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April 1, 2016

Bernadette Wilson
Equal Employment Opportunity Commission
131 M Street NE.
Washington, DC 20507

Re: EEOC's Proposed Revisions to the Employer Information Report.

Dear Ms. Wilson:

Seyfarth Shaw LLP ("Seyfarth") welcomes the opportunity to submit these comments responding to the Equal Employment Opportunity Commission's ("EEOC's" or "Commission's") Proposed Revisions to the Employer Information Report ("EEO-1" or the "Proposed Revision").

Seyfarth is a full-service global law firm serving a diverse group of clients. Founded in 1945, Seyfarth Shaw was among the earliest exclusive practitioners of what has become labor and employment law. From that start, and through today, Seyfarth's Labor & Employment practice has been recognized as an innovator. In addition to representing employers in litigation involving claims of employment discrimination, we also represent employers in designing, reviewing, and evaluating their employment practices to ensure compliance with federal and local equal employment opportunity laws.

Seyfarth has a sincere and robust commitment to fair employment practices, fair pay, and diversity. Seyfarth has a substantial practice in affirmative action and equal employment opportunity compliance for federal contractors and subcontractors and a standalone Pay Equity Group. We believe that diversity—in terms of people, perspectives and experiences—creates more innovative solutions and leads to greater contributions from everyone. Further, the clients we represent are some of the largest and most innovative thought-leaders in diversity and inclusion, pay equity, and best employment practices. The comments we provide herein reflect our own thoughts as experienced practitioners in this arena as well as the comments of many employers.[1]

[1]The U.S. Chamber of Commerce submitted robust comments to this proposal including testimony from experts in the field. We participated in and join those comments in their entirety. Here, we provide additional comments based on additional significant concerns with the EEOC's proposal.

Seyfarth is also a nationwide employer and a recognized leader in diversity.[2] Seyfarth employs over 1,750 persons providing legal and consulting services throughout the United States. Seyfarth' s non-discrimination policy, applicable to all employees, states as follows: "Seyfarth Shaw is committed to the principles of equal employment opportunity. Firm practices and employment decisions, including those regarding recruitment, hiring, assignment, promotion and compensation, shall not be based on any person's sex, race, color, religion, ancestry or national origin, age, disability, marital status, sexual orientation, gender identity or expression, veteran status, citizenship status, or other protected group status as defined by law. Sexual harassment or harassment based on other protected group status as defined by law is also prohibited."

Analysis of compensation is complex. Compensation can be comprised of many components, including, but not limited to, base pay, bonuses, commissions, shift differentials, stock options and other forms of long-term incentive compensation, sign-on bonuses, and paid employment benefits. The components of compensation vary from organization to organization, establishment to establishment, business unit to business unit, and from one employee group to another. Likewise, the factors dictating compensation decisions are numerous and usually differ by organization, establishment, and business unit and employee group. Tenure, time in position, education, prior training, prior experience, certifications, performance, shift assignment, level of responsibility, and degree of skill represents only a handful of the possible factors impacting compensation. Further, compensation data is fluid. Employees may change positions, grade, work location or any of the variables that impact their pay within the course of a year.

In light of this complexity, capturing the compensation data necessary to make meaningful analysis and audit selection decisions cannot be done under the EEOC's Proposed Revision. While we share the importance of ensuring that employees are paid fairly and equitably, the EEOC's proposal will ensure no such thing. Instead, in practice, it would impose enormous burdens on employers who base complex compensation decisions on factors other than membership in a particular EEO-1 category and the millions of hours that would be spent on collecting the data will serve no true benefit. As the Proposed Revision will require submission of data that is neither reasonable, necessary, nor appropriate, we respectfully urge the EEOC withdraw this proposal.

I. PAPERWORK REDUCTION ACT

The EEO-1 Revision process, ironically, is being conducted pursuant to the Paperwork Reduction Act ("PRA"). The PRA, which was reauthorized in 1995, was promulgated in response to the federal government's "insatiable appetite for data."). *See Dole v. United Steelworkers of America*, 494 U.S. 26 (1990). The purposes of the PRA set forth in direct terms what the Act was designed to accomplish:

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[2] Seyfarth has been recognized by numerous associations for its commitment to workplace diversity. Seyfarth' s recent awards for diversity include: the 2016 Award to Seyfarth Shaw's CEO, J. Stephen Poor, as an "Innovative Trailblazer" in Workplace Flexibility by the Diversity and Flexibility Alliance; Perfect Score in the 2016 Corporate Equality Index; Ranked Among Top 10 "Best Law Firms for Women"; National Asian Pacific American Bar Association's 2013 Hope Award For Diversity; and the 2013 Thomas L. Sager Award for Diversity from the Minority Corporate Counsel Association.

