SEYFARTH SHAW

Seyfarth Shaw LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000
fax (312) 460-7000
www.seyfarth.com

Writer's direct phone
(312) 460-5943

Writer's e-mail
atyman@seyfarth.com

August 15, 2016

**Via Electronic Filing**

Joseph B. Nye
Policy Analyst
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB Room 10202
725 17th Street, NW
Washington, DC 20503

Re: Comments on the Equal Employment Opportunity Commission's Proposed Revisions to the Employer Information Report (EEO-1)

Dear Mr. Nye:

Seyfarth Shaw LLP ("Seyfarth")[1] welcomes the opportunity to submit these comments responding to the Equal Employment Opportunity Commission's ("EEOC's") Proposed Revisions to the Employer Information Report ("Proposed Revisions") and in response to the EEOC's Notice of Submission for OMB Review, Final Comment Request: Revision of the EEO-1 ("OMB Submission").

Seyfarth has a sincere and robust commitment to fair employment practices, non-discriminatory pay, and diversity. Seyfarth has a substantial practice assisting employers on evaluating compensation issues through its Pay Equity Group, and addressing compliance on affirmative action and equal employment opportunity for federal contractors and subcontractors. 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 pay equity, diversity and inclusion, and best employment practices.

[1] Seyfarth is a full-service international law firm serving a diverse group of clients globally. 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 an innovator in this field. 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.

The U.S. Chamber of Commerce ("Chamber") submitted detailed comments on the OMB Submission. We join those comments and provide the additional comments herein based on our continuing concerns with the OMB Submission.

In its OMB Submission, the EEOC has failed to address the significant defects of its initial proposal, and thus the Office of Information and Regulatory Affairs ("OIRA") should conclude that the OMB Submission does not further the purposes of the Paperwork Reduction Act ("PRA"), including: (1) minimizing paperwork burdens resulting from the collection of information by the federal government; (2) ensuring the "greatest possible public benefit" and utility from such collection; and (3) maintaining the privacy, confidentiality and security of the information collected. 44 U.S.C. § 3501.[2] The OMB Submission provides no benefit in identifying or eliminating pay discrimination and fails to protect the confidentiality of the sensitive data the EEOC seeks to gather. Thus, in furtherance of OIRA's duty to ensure that the EEOC's information collection requests satisfy the safeguards established by the PRA, OIRA should reject the OMB Submission and return it to the EEOC.

## I. THE PAPERWORK REDUCTION ACT REQUIREMENT

The revisions to the EEO-1 report that would collect demographic data, compensation and hours from employers with more than 100 employees, ironically, is being conducted pursuant to the 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 are set forth in direct terms of what the Act was designed to accomplish:

> 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…

[2] OIRA is required to review data collection requests in accordance with the direction of the PRA in order to (1) "minimize burden and duplication" on those individuals and entities most adversely affected; (2) "provide useful information" by maximizing the practical utility and public benefit from the information; and (3) "support the proper performance of the agency's mission." Office of Information and Regulatory Affairs, *Q*&A's https://www.whitehouse.gov/omb/OIRA_QsandAs (last visited Aug. 8, 2016).

44 U.S.C. § 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 (3) 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, among 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 OMB Submission continues to be 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. The EEOC failed to substantively address the comments and information submitted in response to the February Proposed Revisions. Accordingly, the EEOC's proposal does not comply with the requirements of the PRA. For this reason, the proposal should be rejected.

## II. OIRA SHOULD REJECT THE OMB SUBMISSION DUE TO THE SIGNIFICANT BURDEN IT IMPOSES ON RESPONDERS

In its OMB Submission, the EEOC revised its burden estimate recognizing that its February Proposed Revisions did not reflect the realities employers would face in order to comply with the requested changes. However, even as modified, the EEOC's PRA burden analysis is not supported by empirical evidence regarding the time and resources required to collect, analyze and report the requested data. While the EEOC has recognized that the cost estimates it attached to the Proposed Revisions were not realistic, in part, because they "reflected a level of automation that was unlikely to be attained imminently,"[3] the new estimates similarly lack any basis in fact.

We highlight four major concerns:

- The EEOC's estimate that employers spend an average of 15.7 hours to generate the EEO-1 form in its current format at an annual cost of $30.0 million does not

[3] Equal Employment Opportunity Commission, *Final Comment Request: Revision of the Employer Information Report (EEO-1)* FEDERAL REGISTER 54 (July 15, 2016), https://federalregister.gov/a/2016-16692 .

withstand scrutiny and is contradicted by the survey data the Chamber has compiled. The EEOC has not explained or cited empirical data to support the estimated 15.7 hours to generate the current EEO-1 reports. More is required under the mandates of the PRA.

