

August 15, 2016

Joseph B. Nye
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Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

RE: Notice of Submission for OMB Review, Revision of the Employer Information Report (EEO-1), FR Doc # 2016-16692

Dear Mr. Nye,

WorldatWork appreciates this second opportunity to provide comments on the U.S. Equal Employment Opportunity Commission's (EEOC) proposal to revise the Employer Information Report (EEO-1). WorldatWork submitted a request for extension of the comment deadline¹ on Feb. 18, 2016, and formal comments on April 1, 2016², in response to the EEOC's original announcement of its intention to submit to the Office of Management and Budget (OMB) a request for a three-year Paperwork Reduction Act (PRA) approval of the revised EEO-1 data collection. The association appreciates the opportunity to provide further feedback to the EEOC and OMB.

WorldatWork Background Information

[WorldatWork](#) is a nonprofit human resources association for professionals and organizations focused on compensation, benefits, work-life effectiveness and total rewards — strategies to attract, motivate, retain and engage a productive workforce. It's our mission to help total rewards professionals achieve their goals and influence their organization's success. We do so by providing thought leadership in total rewards disciplines from the world's most respected experts and fostering an active community of total rewards practitioners.

WorldatWork and our affiliates provide comprehensive global education, certification, research, advocacy and community to our members and the total rewards community. Our work enhances the careers of professionals and optimizes the employee experience, all of which leads to improved organizational results. WorldatWork has more than 70,000 members and subscribers worldwide; more than 80% of Fortune 500 companies employ a WorldatWork member.

Founded in 1955, WorldatWork has offices in Scottsdale, Ariz., and Washington, D.C., and is affiliated with more than 70 human resources associations across the United States and around the world.

¹ WorldatWork. Feb. 19, 2016. Request for Extension of Comment Deadline on the Revision of the Employer Information Report, ID: EEOC-2016-0002-0001. Available at <https://www.regulations.gov/document?D=EEOC-2016-0002-0038>

² WorldatWork. April 1, 2016. Comment Letter on Revision of the Employer Information Report (EEO-1), FR Doc #2016-01544 <https://www.regulations.gov/document?D=EEOC-2016-0002-0216>

WorldatWork members believe there is a powerful exchange relationship between employer and employee, as demonstrated through the [WorldatWork Total Rewards Model](#). Total rewards involves the deliberate integration of six key elements that effectively attract, motivate, retain and engage the talent required to achieve desired organizational results. The six key elements are: compensation, benefits, work-life effectiveness, recognition, performance management and talent development.

This model recognizes that total rewards operates in the context of overall business strategy, organizational culture and human resources strategy, as well as a complex external environment. Within this context, an employer leverages the six elements to offer and align a value proposition that benefits the organization and the employee. An effective total rewards strategy results in satisfied, engaged and productive employees, who in turn deliver desired performance and results.

There is significant social value derived from a compensation strategy. Compensation's positive influence on an employer in terms of long-term results and productivity gains have far-reaching benefits to organizations and individual employees, the communities in which they operate, live and work, and to the overall U.S. and global economies. There are many approaches to achieving this positive effect from the employment relationship, all of which consider a broad array of ideas, values and goals.

The influence of public policy on shaping compensation practices should be carefully considered. Government has demonstrated that it can positively influence the final outcome through areas such as prohibiting wage discrimination for protected classes or establishing a reasonable minimum wage for employees. However, government policies also can disrupt the delicate environment of cost structures for employers and competitive pay for employees.

Any government intervention that hinders either the employer or the employee's ability to determine an appropriate compensation agreement should be limited, purposeful, reasonable and carefully defined. The proposed changes to EEO-1 reporting do not meet these tests; therefore, WorldatWork urges the EEOC to withdraw the proposed changes until it can prove that additional disclosures are warranted.

I. Comments on the Notice of Submission of Revisions to the Employer Information Report (EEO-1) for OMB Review, FR Doc # 2016-16692

While WorldatWork and its members appreciate the minor and common-sense revisions the EEOC made to its original notice, including adjusting the snapshot window and date of disclosure requirements, we continue to have many serious concerns with this substantially-similar version submitted to OMB. The goal of eliminating discrimination-based gender pay disparities is shared and applauded by WorldatWork and our members. However, compensation experts disagree with the EEOC and do not believe that the additional disclosures proposed will assist in identifying and addressing true pay discrepancies.

