8 (Bird Declaration). As noted in footnote 18, this recurring cost figure of $692.9 million to $729.4 million does not including the recurring costs employers will incur tabulating hours worked by their employees. As a result, even these extraordinary cost figures are simply the lower bound of the costs to be expected.

[18] The Chamber will continue to assess this figure as additional Survey responses are received. The upper bound, which one could calculate using the high end of the cost per company range ($115,817) and the total number of filers (60,886), is as high as $7 billion. Exh. 2, p. 5 (Bird Declaration).

[19] The EEOC should note that respondents were unable to provide an estimate of the recurring costs associated with tabulating hours worked data, as would be required under the EEOC's proposal.

III. THE PROPOSAL WILL NOT PROVIDE A PUBLIC BENEFIT OR MAXIMIZE THE UTILITY OF THE REQUESTED DATA AS REQUIRED BY THE PAPERWORK REDUCTION ACT.

Despite the significant burden that employers with more than 100 employees will face as a result of the requirements in the Proposed Revisions, the EEOC has failed to articulate any rationale or evidence whatsoever to justify the need for the proposed EEO-1 Revisions. Nor has the agency identified the specific benefit that the collection of aggregated wage and hours data would provide to the Commission. The EEOC's wholesale failure to articulate the proposed benefit is significant given that one of the purposes of the PRA is to "ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the federal Government."

The Sage Report, which the EEOC used to "formulat[e] the proposal and guide the development of analytical techniques to make full use of the data to be collected," recognized the inherent limited use of the requested data. Specifically, the Sage Report recognized that "**[s]ummary data at the organization level will likely be of very limited use in EEOC practice**."[20] The reasons for this observation are numerous, as articulated below.

To evaluate the utility of the proposed EEO-1 Revision, one must consider the legal framework that governs compensation discrimination. Since 1963, the EPA has required employers to pay men and women at the same establishment equal pay for equal work. In addition to the protections against wage discrimination based on sex afforded by the EPA, Title VII prohibits pay discrimination on the basis of race, color, national origin as well as other protected factors.[21] Employees who work for Federal contractors and subcontractors share

[20]" Sage Computing Final Report: To Conduct a Pilot Study for How Compensation Earning Data Could Be Collected from Employers on EEO's Survey Collection Systems (EEO-1, EEO-4, EEO-5 Survey Reports) and Develop Burden Cost Estimates for Both EEOC and Respondents for Each of EEOC Surveys (EEO-1, EEO-4, and EEO-5), p. 57 (Sept. 2015).

[21] Against this backdrop, it is important to note that Congress and courts have explicitly rejected the notion of pay equity based on "comparable worth" theories under which employers would be required to set wages to reflect differences in the "worth" of different jobs. (In the 1960s, the Kennedy Administration proposed a ban on sex discrimination in wages "for work of comparable character on jobs the performance of which requires comparable skills," with the assumption that job evaluation systems were available to evaluate the comparative worth of different jobs. Equal Pay Act of 1963: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 2 (1963) (quoting S. 882, 88th Cong., 1st Sess., 109 CONG. REC. 2770 (1963) and S. 910. 88th Cong., 1st Sess., 109 CONG. REC. 2886 (1963)). Congress resisted the proposal for the simple reason that it did not want the government or judges to invade the workplace and tell employers what to pay their employees.) Under federal law, the value of the relative worth of one job as compared to another job is a matter to be decided within the province of the employer offering the employment opportunities to workers. For instance, the Sixth Circuit rejected the comparable worth theory stating, "Title VII is not a substitute for the free market, which historically determines labor rates." *Int'l Union v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989). Likewise, the Ninth Circuit rejected the theory on the grounds that it found "nothing in the language of Title VII or

similar protections under Executive Order 11246. Since 1978, the EEOC is the administrative agency with enforcement authority of the EPA and Title VII, while the OFCCP enforces EO 11246.

Notwithstanding these protections, both the EPA and Title VII recognize that there are legitimate reasons for differences in compensation. In this regard, the EEOC has recognized that differences in education, experience, training, shift differentials, job classification systems, temporary assignments, "red circling," revenue production, and market factors, to name a few, can legitimately explain compensation differences.[22] Thus, mere differences in pay even as between comparable employees are insufficient to infer unlawful discrimination.

A. The EEOC's Proposed Tool Will Not Advance Investigations Under the EPA

As noted above, the EPA prohibits sex-based compensation discrimination for employees working at the same establishment if they perform "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[23] In other words, the relevant comparators are only those employees who perform "equal work" in the "same establishment." The EEOC itself describes the *prima facie* elements of an EPA claim as follows:

- Prima Facie Case: (1) the complainant receives a lower wage than paid to an employee of the opposite sex in the same establishment; and (2) the employees perform substantially equal work (in terms of skill, effort, and responsibilities) under similar working conditions.[24]

Despite the requirement that pay comparisons can only be made between employees who perform "equal work," the proposed EEO-1 Revision would require that employers provide W-2 wage data by EEO-1 job category. Because there are only ten EEO-1 job categories or groupings of jobs,[25] employers would be forced to categorize employees who perform wildly different work into these groupings. The job groupings are exceedingly broad, and will necessarily capture a wide range of positions that are not capable of meaningful compensation comparisons.

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its legislative history to indicate Congress intended to abrogate fundamental economic principles such the laws of supply and demand or to prevent employers from competing in the labor market." *AFSCME v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985).

[22] EEOC Compl. Man. Ch. 10.

[23] 29 U.S.C. § 206(d).

[24] EEOC Comp. Man. Ch. 10, at p. 20, available at www.eeoc.gov/policy/docs/compensation.html

[25] The ten EEO-1 Job groups include: Executive/Senior Level Officials and Managers; First/Mid-Level Officials and Managers; Professionals; Technicians; Sales Workers; Administrative Support Workers; Craft Workers; Operatives; Laborers and Helpers; and Service Workers.

For instance, as Economist Dr. J. Michael DuMond observed, one of the most serious deficiencies with the proposed EEO-1 Revisions are the "very broad occupational group[ings]" that would "result in comparisons of employees who work in very different jobs and who may perform different work." Dr. DuMond uses the following example:

> [O]ne of the 10 EEO-1 job categories is "Professionals", which encompasses a wide range of occupations such as lawyers and registered nurses. Hospitals that employ both nurses and lawyers would nevertheless be required to include both of these occupations together in the proposed EEO-1 survey. This grouping of nurses with lawyers ignores the fact that a nursing degree does not require a post-graduate college degree whereas a lawyer will almost surely have post-graduate education. Moreover, the knowledge, skills and abilities required of a nurse differ greatly from those factors that required of a lawyer. In fact, there is actually very little in common between nurses and lawyers beyond the sharing of a common EEO-1 category. While it is undeniable that nurses and lawyers are tied to very different labor markets, the EEOC's proposal ignores this reality and assumes pay should be similar for these types of occupations simply because they are both "Professionals."[26]

Dr. DuMond is not alone in his concerns; Economist Dr. Speakman expressed similar apprehensions, stating "it is my experience [employers] don't use the EEO-1 job classification for any type of review or planning or comparison purposes, much less for compensation-related determinations, outside the scope of providing data to the government. It's an artificial and meaningless conglomeration of dissimilar workers used only for EEO-1 reports. . . It's unclear why anyone or any agency would consider it an appropriate grouping for a meaningful analysis of employees' pay."[27]

The EEOC's instruction booklet outlines other "Professional" positions that similarly cannot form a proper comparison for compensation purposes under the EPA. For instance, using the Professionals job category for positions typically found within a hospital, we would also find accountants, computer programmers, dieticians, physicians and surgeons.[28] But these jobs are simply not comparable under the EPA.

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[26] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 9.
[27] Ex. 4, Dr. Robert Speakman Declaration at p. 11.
[28] *See* EEO-1 instruction booklet, available at http://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm. Notably, the examples provided omit the myriad other jobs that would also fall within the Professionals EEO-1 job group.

The EEOC itself must recognize the inappropriateness of such groupings under the EPA. Indeed, in investigating and analyzing the "equal work" requirement, the EEOC advises as follows:

> [A]n inquiry should first be made as to whether the jobs have the same common core of tasks, i.e., whether a significant portion of the tasks performed is the same. *If the common core of tasks is not substantially the same, no further examination is needed and no cause can be found on the EPA violation*.[29]

Common sense tells us that accountants, computer programmers, dieticians, registered nurses, lawyers, physicians and surgeons do not share the same common core of tasks. But to be more specific, the Department of Labor, Bureau of Labor Statistics makes those distinctions clear in the descriptions it assigns to these workers: [30]

> Accountants & Auditors: Examine, analyze, and interpret accounting records to prepare financial statements, give advice, or audit and evaluate statements prepared by others. Install or advise on systems of recording costs or other financial and budgetary data.
>
> Computer Programmers: Create, modify, and test the code, forms, and script that allow computer applications to run. Work from specifications drawn up by software developers or other individuals. May assist software developers by analyzing user needs and designing software solutions. May develop and write computer programs to store, locate, and retrieve specific documents, data, and information.

[29] EEOC Comp. Man. Ch. 10, at p. 22, available at www.eeoc.gov/policy/docs/compensation.html, (emphasis added) citing *Stanley v. University of S. Cal.*, 178 F.3d 1069, 1074 (9th Cir.) (EPA requires two-step analysis: first, the jobs must have a common core of tasks; second, court must determine whether any additional tasks incumbent on one of the jobs make the two jobs substantially different), cert. denied, 120 S. Ct. 533 (1999); *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998) (critical issue in determining whether two jobs are equal under the EPA is whether the two jobs involve a "common core of tasks" or whether "a significant portion of the two jobs is identical"); *Brewster v. Barnes*, 788 F.2d 985, 991 (4th Cir. 1986) (same).

[30] Standard Occupational Classification system overview, March 5, 2016, http://www.bls.gov/soc/home.htm, "The 2010 Standard Occupational Classification (SOC) system is used by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. All workers are classified into one of 840 detailed occupations according to their occupational definition. To facilitate classification, detailed occupations are combined to form 461 broad occupations, 97 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, and/or training, are grouped together."

> Dieticians: Plan and conduct food service or nutritional programs to assist in the promotion of health and control of disease. May supervise activities of a department providing quantity food services, counsel individuals, or conduct nutritional research.
>
> Registered Nurses: Assess patient health problems and needs, develop and implement nursing care plans, and maintain medical records. Administer nursing care to ill, injured, convalescent, or disabled patients. May advise patients on health maintenance and disease prevention or provide case management. Licensing or registration required. Includes Clinical Nurse Specialists. Excludes "Nurse Anesthetists" (29-1151), "Nurse Midwives" (29-1161), and "Nurse Practitioners" (29-1171).
>
> Lawyers: Represent clients in criminal and civil litigation and other legal proceedings, draw up legal documents, or manage or advise clients on legal transactions. May specialize in a single area or may practice broadly in many areas of law.
>
> Physicians:[31] Physicians who diagnose and provide non-surgical treatment of diseases and injuries of internal organ systems. Provide care mainly for adults who have a wide range of problems associated with the internal organs. Subspecialists, such as cardiologists and gastroenterologists, are included in "Physicians and Surgeons, All Other" (29-1069).
>
> Surgeons: Physicians who treat diseases, injuries, and deformities by invasive, minimally-invasive, or non-invasive surgical methods, such as using instruments, appliances, or by manual manipulation. Excludes "Oral and Maxillofacial Surgeons" (29-1022).

And of course, the BLS job descriptions do not take into account the many specific job descriptions and duties employers are likely to have in their own workforces.

Aside from the "same common core of tasks" analysis, assessing whether required "skills" of comparator jobs are substantially equal further demonstrates that comparisons of pay by EEO-1 job groupings can serve little utility. As the EEOC's Compliance Manual provides:

[31] *See* Internists, SOC 29-1063 given the multiple listings categories of "Physicians and Surgeons."

> Two jobs require equal skill for purposes of the EPA if the experience, ability, education and training required are substantially the same for each job.

Again, one need only look at the instructions the EEOC has provided to employers to see that the EEO-1 job groupings take into account a wide range of experience and educational requirements within the same job group. For instance, employers are advised that most jobs in the "Professionals" job group "require bachelor and graduate degrees, and/or professional certification." The EEOC further provides that "[i]n some instances, comparable experience may establish a person's qualifications." Thus, the explicit directions make clear that jobs that do not require the same education, experience and training will be grouped together. On its face, the EEO-1 job groupings are not capable of any meaningful analysis under the EPA. As Dr. Speakman indicated "…analyses using the EEOC's proposed pay data and suggested tests will result in a high error rate – firms that pay fairly will be investigated too often and firms that underpay women or minorities will often go undetected. Simply put, the recommended tests and data will lead to many false-positive and false-negative conclusions, negating any utility from this proposal. In fact, it appears that at best the targeting mechanisms suggested by the EEOC will do only negligibly better than selecting firms at random."[32]

B. The EEOC's Proposed Tool Will Not Advance Investigations Under Title VII

The proposed EEO-1 Revisions are also inconsistent with Title VII and, therefore, cannot support any meaningful analysis probative of further investigation. Specifically, providing W-2 data by EEO-1 job categories is not consistent with the requirement that compensation differences only matter if the comparators are "similarly situated." As articulated by the EEOC in its compliance manual, "similarly situated employees are those who would be expected to receive the same compensation because of the similarity of their jobs and other objective factors."[33] And when reviewing similarity of jobs, EEOC investigators are instructed that the "actual content of the jobs must be similar enough that one would expect those who hold the jobs to be paid at the same rate or level."[34]

For the reasons set forth in Section III.A above, the EEO-1 job groups are exceedingly broad and will necessarily include a wide range of positions that are not capable of meaningful compensation comparisons under Title VII. Using the same example described above, it is simply implausible to expect that accountants, computer programmers, dieticians, registered nurses, lawyers, physicians and surgeons are "paid at the same level or rate."

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[32] Ex. 4, Dr. Robert Speakman Declaration, at p. 3.
[33] EEOC Comp. Man. Ch. 10, at p. 6, available at www.eeoc.gov/policy/docs/compensation.html.
[34] *Id*. at 7.

Moreover, courts across this country have held that although similarly situated employees need not be "identical," they must be "directly comparable to the plaintiff in all material respects...."[35] Under these legal standards, any compensation analysis based upon EEO-1 job groupings would be meaningless.

We see a similar result in the EEO-1 "Sales Workers" job grouping. In that group we find advertising sales agents, insurance sales agents, real estate brokers and sales agents, securities, commodities, financial services sales agents, and telemarketers. Many of these positions could reasonably be found within a financial services organization. Yet one would not expect that these jobs would be similar enough to suggest that those who hold the positions would be paid at the same rate or level. Indeed, sales workers are often compensated based on varying levels of base salary and commission plans. Thus, unless they were truly in similar jobs, it would be impossible to conduct pay comparisons based on an overall broad-based job grouping that would include, for example, telemarketers and securities and commodities brokers.

And aside from the overly broad EEO-1 job groupings themselves, the EEOC has acknowledged that "differences in job titles, departments, or other organizational units may reflect meaningful differences in job content or other factors that *preclude direct pay comparisons* between employees."[36] But neither these factors nor the legitimate factors that explain compensation discrimination as described in Section III.C.1 below, are captured under the proposed EEO-1 Revisions.

C. There are Fatal Limitations with the Information Sought and the Statistical Tool Proposed to be Utilized by the EEOC to Analyze this Information

For reasons addressed in detail below, there is simply no circumstance under which broad-brush, aggregate compensation and hours data can be used effectively on a grand scale to target employers for review.[37] Every employer's compensation system is unique and numerous

[35] *Eskridge v. Chicago Bd. of Educ*., 47 F. Supp. 3d 781, 790-91 (N.D. Ill. 2014). Although a similarly situated employee need not be "identical," *Caskey v. Colgate–Palmolive Co*., 535 F.3d 585, 592 (7th Cir.2008), he must be "directly comparable to the plaintiff in all material respects...." citing *Naik v. Boehringer Ingelheim Pharm., Inc*., 627 F.3d 596, 600 (7th Cir. 2010); *Lopez v. Kempthorne*, 684 F. Supp. 2d 827, 856-57 (S.D.Tex. 2010) ("'Similarly situated' employees are employees who are treated more favorably in 'nearly identical' circumstances; the Fifth Circuit defines 'similarly situated' narrowly. Similarly situated individuals must be 'nearly identical' and must fall outside the plaintiff's protective class. Where different decision makers or supervisors are involved, their decisions are rarely 'similarly situated' in relevant ways for establishing a prima facie case."); *Alexander v. Ohio State University College of Social Work*, 697 F.Supp.2d 831, 846-47 (S.D. Ohio 2012) (To be similarly situated, a plaintiff's purported comparators must have the same responsibilities and occupy the same level position.)

[36] EEOC Comp. Man. Ch. 10, at p. 8, available at www.eeoc.gov/policy/docs/compensation.html.

[37] *Bazemore v. Friday*, 478 U.S. 385, 400 n.10 (1986) (noting that "some [are] regressions so incomplete as to be inadmissible as irrelevant . . . .''); *Sheehan v. Purolator*, 839 F.2d 99, 103 (2d Cir. 1988) (affirming the district

factors impact compensation decisions and results. The authors of the Sage Report, commissioned by the EEOC, detailed a theoretical framework for identifying pay disparities that is consistent with standard labor economic theory.[38] More specifically, the authors demonstrated that an employee's pay is estimated as a function that includes "control variables that can have a justifiable impact on difference in pay (such as education, certification, and work experience)." The inclusion of the control variables is critical in explaining why some employees are paid more than others. As the authors correctly note: "market forces determine one's level of pay, and *variation in pay is both necessary and inevitable*."[39]

Nonetheless, the two tests that the EEOC specifically references in the Proposed Revisions are simply distributional tests that do not control for any legitimate factors that explain pay such as those identified in the Pilot Study. Besides pay band, the only other factor that a covered employer will be providing to the EEOC is the aggregate number of work hours associated with employees in each pay band and demographic group. However, the Sage Report's authors noted that simply adjusting for the number of work hours, as recommended by the EEOC, could generate misleading results:

> [W]e have to recognize the varying patterns of compensation for employees who work different hours. As a result, pooling together into a single cell the employees who may have received the same compensation from working different hours and *analyzing them with a single offset as the format of the proposed EEOC form suggests, may lead to biases that are difficult to quantify*…"[40]

As the EEOC has found with similar efforts to collect compensation data on a broad scale, compensation cannot be subjected to a normalized, one-size-fits-all method of

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court's denial of class certification because the regression analysis relied upon was deemed to be ''flawed'' for failing to take into account non-discriminatory factors, such as "education and prior work experience."); *Griffin v. Board of Regents*, 795 F.2d 1281, 1292 (7th Cir. 1986) (holding that ''the explanatory power of a model is a factor that may legitimately be considered by the district court in deciding whether the model may be relied upon.''); EEOC Compliance Manual, Section 10: Compensation Discrimination ("[Employers often] assert[] that pay disparities are caused by nondiscriminatory factors. Such factors could include the employees' education, work experience with previous employers, seniority in the job, time in a particular salary grade, performance ratings, and others. The Commission will need accurate information about all the variables on which the employer relies, for each employee similarly situated to the charging party. The employer should be asked to provide and explain all of its reasons for a compensation differential to reduce the need for burdensome repetitive requests.")

[38] Sage Computing "Final Report: To Conduct a Pilot Study for How Compensation Earning Data Could Be Collected from Employers on EEO's Survey Collection Systems (EEO-1, EEO-4, EEO-5 Survey Reports) and Develop Burden Cost Estimates for Both EEOC and Respondents for Each of EEOC Surveys (EEO-1, EEO-4, and EEO-5), p. 16 (Sept. 2015).

[39] *Id*., at 16, emphasis added.

[40] *Id*., at 61, emphasis added.

interpretation. As a result, the proposed data collection will have no "meaningful value" and certainly no benefit that rises to the level required by the PRA. Simply put, the EEOC cannot achieve the objectives identified in the proposal through any mechanism, and certainly not through the mechanism it has identified.

1. The Pay Proposal Ignores Legitimate Reasons for Differences in Compensation

Employers have an inherent right to value jobs differently based on non-gender or race/ethnicity based standards.[41] The EEOC's proposal does not account for the explicitly-permitted differentiation in compensation based on factors like experience, performance, work productivity, skills, scope of responsibility, market, and education – to name just a few. This is particularly troublesome because differences in sex and race/ethnicity correlate with some of these factors. For example, the Bureau of Labor Statistics indicates that the average amounts of company-specific tenure differ between men and women and among different race/ethnic groups.[42] Notwithstanding, the statistical tests proposed by the EEOC do not account for these permitted differences.

Moreover, the EEOC's proposal ignores the role of working conditions and how that affects an employee's compensation. For example, employees who work night shifts, swing shifts and/or weekends are often paid a differential to account for less desirable work schedules.[43] For the same reason, jobs that require employees to work outside or exert atypical physical effort may also command a wage premium.[44] Nevertheless, the statistical tests proposed by the EEOC using the collected data will not and cannot account for differences in working conditions.

The concerns with the EEOC's failure to account for differences in working conditions is compounded because the Commission is proposing that employers use W-2 data, which includes not only base salary but also commissions, tips, overtime pay, shift differentials and bonus payments in the aggregate. In doing so, the EEOC is ignoring that some types of pay, specifically commissions and tips, are determined more by an employee's skill and effort than an employer's pay policies.[45] For example, Dr. DuMond notes that differences in W-2 earnings among servers at a restaurant will be based on their ability to provide quality service and earning the associated tips/gratuities, and is largely undetermined by the employer.[46]

[41] 29 U.S.C. 206(d) and 42 CFR 2000e-2(h).
[42] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 10.
[43] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 11.
[44] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 11.
[45] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 12.
[46] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 12.

2. The Use of W-2 Earnings Further Obscures the Relevance of the Data Collection

The EEOC's proposal does not specify how employers are to report W-2 earnings and does not indicate whether employers should report the W-2 federal income taxable earnings (box 1) or Medicare taxable earnings (box 5) or report in some other manner. It is possible--and indeed likely--that a difference in tax-deferred retirement contributions and savings propensities could drive a pay difference between groups of employees, creating false positives and false negatives.[47] As Dr. Speakman noted, pay differences "generated by employees' decisions" will undermine the EEOC's efforts to correctly identify firms that discriminate in pay.[48]

3. The EEOC's Approach to Reporting of Hours for Salaried, Part-Time and Terminated Employees Further Denigrates the Efficacy of the Data

The proposal would require employers to report hours worked as well as W-2 earnings data that span a two-year income tax period. The Commission stated that this will allow the EEOC and OFCCP to "meaningfully analyze"[49] pay differences because "collection of hours-worked data will account for the fact that some individuals are employed for less than the entire reporting year, and therefore, may work fewer hours."[50] The proposed approach to reporting data for employees exempt from the overtime provisions of the FLSA, part-time employees, and employees who are hired or terminated mid-year, however, is fundamentally flawed.

First, as the EEOC admits in the proposal, it is unsure how to count hours worked for full-time, salaried exempt employees, noting that the Agency "*seeks employer input*" on how to report hours worked for these exempt employees.[51] The EEOC indicated that it is "not proposing" that employers begin collecting additional data on actual hours worked for salaried workers "to the extent that the employer does not currently maintain such data," but rather is considering a standard such as estimating 40 hours per week for all full-time salaried workers in all industries. In our experience and in the experience of Dr. DuMond and Dr. Speakman, very few employers track the number of actual hours worked for their salaried workers and even HRIS systems that maintain a standardized or default value for "work hours" for salaried exempt

[47] Employee Benefits Security Administration Publications, *Women And Retirement Savings*, available at http://www.dol.gov/ebsa/publications/women.html ("Women are more likely to work in part-time jobs that don't qualify for a retirement plan. And working women are more likely than men to interrupt their careers to take care of family members. Therefore, they work fewer years and contribute less toward their retirement, resulting in lower lifetime savings.")
[48] Ex. 4, Dr. Robert Speakman Declaration at p. 10.
[49] EEOC's Notice of Proposed Changes to the EEO-1 to Collect Pay Data from Certain Employers, available at http://www.eeoc.gov/employers/eeo1survey/2016_eeo-1_proposed_changes_qa.cfm.
[50] 81 Fed. Reg. 5117, fn. 45 (February 1, 2016).
[51] 81 Fed. Reg. 5117-5118 (February 1, 2016) (emphasis added).

employees (such as 40 hours per week) does not reflect an employee's actual hours worked.[52] As such, the Agency will be forced to apply an across-the-board rule that does further harm to the efficacy of the data and that would be uninformative and unreliable for purposes of identifying pay disparities.[53] The impact of this data limitation is serious: according to data from the Bureau of Labor Statistics, 59% of the US workforce is paid by the hour, meaning that 41% of the US workforce is paid on a basis for which no accurate work hours may be available and for which the EEOC does not have a recommended method for measuring.[54]

Further, combining employees who work part-time or partial year with full-time and full-year employees will result in very misleading results. The variation is explained by Dr. DuMond in his example of an employee who has an annual salary of $120,000 per year but was recently hired and only worked 1 of 12 months, he or she will be placed in the lowest pay band since he/she only earned $10,000. Under the EEOC's proposal, this employee could be grouped with lower wage workers at the same company, even though the hourly rate for this employee would be much higher than the other employees in the same pay band. [55] Similarly, an employee who works a part-time schedule of 20 hours per week will be grouped and counted with full-time employees who earn half of that hourly rate but work 40 hours per week.[56] Likewise, Dr. Speakman raised similar concerns with comparing employees who worked part-time or part-year or who took leaves of absence with other employees who worked full-time, full-year without any breaks.[57]

Simply collecting the aggregate number of hours worked does not fix the bigger underlying problem with the EEOC's proposal: employees are being counted in the "wrong" pay band. However, the EEOC might again infer discrimination from differences in the imputed hourly rates for employees in the same pay band, not recognizing that those differences can just as easily arise from part time and partial year employees, and the Commission will not be able to make that distinction with the aggregated data. Additionally, the proposal does not suggest a methodology by which the EEOC will distinguish between intermixed part-time, partial year or full-time employees in the aggregate W-2 data. Moreover, since the total number of hours worked by employees in a pay band does not incorporate any of the factors known to affect pay, the data collected under this proposal will not provide any useful insight into the actual nature of employers' pay practices.

[52] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 13; Ex 4, Dr. Robert Speakman Declaration at p 9-10.
[53] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraphs 13-15.
[54] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 14.
[55] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 15.
[56] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 15.
[57] Ex. 4, Dr. Robert Speakman Declaration at p. 10.

4. The EEOC's Proposed Statistical Approaches Will Not be Useful in Identifying Pay Differences

The EEOC's proposal suggests that they will primarily use two statistical tests to analyze the collected data: the Mann-Whitney and the Kruskal-Wallis tests.[58] The EEOC indicates that it can "compute the statistical tests within job categories and then proceeding [sic?] to more closely investigate companies and establishments with low p-values" and may also "compare a particular firm's regression coefficients for the hours worked, race and gender variables to those derived from an analysis of the relevant labor market as a whole."[59] The use of these measures could easily lead to both "false positives" (i.e., flagging a company for further review even when all employees working in the same job are paid exactly the same) and also "false negatives" (i.e., concluding that pay disparities do not exist at a company even in the presence of unambiguous pay discrimination).[60]

The reason that the two statistical tests proposed by the EEOC are likely to lead to both false positives and false negatives is that the aggregated data collected by the EEOC will not include the most important factors that drive compensation. For example, the report will not account for one of the most critical factors that determine pay, specifically the job level/job grade of an employee.[61] According to Dr. DuMond, it is commonly understood that all employees, regardless of their race, ethnicity or gender, will experience increases in pay as they move "up" or "higher" in an organization.[62] He provides the example that Pharmaceutical Sales Representatives are paid less than their District Sales Managers who are paid less than their Regional Sales Directors. [63] While it would not be reasonable to assume that an inexperienced Pharmaceutical Sales Representative would be paid similarly to an experienced Regional Sales Director simply because they are in the same EEO-1 job category (Sales), the statistical measure the EEOC proposes utilizing could lead to this conclusion because the EEOC's proposal will not include any information or breakdown relating to an employee's job level/job grade. Despite this lack of consideration for an employee's job level/grade, the two statistical tests will nevertheless ascertain whether gender and racial groups are equally distributed across all the pay levels of a company without any consideration of the employee's job level/grade.

[58] 81 Fed. Reg. 5118, fn. 47 (February 1, 2016).
[59] 81 Fed. Reg. 5118, fn. 47 (February 1, 2016).
[60] Ex. 4, Dr. Robert Speakman Declaration, at p. 13 ("Of secondary concern is that the EEOC's proposed data collection removes within pay band earnings variation. This variation may add information and it may add uncertainty. Suppose, for example, that men are paid at the top of every pay band and women are paid at the bottom. Given the proposed data collection, they will all appear to all earn the same amount. That men earn more is masked by the pay band data, which limits the EEOC's ability to detect a pay difference.")
[61] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 17.
[62] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 17.
[63] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 17.

The Pilot Study commissioned by the EEOC is very clear as to what these two statistical tests assume: "Although the (Mann-Whitney) test is sensitive to pure shifts, it has the more general interpretation of a test of the differences between two or more distributions."[64] Thus, because the Mann-Whitney and Kruskal-Wallis tests are determining whether men and women, for example, are distributed similarly across all pay bands (and hence all levels of an organization), these tests do not determine whether there are improper disparities within a pay band.[65] Instead, it is a test of whether racial and gender groups of employees are similarly distributed across all pay bands, even when the employees in these groups may have very different levels of experience, may hold very different jobs (e.g., nurses and lawyers) and may be at very differently job and pay levels within an organization.[66] If the EEOC proceeds with its stated proposal to use these tests on the collected data to "detect discrimination," then the likelihood that they would lead to false positives and false negatives is greatly increased.

Dr. Speakman also had serious concerns with the use of these statistical measures. Dr. Speakman stated:

> In my twenty-four years of experience working as an expert in the areas of economics and statistics, I've only seen the Mann-Whitney test run once and I've never seen the Kruskal-Wallis test run. In the one instance that I saw the Mann-Whitney test run, the opposing expert was inexperienced and there were many other errors made in the analysis that using the wrong test was only one of many concerns.
>
> The reason these tests are never used is that the comparisons made cannot be used to assess Title VII or EPA claims as they cannot be used to make comparisons among similarly situated workers. The exception would be if the population of employees was defined so that they are similarly situated in all relevant, potentially confounding factors. This would almost always lead to comparisons among very small groups of employees and the tests would not have the ability to statistically detect pay differences even if they existed.[67]

These concerns are all too real. Dr. DuMond conducted the Mann-Whitney test on two sets of simulated employment data to illustrate the problems with the use of these measures.

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[64] EEOC pilot study on collecting pay data, available at: http://www.eeoc.gov/employers/eeo1survey/pay-pilot-study.pdf, at p. 27.
[65] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 19; Ex. 4, Dr. Robert Speakman Declaration at Page 12.
[66] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 19; Dr. Robert Speakman Declaration at Page 12.
[67] Ex. 4. Dr. Robert Speakman Declaration, at pp. 12-13.

