Request for Additional Review of EEO-1 Form under the Paperwork Reduction Act

From: "Johnson, Randel" <Ex 6 - (5 U.S.C. Sec 552(b)(6))

To: "Mulvaney, John" <Ex 6 - (5 U.S.C. Sec 552(b)(6))

Cc: "Mancini, Dominic J. EOP/OMB" <dominic_j._mancini@omb.eop.gov>, "Pickitt, Kailey M. EOP/OMB" <kailey.m.pickitt@omb.eop.gov>

Date: Mon, 27 Feb 2017 14:47:15 -0500

Attachments: US Chamber EEO-1 Request for Review.pdf (314.43 kB)

Director Mulvaney,

Attached is a letter from the U.S. Chamber requesting that OMB again review its earlier approval of massive new requirements for reporting under the EEOC's EEO-1 form. We commented extensively before EEOC, and later met with OMB, laying out the case for why this expansion was not appropriate. These arguments are set out in the attached letter, but in essence can be reduced to three points: 1) EEOC grossly underestimated the paperwork burdens imposed by the new requirements; 2) there is no benefit which could justify the additional burdens; and 3) the confidentiality protections are clearly inadequate. Recent input obtained by the Chamber from its members confirmed our earlier analysis. We therefore ask that the new EEO-1 requirements be stayed or rescinded.

Thank you for your consideration of this request.

Randel K. Johnson
Senior Vice President
Labor, Immigration and Employee Benefits
U.S. Chamber of Commerce
1615 H Street, NW
Washington, DC 20062
Ex 6 - (5 U.S.C. Sec 552(b)(6))

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA
1615 H STREET, N.W.
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202/463-5522

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE BENEFITS

JAMES PLUNKETT
DIRECTOR
LABOR LAW POLICY

February 27, 2017

Via Email, John.M.Mulvaney@omb.eop.gov

John M. Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

RE: Request for Review; EEOC's Revision of the Employer Information Report

Dear Director Mulvaney:

On behalf of the U.S. Chamber of Commerce (Chamber), the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, we are writing to request your review under Section 3517 of the Paperwork Reduction Act (PRA) and the PRA's implementing regulations (5 CFR 1320.10(f)) of the Equal Employment Opportunity Commission's (EEOC or Commission) revisions to the EEO-1 Form, as proposed at 81 Fed. Reg. 5113 (February 1, 2016) and 81 Fed Reg. 45479 (July 14, 2016), and approved by OMB's Office of Information and Regulatory Affairs (OIRA) on October 18, 2016 (ICR number 201610-3046-001).[1]

In short, the Chamber requests OMB to review and reject the EEOC's revisions to the EEO-1 Form because they do not comply with the PRA as detailed below and in the Chamber's prior submissions to both EEOC and OMB. The EEOC has not met its requirement to satisfy the burden, benefit, or confidentiality prerequisites of the PRA. For example, the EEOC has grossly understated the

[1] The U.S. Chamber of Commerce is also an employer which must file the revised EEO-1 Report.

burden based on conjecture, as opposed to data, at $53.5 million per year. In contrast, the Chamber's 2016 survey of over 50 companies with 100 or more employees demonstrates that that cost of the EEOC's revised EEO-1 is in excess of $400 million in pure labor costs alone, and carries a total burden of 1.3 billion per year for all businesses employing 100 or more employees. This is a huge additional cost for companies of all sizes, yet has no accompanying benefit, or protections for the confidentiality of the information to be gathered under the revised government form.

Although reporting of the new information does not begin for approximately one year, employers are already making the necessary investments in software upgrades, internal reporting processes, and staffing needs in order to comply. Therefore, as discussed in greater detail below, pursuant to Section 3517 of the PRA and 5 CFR 1320.10(f) and (g), the Chamber requests that OMB review and stay the effectiveness of, or rescind, the EEOC's revised EEO-1 as quickly as possible, as businesses are already incurring unnecessary expenses to compile 2017 data solely as a result of the requirements of the revised EEO-1.

I. Circumstances Leading to the EEO-1 Changes

Lawmakers on Capitol Hill and regulators in federal agencies such as the Department of Labor have long sought to force employers to report on their compensation practices.[2] These efforts have been largely unsuccessful because none have been shown to result in the production of data relevant to the current practices in the workplace and have been shown to place a tremendous and unnecessary burden on employers. As part of the most recent attempt during the Obama administration to collect employee salary information from employers, in 2014 the Office of Federal Contract Compliance Programs (OFCCP) issued a proposed regulation known as the compensation data collection tool.[3] The comment period for OFCCP's proposal closed in early 2015 and the rulemaking process stalled – the proposal is currently listed as a "Long-Term Action" on the Fall 2016 regulatory agenda.