> The purposes of this chapter are to--
>
> (1) *minimize* the paperwork burdens for individuals, small businesses…Federal contractors…and other persons resulting from the collection of information by or for the Federal Government;
>
> (2) ensure the *greatest possible public benefit* from and *maximize the utility* of information created, collected, maintained, used, shared and disseminated by or for the federal Government.
>
> (4) improve the quality and use of Federal information to strengthen decisionmaking, accountability and openness in Government and society…

44 USC 3501 (emphasis added).

The PRA established within the Office of Management and Budget ("OMB") the Office of Information and Regulatory Affairs ("OIRA") whose Director is charged with the administration of the PRA. *Livestock Marketing Ass'n v. U.S. Dept. of Agr.*, 132 F. Supp. 2d 817, 830 (D.S.D. 2001) ("Among other things, the Act establishes the Office of Information and Regulatory Affairs within the Office of Management and Budget, with authority to" facilitate and manage the PRA). The Director, in turn, is mandated to review data collection requests in accordance with the direction of the PRA to (1) minimize the burden on those individuals and entities most adversely affected and (2) maximize the practical utility of and public benefit from information collected by or for the Federal Government and establish standards for the agencies to estimate the burden of data collection. *See Dole,* 494 U.S. at 32 (explaining that the PRA charges the OMB with responsibility for minimizing the burden on individuals and establishing standards to reduce federal collection of information). The Director is also charged with developing and promulgating standards to insure the privacy, confidentiality and security of information collected or maintained by agencies. *In re French*, 401. B.R. 295 (E.D. Tenn. 2009) (noting that, amongst other things, the PRA's purpose is to ensure that information is collected consistent with privacy and security laws) (quoting 44 U.S.C. § 3501).

The EEOC's proposal is based on inaccurate and uncorroborated burden estimates. At the same time, the proposal will provide little to no benefit in identifying or combating pay discrimination. Moreover, there are serious concerns with the confidentiality of the sensitive data the EEOC seeks to gather. Accordingly, the EEOC's proposal does not comply with the requirements of the PRA. For this reason, the proposal should be withdrawn.

II. THE BURDEN ESTIMATE IS INACCURATE AND UNCORROBORATED

Based on our own analysis and the estimates of many employers, the EEOC's proposal significantly underestimates the employer burden associated with compiling, analyzing, and reporting the W-2 information the Proposed Revisions would require. It also grossly underestimates the burden associated with compiling, analyzing and reporting the hours information

that would be required, particularly as to exempt employees. The U.S. Chamber of Commerce's comments outline clearly the concerns with the EEOC's burden estimate, which we share. We highlight four major concerns:

- We are particularly concerned with the EEOC's approach of quantifying the hours to submit the current EEO-1 report in a manner that is lower and at odds with the approach the EEOC has used to quantify the burden associated with EEO-1 filings since at least 2009. From at least 2009 through 2015, the EEOC, when estimating the burden associated with filing EEO-1 Reports, based its assessment on the number of responses filed by the employer community, not on the number of EEO-1 Filers. Exhibit A (EEOC OIRA filings). The EEOC's approach over at least the last six years accounted for the fact that many EEO-1 Filers are required to generate multiple "responses" or reports: one for each physical establishment with 50 or more employees and one consolidated report. Without justification, in the Proposed Revision, the EEOC changed the burden estimate for submitting the current EEO-1 report from a "per report" calculation to a "per employer" calculation. This arbitrary change, results in a false reduction in the burden estimates for submitting the current EEO-1 report. For instance, in 2015, the EEOC estimated the annual employer burden associated with EEO-1 filings as follows:

    - 307,103 EEO-1 reports filed, based on actual 2013 filings.
    - 3.4 hours per report, which yields 1,044,150 total burden hours.
    - Average cost per hour estimated to be $19.00 per hour, based on the hourly rate paid to "Human Resources Assistants" according to the BLS publication "Occupational Employment Statistics, Occupational Employment and Wages, May 2010" – $18.22 – "rounded to $19.00 to account for instances where higher paid staff perform this work."

  Based on the EEOC's assumptions, it estimated in 2015 – less than one year ago – that EEO-1 Filers would incur costs of *$19.8 million* annually in submitting EEO-1 reports. That cost figure is *350% higher than the EEOC's new estimate* of what the current burden is *without* any of the proposed changes. For this reason alone, the Proposed Revision does not comply with the PRA given that is based on a wholly inaccurate burden estimate.