In the first simulation, an employee's pay is completely determined by two factors: his or her job grade/level and the number of years he or she has worked at that level.[68] For example, an employee entering the first job grade receives a starting annual salary of $30,000 and is awarded a raise of $1,000 each year he or she remains in that position. Similarly, an employee hired into the next grade level receives a starting salary of $40,000 and receives a raise of $2,000 each year he/she or she remains in their job. A similar method of pay determination exists for the next three job grades at this fictitious company, though the starting pay and annual pay adjustments are naturally greater in the higher-level grades. In this simulation, it is clearly impossible for a pay disparity to exist between women and men in the same job grade, after taking into account any differences in job tenure. A standard multiple regression analysis of this simulated data confirmed this obvious conclusion. Using the Mann-Whitney test on these simulated data, however, yielded a statistically significant result, which the EEOC may incorrectly interpret as an indication of pay disparities that are adverse to women.[69] That is, even in a simulation in which an employee's pay is 100% determined by a formula that allows no room for discrimination, the test that the EEOC is proposing to use still yielded a statistically significant difference. Put simply, the EEOC's proposal won't be able to test whether or not similarly situated men and women are paid equally.

This point is further illustrated in the second simulation. At this second fictitious company, there is an explicit, racially discriminatory policy that all African-American employees in grade level 1 receive a starting salary of $30,000 and all white employees in grade level 1 receive a higher starting salary of $30,500. Both employees receive a pay adjustment of $1,000 for each year worked. This blatantly discriminatory policy is found at all other job grades as well: white employees in grade level 2 receive a starting pay of $40,500 compared to $40,000 for African-Americans. At the highest job grade in this hypothetical company, the starting pay gap is even more pronounced: African-Americans have a starting salary of $100,000 compared to $105,000 for white employees.[70] As would be expected, the existence of such an overt policy of pay discrimination was readily detectible through a standard multivariate regression analysis, which indicated that African-American employees were paid statistically significantly less than their white counterparts. On the other hand, applying the EEOC's proposed Mann-Whitney test to these same data did not reveal any statistically significant differences between white and African-American employees.

Dr. Speakman conducted a different simulation using the 2013 and 2014 earner study population of the Current Population Survey (CPS) and reached the exact same conclusion.[71] Dr. Speakman produced simulated employer data in thirteen industry and EEO-1 job category

[68] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 20.
[69] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 20.
[70] Ex. 1, Dr. J. Michael DuMond Declaration at Paragraph 23.
[71] Ex. 4, Dr. Robert Speakman Declaration, at p. 18.

pairings.[72] Using the CPS data, Dr. Speakman constructed an annual wage and salary measure[73] and annual hours.[74] From there, Dr. Speakman selected 10 "workers" at random and matched them to a random pay rate. Dr. Speakman performed this matching 10,000 times. In theory, the "workers" are matched randomly with predicted pay and the *expectation* is that there will not be a gender difference in the new pay amounts. Dr. Speakman indicated that labor economists would expect 5% of the trials to have statistically significant pay disparities even when controlling for hours worked, age, and census occupation code (the three pay determinants). About half of these significant outcomes will favor men (2.5%) and half will favor women (2.5%). However, the findings using the Mann-Whitney test did not show this. They found far more significant results than would be expected. For example, for Sales Workers in the Grocery Stores industry, when it is assumed that there is no underlying gender pay disparity (0%), for employers with 10 employees in this job classification, Dr. Speakman found that 8.0% of the trials produced a statistically significant pay disparity adverse to women. These are false positives, instances of when a firm pays employees equitably, but the statistical test is significant anyway. The findings in Dr. Speakman's simulation were damning:

> [T]here is a high rate of false positives and the ability to detect actual pay differences is weak. The false positive rate will be higher when workers are more dissimilar and the (omitted) factors impacting pay are correlated with gender. Increased population size exacerbates the problem. As population size and the underlying gender pay difference increase, the test will be better able to identify firms that actually underpay women, but at the cost of an increase in targeting firms that pay fairly. The statistical tests and targeting mechanism suggested by the EEOC will perform poorly.[75]

These simulations call into question the usefulness of the data that would be collected under the EEOC's proposal. These examples illustrate that the proposed statistical tests may not identify actual pay differences that are consistent with discrimination when it truly exists, and

[72] Ex. 4, Dr. Robert Speakman Declaration, at p. 18. Dr. Speakman indicated that these will likely be the largest industry and job classifications, which means that the EEOC's targeting mechanism should be more successful here than in smaller industries and job classifications. Dr. Speakman indicated that if the targeting mechanism is not successful with these larger populations, the chance of being successful elsewhere is even smaller.

[73] Ex. 4, Dr. Robert Speakman Declaration at p. 19. This measure does not include overtime, commissions, bonuses, tips, etc., which Dr. Speakman indicated makes the simulation more likely (not less likely) to be able to identify pay discrimination, noting "it does not have the shortcomings introduced by examining W-2 earnings." *Id.*

[74] The CPS data includes the information necessary to derive weekly earnings for all workers, but it does not include weeks worked except for those paid an annual salary. As such, Dr. Speakman assumed that all workers work fifty-two weeks per year. As Dr. Speakman noted: "If there is a difference between men and women in weeks worked, the test performed here will perform better than those that would be performed by the EEOC."

[75] Ex. 4, Dr. Robert Speakman Declaration, at pp. 22-23.

may incorrectly conclude that there is evidence consistent with discrimination when employees are actually paid equivalently. But perhaps more importantly, the first simulation shows that a company with a disproportionately greater number of female or minorities at the lower grade levels is likely to "fail" the Mann-Whitney test. In fact, failing the Mann-Whitney test could occur while companies are making good-faith efforts to increase their minority and female representation. That is, many firms have worked diligently to increase the participation of workers from historically disadvantaged groups by hiring these workers as they became available. The result of this effort is that higher percentages of female, African American, and Hispanic workers are found in some of the lower job levels as they gain additional experience to be eligible for promotion.

The EEOC has also suggested it may also use interval regression to perform analyses that attempt to correct for potential differences in annual hours worked between men and women and between members of different race groups. The EEOC indicated that the use of interval regression is to remove the effect of differences in hours worked. However, based on the analysis by Dr. Speakman, it appears the EEOC's proposed approach results in the same false positives and false negatives outlined with the Mann-Whitney and Kruskal-Wallace tests.[76] To illustrate the fatal limitations of interval regression, Dr. Speakman provided two hypotheticals:

- In Hypothetical 1, Dr. Speakman assumed that there are five women and five men who work 1,560 hours per year and five women and five men who work 2,080 hours per year. Dr. Speakman set the hourly pay rate for women at $20 per hour and set the hourly pay rate for men at twice the rate as women ($40/hour). In Hypothetical 1 men and women work the same number of average hours per year (1,820) but men are paid twice the rate of women. However, the interval regression would not produce any estimates of a gender pay difference even though men are clearly paid twice as much as women.

- In Hypothetical 2, Dr. Speakman produced a dataset with 24 men and 24 women, who on average earned the same hourly rate ($27.43) but who worked different number of hours. All workers worked either 1,040 hours per year or 2,080 hours per year, but men were more likely to work full-time and women more likely to work part-time. Interval regression produced a statistically significant gender pay result favoring men, even though the hourly pay rates were exactly the same.[77]

In sum, the statistical tests that the EEOC suggests they will use will undercut the EEOC's ability to correctly identify firms that discriminate in pay. They will not allow them to make comparisons among similarly situated workers. It appears that they will not even allow

[76] Ex. 4, Dr. Robert Speakman Declaration at p. 13.
[77] Ex. 4, Dr. Robert Speakman Declaration at p. 14.

them to account for differences in the number of hours worked by gender or race. [78] Accordingly, the EEOC's proposed statistical methodology provides no benefit and does not meet the standards of the PRA.

D. The EEOC's Proposal to Compare the Pay of a Firm or Establishment to Industry or Metropolitan-Area Data Serves No Purpose Under Title VII or the EPA.

The EEO-1 Revisions state that EEOC and OFCCP will develop a software tool that will allow its investigators to analyze "W-2 pay distribution within a single firm or establishment, and by comparing the firm's or establishment's data to aggregate industry or metropolitan-area data" which would "highlight statistics of interest."

However, neither Title VII, the EPA nor EO 11246 requires employers to pay its employees according to industry or geographical standards. Certainly, employers cannot use as a defense to claims of inequitable pay practices that others in its industry are also paying women or minorities in a particular EEO-1 category less than white men. Conversely, it is not discriminatory for an employer to decide to pay lower wages for certain positions than its competitors may choose to pay for the same positions. As such, the mere fact that a particular employer's aggregate compensation data is below the pay of the industry or metropolitan area is irrelevant to an investigation of whether an employer's pay practices are discriminatory.

Employers already have many different, much more finely-tuned, methods by which they can benchmark their compensation against others for particular jobs. Many companies, large and small alike, look to market data that is specific to the jobs in their workforce to assess their position vis-a-vis their competitors. The data that could be assembled through the proposed EEO-1 Revisions will lack the reliability of such targeted market data — data that employers can and do already access. We would note as well that the EEOC proposal dos not permit area differentials to be factored into the reported compensation data. Insofar as the federal government itself has area pay differentials for civil service pay grades, it makes absolutely no sense that the EEOC will require EEO-1 reports, either on the establishment or consolidated basis and not permit the employer to apply geographic differentials.

Moreover, the EEO-1 Revisions' suggestion that reporting pay data may "encourage self-monitoring" and "voluntary" compliance by employees if they uncover pay disparities misses the mark. As an initial matter, federal contractors and subcontractors are already required to monitor their pay practices as part of their compliance obligations.[79] And any

[78] Ex. 4, Dr. Robert Speakman Declaration at Page 14.
[79] 41 CFR 60-2.17 (b) "Identification of problem areas. The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate … (3) Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities."

contractor subject to an OFCCP compliance evaluation is required to submit employee-level detailed compensation data for the establishment under review. Thus, there would be no added utility to federal contractors and subcontractors who already self-monitor pay within their organizations.

And, generally speaking, the EEO-1 Revisions would not otherwise encourage self-monitoring efforts because, for the reasons explained above: (1) EEOC cannot effectively target its enforcement efforts based on the data; and (2) the data is too broad and generalized to be of any practical use to those employers who endeavor to establish equitable pay practices.

IV. CONFIDENTIALITY & PRIVACY

A. EEOC Should Take All Possible Actions to Protect the Confidentiality and Security of the Highly Confidential, Proprietary Data Being Requested

EEOC gives short shrift to the privacy and confidentiality issues raised by the Proposed Revisions notwithstanding the mandate of the PRA. The notice published in the Federal Register merely reiterated that Section 709(e) of Title VII, 42 USC § 2000e-8(e) prohibits disclosure of any information contained in the EEO-1 report "prior to the institution of any [Title VII] proceeding." The proposal notes that while the OFCCP is not subject to the restrictions of section 709(e), it nevertheless will hold the information contained in the EEO-1 confidential "to the extent permitted by law, in accordance with Exemption 4 of the Freedom of Information Act and the Trade Secrets Act." While these assertions state the law as codified and practiced, they understate the significant privacy and confidentiality concerns raised by the proposal.

We only have to refer to the draft report of the EEOC Survey System Modernization Work Group (Working Group) Meeting conducted on March 8-9, 2012, which was published with the Proposed Revisions to confirm these concerns. While this Working Group performed its work nearly four years prior to the publication of the Proposed Revisions and while the draft report was deficient in many respects, the sparsely published report highlighted issues raised which were not addressed in the Proposed Revisions. The Working Group noted that "the Privacy Act is a concern."[80] The report stated that: "Statistical Controls would be required to ensure the confidentiality of data to companies with smaller job categories."[81] The proposal is devoid of any discussion of data confidentiality. The draft report notes as well that if the "cell" size was lower than 5, we do not publish data for that cell."[82] There is no discussion of the implication of small cells, particularly in the upper pay bands.

[80] Draft Report pg 10, Question 6. Group 1
[81] Draft Report page 11 group 1
[82] Draft Report page 11, group 2.

In fact, there is no discussion at all of confidentiality issues in the proposal. In addition, the general reference to the Exemption 4 exclusion from the OFCCP releasing this information does not reference a crucial point. Unlike the section 709(e) restriction on EEOC disclosure, the OFCCP procedure requires contractors to follow the regulatory constraints found in the OFCCP and Department of Labor FOIA regulations. The Department of Labor FOIA Regulations, 29 CFR Part 70, create a complex process for employers to request that business confidential information not be disclosed. Rather than a simple prohibition of disclosure, the regulations state:

> (b) Designation of business information. A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.
>
> (c) Notice to submitters. A component will provide a submitter with prompt written notice of a FOIA request that seeks its business information whenever required under paragraph (d) of this section, except as provided in paragraph (g) of this section, in order to give the submitter an opportunity to object in writing to disclosure of any specified portion of that information under paragraph (e) of this section. The notice will either describe the business information requested or include copies of the requested records or record portions containing the information. When notification to a voluminous number of submitters is required, notification may be made by posting or publishing notice reasonably likely to accomplish such notification.
>
> (e) Opportunity to object to disclosure. A component will allow a submitter a reasonable time to respond to the notice described in paragraph (c) of this section. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to disclosure of the information. Information

> provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

Thus, in every instance where the Department of Labor receives a FOIA request for the extended EEO-1 information, it must timely notify the employer submitter which in turn must submit a detailed written statement explaining why some or all of the EEO-1 information is a trade secret or commercial or financial information. The regulations then provide a process whereby the requester and the employer have to undertake a lengthy appeal process where each presents its arguments. Final determinations are subject to judicial review. Further, even if the Department of Labor applies Exemption 4, that exemption from disclosure expires 10 years after it is granted. As noted in the draft Working Group report, information contained in small cells or smaller job categories may well disclose individual pay or other personal information. Thus, the submission to the OFCCP is not resolved by the glib assertion in the proposal that the OFCCP holds this information confidential "to the extent permitted by law." In fact, there is a significant burden placed on contractors to protect the confidentiality of the new EEO-1 information.

To the extent that the OFCCP shares the EEO-1 information, disclosure concerns would be alleviated to some extent if the EEOC requests that the Director of OIRA treats all information submitted to the EEOC as covered by Section 3510 of the Paperwork Reduction Act[83] and directs the EEOC that the statutory restrictions on disclosure of EEO-1 data will apply to the OFCCP.[84] In this regard, the direct prohibition on disclosure will not be subject to regulatory considerations and determination of trade secrets or commercial or financial information by OFCCP personnel not trained in these issues or a laborious and expensive regulatory and judicial review process.

B. Potential Data Breaches

As noted above, the proposal to collect employee pay data through the EEO-1 reports presents significant confidentiality issues related to the potential disclosure of this data. The EEOC publishes aggregate data collected from the EEO-1 reports and also shares original EEO-1 data with other federal and state agencies and individual researchers. With regard to the aggregate data, there are concerns that those who receive it will be able to reverse-engineer the aggregate data. With regard to original data, there are concerns that those who receive it might not take appropriate steps or have appropriate procedures in place to maintain its confidentiality. Furthermore, the EEOC must be transparent about the steps that it will take as an agency to insure that its information security program is now, and will be in the future, able to protect this sensitive data from access or acquisition by unauthorized individuals.

[83] 44 U.S.C. 3510
[84] 44 U.S.C. 3510 (b)(1)(2)

Prior to issuing the proposed rule, the EEOC engaged the National Academy of Sciences (NAS) to conduct a study, which, *inter alia*, looked at confidentiality concerns raised by the EEOC's collection of employee pay data in EEO-1 reports and its subsequent disclosure of this data in aggregate and original form. As a threshold matter, the report issued by the NAS (NAS Report) recognized -- and we wish to underscore -- that "[e]mployee compensation data are generally considered to be highly sensitive; they are even considered proprietary information by many private-sector employees."[85]

The NAS Report underscored that "there will be a great demand on the part of other federal agencies, researchers, analysts, compensation-setting bodies and others for access to these powerful new data . . . and the EEOC would be well advised to start taking steps now to develop policies to provide access in a protected environment."[86] The NAS Report went on to note that, despite the sensitive nature of employee pay data, the "EEOC provides [this] data to agencies that do not have the same level of confidentiality protections."[87] With regard to both its routine disclosure of data from the EEO-1 reports to other federal and state agencies, as well as researchers, the NAS Report recommended that the EEOC:

> (1) consider implementing appropriate data protection techniques, such as data perturbation and the generation of synthetic data to protect the confidentiality of the data, and it should also consider supporting research for the development of these applications; and
>
> (2) seek legislation that would increase the ability of the agency to protect confidential data. The legislation should specifically authorize data-sharing agreements with other agencies with legislative authority to enforce antidiscrimination laws and should extend Title VII penalties to non-agency employees.[88]

EEOC's proposal does not address these recommendations in any way.

Moreover, these is no indication in the proposal that the EEOC requires those to whom it provides the EEO-1 reports to (1) maintain the same level of confidentiality that the EEOC does with respect to this information (other than the Department of Justice) (2) demonstrate that their information security programs are sufficient to protect this data from malicious attacks targeted at such data or (3) provide notification to the EEOC in the event their data security is compromised or the entity or individual experiences a data breach. Moreover, the proposal is

[85] National Research Council, 2012, *Collecting Compensation Data from* Employers, Washington D.C., National Academies Press, p. 84, available at http://www.nap.edu/catalog/13496.
[86] *Id*. at 90.
[87] *Id*.
[88] *Id.* at 91.

silent as to how the data will be transferred from the EEOC to the various federal or state agencies or individuals.

Although the NAS Report did not make any specific recommendations about a review of, or improvements to, the EEOC's information security protocols in connection with requiring employers to provide pay data in the EEO-1 forms, the NAS Report did emphasize that "the consequences of a breach in the protection of data provided in confidence are, as other federal agencies have discovered, painful and of lasting consequence."[89] This has most recently been seen with the data breach experienced last year by the Office of Personnel Management. This massive data breach was one of the largest in recent memory and was specifically targeted at employee, applicant and former employee information. OPM has now had to make major changes to its personnel and its policies and procedures in an attempt to earn the trust of the American public when it comes to the information entrusted to this agency. A major source of criticism of OPM has been its decision to transfer the personally identifiable information entrusted to it to a third party vendor. The class action complaints filed against OPM and the vendor allege that OPM did not do enough to vet the security measures employed by the vendor or require the vendor to provide ongoing updates to OPM regarding its security program and any breaches.

The OPM breach holds lessons for all federal agencies and should inform how the EEOC handles the disclosure and transfer of employee pay data to third parties. The EEOC needs to assure employers that it has reviewed its information security protocols and that they can and will safeguard the pay data employers are providing. In the hands of the wrong people, the original pay data from the EEO-1 report regarding pay could cause significant harm to a company and as previously noted subject employees to potential violation of their privacy. Indeed, while the Working Group noted potential Privacy Act concerns, the EEOC apparently gave absolutely no consideration to this potential problem. And even though no information in the EEO-1 report is tied to the name of any one individual, it is not hard to imagine a scenario in which individual employees within a small group listed on the EEO-1 report could be identified. Indeed, this is why the EEOC has suppression protocols in place for aggregate data where a group has three or less employers' information in it or any one employer accounts for 80% of the group data being aggregated.

Finally, we would observe that the EEOC is apparently providing establishment EEO-1 data to researchers whom it engages under some form or another of consultancy agreement to enable the researchers to publish findings in learned journals or to enhance their academic credentials. There is absolutely no indication as to what, if any, confidentiality restrictions are imposed on these shared reports, nor is there any agency enforcement purpose from these arrangements, the sole Title VII justification for requiring these reports. And of course the PRA

[89] *Id*.

does not create an exemption from its requirements to permit agencies to share privileged data with academic researchers which has been submitted as a result of massive cost and operational burdens on employers.

Conclusion

In conclusion, the Chamber has serious concerns with the proposed EEO-1 Revisions. In view of the multitude of deficiencies which we have illuminated in these comments and which will be further highlighted in our formal comments, we request that the EEOC withdraw the proposed revisions and commence a cooperative effort with all stakeholders to deal with the issues.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

James Plunkett
Director
Labor Law Policy

Of Counsel:

/s/ Kris D. Meade
Kris D. Meade
Rebecca L. Springer
Crowell & Moring LLP

/s/ Larry Lorber
Larry Lorber
Camille Olson
Annette Tyman
Seyfarth Shaw, LLP

Exhibit 1

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25041886v.1

DECLARATION OF J. MICHAEL DUMOND, PH.D.

I, J. Michael DuMond, do hereby declare as follows:

1. I am over the age of 18. I have personal knowledge of the facts contained in this declaration and if called as a witness I would testify truthfully to the matters stated herein.

2. My name is Jon Michael DuMond. I hold a Ph.D., M.S. and B.S. in economics, all from Florida State University. I am currently a Vice President at Economists Incorporated, a position I have held since 2014. Economists Incorporated ("EI") is an economic consulting firm that offers consulting services to a wide variety of clients, including law firms, businesses, trade associations, government agencies and multilateral organizations. From 2009 to 2014, I worked as a Principal within the labor and employment practice of Charles River Associates ("CRA"). Prior to CRA, I worked as an economist with ERS Group from 2001 to 2008, an economic consulting firm which specializes in the economic analysis of labor and employment issues.

3. Since 2002, I have also been an adjunct professor with the Department of Economics at Florida State University. Beginning in 2006, my teaching has consisted solely of graduate-level courses, including computer programming, applied research methods and the econometric analysis of data. My academic research has focused on employee compensation and selection procedures and has appeared in peer-reviewed professional economic journals such as *Economic Inquiry, Industrial Labor Relations Review, Managerial and Decision Economics, and the Journal of Sports Economics*.

4. During my tenure with EI, CRA and ERS Group, I have regularly been engaged to analyze employee compensation for potential disparities in pay related to gender or race/ethnicity. These engagements have encompassed a wide variety of industries and occupations, and have included both private-

sector and public-sector employees. I have been retained on behalf of both plaintiffs and defendants. A copy of my curriculum vitae is attached to this declaration as Exhibit A.

5. I was retained by the United States Chamber of Commerce in connection with the Equal Employment Opportunity Commission's proposed changes to the EEO-1 survey, which would affect federal contractors and private employers with at least 100 employees. More specifically, I was asked to evaluate whether the data that would be collected by the Equal Employment Opportunity Commission (EEOC) would be useful and informative with respect to identifying pay discrimination.[1]

6. If adopted, the new reporting requirements would require covered employers to "collect aggregate W-2 data in 12 pay bands for the 10 EEO-1 job categories. Employers will simply count and report the number of employees in each pay band.[2]" Separate counts would be made in order to show the number of male and female employees in each of the pay bands as well as the number of employees in seven race/ethnic groups.[3] In addition to the number of employees in each pay band, covered employers would also report the total number of hours worked by those same employees in the prior 12 months.

7. The EEOC and Office of Federal Contract Compliance Programs (OFCCP) have stated they intend to rely on these data to guide their investigations, "identify employers with existing pay disparities" and "detect discrimination.[4]" The proposal does not define "discrimination".

8. In my opinion, the collection of such limited and aggregated data is highly unlikely to provide meaningful information for detecting discriminatory

[1] The details of the EEOC's proposal are presented in the Federal Register, Vol. 81, No. 20, pp. 5113 – 5121.
[2] Federal Register, Vol. 81, No. 20, page 5117.
[3] These seven groups are: 1) Hispanic/Latino, 2) White (not Hispanic/Latino), 3) African-American (not Hispanic/Latino), 4) Native Hawaiian or Other Pacific Islander (not Hispanic/Latino), 5) Asian (not Hispanic/Latino), 6) American Indian or Alaskan Native (not Hispanic/Latino) and 7) Two or More Races (not Hispanic/Latino).
[4] Federal Register, Vol. 81, No. 20, pages 5115, and 5118.

pay disparities and even less useful in determining whether a contractor or covered employer is providing "equal pay for equal work." The reasons that these data would be uninformative in identifying potential pay discrimination are numerous, and I have detailed six of the most serious deficiencies in the following paragraphs.

9. First, the aggregated reporting structure proposed by the EEOC only distinguishes employees based on very broad occupational groups. That is, these groupings result in comparisons of employees who work in very different jobs and who may perform different work. As a result, these groupings will necessarily result in comparisons of employees with large differences in skills, training, education and other qualifications. For example, one of the 10 EEO-1 job categories is "Professionals", which encompasses a wide range of occupations such as lawyers and registered nurses. Hospitals that employ both nurses and lawyers would nevertheless be required to include both of these occupations together in the proposed EEO-1 survey. This grouping of nurses with lawyers ignores the fact that a nursing degree does not require a post-graduate college degree whereas a lawyer will almost surely have post-graduate education. Moreover, the knowledge, skills and abilities required of a nurse differ greatly from those factors that required of a lawyer. In fact, there is actually very little in common between nurses and lawyers beyond the sharing of a common EEO-1 category. While it is undeniable that nurses and lawyers are tied to very different labor markets, the EEOC's proposal ignores this reality and assumes pay should be similar for these types of occupations simply because they are both "Professionals."

10. Second, the EEOC's proposal does not recognize that pay is highly correlated with job experience. For example, some employers have an explicit seniority-based pay system. Also, pay generally increases the longer an employee has been with a company. Recent data from the Bureau of Labor

Statistics indicates that the average amounts of company-specific tenure differ between men and women and among different race/ethnic groups.[5] Notwithstanding, the statistical tests proposed by the EEOC do not account for differences between employees based on length of service.

11. Third, The EEOC's proposal ignores the role of working conditions and how that affects an employee's compensation. For example, employees who work night shifts, swing shifts and/or weekends are often paid a differential to account for less desirable work schedules. For the same reason, jobs that require employees to work outside or exert atypical physical effort may also command a wage premium. Nevertheless, the statistical tests proposed by the EEOC using the collected data will not and cannot account for differences in working conditions.

12. Fourth, the EEOC is proposing that employers use W-2 data rather than an employee's "base" pay as the former includes commissions, tips, overtime pay, shift differentials and bonus payments. However, the EEOC is not proposing that employers report each of these compensation types separately, but instead is requiring that employers use the total of all these earnings when assigning an employee to one of the 12 proposed pay bands. In doing so, the EEOC is ignoring that some types of pay, specifically commissions and tips, are determined more by an employee's skill and efforts rather than an employer's pay policies. For example, differences in W-2 earnings among servers at a restaurant will be based on their ability to provide quality service and earning the associated tips/gratuities, and is largely undetermined by the employer. Unfortunately, the data that the EEOC is proposing to gather will not account for such differences.

[5] See "Employee Tenure in 2014"; News Release; Bureau of Labor Statistics, US Department of Labor; http://www.bls.gov/news.release/pdf/tenure.pdf

13. The fifth reason that the data collected through the EEOC's proposal would be uninformative and unreliable for purposes of identifying pay disparities arises from the inherent problem in determining the number of work hours for salaried employees. As previously noted, covered employers would be required to also determine the total number of annual work hours for employees in each of the 12 pay bands. While such data is obviously available for employees paid by the hour, in my experience very few employers track the number of actual work hours for their salaried workers. In reviewing data from numerous HRIS data systems over the course of my professional career, I have learned that even though these systems often maintain a standardized or default value for "work hours" for salaried exempt employees (such as 40 hours per week) this default value frequently does not reflect an employee's actual work hours. For most employers, there is no need to track actual hours worked for salaried exempt employees, as they are not eligible for overtime pay. Put another way, accurate data on work hours for salaried or commissioned employees are typically not maintained in the normal course of business.

14. This limitation on accurate data for non-hourly employees is openly acknowledged within the EEOC's own proposal, as they invite "specific, detailed input on this aspect of its proposed data collection.[6]" The impact of this data limitation is serious: according to data from the Bureau of Labor Statistics, 59% of the US workforce is paid by the hour, meaning that 41% of the US workforce is paid on a basis for which no accurate work hours may be available and for which the EEOC does not have a recommended method for measuring.[7]

15. The proposal is also unclear as to how the EEOC will use or analyze the data relating to work hours. I assume that this information will be used to undertake a rough conversion of the pay range counts into hourly rates

[6] Federal Register, Vol. 81, No. 20, page 5118, footnote 46.
[7] http://www.bls.gov/opub/reports/cps/characteristics-of-minimum-wage-workers-2014.pdf

for workers in each of the pay bands, most likely using the midpoint of each of the proposed pay bands divided by the number of hours per employee. This approach, however, could be very misleading. For example, an employee that has an annual salary of $120,000 per year but was recently hired and only worked 1 of 12 months will be placed in the lowest pay band since he/she only earned $10,000. Under the EEOC's proposal, this employee would be grouped with minimum wage workers at the same company, even though the hourly rate for this employee would be much higher than the other employees in the same pay band. Similarly, an employee who works a part time schedule of 20 hours per week will be grouped and counted with FT employees who earn half of that hourly rate but work 40 hours per week. Simply collecting the aggregate number of hours worked doesn't fix the bigger underlying problem with the EEOC's proposal: employees are being counted in the "wrong" pay band. However, the EEOC and OFCCP might again infer discrimination from differences in the imputed hourly rates for employees in the same pay band, not recognizing that those differences can just as easily arise from part time and partial year employees, and the agencies will not be able to make that distinction with the aggregated data. Additionally, the proposal does not suggest a methodology by which the EEOC and the OFCCP will distinguish between intermixed part time, partial year or fulltime employees in the aggregate W-2 data. Moreover, since the total number of hours worked by employees in a pay band does not incorporate any of the factors known to affect pay, the data collected under this proposal will not provide any useful insight into the actual nature of employers' pay practices.

16. The sixth reason that the data that would be collected by the EEOC would not be useful in identifying pay disparities is that the two statistical tests that the EEOC suggests they would use in analyzing the collected data (i.e., the Mann-Whitney tests and the Kruskal-Wallis test) could easily lead to both "false

positives" and "false negatives." In this context, an example of a "false positive" would be an inference that a company has gender pay disparities although women and men working in the same job are paid exactly the same (i.e., "equal pay for equal work.") On the other hand, an example of a "false negative" is a conclusion that pay disparities do not exist at a company even in the presence of unambiguous pay discrimination.

17. The reason that the two statistical tests proposed by the EEOC are likely to lead to both false negatives and false positives is that the aggregated data collected by the EEOC will not include one of the most critical factors that determine pay, specifically the job level/job grade of an employee. It is commonly understood that all employees, regardless of their race, ethnicity or gender, will experience increases in pay as they move "up" or "higher" in an organization. In my experience, most every company defines salary ranges for positions based on the level of the job within the organization. For example, Pharmaceutical Sales Representatives are paid less than their District Sales Managers who are paid less than their Regional Sales Directors. It would not be reasonable to assume that an inexperienced Pharmaceutical Sales Representative would be paid similarly to an experienced Regional Sales Director simply because they are in the same EEO-1 job category (Sales). But since the data that the EEOC is proposing to collect will not include any information or breakdown relating to an employee's job level/job grade, these relevant data will be ignored.

18. Despite a lack of consideration for an employee's job level/grade, the two statistical tests will nevertheless ascertain whether gender and racial groups are equally distributed across all the pay levels of a company without any consideration of the employee's job level/grade. The Pilot Study commissioned by the EEOC is very clear as to what these two statistical tests assume:

> *Although the (Mann-Whitney) test is sensitive to pure shifts, it has the more general interpretation of a test of the differences between two or more distributions.*[8]

19. Because the Mann-Whitney and Kruskal-Wallis tests are determining whether men and women, for example, are distributed similarly across all pay bands (and hence all levels of an organization), these tests do not determine whether there are improper disparities within a pay band. Instead, it is a test of whether racial and gender groups of employees are similarly distributed across all pay bands, even when the employees in these groups may have very different levels of experience, may hold very different jobs (e.g., nurses and lawyers) and may be at very differently job levels of an organization. If the EEOC proceeds with their stated proposal to use these tests on the collected data to "detect discrimination," then the likelihood that they would lead to false positives and false negatives is greatly increased.