According to our 2015 "Compensation Programs and Practices" survey, which focuses on the prevalence of base and variable pay programs as well as common practices used to administer and communicate these programs in today's workplace, compensating employees is the result of a complex process that is

different for every organization.³ Each decision — from starting salary to bonuses and from determining wage increases to alternative ways to reward employees — is based on an organization’s mission, environment and culture, as well as the needs and values of its workforce.

The proposed changes to EEO-1 reporting will not accurately capture these wide-ranging factors that contribute to compensation strategies and decisions.

When properly implemented and administered, compensation programs maximize an organization’s ability to fully comply with laws pertaining to fair pay. They also support business needs in terms of differentiating compensation levels between individuals based on legitimate and lawful factors. A thorough compensation program provides organizations with key tools they need to attract, motivate, retain and engage a qualified workforce that can successfully execute business strategy.

The EEOC and the Office of Federal Contract Compliance Programs (OFCCP) claim this proposal is a sympathetic response to business concerns related to the OFCCP’s earlier proposal⁴ to require reporting of summary pay data for federal contractors only. This may be the intent, but expanding this proposal beyond federal contractors to include all employers with 100 or more employees dramatically changes the scope of the proposal and maximizes the likely negative consequences that will result from these changes.

A. Additional Data Reporting Is Not Necessary

The government simply has not established a reasonable need for additional data collection. As mentioned in our previous letters to the OFCCP and EEOC, it is important to note that a number of current federal laws — the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991 and the Lilly Ledbetter Fair Pay Act of 2009 — already require that employers comply with the immediate intent of this proposal. Therefore, the proposed revision of the EEO-1 report, which incorrectly assumes employers are not doing enough to ensure pay equality, would just add a duplicative layer of burdensome reporting.

The EEOC states that it anticipates that the reporting of this pay data will encourage employers to self-monitor and regulate voluntarily if they uncover pay inequalities. This assumption is misguided. WorldatWork members report that current best practice is to regularly self-audit their pay practices. Any pay anomalies for any reason are reviewed and changes are made if and when necessary. The additional proposed EEO-1 reporting requirements are unnecessary because employers will and do self-regulate their pay practices with or without the additional reporting required by the EEO-1 revisions. Given that organizations generally are diligent in auditing pay practices, ongoing differences in pay between various classes cannot and should not be immediately assumed to be the result of discrimination. Section C of this letter addresses how nonmonetary elements of an employer’s total rewards package may be viewed as more desirable than a higher level of pay alone.

³ WorldatWork. January 2015. “Compensation Programs and Practices.” Available at <https://www.worldatwork.org/waw/adimLink?id=78232>.

⁴ Department of Labor Office of Federal Contract Compliance Programs, 41 C.F.R. Part 60-1 (proposed Aug. 8, 2014) Available at <https://www.gpo.gov/fdsys/pkg/FR-2014-08-08/pdf/2014-18557.pdf>.

B. Proposed W-2 Data Alone Is Not a Legitimate Metric to Analyze Pay Practices

WorldatWork is sensitive to the EEOC's concerns regarding the problems of unlawful compensation discrimination based on protected factors. However, it is reasonable to question whether this broad-based compensation data collected from W-2 information is an accurate basis for identifying an employer for compliance review based on alleged concerns about equal pay or adequate compensation for an employee's work. Our members have raised legitimate concerns regarding the appropriateness and efficacy of providing W-2 data and hours worked.

W-2 data is the wrong metric and misrepresents the total compensation of an employee. From a practical point, W-2 data by itself does not explain the critical factors upon which pay rate is dependent (e.g., location, type of job, level of responsibility, qualifications, training, experience, education and performance). Organizations use these additional common, lawful practices. For example, according to our 2015 "Compensation Programs and Practices" survey, "Pay for performance continues to thrive with better than 7 in 10 (72%) (of respondents) saying they directly tie pay increases to job performance, and two-thirds (67%) indicating increases for top performers are at least 1.5 times the increase of average performers."⁵

The EEOC cited a WorldatWork study⁶ in the proposed rule that highlights the widespread use of bonuses, particularly sign-on and retention bonuses. The EEOC is correct that these elements are widely used elements of compensation. However, it failed to understand that these practices are used to reward, motivate, attract and retain individual employees. These underlying reasons for using bonuses will not be depicted in W-2 income.

Additionally, the proposed data does not reflect current practice of total rewards design that includes nonmonetary compensation employees might receive, such as flexible working arrangements, paid leave and many other common benefits, which all have monetary value. Without taking into consideration the entire compensation and rewards package (total rewards and free will), the proposed EEO-1 report will not be comparing similarly situated employees properly. There are many reasons that employees, especially those with children and/or those that care for the elderly, voluntarily take jobs that fit their needs in exchange for lower compensation⁷. These reasons will not be known simply by reviewing W-2 data.

