

March 17, 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:

The undersigned associations (together “the Associations”) respectfully request your review under Section 3517 of the Paperwork Reduction Act (PRA) and the PRA’s implementing regulations (5 CFR 1320.10(f) and (g)) 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

The Associations request 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 administrative record. Simply put, the EEOC has not met its requirement to satisfy the burden, benefit, or confidentiality prerequisites of the PRA. For example, as a result of EEOC’s changes, the EEO-1 form has been expanded from 180 to 3660 data cells. By itself, this exponential increase in the amount of solicited data speaks volumes with regard to the burdensome nature of the new EEO-1 form. This expansion means huge additional costs 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.

¹ The Associations’ members are committed to maintaining workplaces which are free from discrimination, and in particular discrimination relating to compensation. But while the Associations support the overall goal of combating compensation discrimination, we do not support the final changes to the EEO-1 report.

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 Associations request 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. 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, the EEOC has revised its existing EEO-1 form to include data on employee compensation and hours worked.² In order to avoid the more complex obligations under the Administrative Procedure Act (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

² 81 Fed. Reg. 5113 (February 1, 2016).

OMB. 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.

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. The EEOC should have based its burden calculations on surveys of actual companies who submit EEO-1 forms, pilot studies, or other reliable experiments. Instead, the EEOC bases its estimate on *assumptions* about employers' processes for submitting EEO-1 data, who is involved in these processes, their wages/salaries and the time needed to complete the processes.

EEOC did not bother to address how much it might cost employers to upgrade their HRIS systems or how long this may take. Moreover, EEOC failed to consider costs associated with integrating time management systems into the reporting process as well as the burden on employers who must compile the varied and multiple data sources that arise as a result of mergers and acquisitions. This guesswork approach resulted in an overall inaccurate and artificially low burden estimate that was materially in error. *See* 5 CFR 1320.10(f).

Such conclusory and erroneous explanations are insufficient to meet the standards of the PRA. 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.”³ 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.

- 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. 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, as required by the PRA.

Despite EEOC’s failure to satisfy the burden, benefit and confidentiality standards of the PRA, OMB nevertheless approved the information collection. The Associations believe that OMB erred in this decision. Given the enormous costs associated with compliance, 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 burden on employers to produce information that will not advance EEOC’s mission. Therefore, rescission of this extraordinarily

³ 81 Fed. Reg. at 45489 (July 14, 2016).

expensive and useless requirement comports with the President's efforts to ease regulatory burdens on employers and the American public in general.

VI. Conclusion

The Associations 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.

Sincerely,

American Benefits Council
American Gaming Association
American Institute of CPAs
American Road & Transportation Builders Association
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors
The ERISA Industry Committee
Food Marketing Institute
HR Policy Association
National Association of Home Builders
National Association of Manufacturers
National Association of Professional Employer Organizations
National Automobile Dealers Association
National Council of Chain Restaurants
National Federation of Independent Business
National Industry Liaison Group
National Restaurant Association
National Retail Federation
Retail Industry Leaders Association
Securities Industry and Financial Markets Association
Truck Renting and Leasing Association
U.S. Chamber of Commerce
WorldatWork