20. I conducted the Mann-Whitney test on two sets of simulated employment data[9] that the EEOC is proposing to collect in order to illustrate the inherent flaws in the analytical framework in the EEOC's proposal. In the first simulation, an employee's pay is completely determined by two factors: their job grade/level and the number of years they have worked at that level. For example, an employee entering the first job grade receives a starting annual salary of $30,000 and is awarded a raise of $1,000 each year he or she remains in that position. Similarly, an employee hired into the next grade level would receive a starting salary of $40,000 and receives a raise of $2,000 each year he/she or she remains in their job. A similar method of pay determination exists for the next three job grades at this fictitious company, though the starting pay and annual pay adjustments are naturally greater in the higher level grades. In

[8] Sage Computing Pilot Study, September 2015, page 27. Emphasis added.

[9] A summary of these two simulations is provided within this declaration. The details of these simulations are included as Exhibit B.

this simulation, it is clearly impossible for a pay disparity to exist between women and men in the same job grade, after taking into account any differences in job tenure. A standard multiple regression analysis of this simulated data confirmed this obvious conclusion.

21. Using the Mann-Whitney test on these simulated data, however, yielded a statistically significant result, which the EEOC may incorrectly interpret as an indication of pay disparities that are adverse to women. That is, even in a simulation in which an employee's pay is 100% determined by a formula that allows no room for discrimination, the test that the EEOC is proposing to use still found a statistically significant difference.

22. This seemingly contradictory result occurs because in this simulation there are (by design) proportionately more female employees than male employees in the lower job grades, and therefore also in the lower pay bands. This demonstrates an important issue about the EEO-1 Pay Reporting Proposal: Since employees' compensation (and therefore their pay band) is highly correlated with their job grade, the statistical significance of both the Mann-Whitney and Kruskal-Wallis tests are going to depend on whether men and women are similarly distributed across all levels of a company's job grades/levels. This of course, is a very different type of question than whether pay disparities exist among employees in jobs requiring substantially equal skill, effort, and responsibility. Put simply, the EEOC's proposal won't be able to test whether or not similarly situated men and women are paid equally.

23. This point is further illustrated in the next simulation. At this second fictitious company, an African-American employee in grade level 1 receives a starting salary of $30,000. In contrast, a white employee in grade level 1 receives a higher starting salary of $30,500. Both employees receive a pay adjustment of $1,000 for each year worked. This blatant policy of pay discrimination is found at all other job grades as well: white employees in grade

level 2 receive a starting pay of $40,500 compared to $40,000 for African-Americans. At the highest job grade in this hypothetical company, the starting pay gap is even more pronounced: African-Americans have a starting salary of $100,000 compared to $105,000 for white employees.

24. As would be expected, the existence of such an overt policy of pay discrimination was readily detectible through a standard multivariate regression analysis, which indicated that African-American employees were paid statistically significantly less than their white counterparts. On the other hand, applying the EEOC's proposed Mann-Whitney test to these same data did *not* show any statistically significant differences between white and African-American employees.

25. As before, this contradiction occurs because the Mann-Whitney test does not measure actual pay differences between groups of employees, but instead it tests if groups of employees are found in relatively similar proportions across all pay levels of that company. To illustrate this point, the second simulation included a similar percentage of African-Americans and white employees in each of the EEO-1 pay bands, even though the actual pay of African-Americans was always less than white employees in the same job grade.

26. These two simulations call into question the usefulness of the data that would be collected under the EEOC's proposal. These examples illustrate that the proposed statistical tests may not identify actual pay differences that are consistent with discrimination when they truly exist, and may incorrectly conclude that there is evidence consistent with discrimination when employees are actually paid equivalently.

27. But perhaps more importantly, the first simulation shows that a company with a disproportionate greater number of female or minorities at the lower grade levels is likely to "fail" the Mann-Whitney test. In fact, failing the Mann-Whitney test could occur while companies are making good-faith efforts

to increase their minority and female representation. That is, many firms have worked diligently to increase the participation of workers from historically disadvantaged groups by hiring these workers as they became available. The result of this effort is that higher percentages of female, African American, and Hispanic workers are found in some of the lower job levels as they gain additional experience to be eligible for promotion. Accordingly, such companies would "fail" the Mann-Whitney or Kruskal-Wallis tests. The EEOC's proposal is likely to have the unintended and ironic effect of harming employers seeking to increase the participation of historically disadvantaged workers at all levels of their organization.

28. In summary, the aggregated data that the EEOC is proposing to collect and the analyses using the Mann-Whitney and Kruskal-Wallis tests are extremely unlikely to be useful or informative in addressing the laudable and important goal of eliminating gender and race-related pay disparities. The EEOC's proposal, as currently designed, will result in misleading comparisons, will not take into account known and accepted factors that influence pay, and will not lead to any useful determination as to whether employees are truly being paid the same for equal work or are otherwise being subjected to pay practices which violate Title VII.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at Tallahassee, Florida on March 4, 2016.

J. Michael DuMond

Exhibit A to the Declaration of J. Michael DuMond, Ph.D.

J. Michael DuMond
1276 Metropolitan Blvd. Suite 303 · Tallahassee, Florida 32312 · (850) 558-6036
dumond.m@ei.com

Professional Experience

Economists Incorporated

Vice President (2014 – Present)

Apply economic, econometric and statistical analysis to pay equity, employment litigation, EEOC investigations, OFCCP audits and pro-active self-monitoring studies. Consult with corporations, government contractors and law firms on employment discrimination matters to monitor and assess the risk of litigation or government investigation for various occupations and industries. Work closely with clients to design statistical models consistent with the employer's hiring, promotion, performance evaluation, compensation, termination and reduction-in-force decisions. Assist clients in identifying the data required to conduct thorough analyses of their workforce and excels at preparing and analyzing extremely large and complex human resources data.

Conduct quantitative data analysis designed to help attorneys assess the value and merits of Fair Labor Standards Act (FLSA) and state wage and hour claims including misclassification, missed meal/rest periods, donning/doffing, off-the-clock work, unpaid overtime and regular rate calculations. Assist companies with extracting, compiling and summarizing archived data from payroll and timekeeping systems, as well as unconventional systems such as computer logs, to evaluate wage and hour claims. Compute waiting time penalties and other PAGA penalties in California wage claims.

Prepare written reports and declarations relating to economic analyses, data production and/or the calculation of economic exposure; provide support of these analyses in the form of sworn testimony.

Charles River Associates

Principal (2009 – 2014)

Manage and design economic analyses relating to labor and employment issues, including matters in preparation for litigation, audits, mediation, monitoring, and settlement. Supervise the activities and analyses of a team of Ph.D. economists and other junior staff. Direct the construction of computerized databases for use in analyses. Extensive experience in matters relating to Fair Labor Standards Act compliance (as well as state-specific wage and hour laws), including calculation of economic exposure relating to allegations of unpaid overtime and the miscalculation of the regular rate of pay.

Economic Research Services (ERS) Group, Inc.

Client Relationship Manager (2008 – 2009)

Research Economist (2001 – 2008)

Professional Experience (Continued)

Worked as a client relationship manager at an economic consulting firm that specializes in labor and employment issues. Casework included matters in preparation for litigation, arbitration, monitoring and settlement. Conducted economic and statistical analyses involving allegations of gender, race, and age discrimination in a variety of employment practices, including selection, termination, and compensation as well as Fair Labor Standards Act compliance.

Case management experience included the supervision of economists and analysts, data receipt and preparation, database construction and analysis, summarization of relevant economic literature and direct contact with clients. Past clients represent a wide variety of employers, including state and local governments, multi-facility retailers, production facilities, and educational institutions.

Florida State University

Adjunct Professor (2002 - Present)

Courses taught include Labor Economics, Economic Analysis of Data, SAS Programming, and MS Project. Since 2006, all courses have been taught at the post-graduate level. MS Project is the capstone course that simulates a consulting project, including the preparation of written and oral presentations.

Blockbuster, Inc.

Director of Franchise Finance (1999 – 2001)
Manager/Director of Modeling and Research (1997 – 1999)
Senior Demographic Research Analyst (1996 – 1997)

Responsible for all budgeting, forecasting and financial analysis of the 800+ store franchise division. Designed and implemented projects to improve profitability of both franchisees and franchisor, such as optimal labor allocation methods and alternative methods of acquiring rental product. These programs and models helped franchisees lower their labor and product costs without sacrificing top-line revenue.

Developed and supervised the implementation of predictive models for use by the real-estate, product and special format divisions. Oversaw the worldwide rollout of site-selection and cannibalization modeling applications and assisted in the valuation and pricing of company stores for sale to franchise units. The site-selection models were used extensively during the years in which Blockbuster opened 500 stores annually, resulting in first-year store revenues that exceeded the projected rate of return. Expanded the scope of the department by introducing econometric models into business segments that had not previously relied on statistical tools. Subsequently, took on the additional responsibility of designing a product allocation system that simultaneously determines the optimal aggregate purchase amount for the entire company. Managed a staff of analysts, including Ph.D economists. Prepared written reports and presented results to executive management.

Education

Ph.D., Labor Economics, Florida State University (1997)

M.S., Economics, Florida State University (1994)

B.S., Florida State University (1991) – Summa Cum Laude

Publications and Research Papers

"Stockwell v. City & County of San Francisco: What it Doesn't Say about Statistics in Age Discrimination Cases," (with Kenneth W. Gage), Daily Labor Report, Bloomberg BNA, July 2, 2014.

"Evidence of Bias in NCAA Tournament Selection and Seeding," (with Jay B. Coleman and Allen K. Lynch), Managerial and Decision Economics, Vol. 31, March 2010.

"An Examination of NBA MVP Voting Behavior: Does Race Matter?" (with Jay B. Coleman and Allen K. Lynch), Journal of Sports Economics, Vol. 9, No. 6, December 2008.

"An Economic Model of the College Football Recruiting Process," (with Allen K. Lynch and Jennifer Platania), Journal of Sports Economics, Vol. 9, No. 1, February 2008.

"Estimating Wage Differentials: When Does Cost-of-Living Matter?" (with Barry Hirsch and David Macpherson), Economic Inquiry, Vol. 37, No. 4, October 1999.

"Two Essays on Wage Differentials," Ph.D. Dissertation, Department of Economics, Florida State University, April 1997."

"Workers Compensation Recipiency in Union and Nonunion Workplaces," (with Barry Hirsch and David Macpherson), Industrial and Labor Relations Review, Vol. 50, No. 2, January 1997.

Presentations/Professional Meetings

"Navigating the New Frontier of Steering Claims," National Industry Liaison Group 2015 Annual Conference, July 2015, New York, NY. (Panel Discussant).

"Early Mediation of Wage and Hour Claims," American Conference Institute's 20th National Forum on Wage and Hour Claims and Class Actions, January 2014, Miami, FL. (Panel Discussant).

"Prob(it)ing the NCAA: Three Empirical Models on Collegiate Athletics," (with Allen K. Lynch and Jay B. Coleman), 2005, presented at the SAS M2005 Data Mining Conference. Invited Presentation, Mid-day Keynote Address.

"An Economic Model of the College Football Recruiting Process," paper presented at the Eastern Economic Association meetings, 2005.

"Customer Discrimination in Major League Baseball," (with Allen K. Lynch) paper presented at the Southern Economic Association meetings, 1999.

Expert Reports & Testimony

Johnny Reynolds v. State of Alabama. This case involved the termination of a consent decree between the State of Alabama and the U.S. Department of Justice relating to the hiring and promotions of African-American employees. Submitted report and provided testimony at judicial hearing.

Simmons, et al. v. Comerica Bank. This matter involved allegations of additional overdraft fees resulting from changes in debit posting procedures during nightly settlement. Submitted a written report that examined plaintiff's expert's statistical approach and its applicability for purposes of class certification and provided deposition testimony.

Coordinated Proceedings Special Title, Sutter Health Wage and Hours Cases and Coordinated Actions. These matters involved allegations of missed meal and rest periods for nurses and surgical care technicians at approximately 20 affiliates within the Sutter Health system. Submitted a declaration in relation to the motion for class certification.

Tammy Garcia v. MAKO Surgical Corporation. This case involved allegations of an unlawful termination due to plaintiff's gender. Submitted a written report that provides estimates of economic loss, arising from differences in base salary, incentive compensation, and stock options.

Angel Corona v. Time Warner Cable. This matter involved calculation of unpaid overtime due to an alleged improper calculation of the regular rate of pay. Written report submitted.

Selene Prado v. Warehouse Demo Services, et al. This report detailed the necessary calculations relating to the determination of rest period violations on a class-wide basis and damages relating to the miscalculation of the regular rate of pay for overtime purposes. Submitted a written report in relation to the motion for class certification.

Victor Guerrero v. California Department of Corrections and Rehabilitation. Plaintiff alleges that he was disqualified from consideration of a Correctional Officer position due to his past usage of a false Social Security number, a pre-employment criteria that allegedly had a disparate impact on Latino applicants. Submitted written reports and provided testimony at deposition and trial.

Daisy Vazquez and Bryan Joseph, et al.v. TWC Administration, LLC. Plaintiff alleges that putative class members were not properly paid overtime due to the inclusion of non-working hours in the calculation of the regular rate of pay and an improper allocation of commissions to the time periods in which they were earned. Submitted a written report in relation to the motion for class certification.

Fernando Vega v. Hydraulics International, Inc. Submitted a written report in regards to allegations that non-exempt employees were not paid for all hours they were logged into the timekeeping and project management system.

Representative Engagements as a Consulting Expert – Wage and Hour

Regular Rate Miscalculation

Inside sales employees at a multi-site retailer alleged that their overtime true-ups were based only on weekly overtime hours without consideration of additional daily overtime hours. Prepared estimates of economic exposure, including the valuation of potential offsets from factors that were included in the regular rate calculation beyond what was legally required.

Customer Service Representatives at multiple facilities filed collective actions involving failure to properly calculate the regular rate relating to overtime pay. Prepared economic loss estimates for use in mediation and settlement. Prepared measures of overpayments that were used as financial offsets to the estimated liability.

First line supervisors at a national landscaping company had overtime pay calculated using the fluctuating work week (FWW) methodology, in violation of wage and hour laws in some states, and the paid overtime did not properly include shift differential payments. Calculated economic exposure relating to these claims using the proper regular rate of pay.

Misclassification of Exempt Status

Inside sales representatives for an online retailer alleged they were misclassified as salaried exempt. Analyzed millions of records of time-stamped activity in order to ascertain estimates of alleged overtime hours. Calculated potential economic losses under alternate scenarios for use at mediation.

Store managers at a nationwide multi-site retailer claimed misclassification as salaried exempt. Prepared economic loss estimates of alleged unpaid overtime for use in mediation. (Multiple similar engagements)

Outside engineers at a national telecommunications company alleged that they were misclassified as exempt. Prepared an analysis of alleged overtime work and the related economic exposure for mediation and eventual settlement.

First-line construction and maintenance supervisors challenged their exempt status; prepared estimates of potential liability exhibits for trial.

Missed Meal/Rest Periods

Delivery drivers of a nationwide medical supply distributor alleged that their schedule necessitated that they work through their unpaid meal periods. Combined multiple data sources, including GPS data to assess the validity of these claims.

Major financial institution with multiple collective actions involving pay stub violations, deductions, wait-time penalties, overtime, and meal and rest periods. Prepared economic loss estimates for use in mediation and settlement.

Assistant store managers at a nationwide multi-site retailer alleged they were working without compensation during meal periods. Prepared an analysis to assess liability by integrating time-clock data with time-stamped cash register activity records.

Representative Engagements as a Consulting Expert – Wage and Hour (continued)

Employees of on-campus restaurants at a state university alleged they were denied meal and rest breaks in violation of state law. Analyzed time-punch records to assess violation incidence and prepared estimates of economic exposure that were relied upon during mediation to reach settlement.

Off-the-clock/Time-Rounding allegations

Call center operators at several facilities filed collective actions involving failure to pay overtime as required under the Fair Labor Standards Act (FLSA). Prepared estimates of the amount of alleged "off-the-clock" work and the associated economic loss estimates; identified and corrected numerous errors made by plaintiff's expert. (Multiple similar engagements)

Customer Service Representatives at multiple facilities filed collective actions alleging a failure to pay for pre-shift activities. Integrated employees' computer time-stamp records with their time-clock data in order to determine the potential range of pre-shift work. Prepared estimates of potential exposure for use at mediation.

Non-exempt employees alleged that their Employees of a restaurant chain alleged that paid hours were systematically lower than their actual work hours due to the employer's time-rounding policies. Analyzed and compared actual work activity with payroll data to assess validity of these claims. (Multiple similar engagements)

Representative Engagements as a Consulting Expert – Equal Employment Opportunity

A major computer manufacturer was faced with allegations of Title VII violations, specifically involving discriminatory compensation and promotions. Assisted client with data production and responses to discovery requests. Conducted statistical analyses of compensation, promotions and estimates of potential economic exposure. Developed methodologies and analytical tools used to assess differences in performance ratings, annual bonuses, and merit pay adjustments on an on-going basis. (Multiple similar engagements)

Prepared analyses relating to a comprehensive audit of the major employment decisions at a global healthcare company, including promotions, terminations, performance evaluations, compensation, and disciplinary actions. Provided remediation recommendations for sub-groups of employees based on results of the audit.

Servers at a nationwide chain of restaurants alleged disparate treatment with respect to work assignments. Prepared a statistical analysis of allegations that resulted in a favorable settlement for client.

Store managers at a nationwide multi-site retailer alleged compensation differences under the Equal Pay Act. Prepared analytical databases and prepared estimates of potential economic exposure.

Multiple engagements involving analyses of potential adverse impact by race and gender relating to the conversion of salary grades to salary bands and the associated reclassification of employees.

Representative Engagements as a Consulting Expert – Equal Employment Opportunity

Reviewed and identified errors made by opposing counsel's expert relating to the valuation of stock-options in a case involving a termination allegedly based on the plaintiff's age.

Multiple retentions for a variety of clients relating to potential adverse impact by race and gender of employees' annual performance rating assignments and the associated merit increases/bonus payments.

Prepared analyses of compensation for a large technology company. Investigated whether the observed pay differentials were the result of initial (starting) pay or whether they developed during the course of their employment tenure with the company. Calculated remediation amounts and devised a procedure in which the pay adjustments were incorporated into the annual merit pay adjustment cycle.

Data Sampling and Production

Processed millions of data records and prepared numerous databases for opposing counsel for a class of over 600 opt-ins in a wage and hour matter after limiting the data to relevant work dates and employment spells. (Multiple similar engagements)

Prepared a stratified sampling plan of stores for a nationwide, multi-site retailer who was alleged to have improperly classified assistant managers as salaried exempt. The sample was used for purposes of challenging conditional certification.

Exhibit B to the Declaration of J. Michael DuMond, Ph.D.

The EEOC's pay reporting proposal ("Proposal") recommends the use of the Mann-Whitney or Kruskal-Wallis test to evaluate the pay band data that will be submitted by companies. The Proposal does concede that the accuracy of these tests "needed to be addressed" as there is a concern that using them may yield "false positives."[1] Put another way, a statistically significant result from these tests may give rise to an inference of discrimination, even when no such discrimination exists. This is not a trivial concern. As will be shown in the following two examples, the Mann-Whitney test can be shown to find "discrimination" against women even when a company has a gender-neutral and formulaic pay policy. The second example shows just the opposite: the Mann-Whitney test fails to identify evidence consistent with discrimination against African-Americans even when a company chooses to pay them less than white employees in every job.

Example 1 – "False Positive"

Company XYZ sets their employee's salary based on two factors. The first factor is the employee's job grade. Like most companies, jobs at the higher grade levels pay more than jobs at the lower grade levels in accordance with the greater responsibilities, supervisory authority and requisite skills and experience that the higher grade jobs require. Second, company XYZ increases an employee's salary for each additional year of experience in their job grade. The salary structure of Company XYZ is shown in the following table.

Job Grade Level	**Starting Salary**	**Additional Salary per (Full) Year in Job**
1	$30,000	$1,000
2	$40,000	$2,000
3	$70,000	$3,000
4	$90,000	$4,000
5	$100,000	$5,000

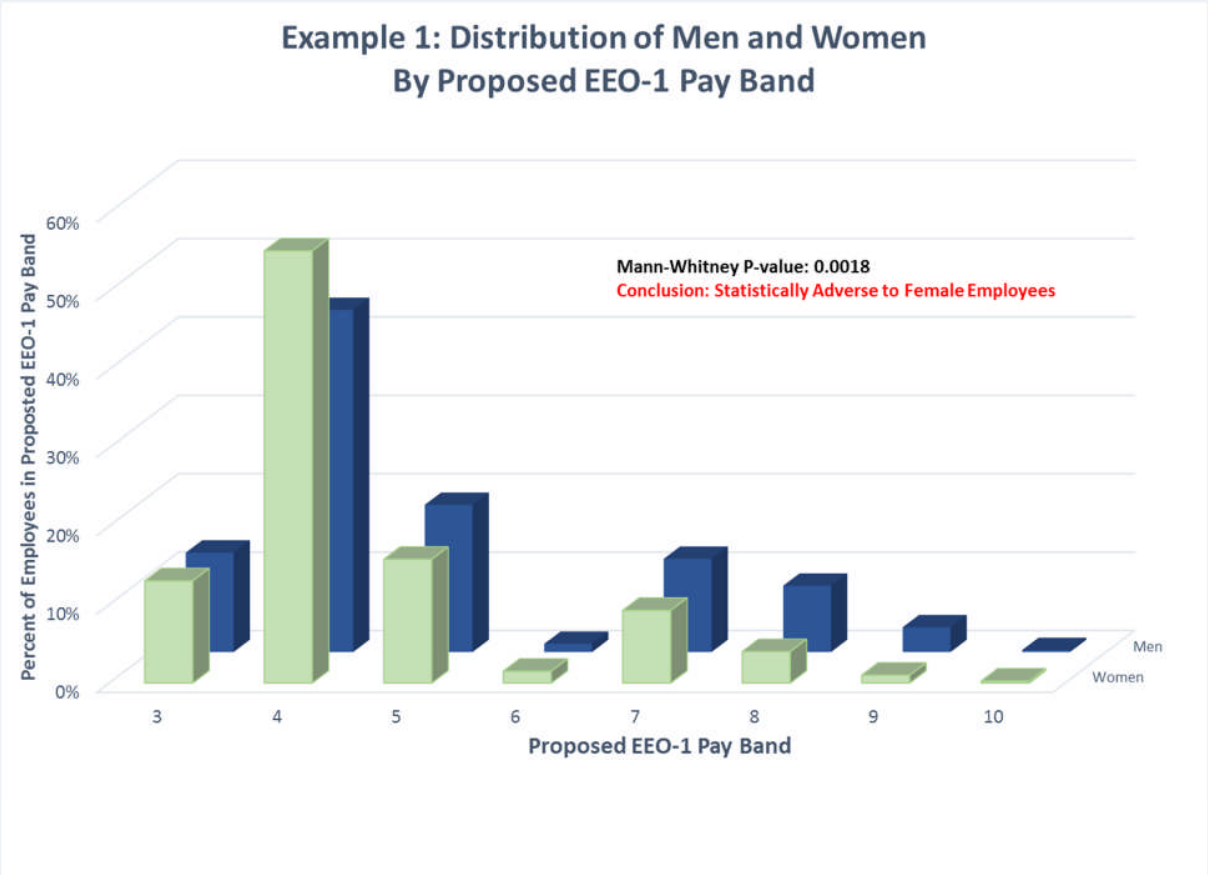
As would be expected, a standard regression analysis of employee compensation that controls for job grade and the number of years an employee has worked in their current grade would reveal that there is not a gender pay difference. That is, the average female employee at Company XYZ is paid almost identically to the average male employee, after considering the effect of job grade

[1] Federal Register, Vol. 81, No. 20, page 5118. The Proposal also suggests that the statistical tests would be used to "detect discrimination," implying that a statistically significant result from either a Mann-Whitney or Kruskal-Wallis would be sufficient evidence thereof. However, statistical evidence cannot be used to find discrimination—it can only identify outcomes that are consistent or inconsistent with discrimination.

and the number of years worked, and the measured gender pay difference is not statistically significant.

Total Number of Employees	Number of Female Employees	Estimated Pay Difference for Female Employees	Number of Standard Deviations
777	399	-$44.54	-0.19

Despite a pay policy that is, by construction, completely gender-neutral, the Mann-Whitney test of the EEO-1 pay bands would show a statistically significant result in favor of male employees, as depicted in the following chart.



This seemingly contradictory result stems only from the fact that there are proportionately more female employees than male employees in the lower grades, and therefore also in the lower pay bands. For example, the percent of women in Pay Band 4 ($30,680 - $38,999) is noticeably

higher than the percent of men, while the opposite is true in Pay Bands 7 and above. This raises an important issue about the EEO-1 Pay Reporting Proposal: Since employees' compensation (and therefore their pay band) is heavily correlated with their job grade, the statistical significance of both the Mann-Whitney and Kruskal-Wallis tests are going to depend on whether men and women are similarly distributed across all levels of a company's pay grades.

Put simply, the Proposal doesn't test whether or not similarly situated men and women are paid equally, but rather, whether women are hired, promoted or otherwise placed into levels within the company at rates similar to men. This point is further illustrated in the second example.

Example 2 – "False Negative"

Like the first example, Company ABC uses only three factors to determine an employee's pay: job grade, the number of years of worked in the job and the race of an employee.[2] The salary structure for Company ABC is as follows:

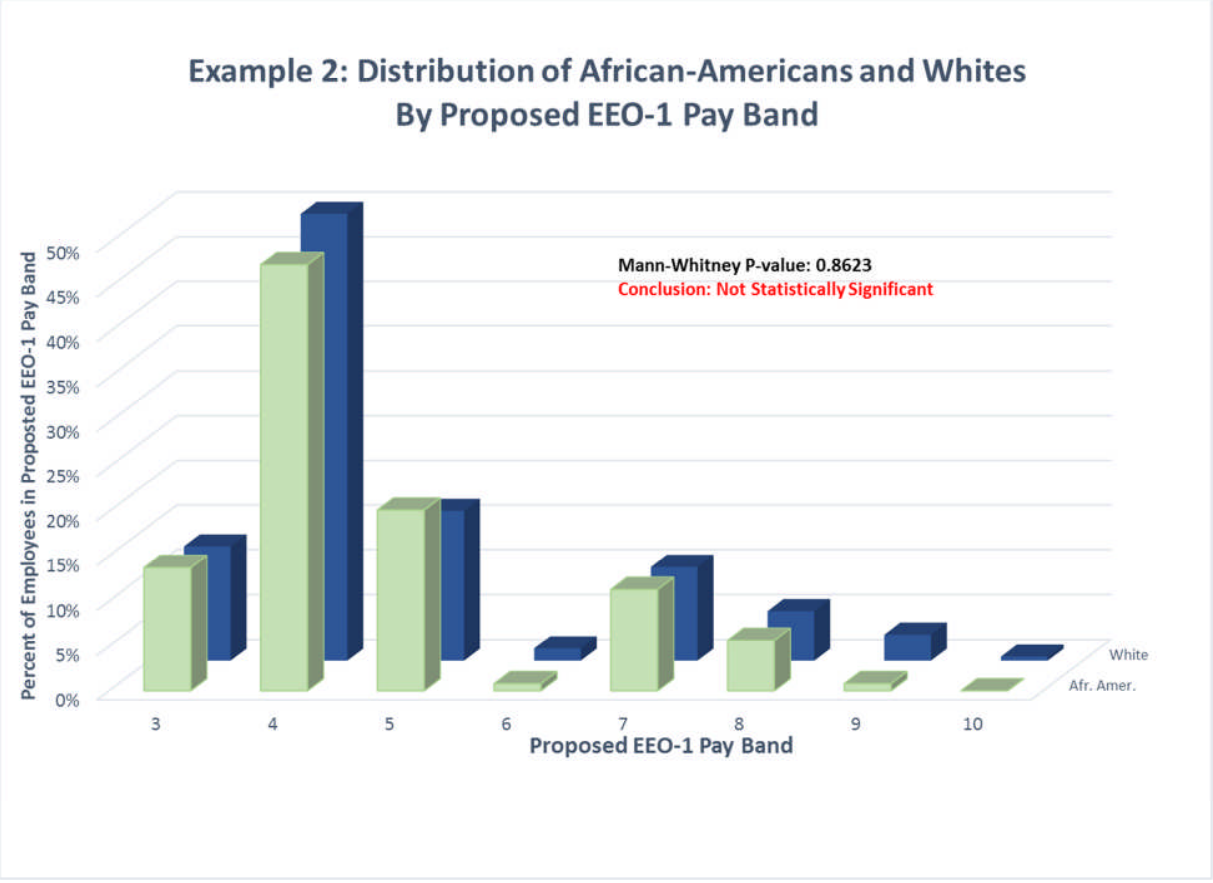
Grade Level	**Starting Pay Whites**	**Starting Pay African-Americans**	**Additional Salary per Year in Job**
1	$30,500	$30,000	$1,000
2	$40,500	$40,000	$2,000
3	$71,000	$70,000	$3,000
4	$95,000	$90,000	$4,000
5	$105,000	$100,000	$5,000

Naturally, a regression analysis that controls for job grade and the number of years an employee has worked in their current job would identify the existence of a pay disparity. More specifically, African-Americans are paid, on average, $923 less than otherwise similar white employees, a difference that is statistically significant.

[2] For this simulation, an employee's race was randomly assigned such that 12.5% of the employees were designated as African-American. The random nature of this assignment results in a similar job grade distribution of "white" and "African-American" employees.

Total Number of Employees	Number of Female Employees	Estimated Pay Difference for Female Employees	Number of Standard Deviations
777	79	-$923	-2.34

In spite of this pay policy, the Mann-Whitney test does not reveal a statistically significant difference in the pay bands between whites and African-American employees, even in a situation in which the company is blatantly discriminating against African-Americans.



These examples call into question the usefulness of the data that would be collected under the EEOC's Pay Data Reporting proposal. First and foremost, these examples illustrate that the proposed statistical tests may not identify differences that are consistent with discrimination when those differences exist, and may incorrectly conclude that there is evidence consistent with

discrimination when the evidence definitively is not. Secondly, while it is often the case that female and minority employees are paid less than male and white employees on average, the aggregated data that would be collected ignores any of the possible and often legitimate reasons for pay differences between gender or race/ethnicity groups. It only depicts the pay difference in a different manner.

Exhibit 2

Declaration and Report of Ronald Bird
Regarding Results of a Survey of Affected Companies Regarding EEO-1 Information Collection Burdens
Prepared for the U.S. Chamber of commerce in Response to Equal Employment Opportunity Commission Notice to Revise EEO-1 Reporting Requirements

Qualifications:

I hold the Ph.D. degree in economics (University of North Carolina at Chapel Hill, 1974), and I have over 25 years of experience conducting and reviewing economic analyses of the benefits and burdens of government policies, regulations and information collection mandates. I presently serve as Senior Regulatory Economist with the United States Chamber of Commerce. Previously, I served as Chief Economist of the United States Department of Labor (2005-2009), Chief Economist for The Employment Policy Foundation (1999-2005), Chief Economist for Dyncorp Information Technologies (a regulatory and policy analysis support contractor to Federal agencies (1992-1999)), and Senior Economist for Jack Faucett Associates (a regulatory and policy analysis support contractor to Federal agencies (1989-1992)). I have held faculty appointments in economics at North Carolina State University (1973-1975 and 1982- 1987), The University of Alabama (1975- 1982), Meredith College (1986-1987), and Wesleyan College (1987-1989).