When OFCCP's effort failed – likely because the agency recognized its uselessness or otherwise knew its proposal could not pass muster under the

[2] For example, OFCCP's Equal Opportunity survey instrument, which began in 2000, similarly collected pay data from federal contractors. This survey was scrapped six years later due to ineffectiveness. Additionally, an often-forgotten component of the failed Paycheck Fairness Act would have resuscitated the fruitless EO survey.

[3] 79 Fed. Reg. 46562 (August 8, 2014).

Administrative Procedure Act ("APA") – the administration turned elsewhere to meet its quest for employee compensation data. This time, EEOC assumed the mission and proposed revising its existing EEO-1 form to include data on employee compensation and hours worked.[4] In order to avoid the more complex obligations under the APA, the EEOC determined that the revisions to the EEO-1 would be examined under the PRA. Importantly, the PRA process does not provide the public with rulemaking protections as under the APA, such as a right to petition a federal court to review the agency's action. The lack of judicial review under the PRA is a primary reason why OMB review of EEOC's changes to its EEO-1 form is so vital.

II. EEOC's Changes to the EEO-1 Reporting Form

The EEO-1 form requires employers and certain federal contractors to report on the demographics of their workforce. From time to time the form has been updated to reflect the changing demographics in our country. On February 1, 2016, the EEOC published a proposed revision to its EEO-1 reporting form. The changes would require every employer with 100 employees or more to submit not just demographic information, but also the W-2 wages and hours worked for all of their employees grouped in broad EEO-1 job categories, subdivided into twelve pay bands.

After a public hearing at EEOC as well as a public comment period, on July 14, 2016, the EEOC submitted its final proposal for revisions to the EEO-1 Form to OMB.[5] Aside from changing the yearly reporting date to more closely align with the W-2 year and extending the initial reporting due date by six months, little substantive changes were made. After the PRA-required 30-day comment period at OMB, EEOC announced these changes as final on September 29, 2016, though the completed Notice of Action was not authorized by former OIRA Administrator Howard Shelanski until October 18, 2016. No EEO-1 filing will be required for 2017, but covered employers will have to file the new EEO-1 reports by the end of March 2018.

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[4] 81 Fed. Reg. 5113 (February 1, 2016).

[5] Camille Olson, partner at Seyfarth Shaw and chair of the Chamber's Equal Employment Opportunity Subcommittee, presented testimony on behalf of the Chamber at this hearing. Additionally, the Chamber submitted comprehensive and substantive comments to the EEOC on April 1, 2016 noting that the EEOC's proposal failed to satisfy the PRA. The Chamber also presented critical comments to OMB on August 15, 2016.

III. The PRA Permits Rescission of Previously Approved Collections

Section 3517(b) of the PRA allows OMB to "review any collection of information conducted by or for an agency to determine, if . . . a person shall maintain, provide or disclose the information to or for the agency." In turn, Section 3517(b)(2) permits OMB to "take appropriate remedial action, if necessary." Further, in the regulations promulgated pursuant to the PRA, 5 CFR Part 1320, OMB is required to review its approval in the case of changed circumstances or when the burden estimates provided by the agency at the time of initial submission were materially in error. *See* 5 CFR 1320.10(f). If such circumstances are present, OMB may stay the effectiveness of its prior approval.

As demonstrated in further detail below, EEOC's burden estimates for compliance with the revised EEO-1 report were materially in error and OMB therefore erred in approving EEOC's revisions to its EEO-1 form. Given the broad remedial powers under Section 3517(b)(2) and 5 CFR 1320.10(g), the proper remedy in this situation is for OMB to either stay the effectiveness of its prior approval of the information collection, or otherwise rescind the OMB Control Number (3046-0007) until EEOC demonstrates that its proposal satisfies the burden, benefit, and confidentiality standards of the PRA.

IV. The EEOC Never Satisfied the Requirements of the PRA

When the federal government seeks to collect information from the public, the PRA requires the issuing agency to: (1) minimize the burden on those required to comply with government requests; (2) maximize the utility of the information being sought; and (3) ensure that the information provided is subject to appropriate confidentiality and privacy protections. EEOC failed to meet *all* of these standards throughout the entirety of the process that resulted in the changes to the EEO-1 form.

