



June 5, 2017

The Honorable R. Alexander Acosta
Secretary of Labor
US Department of Labor
S-2521
200 Constitution Avenue, NW
Washington D.C. 20210

The Honorable Mick Mulvaney
Director
The Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

RE: Proposed Consolidation of the Office of Federal Contract Compliance Programs with the Equal Employment Opportunity Commission

Dear Secretary Acosta and Director Mulvaney:

The American Association for Access, Equity and Diversity (AAAED) and the National Association of Diversity Officers in Higher Education (NADOHE) submit this letter to jointly express our opposition to the proposed merger of the Office of Federal Contract Compliance Programs, U.S. Department of Labor (OFCCP) into the Equal Employment Opportunity Commission (EEOC).¹ In so doing, we join the federal contractor and civil rights communities who have expressed their collective opposition to this merger.² In our view, such an action is inefficient, and it will undermine more than fifty years of progress towards equal opportunity, not only in academic institutions but in the entire employment sector of the United States.³

Founded in 1974 as the American Association for Affirmative Action (AAAA), AAAED has four decades of leadership in providing professional training to members, enabling them to be more successful and productive in their careers. It also promotes understanding and advocacy of affirmative action and other equal opportunity and related compliance laws to enhance the tenets of access, inclusion and equality in employment, economic and educational opportunities. AAAED was founded by equal employment

¹ FY 2018, Congressional Budget Justification, Office of Federal Contract Compliance Programs, <https://www.dol.gov/sites/default/files/CBJ-2018-V2-10.pdf>

² See, e.g., Letter of the Institute for Workplace Equality to the Secretary of Labor and Director of OMB, May 19, 2017; and Letter of 73 Civil Rights organizations to Secretary Acosta and Director Mulvaney, May 26, 2017.

³ It should be noted that colleges and universities are among the top 200 federal contractors: See, Top 200 U.S. Government Contractors FY2015, <https://blog.forecastinternational.com/wordpress/top-200-u-s-government-contractors-fy2015/>

opportunity and affirmative action professionals in higher education. Its membership now includes equal opportunity, affirmative action, and diversity professionals in the private sector and government as well as the academic sector.

The National Association of Diversity Officers in Higher Education (NADOHE) was established to serve as the preeminent voice for diversity officers in higher education by supporting their collective efforts to lead their member institutions towards inclusive excellence. NADOHE's membership includes chief diversity officers (CDOs) at colleges and universities throughout the United States.

The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246, signed by President Lyndon Baines Johnson in 1965. It also enforces Section 503 of the Rehabilitation Act of 1973 and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. Taken together these laws require nondiscrimination and affirmative action by companies doing business with the federal government.⁴ The laws enforced by OFCCP prohibit discrimination based on race, color, religion, national origin, sex, disability, veterans' status, gender identity and sexual orientation. Executive Order 11246 also prohibits federal contractors and subcontractors from, under certain circumstances, taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers.⁵

Unlike the EEOC, which is a semi-independent agency, the OFCCP is a product of the government's procurement process and administrative structure. It is a sub-agency of the Department of Labor, which is part of the President's Cabinet. The federal contractor universe within OFCCP's jurisdiction covers approximately one-quarter of the civilian labor force.

OFCCP's History

The OFCCP's origins date back to 1941, with President Roosevelt's Executive Order 8802 integrating the Defense industries, reportedly when the Brotherhood of Sleeping Car Porters threatened a March on Washington. There have been successive executive orders on equal employment opportunity since then.⁶

In its Final Report to President Eisenhower, the President's Committee on Government Contracts, headed by Vice President Richard M. Nixon, concluded:

Overt discrimination, in the sense that an employer actually refuses to hire solely because of race, religion, color, or national origin is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.⁷

⁴ U.S. Department of Labor, Executive Order 11246 as amended, 30 FR 12319, 12935, 3 CFR, 1964-1965 Comp., p.339; Section 503 of the Rehabilitation Act of 1973, as amended, 29 USC Sec. 793; Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 USC Sec. 4212.

⁵ U.S. Department of Labor, OFCCP, https://www.dol.gov/ofccp/regs/compliance/ca_11246.htm

⁶ National Archives, Executive Order 8802: Prohibition of Discrimination in the Defense Industry, June 25, 1941, <https://www.archives.gov/historical-docs/todays-doc/?dod-date=625>; OFCCP, History of Executive Order 11246, <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html>; See, Nicholas D. Brown, The Brotherhood of Sleeping Car Porters: the Civil Rights Movement, University of Toledo, 2015.

⁷ See AAAED, About Affirmative Action, Diversity and Inclusion, https://www.aaed.org/aaed/About_Affirmative_Action__Diversity_and_Inclusion.asp

Vice President Nixon's "positive policy of nondiscrimination" is embodied in the laws enforced by OFCCP.

