

MAJORITY MEMBERS:

JOHN KLINE, MINNESOTA, Chairman
THOMAS E. PETRI, WISCONSIN
HOWARD P. "BUCK" McKEON, CALIFORNIA
JUDY BIGGERT, ILLINOIS
TODD RUSSELL FLATTS, PENNSYLVANIA
JOE WILSON, SOUTH CAROLINA
VIRGINIA FOXX, NORTH CAROLINA
BOB GOODLATTE, VIRGINIA
DUNCAN HUNTER, CALIFORNIA
DAVID P. ROE, TENNESSEE
GLENN THOMPSON, PENNSYLVANIA
TIM WALBERG, MICHIGAN
SCOTT DesJARLAIS, TENNESSEE
RICHARD L. HANNA, NEW YORK
TODD ROKITA, INDIANA
LARRY BUCSHON, INDIANA
TREY GOWDY, SOUTH CAROLINA
LOU BARLETTA, PENNSYLVANIA
KRISTI L. NOEM, SOUTH DAKOTA
MARTHA ROBY, ALABAMA
JOSEPH J. HECK, NEVADA
DENNIS A. ROSS, FLORIDA
MIKE KELLY, PENNSYLVANIA



COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

GEORGE MILLER, CALIFORNIA
Senior Democratic Member
DALE E. KILDEE, MICHIGAN, Vice Chairman
ROBERT E. ANDREWS, NEW JERSEY
ROBERT C. "BOBBY" SCOTT, VIRGINIA
LYNN C. WOOLSEY, CALIFORNIA
RUBÉN HINOJOSA, TEXAS
CAROLYN McCARTHY, NEW YORK
JOHN F. TIERNEY, MASSACHUSETTS
DENNIS J. KUCINICH, OHIO
RUSH D. HOLT, NEW JERSEY
SUSAN A. DAVIS, CALIFORNIA
RAÚL M. GRIJALVA, ARIZONA
TIMOTHY H. BISHOP, NEW YORK
DAVID LOEBSACK, IOWA
MAZIE HIRONO, HAWAII
JASON ALTMIRE, PENNSYLVANIA
MARCIA L. FUDGE, OHIO

September 6, 2012

The Honorable Hilda L. Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, Northwest
Washington, D.C. 20210

Dear Secretary Solis:

We remain concerned about the policies and priorities of the Department of Labor's (the department) Office of Federal Contract Compliance Programs (OFCCP). Recently, OFCCP proposed a number of requirements relating to the collection of compensation data from federal contractors. At the same time OFCCP proposed these requirements, the National Academy of Sciences (NAS) studied the collection of employers' compensation data by the federal government and determined federal agencies should refrain from collecting compensation data until agencies develop a clearly articulated, comprehensive plan regarding how such data would be used. In light of NAS's study, we respectfully request information regarding the department's actions, including OFCCP's actions, relating to the collection of compensation data from employers.

On August 15, 2012, NAS issued a study entitled "Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin."¹ Commissioned in October 2010 by the U.S. Equal Employment Opportunity Commission (EEOC), at the suggestion of the White House's National Equal Pay Enforcement Task Force, NAS was asked to "determine what [compensation] data [EEOC] should collect to most effectively enhance its wage discrimination law enforcement efforts."² To do so, NAS "evaluate[d] currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data," and "consider[ed] suitable data collection instruments, procedures for reducing reporting burdens on employers, and confidentiality, disclosure, and data access

¹ National Academy of Sciences, *Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin* (Aug. 15, 2012) [hereinafter NAS Study], available at http://www.nap.edu/catalog.php?record_id=13496&utm_source=feedburner&utm_med.

² The White House, National Equal Pay Enforcement Task Force (Jan. 2010) [hereinafter Equal Pay Task Force], available at http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf.

issues.”³ In conducting this review, NAS met with and gathered information from compensation data “users” and “experts,” and considered “papers and presentations provided by leadership and staff of EEOC, the Office of Federal Contract Compliance Programs [. . .] of the U.S. Department of Labor, and the U.S. Department of Justice.”⁴

The following findings of NAS are of particular relevance:

The main purpose for which the wage data would be collected, as articulated to the [NAS] panel by EEOC and OFCCP representatives, is for targeting employers for investigation regarding their compliance with antidiscrimination laws. But beyond this general statement of purpose, the specific mechanisms by which the data would be assembled, assessed, compared, and used in a targeting operation are not well developed by either agency. The panel found no evidence of a clearly articulated plan for using the earnings data if they are collected. The fundamental question that would need to be answered is how the earnings data should be integrated into the compliance programs, for which the triggers have primarily been a complaint process that has generated relatively few complaints about pay matters.⁵

...