- Burden. EEOC failed to accurately or adequately address the burden being placed on filers by the revised EEO-1 report, thereby ignoring the PRA statutory requirement that it minimize the burden. Throughout the revision process, EEOC continually shifted its burden analysis and steadfastly refused to base its analysis on anything other than conjecture and speculation. In contrast, the Chamber performed an empirical survey of over 50 companies who file approximately 20,000 EEO-1 reports each year. The results are telling. As set forth in more detail in the attached Appendix A, EEOC speculated that it would require

1,892,980 hours per year at a cost **$53.5 million** for 60,866 respondent companies to file an estimated 674,146 reports covering employment in their establishments using the "Components 1 and 2" expanded format EEO-1 form for the 2017 reporting year. The Chamber's survey feedback estimated that in reality, employers would actually spend 8,056,045 hours complying with the reporting requirements at a cost of **$400.8 million**.[6]

Along with other submissions during the comment period which showed that the EEOC's burden estimates were absurdly low, the Chamber continues to receive information from members indicating that the EEOC materially underestimated the burden that the revised form would impose. Under these circumstances and pursuant to Section 3517(b) of the PRA and 5 CFR 1320.10(f) and (g), the OMB must either rescind its approval of the EEOC submission or stay the effectiveness of its approval until the EEOC acknowledges the actual burden and justifies its imposition pursuant to the requirements of law.

- Benefit. EEOC failed to identify any significant or tangible benefit the revised EEO-1 report would generate, thereby failing the requirement that it maximize the benefit to be derived from the report. Indeed, the EEOC did not demonstrate that its revisions to the EEO-1 form would be of any utility in helping the Commission carry out its statutory mission to combat discrimination. The new EEO-1 form categorizes employees in broad occupational groups that inevitably results in comparison of employees in very different jobs, performing very different tasks, with very different skills. This data will be of no utility to the EEOC because courts upholding federal employment laws do not permit the aggregation of dissimilar individuals into artificial job groupings in order to prove pay discrimination. EEOC itself even admitted that the information sought will not "establish pay discrimination as a legal matter."[7] Moreover, as the Chamber demonstrated in both its comments to the EEOC as well as its comments to OMB, the significant potential for statistical false positives and false negatives further undermines the utility of the data

[6] This is the Chamber cost estimate based on direct labor cost only. Adding allowance for indirect overhead costs could result in an annual economic cost burden of $1.3 billion. Furthermore, as reflected in Appendix A, EEOC's burden estimate of the then-existing EEO-1 Form – referred to as Component 1 – was also materially in error.

[7] 81 Fed. Reg. at 45489 (July 14, 2016).

and even prevents the data from being used as an early warning system, of sorts.

While OMB apparently chose to disregard these submissions in its prior review of the EEO-1 submission, the Chamber submits that the failure to show any tangible benefit with the new data collection requirement, let alone that the new requirement maximizes the benefit to be derived from the massive data collection to be compelled by the revised EEO-1, requires that the OMB rescind or stay its approval of the revised EEO-1 data collection. Further, upon a stay or rescission of the prior approval of the EEO-1 data request, the OMB should impose the stringent cost saving requirements required by the Executive Order issued by the President on January 30 regarding Reducing Regulation and Controlling Regulation Costs, to any resubmission by EEOC of its proposal to collect employee compensation data via the EEO-1 form.

- Confidentiality. EEOC ignored the significant privacy and confidentiality concerns raised in the review process and thereby failed to ensure that the privacy and confidentiality of the revised EEO-1 data would be protected. The EEOC is proposing to collect highly sensitive personal data regarding compensation at thousands of U.S. companies in a format which will not serve any of its statutory purposes but which will certainly be of great use to any hacker who is interested in the compensation practices of employers. In the hands of the wrong people, the original pay data from the EEO-1 report could cause significant harm to EEO-1 responders and subject employees to potential violation of their privacy. By letter dated September 23, 2016 we called to the attention of former Administrator Shelanski the GAO report of September 19, 2016 which criticized the government's response to cyber attacks, and noting that "[c]yber incidents affecting federal agencies have continued to grow, increasing about 1,300 percent from fiscal year 2006 to fiscal year 2015."[8] Unfortunately, EEOC appears to be completely unaware of the enormity of this potential issue, and although it is statutorily required to do so, has failed to set forth appropriate steps or protocols to ensure the privacy and confidentiality of EEO-1 data.

[8] GAO 16-885-T: "Federal Information Security: Actions Needed to Address Challenges" (September 19, 2016), available at http://www.gao.gov/assets/680/679877.pdf.