- The assumption in the Proposed Revision that "each additional report" for those employers with multiple establishments "has just a marginal cost" is nothing more than an unsubstantiated assertion, without any analysis or logical support. The EEOC appears to assume that the electronically fillable PDF format relieves employers of the necessity of manually entering data when filing their EEO-1 Reports. That assumption is wrong. See attached Declaration of Annette Tyman. Even when using the EEOC's on-line system, EEO-1 Filers must manually enter the data for each cell and for each establishment. Declaration of Annette Tyman, Paragraph 7-8. Notably, the EEOC's Proposed Revisions acknowledge that only 2% of EEO-1 Filers (1,449 of 67,146) submitted their data by uploading a data file in 2014 rather than manually completing the online submission. Thus, the process remains a

manual one for the vast majority of employers, even if the EEO-1 Report is submitted "electronically."

- Similarly erroneous is the EEOC's apparent assumption that employers will be able to automatically generate the requested data from electronically available data sources. In our experience, most employers often have one system for pay and another system for HR information. These separate databases typically do not "speak with" one another. This would require employers to add volumes of extra data to existing reports to prepare the data to submission the format suggested by the Proposed Revision. Moreover, many smaller employers with more than 100 employees do not have any HRIS systems and have very little administrative staff. For those employers, the Proposed Revision would require them to populate the EEO-1 report manually each year. In either case, reporting will be highly cumbersome and the time to complete the EEO-1 report would greatly exceed the EEOC's burden estimates.

- The EEOC's proposal suggests that there will be fewer hours after the initial start-up year. Employers dispute this assertion because the report is largely a manual process contrary to the EEOC's suggestion. As put by one large employer, the report was not something that you would get "good at" with repetition.

III. THE PROPOSAL SERVES NO PUBLIC BENEFIT AND WILL NOT ADVANCE INVESTIGATIONS UNDER LAWS ENFORCED BY EEOC AND OFCCP.

Despite the significant burden that employers will face as a result of the requirements in the Proposed Revisions, the EEOC has failed to articulate any rationale or evidence whatsoever to justify the need for the proposed EEO-1 Revisions. Similarly, the agency has failed to identify the specific benefit that the collection of aggregated wage and hours data would provide. Our most significant concerns follow.

- Despite the millions of hours it is estimated that employers will collectively spend completing the report, the report is completely unable to identify illegal pay practices. The Equal Pay Act ("EPA") prohibits sex-based compensation discrimination for employees working at the same establishment if they perform "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." In other words, the relevant comparators are only those employees who perform "equal work" in the "same establishment." Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits unexplained differences in pay between comparators who are "similarly situated." Despite the requirement that pay comparisons can only be made between employees who perform "equal work" or are "similarly situated," the proposed EEO-1 Revision would require that employers provide W-2 wage data by EEO-1 job category. Because there are only ten EEO-1 job categories or groupings of jobs, employers would be forced to categorize employees who perform wildly different work into these groupings. The job groupings are exceedingly broad, and will necessarily capture a wide range of positions that are not capable of meaningful compensation comparisons.

- The broad-brush, aggregate compensation data cannot be used effectively on a grand scale to target employers for review. It is our experience in working with thousands of employers that every employer's compensation system is unique and numerous factors impact compensation decisions and results. Nonetheless, the two tests that the EEOC specifically references in the Proposed Revisions are simply distributional tests that do not control for *any* legitimate factors that explain pay such as job, job grade, tenure, time in position, education, prior training, prior experience, certifications, performance, shift assignment, level of responsibility, and degree of skill represents, to name just a few. Consequently, the data they provide will not further the inquiry as to whether employees performing the same work are being paid differently based on the factor of sex (or race or national origin). As a result, the collection of data proposed by the EEOC provides no benefit to the EEOC for purposes of enforcement of the EPA.

- Similarly, the EEOC's proposal ignores the role of working conditions and how those conditions impact an employee's compensation. For example, employees who work night shifts, swing shifts and/or weekends are often paid a differential to account for less desirable work schedules. For the same reason, jobs that require employees to work outside or exert atypical physical effort may also command a wage premium. Nevertheless, the statistical tests proposed by the EEOC using the collected data will not and cannot account for differences in working conditions.

- The EEOC's approach will inappropriately compare partial year and part-time employees with full-year and full-time employees.