WorldatWork fears incorrect data will lead to false positives, therefore failing to assist or possibly causing greater confusion about an organization's pay practices. The data and ability of the EEOC to investigate and prosecute pay discrimination already exists. The EEOC hasn't proven how this additional data will improve its ability to enforce current laws, so has not established a need for additional data collection.

⁵ WorldatWork. January 2015. "Compensation Programs and Practices." Available at <https://www.worldatwork.org/waw/adimLink?id=78232>.

⁶ WorldatWork. June 2014. "Bonus Programs and Practices." Available at <https://www.worldatwork.org/waw/adimLink?id=75444>.

⁷ Cohen, Carol Fisher. *Why Some People Intentionally Take a Pay Cut When Resuming Their Careers* Harvard Business Review. January 2016. Available at <https://hbr.org/2016/01/why-some-people-intentionally-take-a-pay-cut-when-resuming-their-careers>

C. Box 5 “Medicare Wages and Tips” Is a More Appropriate Measure of Wages

As described, WorldatWork believes that W-2 data is the wrong metric and does not take into account all the noncash elements of an employer’s total rewards package that employees value. Box 1, “Wages, tips, other compensation,” is an incomplete measure of total cash compensation as it excludes deferrals to retirement plans, pretax benefits or other qualified plans. These deferrals can represent a significant percentage of an employee’s gross compensation.

WorldatWork recommends that a more appropriate measure of wages — if confined to W-2 data — is Box 5, “Medicare Wages and Tips,” because Medicare taxes generally include any pretax deductions and taxable benefits. While no data on the W-2 properly represents and captures the total compensation of an employee, Box 5 better reflects what the employer is providing to the employee.

Again, as outlined throughout this letter, WorldatWork advises against the entire expanded disclosure required by the proposed revision and urges OMB, pursuant to requirements of the PRA, to disapprove the proposal. However, if OMB chooses to allow this proposal to proceed, we implore you to instruct the EEOC to make this change at the minimum.

D. Tracking and/or Assuming Exempt Hours Worked Is Not Legitimate Data

In the proposals, the EEOC acknowledges that the majority of employers do not track hours worked by salaried employees, yet it proposes again that employers “report a proxy of 40 hours per week for full-time exempt employees, and 20 hours per week for part-time exempt employees, multiplied by the number of weeks the individuals were employed during the EEO-1 reporting year.” This assumption for all salaried workers likely understates the average actual hours worked and may lead to false positive results, indicating possible discrimination where none exists. WorldatWork also believes that to assume a set number of hours worked would bring into question the validity of the data and possibly the whole exercise itself.

The EEOC is correct to assume that most employers currently do not track the hours exempt employees work because to do so would be a seismic shift in handling the exempt position in general. Also, as defined by the Fair Labor Standards Act of 1938 (FLSA), pay specifically should not be adjusted based on the quality *or quantity* of work performed. As a result, legal counsel for most organizations advises against any tracking of hours because exempt employees’ salaries are based on job duties and performance, not hours worked. Therefore, to track exempt hours worked could put many organizations under FLSA legal scrutiny.

E. Administrative Burden Is Underestimated

Since the mid-1930s, businesses have had to respond to an ever-increasing number of local, state and federal laws, regulations and enforcement agencies. With each new government intervention, opportunities for individual initiative and management activities become more restricted, and the administrative burden increases exponentially. With every new requirement there is an administrative cost associated, and absent a proven need for additional compensation data collection (refer to the *Additional Data Reporting Is Not Necessary* section), the administrative burden is not warranted.

The EEOC also did not consider in its proposal the tracking of hours worked by exempt workers, which would be a huge administrative burden. As described, this kind of tracking typically is not done for many reasons, including the associated difficulty. Experts on WorldatWork’s Compensation Advisory Council

have said that ensuring exempt employees maintain an accurate record of hours worked would be extremely difficult and costly, not to mention its negative reception among exempt workers.

WorldatWork's Compensation Advisory Council believes that the administrative burden of having exempt employees enter time into a web-enabled system and then having managers approve the hours (for no purpose) would be daunting. Council members shared how payroll systems would have to be updated. For example, if payroll is set up to default to pay X unless an exception is reported (e.g., vacation), then it would be formidable to now have employees tracked hourly.