> In addition, the EEOC has failed to address the problem that it disseminates information collected under the current EEO-1 to other federal agencies, state and local agencies and even private researchers without the protection required of this data by Section 709(d)(e) of Title VII. It has completely ignored the additional risk of disclosure of the significantly more sensitive information to be generated by the revised EEO-1 report. In the previous review process for the proposed EEO-1, the Chamber asked that OMB, at the very least, exercise its authority to impose the sanctions set forth in Section 709(e) of Title VII on every recipient of EEO-1 data. OMB did not respond to that request.

Despite EEOC's failure to satisfy the burden, benefit and confidentiality standards of the PRA, OMB nevertheless approved the information collection. We believe that OMB erred in this decision. Given the enormous costs associated with compliance – costs which the Chamber demonstrated through an empirical survey and which have been confirmed through recent member communications – it is imperative that OMB review the information collection and either issue a stay in the effectiveness of its prior approval or rescind its prior approval altogether; or undertake any other remedial action pursuant to Section 3517(b)(2) of the PRA, as appropriate.

V. Stay or Rescission of the EEO-1 Approval is Consistent with Current Regulatory Policy

In his Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017), President Trump noted that "it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations." As noted above, the Commission's new EEO-1 form will place an incredible economic burden on employers to produce information that will not advance EEOC's mission. Therefore, rescission of this extraordinarily expensive and useless requirement comports with the President's efforts to ease regulatory burdens on employers and the American public in general.

VI. Conclusion

We respectfully request that pursuant to Section 3517, you rescind OMB's prior approval of the EEOC's changes to its EEO-1 form, or alternatively, grant a stay of OMB's prior approval pursuant to 5 CFR 1320.10(g), until the Commission demonstrates that its revisions satisfy the PRA.

Thank you for your attention to this matter. Please contact us if you have any questions.

Sincerely,

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

James Plunkett
Director
Labor Law Policy

Appendix A

Comparison of EEOC and U.S. Chamber Parameters and Calculations

Current EEO-1 Form Occupation, Gender & Race/Ethnicity Counts- "Component 1 only"

		EEOC	U.S. Chamber
1	Number of Respondent Firms	67,146	67,146
2	Number of Reports Filed	683,275	683,275
3	Reports per Firm (calculated 2/1)	10.2	10.2
4	Total Hours per Firm	15.7	66.8
5	Total Hours per Report	1.5	6.6
6	Total National Burden Hours	1,055,471	4,485,392
7	Cost per Burden Hour	$28.48	$49.75
8	**Estimated Annual Cost**	**$30,055,087**	**$223,148,252**

Proposed Expanded EEO-1 Form Occupation, Gender, Race/Ethnicity, Earnings, counts and Hours "Components 1 and 2"

		EEOC	U.S. Chamber
1	Number of Respondent Firms	60,866	60,866
2	Number of Reports Filed	674,146	674,146
3	Reports per Firm (calculated 2/1)	11.1	11.1
4	Total Hours per Firm	31.1	132.4
5	Total Hours per Report	2.8	12.0
6	Total National Burden Hours	1,892,980	8,056,045
7	Cost per Burden Hour	$28.29	$49.75
8	**Estimated Annual Cost**	**$53,546,359**	**$400,788,224**

RE: Coalition Letter on EEO-1 Form Concerns

From: "Peacock, Marcus C. EOP/OMB" <marcus.c.peacock@omb.eop.gov>

To: "Johnson, Randel" [redacted]

Cc: "Mancini, Dominic J. EOP/OMB" <dominic_j._mancini@omb.eop.gov>

Date: Mon, 20 Mar 2017 13:12:00 -0400

Randel,
Thanks for sending this to the Director. We'll take a close look at it.
Marcus Peacock

From: Johnson, Randel [redacted]
Sent: Monday, March 20, 2017 12:20 PM
To: Mulvaney, John M. EOP/OMB [redacted]
Cc: Mancini, Dominic J. EOP/OMB <Dominic_J._Mancini@omb.eop.gov>; Pickitt, Kailey M. EOP/OMB <Kailey.M.Pickitt@omb.eop.gov>; Peacock, Marcus C. EOP/OMB <Marcus.C.Peacock@omb.eop.gov>
Subject: Coalition Letter on EEO-1 Form Concerns

Director Mulvaney,

Attached is a letter from numerous trade associations expressing serious concerns with EEOC's radical revisions to the EEO-1 form. The attached letter makes arguments similar to that made by the U.S. Chamber which we sent earlier and demonstrates the wide breadth of concern over the requirements of the new form. I have also reattached the earlier letter sent by the U.S. Chamber for your convenience. We would very much appreciate your attention to this matter as companies are now being forced to change internal procedures to meet compliance deadlines.