- The EEOC's proposal does not specify how employers are to report W-2 earnings and does not indicate whether employers should report the W-2 federal income taxable earnings (box 1) or Medicare taxable earnings (box 5) or report in some other manner. It is possible--and indeed likely--that a difference in tax-deferred retirement contributions and savings propensities could drive a pay difference between groups of employees, creating false positives and false negatives.

- As the EEOC admits in the proposal, it is unsure how to count hours worked for full-time, salaried exempt employees, noting that the Agency "seeks employer input" on how to report hours worked for these exempt employees. The EEOC indicated that it is "not proposing" that employers begin collecting additional data on actual hours worked for salaried workers "to the extent that the employer does not currently maintain such data," but rather is considering a standard such as estimating 40 hours per week for all full-time salaried workers in all industries. It is our experience that this alone is a fatal flaw. For the vast majority of employers, hours for exempt employees are not tracked and are, therefore, unknown. Many employers, however, pay more to exempt employees because they recognize that most exempt employees work well more than 40 hours a week. Whether that hours estimate is 45 hours, 50 hours, 60 hours, or upwards of 70 hours a week, varies depending on many factors including the industry, the employer, and the individual employees. Thus, using a 40-hour-per-week estimate will likely dramatically undercount the hours worked by the exempt workforce, hours which will be reflected in pay premiums

that the report will not distinguish. The alternative to make the reporting accurate (i.e., requiring all exempt employees to enter their hours work) would result in a significant burden on employees and, as employers reported to us, would also result in a significant decrease in employee engagement. Exempt employees have reported that a benefit of being treated exempt is that their employer does not require them to keep track of the hours that they work. This additional non-economic burden has neither been measured nor considered by the EEOC's burden analysis under the PRA.

- The one-size-fits-all approach to counting exempt employees will also impact employers whose pay systems are unique. For example, as one employer indicated to us, in the aviation industry, full-time pilots and flight attendants are paid a guaranteed minimum hours for the month. For example, flight attendants are paid a guaranteed minimum of 65 hours/month and pilots are paid a guaranteed minimum of 70 hours/month. For employers like those, the hourly rate will be significantly skewed and would not be comparable with other full-time employees working 40 hours/week in the same EEO category. If the employer instead reported actual hours worked, this would require a complicated calculation based on duty hours, time away from base, and other factors.

IV. CONFIDENTIALITY

Employers also spoke loudly and with one voice about their significant confidentiality concerns with the EEOC's Proposal Revisions. The PRA requires that the requesting agency and the OMB ensure that data collected will be treated with complete confidentiality. And yet, the Proposed Revisions merely reiterated that Section 709(e) of Title VII, 42 USC § 2000e-8(e) prohibits disclosure of any information contained in the EEO-1 report "prior to the institution of any [Title VII] proceeding." The proposal notes that while the OFCCP is not subject to the restrictions of section 709(e), it nevertheless will hold the information contained in the EEO-1 confidential "to the extent permitted by law, in accordance with Exemption 4 of the Freedom of Information Act and the Trade Secrets Act." These assertions understate the significant privacy and confidentiality concerns raised by the Proposed Revision.

Specifically, the general reference to the Exemption 4 exclusion from the OFCCP releasing this information ignores a critical point. Unlike the section 709(e) restriction on EEOC disclosure, the OFCCP's procedure requires that employers follow the regulatory constraints found in the OFCCP and Department of Labor FOIA regulations. That process requires employers to take affirmative steps under a complex and expensive mechanism to request that confidential business information not be disclosed.

After receiving a FOIA request, the OFCCP must timely notify the employer of the request. The employer, in turn is required to submit a detailed written statement explaining why some or all of the EEO-1 information is a trade secret or commercial or financial information. In the event of a dispute, the regulations then provide a process whereby the requester and the employer have to undertake a lengthy process where each presents its arguments and final determinations are subject to judicial review. This process is both expensive, complex, and cumbersome for employers which further increases the burden associated with producing its confidential information to the EEOC.

Moreover, with recent data leaks involving the federal government--including the leak of personnel data of 21 million federal employees or applicants--there are serious concerns that the pay data of 70,000 employers could be similarly vulnerable. The potential release of compensation information gives rise to trade secret/competitive advantage and employee privacy concerns as shared with us by many employers. The lack of the EEOC's proposal to address these very real confidentiality concerns in a meaningful way is particularly problematic for employers.

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In conclusion, based on these significant concerns with the proposed EEO-1 Revisions, we respectfully request that the EEOC withdraw the Proposed Revisions.

Very truly yours,

Seyfarth Shaw LLP

s/

Annette Tyman

Christine Hendrickson