[T]he panel concludes that existing studies of the cost-effectiveness of an instrument for collecting wage data and the resulting burden are inadequate to assess any new program. Unless the agencies have a comprehensive plan that includes the form of the data collection, it will not be possible to determine, with precision, the actual burden on employers and the probable costs and benefits of the collection.⁶

...

In conjunction with [OFCCP] and the Civil Rights Division of the U.S. Department of Justice, [EEOC] should prepare a comprehensive plan for use of earnings data before initiating any data collection.⁷

While NAS was conducting a study that led to the aforementioned conclusions, OFCCP was taking steps to advance its own, separate agenda for the collection of compensation data from federal contractors:

- On January 3, 2011, OFCCP announced the rescission of its standards and guidelines on systemic compensation discrimination and self-evaluation of compensation practices.⁸

³ The National Academies, Project Information, *Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin*, available at <http://www8.nationalacademies.org/cp/projectview.aspx?key=49344>.

⁴ See NAS Study, *supra* note 1, at FM – ix.

⁵ *Id.* at S – 2.

⁶ *Id.*

⁷ *Id.*

- On May 12, 2011, OFCCP announced changes to its “Scheduling Letter and Itemized Listing”—the mechanism by which OFCCP collects contractors’ workforce-related information—which requires contractors to provide OFCCP with compensation-related data.⁹
- On August 10, 2011, OFCCP issued an advance notice of proposed rulemaking entitled “Non-Discrimination in Compensation; Compensation Data Collection Tool.”¹⁰ According to OFCCP, this new tool would “collect compensation data from 70,000 to 110,000 contractors,”¹¹ so the agency can examine pay practices and policies at individual contractor establishments and conduct “nationwide, multi-establishment compensation reviews.”¹²

We are concerned OFCCP, in its haste to regulate, potentially wasted time and resources, and created undue uncertainty for federal contractors by not working with EEOC and other federal agencies to develop a “comprehensive” plan for collecting compensation data. As outlined by NAS in their recommendations, without such a plan, “it will not be possible to reliably determine the actual burden on employers and the costs and benefits of the collection.”¹³

We are also concerned OFCCP’s actions conflict with the order from the White House’s National Equal Pay Enforcement Task Force that OFCCP and EEOC “work collaboratively when evaluating data collection needs, capabilities, and tools,” so as to “avoid duplicative data collection efforts.”¹⁴ Duplicative or inconsistent efforts by OFCCP and EEOC unnecessarily burden employers and increasingly divert their resources away from innovation, growth, and much-needed new hiring and job creation.

Further, before the department takes any new action relating to the collection of compensation data, we urge it to ensure there is an overwhelming need for and benefit to pursuing burdensome new requirements for federal contractors to collect, compile, and disclose such data. To that end, the so-called “wage gap” should not be casually cited in justifying sweeping revisions to federal anti-discrimination laws and increased government intervention in economic decision-making.¹⁵ The Government Accountability Office found that any number of factors explains the “wage gap,” that

⁸ See Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246; Notice of Rescission, RIN 1250-ZA00, 76 Fed. Reg. 62 (Jan. 3, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-01-03/pdf/2010-32602.pdf>.

⁹ See Proposed Extension of the Approval of Information Collection Requirements; Comment Request, 76 Fed. Reg. 27670 (May 12, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-05-12/pdf/2011-11570.pdf>. See also *id.* at “Supporting & Related Material,” available at <http://www.regulations.gov/#!docketDetail;dcct=FR%252BPR%252BN%252BO%252BSR;rpp=25;po=0;D=OFCCP-2011-0003>.

¹⁰ RIN 1250-AA03, 76 Fed. Reg. 49398 (Aug. 10, 2011) [hereinafter ANPRM], available at <http://webapps.dol.gov/federalregister/PdfDisplay.aspx?DocId=25238>.