Survey Need and Description:

In response to the Equal Employment Opportunity Commission's (EEOC) announcement, 81 Federal Register 20, p. 5113, February 1, 2016, of intention to revise Form EEO-1, Annual Employer Report, to add mandatory reporting of earnings and hours worked data, I reviewed EEOC's documentation of its estimates of the burden of the current version of the EEO-1 form and its estimates of the future burden of its proposed revised report form. From that review, I found that the estimated time and cost burdens presented by EEOC were based on specious reasoning and lacked a credible empirical foundation. These findings are discussed in detail in my Declaration of March 8, 2016, which is attached as Exhibit 2 of the testimony Statement of Camille A. Olson, submitted for the March 16, 2016, hearing before the Commission, and are reproduced here as Appendix A of this declaration.

A critical finding of my review was that the EEOC failed to conduct surveys of experienced EEO-1 report filers to ascertain both the baseline burden of the existing form and the expected burden of adjusting to and complying with the proposed revised form. In order to demonstrate the feasibility and utility of information that can be obtained from experienced filers, I designed and implemented a survey instrument to collect information regarding the time and cost burden of the currently active (2015 reporting year) version of the EEO-1 form and to collect information about the expected time and cost burden of the proposed revised form.

The survey instrument presented as Appendix B of this report was initially sent to 35 companies selected from the list of U.S. Chamber of Commerce member companies who employ at least 100 employees. As of March 25, 2016, responses from 22 companies had been received, and

those responses were tabulated for this report. Additional responses have been received since and most recent communications suggest that additional survey recipients will respond within the next few weeks. This report will be updated, revised and expanded for submission to the OIRA public comment process at that time.

The survey instrument that was sent initially to 35 potential respondents was designed based on preliminary discussions and input from 9 experienced human resource management practitioners who described in detail during in-person or telephone interviews how they handled current EEO-1 reporting and how their information systems and consultant relationships were involved in responses. An important point that became obvious from these discussions was that the production and submission of the EEO-1 report is not typically the work of a single individual: Because it is a legally significant document that carries with it potential liabilities and legal consequences for the filing entity, the compilation, verification, review and final submission of the annual report requires labor inputs blended across a wide spectrum of jobs, including clerical staff, senior human resource managers, corporate legal counsel and chief executive officers.

It also became apparent that many filers depend on an assortment of paid outside service providers, attorneys and consultants to assist in the preparation and submission of the EEO-1 as it now exists, comprising a compliance cost element in addition to the internal labor resources time burdens. Various drafts of survey questions were reviewed and pilot tested through this preliminary field research. All of this preparatory work was accomplished within about two weeks before the final survey was completed and distributed.

The final survey does not address every question that is relevant to estimation of the full burdens of the present and proposed EEO-1 formats. Some questions were omitted in the interests of brevity and feasibility, and other questions have arisen upon analysis of the initial responses. The survey reported here represents a practical beginning effort credibly to ascertain the salient dimensions of the time and cost burdens involved. Further research should and will be undertaken to expand more fully an understanding of the burdens and implications of this major Federal information collection activity.

Preliminary Survey Results:

Because the EEOC did not grant the Chamber's request to extend the comment period for this matter to accommodate fully the collection and tabulation of survey data, this report reflects only data collected through March 25, 2016, and should be considered preliminary. Nevertheless, 22 empirical data responses are notably more than the EEOC's analysis, which failed to include empirical data responses from any companies that currently file EEO-1 reports. As additional responses are received, this report will be updated, expanded and provided to OIRA and others.

The 22 respondents tabulated thus far represent a range of company sizes and industries. The smallest company reported having about 400 employees, 90% of whom are housed in a single establishment. The largest company reported having over 200,000 employees in more than 2,000 EEO-1 reportable establishments. Altogether, the 22 respondents account for 1.3 million employees, about 1% of total private non-farm payroll employment in the U.S., and respondents to this survey filed a total of 12,928 EEO-1 reports in 2015, comprising 4.2% of the total number of reports filed annually according to EEOC's most recent tabulation of 307,103 reports.

Current EEO-1 Baseline Burden.

Based on the 22 responses received and tabulated thus far, it is clear that the EEOC estimate of the information collection burden for the current EEO-1 form is erroneous. Instead of the report requiring 3.4 hours on average per response for each of the approximately 307,000 reports filed annually, these survey responses indicate an average response time of 8.1 hours per establishment report. Instead of the $19 per hour labor wage rate assumed by the EEOC, the survey responses averaged $45 per hour for the blended wage rate of all labor categories used to compile, verify, review, and submit the current report each year.

Specifically, seven respondents agreed with the EEOC estimate of 3.4 hours per report filed as the burden of information collection for the current format of the report. Of the 15 respondents who disagreed with the EEOC estimate of 3.4 hours per report, two reported lower burden levels per report based on their practical experience and 13 reported that their experience confirmed a higher burden level.

The survey responses demonstrate a wide variation across companies in terms of the automation, integration, centralization and flexibility of human resource information systems. The two lower burden reports averaged 2.6 hours per report. Both of these respondents were large in terms of total employment and number of separate reportable establishments and both operate fully integrated and centralized human resource information systems. The two companies reporting low current compliance burdens are clearly on the more sophisticated end of that spectrum. The two companies on the high end of the time per report spectrum reported not having integrated and consistent human resource information and payroll systems across their establishments.

The 13 companies that reported higher burdens than the 3.4 hours per report filed estimated by EEOC, reported a burden on average of 11.6 hours per report filed. These 13 companies' burden estimates ranged from 3.5 hours per report to 42.5 hours per report, with a median value of 8.3 hours per report.

Across all 22 respondent companies, including those who reported estimated burdens higher, equal to and less than the EEOC estimate of 3.4 hours per report, the average reported burden per report was 8.1 hours—2.4 times greater than the EEOC estimate of the information collection burden for the currently approved format of the form. Applying the EEOC's tabulation of 307,103 reports filed by 67,146 distinct companies (4.6 reports per filer), this 8.1 hours per report estimate based on the Chamber survey implies a national burden of 2,479,156 hours, or 36.9 hours per company. This is over 10 times greater than the 3.4 hours per filer time parameter that EEOC proposes for 2016 in Table 3 on page 5119 of its February 1, 2016 Federal Register notice.[1] The EEOC's estimate for 2016 is for continuation of the current version of the EEO-1 form during the year prior to the proposed implementation of expanded earnings and hours data collection in 2017. EEOC's decision to shift from its previous practice of assuming 3.4 hours

[1] EEOC assumed 3.4 hours per report filed in its information collection request analyses for 2009 through 2015, and acknowledged in 2015 a total of 307,103 reports filed in the most recent year, with most firms filing multiple reports for their multiple numbers of reportable establishments. In its proposed new analysis, EEOC applies the 3.4 hours parameter to each of the 67,146 entities that file reports, as a total burden regardless of the number of distinct reports filed by the employer.

per report filed to a new practice of assuming 3.4 hours per filer, is without any basis in empirical fact.

I also found that the EEOC had omitted two important items for correctly calculating the information collection burden: (1) the cost of outside service providers, attorneys, and consultants relied upon by some report filers, and (2) overhead cost for the internal labor used.

The survey provided data for the cost of external services: The average respondent reported annual external costs of $8,307 per filer firm for current EEO-1 compliance in addition to internal labor time burden. This per firm cost amounted to $215.83 per report filed by the average respondent.[2]

Available data from previous studies indicates that an overhead/profit multiplier of 3.25 is appropriate for estimating the fully loaded opportunity cost of labor relative to direct wages.[3] Applying this overhead plus profit load factor to the $45 per hour blended direct wage average reported by survey respondents yields a full opportunity cost value of $146 per hour.[4] Applying this fully loaded labor cost to the 8.1 hours average internal labor per EEO-1 report form filed by survey respondents results in a cost per report for internal labor of $1,175.[5]

Adding the per report cost for internal labor ($1,175.68) to the per report cost for outside services ($215.83), both derived from the survey responses, results in an annual cost for the current EEO-1 report of $1,391 per establishment report filed. Based on the 307,103 total reports filed in the most recent year (according to the EEOC), the national annual cost burden of the current format EEO-1 form is $427.3 million, about 21 times greater than the $19.8 million annual total that the EEOC estimated in its 2015 information clearance request supporting statement for the current format EEO-1 form, and 76 times greater than the proposed burden hours cost of $5.5 million for 2016 (before addition of the proposed earnings and hours requirements) shown in Table 3 of EEOC's February 1, 2016 Federal Register notice.

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[2] Because the respondent firms on average account for more reports per firm than appears to be the case for the reporting universe (EEOC estimate of 307,103 reports and 67,146 filers) values per report derived from the survey yield more conservative (smaller) national time and cost estimates than per firm response values. However, smaller size firms or firms with fewer establishments than survey respondents may have fixed cost components that would result in higher burdens per report if included in the sample. Further survey sampling over the next weeks will focus on increasing the representation of smaller filers in terms of employment and reports filed.

[3] The 3.25 multiplier is based on an examination of fully loaded labor cost reimbursement rates paid by government agencies for administrative, professional, technical and managerial services under GSA government-wide services contracts. For example, government agencies who hire contractors to perform technical services typically pay the contract firm $146 per hour for the services of a professional worker that the contractor firm pays direct wages of $45. The difference is accounted for by the contractor's indirect costs (overhead) and profit. EEOC is encouraged to examine the details of its own contract with Sage Computing for research services related to the EEO-1 form proposal to confirm this.

[4] Two survey respondents noted that survey question asked only for the wage information and volunteered their own acknowledgement that overhead costs and foregone profit should also be considered. These respondents independently reported individual "fully loaded" opportunity cost amounts that their companies use for internal planning purposes. These amounts each were between $250 and $275 per labor hour, significantly greater that the loaded rates based on government contractor data used above, and if proven to be broadly applicable these observations would significantly increase both the baseline EEO-1 burden and the impact of the proposed information collection expansion. The next stage of survey research for this matter will include an effort to estimate with more precision the economic opportunity cost factor applicable to EEO-1 filers.

[5] 8.0727 x $44.81 x 3.25 = $1,175.68.

Proposed New EEO-1 Expected Burden.

The Chamber's survey addressed two distinct aspects of the time and cost burden of the proposed expansion of the EEO-1 report: (1) the one-time, initial costs of modifying existing procedures and integrating information systems to accommodate the proposed change, and (2) the ongoing annual operating cost of compiling, tabulating, verifying, reviewing and submitting the expanded collection of information.

Most survey respondents reported that they expected the proposed expansion of EEO-1 reporting items to include earnings data to result in both significant one-time adjustment costs and significant on-going higher annual compliance costs: 15 of 22 respondents expected BOTH significant one-time costs and significantly higher on-going annual costs; six respondents expected significant one-time costs but no significantly higher annual costs after the initial adjustments to processes and systems were accomplished; and one respondent reported an expectation of neither significant one-time or on-going costs, but, nevertheless, entered for question 9.1 an estimate of $1,000 to $5,000 as a one-time cost (response C) rather than the lowest offered range of less than $100 (response A).

One-time Cost Burden of the Proposed EEO-1 Revision. Each respondent who expected significant one-time costs of adjusting to comply with the earnings data requirement of the proposed EEO-1 revision was asked to estimate these costs as a low to high range value. On average, respondents estimated a range of $50,799 to $58,254 per company for this new data element alone. Based on the number of reports filed by each respondent company these responses are equivalent to $253 to $406 per report filed by each respondent company.[6]

Each respondent was also asked to estimate a range of costs for integrating and modifying existing hours tracking systems to facilitate compliance with the hours reporting element of the proposed EEO-1 revision. On average, respondents reported $37,535 to $57,563 per company, which is equivalent to $174 to $242 per report filed by respondent companies.[7]

Together, the one-time costs for system modifications, integration and related adjustments to comply with the proposed new EEO-1 information collections amount to a total of $88,334 to $115,817 per respondent company, or $427 to $648 per report filed by each respondent company. Inference of these one-time cost results to the population of all EEO-1 responses is difficult because the survey respondents collected at this preliminary stage represent companies with larger total employment and larger numbers of reportable establishments than appears to be typical for the universe of EEO-1 filers. However, the survey responses calculated alternatively on per company and per report filed basis do provide upper and lower bounds for the one-time burden. If the cost per company of $115,817 were applicable to all 60,886 employers that EEOC estimates will be subject to the new reporting format, the national one-time cost would be nearly $7.1 billion.[8] This estimate may overestimate the true value to the extent that typical companies have fewer establishments and smaller information data systems to adjust. If the one-time cost

[6] For each respondent that reported company-wide range values (n=19), the high and low values were each divided by the number of annual report filings for 2015 that the respondent recorded in response to survey questions 2 and 3. $253 and $406 are the averages of the low and high range values, respectively.

[7] The same procedure as described in the preceding note was followed for these calculations.

[8] $115,817 x 60886 = $7,051,630,479. Alternatively, $88,334 x 60886 = $5,378,315,067.

of $427 per report filed by survey respondents were applied to the reports filed in the most recent year reported by the EEOC, the implied nationwide one-time cost would be $118.9 million.[9] This amount may be considered to underestimate the true one-time cost. Fixed costs of adjusting and integrating information systems regardless of firm size may impose relatively higher costs on smaller companies per report than on larger companies. Another way of expressing this is to say that the $427 per report amount may reflect economies of scale enjoyed by the larger size respondents who are predominantly represented among the survey respondents.

As this survey research project continues over the next several weeks, a focus of effort will be to expand the responses to include additional small to medium size filers in order to balance the size of survey responders who may, as a result experience, have different initial adjustment costs. However, the results thus far demonstrate that even the most conservative estimate of the one-time cost of the proposed information collection revision is in excess of $100 million, is economically significant, and demonstrates the need for the EEOC to consider less burdensome alternatives to the proposed revision of the EEO-1 form.

On-Going Annual Compliance Burden of the Proposed EEO-1 Revision.

The Chamber's survey asked respondents to estimate their expected costs of the proposed expanded EEO-1 report in relation to their experience with the current form. The average respondent reported an expectation that the expanded effort to add the earnings data element would require 1.9 times as much internal labor and external services burden as the current form. Note that this value is for the impact of the earnings element alone, not the second element of hours worked data. That second element will be addressed later in this report. This 1.9 effort multiple finding of the survey implies that the addition of the earnings element (counts of workers in each of twelve wage bands overlaid on the existing cross-tabulations), will increase the cost per report (internal and external cost elements) to a range of $2,488 to $2,619.[10] The corresponding national on-going annual total cost for the proposed expanded report of earnings

[9] According to the EEOC, 307,103 reports were filed in the most recent year for which data is available, but only 60,886 of the 67,146 employers who filed these firms had 100 or more employees and will be required to file the proposed expanded report. An estimate of the number of reports subject to the proposed rule was calculated as (60866 / 67146) x 307103 = 278471.9, and this value multiplied by $427 = $118,863,900. Also $648 x 278471.9 = $180,411,854.

[10] This range is the result of applying alternative calculations to the multiplier for projecting the annual operational burden of the proposed earnings data compilation from the baseline burden of the existing EEO-1 form. Multiplying the average 8.0727 hours respondent burden average for the present form by 1.8824 equals 15.1957, which multiplied by $145.64 per hour fully loaded labor rate ($44.81 x 3.25) equals $2,213 internal cost per report. Adding $406.27 outside services cost per report ($406.27 = $215.83 x 1.8824) equals $2,619.32 total annual cost per report. Alternatively, because all respondents did not provide an effort multiple response (16 provided a response, 6 provided no response), a calculation was made for each of the 16 of the amount of hours effort would be expected for each. The average of these results was 13.4634 hours, reflecting the fact that the 16 respondents who provided effort multiple expectation responses had also reported slightly lower baseline hours than the average of all 22 respondents who provided baseline hours estimates (question 4). 13.4634 hours x $145.64 = $1,960.75 per report for internal labor time, to which is added $527.66 per report for outside services, based on the same process described above for the 16 respondents who provided individual expected effort multiplier estimates. In this case the higher amount reflects the fact that these 16 respondents who each used on average less baseline internal labor than all 22 respondents did, also used higher baseline external services, on average. Adding the average $527.66 calculated outside services expense per report for the 16 respondents who provided expected effort multiplier estimates to their average $1,960.75 internal labor cost, sums to a total cost of $2,488.41.

will be $692.95 million to $729.41 million, an increase of $265.61 million to $302.07 million compared to the cost burden of the current format form EEO-1.[11]

The increase in the annual compliance cost for the proposed EEO-1 expanded form described above applies only to the addition of the 1,680 cell matrix of counts of employees in 12 wage bands overlaying each of the 10 occupation categories and 14 gender/race/ethnicity categories. Pilot testing of the survey revealed that respondents who could reasonably estimate the effort to compile data for the earnings cells counts were not able to do so for the hours tabulation requirement of the proposal. This was because of a number of uncertainties about the practical process of hours tabulations required by the proposal. For this reason, the "effort multiple" question was not asked in relation to the hours worked data requirement of the proposal.

Based on interviews conducted with companies during the survey development phase and follow-up interviews with some survey respondents, it appears that the potential on-going annual burden of adding hours worked data to the EEO-1 form will depend on two critical factors: (1) the extent to which employers are able to integrate successfully existing hours tracking systems with other information systems linked to EEO-1 report compilation; and (2) how employers are required to report hours information for workers who are exempt from FLSA overtime pay requirements and, therefore, do not maintain weekly working hours records. The survey (Question 11) found that no respondent maintains an information system that tracks actual hours for all workers, regardless of FLSA classification. On average, survey respondents reported that 36% of their workforces were not covered by an actual hours recordkeeping system. If 36% of entries in a revised EEO-1 form are comprised of potentially inaccurate or imprecise hours worked information based on dubious "assumptions" about typical working hours the report will be statistically useless for the purpose intended. Since FLSA exempt workers are present in each of the 10 EEO occupation groups and across all but the lowest "wage bands" proposed, the lack of empirically reliable data for FLSA exempt workers renders the entire proposal void of any meaningful operational benefit to the EEOC.

The EEOC's suggestion that exempt workers' hours be entered as a "standard" 40 hours per week is not a viable solution. Analyses of data supplied by workers in the Census/BLS monthly Current Population Survey clearly shows that salaried (i.e., FLSA exempt) workers self-reported work hours widely above and below 40 hours per week. Employers' and employees' subjective perceptions of "standard" hours for FLSA exempt jobs may vary between different jobs (a senior manager may be expected to be on call 24 hours per day, while a junior manager may not) within the same EEO occupation group. Different workers may negotiate with employers for different expectations of "standard" hours for otherwise similar jobs and accordingly be paid differently.

[11] As discussed previously, because survey respondents report higher numbers of reports than may be representative of the EEO-1 filer universe, these estimates based on per-report burden calculations provide a lower bound for the national aggregate cost estimate. See note 2 above. For the calculation of the national costs here, the 307,103 number reported by EEOC as the most recent total for reports submitted was multiplied by the ratio of EEOC's estimates of numbers of filers with 100 or more employees to total filers (60,886/67146) to obtain an estimate of 278,471.9 reports to be filed based on the proposed new EEO-1 format. This number was multiplied alternately by the per report cost estimates of $2,488.41 and $2,619.32 to obtain the national aggregate values of $692.95 million to $729.41 million. The 307,103 number includes federal contractors with 50 to 99 employees who will not have to file the longer proposed form, those firms represent the difference between the 60,866 firms that the EEOC counts as affected by the new form and the total of 67,146 firms that filed the 307,103 reports referenced for the most recent year.

EEOC's suggestion to introduce "standard" hours assumptions into the data report injects a subjective element that destroys any statistical validity that the report may have otherwise had.

The prevalence of FLSA exempt workers in the workforce affected by the proposed change in EEO-1 reporting requirements is an important consideration for gauging the potential impact of the hours worked requirement. Many potentially costly uncertainties and concerns surround the interplay between reporting hours for non-exempt and for exempt workers.

According to comments from some survey respondents, complicated and costly manual data handling problems could arise if a worker were reclassified from FLSA exempt to non-exempt or vice versa during the year, if an employee moves from a salaried (FLSA exempt) full-time to part-time status during the year, or if an FLSA exempt employee were promoted or transferred during the year between positions with different salaries and different standard hours expectations during the year, similar needs for manual handling of EEO-1 reporting may arise. Such situations have the potential to create significant new reporting burdens associated with the proposed hours worked report element, but the extent to which such situations may occur and the time that handling them will require is presently unknown.

This problem may be made more prevalent if the proposed rule by the Department of Labor to annually revise the salary threshold delineating the FLSA exemptions for Executive, Administrative and Professional employees becomes effective. That rule, which may be finalized within a few weeks, could greatly increase the incidence each year of large numbers of employees being reclassified from exempt to non-exempt and moving from one system of hours worked determinations to another.

The discussion above is just one example of procedural uncertainties that make it difficult to forecast the cost impact of the proposed hours worked reporting requirement, but which raise very real concerns that there could be significant on-going annual processing costs. This and related concerns with the hours worked reporting proposal should be the focus of further research by EEOC to ascertain the burden risks more confidently before any decision to proceed with the proposed revision to the EEO-1 report is made.

Summary. The proposed expansion of the EEO-1 annual employer report to include earnings data will add at least $265.61 million to $302.07 million to the already significant information collection costs of the existing EEO-1. This is equivalent to a 62 percent to 71 percent increase over the current baseline information collection cost of $427.3 million per year. This cost estimate does not include the potentially significant additional costs associated with the hours worked component of the EEOC proposal. In addition, the proposed change will entail significant one-time costs for modifying and integrating information systems and related adjustment and training costs. These one-time costs have been conservatively estimated at $118.9 million to $180.4 million, but could balloon to the multi- billion dollar range under some scenarios. The uncertainties and risks of excessive burdens associated with this proposed information collection suggest the need for much more research and analysis before a decision to move forward is made. The Table below summarizes the relevant parameters and cost estimate comparisons between the EEOC' s analysis and the results derived from our survey of experienced EEO-1 filers.

The Paperwork Burden of the EEO-1 Report Now and in the Future Comparison of EEOC Estimates and Results from U.S. Chamber Survey of Affected Employers			
Current EEO-1 Report	**EEOC**	**Chamber Survey**	**Notes**
Internal hours per report	3.4 hours	8.1 hours	No source for EEOC; Chamber estimate based on 22 survey responses of EEO-1 filers
Aggregate hours for 307,103 reports annually	1,044,150.20 hours	2,479,155.96 hours	307,103 reports generated by 67,146 filers in 2013
Labor wage per hour	$19.00	$44.81	Wage reflects blending of various staff involved
Overhead cost factor	ZERO	3.25 times direct wage amount	Overhead costs include, for example, indirect labor costs associated with additional resources needed to comply with the EEOC's proposal.
Internal cost per report	$64.60	$1,175.68	
External services per report	ZERO	$215.83	
Total cost per report	$64,60	$1,391.50	
Aggregate national cost	$19,838,850	$427,337,797	Based on 307,103 reports filed annually
Proposed Report			
Internal labor hours per report	1.44[12]	13.46	Or, up to 15.39 hours based on Chamber survey
Labor wage per hour	$24.23	$44.81	
Overhead cost factor	none[13]	3.35 times direct wage	See full report text for explanation
Internal cost per report	$33.52	$1960.75	Or up to $2,213.05

[12] The EEOC assumed 6.6 hours per filer for 60,866 filers with 100 or more employees who will be required to file the new EEO-1 format compared to 67,146 filers of the current version. Based on the EEOC's reported total reports filed in 2013, we estimated 307,103 x(60866 / 67146) = 278,471.9 reports of the proposed expanded format.
[13] The explanation on page 5120 of the EEOC Federal Register notice identifies the $24.23 amount as "compensation" for an administrative support worker, which presumably includes direct labor fringe benefits, which is one element of many that comprise employers'overhead costs.

External services per report	ZERO	$527.66	Or $406.27
Total cost per report	$33.52	$2,488.41	Or 2,619.32
Aggregate annual cost	$9,736,767	$692,951,793	Or up to $729,406, 522
One time costs	$23,000,295	$118,863,900[14]	Or $180,411,854

[14] Range shown are lower bounds. Alternative calculations show upper bound of $7.1 billion.

Additional Comments

Many survey respondents have noted concerns regarding the risk that the proposed collection of earnings and hours worked data will be vulnerable to security breaches. OMB regulations require information collecting agencies to certify the privacy and security of sensitive personal and business data. The EEOC's proposal does not address this important issue. The small cell sizes that the proposed information collection may entail for many reports may make it possible for an observer to discern private wages and working hours information for individual workers. There is also the danger that company information regarding pay structure and work schedules could fall into the hands of competitors at home or abroad, with adverse impacts on the ability of employers to retain their best workers. Revelation of a company's pay structure and employment mix could also harm its ability to bid successfully for new work. EEOC should examine carefully the economic risks attendant with the proposed information collection in the event, however likely, that confidential information were released. Such releases of confidential information are a special concern when an agency gives access to raw data files to private academic "researchers" for purposes tangential to the stated government purpose of the information collection. Testimony provided during the EEOC's March 16, 2016, hearing confirmed that such access has been given in the past. The greater sensitivity of the new data being sought by the proposed information collection makes it most important that the EEOC specify how sensitive private information will be safeguarded.

Survey respondents also commented on the infeasibility of the EEOC's proposal to begin reporting the expanded data in 2017 (including data from 2016). Most respondents cited practical obstacles to such an ambitious start up for the proposed information collection. Most suggested the need for at least two to three years to modify systems and to test new procedures.

Overhead cost and foregone profit are legitimate elements of the economic opportunity cost of an information collection mandate that causes an employer to shift scarce labor resources from productive work to government paperwork. A restaurant that only charged customers for the labor cost of the servers, cooks and dishwashers employed would quickly go bankrupt: There are also costs for the food, fuel, lighting, building, tables, chairs, and thousands of other things that the employees use to create the restaurant product. A part of the overhead is indirect labor – the bookkeepers, human resource professionals, maintenance workers, managers, and others necessary to help the servers and cooks do their jobs and get their pay checks. Hiring a new worker brings along an increment of overhead cost in addition to the new worker's wage. Shifting a worker from a productive line job to a regulatory compliance task, entails the workers' overhead cost "baggage" in addition to the direct wage.

To fulfill a paperwork mandate that requires allocation of additional labor hours, an employer must either shift labor from the firm's own labor force and reduce productive output, sales and profit, or hire new labor from outside (which will add to costs without increasing output, thereby reducing profit). In an economy operating at full employment, a firm that hires a new worker to provide labor for a new government paperwork mandate must hire that worker away from productive employment elsewhere, with the overall effect of reducing output.

I have noted the claims in the EEOC's proposal notice and in the report of the EEOC's contractor, Sage Computing, that attempts had been made to elicit data from some current filers

but that no responses were obtained. Based on my prior experience as a consultant to Federal agencies to collect this type of information, and based on direct discussions with current EEO-1 filers, I became aware that a failing of the EEOC's putative attempt at collection of burden data may have been its failure to assure potential respondents that their responses would be held confidential. I also considered a practice that I have developed from more than 25 years' experience collecting data to inform regulatory and paperwork compliance burden analyses: It is important, first, to listen and to learn the details and procedures of the work that potential informants do and to ask them for data in a way that speaks to how the respondents understand and organize their work.

For an employer with only a few hundred employees, by the time one performs a multivariate cross-tabulation to account for detailed occupation, hours, age/experience, education and other legitimate factors, the resulting cell sizes are often too small to yield statistically significant measures of possibly discriminatory differences between genders, races or ethnicities. Even if the proposed gross data that the EEOC proposed to collect were useful as an initial screening device (which it has not been demonstrated to be), it would be impractical to apply this screening device to a company with less than several thousand employees, because many cell sizes would be too small for the next stage of any investigation to find meaningful.

A well-established principle recognized by regulatory economists is that regulators and mandatory information collectors should consider alternative approaches that may achieve a beneficial end at less cost. The EEOC has not considered and examined the costs and benefits of alternatives to reduce the cost of the information collection such as collecting the information on a less frequent schedule, collecting the expanded information only from a random sample of respondents, collecting additional information only for industries, occupations or geographic regions where other information such as direct complaints may indicate that more detailed reporting is warranted.

A significant flaw in the EEOC's analysis is the failure to quantify the expected benefits of the proposed information collection. Given the large potential costs of the proposal, it is especially important to consider and to demonstrate credibly that it will yield commensurate benefits. EEOC has not clearly demonstrated how it will apply the data to improve the achievement of its statutory mission, and the agency should further demonstrate that the social benefits of putative improvements in its outcomes will be commensurate with the costs. The survey response data reported herein is accurately tabulated and reported to the best of my knowledge and the conclusions expressed are my true opinions to a reasonable degree of economic certainty.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 30th day of March, 2016, at Washington, D.C..

Ronald Bird

Appendix A – Previous Declaration Regarding Errors and Omissions in the EEOC's Analysis and Burden Estimates

Declaration of Ronald Bird, Ph.D.
Regarding the Equal Employment Opportunity Commission Proposal to Revise the Annual Employer Report EEO-1 Survey To Add Earnings and Hours Data

March 8, 2016

Statement of Qualification:

I, Ronald Edward Bird, was awarded the degree of Doctor of Philosophy (Ph.D.) in economics by The University of North Carolina at Chapel Hill on May 9, 1974. Subsequently I served as a faculty member teaching economic theory, economic benefit/cost analysis, economic statistics, labor economics and financial economics at North Carolina State University, The University of Alabama, Meredith College, and Wesleyan College.

Subsequently I served as Chief Economist for DynCorp Government Services conducting research regarding the costs and benefits of existing and proposed regulations and Paperwork Reduction Act information collection requests as a contractor to various Federal agencies, including the U.S. Departments of Labor, Energy, Treasury, and Defense and the U.S. Environmental Protection Agency.

From 1999 to 2005, I served as Chief Economist for the Employment Policy Foundation, a non-profit, non-partisan educational foundation that conducted research, inter alia, regarding the compliance costs to employers of Federal regulations and information collection mandates.

From 2005 to 2009, I served as Chief Economist of the U.S. Department of Labor, in which capacity I directly advised the Secretary of Labor regarding various economic policy and statistical issues, including

- the compliance costs and benefits of existing and proposed regulations;
- methods of estimating the compliance costs of Federal information collection requirements;
- the economic theories of employment and wage determination; and
- the statistical/econometric analysis of earnings differentials in relation to occupations, industries, education, experience, hours of work, race, ethnicity, gender and other factors.

As Chief Economist of the U.S. Department of Labor, I also served as liaison for the Department to the Executive Office of the President , the President's Council of Economic Advisers, and the Office of Management and Budget's Office of Information and Regulatory Affairs regarding various economic policy and analysis topics, including the conformity of the Department's regulatory economic analyses with the requirements of Executive Order 12866 regarding analysis of the economic costs and benefits of regulations, the requirements of The Paperwork Reduction Act, regarding the time and monetary cost burdens of Federal information collection activities, and the Regulatory Flexibility Act, regarding the economic impact of regulation compliance costs and of Federal information collection costs on small businesses and organizations.

