



NATIONAL  
INDUSTRY  
LIAISON  
GROUP

Date June 12, 2017

**VIA INTERNET SUBMISSION**

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: OFCCP and EEOC merger**

Dear Secretary Acosta and Director Mulvaney:

The National Industry Liaison Group (“NILG”) opposes the possible consolidation or merger of the U.S. Department of Labor’s Office of Federal Contracts Compliance Programs (“OFCCP”) and its responsibilities into the Equal Employment Opportunity Commission (“EEOC”) as described in President Trump’s proposed FY 2018 budget. For the reasons stated below, the NILG respectfully submits that it is not sound policy or in the interests of federal contractors or American workers for the OFCCP’s duties and functions to be transferred from the Department of Labor to the EEOC.

By way of background, the NILG was created over twenty years ago as a forum for the OFCCP and federal contractors to work together towards equal opportunity in the workplace. Throughout the country, local Industry Liaison Groups (“ILGs”) have formed to further this unique partnership of public and private sector cooperation to proactively advance workplace equal employment opportunity. The NILG Board is comprised of elected members representing local ILGs from across the country. Over the years, the NILG and the ILGs, which are comprised of thousands of small, mid-size and large employers, have reached out to the OFCCP and other agencies, such as the EEOC, with mutual goals of fostering a non-discriminatory workplace.

**Nondiscrimination and Affirmative Action is a Bipartisan Effort**

Nondiscrimination by federal contractors is a bipartisan initiative. Executive Order (“EO”) 11246 was signed by President Lyndon B. Johnson in 1965 to build on the legacy of President Franklin Roosevelt’s Executive Order 8802 on June 25, 1941, that prohibited racial discrimination in the national defense industry and those EOs that followed. In 1943, EO 9346 expanded the prohibition to all federal contractors.

President Dwight D. Eisenhower took a further step on August 13, 1953, by creating the President’s Committee on Government Contracts under EO 10479. This reorganization furthered the principle that “... it is the obligation of the contracting agencies of the United States Government and government contractors to insure compliance with, and successful execution of, the equal employment opportunity program of the United States Government.” This EO made the head of each contracting agency of the federal government responsible for obtaining compliance by their contractors and subcontractors with the nondiscrimination provisions of the contracts into which they entered.

On March 6, 1961, President John F. Kennedy continued the legacy and signed EO 10925, requiring government contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin.”

Executive Order 11246 was executed in 1965 and made the Secretary of Labor responsible for administering the Order’s non-discrimination and affirmative action provisions. The OFCCP was established shortly thereafter. In 1978, President Jimmy Carter issued EO 12086 to consolidate the various agencies contract compliance offices into the OFCCP.

President George W. Bush further amended EO 11246 with EO 13279, which allows religiously affiliated contractors (religious corporations, associations, educational institutions, or societies) to prefer individuals of a particular religion when making employment decisions relevant to the work connected with its activities. However, such contractors and subcontractors were not exempted or excused from complying with the other requirements of Executive Order 11246. President Bush recognized the need for EO 11246.

### **The OFCCP’s and EEOC’s Missions are Vastly Different**

The OFCCP was designed to be separate and apart from the EEOC when EO 11246 was first promulgated. The EEOC was established before the EO was promulgated and could have housed the requirements of EO 11246, but President Johnson specifically did not do so when the opportunity arose. President Johnson specifically placed the responsibilities of ensuring federal contractor compliance with the Department of Labor to ensure better coordination of all workplace compliance agencies.

The OFCCP's mission is to ensure compliance with EO 11246 and implementing regulations, as well as Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act, as amended ("VEVRAA"), and Section 503 of the Rehabilitation Act, as amended ("Section 503"). The focus of all these EOs and laws are clear: affirmative action toward specific categories of individuals and technical compliance in the workplace by those organizations contracting to do business with the federal government. Although the OFCCP does investigate individual complaints within its jurisdiction, the primary focus of the agency is to audit federal contractors' employment processes by reviewing the contractor's affirmative action plan and relevant supporting employment data and procedures after initiating a compliance evaluation. The purpose of the OFCCP is to ensure that companies doing business with the federal government comply with these important civil rights and affirmative action obligations.

The EEOC's mission, on the other hand, is quite different. Established by the Civil Rights Act of 1964 on July 2, 1965, the EEOC is a legislative agency that focuses on the enforcement of workplace nondiscrimination laws. Although in recent years the EEOC has placed some focus on addressing systemic issues, handling individual worker charges continues to be its enforcement priority and represents the bulk of its investigations. The EEOC's approach to enforcement is not from a holistic perspective, but from a "worker make whole" perspective. Its focus is on a specific issue, whether race, gender, disability, etc., addressing the needs of a single person or a relatively small number of similarly-situated individuals. The OFCCP's approach to audits, however, is holistic, and digs deeper than the EEOC's "one-off" issue review. Further, the EEOC has no jurisdiction in enforcing EO 11246, Section 503, and VEVRAA, and its staff has no experience or authority in handling affirmative action issues under these requirements or any others.

At the time of its establishment, the Department of Labor transferred different law enforcement responsibilities to the EEOC, such as the Age Discrimination in Employment Act and Equal Pay Act, as the EEOC would specialize in enforcement of law. The OFCCP could again have been transferred over to the EEOC at that time, but the Department of Labor declined, maintaining it within its purview as a compliance agency.