Again, organizations could just assume a set number for hours worked, but that would bring into question the validity of the data and possibly the whole exercise itself.

Another serious concern is the burden associated with increased investigations. The EEOC intends to use this data to identify instances in which it believes additional investigations into wage disparity are warranted. As outlined, WorldatWork believes that, by design, the data collected will lead to incorrect conclusions and, inevitably, more investigations that lack merit. With more investigations, even when no wrongdoing is found, comes increased cost to organizations that are required to defend themselves, as the burden of proof and response to investigation falls to the organization.

F. Confidentiality Is Not Fully Addressed or Assured

Compensation levels often define a company's competitive advantage and are sensitive components of the business strategy. Our members have expressed concern about the disclosure of this sensitive information and the assurance that it remains secure and confidential. For smaller organizations, the release of the data, even in aggregate form, could put confidential information at risk. As proposed, the revisions would greatly increase the likelihood that the compensation and race/ethnicity of individual employees would be disclosed whenever there are only a few employees in a particular job category, race/ethnicity group and pay band at an establishment.

Additionally, in 2015, hackers were able to compromise the confidential information of more than 22 million people within the Office of Personnel Management (OPM). The proposal does not address security concerns nor how and where the EEOC will store and protect this sensitive data. The claim that the EEOC has never suffered a data-security breach is not proper assurance of future security. These important details must be addressed.

Another concern is the sharing of the data between agencies and the possibility of it being revealed through investigation. Organizations would have to expend significant resources to assert their right under the law to protect this data. The more it's shared, the more it is exposed to the possibility of theft or exposure. The National Academy of Sciences (NAS) report, commissioned prior to the development of the proposal, highlights these concerns: "We expect 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. EEOC would be well advised to start taking steps now to develop policies to provide access in a protected environment."⁸ It is obvious that the EEOC has failed to address these concerns as recommended by its own report and must do so prior to any revision of the EEO-1 form

⁸ National Research Council of the National Academies. 2012. *Collecting Compensation Data from Employers*. Washington, D.C.: National Academies Press, 90. Available at <http://www.nap.edu/read/13496/chapter/1>

being finalized and enforced. EEOC additionally says in the proposal that the data is useful for academics to study and that it intends to periodically publish the aggregate data, but does not describe in sufficient detail exactly how and when the data will be published or shared. These concerns must be addressed.

G. The EEOC's Proposal Does Not Comply with the Paperwork Reduction Act

Taking into account the massive expansion of data to be submitted and the additional burdens organizations would inevitably face as a result of this this revision, WorldatWork does not believe that the EEOC truly meets the requirements of the Paperwork Reduction Act (PRA), under which this revision is being processed. The PRA requires OMB to ensure that the proposed information request minimizes the burden on employers, maximizes the utility of the data being collected and ensures the privacy and confidentiality of the information. Instead, as outlined, the EEOC fails to satisfy these PRA requirements. The proposal is unduly burdensome, would not provide legitimate data to combat discrimination, and fails to ensure that sensitive employer data remains confidential.

II. Conclusion

In 2016, rewarding employees for their time and labor is no longer solely about monetary compensation. Employer programs that address their employees' health care, workplace flexibility, retirement savings, development opportunities and recognition programs are prioritized by today's American workforce and reflected in organizations' compensation and rewards strategies.

While WorldatWork appreciates the EEOC providing common-sense revisions to the snapshot window and date of disclosure requirements in the recent proposal, we continue to believe that the EEOC's proposal, as written, is ill-advised. Given the concerns outlined in this comment letter, WorldatWork urges OMB, pursuant to requirements of the PRA, to disapprove the proposal and instruct the EEOC to perform extensive real-world research into the proposal's impact before subjecting all employers with more than 100 employees to its burdensome effects. The EEOC must prove that any collection of pay data through the EEO-1 is an effective way to identify discriminatory pay practices and whether it can be accomplished in a way in which the benefits outweigh the burdens. WorldatWork believes that the current proposal still does not meet these requirements.

WorldatWork appreciates the opportunity to provide further comments on the EEOC's proposal to revise the Employer Information Report (EEO-1). On behalf of WorldatWork's 70,000 members and subscribers, the association looks forward to working with the EEOC on this issue and future endeavors. Please do not hesitate to contact me at 202-315-5500 or cara.welch@worldatwork.org for further information.

Sincerely,



Cara Woodson Welch, Esq.
Vice President, External Affairs & Practice Leadership
WorldatWork

CC: Howard Shelanski, Administrator, Office of Information and Regulatory Affairs