Currently, I serve as Senior Regulatory Economist for the United States Chamber of Commerce. I conduct economic research and analysis regarding the costs and benefits of Federal regulatory and information collection activities as they affect employers. This work includes detailed review, evaluation and analysis of the benefits and costs of existing and proposed regulations and information collection activities of various Federal agencies and programs, including the Department of Labor's Office of Federal Contract Compliance Programs and the Equal Employment Opportunity Commission.

Summary of EEOC Information Collection Burden Estimate:

The Equal Employment Opportunity Commission has proposed (81 FR 20, p. 5113) to revise the existing annual "Employer Information Report" (Form EEO-1), by adding to the existing form requirements that employers of 100 or more total employees (1) report the number of employees in each of the 140 standard EEOC occupation/gender/race/ethnicity categories with a further cross-tabulation of each of these categorical employee counts by 12 annual earnings categories based on employer tax form W-2 data for the 12 months preceding the reference date of the report, and (2) report the total hours worked of employees counted in each of the resulting 1,680 categories for the 12 months prior to the reference date of the report. These requirements (which EEOC identifies as "Component 2") are in addition to the continuing requirement to file the currently specified tabulation of total employees in each of 10 EEOC occupations and 14 gender/race/ethnicity categories (140 categorical cell counts) , which EEOC identifies as "Component 1" of the proposed report.

The proposed revised EEO-1 form, including both components 1 and 2, would be required of all private industry employers of 100 or more total employees across all of the employer's establishments and wholly owned subsidiaries. The proposed revision would become effective for the annual employer information reports due September 30, 2017.

EEOC claims that the proposed combination of components 1 and 2 (see Table 4, 81 FR 20, p. 5120) of the proposed information collection will impose an average annual burden of 6.6 hours on each covered employer, including 5.6 hours per employer for collecting, verifying, validating and reporting data and 1 hour for "reading instructions." This amounts to 3.2 hours of additional labor effort per employer, 0.5 hours for additional instruction reading and 2.7 additional hours for collecting, verifying, validating and reporting data. The EEOC asserts that the total average per hour labor cost will be $24.23, which implies a total cost per employer of $159.92 per employer for components 1 and 2 combined. The additional cost, according to EEOC calculations, for the increment of the earnings and hours data required in proposed component 2 is $77.54. EEOC also asserts that the number of employers (filers) affected by the proposed new requirements (component 2) is 60,886, resulting in a national aggregate on-going annual burden subject to the Paperwork Reduction Act of 401,847.6 hours or $9,736,767.35.

EEOC recognizes in its proposal notice at 81 FR 20, p. 5120, a one-time implementation burden for developing new or revised standard database queries to existing human resources management information systems. EEOC asserts that an employer (filer) affected by the proposed requirements will "take 8 hours per filer at a wage rate of $47.22 per hour." This cost element amounts to $377.76 per employer who would be required to file the proposed EEO-1 reports. Based on EEOC's assertion that 60,886 employer filers would be affected, the calculated national one-time additional cost burden is $23,000,295.

EEOC also estimates the additional cost on itself to process the expanded data that would be submitted as $290,478, as the cost of needed internal staffing needs and costs.

In addition to reviewing the referenced Federal Register notice, I have reviewed the following documents that EEOC references in support of its calculation of time and cost burdens of its proposed information collection request under the requirements of the Paperwork Reduction Act.

1. National Research Council, "Collecting Compensation Data from Employers," report of the Committee on National Statistics, Panel on Measuring and Collecting Pay Information from U.S. Employers by Gender, Race and National Origin. Washington: National Academies Press, 2012.
2. Equal Employment Opportunity Commission, "EEOC Survey System Modernization Work Group Meeting, March 8-9, 2012, Draft Report," Washington, D.C., prepared by Sage Computing, Inc., March 19, 2012.
3. Sage Computing, "Final Report [of task order] To Conduct a Pilot Study for How Compensation Earning Data Could Be Collected From Employers on EEOC's survey Collection Systems and Development of Burden Cost

Estimates for Bothe EEOC and Respondents for Each of EEOCC Surveys (EEO-1, EEO-4, and EEO-5).

I have also reviewed the burden estimation supporting statements and other documents submitted by EEOC to OMB/OIRA in connection with the information collection clearance requests for the currently approved version of the EEO-1 form and for previous requests going back to 2009.

Findings and Opinion:

Based on my review of the burden calculations and supporting materials and justifications presented by EEOC in its Federal Register notice and my review of the supporting documents cited by EEOC, based on my knowledge and experience regarding the requirements of the Paperwork Reduction Act, OMB guidance documents and requirements for submission of information collection requests and regulatory impact analyses, and based on my knowledge and experience of the generally accepted standards of research in the economics profession, it is my finding and opinion, to a reasonable degree of economic certainty, that the cost burden estimate presented by EEOC in support of its proposal to add earnings and hours worked data requirements to the current EEO-1 report grossly and significantly under-estimates the likely cost burden that the proposal will impose on affected employers. Both elements of the cost burden, (1) the one-time cost of modifying information systems and administrative procedures and (2) the on-going annual costs of collecting, compiling, tabulating, verifying, validating, and submitting the data have been inaccurately calculated and grossly and significantly underestimated by EEOC.

The errors and under-estimation of the reporting burden arise from at least six fundamental deficiencies in EEOC's economic analysis:

1. EEOC has not conducted any credible empirical study to validate the accuracy of its estimate of the compliance time burden of the current EEO-1 reporting requirement. Because the cost burden of the proposed new reporting elements (Component 2), is presented by EEOC as an addition of about 96% (near doubling) to the 3.4 hour reporting burden ascribed to the existing report (Component 1), the accuracy of the underlying current report burden is of critical importance to the final cost result. To establish, to a reasonable degree of economic certainty, the time and cost of the current reporting format, the Commission could have either conducted a survey of current filers or an experiment using itself and other government agencies as proxy filers. No evidence of either sort has been presented. EEOC, in its Federal Register notice states that its "pilot study" contractor, Sage, "approached some private employers to seek data" about the additional cost of the proposed new elements, but received too few responses. My experience in research to obtain similar data for information collection burden and regulatory impact analysis purposes has been that surveys, field audits and experiments to collect such compliance time and cost information are feasible

and relatively economical to conduct. EEOC's claim of non-response to its request may be mostly a reflection of the ineffectiveness of its initial effort, and it is no excuse for putting forward a baseline burden estimate that is without empirical or reasonable foundation.

2. EEOC has also not conducted any credible empirical study to validate its estimate of the additional time burden of the proposed new earnings and hours report elements. The claim that the additional burden would be 3.2 hours on top of the current format report (Component 1) burden is not based on any evidence cited explicitly in the Commission's notice. One possible conclusion is that EEOC invented the number arbitrarily and capriciously from its imagination. The Commission's consultant, Sage, clearly states on page 109 of its report that its failed survey attempt yielded no results and that "it is not possible to provide estimates of the burden." It seems that EEOC has chosen to attempt to do the impossible by presenting a rather precise seeming burden estimate (3.2 hours for Component 2) that its own consultant declared to be impossible to do.[1]
3. EEOC has not provided any credible empirical evidence as a basis for its estimate that the one-time cost burden of the proposal is represented by 8 hours of total labor time. Again, EEOC could have conducted surveys or experiments to obtain empirical estimates of the time and resources needed to adjust information systems and administrative procedures to facilitate the proposed earnings and hours reporting. Again, EEOC has presented a number arbitrarily and capriciously produced from nothing. EEOC's analysis on this and other points fails to meet the most fundamental standard of economic research – that the methods by which data is obtained be transparent to and reproducible by independent observers. EEOC's analysis is not transparent.
4. EEOC uses two wage data parameters in its burden cost calculations: $24.23 per hour for labor employed to collect, compile, tabulate, validate, verify, and submit required data, and $47.22 per hour for the labor to make one-time modifications to information systems to facilitate the new reporting elements. In the first case the amount is the average hourly compensation reported by the Bureau of Labor Statistics from its Employer Cost of Employee

[1] Although EEOC does not cite any source for its 3.2 hour burden increment, careful examination of the Sage (2015) report provides a clue. Sage reports on page 104 of its report that a 2012 EEOC working group forum on surveys modernization included some representatives of EEO-1 filers and that these filers on average opined that the addition of compensation data to the report would increase their reporting burden by "approximately 96 per cent. It is an interesting coincidence that 3.2 hours, EEOC's estimate of the incremental burden for component 1, is 96 percent of the 3.4 hours listed for the Component 1 (existing form) burden in EEOC's notice Table 4 on p.5120. A problem for EEOC, however, is that this 96% burden increase estimate is relative to the respondents' own current burden, not the EEOC estimate of 3.4 hours as contained in the ICR supporting documents that EEOC has filed with OIRA since 2009. Another important fact that is not presented is how many forum attendees were responsible for the 96 percent burden estimate and how statistically representative they were of the total filer universe. These are questions that should be important to an agency whose mission is closely linked with the importance of statistical data and analysis.

Compensation Survey of December 2013 for an "administrative support" employee. In the second case the amount is the BLS compensation survey amount for a professional employee. EEOC has failed to account for the fact that the labor involved in both the annual report preparation and submission activity and in the one-time adjustment of systems to facilitate new requirements is not restricted to a single occupational category. A correct analysis of the information cost burden would recognize that the activity involves the blended effort of workers across an array of occupations, levels of responsibility, training, experience and compensation. An average hourly compensation rate used in any information collection burden calculation is meaningless unless it is constructed as a weighted average of the time and cost associated with each member of the overall task team. In particular, EEOC should have considered that an official report to the government by an employer from which potential legal charges and liabilities could emanate will require some review and approval at the highest levels of corporate responsibility. It is plainly absurd for EEOC to assume, without any empirical basis reflecting the practice of actual filers, that the annual reporting responsibility is fully represented by the hourly pay rate of the lowest rank of administrative support worker. A further error in the analysis is EEOC's assumption that employee compensation is the full measure of the compliance burden on the employer of allocating labor time to the task. In addition to direct labor compensation, EEOC should add allowance for physical and indirect labor overhead as parts of an estimate of the full economic opportunity cost of a regulatory or paperwork compliance mandate.

5. EEOC's calculation of the aggregate national time and cost burden of the proposed information collection is based on an assumption that 60,886 filers will be subject to the revised reporting requirement. The proposed requirement applies to all private sector employers of 100 or more workers. According to authoritative data published by the Office of Advocacy of the U.S. Small Business Administration, the number of private employers in 2012 (the latest year available) with 100 or more employees totaled 101,642 and these firms operated a total of 1,559,581 separate establishments (39 establishments per employer firm). To the extent that the EEOC's burden calculation identifies the number of employers subject to the current EEO-1 filing requirement, that number is, 101,642. The Paperwork Reduction Act does not contain any provision allowing an agency to "discount" its estimate of information collection burden imposed on the public because of public non-response or because of the agency's own ineffectiveness in collecting the subject data. The EEOC is asking for data from all firms with 100 or more employees. That number of firms being asked for data is the number that EEOC is required to use to calculate its information collection burden estimate. That number is 101,642 according to the most recent available authoritative data. This means that regardless of other issues discussed herein, EEOC's burden estimate is in error by about 40 percent.

Furthermore, to the extent that individual filers must submit multiple reports, the number of responses and attendant burden is greater.

6. EEOC's analysis assumes, contrary to its own reporting instructions, that every covered employer will file only a single report. EEOC's current and proposed instructions clearly require that each employer of 100 or more total workers, company-wide, submit a separate report form for each separate establishment employing 50 or more employees, and that each multi-establishment employer submit an additional composite report for aggregating the data across all establishments. Furthermore, covered employers are required to prepare and submit for establishments with less than 50 employees either a small establishments consolidated report or individual establishment reports. EEOC's own data indicates that the average filer in 2013 submitted 4.5 distinct reports, including all separate establishment reports. My experience in analysis of hundreds of information collection and regulatory recordkeeping burdens is that the number of separate establishments within a company is a significant parameter affecting the total compliance cost burden, and it has remained so despite reporting efficiency improvements associated with newer information technology and systems. Total employment is a similarly important parameter. EEOC has presented no meaningful empirical evidence to support its contention that the time and cost burdens of the existing and proposed EEO-1 reporting requirements will be invariant with respect to a filer's number of establishments or number of employees.

   In all prior calculations of the reporting burden for the EEO-1 form, the Commission recognized the principle that number of establishments for which data must be compiled, tabulated and reported is a significant factor affecting the total time and cost burden for a filing entity. In fact, the commission previously used the exact number of 3.4 hours per report filed in all previous burden calculations, beginning with the earliest on record in 2009. Now EEOC proposes to shift that number and apply it to the burden per filer (i.e., per employer firm) instead of per report. EEOC claims that its shift from the per report basis to the per filer basis is a reflection of its consideration of the effect of increasing automation of human resource information systems, but EEOC does not present any quantitative empirical data regarding the supposed change in circumstances.

   It is notable that the exact same 3.4 hour number, which previously was used as a per report burden and multiplied by the 307,103 reports filed in 2013 in EEOC's supporting statement for its information collection clearance filed in 2015, is now being used by EEOC as a per filer hour burden and multiplied against the 67,146 filers of Component 1 of the proposed information collection. Not only does the Commission lack real data to support its putative estimate of a per filer burden, it appears that the Commission lacks the imagination to invent a number that is different from the one it used

previously for the per report calculation. The numbers and calculations presented by the Commission give the appearance of an effort to manipulate the results to make it appear that the burden is low. The error is compounded by the fact that EEOC has no credible evidence to support the contention that 3.4 hours is the correct burden even on a per report basis. There is reason to suspect that for many filers the burden per report is significantly greater than 3.4 hours per report, and for filers of multiple reports, the total cost per filer would likely be even greater.

I also find that EEOC has not presented credible evidence that the proposed revision will yield any meaningful or measurable welfare benefit. Indeed, the study by Sage Computing, cited above, which EEOC commissioned to inform and advise its decision to put forth the proposed EEO-1 revision, points toward the conclusion that the proposal will likely reduce benefit in comparison to the current reporting format. On page 61 of their report to EEOC, Sage states

> *…we have to recognize the varying patterns of compensation for employees who work different hours. As a result, pooling together into a single cell the employees who may have received the same compensation from working different hours, and analyzing them with a single offset as the format of the proposed EEOC form suggests, may lead to biases that are difficult to quantify because of the model misspecification with respect to the time commitments required by the different positions.*

This flaw in the design of the proposed new reporting requirement, which EEOC's own contract consultant identified, could significantly impact the rate of false-positive results obtained. Increased false positives from using the proposed form to inform investigations will divert EEOC's scarce investigative resources in fruitless directions, with the possible result that the Commission's effectiveness to identify and eliminate discrimination may be reduced by adoption of the proposed revision. Reduction in the Commission's effectiveness because it allows its scarce resources to be wasted by investigations based on a report format that generates excessive numbers of false positives would mean that the welfare benefit of the proposed revision is negative compared to the status quo reporting requirement.

EEOC is required to seek public input regarding its information collection and regulatory proposals, and the requirement is that EEOC provide the public with at least 60 days to comment before it sends its proposal to OMB/OIRA. EEOC is not prevented from providing a longer public comment period, and the size and complexity of the proposal to add earnings and hours worked data to the EEO-1 reporting form is such that meaningful public comment is curtailed by the 60 day limit. The 60 day limit has been further truncated by EEOC's decision to hold hearings on the proposal at an earlier date and to require submission of testimony and supporting documents (such as this declaration) a further week in advance of the hearing. EEOC rejected requests for an extension of the comment deadline, and

EEOC has presented no reasoned basis for its rush to proceed with the proposed revision.

Because EEOC has arbitrarily limited the time available for public response and comment, the analysis presented here is limited. In particular, it would have been useful to provide empirical data from surveys of employers, which are currently underway and being tabulated. Preliminary results confirm the findings presented here based on limited time and information: EEOC's estimates of the information collection burden are inaccurate and grossly under-estimate the likely compliance cost burden. This analysis will be revised and resubmitted as additional information becomes available from on-going private surveys and as further research into existing sources reveals additional empirical evidence.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 9th day of March, 2016, at Washington, D.C..

_____

Ronald Bird

Appendix B – Survey Instrument
Cost Burden of Current and Proposed Annual EEO-1 Employer Report
to the Equal Employment Opportunity Commission
A Survey of Impacted Employers

Thank you. The time taken to complete this survey and the benefit of your company's experience complying with the EEO-1 data reporting requirement will be valuable to ensure that any changes to the data format will be based on a realistic assessment of the costs of collecting the data and the benefits of using the data obtained.

Responses to this survey will be used to inform comments that the U.S. Chamber of Commerce will submit to EEOC in response to their notice of proposed revision of the EEO-1 report form (OMB Paperwork Reduction Act control number 3046-0007), which was published on February 1, 2016 at 81 Federal Register 20, p.5113. Comments are due April 1, 2016, but the Chamber will also present both oral and written testimony at the EEOC's March 16, 2016 hearing.

Ideally, we would like to present some evidence of the true costs of EEOC's proposal at the March 16 hearing, so we would greatly appreciate your feedback as soon as possible. If that quick turnaround is not practical, we kindly ask for your r response by March 14, 2016, but later responses will be useful as well. Please provide answers based on your knowledge and experience. Feel free to use the abbreviation "est" to flag responses that are estimates or approximations, and provide range estimates for responses if necessary.

Please insert comments or notes into the survey instrument wherever you wish. Insert extra lines into the Word™ survey template as needed to add comments or notes. Save and return the completed survey as either a WORD™ document or as a PDF document email attachment.

Individual company responses to this survey will be held in strict confidence. Only aggregate information from tabulation of survey responses will be published, and individual company identification will be deleted after responses are tabulated.

Some questions may be impractical to answer. In that case enter the comment "not available" and go to the next item.

Please track the total time that your company staff devotes to reviewing and completing this survey. The last question asks for an estimate of how many staff members participated and their total hours.

Please return your completed survey to Ronald Bird via email: rbird@uschamber.com. If you have any questions or concerns email Bird at the address above or call on 202-463- 5748.

NAME OF COMPANY _____

WHO SHOULD BE CONTACTED IF CLARIFICATION IS NEEDED REGARDING RESPONSES?

NAME:_____.

EMAIL_____. PHONE_____.

Background. The Equal Employment Opportunity Commission requires all employers of 100 or more employees to file an annual report of their numbers of employees in each of ten occupation groups and 14 gender/ race/ethnicity categories. The current report requires covered employers to report data for each establishment or subsidiary with 50 or more employees and to report either separately or in a combined report for establishments or subsidiaries with fewer than 50 employees. In addition, a multi-unit employer must produce a consolidated report that combines the data from the separate establishment/subsidiary reports.

The current report requires the employer to count the number of employees corresponding to each of the 140 cells representing possible combinations of the 10 designated occupations and 14 gender/race/ethnicity categories (10 x 14 = 140).

The EEOC claims that the reporting burden for the current version of the form totals 3.4 hours of labor time of a clerical staff assistant who earns $19 per hour. This amounts to about $65 per report each year. For a company with several thousand employees distributed across 99 separate establishments, offices, facilities or subsidiaries, the company might file 100 reports each year (including the composite roll-up of the separate establishment reports). According to EEOC, this company would be expected to spend no more than $6,500 per year in terms of internal labor or outside services for compiling, checking, reviewing and submitting its 100 EEO-1 reports.

QUESTION 1. What is the total employment of your company across all U.S. establishments and wholly-owned subsidiaries? _____.

QUESTION 2. For how many total establishments or other business units did your company file EEO-1 data in 2015 (include in the count the consolidated data form and the individual establishment forms)?

_____.

QUESTION 3. For establishments with fewer than 50 employees, how did you file reports in 2015?

A. We had no establishments with fewer than 50 employees.
B. We filed a single combined reporting form representing _____ (fill in number) establishments with fewer than 50 employees, and we filed _____ (fill in number) separate reports for other establishments with fewer than 50 employees.
C. Other response (explain). _____.

QUESTION 4. In 2015, EEOC reported to the Federal Office of Management and Budget (OMB) under the requirements of the Paperwork Reduction Act that the average company filing a EEO-1 data would use 3.4 hours of labor time for each establishment data form filed. From the perspective of your company's experience, do you agree or disagree with this estimate? As you

think about an answer to this question please consider time to make and record occupation classifications and to obtain gender, race and ethnicity identification information for each new employee; time for any review/approval of filings by legal counsel or senior management prior to submission; and routine reporting work such as data entry, error correction, transmission file formatting, etc. Do NOT include one-time custom programming or software development to improve the on-going ability of information systems to produce the report.

A. Yes, the EEOC estimate of time per establishment is consistent with our experience.
B. No, our experience indicates a lower number. A better estimate is_____.
C. No, our experience indicates a higher number. A better estimate is _____.

Please add additional comments or information if you like:_____
_____.

QUESTION 5. In 2015, did you company use an outside service provider, consultant, or legal counsel to prepare, assist, review, or advise regarding filing of EEO-1 data?

A. No. All work was done with internal labor.
B. Yes, and our company expended a total of about $_____ on such outside services in 2015. If known, about how many hours of outside services were used? _____.

QUESTION 6. In its 2015 Paperwork Reduction Act report to OMB, EEOC estimated that the average wage rate of staff involved in preparing and submitting EEO-1 data reports was $19 per hour. Based on your company's experience, do you agree or disagree with this estimate of the average wage cost of labor used? If applicable, please consider the cost of both internal labor and external service providers.

A. Yes. $19 per hour seems about right.
B. No. The average is less than $19 per hour. A better estimate is $_____per hour.
C. No. The average is more than $19 per hour. A better estimate is $_____per hour.

QUESTION 7. Approximately how much did your company pay in 2015 to outside service providers to compile or file EEO-1 reports? Do not include contracts or consulting that represents a one-time modification of information systems or procedures to improve the on-going ability to produce the report. Note that the responses are in PER ESTABLISHMENT REPORT FILED terms.

A. Zero. All work is done internally.
B. Less than $100 per report filed.
C. More than $100 per report but less than $200 per report.
D. $200 per report and up to $300 per report.
E. More than $300 per report but less than $500 per report.
F. More than $500 per report. Please estimate the amount per report: $_____.

QUESTION 8. How did your company submit EEO-1 Reports in 2015?

A. Paper report forms.
B. Keyed data into EEOC's EEO-1 website, using the available electronically fillable form.
C. Emailed data to EEOC using a data format in compliance with EEOC file specifications, e.g. ASCII/Text, CSV, XML. Did your company experience difficulties with this method? __ Y __N. Explain: _____.

EEOC has proposed to expand the reporting requirement to include numbers of employees and their annual hours of work in each of 12 annual pay bands for each occupation and associated gender/race/ethnicity categories. This would result in the requirement to file two report matrices. The first would be a matrix of 1,680 cells showing the numbers of employees in each possible occupation, pay band and gender/race/ethnicity category. The second would be a matrix of 1,680 cells showing the total hours worked during the previous 12 months by the employees represented in each occupation, pay band and gender/race/ethnicity category. Altogether, the proposed new report would require compilation of 3,360 distinct data elements plus totals for each row and column.

The following questions address the feasibility, expected cost burden and potential benefits of complying with the expanded EEOC reporting mandate.

To complete the first expanded element of the report (employee counts) employers may need to link their existing EEO-1 reporting records showing the gender, race/ethnicity and EEOC designated occupation category of each employee to pay data showing the total earnings as reportable on the IRS W-2 form for each employee for the 12 months ending September 30 each year. The pay amount for each employee would then be mapped to the correct "pay band" category, and the total number of employees would be counted for each of the 1,680 distinct pay band, occupation, gender, and race/ethnicity cells.

QUESTION 9. Which statement best describes your company's ability to comply with the proposed expansion of the EEO-1 Report to include counts of employees in each of 1,680 cells corresponding to the proposed pay bands for each of occupation and gender/race/ethnicity combination? NOTE that this question refers only to the first revision element (adding pay bands) and does NOT include the second element that adds hours worked data.

A. This element of the proposed report revision would be easy to do with no significant initial or on-going added cost compared to the current report. GO TO QUESTION 10
B. There would be significant initial (one-time) costs for training, programming to link information systems or other adjustments to facilitate the revised reporting, but future on-going annual reporting costs would be **about the same as current reporting costs**. GO TO QUESTION 9.1
C. There would be **both** significant initial (one-time) costs for training, programming to link information systems and other adjustments and also there would be significant future on-going annual reporting cost increases compared to present reporting costs. GO TO QUESTIONS 9.1 AND 9.2.

If you answered B or C to QUESTION 9, above, please also answer the following

QUESTION 9.1. Which statement best describes your expectation regarding the initial (one-time) cost of training, programming to link information systems, and other costs to facilitate the first element (adding pay bands) of the proposal?

A. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total less than $100.
B. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total $100 to $1,000.

C. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total more than $1,000 and up to $5,000.
D. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total more than $5,000 and up to $10,000.
E. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total more than $10,000. Please enter an estimated amount:_____.

If you answered C to QUESTION 9, please answer the following question.

QUESTION 9.2. Which statement best describes your expectation regarding the increased annual reporting costs of the first element of the proposal (adding counts of employees by pay bands)?

A. The added reporting of pay bands information to the count of employees in each occupation and gender/race/ethnicity group will increase the per report total cost (both internal and external cost) by about 25%.
B. The added reporting of pay bands information to the count of employees in each occupation and gender/race/ethnicity group will increase the per report total cost (both internal and external cost) by about 50%.
C. The added reporting of pay bands information to the count of employees in each occupation and gender/race/ethnicity group will increase the per report total cost (both internal and external cost) by about 75%.
D. The added reporting of pay bands information to the count of employees in each occupation and gender/race/ethnicity group will increase the per report total cost (both internal and external cost) by 100 % (e.g. double the per report cost).
E. The added reporting of pay bands information to the count of employees in each occupation and gender/race/ethnicity group will increase the per report total cost (both internal and external cost) by more than doubling it. Please estimate the increase multiple _____ (e.g., 2.5 x, 3x, etc.).

Additional explanation or comment will be appreciated:_____

_____.

QUESTION 10. Which statement best describes the access to "W-2" payroll data by your corporate headquarters staff who currently are involved in the submission of EEO-1 reports?

A. Payroll data for all employees in all facilities, business units or subsidiary corporations is maintained in a single consolidated central information system that is readily accessible by staff responsible for preparing, reviewing and submitting EEO-1 reports.
B. Payroll data for some employees is maintained in separate information systems for individual facilities, locations, business units and is not readily accessible by staff responsible for preparing, reviewing and submitting EEO-1 reports.

The second element of the proposed EEO-1 revision will require employers to report total hours worked over the 12 months ending September 30 of each year for employees represented by each of the 1,680 distinct pay band, occupation, gender, and race/ethnicity cells of the hours reporting matrix. Hours worked information for each employee will need to be mapped to the applicable

pay band, occupation and gender/race/ethnicity category and aggregated across all employees who correspond to the same group combination.

To meet this requirement the employer will need information about the annual work hours of each employee based on either a system that records actual hours or based on reasonable assumptions regarding each worker's standard working hours. For workers paid on an hourly basis, the necessary information may be found in an existing working time information system maintained for FLSA overtime pay calculation purposes, but for FLSA exempt workers a system to track actual hours worked may be needed for EEO-1 reporting purposes unless the employer chooses to apply a standard work schedule assumption for these employees. When choosing whether to assume standard hours or to create a system for tracking actual daily hours, the employer may need to weigh the cost of actual hours recordkeeping against the possibility of incurring costs of responding to EEOC or OFCCP inquiries or investigations if the "assumption" approach creates the appearance of pay differences that would not appear if actual daily hours were reported.

QUESTION 11. Does your company currently maintain an information system that records the actual daily or weekly hours worked for all employees, including those exempt from FLSA overtime pay requirements?

A. Yes. GO TO QUESTION 14.
B. No.

QUESTION 12. If you answered No to Question 11, which option would your company likely adopt to report for EEO-1 purposes hours worked for FLSA exempt employees not covered by an existing time timekeeping system?

A. Assume that FLSA exempt employees work a fixed standard number of hours per week, e.g., 40 hours per week. GO TO QUESTION 14.
B. Develop and implement a system for recording actual hours worked by employees who are not covered by an existing timekeeping system.

QUESTION 13. If you answered B to QUESTION 12, what is your estimate of the one-time cost of training and information system modifications to implement hours worked recordkeeping for employees who do not currently record actual daily or weekly hours worked?

A. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total less than $100.
B. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total $100 to $1,000.
C. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total more than $1,000 and up to $5,000.
D. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total more than $5,000 and up to $10,000.
E. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total more than $10,000. Please enter an estimated amount:_____.

QUESTION 14: What is your estimate of the proportion of company employees who currently are not required to record daily actual hours?

A. None. All employees currently record actual daily work hours.
B. Less than 10 percent do not record actual daily work hours.
C. 10 per cent but less than 20 percent.
D. 20 percent to less than 30 percent.
E. 30 percent or more. If possible please enter an estimate: _____%.

QUESTION 15. What is your estimate of the additional daily time per affected employee that would be required for FLSA exempt employees or others not covered by an existing time recording requirement to record their actual daily hours of work.

A. Unknown.
B. Less than 5 minutes per day.
C. 5 to 10 minutes per day.
D. More than 10 minutes per day. Please enter an estimate: _____minutes per day.

Once a system is in place to track and record hours worked of employees, the data from such a system would need to be integrated with other information systems providing earnings data and providing occupation and gender/race/ethnicity identification information required by the EEO-1 report.

QUESTION 16. Regardless of possible costs to expand hours of work recordkeeping to FLSA exempt employees, what is your estimate of the other initial (one-time) costs of programming and other adjustments needed to integrate an existing hours of worked information system with the other necessary information systems to facilitate the creation of the proposed 1,680 cell matrix of hours worked by pay bands, occupations, and gender/race/ethnicity groups?

A. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total less than $100.
B. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total $100 to $1,000.
C. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total more than $1,000 and up to $5,000.
D. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total more than $5,000 and up to $10,000.
E. The company-wide initial (one-time) cost, including both internal time and resources and external services fees, would total more than $10,000. Please enter an estimated amount:_____.

QUESTION 17. The proposed revision to the EEO-1 report would be effective for reports due on September 30, 2017, which means that some systems may need to be in place to collect required data by October 1, 2016, e.g., hours worked and earnings data. Is the proposed implementation time schedule feasible?

A. Yes.
B. No. Please explain and suggest what time schedule, if any, would be feasible.

_____.

QUESTION 18. EEOC has stated that the proposed expansion of the EEO-1 report to include pay data would benefit employers by enabling them "to self-monitor and comply voluntarily if they uncover pay inequities." Do you agree that your company will find the proposed expanded EEO-1 report to be beneficial in this way for your internal diversity evaluations?

A. Yes.

B. No.

Please explain or comment if you wish.

_____.

Please add any additional comments, questions, suggestions or information that you believe may be useful to help respond to the proposed revision of the EEO-1 reporting requirement.

TIME BURDEN OF THIS SURVEY:

How many individuals participated in reviewing and completing this survey?_____.
What is the combined total time that they spent on this effort?_____hours.

Please email completed survey form to rbird@uschamber.com

Thank you.

Exhibit 3

DECLARATION OF ANNETTE TYMAN

I, Annette Tyman, do hereby declare as follows:

Qualifications

1. I am over the age of 18. I declare that the statements in this declaration are correct of my own personal knowledge and I am competent to testify concerning them.