President Kennedy incorporated the concept of "affirmative action" into Executive Order 10925, which he issued in 1961. In that year, the Kennedy Administration established "Plans for Progress," a "voluntary program to provide leadership in achieving equal employment opportunity."⁸ These plans called for "continuous, systematic and vigorous action to open new job opportunities to members of minority groups."⁹ This program evolved from the President's Committee on Equal Employment Opportunity chaired by then Vice President Lyndon Johnson. In 1963 participants in Plans for Progress included 115 leading companies and institutions of higher education who held government contracts and sought a means of communicating policies of equal employment opportunity internally and externally.¹⁰

In 1965, President Johnson signed Executive Order 11246, which gave the Secretary of Labor responsibility for administration and enforcement of the Order mandating that contractors not discriminate against any employees or qualified applicants because of race, color, religion, or national origin. The agency that was created to administer the Order was the Office of Federal Contract Compliance. Before signing the order in September 1965, President Johnson uttered the words that continue to resonate today during his speech at Howard University's Commencement, June 4, 1965:

"Freedom is not enough. ... You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others, ' and still justly believe that you have been completely fair."¹¹

In 1967, "sex" was added to the Order after intense lobbying by the women's rights community. This year, we celebrate the 50th anniversary of Executive Order 11375, which added "sex" to EO 11246.¹²

In the 1970s, the Nixon Administration strengthened the OFCC's program by issuing Order No. 4, authorizing flexible goals and timetables to correct "underutilization" of minorities by federal contractors.¹³ In 1973, Section 503 of the Rehabilitation Act was enacted and in the following year, Section 4212 of the Vietnam Era Readjustment Assistance Act became law. The Office of Federal Contract Compliance became the Office of Federal Contract Compliance Programs. Both of these statutes were signed by a Republican president. In 1978 the contract compliance programs, situated in approximately eleven Cabinet agencies, were merged into the Department of Labor's OFCCP.

⁸ John F. Kennedy Presidential Library and Museum, Plans for Progress Program, July 31, 1963, <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHSFLCW-023-011.aspx>

⁹ Statement by the President Upon Signing the Plans for Progress, Washington, DC, July 12, 1961, <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-035-026.aspx>

¹⁰ Plans for Progress Program, July 31, 1963, John F. Kennedy Presidential Library and Museum, <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHSFLCW-023-011.aspx>

¹¹ Commencement Address at Howard University: "To Fulfill These Rights" <http://www.presidency.ucsb.edu/ws/?pid=27021>

¹² Executive Order 11375—Amending Executive Order No. 11246, Relating to Equal Employment Opportunity, October 13, 1967, <http://www.presidency.ucsb.edu/ws/?pid=60553>

¹³ See, AAAED, "More History of Affirmative Action Policies from the 1960s," https://www.aaaed.org/aaaed/History_of_Affirmative_Action.asp

In the 1980s, despite attempts to eviscerate Executive Order 11246, the order was saved when members of the federal contractor community, along with Members of Congress of both parties, rallied in support of leaving it unchanged. In the 1990s, after the *Adarand v. Peña* decision led to a comprehensive review of federal affirmative action programs, President Clinton, speaking at the National Archives, declared his support for affirmative action in his “Mend it; Don’t End it” speech.¹⁴

OFCCP is an Integral Part of the Federal Procurement Process

We provide this partial history to reflect the more than half of a century of bi-partisan support for the OFCCP and its equal employment opportunity mission. The agency has more than political, business and moral support to justify retaining it in the Department of Labor, however. Unlike the EEOC, the OFCCP is fundamentally a component of the federal procurement system. Under Executive Order 11246 and the related statutes, companies (including institutions of higher education) that provide supplies and services or that perform construction services in an amount designated by the government must comply with the Equal Opportunity (EO) Clause in each contract.¹⁵

To enforce the EO Clause, the agency’s regulations set forth the administrative compliance process, which includes evaluations and reviews of contractors, desk audits, pre-award reviews, and other mechanisms. Contractors are selected for reviews based on the EEO-1 or other data that they file annually with the Joint Reporting Committee or by other means. The selection process requires a neutral procedure, and cannot violate the Fourth Amendment’s prohibition against unreasonable searches and seizures.

Where there is no conciliation when noncompliance is found, the OFCCP, represented by the Solicitor of Labor, may institute administrative enforcement proceedings, which may be brought to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions.¹⁶ The ultimate sanction is debarment from receiving future contracts or modifications or extensions of existing contracts, subject

¹⁴ Washington Post, reprint of President Clinton’s speech, 'The Job of Ending Discrimination in This Country Is Not Over', July 19, 1995, <http://www.washingtonpost.com/wp-srv/politics/special/affirm/docs/clintonspeech.htm>

¹⁵ §60-1.4 Equal opportunity clause.