### **The OFCCP is Effective in its Mission**

Over the many years of its existence, the OFCCP has been very effective in implementing its mission and ensuring that federal contractors adhere to the non-discrimination and affirmative action requirements of EO 11246, Section 503, and VEVRAA. Anecdotally, it has led to compliance being a strategic focus of many contractors, reducing the number of EEO charges against them. For the relatively small cost of compliance, it has saved millions of dollars in defense of EEOC charges. Furthermore, that less than 2% of all OFCCP audits have findings of discrimination is a testament to the OFCCP's long-term efficacy in ensuring compliance by contractors. Most federal contractors are very cognizant of the impact the OFCCP has had on their operations. When issues are found by the agency, for the most part, it has taken a professional and respectful approach to conciliation.

Further, the OFCCP requirements have been the basis for successful implementation of Diversity and Inclusion (“D&I”) strategies for contractors. The OFCCP has a strong record assisting under-represented populations, regardless of race or gender. OFCCP requirements have not only opened doors for the employment of these populations, but have promoted community of practices that our members use for channel and worker pipeline development, both internally and externally. For example, relationships with Veteran and Disability organizations have increased the number of hires of both groups into contractor workforces. And many contractors especially have taken affirmative steps to create inclusion strategies for Individuals with Disabilities and to make the workplace a comfortable environment for workers to self-report their disability, an important first step for inclusion, as well as other demographic information.

Moreover, the OFCCP has been in the forefront of big data analytics and Human Resource (“HR”) transformation. Contractors self-audit employment activity and conduct Return on Investment (ROI) on recruitment activities, ensuring that the HR function became more integrated throughout the organization as a value center, as opposed to the traditional view of a cost center. Utilizing OFCCP audit techniques, contractors have been able to report more effectively on a variety of issues from ROI to pay disparities. The compliance focus has ensured that contractors continually “do the right thing” all the time for its workforce.

Further, studies have shown that Millennials, who comprise the largest employee group in the workforce today, expect compliance and diversity to be core values of the preferred employer. The war for talent is fierce. The contractor community has long been ahead of the curve because of OFCCP requirements. Many of our members have found that through implementation of affirmative action and diversity strategies, they have created greater opportunities of participation for all employees in the organization, making them succeed in the strategy of being an “Employer of Choice.”

Finally, a number of studies have shown that contractors that have implemented affirmative action effectively have higher stock value and rates of return than those that do not. Intelligent investors will always include the contractor’s view of compliance when making investment decisions, and these decisions to invest when compliance is a core value of an organization, as studies have shown, have been found to generally pay off positively.

## Conclusion

The NILG is concerned that by combining the agencies, the value add and approach to compliance will negatively impact federal contractors, and ultimately the American worker. We fear that by eliminating the OFCCP, the focus of audits will become full blown EEOC lawsuits. We also fear the cost to our members from this type of possibility, where the EEOC has the tools for subpoenas and filing lawsuits. We also are afraid that the *Mach Mining* case approach to conciliation may become a norm and more issues that could have been easily settled will become bones of contention costing millions for contractors to defend.

In addition, two seminal issues must not be overlooked regarding the practical effects of this budget proposal. First, the reduction in resources and staff responsible for enforcing these laws will indisputably create a situation where compliance is no longer a significant concern for most federal contractors, who will place less priority and resources in ensuring continued compliance. If the federal government does not place emphasis on enforcing these requirements by providing adequate funding and staffing, then contractors will likely reduce their spending and staffing concomitantly. Second, combining these two agencies will require significantly more time and effort than simply passing the President's proposed budget. Substantial work will be required to overhaul existing statutes, EO 11246, and their implementing regulations to transfer jurisdiction and authority to the EEOC. This will be a time-consuming and lengthy process, which will have deleterious effects on both the federal government's procurement process and federal contractor compliance. The belief that a merger of these two vastly different federal agencies will create efficiency and avoid duplication of effort misunderstands these subtle but important nuances; although there is minor overlap in some of the non-discrimination laws overseen by the two agencies, everything else is different: how they ensure compliance, the laws they enforce, how staff is trained, etc.

The NILG believes that the OFCCP has been generally effective and a role model for other agencies in compliance and resolution of issues. We agree that, at times, the OFCCP has perhaps steered off course from its main mission, but that is a reflection on the OFCCP's leadership at that time, not the agency itself; its mission is clear, easily implementable, and adds significant value to the contractor community and the federal government's procurement process. The agency, federal contractors, and the individual workers supported by the same should not be punished for past misguided leadership. As stated before, the OFCCP has long played an extremely valuable role in our organizations' "keeping their eyes on the compliance ball" and will in the future as it is currently structured.

To conclude, we believe the OFCCP should not be combined with the EEOC for the reasons stated above. As our organizations' leadership retires or changes, the constant shadow of the OFCCP ensures that contractors stay focused on the right thing at all times: compliance with federal contracting procurement laws. This inures to the benefit of the millions of American workers who work or want to work for a federal contractor.

Respectfully submitted,



The National Industry Liaison Group Board

Stella Raymaker

Chair, National Industry Liaison Group

- cc. Representative Virginia Foxx, chairwoman of the House Committee on Education and the Workforce
- Senator Lamar Alexander, Chairman of the Health, Education, Labor and Pensions Committee