2. My name is Annette Tyman. I am an attorney and Partner at Seyfarth Shaw LLP. I also serve as Co-Chair of the Firm's OFCCP Compliance, Affirmative Action & Diversity Consulting Practice Group. In that role, I oversee a team of Advisors and Analysts who prepare Affirmative Action Plans and EEO-1 Reports on behalf of companies across the United States.

Overview of the EEO-1 Filing Process

3. A general overview of the EEO-1 filing submission process is summarized as follows.

4. Typically, the process to prepare and submit EEO-1 Reports begins with employers who provide employee information, including employee name or employee identification number, location, race, gender, EEO-1 job category (if tracked by the employer), and job title.

5. At that point, one must analyze and prepare the data. This step includes validating, coding and creating summary tables in order to input or submit the EEO-1 required data to the EEO-1 Survey site. The quality and consistency of the data set necessarily impacts the time it takes to prepare the data for submission to the EEO-1 Survey site.

6. Pursuant to the EEO-1 instructions, multi-establishment employers are required to submit (1) a report covering the principal or headquarters office ("Headquarters Report"); (2) a separate report for each establishment employing 50 or more persons ("Type 4" report); (3) a separate report ("Type 8" report - which provides similar information to the Type 4 report) for each establishment employing fewer than 50 employees, *or* an Establishment List (Type 6 report),

showing the name, address, and total employment for each establishment employing fewer than 50 persons; and (4) a Consolidated Report which summarizes the employers workforce.

Submission of EEO-1 Data - Two Formats

7. The EEOC allows employers to submit data using two electronic formats methods.

a. The first format, which is most commonly used by employers, is most easily described as a "fillable pdf." The data requires manual entry of employee summary counts by race/ethnicity and gender, using the EEO-1 job groups. Pursuant to Footnote 62 of the EEOC's Proposed Revision of the Employer Information Report (EEO-1) and Comment Request ("proposed EEO-1 Revision"), 98% of all employers use this format ((60,886 - 1449)/60,886) for completing the EEO-1 Survey.

b. The second format involves the submission of an electronic data file. The EEOC's parameters are specific and technical and include a few data file formats. While the proposed EEO-1 Revision refers to this methodology as a data file "upload," the data file is actually emailed to EEO1.upload@EEOC.gov.

Submission by "PDF Fillable Format"

8. If employers use the EEO-1 electronic "fillable pdf" format for submitting to the EEO-1 Survey, which is described in 7.a. above, the steps identified below are generally followed.

a. After analyzing the data and preparing summary totals for input into the EEO-1 Survey, employers log into the EEO-1 Survey site using employer specific login information. Once employers log in, they see a listing of the EEO-1 reports that were filed for each establishment in the location that was filed in the previous year. The company will be required to "select" each location and either complete

a new form or delete the form. EEO-1 forms for establishments may be deleted for various reasons, including, for example, if the location closed during the last reporting period.

b. The employers then answer or verify the response to the three EEO-1 Survey questions found in Section C of the EEO-1 Survey regarding "Employers Who Are Required to File" and verify NAICS codes.

c. In our experience, most employers do not track EEO-1 survey "unit numbers" which identify the establishment for previously submitted reports. Instead, this information is obtained by downloading prior year EEO-1 reports before submission.

d. For previously existing establishments, employers review and revise, if necessary, the address information of the location and complete the ethnicity/race and gender totals by location and EEO-1 Category. If the location total has changed by more than 20%, a prompt will appear to verify the entries are correct.

e. If there are new locations, employers are required to complete a new EEO-1 establishment form for those locations.

    i. For locations with more than 50 employees, the company is required to complete Type 4 establishment reports. For locations with less than 50 employees, the company has the option to complete a Type 8 report, which is the similar to the Type 4 establishment report (but is coded as a Type 8 report to signify it is being submitted for a location with less than 50 employees), or a Type 6 establishment list. A Type 6 establishment list

includes a listing of the address and total employee count for each location with less than 50 employees.

ii. A key difference between Type 6 establishment *list* and Type 8 establishment *report* (both of which relate only to establishments with less than 50 employees) is found when preparing the employer's Consolidated Report. The Consolidated Report automatically populates if employers submit Type 8 establishment *reports*. In other words, if employers choose to provide the more detailed information that includes race/ethnicity and gender, even for its locations with less than 50 employees, the Consolidated report is automatically populates the detailed counts provided for each establishment and the headquarters location. If the employer instead completes Type 6 Establishment *lists* for locations with less than 50 employees (which includes only address location and total employee count at that location), then it must manually complete the Consolidated Report, to ensure the total counts, including race/ethnicity and gender by location and EEO-1 Category for both locations with more than 50 employees and locations with less than 50 locations are included in the Consolidated Summary. This manual process must be carefully reviewed because the employer must ensure that the totals for each location and establishment match the data entered into the Consolidated Report submission.

9. Once the data has been entered and the employer receives confirmation from the EEO-1 Survey site that the forms are complete (as noted by a change in status from "Red" to "Green"),

the data is ready to be "certified." At that point, the authorized official for the employer certifies the submission of the report.

Submission by Data File "Upload" and One-Time Implementation Cost

10. As previously noted in 7.b. above, once the data has been collected, validated and coded, employers also have the option to "upload" a data file to the EEO-1 Survey tool. All data files must comply with the precise data specifications prescribed by the EEOC.

11. Because Seyfarth Shaw provides specialized consulting services to a multitude of employers, it has developed an analytical tool to facilitate the uploading of data files needed to complete the current EEO-1 Survey submission. The development of the tool for the current EEO-1 data file "upload" required a one-time expenditure of over 110 hours data analyst hours to implement the data requirements of the current EEO-1 report. To facilitate the data file upload for employers, Seyfarth utilizes this data tool to submit multi-establishment EEO-1 reports. Pursuant to Footnote 62 of the proposed EEO-1 Revision, the EEOC recognizes that only 2% of all employers have availed themselves of the tools necessary to use this format (1,449/60,886) for completing the EEO-1 Survey. In our experience, information does not go "nearly directly from an electronic file generated by the HRIS to the survey data base" as set forth in Footnote 62 of the proposed EEO-1 Revision.

12. Before data submission using an "upload" file, employers must first test the data file to ensure it complies with the EEO-1 Survey data upload specifications. During the testing phase, employers receive a summary report detailing the specific issues, if any, with the upload file. After correcting any identified issues, the file is e-mailed to EEO1.upload@EEOC.gov for upload to the Survey site. Once confirmation is received from the EO Survey team that the data file has been "uploaded" to the EEO-1 Survey site, the process continues on as if the Company

had manually keyed in the data using the “electronic fillable pdf.” Specifically, the company will receive a notification that the forms are ready for certification. The company representative must then review all the reports that are flagged on the EO Survey site (identified as red). The flagged reports are typically those for new establishments, closed establishments, or locations establishments with workforce counts that have changed by more than 20%. Once all the reports that were flagged have been reviewed and finalized, the Company will then need to certify their reports to successfully file them.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 8th day of March, 2016, at Chicago, Illinois.

/s/ Annette Tyman
Annette Tyman

Exhibit 4

DECLARATION OF ROBERT B. SPEAKMAN, JR., Ph.D.

I, Robert B. Speakman, Jr., Ph.D., do hereby declare:

1. I am over the age of 18. I have personal knowledge of the facts contained in this declaration and if called as a witness I would testify truthfully to the matters stated herein.

Qualifications

2. My name is Robert B. Speakman, Jr. I am an Economist at Welch Consulting, a company specializing in providing expert services in economics and statistics to the legal community. A copy of my resume is attached hereto as Attachment 2. I hold a bachelor's degree in Economics from Brigham Young University and a Ph.D. in Economics from Texas A&M University. My fields of emphasis are labor economics and econometrics, which is the application of statistical techniques to economic research. From 1993 to 1994, I taught undergraduate microeconomics courses at Texas A&M University.

3. Since joining Welch Consulting in 1992 I have served as an expert and performed statistical analyses of claims related to employment practices, including claims of gender, race, and age discrimination. I have also served as an expert and as a consultant in numerous wage and hour litigations involving FLSA misclassification, uncompensated time worked, meal period and rest break violations, minimum wage violations, and other payroll practices in violation of federal and state laws. I have evaluated economic damages in discrimination and wage and hours cases as well as personal injury and wrongful death claims. I have testified in deposition, arbitration and at trial.

Overview and Conclusion

4. I have been retained, on behalf of the United States Chamber of Commerce,to review and evaluate the Equal Employment Opportunity Commission's (EEOC) proposal to augment the data collected from employers on EEO-1 reports to include summary pay and hours worked information as described below. The EEOC's stated objective in collecting pay and hours worked data is "to assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities that might warrant further investigation."[1] The EEOC states that the "Data collected from the proposed EEO-1 will help the EEOC and OFCCP (the

[1] Federal Register, Vol. 81, No. 20, p. 5115.

Agencies) better understand the scope of the pay gap and focus enforcement resources on employers that are more likely to be out of compliance with federal laws."[2]

5. In this declaration I do not attempt to evaluate the cost of gathering, collecting, verifying, and analyzing the data nor for prosecuting or defending any claims that might stem from that analysis. It should be clear, however, that if there is little or no benefit to gathering and analyzing the data because it does not help to identify firms that discriminate in pay, then the EEOC should not collect the data if there are any costs. My conclusions are as follows:

a. The EEOC's proposed pay data collection and the analyses they suggest they will run will not allow the Agenciesy to effectively and accurately identify firms that discriminate in pay or that would warrant further investigation.

b. The EEOC has largely ignored the data collection and analysis recommendations of the National Academy of Sciences Study (NAS Study).[3]

c. Given that the stated purpose for collecting EEO-1 pay data is to identify non-compliant employers for further investigation, it is glaring that the EEOC has offered no evidence that they will be able to use the proposed data to effectively and accurately accomplish that purpose. This is a recommendation of the NAS Study that has been ignored by the EEOC.

d. The EEOC does not have a comprehensive plan for analyzing the pay data it would like to collect. This was a recommendation of the NAS Study that has been ignored by the EEOC. The EEOC appears to have only a plan to develop a plan.

    i. The proposal is not clear on what it means by W-2 earnings (Box 1 or Box 5).

    ii. The EEOC has not determined how to collect hours worked data for salaried/exempt employees for whom hours worked is not tracked.

    iii. The EEOC is not definitive on which statistical tests will be used, offering only suggestions as to what they might do.

    iv. The EEOC is not clear on how the statistical tests will be evaluated or used to select employers for investigation.

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[2] Questions and Answers: Notice of Proposed Changes to the EEO-1 to Collect Pay Data from Certain Employers, http://www.eeoc.gov/employers/eeo1survey/2016_eeo-1_proposed_changes_qa.cfm. (Questions and Answers hereafter)

[3] *Collecting Compensation Data from Employers*. National Research Council, 2012. Washington, DC: National Academies Press, 8. A copy can be found online at http://www.nap.edu/catalog.php?recordid=13496.

e. The EEOC proposes collecting data on W-2 earning by pay bands within EEO-1 job classification, race/ethnicity, and gender.
    i. The use of W-2 earnings confounds the decisions of employers and employees. W-2 earnings may differ because of employees' own decisions, such as how much to contribute to employer-sponsored retirement plans or the willingness to work overtime or night shifts. As such, it is unclear what the EEOC will actually be analyzing if their focus is on W-2 earnings.
    ii. The EEO-1 job classifications are overly broad to analyze compensation and analyses within these classifications do not address any claims that might be made under Title VII, the EPA, or Executive Order 11246. The workers being compared will not be similarly situated. The EEOC has offered no evidence that comparisons within EEO-1 job classification can be used to target firms that discriminate in pay.
    iii. The NAS Study's recommendation against collecting data by pay bands was completely ignored by the EEOC.
f. The EEOC has suggested the use of statistical tests – the Mann-Whitney and Kruskal-Wallis tests – that will not allow them to remove the effect of any potentially explanatory factors. Comparisons made using these tests will be non-probative of potential pay discrimination. In addition to these tests, the EEOC has suggested the use of interval regression to remove the effect of differences in hours worked. It is not clear that this can be accomplished using interval regression. Interval regression does not always return computational results and it can result in a finding of statistical significance when the underlying data show equal pay.
g. In *addition* to the criticisms above, I have conducted an experiment using simulated firm-level data. Based on this simulation, it is my opinion that analyses using the EEOC's proposed pay data and suggested tests will result in a high error rate – firms that pay fairly will be investigated too often and firms that underpay women or minorities will often go undetected. Simply put, the recommended tests and data will lead to many false-positive and false-negative conclusions, negating any utility from this proposal. In fact, it appears that at best the targeting mechanisms suggested by the EEOC will do only negligibly better than selecting firms at random.

h. Past efforts by the EEOC and the OFCCP to identify firms that discriminate in pay using similar data and statistical tools have failed.
    i. The EEOC currently collects very similar pay data from state and local governments (EEO-4 reports). There appears to have been no success using the EEO-4 pay data to identify public employers that discriminate in pay.
    ii. The OFCCP's EO Survey collected similar pay data from federal contractors. OFCCP abandoned the EO Survey when it was concluded, through an analysis by Abt Associates, that the EO Survey failed to help identify firms that were out of compliance with anti-discrimination laws.
    iii. The EEOC has offered no evidence or reasoning as to how running the same data exercise a third time will result in a better outcome.

6. Nothing in this declaration is meant to suggest a viable alternative to the EEOC's proposed data collection and analytical suggestions. I have not attempted to devise an alternative. The opinions contained herein are only meant to make clear that the EEOC's proposed methodology will not allow them to accurately identify firms that discriminate in pay.

7. The opinions expressed herein are subject to the information that is available to me at this time. Should additional information become available, I reserve the right to revisit my opinions. Tables described in this declaration can be found in Attachment 1.

Background

8. On February 1, 2016, the EEOC issued a notice containing their proposed revisions to the employer information report (EEO-1), which would additionally collect pay and hours worked information.[4] Currently the EEO-1 collects employee counts from federal contractors with 50 or more employees and from non-federal contractors (private industry firms) with 100 or more employees. Reporting firms select a pay period between July 1st and September 30th and provide employee counts by EEO-1 job classification[5], race/ethnicity[6], and gender. In total, 140 counts

[4] Federal Register, Vol. 81, No. 20, pp. 5113-5121.
[5] Executives/Senior-Level Officials and Managers, First/Mid-Level Officials and Managers, Professionals, Technicians, Sales, Office and Clerical, Craft Workers (skilled), Operatives (semi-skilled), Laborers and Helpers (unskilled), and Service Workers.
[6] The seven groups are: 1) Hispanic/Latino, 2) White (not Hispanic/Latino), 3) African-American (not Hispanic/Latino), 4) Native Hawaiian or Other Pacific Islander, 5) Asian (not Hispanic/Latino), 6) American Indian or Alaskan Native (not Hispanic/Latino) and 7) Two or More Races (not Hispanic/Latino). Although this grouping includes both race and ethnicity, I refer to the combination as "race" in this report.

are provided (10 job classifications x 7 race/ethnicity groups x 2 genders) ignoring totals and previous year's totals. This existing portion will be called Component 1.

9. The new pay and hours data section, Component 2, would require firms with 100 or more employees to further stratify the employee counts in Component 1 into 12 pay bands using an employee's annual W-2 earnings.[7] Part-time and part-year employees would be included in the counts. In addition, there would be another section of Component 2 for employers to provide the total hours worked for employees in each EEO-1 job classification, race/ethnicity, gender, and pay band. Firms would begin providing this additional information beginning with the reports due on September 30, 2017.

10. The EEOC's stated purpose in collecting this new data is "to *assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities that might warrant further investigation*."[8] They clarify:

> The proposed pay data collection will provide a much needed tool to *identify discriminatory pay practices* where they exist in order to ensure that fair pay practices are put in place. … Access to pay data will help EEOC and OFCCP *identify and combat pay discrimination*. … The pay data will provide EEOC and OFCCP with insight into pay disparities across industries and occupations and strengthen federal efforts to *combat discrimination*. EEOC and OFCCP will use this data to more *effectively focus agency investigations*, assess complaints of discrimination, and *identify existing pay disparities* that may warrant further examination. … Data collected from the proposed EEO-1 will help EEOC and OFCCP better understand the scope of the pay gap and *focus enforcement resources* on employers that are more likely to be out of compliance with federal laws. [9]

11. It is appears that the purpose of the EEOC's proposal is to combat discriminatory pay practices by collecting data that will allow the EEOC to identify firms that should be further investigated to determine if they discriminate in pay. Although the EEOC does not define what it means by pay discrimination, I interpret it to mean pay differences based upon gender or

[7] Annual W-2 earning would include the 12 months prior to the pay period selected for reporting purposes. A sample of the proposed EEO-1 report can be found at http://www.eeoc.gov/employers/eeo1survey/2016_new_survey.cfm.
[8] Fed. Reg., Vol. 81, No 20, p. 5115. Italics added.
[9] Questions and Answers. Italics added.

ethnicity that cannot be explained by legitimate, business related reasons and I use it with that meaning throughout this report.

12. The EEOC states that data on "pay bands would generate reliable aggregated data to support meaningful statistical analysis."[10] While it is not directly stated what the EEOC means by "meaningful", it might be inferred from their statements that meaningful analyses would allow them to correctly "discern potential discrimination", i.e., identify firms that are discriminating in their pay practices for further investigation. They have offered no evidence that pay band data can be used to accurately identify firms that discriminate in pay.

13. The EEOC also does not definitively state which statistical tests they will use to evaluate firms, but suggests that they will use the tests recommended in the Pilot Study – the Mann-Whitney test and the Kruskal-Wallis test.[11] The EEOC suggested that it may also use interval regression to perform analyses that attempt to correct for potential differences in annual hours worked between men and women and between members of different race groups. The Mann-Whitney and Kruskal-Wallis tests examine whether groups of employees come from the same population. Put another way, they test whether groups of employees have the same underlying distribution of earnings or, more simply, whether they are paid the same.

14. These tests are free from the assumption of normality that are imposed when running multiple regression, but at the cost of not being able to control for potentially explanatory factors. It's not clear how much (if any) benefit is derived from eliminating the normality assumption, but the cost of not being able to remove the effect of legitimate, business-related factors may serve to completely undermine any results from these tests.[12]

15. The EEOC states that the recommendations in their notice were guided by the findings in the NAS Study and the EEOC Pay Pilot Study[13] (Pilot Study). This declaration is not meant to be a comprehensive review of those studies, but where they add to the discussion of the EEOC's Notice, I will include information from those studies.

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[10] Questions and Answers.

[11] The Mann-Whitney test is used to compare two groups (men and women) and the Kruskal-Wallis test is used to compare multiple groups (race/ethnicity).

[12] In fact, labor economists frequently use multiple regression to study wages and earnings. It is unclear why the EEOC is concerned with the normality assumption imposed using multiple regression.

[13] *EEOC Pay Pilot Study*, September 2015. Sage Computing. A copy can be found at http://www.eeoc.gov/employers/eeo1survey/pay-pilot-study.pdf. The actual title or sub-title may be, "Final Report: To Conduct a Pilot Study for How Compensation Earning Data Could Be Collected From Employers on EEOC's Survey Collection Systems (EEO-1, EEO-4, and EEO-5 Survey Reports) and Develop Burden Cost Estimates for Both EEOC and Respondents for Each of EEOC Surveys (EEO-1, EEO-4, and EEO-5)."

The Recommendations from the NAS Study Are Largely Ignored by the EEOC's Notice.

16. The NAS study made six recommendations. The final two involve data confidentiality and security, topics I do not discuss in this declaration. In this section I examine the first four NAS recommendations.

17. Recommendation 1: The EEOC "should *prepare a comprehensive plan* for use of earnings data before initiating any data collection."[14]

18. The EEOC has a plan for which data to collect, but it seems clear that they do not have a definitive plan on what to do with that data once it arrives. One might infer that they will use the Mann-Whitney and the Kruskal-Wallis tests as well as possibly interval regression, but the EEOC is not definitive. They only state that the "Pilot Study recommends using the Mann-Whitney test … and the Kruskal-Wallis test." It is unclear whether the EEOC will follow the Pilot Study's recommendation regarding these tests.

19. The Notice also states that "interval regressions *can* be used to examine the impact of hours worked", which is different than stating that interval regression *will* be used.[15] And, there is no clarification when interval regression might be used. They might run interval regression for all employers or they might run it only when there is a significant result in the Mann-Whitney or Kruskal-Wallis test. The order in which the tests are run and how the tests results are to be evaluated has an impact on which employers will be selected for investigation. The EEOC has not indicated how these tests will be used jointly to target employers for further investigation.

20. It is also not clear how the EEOC will evaluate the results of the statistical tests nor which firms will be selected for further investigation. They imply that they will rely upon a two-standard deviation rule by referencing the Supreme Court's *Hazelwood School District v. United States* decision, but they do not explicitly state that comparisons of two (or possibly three) standard deviations or more will be investigated.[16]

21. They further suggest that they will make within-industry comparisons and select firms that perform the poorest on whatever statistical test(s) they decide to run. "The EEOC and OFCCP **plan to develop** a software tool that will allow their investigators to conduct an initial analysis by looking at W-2 pay distribution within a single firm or establishment, and by comparing the firm's or establishment's data to the aggregate industry or metropolitan-area

[14] NAS Study, p. S-2. Emphasis added.
[15] Fed. Reg., Vol. 81, No. 20, fn. 47. Emphasis added.
[16] Fed. Reg., Vol. 81, No. 20, fn. 48. Emphasis added.

data."[17] They do not define any standard for those that will be selected for further investigation within industry. For example, they might be ranked on the test statistic or they might be ranked on the p-value from the test statistic. This is not the same ranking. Once the rank order is determined, it is not clear how many employers will be selected for investigation. It might be the bottom 1% or 5% or 10%.

22. In addition, there is no definitive plan on how employers should report hours data for salaried employees for whom the firm does not already collect data. "The EEOC **seeks employer input** with respect to how to report hours worked for salaried employees."[18] The EEOC also states that the Pilot Study "**will guide the development** of analytical techniques to make full use of the data to be collected", implying that these analytical techniques are not already developed.

23. The EEOC's language cited above – "plan to develop", "seek employer input", and "will guide the development" – suggests that this has not been completed yet. It appears that there is not a plan for how to analyze the data, only a plan to make a plan. **The EEOC has ignored the first recommendation of the NAS Study.**

24. Recommendation 2: "After the [EEOC], [OFCCP], and the [US DOJ] complete the comprehensive plan for use of earnings data, the agencies should initiate a pilot study to *test* the collection instrument and *the plan for the use of the data*. The pilot study should be conducted by an independent contractor charged with measuring the resulting data quality, *fitness for use in the comprehensive plan*, cost, and respondent burden."[19]

25. The NAS Study gave two options for the pilot study – they could study the effectiveness of use of individual level data[20] or they could study the effectiveness of a modification to the EEO-1 report that would collect aggregate level data.[21]

26. The EEOC commissioned a pilot study, which made recommendations regarding many technical aspects of data collection, possible analyses, and it attempted to estimate the costs of the proposed revisions. But, it did not examine the effectiveness of the comprehensive plan that the EEOC was to develop. It's an impossible task as the EEOC has yet to articulate a

[17] Fed. Reg., Vol. 81, No. 20, p. 5118.
[18] Fed. Reg., Vol. 81, No. 20, p. 5117.
[19] NAS Study, p. S-2. Emphasis added.
[20] The study would "test targeting firms for enforcement purposes." See NAS Study, p. S-2.
[21] "The end product would be a prototyped method for providing screening information about pay that is based on standardized information and *audited test statistic formulas*." NAS Study, p. S-3. Emphasis added.

comprehensive plan. The Pilot Study also did not address the recommendation to assess the "fitness for use in the comprehensive plan" of the data to be collected nor did it "test … the plan for the use of the data", i.e., whether the data and analyses would allow the EEOC to effectively identify firms that are underpaying women and minorities.

27. As such, the EEOC has begun work on this recommendation, but has not completed the main purpose of the Pilot Study.

28. Recommendation 3: "The U.S. Equal Employment Opportunity Commission should enhance its capacity to summarize, analyze, and protect earnings data."[22]

29. This was suggested in light of the EEOC's and OFCCP's limited resources to conduct audits. The EEOC has begun working on developing this ability with the Pilot Study, which made recommendations about possible data summaries and analyses. But, it appears that the EEOC is still considering its options and has not definitively decided on the tests it will use or how firms will be selected for further investigation. As such, they have not evaluated whether the data to be collected and the tests to be run will be effective in targeting employers that discriminate in pay. That they are still planning to develop software tools to analyze data suggests that this recommendation has not been fully addresses and there is still more work to be done.

30. Recommendation 4: "The Equal Employment Opportunity Commission should collect data on *rates of pay*, not actual earnings or *pay bands*, in a manner that permits the calculation of measures of both central tendency and dispersion."[23]

31. This recommendation was completely ignored. The EEOC plans to collect data in pay bands derived from actual W-2 earnings.

32. In sum, each of the NAS Study's four recommendations regarding data collection and analysis have either been completely ignored or have only been partially addressed.

The Use of W-2 Earnings Will Impede the EEOC's Ability to Accurately Identify Firms that Underpay Women and Minorities.

33. W-2 earnings include base pay, overtime pay, commissions, tips, severance pay, shift differentials, and nonproduction bonuses (year-end bonuses, sign-on bonuses, referral bonuses, and holiday bonuses). They are impacted by retirement contributions, covered childcare

[22] NAS Study, p. S-3.
[23] NAS Study, p. S-3.

expenses, pre-tax medical premiums, Cafeteria 125 benefits (Flexible Spending Accounts), contributions to Health Savings Accounts, educational assistance, etc.

34. Some of these components are determined by the employer and some are determined by the employee. Differences in propensities to contribute to a 401k plan or have covered childcare expenses or the willingness and ability to work the night shift or overtime hours, for example, may differ between men and women or between members of different races. A difference in employee behavior may drive a wedge in W-2 earnings between groups when they are being paid equitably by their employer. And, it is not possible to disentangle the individual elements of earnings from the W-2 amounts the EEOC proposes to collect. Any pay differences generated or distorted by employees' decisions is meaningless and potentially misleading in determining whether an employer systematically underpays any particular group. It will undermine the EEOC's efforts to correctly identify firms that discriminate in pay.

35. An additional complication of using annual W-2 earnings is that they include all earnings during the past year and treat employment as if it is static or unchanging. But some employees are promoted or demoted while others stay in the same job. Some work part-time or part-year or take leaves or are hired mid-year and others work full-time, full-year without any breaks. The proposed EEO-1 pay data treats all of these workers the same given their employment status and EEO-1 job classification during the selected pay period.

The EEO-1 Job Classifications Are Overly Broad and Workers Within a Classification Are Not Similarly Situated Leading to Meaningless Comparisons.

36. Title VII prohibits discrimination in pay (among other practices) based on gender, race, ethnicity and other protected characteristics. For an analysis to be meaningful under Title VII, workers must be similarly situated. The EEOC Compliance Manual states that "Similarly situated employees are those who would be expected to receive the same compensation because of the similarity of their jobs and other objective factors. … The investigator should determine the similarity of jobs by ascertaining whether the jobs generally involve similar tasks, require similar skill, effort, and responsibility, working conditions, and are similarly complex or

difficult. … Factors other than job content also may be important in identifying similarly situated comparators."[24]

37. The Equal Pay Act prohibits gender-based pay discrimination for workers in the same establishment with jobs that require equal skill, effort, responsibility, and are performed under similar working conditions.[25]

38. Unfortunately, the EEO-1 job classifications are very broad and include obviously dissimilar workers. Within the same classification you will find receptionists and paralegals (Administrative Support Workers); food service managers and engineering managers (First/Mid Officials and Managers); dieticians, social workers, registered nurses, pharmacists, physicians, surgeons, and lawyers (Professionals); dishwashers and security guards (Service Workers). These are meant to be illustrative only, as compiling an exhaustive list of non-informative comparisons created by using these classifications is a nearly impossible task. The point is that grouping workers into EEO-1 job classifications necessarily combines dissimilar workers with market-driven dissimilarities in compensation; the analytical results from comparisons of pay to such dissiminar workers are meaningless and potentially misleading.

39. In my experience, employers don't use the EEO-1 job classification for any type of review or planning or comparison purposes, much less for compensation-related determinations, outside the scope of providing data to the government. It's an artificial and meaningless conglomeration of dissimilar workers used only for EEO-1 reports. Similarly, the job groups that must be created by federal contractors to file Affirmative Action Plans each year are an artificial and meaningless conglomeration of dissimilar workers used only for filing AAP reports.

40. The EEOC already collects pay data from state and local governments, who are required to file an EEO-4 form. Data is collected using broad EEO-4 job classifications (similar to the EEO-1 classifications) and using pay bands. They are very similar to the data that the EEOC wants to collect in Component 2 of the proposed EEO-1 report. Jocelyn Samuels, senior counselor to the assistant attorney general for civil rights of DOJ, provided information to the panel that authored the NAS Study. In her presentation to the panel, Samuels stated that the

[24] EEOC Compliance Manual, Section 10-III.A.b. This document can be found at: http://www.eeoc.gov/policy/docs/compensation.html#1. Identifying Employees Similarly Situated to the Charging Party

[25] The Equal Pay Act of 1963. This document can be found at: http://www.eeoc.gov/laws/statutes/epa.cfm.

demographic data collected on the EEO-4 reports are invaluable for enforcement purposes, but *the wage data on the form are currently less useful*. The job categories and the wage bands reported on the EEO-4 form are *too broad*, and the current EEO-4 form does not include any other information, such as longevity (years of service), which can be a key determinant of salary in the public sector.[26]

41. The proposed EEO-1 pay data has the same shortcomings as the EEO-4 data currently collected. Comparisons made using data within broad EEO-1 job groups by pay bands will be no more useful in helping the EEOC to identify firms that discriminate in pay than are the EEO-4 data.

42. In sum, performing analyses by EEO-1 job classification will undercut the EEOC's ability to correctly identify for investigation employers that discriminate in pay. Firms that pay fairly will be investigated when they should not be and employers that underpay groups of employees will be overlooked because the EEOC intends to run analyses among workers who are not similarly situated.

The Statistical Tests Suggested by the EEOC Do Not Allow For Comparisons of Similarly Situated Workers.

43. The EEOC has suggested the use of statistical tests that do not allow comparisons among similarly situated workers. Not only will the Mann-Whitney and Kruskal-Wallis tests fail to group together workers with similar jobs (skill, effort, responsibility, and working conditions) if they are to be conducted at the EEO-1 job classification level, these tests also cannot be used to remove the effect of any potentially explanatory factor like hours worked, experience, or performance.

44. In my twenty-four years of experience working as an expert in the areas of economics and statistics, I've only seen the Mann-Whitney test run once and I've never seen the Kruskal-Wallis test run. In the one instance that I saw the Mann-Whitney test run, the opposing expert was inexperienced, didn't understand what the test was doing, and didn't know how the results were to be interpreted.

45. The reason these tests are not used is that the comparisons made cannot be used to assess Title VII or EPA claims as they do not make comparisons among similarly situated workers. The exception would be if the population of employees was defined so that they are similarly

[26] NAS Study, p. 1-8. Emphasis added.

situated in all relevant, potentially explanatory factors. This would almost always lead to comparisons among very small groups of employees and the tests would not have the ability to statistically detect pay differences even if they existed.