¹¹ FY 2012 Congressional Budget Justification, Office of Federal Compliance Programs, available at <http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-04.pdf>.

¹² See ANPRM, *supra* note 10, at 49401.

¹³ See NAS Study, *supra* note 1, at 6 – 2.

¹⁴ See Equal Pay Task Force, *supra* note 2, at 5.

¹⁵ See, e.g., ANPRM, *supra* note 10, at 49399-400; Equal Pay Task Force, *supra* note 2, at 1.

raw earnings differences cannot be explained simply as a function of wage or sex discrimination, and that any unexplained portion of the “wage gap” is “problematic” to interpret and may be “impossible” to measure and quantify.¹⁶

If the department determines it necessary and beneficial to participate in a “comprehensive” data collection plan or related efforts, per NAS’s recommendations, we request the department consult with the public and Congress before initiating any such efforts.

Finally, to assist the committee in better understanding the department’s actions to date, including OFCCP’s actions,¹⁷ relating to NAS’s study and the collection of compensation data from employers, please provide the following information **no later than September 20, 2012**¹⁸:

1. All documents and communications relating to the NAS study, including, but not limited to:
 - a. All documents and communications within the department relating to the NAS study
 - b. All documents and communications between the department and NAS relating to the NAS study
 - c. All “papers and presentations” provided by the department to NAS, and all documents and communications within the department relating to same¹⁹
 - d. All documents and communications relating to the participation of department personnel in the NAS study and its “two workshops”²⁰

¹⁶ Government Accountability Office, *Women’s Earnings: Work Patterns Partially Explain Difference between Men’s and Women’s Earnings*, GAO-04-35 at 2-3 (Oct. 2003), available at <http://www.gao.gov/new.items/d0435.pdf>. See also CONSAD Research Corporation, *An Analysis of the Reasons for the Disparity in Wages Between Men and Women* (2009) (in the foreword to CONSAD’s study, the department’s Deputy Assistant Secretary for Federal Contract Compliance said: “[T]he differences in the compensation of men and women are the result of a multitude of factors and [] the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of the individual choices being made by both male and female workers.”), available at <http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf>; June E. O’Neill and Dave M. O’Neill, *What Do Wage Differentials Tell Us About Labor Market Discrimination?* (Mar. 2005) (“[T]he gender gap largely stems from choices made by women and men concerning the amount of time and energy devoted to a career, as reflected in years of work experience, utilization of part-time work, and other workplace job characteristics.”), available at <http://www.nber.org/papers/w11240.pdf>.

¹⁷ For the purpose of the following requests, please provide all responsive information within the department’s control, whether within OFCCP, the Bureau of Labor Statistics, the Women’s Bureau, or any other office or agency within the department.

¹⁸ If you are unable to provide the requested information by said date, please inform the committee in writing why the deadline cannot be met and the date by which you will provide the requested information.

¹⁹ See NAS Study, *supra* note 1, at FM – ix.

²⁰ See *id.* at FM – x.

- e. All documents and communications between the department and EEOC relating to the NAS study
- f. All documents and communications between the department and other federal agencies relating to the NAS study
2. All documents and communications relating to the department's collaboration with EEOC and other federal agencies concerning the collection of compensation-related data from employers.
3. All documents and communications relating to the department's collaboration with EEOC and other federal agencies concerning OFCCP's January 3, 2011 rescission of its standards and guidelines on systemic compensation discrimination and self-evaluation of compensation practices.
4. All documents and communications relating to the department's collaboration with EEOC and other federal agencies concerning OFCCP's May 12, 2011 announced changes to its "Scheduling Letter and Itemized Listing."
5. All documents and communications relating to the department's collaboration with EEOC and other federal agencies concerning OFCCP's August 10, 2011 advance notice of proposed rulemaking entitled "Non-Discrimination in Compensation; Compensation Data Collection Tool."

If you have questions, please contact Donald McIntosh or Molly Conway of the committee staff at (202) 225-7101.

Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



DAVID "PHIL" ROE
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions

Enclosure

CC: The Honorable George Miller, Senior Democratic Member, Committee on Education and the Workforce

The Honorable Robert Andrews, Senior Democratic Member, Subcommittee on Health, Employment, Labor, and Pensions