- The EEOC's estimate that 60,866 companies will be required to generate EEO-1 reports that include earnings and hours data, and that the total annual burden to such companies will be 1.893 million hours, at a cost of $53.5 million, is also devoid of factual support, and greatly underestimates the burden associated with collection, analysis and filing of the proposed EEO-1 containing earnings and hours information. The EEOC's calculations are based on unrealistic and inaccurate assumptions regarding the extent to which employers maintain one centralized human resources information system that contains fully integrated data from relevant records, and the extent to which automation reduces the time and cost associated with compiling information.

- The EEOC offers no support for its estimate that an average employer could make all of the changes required to accommodate the proposed EEO-1 earnings and hours in 8 hours, at a cost of less than $500. Instead, it rejects one-time cost estimates from employers because the *commenters* "did not provide details explaining how they were calculated." The EEOC provides no information to refute the estimates nor does it provide any data or information that reasonably articulates the basis for EEOC's estimates. To be clear, it is the EEOC -- not commenters -- that carries the obligation to demonstrate it has met the requirements of the PRA.

- The EEOC's burden calculations use artificially low wage rates and do not include any consideration of overhead costs associated with completing the reports that would be required under the OMB Submission.

## III. THERE IS NO PUBLIC BENEFIT THAT JUSTIFIES THE IMMENSE BURDEN ON RESPONDERS

The EEOC has failed to comply with the PRA requirements. Instead, it is clear that the EEOC is on a fishing expedition for data that it concedes will not "establish pay discrimination as a legal matter."[4] Instead, the EEOC will require employers to produce data to the EEOC and other agencies, regardless of whether there are any allegations concerning pay discrimination against that employer. Such an onerous obligation applied in a wholesale fashion to every employer across the country is absurd when one considers that the EEOC is already authorized to request detailed compensation data from any employer in connection with an investigation. Thus, collection of aggregate compensation data that is coupled with erroneous "proxy" hours, will lead to false findings that will serve no purpose under the laws the EEOC and the OFCCP are charged with enforcing.

---

[4] *Id.* at 45489.

Significantly, none of the EEOC's three articulated uses for the proposed data -- (1) early assessment of charges of discrimination; (2) publication of aggregate EEO-1 data and (3) EEOC training[5] -- satisfy the public benefit or "utility" PRA requirement when compared against the burden of collecting sensitive data from every employer in the country with more than 100 employees. Because the data collected will be tangential at best for discerning pay discrimination, the data does not justify the excessively burdensome collection efforts.

Our main areas of concern are:

- Early assessment of charges of discrimination. The data will not assist the EEOC with early assessment of charges for the following reasons:

  - *Inappropriately broad job groupings.* Using EEO-1 job groupings to analyze differences in compensation serves no purpose under federal law because the data cannot be used to identify similarly situated comparators or establish pay discrimination. The EEOC admits that it "does not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter. Therefore, it is not critical that each EEO-1 pay band include only the same or similar occupations." In its own words, the EEOC acknowledges that the groupings will not include individuals who perform "equal work" or who are "similarly situated," which is required under Title VII, EO 11246, and the Equal Pay Act. Courts upholding federal employment laws do not permit the aggregation of dissimilar individuals into artificial job groupings in order to prove pay inequity.[6] For example, there is no legal support for comparing Sales Workers to Laborers and Helpers.

  - *Inappropriate use during investigations*. The EEOC has explained that "if a charging party alleges she was paid less than her male colleagues in a similar job, the EEOC's enforcement staff *might* use the expanded EEO-1 analytics tool to generate a report comparing the distribution of the pay of women to that of men in the same EEO-1 job category."[7] However, because there can be no comparison of pay between men and women to others in the same EEO-1 job category unless the jobs themselves are the same or substantially

---

[5] 81 FR 45490-91 (July 14, 2016).

[6] Although a similarly situated employee need not be "identical," *Caskey v. Colgate–Palmolive Co*., 535 F.3d 585, 592 (7th Cir. 2008), he must be "directly comparable to the plaintiff in all material respects...." (citing *Naik v. Boehringer Ingelheim Pharm., Inc*., 627 F.3d 596, 600 (7th Cir. 2010); *Lopez v. Kempthorne*, 684 F. Supp. 2d 827, 856-57 (S.D.Tex. 2010) ("'Similarly situated' employees are employees who are treated more favorably in 'nearly identical' circumstances; the Fifth Circuit defines 'similarly situated' narrowly. Similarly situated individuals must be 'nearly identical' and must fall outside the plaintiff's protective class. Where different decision makers or supervisors are involved, their decisions are rarely 'similarly situated' in relevant ways for establishing a prima facie case."); *Alexander v. Ohio State Univ. Coll. of Soc. Work*, 697 F. Supp. 2d 831, 846-47 (S.D. Ohio 2012) (finding that to be similarly situated, a plaintiff's purported comparators must have the same responsibilities and occupy the same level position.)