46. Of secondary concern is that the EEOC's proposed data collection removes within pay band earnings variation. This variation may add information and it may add uncertainty. Suppose, for example, that men are paid at the top of every pay band and women are paid at the bottom. Given the proposed data collection, they will all appear to all earn the same amount. That men earn more is masked by the pay band data, which limits the EEOC's ability to detect a pay difference. Suppose further, that men earn more because they have more experience. The difference within band might be fully explained by the experience difference, which the EEOC will not be able to detect because their statistical test will not allow it. On the other hand, the reduction in pay variation created by placing workers undifferentiated in pay bands will appear to increase the precision of any estimate, perhaps creating a statistically significant outcome when it should not.

47. Another statistical technique that the EEOC suggests they might use is interval regression, which they believe will allow them to control for differences in hours worked by employees. It is not clear, however, whether interval regression will make this correction. To test this, I created several hypothetical datasets to see what interval regression would do.[27]

48. Hypothetical 1: There are five women and five men who work 1,560 hours per year and five women and five men who work 2,080 hours per year. I set the hourly pay rate to $20 for all workers. Clearly men and women work the same number of average hours per year (1,820) and are paid the same amount on average ($36,400). Unfortunately, interval regression could not estimate a gender pay difference because hours worked are perfectly explained by (or collinear with) the pay bands. I next increased men's pay to $30 per hour and left women's pay at $20 per hour, creating a large gender pay gap. The interval regression would not produce estimates of a gender pay difference.[28] Finally, I increased men's pay to $40 per hour leaving women's pay unchanged. Again, interval regression would not produce any estimates of a gender pay difference even though men are clearly paid twice as much as women.[29]

[27] Interval regressions are estimated using Stata, a widely used and accepted statistical software package.
[28] This is because interval regression is estimated using a maximum likelihood technique that failed to converge.
[29] Some of the interval regressions in the Pilot Study also failed to produce estimates. [Pilot Study, p. 94.]

49. Hypothetical 2: Here the data are larger and more complex and so I only present summary statistics. I produced a dataset with 24 men and 24 women, who on average earned the same hourly rate ($27.43) but who worked different number of hours. All workers worked either 1,040 hours per year or 2,080 hours per year, but men were more likely to work full-time and women more likely to work part-time. Interval regression produced a statistically significant gender pay result favoring men, even though the hourly pay rates were exactly the same.

50. Sometimes interval regression is able to produce an estimate and other times it is not. Neither the EEOC nor the Pilot Study articulate a plan for how to proceed when an interval regression cannot be run. And, they have not presented any evidence on the accuracy of interval regression, i.e., whether it produces the same outcomes as if the underlying individual-level data had been used.

51. In sum, the statistical tests that the EEOC's suggests they will use will undercut the EEOC's ability to correctly identify firms that discriminate in pay. They will not allow the agency to make comparisons among similarly situated workers. It appears that they may not even allow them to account for differences in the number of hours worked.

The OFCCP Has Already Attempted this Data Collection Experiment and It Was a Failure.[30]

52. In an attempt to develop a screening tool for identifying federal contractors that discriminate in pay, the OFCCP conducted a pilot study of their EO Survey in April 2000. Based on a preliminary analysis of the results it was believed that the Survey might be helpful.

53. The EO Survey collected total annualized monetary earnings[31] for full-time employees at the end of the calendar or AAP plan year as well as the number of full-time employees by EEO-1 job classification, gender, and minority status.[32]

54. These figures permitted the calculation of averages by EEO01 job classification. Additionally, the Survey collected the high and low annualized monetary earnings and the average tenure for each group (job classification, gender, and minority status).

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[30] The information in the section is taken from the NAS Study, p. 2-6 to 2-8, the Abt Report, and the OFCCP's Final Rule to rescind the EO Survey.

[31] "[A]nnual monetary compensation is defined as an employee's base rate (wage or salary), plus other earnings such as cost-of-living allowance, hazard pay, or other increment paid to all employees regardless of tenure on the job. Annual monetary compensation should not include the value of benefits, overtime, or one-time payments such as relocation expenses. Annual monetary compensation should be expressed in terms of an annual amount." EO Survey, Instructions for Part C.

[32] It also collected information on applicants, hires, promotions, and terminations.

55. The OFCCP collected EO Survey data from December 2000 to December 2004 at which time they contracted with an outside vendor, Abt Associates, to examine the usefulness of the EO Survey information in predicting the results of completed compliance reviews.[33] In total, 3.5% (67 of 1,888) of the compliance reviews ended with a finding of systemic discrimination.[34]

56. The Abt Report used the data to develop a statistical model to attempt to detect establishments that had a finding of systemic discrimination. None of the compensation data proved useful and was excluded from the final model. In the end, "Abt found the [final] model's predictive power to be only slightly better than chance."[35] The model resulted in a large number of false-positives and false-negatives. Under their preferred threshold for predicting establishments that might engage in system discrimination, they would have selected 637 establishments for review. Of these, 595 (or 93%) would have been found in compliance. This is the false-positive rate, the number of establishments selected that should not have been. Moreover, 21 of the 67 (31%) establishments found to be non-compliant would *not* have been selected for further review. This is the false-negative rate, the number of establishments that should have been selected for review but were not. Using a more conservative threshold resulted in fewer establishments being selected for review (143), but still resulted in a high false-positive rate (89% of the establishments selected should not have been) and a high false-negative rate (75% of the establishments that should have been selected were not).[36]

57. Based on that evaluation, OFCCP concluded that the "EO Survey did not improve deployment of enforcement resources toward contractors most likely to be out of compliance and did not lead to greater self-awareness or encourage self-evaluations. … The evaluation also found that the EO Survey imposed a burden on respondents. … OFCCP's consultant's bottom-line conclusion was that ***the EO Survey had failed*** to provide the utility anticipated when the regulation was promulgated in 2000, and, consequently, it eliminated the survey."[37]

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[33] *An Evaluation of OFCCP's Equal Opportunity Survey*. Prepared for the OFCCP by Abt Associates, Cambridge, MA.

[34] Systemic discrimination determinations include both gender and race comparisons and appear to include pay, hiring, termination, and promotion decisions.

[35] Fed. Reg., Vol. 71, No. 13, p. 3375.

[36] Abt Report, p. 33-35.

[37] NAS Study, p. 2-8. Emphasis added. See also the Final Rule to rescind the EO Survey [Fed. Reg., Vol. 17, No. 174, pp. 53032-53042] for an extended discussion of the OFCCP's inability to detect contractors found to engage in system discrimination using the EO Survey.

58. The pay and hours data that the EEOC propose to collect bear a striking resemblance to the EO Survey data that the OFCCP discontinued collecting more than a decade ago. The OFCCP concluded that the EO Survey data could not be used to identify firms with discriminatory pay practices. It is unclear why the EEOC thinks that bringing back this data collection experiment will result in better results and has not offered any evidence that it might. The simulation experiment described below provides evidence that the minor differences between the EEOC's proposed pay data and the EO Survey data will not improve the predictive ability of the data.

Multiple Testing Will Result in Too Many Firms With Fair Pay Practices Being Investigated.

59. In *Hazelwood School District v. United States*, the Supreme Court established the standard that a difference of more than two or three standard deviations is probably statistically significant. The two standard deviation benchmark is approximately equivalent to a 5% chance probability that the statistical test will *incorrectly* reject a hypothesis of gender-neutrality in pay when in fact pay is set equitably.[38] If we were to examine pay data for 100 firms that paid men and women fairly, we would expect 5 of those firms to have statistically significant pay disparities. Half (2.5%) would favor men and half (2.5%) would favor women. This is known as a type I error in statistics and is sometimes referred to as a "false-positive."

60. The two or three standard deviation standard is established under the assumption that a single hypothesis test is being performed. It also assumes that the test is making comparisons among those who are similarly situated. That implies that if the EEOC wants to use a two standard deviation threshold for significance, it should be looking at a single firm and a single EEO-1 job classification and that the comparison should be made among similarly situated workers. Both of these assumptions, however, are violated by the EEOC's proposed statistical testing methodology.

61. The likelihood of obtaining a false-positive increases when more than one test is performed. Suppose that a firm pays men and women equitably. If we know the probability of a false-positive, then we can easily compute the probability of obtaining *at least one* significant result when multiple tests are run. If the probability of a false-positive is 5% and one test is run,

[38] There is a one-to-one mapping from standard deviations to chance probabilities. A two standard deviation difference equates to a 4.55% chance probability. A 5% chance probability equates to a 1.96 standard deviation difference.

then there is a 95% chance probability that the result will not be significant. If two independent tests are run, there is 95% chance the first will be insignificant and a 95% chance the second will be insignificant. The probability of both tests being insignificant is 90.25% (= 0.95 x 0.95) and, conversely, the probability of either test being significant is 9.75%. The false-positive rate has increased from 5% to 9.75% as we move from running a single test to running two independent tests. Importantly, this is under the assumption of complete neutrality in pay.

62. The EEOC intends to collect and analyze data for 10 job categories and to examine both gender- and race-based pay differences. There are seven race groups specified on both the current and the proposed EEO-1 forms. This implies that there are up to 70 comparisons that will be made for each firm.[39] In a firm with gender- and race-neutral pay practices, this results in a 97.2% chance of at least one of the statistical tests being significant.[40] The false-positive rate for a single firm is well above the traditionally used 5% and may be as high as 97.2%.

63. If 97.2% of firms that pay women and minorities equitably are to be investigated, and presumably the rate will be higher for those that do not pay equitably, then it is difficult to see how a two standard deviation rule could be used to effectively identify firms that discriminate in pay as nearly every firm will ultimately be targeted for investigation.

64. This argument against multiple testing is recognized and discussed in the Pilot Study (p. 48), but ignored by the EEOC when they imply that they will use a two standard deviation rule citing the Court's *Hazelwood* decision.[41]

65. In addition, these probabilities assume that the statistical model has removed the effect of any explanatory factors so that the workers being compared are similarly situated. As discussed above, this will not be the case as the EEOC intends to make comparisons of W-2 earnings within broad EEO-1 job categories without any further adjustments.

66. Alternatively, there is also the possibility of the statistical test failing to detect a real pay disparity. This occurs when a firm underpays women or minorities, but the statistical tests are not significant. This is known as a type II error. The converse of a type II error, or one minus the type II error rate, is known as the "power" of the test as it indicates the ability of the test to

[39] There may be more tests run for firms with multiple establishments as each establishment may be examined independently and then aggregated and examined at the firm level.

[40] Computed as $1 - (0.95)^{70}$. If we suppose that only four of the race groups will be of sufficient size to reliably run the statistical test, this implies that there is an 87.1% chance of at least one of the statistical tests being significant. If the EEOC runs a one-tailed test with a two-standard deviation threshold for significance, there is an 83.0% chance of at least one of the statistical tests being significant.

[41] Fed. Reg., Vol. 81, No. 20, fn. 48.

correctly detect a pay difference. Just as 5% is often used as the standard for an "acceptable" type I error rate, 80% is often used as an acceptable level of power for a statistical test. [42]

Results from the EEOC's Statistical Tests Will Be Non-Informative: Evidence from a Simulation Experiment

67. In this section, I set aside all of the criticisms discussed above while continuing to investigate the issue of primary concern – whether the EEOC's proposed data collection efforts will allow them to identify firms that pay women less given the statistical tests they suggest they will use and the within-industry comparisons they suggest they will make. I focus exclusively on gender pay differences, but my conclusions are applicable to race pay differences as well.

The Setup

68. This section abstracts from the argument made above regarding multiple testing as this section examines results when a single test is run to examine gender pay differences for one employer and one EEO-1 job classification.

69. I work with the 2013 and 2014 earner study population of the Current Population Survey (CPS) collected by the Bureau of Labor Statistics. From the CPS, I produce simulated firm-level data by job classification and I assess whether the EEOC's suggested targeting mechanisms will be effective in identifying employers that underpay women.

70. I focus on larger industry and job classifications where there are a sufficient number of CPS respondents from which to randomly sample.[43] In the end, I examine data for thirteen industry and EEO-1 job category pairings. These will likely be the largest industry and job classifications, which means that the EEOC's targeting mechanism should be more successful here than in smaller industries and job classifications. If the targeting mechanism is not successful with these larger populations, the chance of being successful elsewhere is even smaller.

[42] Pilot Study, p. 49. The Pilot Study discusses type I and type II errors and the costs associated with them. One of the areas where I believe the Pilot Study fell short, likely because they were not given the task, is that it failed to investigate actual type I and type II errors rates. While it makes recommendations regarding data collection and the statistical tests that could be run, a study of statistical error rates under various assumptions could have addressed how accurate and effective a particular targeting mechanism might be.

[43] Workers are placed into EEO-1 job classification using the 2010 census occupation code in the CPS data and the EEOC's *EEO-1 Job Classification Guide 2010*, which can be found at http://www1.eeoc.gov//employers/eeo1survey/jobclassguide.cfm?renderforprint=1.

71. Using the CPS data, I construct an annual wage and salary measure. This measure does not include overtime, commissions, bonuses, tips, etc. As such, it does not have the shortcomings introduced by examining W-2 earnings.[44] The CPS data includes the information necessary to derive weekly earnings for all workers, but it does not include weeks worked except for those paid an annual salary. As such, I assume that all workers work fifty-two weeks per year. If there is a difference between men and women in weeks worked, the test performed here will perform better than those that would be performed by the EEOC.[45]

72. Focusing on a single industry and job classification, I remove the effect of hours worked, age, and census occupation code on annual earnings, which results in a predicted pay estimate and an unexplained variation in pay component (the residual) for each worker.[46] The three pay determinants represent legitimate, business related factors that may impact an individual's pay as well as the pay comparison, but that cannot be accounted for in the analysis proposed by the EEOC using the Mann-Whitney test.

73. I use predicted pay and the residual to build simulated firm-level data for each industry and job classification pairing. I start by building employers and job classifications with 10 employees. Later I allow the number of employees to increase to see the impact of increased population size on the outcomes. The simulated data for an employer is built by randomly selecting 10 workers and matching their predicted pay to 10 randomly selected residuals. This creates a "new pay" value that is gender-neutral yet preserves the underlying unexplained variation in pay observed in the original data.

74. Because residuals are matched randomly with predicted pay, the *expectation* is that there will not be a gender difference in the new pay amounts. In practice, this may not be true. In fact, if the population has sufficient size (power), then we expect 5% of the trials to have statistically significant gender pay disparities even when controlling for hours worked, age, and census occupation code (the three pay determinants). About half of these significant outcomes will favor men (2.5%) and half will favor women (2.5%). These are type I errors as discussed above. There is no underlying gender bias in pay, but the statistical test is significant.

75. If gender and the three pay determinants are correlated and if the analysis ignores these determinants, then the probability of committing a type I error will be higher than 5%. The

[44] The CPS data also does not contain W-2 earnings.
[45] I expect their tests to generate a higher number of false-positives.
[46] The residual, or unexplained variation in pay, is the difference between actual pay and predicted pay.

omission of relevant factors from the analysis biases the results and may give the appearance of pay inequity when it does not exist.

76. The final step of the experiment is to place the new pay value for the 10 workers into the EEOC's proposed pay bands and run the Mann-Whitney test that ignores (by necessity) the three pay determinants. The outcome for the firm is a finding of statistical significance or not.

77. I repeat this process – selecting 10 workers at random and matching them to a random residual – 10,000 times. Each time a synthetic firm/job classification is created is called a trial, so there are 10,000 trials. I count the number of trials with a statistically significant outcome adverse to women at the two standard deviation level.

78. In this first pass, the result may be statically significant because of chance variation, which will occur in 2.5% of the trials if there is sufficient power to make the comparison, or because the three pay determinants that legitimately effect pay are omitted from the analysis. The rate of false-positives falls from 5% to 2.5% because I am only counting significant results adverse to women.

79. The results are presented in Table 1. In the first line I present outcomes for Sales Workers in the Grocery Stores industry when it is assumed that there is no underlying gender pay disparity (0%). In the first column of results, for firms with 10 employees in this job classification, I find that 8.0% of the trials produced a statistically significant pay disparity adverse to women. These are false-positives, instances of when a firm pays employees equitably, but the statistical test is significant anyway. The false-positive rate of 8.0% is well above the expected 2.5% indicating that for these workers, gender and the underlying (but ignored) pay determinants are correlated.

80. I next examine how the false-positive rate changes as the number of workers increases. Reading across the first line, for this industry and job classification the false-positive rate rises to 18.5% with 25 employees, to 34.5% with 50 employees, and so on. As the number of employees increases to 400, the false-positive rate increases to 99.6%. With a large enough population and omitted relevant factors, all firms that pay equitably may have statistically significant outcomes.

81. The results in Table 1 are presented in blocks of four rows with each block being an industry and job classification pairing. Before moving to lines two through four of the first block of results (Grocery Stores, Sales Workers), you might examine the first line (0% assumed gender pay difference) of each block. The false-positive rate increases as the number of employees in

the comparison increases for each industry and job classification pairing, with only one exception. Sometimes the increase is more pronounced and other times it is smaller.

82. The bottom line is that the false-positive rate will likely be higher than the expected 2.5% due to the inability of the Mann-Whitney test to remove the effect of potentially explanatory factors. The comparison cannot be made among similarly situated workers using the data the EEOC would collect and the statistical tests they suggest they will run.

83. The discussion of false-positive rates when using multiple statistical tests in the previous section is understated as the false-positive rate may be much higher than 2.5%. That discussion assumed that the workers being compared were similarly situated. That will not be the case.

84. Returning to Sales Workers in the Grocery Store industry (the first block) in Table 1, the second, third, and fourth rows examine the percentage of trials with statistically significant outcomes adverse to women when their pay is reduced by 2%, 5%, and 10%, respectively.[47]

85. In the second line of Table 1, I observe that 9.0% of the trials have a statistically significant result adverse to women when a 2% gender pay difference is introduced into the new pay and there are 10 workers in the comparison. Reading down the first column (for 10 workers), I see the percentage of statistically significant outcomes increases slightly as the gender pay gap grows – 9.5% are statistically significant with a 5% gender pay gap and 11.4% are significant with a 10% gender pay gap. With 10 workers in the comparison, the percent of significant results increases only slightly as a gender pay gap is introduced and increased to 10%.

86. If 11.4% of the firms with a large gender pay disparity (of 10%) have a statistically significant result, then 88.6% of the firms that systemically underpay women will not have a statistically significant result. Under the assumptions of the simulation, most real pay disparities go undetected. These are false-negatives. Comparing the 11.4% detection rate with the typical statistical standard for power (80%), this test does not have a good ability to detect pay differences when they exist.

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[47] The levels of the gender pay gaps are taken from the OFCCP's 2%-or-$2,000 tests (2%), the CONSAD report's 4.8% to 7.1% (5%), and the 10.2% gender pay gap presented in the Pilot Study (10%). I'm not aware of how the OFCCP arrived at their 2% pay difference. The CONSAD report finds an unexplained difference in pay of 4.8% to 7.1% after accounting for the factors available to them in the CPS data. They are quick to point out, however, that there are additional factors that have been shown in the economic literature to legitimately reduce the gender pay gap but that were unavailable to them in the CPS data. [*An Analysis of the Reasons for the Disparity in Wages Between Men and Women*. Prepared by CONSAD Research Corporation for the US Department of Labor Employment Standards Administration, January 12, 2009.] The Pilot Study ran a regression of wages on major industry, major occupation, education, and class (private, government, self-employed) using CPS data and found a gender pay difference of 10.2%.

87. Examining the results for larger sample sizes reveals that the power of the test, the ability to detect a real difference, increases as the population increases. Unfortunately, recall from the first line of results that increasing the population also increases the likelihood of a false-positive. It is unclear, in general, whether the gain in the ability to correctly detect pay inequities outweighs the decline in the ability to eliminate from investigation firms that do pay equitably but this evidence suggests that it does not.

88. For Sales Workers in the Grocery Store industry, the relative detection rate (the ratio of correctly identified firms to false-positives) becomes slightly better as the sample size increases until the rate of false-positives becomes very large.[48] The best population size for the first block is 25 employees, where the percent of significant outcomes for firms with a 10% pay gap is 1.52 times higher than when there is no pay gap (28.2% v. 18.5%). Even in this best case outcome, the ability of the test to detect a large pay disparity is low with only 28.2% of firms non-compliant with discrimination laws being detected and 71.8% slipping through the cracks. And, of the firms that pay equitably, 18.5% will be incorrectly and unfairly selected for audit.

89. To be clear, the ideal would be a 0% rate in the first line of each block and a 100% rate in rows two through four. In this case, every comparison with a statistically significant result would be for a firm that underpaid women and every comparison with an insignificant result would be one that paid women fairly. This 0% / 100% outcome isn't observed for any of the industry/job classifications examined. It's a very difficult standard to meet and the targeting mechanism does not need to perfect. If we compare the results in Table 1 instead to the standard often used by statisticians, a 2.5% false-positive rate with 80% power, that lower standard is also never met. The ability of these comparisons to correctly identify firms that discriminate in pay is poor.

90. In sum, there is a high rate of false-positives and the ability to detect actual pay differences is weak. The false-positive rate will be higher when workers are more dissimilar and the (omitted) factors impacting pay are correlated with gender. Increased population size exacerbates the problem. As population size and the underlying gender pay difference increase, the test will be better able to identify firms that actually underpay women, but at the cost of an

[48] For synthetic firms with 400 or more employees in this industry and job classification, nearly every statistical test is significant and adverse to women. No information is gained by the test.

increase in targeting firms that pay fairly.[49] The statistical tests suggested by the EEOC will perform poorly.

The EEOC's First Targeting Mechanism Will Be Ineffective –Using Statistically Significant Outcomes.

91. The simulation can be used to determine whether the EEOC's targeting mechanism will be successful in identifying firms that underpay women for further investigation. The EEOC suggests two methods for identifying firms. First, they indicate that they will rely upon statistical levels typically relied upon by the courts, i.e., differences of more than two or three standard deviations.[50] Second, they suggest that they will investigate firms with the worst outcomes within their industry.[51]

92. In this section I explore the impact of examining all firms with a statistically significant outcome adverse to women. The results from Table 1 can be used to probabilistically determine the percent of firms selected for investigation that actually underpay women and the percent that pay women equitably. I present results for the simulations with 50 workers only, but the comparisons using other population sizes looked very similar. I continue to present results assuming gender pay differences of 2%, 5%, and 10% for firms that underpay women.

93. In addition to the assumptions above, I need to make an assumption regarding the fraction of firms that underpay women. I select 0.5%, 1%, 5%, 10%, and 25%. The first number, 0.5%, is taken from the OFCCP enforcement database.[52] They report that they came to a financial agreement on salary investigations for 87 of 15,951 audits conducted between 2011 and 2014.[53] It is my understanding that many of these collections were the results of cohort comparisons, i.e., a small number of employees compared directly against each other that resulted in small payments to a few employees. Importantly, this means that many of them were not the result of an analysis that ended with a finding of a statistically significant outcome. As such, it could be argued that this number is actually too high. Recall also that the review of the EO Survey discussed above found that 3.5% of firms investigated were noncompliant with

[49] Although not presented in the table, a decrease in the unexplained variation in pay will improve the test's ability to detect actual differences, but again at the cost of an increase in false-positives.
[50] Fed. Reg., Vol. 81, No. 20, fn. 48.
[51] Fed. Reg., Vol. 81, No. 20, p. 5118.
[52] This data can be found at http://ogesdw.dol.gov/views/data_summary.php.
[53] The percent of financial agreements is slightly higher for 2011 and 2012 (0.72%).

federal discrimination laws.[54] The other percentages are chosen arbitrarily to show how the targeting mechanism works as the percentage increases.

94. Table 2 presents the results of these calculations. In the first row I continue to examine Sales Workers in the Grocery industry. Here I assume that a firm either pays women and men the same (0%) or they pay women 2% less than men. The first calculation, in the column labelled "0.5%", assumes that 0.5% of firms pay similarly situated women 2% less than men and 99.5% of firms pay men and women the equitably. Under these assumptions, 0.6% of the firms selected for investigation will actually be found to have a real pay disparity. This also means that 99.4% of the firms selected for investigation will pay men and women equitably.

95. So if 0.5% of firms underpay women, then 0.6% of the firms selected will be found to actually underpay women. But, if we randomly selected firms for audit, we would expect 0.5% of them to underpay women by the assumptions adopted in this calculation. The net improvement from using the EEO-1 data is 0.1%.

96. Moving across the first row shows how well this targeting mechanism works as the percent of firms that underpay women increases continuing to assume that those that underpay do so by 2%. The percent of firms that actually pay women less than men among those selected is about the same as the assumed percent of firms that underpay women. It appears that this selection mechanism will do no better than randomly selecting firms for investigation, which does not require the proposed EEO-1 pay and hours data.

97. The second and third rows repeat the calculations under the assumptions that firms that underpay women do so by 5% and then 10%, respectively. The targeting mechanisms do slightly better with higher gender pay differences, but they still do poorly. Consider, for example, the calculations when it is assumed that 25% of firms underpay women by 10%. In this case, 33.6% of firms selected for audit actually underpay women and 66.4% of those selected pay women equitably. The error rate is huge.

98. The EEOC's first suggested targeting mechanism, statistical significance, will do only negligibly better than randomly selecting firms for audit. Moreover, the error rates will be enormous.

[54] This includes both gender-based and race-based evaluations of pay, hiring, promotion, and termination decisions.

99. Recall that this simulation assumes that the EEOC is examining one firm and one job classification and ignores the arguments presented above regarding the high rate of false-positives when multiple tests are run.

The EEOC's Second Targeting Mechanism Will Be Ineffective –Using Relative Within-Industry Outcomes.

100. The EEOC's second suggested targeting mechanism is to identify firms within the same industry that do poorly on the statistical test and select them for further investigation. It is unclear exactly how these firms will be compared, but I assume here that the EEOC will select the firms based on the statistical outcomes (p-values) from the Mann-Whitney test.

101. The same simulation performed above and presented in Table 1 can be used to examine the effectiveness of this targeting mechanism. Each of the 10,000 trials becomes a synthetic firm. I created 10,000 synthetic firms that pay women and men the same, 10,000 that underpay women by 2%, 10,000 that underpay by 5%, and 10,000 that underpay by 10%.

102. I then create a labor market of firms given the assumed percent that underpay women by a given percentage. I start by assuming that 0.5% of firms pay women 2% less than men. I randomly select 99.5% of the 10,000 firms that pay men and women the same and 0.5% of the 10,000 firms that underpay women by 2%. I rank the firms based on their Mann-Whitney test statistic and select the firms that do the worst. It's not clear how many firms the EEOC will select for investigation, but in this simulation I select the bottom 5%. I then examine the percent of firms that actually underpay women among those selected.[55] I again report only results for firms with 50 employees, but the numbers are similar for other population sizes.

103. The results presented in Table 3 are interpreted exactly the same as those in Table 2 as they only differ in the selection mechanism being used. Table 2 contains outcomes when a two standard deviation rule is used for selection and Table 3 contains outcomes when the Mann-Whitney test statistic outcomes within-industry are used for selection. The numbers are very similar to those in Table 2 and therefore the conclusions are similar.

104. The EEOC's second suggested targeting mechanism, selecting firms with the worst outcomes within their industry, will do only negligibly better than randomly selecting firms for audit. Moreover, the error rates will be enormous.

[55] This process is repeated 100 times and it is the average of these 100 trials that is reported in Table 3.

105. Based on these simulations, it is my opinion that after incurring the costs to produce, gather, and analyze these data and after incurring the costs to prosecute and defend pay practices based on the data that the EEOC proposes to collect and the flawed and untested targeting mechanisms that they suggest that they will implement, we will find that they have done at best negligibly better than if they had randomly selected firms for further investigation.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at Bryan, Texas on March 31, 2016.

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Robert B. Speakman, Jr.

Table 1. There Will Be Large Error Rates With the EEOC's Proposed Statistical Methodology: The Percent of Statistically Significant Outcomes Adverse to Women.

Industry (2010 Census Code)	EEO-1 Job Category	Assumed Gender Pay Difference	Assumed Population Size						
			10	25	50	75	100	200	400
Grocery Stores	Sales Workers	0%	8.0	18.5	34.5	49.8	61.4	90.0	99.6
Grocery Stores	Sales Workers	2%	9.0	21.0	38.3	54.0	67.0	92.9	99.8
Grocery Stores	Sales Workers	5%	9.5	23.1	43.2	60.5	72.9	95.8	100.0
Grocery Stores	Sales Workers	10%	11.4	28.2	52.4	70.4	82.2	98.5	100.0
Real Estate	Sales Workers	0%	3.7	6.1	9.7	12.3	15.2	26.5	50.1
Real Estate	Sales Workers	2%	3.8	6.8	10.6	13.6	18.4	34.2	60.0
Real Estate	Sales Workers	5%	4.3	7.8	13.5	19.2	24.4	44.3	73.2
Real Estate	Sales Workers	10%	5.0	10.7	18.7	26.9	35.7	61.5	89.4
Nursing Care Facilities	Service Workers	0%	1.1	2.6	3.0	3.3	4.0	3.9	5.3
Nursing Care Facilities	Service Workers	2%	1.5	3.5	4.3	4.7	5.0	6.7	9.4
Nursing Care Facilities	Service Workers	5%	2.0	4.3	6.0	6.9	8.3	11.6	19.1
Nursing Care Facilities	Service Workers	10%	2.6	6.6	9.9	12.7	15.3	26.3	45.9
Restaurants and Other Food Services	Service Workers	0%	2.6	7.3	12.7	17.7	22.0	39.8	68.3
Restaurants and Other Food Services	Service Workers	2%	3.2	8.4	15.5	20.6	25.7	48.5	78.5
Restaurants and Other Food Services	Service Workers	5%	3.3	10.3	18.2	26.7	34.5	60.4	89.0
Restaurants and Other Food Services	Service Workers	10%	4.6	14.1	26.1	38.3	48.8	79.2	97.8
Banking and Related Activities	Administrative Support Workers	0%	1.2	1.9	2.1	1.7	1.9	1.7	1.6
Banking and Related Activities	Administrative Support Workers	2%	1.2	2.1	2.5	2.6	2.9	2.8	3.0
Banking and Related Activities	Administrative Support Workers	5%	1.8	2.8	3.8	4.4	4.2	5.7	8.1

Banking and Related Activities	Administrative Support Workers	10%	1.7	4.4	6.6	8.6	9.4	16.3	27.1
Insurance Carriers and Related Activities	Administrative Support Workers	0%	1.5	4.8	6.9	8.9	11.0	17.9	31.5
Insurance Carriers and Related Activities	Administrative Support Workers	2%	1.8	5.1	7.9	11.6	13.9	23.3	42.7
Insurance Carriers and Related Activities	Administrative Support Workers	5%	2.2	6.4	10.9	15.4	18.7	33.6	58.9
Insurance Carriers and Related Activities	Administrative Support Workers	10%	3.0	9.2	17.3	22.8	29.8	52.7	82.7
Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	0%	1.6	2.7	2.9	3.4	3.4	4.5	5.2
Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	2%	2.3	3.7	4.1	4.7	5.6	8.0	12.2
Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	5%	2.7	4.6	6.7	8.1	10.6	16.2	29.0
Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	10%	3.5	7.2	12.1	17.0	21.5	39.2	68.2
Architectural, Engineering, and Related Services	Professionals	0%	2.8	6.4	12.0	16.9	21.0	39.8	68.4
Architectural, Engineering, and Related Services	Professionals	2%	3.1	7.4	14.0	21.0	26.3	47.8	78.0
Architectural, Engineering, and Related Services	Professionals	5%	3.5	9.6	18.1	25.8	33.9	60.8	89.1
Architectural, Engineering, and Related Services	Professionals	10%	4.8	12.8	26.0	38.6	48.8	79.2	97.6
Computer Systems Design & Related Services	Professionals	0%	2.1	3.7	4.8	5.9	6.7	10.6	17.4

Computer Systems Design & Related Services	Professionals	2%	2.1	3.9	5.9	7.5	9.2	14.8	26.1
Computer Systems Design & Related Services	Professionals	5%	2.2	5.2	8.2	10.9	12.6	23.1	42.5
Computer Systems Design & Related Services	Professionals	10%	3.3	7.7	12.8	17.9	24.1	42.7	71.5
Hospitals	Professionals	0%	3.2	9.3	15.3	21.5	27.2	48.3	77.3
Hospitals	Professionals	2%	3.5	10.5	17.8	25.3	31.3	55.6	84.5
Hospitals	Professionals	5%	4.1	12.1	22.2	31.2	38.4	66.2	92.3
Hospitals	Professionals	10%	5.0	16.1	29.1	42.2	52.3	80.7	98.1
Management, Scientific, & Technical Consulting Services	Professionals	0%	5.2	11.0	19.6	28.0	36.8	64.8	91.5
Management, Scientific, & Technical Consulting Services	Professionals	2%	5.7	12.2	22.4	33.3	42.4	72.0	95.0
Management, Scientific, & Technical Consulting Services	Professionals	5%	6.4	15.5	26.9	39.5	51.1	80.8	98.3
Management, Scientific, & Technical Consulting Services	Professionals	10%	7.9	19.5	36.3	51.5	65.4	92.1	99.7
Securities, Commodities, Funds, Trusts, & Other Financial Investments	Professionals	0%	3.7	6.6	10.0	14.5	17.5	32.0	59.3
Securities, Commodities, Funds, Trusts, & Other Financial Investments	Professionals	2%	4.1	7.8	12.9	18.0	22.3	41.1	70.5
Securities, Commodities, Funds, Trusts, & Other Financial Investments	Professionals	5%	4.1	9.2	16.8	23.3	30.1	54.2	84.8
Securities, Commodities, Funds, Trusts, & Other Financial Investments	Professionals	10%	5.6	13.5	24.7	34.8	45.0	75.2	96.3
Banking and Related Activities	First/Mid Offs & Mgrs	0%	3.1	4.4	6.2	7.1	9.2	14.8	25.4
Banking and Related Activities	First/Mid Offs &	2%	3.6	5.3	7.9	10.1	12.6	20.6	38.7

	Mgrs								
Banking and Related Activities	First/Mid Offs & Mgrs	5%	4.2	7.0	10.6	14.9	18.7	33.1	59.4
Banking and Related Activities	First/Mid Offs & Mgrs	10%	5.1	9.9	18.1	25.2	32.4	58.2	87.1

Table 2. Statistical Targeting Will Be Ineffective: Percent of Firms that Actually Underpay Women if the EEOC Targets Job Classifications with Statistically Significant Outcomes Adverse to Women Using the Mann-Whitney Test (Sample Size 50).