Thank you for your consideration of this request.

Randel K. Johnson
Senior Vice President
Labor, Immigration and Employee Benefits
U.S. Chamber of Commerce
1615 H Street, NW
Washington, DC 20062
[redacted]

Presentation at CEI; Paperwork Reduction Act

From: "Johnson, Randel" Ex 6 - (5 U.S.C. Sec 552(b)(6))

To: "Mulvaney, Mick M. EOP/OMB" Ex 6 - (5 U.S.C. Sec 552(b)(6))

Date: Tue, 27 Jun 2017 15:20:05 -0400

Attachments: 2-27-17 Comment Letter - US Chamber EEO-1 Request for Review.pdf (306.92 kB)

Dear Director,

Enjoyed your presentation yesterday and thank you for the insights. Unfortunately I wasn't able to ask you a question about how you see OMB's enforcement rule under the Paperwork Reduction Act, but I just want to take a moment to say that the Act is one of the few that OMB directly enforces and it can be an excellent weapon to help rein in the agencies. I was the OMB liaison and Paperwork Reduction Act officer at DOL under Reagan and back then the OIRA desk officers were quite adept at using the Act to help rein in agencies through the very fact that OMB had direct authority under the Act and therefore did not have to simply rely on persuasive arguments.

Not surprisingly ,the Obama Administration pretty much neutered OMB in this area and in fact, used it to justify additional paperwork rather than reducing paperwork. One egregious example was EEOC's huge expansion of reporting requirements under the EEO-1 form, which OMB, under much political pressure from Valerie Jarrett, approved. The Chamber earlier submitted a petition (attached) asking OMB to reverse its earlier approval of this egregious expansion. I am taking this opportunity to resubmit it now as the compliance deadline of March 2018 is approaching. That may seem like a long ways off, but companies have to start gearing up very soon to adjust their reporting requirements, etc.

Thanks again for taking a look at this and perhaps forwarding it to the proper staffers. And again, thanks for taking the time at CEI.

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Ex 6 - (5 U.S.C. Sec 552(b)(6))

New EEO-1 Information Collection Form

From: "Johnson, Randel" [redacted]

To: "Rao, Neomi J. EOP/OMB" [redacted]

Date: Tue, 18 Jul 2017 10:56:13 -0400

Attachments: US Chamber EEO-1 Request for Review.pdf (314.43 kB)

Dear Ms. Rao:

Congratulations on your successful and bipartisan confirmation. We are excited to have a new OIRA administrator, and one with such strong credentials and history with the issues the office faces as yours.

As the person who will be central to carrying out President Trump's agenda for reining in, or reversing, the pattern of over regulating that characterized the Obama administration we want to make you aware of a major item that falls squarely in your jurisdiction. The EEOC revised the EEO-1 Form through a Paperwork Reduction Act clearance process that made a mockery of that process and therefore undermined the integrity of OIRA and the PRA. As you know, OIRA was created under the PRA and has primary authority for enforcing it and assuring that agency clearances under the Act are supported by credible data and analyses.

Attached is a letter we submitted earlier this year to Director Mulvaney that lays out the problems with the revised EEO-1 Form, the process used by EEOC, and most importantly how much EEOC underestimated the level of burden associated with the new form. As the letter describes, "EEOC speculated that it would require 1,892,980 hours per year at a cost $53.5 million for 60,866 respondent companies to file an estimated 674,146 reports covering employment in their establishments using the 'Components 1 and 2' expanded format EEO-1 form for the 2017 reporting year. The **Chamber's survey feedback estimated that in reality, employers would actually spend 8,056,045 hours complying with the reporting requirements at a cost of $400.8 million."** (emphasis added) The letter also explains the utter absence of any benefit from the expanded form, and the significant privacy and confidentiality problems that EEOC ignored in pushing through the approval of the revised form.

Our letter focuses on OIRA's authority under the PRA to conduct a *de novo* review of the clearance based on discrepancies in the burden calculation. We renew that request. Furthermore, the first reporting requirement under the new form is in March 2018, but companies having to report will start investing the resources to comply very shortly. This means that OIRA must act quickly to review and rescind the PRA clearance, or at the minimum stay the reporting requirement while that review proceeds.

We would be pleased to discuss this matter in more detail so that you understand fully the problems the new EEO-1 Form will cause, and how much the process to approve it was inappropriate.

Randel K. Johnson

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Ex 6 - (5 U.S.C. Sec 552(b)(6))