[7] 81 FR 45490 (July 14, 2016).

the same, this explanation does not provide any benefit to justify the burden on responders. The EEOC has already conceded that jobs within an EEO-1 job category will not be comparable.

- *Failure to recognize factors that influence pay*. The OMB Submission fails to recognize the numerous factors that influence pay like experience, performance, work productivity, skills, scope of responsibility, market, and education. Ignoring such factors renders any statistical analysis of the reported data meaningless, especially in instances where sex and race/ethnicity correlate with these factors. Because the proposed EEO-1 report will not eliminate data requests issued as part of the EEOC's evaluation of a charge of discrimination, employers will be subject to such data requests and *also* will be forced to respond to erroneous assumptions the EEOC may make based on analyses generated by the proposed changes.

- *Improper statistical methods*. The EEOC's planned statistical analysis of the data will lead to many false-positive and false-negative conclusions. Thus, the EEO-1 pay data report will not assist the EEOC in actually determining whether discrimination has played any role in setting compensation.

- *Use of meaningless proxy hours*. The EEOC's proposed reporting of "proxy" hours for exempt employees renders the data significantly inaccurate and seriously undermines the utility of the data, especially in light of the fact that 41% of the U.S. workforce is paid in a manner that will be reported on a "proxy" basis. In addition, using "proxy" hours for exempt employees renders the overall hours analysis meaningless for discerning actual assignment of hours or denial of overtime or premium pay and requires the EEOC to request detailed information related to any individual allegation.

- Publication of irrelevant aggregate data. There is no law that requires employers to pay employees consistent with their competitors. Employers are only prohibited from making disparate pay decisions concerning employees within their own workforces. For this reason, the fact that a particular employer's aggregate compensation data is below the pay of the industry is irrelevant to an investigation of whether a specific employer's pay practices are discriminatory. The EEOC merely reiterated that it will publish aggregate data, but did not respond to this issue in the OMB Submission even though we, the Chamber, and others raised this concern.

- EEOC's vague training goals. The EEOC admits that at the time of publication, it had no "analytical tools" or accepted methods to use the data requested.[8] Rather, it provides that if and when such an analytical tool is developed, it will periodically

[8] 81 Fed Reg 45490 (July 14, 2016).

train relevant personnel as to how to make any practical use of the data.[9] Such vague aspirations do not justify the burdens created by the OMB Submission.

In sum, the proposed data request is not reasonable or appropriate in light of the fact that EEOC is authorized to request detailed compensation data from any employer in connection with an investigation. Collection of aggregate compensation data that is coupled with erroneous "proxy" hours will lead to false findings. Finally, the EEOC's vague training aspirations will serve no public purpose under the laws the EEOC and OFCCP are charged with enforcing.

## IV. OIRA SHOULD REJECT THE OMB SUBMISSION BECAUSE IT DOES NOT ADEQUATELY PROTECT CONFIDENTIALITY OF EMPLOYERS' RECORDS

The highly sensitive nature of the data requested by the revised EEO-1 Report presents significant confidentiality issues related to a potential disclosure in violation of the PRA, which requires OIRA to ensure that the collection of information by the federal government is consistent with applicable laws, including laws relating to "privacy and confidentiality."[10] Although EEO-1 data has always been sensitive, the addition of pay data increases both the value of the information and the risk created by a breach.

There are at least three ways in which sensitive information may be compromised pursuant to the EEOC's proposal in the OMB Submission. First, the EEOC will provide aggregate pay data to employees and their advocates, who may be able to reverse engineer it and may not adequately protect it. Second, according to a report by the National Academy of Sciences, there will be "great demand" for this data on the part of other federal agencies "that do not have the same level of confidentiality protections" as the EEOC.[11] Third, the EEOC's provision of establishment EEO-1 data to third party academic researchers acting as consultants lacks any enforcement purpose, and it is not clear whether the EEOC will impose confidentiality restrictions on such researchers.

The OMB Submission does not adequately address these concerns. In light of the EEOC's serious omissions relating to protecting the privacy and integrity of the highly sensitive EEO-1 data, OIRA must scrutinize the proposal and ensure it is consistent with applicable laws related to privacy and confidentiality.

*****

[9] 81 Fed Reg 45491 (July 14, 2016).
[10] 44 U.S.C. § 3501(8)(A).
[11] National Research Council, 2012, *Collecting Compensation Data from* Employers, Washington D.C., National Academies Press, p. 90, available at http://www.nap.edu/catalog/13496.

In conclusion, based on these significant concerns with the OMB Submission, we respectfully request that the OIRA reject the OMB Submission and return it to the EEOC.

Very truly yours,

SEYFARTH SHAW LLP

/s/Annette Tyman
Annette Tyman, Esq.

/s/Hillary Massey
Hillary Massey, Esq.