Industry (2010 Census Code)	EEO-1 Job Classification	Assumed Gender Pay Difference	Assumed Percent of Firms that Pay Women Less				
			0.5%	1%	5%	10%	25%
Grocery Stores	Sales Workers	2%	0.6	1.1	5.5	11.0	27.0
Grocery Stores	Sales Workers	5%	0.6	1.2	6.2	12.2	29.5
Grocery Stores	Sales Workers	10%	0.8	1.5	7.4	14.4	33.6
Real Estate	Sales Workers	2%	0.5	1.1	5.4	10.8	26.7
Real Estate	Sales Workers	5%	0.7	1.4	6.8	13.4	31.7
Real Estate	Sales Workers	10%	1.0	1.9	9.2	17.7	39.2
Nursing Care Facilities	Service Workers	2%	0.7	1.4	6.9	13.5	31.8
Nursing Care Facilities	Service Workers	5%	1.0	1.9	9.4	17.9	39.5
Nursing Care Facilities	Service Workers	10%	1.6	3.2	14.6	26.5	52.0
Restaurants and Other Food Services	Service Workers	2%	0.6	1.2	6.0	11.9	28.9
Restaurants and Other Food Services	Service Workers	5%	0.7	1.4	7.0	13.7	32.3
Restaurants and Other Food Services	Service Workers	10%	1.0	2.0	9.8	18.6	40.7
Banking and Related Activities	Administrative Support Workers	2%	0.6	1.2	6.0	11.8	28.7
Banking and Related Activities	Administrative Support Workers	5%	0.9	1.8	8.7	16.8	37.7
Banking and Related Activities	Administrative Support Workers	10%	1.6	3.1	14.3	26.0	51.3
Insurance Carriers and Related Activities	Administrative Support Workers	2%	0.6	1.1	5.7	11.3	27.7
Insurance Carriers and Related Activities	Administrative Support Workers	5%	0.8	1.6	7.7	15.0	34.6
Insurance Carriers and Related	Administrative Support	10%	1.2	2.5	11.6	21.7	45.5

Activities	Workers						
Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	2%	0.7	1.4	6.9	13.6	32.1
Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	5%	1.2	2.3	10.9	20.5	43.7
Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	10%	2.1	4.1	18.1	31.9	58.4
Architectural, Engineering, and Related Services	Professionals	2%	0.6	1.2	5.8	11.5	28.0
Architectural, Engineering, and Related Services	Professionals	5%	0.8	1.5	7.4	14.4	33.5
Architectural, Engineering, and Related Services	Professionals	10%	1.1	2.1	10.2	19.4	41.9
Computer Systems Design & Related Services	Professionals	2%	0.6	1.2	6.2	12.2	29.4
Computer Systems Design & Related Services	Professionals	5%	0.9	1.7	8.3	16.1	36.6
Computer Systems Design & Related Services	Professionals	10%	1.3	2.7	12.4	23.1	47.3
Hospitals	Professionals	2%	0.6	1.2	5.8	11.4	27.9
Hospitals	Professionals	5%	0.7	1.4	7.1	13.8	32.5
Hospitals	Professionals	10%	0.9	1.9	9.1	17.4	38.8
Management, Scientific, & Technical Consulting Services	Professionals	2%	0.6	1.1	5.7	11.2	27.5
Management, Scientific, & Technical Consulting Services	Professionals	5%	0.7	1.4	6.7	13.2	31.3
Management, Scientific, & Technical Consulting Services	Professionals	10%	0.9	1.8	8.9	17.1	38.1
Securities, Commodities, Funds, Trusts, & Other Financial Investments	Professionals	2%	0.6	1.3	6.4	12.6	30.2
Securities, Commodities, Funds,	Professionals	5%	0.8	1.7	8.2	15.8	36.0

Trusts, & Other Financial Investments							
Securities, Commodities, Funds, Trusts, & Other Financial Investments	Professionals	10%	1.2	2.4	11.5	21.6	45.3
Banking and Related Activities	First/Mid Offs & Mgrs	2%	0.6	1.3	6.3	12.4	29.8
Banking and Related Activities	First/Mid Offs & Mgrs	5%	0.8	1.7	8.2	15.9	36.2
Banking and Related Activities	First/Mid Offs & Mgrs	10%	1.4	2.9	13.3	24.5	49.3

Table 3. Relative Industry Based Targeting Will Be Ineffective: Percent of Firms that Actually Underpay Women if the EEOC Targets Firms With the Lowest P-Values Within Their Industry on the Mann-Whitney Test (Sample Size 50).

Industry (2010 Census Code)	EEO-1 Job Classification	Assumed Gender Pay Difference	Assumed Percent of Firms that Pay Women Less				
			0.5%	1%	5%	10%	25%
Grocery Stores	Sales Workers	2%	0.6	1.1	5.3	10.6	26.4
Grocery Stores	Sales Workers	5%	0.7	1.3	6.8	13.1	31.4
Grocery Stores	Sales Workers	10%	1.1	2.2	10.8	19.7	42.6
Real Estate	Sales Workers	2%	0.6	1.1	5.8	11.3	27.4
Real Estate	Sales Workers	5%	0.8	1.4	7.3	14.1	33.5
Real Estate	Sales Workers	10%	1.1	2.2	10.9	20.5	44.6
Nursing Care Facilities	Service Workers	2%	0.7	1.3	7.0	13.4	32.3
Nursing Care Facilities	Service Workers	5%	0.8	1.7	8.3	16.2	37.1
Nursing Care Facilities	Service Workers	10%	1.4	2.8	13.6	25.5	54.0
Restaurants and Other Food Services	Service Workers	2%	0.6	1.2	6.3	12.1	28.6
Restaurants and Other Food Services	Service Workers	5%	0.9	1.8	8.5	16.5	38.3
Restaurants and Other Food Services	Service Workers	10%	1.2	2.6	12.6	23.7	49.7
Banking and Related Activities	Administrative Support Workers	2%	0.5	1.1	5.5	10.8	27.0
Banking and Related Activities	Administrative Support Workers	5%	0.8	1.6	7.9	15.2	35.1
Banking and Related Activities	Administrative Support Workers	10%	1.3	2.6	12.3	22.8	47.0
Insurance Carriers and Related Activities	Administrative Support Workers	2%	0.7	1.3	6.3	12.5	29.8
Insurance Carriers and Related Activities	Administrative Support Workers	5%	0.7	1.7	8.1	15.5	36.1
Insurance Carriers and Related Activities	Administrative Support Workers	10%	1.2	2.5	11.8	22.0	46.9

Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	2%	0.7	1.4	7.4	14.2	34.6
Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	5%	1.0	2.1	10.3	19.2	42.2
Motor Vehicles and Motor Vehicle Equipment Manufacturing	Operatives	10%	1.7	3.6	16.5	30.4	58.0
Architectural, Engineering, and Related Services	Professionals	2%	0.7	1.2	6.1	12.2	29.2
Architectural, Engineering, and Related Services	Professionals	5%	0.8	1.6	8.0	15.3	34.9
Architectural, Engineering, and Related Services	Professionals	10%	1.4	2.7	12.7	23.1	48.4
Computer Systems Design & Related Services	Professionals	2%	0.6	1.2	6.0	11.9	29.2
Computer Systems Design & Related Services	Professionals	5%	0.9	1.6	8.2	16.2	36.9
Computer Systems Design & Related Services	Professionals	10%	1.3	2.3	11.6	22.1	46.2
Hospitals	Professionals	2%	0.6	1.1	6.0	11.5	28.1
Hospitals	Professionals	5%	0.7	1.5	7.4	14.5	34.0
Hospitals	Professionals	10%	1.1	2.3	11.2	21.7	46.7
Management, Scientific, & Technical Consulting Services	Professionals	2%	0.6	1.2	5.8	11.5	28.4
Management, Scientific, & Technical Consulting Services	Professionals	5%	0.9	1.6	7.9	15.7	35.7
Management, Scientific, & Technical Consulting Services	Professionals	10%	1.3	2.5	11.5	22.1	46.6
Securities, Commodities, Funds, Trusts, & Other Financial Investments	Professionals	2%	0.7	1.3	6.4	13.0	30.1
Securities, Commodities, Funds, Trusts, & Other Financial Investments	Professionals	5%	1.0	1.8	8.7	17.3	39.5
Securities, Commodities, Funds, Trusts, & Other Financial Investments	Professionals	10%	1.5	2.7	13.7	25.8	52.1

Banking and Related Activities	First/Mid Offs & Mgrs	2%	0.6	1.2	5.6	11.4	28.3
Banking and Related Activities	First/Mid Offs & Mgrs	5%	0.8	1.6	8.1	15.9	37.2
Banking and Related Activities	First/Mid Offs & Mgrs	10%	1.4	2.7	13.0	24.9	50.6

Exhibit 5

Display additional information by clicking on the following: All ' Brief and OIRA conclusion

' Abstract/Justification ' Legal Statutes ' Rulemaking ' FR Notices/Comments ' IC List ' Burden ' Misc. ' Common Form Info. ' Certification

Please note that the OMB number and expiration date may not have been determined when this Information Collection Request and associated Information Collection forms were submitted to OMB. The approved OMB number and expiration date may be found by clicking on the Notice of Action link below.

View ICR - OIRA Conclusion

OMB Control No: 3046-0007
ICR Reference No: 200901-3046-001
Status: Historical Active
Previous ICR Reference No: 200511-3046-001
Agency/Subagency: EEOC
Agency Tracking No:
Title: Employer Information Report (EEO-1)
Type of Information Collection: Extension without change of a currently approved

Type of Review Request: Regular
OIRA Conclusion Action: Approved without change
Conclusion Date: 03/10/2009
Retrieve Notice of Action (NOA)
Date Received in OIRA: 01/14/2009

Terms of Clearance: Approval of next submission contingent upon its compliance with Standards for Federal Data on Race and Ethnicity. OMB notes that prior terms of clearance continue to apply: "The Employer Information Report (EEO-1) is approved consistent with EEOC memo dated 1/25/2006. OMB notes the following: The 1997 Revised Standards for Data on Race and Ethnicity encourage employers to collect and maintain racial data for Hispanic individuals and detailed racial data for individuals of multiple racial heritages. As noted in the EEOC memo to OMB on 1/25/2006, EEOC will inform employers that they are not precluded from collecting other data at their discretion as deemed appropriate for compliance purposes."

	Inventory as of this Action	Requested	Previously Approved
Expiration Date	01/31/2010	01/31/2010	03/31/2009
Responses	170,000	170,000	170,000
Time Burden (Hours)	599,000	599,000	599,000
Cost Burden (Dollars)	0	0	0

Abstract: EEO-1 data are used by EEOC to investigate charges of discrimination against private employers. Data are shared with the Office of Federal Contract Compliance Programs (DOL) and 86 State and Local Fair Employment Agencies.

Authorizing Statute(s): US Code: 42 USC 2000e-8(c) Name of Law: Civil Rights Act of 1964

Citations for New Statutory Requirements: None

Associated Rulemaking Information

RIN: Stage of Rulemaking: Federal Register Citation: Date:

Federal Register Notices & Comments

60-day Notice:	Federal Register Citation:	Citation Date:
	73 FR 57622	10/03/2008

Number of Information Collection (IC) in this ICR: 1

IC Title	Form No.	Form Name

ICR Summary of Burden

	Total Approved	Previously Approved	Change Due to New Statute	Change Due to Agency Discretion	Change Due to Adjustment in Estimate	Change Due to Potential Violation of the PRA
Annual Number of Responses	170,000	170,000	0	0	0	0
Annual Time Burden (Hours)	599,000	599,000	0	0	0	0
Annual Cost	0	0	0	0	0	0

Burden increases because of Program Change due to Agency Discretion:
No Burden Increase Due to:

Burden decreases because of Program Change due to Agency Discretion:
No Burden Reduction Due to:

Annual Cost to Federal Government: $2,100,000

Does this IC contain surveys, censuses, or employ statistical methods? No

Is the Supporting Statement intended to be a Privacy Impact Assessment required by the E-Government Act of 2002? No

Is this ICR related to the American Recovery and Reinvestment Act of 2009 (ARRA)?
Uncollected **Agency Contact:** Ronald Edwards 2026634949

Common Form ICR: No

On behalf of this Federal agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9 and the related provisions of 5 CFR 1320.8(b)(3).

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- (a) It is necessary for the proper performance of agency functions;
- (b) It avoids unnecessary duplication;
- (c) It reduces burden on small entities;
- (d) It uses plain, coherent, and unambiguous language that is understandable to respondents;
- (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- (f) It indicates the retention periods for recordkeeping requirements;
- (g) It informs respondents of the information called for under 5 CFR 1320.8 (b)(3) about:
  - (i) Why the information is being collected;
  - (ii) Use of information;
  - (iii) Burden estimate;
  - (iv) Nature of response (voluntary, required for a benefit, or mandatory);
  - (v) Nature and extent of confidentiality; and
  - (vi) Need to display currently valid OMB control number;
- (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected.
- (i) It uses effective and efficient statistical survey methodology (if applicable); and
- (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of these provisions, identify the item by leaving the box unchecked and explain the reason in the Supporting Statement. **Certification Date:** 01/14/2009

Exhibit 6

Display additional information by clicking on the following: All ' Brief and OIRA conclusion

' Abstract/Justification ' Legal Statutes ' Rulemaking ' FR Notices/Comments ' IC List ' Burden ' Misc. ' Common Form Info. ' Certification

Please note that the OMB number and expiration date may not have been determined when this Information Collection Request and associated Information Collection forms were submitted to OMB. The approved OMB number and expiration date may be found by clicking on the Notice of Action link below.

View ICR - OIRA Conclusion

OMB Control No: 3046-0007
ICR Reference No: 201104-3046-003
Status: Historical Active
Previous ICR Reference No: 200901-3046-001
Agency/Subagency: EEOC
Agency Tracking No:
Title: Employer Information Report (EEO-1)
Type of Information Collection: Extension without change of a currently approved collection
Common Form ICR: No
Type of Review Request: Regular
OIRA Conclusion Action: Approved without change
Conclusion Date: 08/29/2011
Retrieve Notice of Action (NOA)
Date Received in OIRA: 04/29/2011

Terms of Clearance: Based on conversations with EEOC, it is OMB's understanding that EEOC is considering potential revisions to this report. OMB expects that any revisions to this report will be fully justified under and consistent with the Paperwork Reduction Act and Federal statistical standards, including OMB's 1997 Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity. In addition, in order to minimize burdens and costs to respondents, OMB recommends that EEOC make any planned revisions to this report simultaneously, rather than in a piece-meal fashion. OMB also recommends that EEOC seek the input of affected stakeholders about any revisions as early as possible, and provide respondents with ample notice before making revisions in order to minimize burdens. Finally, OMB expects EEOC to keep it updated about any possible revisions to this report on a regular basis.

		Inventory as of this	
Expiration Date	08/31/2014	36 Months From Approved	08/31/2011
Responses	290,410	170,000	170,000

Abstract: EEOC regulations require private employers with 100 or more employees to collect and retain in their records demographic information about their employees, and report this information to EEOC annually. EEOC uses this information to enforce civil rights laws and shares it with the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, and several other Federal agencies. Data are also shared with State and local Fair Employment Practices Agencies (FEPAs).

Authorizing Statute(s): US Code: 42 USC 2000e-8(c) Name of Law: Civil Rights Act of 1964
Citations for New Statutory Requirements: None

Associated Rulemaking Information

RIN:	Stage of Rulemaking:	Federal Register Citation:	Date:

Federal Register Notices & Comments

60-day Notice:	Federal Register Citation:	Citation Date:
	76 FR 22897	02/04/2011

Number of Information Collection (IC) in this ICR: 1

IC Title	Form No.	Form Name

ICR Summary of Burden

	Total Approved	Previously Approved	Change Due to New Statute	Change Due to Agency Discretion	Change Due to Adjustment in Estimate	Change Due to Potential Violation of the PRA
Annual Number of Responses	290,410	170,000	0	0	120,410	0
Annual Time Burden (Hours)	987,394	599,000	0	0	388,394	0
Annual Cost	0	0	0	0	0	0

Burden increases because of Program Change due to Agency Discretion: Yes
Burden Increase Due to: Miscellaneous Actions
Burden decreases because of Program Change due to Agency Discretion: No
Burden Reduction Due to:

Short Statement: The total burden hour estimate represents an update from the pre-2007 estimates when total burden hours were estimated at 599,000. This increase in burden hours is due to a significant increase in the number of firms reporting that began in 2007. In that year we nearly doubled the number of firms contacted, notified of their obligation to file a report and provided detailed information to do so. That effort was successful in that the number of firms filing increased from 49,610 to 68,999.

Annual Cost to Federal Government: $2,100,000

Does this IC contain surveys, censuses, or employ statistical methods? No

Is the Supporting Statement intended to be a Privacy Impact Assessment required by the E-Government Act of 2002? No Is this ICR related to the Affordable Care Act [PPACA, P.L. 111-148 & 111-152]? No

Is this ICR related to the Dodd-Frank Act [Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203]? No Is this ICR related to the American Recovery and Reinvestment Act of 2009 (ARRA)? No

Agency Contact: Ronald Edwards 2026634949

Common Form ICR: No

On behalf of this Federal agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9 and the related provisions of 5 CFR 1320.8(b)(3).

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

" (a) It is necessary for the proper performance of agency functions;

" (b) It avoids unnecessary duplication;

" (c) It reduces burden on small entities;

" (d) It uses plain, coherent, and unambiguous language that is understandable to respondents;

" (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;

" (f) It indicates the retention periods for recordkeeping requirements;

" (g) It informs respondents of the information called for under 5 CFR 1320.8 (b)(3) about:

(i) Why the information is being collected;
(ii) Use of information;
(iii) Burden estimate;
(iv) Nature of response (voluntary, required for a benefit, or mandatory);
(v) Nature and extent of confidentiality; and
(vi) Need to display currently valid OMB control number;

" (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected.

" (i) It uses effective and efficient statistical survey methodology (if applicable); and

" (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of these provisions, identify the item by leaving the box unchecked and explain the reason in the Supporting Statement. Certification Date: 04/29/2011

Exhibit 7

Display additional information by clicking on the following: All ' Brief and OIRA conclusion

' Abstract/Justification ' Legal Statutes ' Rulemaking ' FR Notices/Comments ' IC List ' Burden ' Misc. ' Common Form Info ' Certification

Please note that the OMB number and expiration date may not have been determined when this Information Collection Request and associated Information Collection forms were submitted to OMB. The approved OMB number and expiration date may be found by clicking on the Notice of Action link below.

View ICR - OIRA Conclusion

OMB Control No: 3046-0007

ICR Reference No: 201409-3046-001

Status: Historical Active

Previous ICR Reference No: 201104-3046-003

Agency/Subagency: EEOC

Agency Tracking No:

Type of Review Request: Emergency

Approval Requested By: 09/04/2014

OIRA Conclusion Action: Approved with change

Conclusion Date: 09/04/2014

Retrieve Notice of Action (NOA)

Date Received in OIRA: 09/04/2014

Expiration Date	03/31/2015 6 Months From Approved		
Responses	290,410	290,410	0

Abstract: EEOC regulations require private employers with 100 or more employees to collect and retain in their records demographic information about their employees, and report this information to EEOC annually. EEOC uses this information to enforce civil rights laws and shares it with the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, and several other Federal agencies. Data are also shared with State and local Fair Employment Practices Agencies (FEPAs).

Emergency Justfication: The Office of Management and Budget (OMB) has approved the EEO-1 through August 31, 2014. EEOC is now requesting an emergency extension without change of the form in order to continue collect the data while EEOC completes the PRA process for the regular three year extension. EEOC published a request for an emergency extension of the approval for the EEO-1 in the Federal Register on August 13, 2014. Please see the supplemental documents for a copy of that notice.

Authorizing Statute(s): US Code: 42 USC 2000e-8(c) Name of Law: Civil Rights Act of 1964

Citations for New Statutory Requirements: None

Associated Rulemaking Information

RIN:	Stage of Rulemaking:	Federal Register Citation:	Date:

Federal Register Notices & Comments

Did the Agency receive public comments on this ICR? No

Number of Information Collection (IC) in this ICR: 1

IC Title	Form No.	Form Name

ICR Summary of Burden

	Total Approved	Previously Approved	Change Due to New Statute	Change Due to Agency Discretion	Change Due to Adjustment in Estimate	Change Due to Potential Violation of the PRA
Annual Number of Responses	290,410	0	0	0	0	290,410
Annual Time Burden (Hours)	987,394	0	0	0	0	987,394
Annual Cost	0	0	0	0	0	0

Burden increases because of Program Change due to Agency Discretion:

No Burden Increase Due to:

Burden decreases because of Program Change due to Agency Discretion:

No Burden Reduction Due to:

Annual Cost to Federal Government: $2,100,000

Does this IC contain surveys, censuses, or employ statistical methods? No

Is the Supporting Statement intended to be a Privacy Impact Assessment required by the E-Government Act of 2002? No Is this ICR related to the Affordable Care Act [PPACA, P.L. 111-148 & 111-152]? No

Agency Contact: Ronald Edwards

2026634949 Common Form ICR: No

On behalf of this Federal agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9 and the related provisions of 5 CFR 1320.8(b)(3).

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

" (a) It is necessary for the proper performance of agency functions;

" (b) It avoids unnecessary duplication;

" (c) It reduces burden on small entities;

" (d) It uses plain, coherent, and unambiguous language that is understandable to respondents;

" (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;

" (f) It indicates the retention periods for recordkeeping requirements;

" (g) It informs respondents of the information called for under 5 CFR 1320.8 (b)(3) about:

(i) Why the information is being collected;
(ii) Use of information;
(iii) Burden estimate;
(iv) Nature of response (voluntary, required for a benefit, or mandatory);
(v) Nature and extent of confidentiality; and
(vi) Need to display currently valid OMB control number;

" (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected.

" (i) It uses effective and efficient statistical survey methodology (if applicable); and

" (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of these provisions, identify the item by leaving the box unchecked and explain the reason in the Supporting Statement. Certification Date: 09/04/2014

Exhibit 8

Supporting Statement

Recordkeeping and Reporting Requirements for

Employer Information Report (EEO-1)

A. Justification

1. The legal basis for the Employer Information Report (EEO-1) form and recordkeeping requirements is Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-8(c), which imposes the requirement that "[e]very employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports there from as the Commission shall prescribe by regulation or order. . ." Accordingly, the EEOC issued a regulation, **29 C.F.R. §1602.7,** which sets forth the reporting and related recordkeeping requirements for private industry employers with 100 or more employees. The U.S. Department of Labor's Office of Federal Contract Compliance Programs has imposed the same reporting requirement on certain Federal Government contractors and first-tier subcontractors with 50 or more employees. The individual reports are confidential and may not be made public by the Commission prior to the institution of a lawsuit under Title VII in which the individual reports are involved.

2. EEO-1 data are used by EEOC to investigate charges of employment discrimination against employers in private industry and to provide information about the employment status of minorities and women. The data are used to evaluate and prioritize charges under the Commission's charge processing system and to determine the appropriate investigative approaches. The data can be analyzed to develop statistical evidence as the investigation proceeds. EEOC uses the data to develop studies of private sector work forces (see www.eeoc.gov/statistics for some examples), and to assist researchers requesting data for academic studies.

   The data are shared with the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, and several other Federal agencies. Pursuant to §709(d) of Title VII of the Civil Rights Act of 1964, as amended, EEO-1 data are also shared with

ninety- four State and local Fair Employment Practices Agencies (FEPAs) for their enforcement efforts.

3. The EEO-1 report is collected through a web based on-line filing system. There are 70,070 respondents reporting annually[1] and 98% of these respondents file on-line. The on-line filing system has reduced the burden hours.

4. We are not aware of any duplicative or related data collection efforts.

5. The EEO-1 report is collected from all private employers with 100 or more employees and certain government contractors with 50 or more employees, so there is no burden on small business.

6. Because the data are an integral part of the Title VII enforcement process, failure to collect the data would reduce our ability to enforce Title VII. The data has been integrated into the enforcement process and computer applications for retrieving EEO-1 reports and conducting statistical comparisons of such reports to the external labor market are available to the enforcement staff at their desktops. Collecting the data less often would impair enforcement decisions by reducing the reliability of the data, as there will be a lag between the employment statistics provided by employers when reporting and the time when the data is used. This problem is likely to be most pronounced among industries and employers with fluctuations in employment. It is important to make certain that employment decisions are consistent with law when increases or decreases in employment occur. A gap of more than a year between data collections would also impose some processing costs on EEOC because more work would be needed to update mailing lists. The data is only collected annually.

7. None of the above special circumstances will be used to collect the EEO-1 Report.

8. See attached Federal Register Notice dated June 30, 2014 (79 FR 36802). Only one comment was received from the public, and it supports the continued use of the EEO-1 without change to the form. However, the commenter suggests making a change to the reporting procedures that currently prevent parent companies from electronically submitting

[1] These respondents often file multiple reports.

EEO-1 reports for different subsidiary companies operating at the same physical location within the same industry classification. EEOC has made contact with this organization to begin implementation of this recommendation for the EEO-1 report. Finally, EEOC is planning to make this change by 2015 reporting cycle.

9. EEOC's employees are prohibited by law from providing any payment or gifts to respondents, other than remuneration of contractors or grantees.

10. All reports and information from individual reports are subject to the confidentiality provisions of Section 709(e) of Title VII, and may not be made public by EEOC prior to the institution of any proceeding under Title VII. However, aggregate data may be made public in a manner so as not to reveal any particular employer's statistics. All state and local FEPAs with whom we share the data must agree to maintain the confidentiality of the data.

11. The EEO-1 Report does not solicit any information of a sensitive nature from respondents.

12.

ANNUAL RESPONDENT BURDEN HOURS	1,044,150
ANNUAL EMPLOYER COSTS	$19.83 million

REPORTS FILED 2013	ESTIMATED BURDEN HOURS PER REPORT	ESTIMATED TOTAL BURDEN HOURS	COSTS PER HOUR	ESTIMATED TOTAL ANNUAL EMPLOYER COSTS
307,103	3.40	1,044,150	19.00	19,838,850

Burden hours are assumed to be 3.4 hours per report at a cost of $19.00 per hour. [2]

13. There are no cost changes. Private employers have been completing this form for a number of years.

14. Estimated cost to the federal government will be: $650,000.00 dollars contract cost (based on a competitive bid process from prior years.) The government cost has decreased because the government has used base year contract plus two option years.

15. There are no program changes. However it should be noted that the burden hours estimated in question 12 above have been revised since the approval of the report for the 2011 reporting period. The total burden hour estimate represents an update from the 2011 estimates when total burden hours were estimated at 987,394. This increase in total burden is due to the creation of new firms filing EEO-1 reports that are subject to the reporting requirement, leading to an increase in reports filed with the agency.

16. The time schedule for information collection and publication is as follows:

Filing deadline September 30

[2] Estimated burden hours were calculated by multiplying the number of reports expected to be filed annually (307,103 in 2013) by the estimated average time to complete and submit each report (3.4 hours), for a total of 1,044,150 hours. Relying on an estimate of $19 per hour results in a total cost of $19.83 million (1,044,150 burden hours multiplied by 19.00 per hour). The rate of $19 per hour is based on the hourly pay rate of human resources assistants of $18.22 (*Occupational Employment Statistics, Occupational Employment and Wages, May 2010, 43-4161 Human Resources Assistants, Except Payroll and Timekeeping*, http://data.bls.gov/cgi-bin/print.pl/oes/current/oes434161.htm 6/30/2011, Last Modified Date: May 17, 2011, U.S. Bureau of Labor Statistics, Division of Occupational Employment Statistics). $18.22 was rounded to $19 to account for instances where higher paid staff perform this work.

First Follow-up	October 15
Second Follow-up	November 15
Preliminary Data	Periodic data audits
Final Data	June 30

. In each survey year a publication, *Job Patterns for Minorities and Women in Private Industry* is posted on our web site. This consists primarily of non-confidential aggregations of the data based on various geographic and industrial criteria. So for example, a table combining all EEO-1 reports for all food and beverage stores in the New York metropolitan area is provided (http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/index.cfm). Similar data sets are available on data.gov. Some of the primary users of this data are employers (for self assessment and affirmative action purposes) and researchers.

17. EEOC is not seeking approval of this nature.

18. No exceptions are requested.