(a) Government contracts. Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause. Title 41 C.F.R. Part 60 -1, https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=3b71cb5b215c393fe910604d33c9fed1&rgn=div5&view=text&node=41:1.2.3.1.1&idno=41#se41.1.60_61_14

¹⁶ §60-1.26 Enforcement proceedings.

to reinstatement.¹⁷ The Administrative Review Board makes the final determination of debarment. Such determinations may be appealed in federal court.

While both the EEOC and the OFCCP may provide make-whole relief to a victim of discrimination, only the OFCCP may debar a company or academic institution from obtaining contracts. Moreover, the agency *fundamentally represents the interests of the United States Government*. There is no private right of action and no “right to sue” letter, as the EEOC provides.

The proposed merger would result in a substantial reduction in resources and staffing.

Any merger of the two agencies would have to include not only the staff and offices of the OFCCP, both in the national office and the regional and district offices, but also the civil rights legal staff of the Office of the Solicitor, both in Washington, DC and nationwide. Moreover, the OFCCP has six regions and offices from Boston to Honolulu and the Solicitor’s Office also has staff throughout the country. In addition, the Administrative Review board may require transfer of staffing and resources. This is, therefore, not an inconsequential proposal, but would upend an entire administrative structure that the EEOC, underfunded and understaffed, could not easily absorb. *This proposal, therefore, is the antithesis of efficiency.*

When the contract compliance programs were consolidated into the Department of Labor, we understand that the program maintained a total of approximately 1800 Full Time Equivalents (FTEs). In the late 1990s the agency had approximately 800 FTEs. *Today, it has approximately 600 FTEs to cover nearly one-quarter of the civilian labor force.* It is axiomatic that a transfer of the OFCCP to the EEOC would result in deeper reductions in staffing and resources. This will result in fewer compliance reviews and less equal employment opportunity. Moreover, this transfer would require substantial training of the EEOC staff who are unfamiliar with the OFCCP compliance process, the affirmative action program regulations, and the laws that EEOC does not currently enforce, including the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) and the sexual orientation and gender identity provisions of Executive Order 11246.

Indeed, the Department of Labor’s Budget Justification for FY 2018 proposes a budget of \$88 million, a reduction of \$17,275 million or 17 percent; and 440 FTE, a reduction of 131 FTE or a 23 percent reduction in staffing. This will result in fewer compliance reviews and less equal employment opportunity. Moreover, this transfer would require substantial training of the EEOC staff who are unfamiliar with the OFCCP compliance process, the affirmative action program regulations, and the laws that EEOC does not currently enforce, including the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) and the sexual orientation and gender identity provisions of Executive Order 11246.

Unlike the EEOC, the OFCCP’s primary compliance focus is systemic.

OFCCP looks to promote equal employment opportunity from the hiring process and compensation practices to the executive suite. While it may receive complaints of discrimination, pursuant to a Memorandum of Understanding with the EEOC, most individual complaints are forwarded to the EEOC for processing. Most importantly, the OFCCP does not have to have a complaint in order to conduct a compliance review. The burden under EO 11246 and related laws is on the government to ensure that no federal dollars are used for discriminatory purposes. Under Title VII of the Civil Rights Act, the burden of compliance is primarily on the complainant, with all of the costs and consequences to one’s self and one’s career that such an effort entails.

¹⁷ §60-1.27 Sanctions.

Conclusion

The American Association for Access, Equity and Diversity and the National Association of Diversity Officers in Higher Education respectfully oppose the proposed merger of the Office of Federal Contract Compliance Programs (OFCCP) into the Equal Employment Opportunity Commission. An agency that enforces the contractual obligations of the federal government should not be relocated into a semi-independent entity. Moreover, while sharing the goal of equal employment opportunity, the similarity of the two agencies' missions and enforcement processes ends there. The OFCCP's focus is systemic discrimination; the EEOC's is primarily individual. The former agency shoulders the burden of enforcing equal employment opportunity laws and policies on behalf of the federal government's contracting authority; for the latter, the burden is on the complainant to seek redress. Lastly, the OFCCP seeks "positive nondiscrimination," to cite the recommendation of Vice President Nixon and his Committee on Government Contracts. The EEOC must, with a few exceptions, wait until a complaint is filed to seek relief from acts of discrimination.

To remove the federal government's only tool to promote the nation's longstanding policy of nondiscrimination in employment where federal dollars are involved would not only be inefficient, it would be unconscionable. Moreover, the thousands of discrimination complaints filed annually with the EEOC call for a more systemic tool than EEOC can provide.¹⁸ They call for the OFCCP and its ancillary agencies - the Office of the Solicitor and the administrative board, to remain undisturbed and undiminished, in the Department of Labor.

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¹⁸ In Fiscal Year 2016, the EEOC received 91,503 complaints of discrimination.
<https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>