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PROPOSED ACTION  
MEMORANDUM

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# Compensation Disclosure: Requiring Federal Contractors to Disclose Compensation Gap Information by Gender, Race, and Ethnicity

Department of Labor  
November 2020

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## I. Summary

Occupational segregation, workplace policies that disproportionately negatively affect women and people of color, and implicit or explicit gender- and race-based employment biases each contribute to pernicious and persistent gender- and race-based wage gaps in workplaces across the country.

When companies examine their pay practices by gender, race and ethnicity, both overall and within job or occupational categories, they often discover—and can correct—employment and pay practices that lead to disparities in compensation. Public policies that require the examination and disclosure of compensation data by gender, race, and ethnicity force companies into analyses they may not otherwise do. Policies that additionally require public disclosure of summary wage gap data may further incentivize companies to commit to closing their wage gaps in order to protect their public image.

A new administration seeking to take executive action to evaluate pay disparities and compel greater transparency in compensation disclosure should start with federal contractors, who comprise 20% of the U.S. workforce.<sup>1</sup> Current federal contracting law requires federal contractors of a certain size to implement Affirmative Action Programs (AAPs) that identify compensation disparities by race, sex, and ethnicity, and to establish internal self-audit procedures.<sup>2</sup>

This memo recommends that President Biden issue an Executive Order directing the Department of Labor's Office of Federal Contracting Compliance Programs (OFCCP) to require certain companies seeking and receiving federal contracts or subcontracts to complete an equal pay audit and to report results to the agency and the public.<sup>3</sup>

Specifically, the executive order would:

- (1) require companies subject to OFCCP AAP requirements (i.e., contractors or first prime subcontractors with 50 or more employees and a contract of at least \$50,000) to certify that they will annually conduct pay audits that meet federal-government issued standards;
- (2) expand AAP requirements to require annual submission of mean and median compensation and compensation gaps by gender, race, and ethnicity overall and within job categories—and a narrative explanation of their gaps and the measures being taken to close them—to OFCCP;
- (3) require annually updated public disclosure of aggregate mean and median compensation gaps by gender, race, and ethnicity, and measures being taken to close these pay gaps on the company's website for the duration of their federal contract.

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<sup>1</sup> There are additional mechanisms through which an administration could further reduce pay disparities. First, it could reinstate Equal Employment Opportunity Commission pay data collection through EEO-1 component 2, a topic on which other advocates are preparing proposals; second, it could require pay gap disclosure as part of SEC filings, a subject we cover in a separate memo.

<sup>2</sup> 41 C.F.R. §60-2.17(b)(3) & (d)(1).

[https://www.ecfr.gov/cgi-bin/text-idx?SID=4a54426f918d00c23c9dd37291bace96&mc=true&node=se41.1.60\\_62\\_117&rgn=div8](https://www.ecfr.gov/cgi-bin/text-idx?SID=4a54426f918d00c23c9dd37291bace96&mc=true&node=se41.1.60_62_117&rgn=div8).

<sup>3</sup> Beyond the scope of this memo, but relevant for improving federal contractor compliance with AAP requirements and OFCCP investigations and enforcement, we recommend broader resources and reforms that make AAP submissions mandatory. The current scheme includes no reporting requirements and, in practice, many contractors skirt these obligations.

## II. Justification

### The Wage Gap

Race and gender wage gaps are pernicious and persistent. In 2019, women in the United States who worked full-time, year-round, were typically paid just eighty-two cents for every dollar paid to men.<sup>4</sup> For many women of color, including Latinas (fifty-five cents), Native women (sixty cents), Native Hawaiian and Pacific Islander women (sixty-three cents), and Black women (sixty-three cents), the pay gap relative to white, non-Hispanic men was even more stark.<sup>5</sup> While Asian women overall experienced a smaller gap relative to white, non-Hispanic men (eighty-seven cents on the dollar), some groups of Asian women experienced very large gaps.<sup>6</sup> Parental status also matters considerably for women's wages and gender-based pay gaps: mothers, mothers of color, and unmarried mothers were all paid substantially less than fathers, and researchers have identified motherhood as a key contributor to the wage gap.<sup>7</sup> The wage gap may manifest in base salary/wages, bonuses and stocks/options—and disparities that are present in initial salary at hiring often compound over time and affect promotion opportunities, future performance-based compensation, and employer contributions to retirement.<sup>8</sup>

The current pandemic and its immediate and long-term economic impacts heighten the importance of proactive efforts to address gender, race, and ethnicity-based wage gaps and pay discrimination. COVID-19 and the unemployment/underemployment crisis it has ushered in has exposed and exacerbated existing inequities and economic insecurities that increase risk of workplace discrimination, including pay discrimination. Now, workers are more desperate to keep a paycheck at any cost; they are less willing to uncover and challenge discrimination and workplace abuses, and face retaliation for doing so. The COVID-19 pandemic is also likely to exacerbate the challenges women face in hiring, promotion, and advancement.<sup>9</sup> All of this could affect companies' hiring and promotion practices, the slotting of women into particular jobs, and women's lower wages during and post-pandemic—and create risks that exacerbate the gender, race, and ethnicity-based wage gaps across a company's workforce overall and within particular job categories.

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<sup>4</sup> Nat'l Women's Law Ctr., The Wage Gap: The Who, How, Why, and What to Do, (Oct. 2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/The-Wage-Gap-Who-How-Why-and-What-to-Do-2019.pdf>

<sup>5</sup> Id.

<sup>6</sup> Nat'l Women's Law Ctr., Equal Pay for Asian American and Pacific Islander Women (Jan. 2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/03/AAPI-EPD-1.30.2020.pdf>

<sup>7</sup> Nat'l Women's Law Ctr., Effects of COVID-19 Show Us Equal Pay Is Critical for Mothers (May 2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/05/Moms-EPD-2020-v2.pdf>

<sup>8</sup> Mita Goldar, Christopher Ryan & Ahu Yildirimaz, *Rethinking Gender Pay Inequity in a More Transparent World*. ADP Research Institute. (January 2019), <https://www.adpri.org/wp-content/uploads/2020/08/21031403/Rethinking-Gender-Pay-Inequity-in-a-More-Transparent-World-Full-Report.pdf>; Felice B. Klein, Ryan Hammond, Aaron D. Hill & Ryan Stice-Lusvardi, *The Road to Pay Inequity is Paved with Good Intentions: Examining the Gender Pay Gap in Employee Equity-Based Awards*, (Aug. 1, 2019), <https://journals.aom.org/doi/pdf/10.5465/AMBPP.2019.59>

<sup>9</sup> Women have borne the brunt of layoffs, taken on a disproportionate share of caregiving for children in this time of incredible uncertainty, have left the workforce in record numbers as a result, and are likely to be “on call” for their families as shutdowns continue or recur over the next year or more—these trends hold both in two-parent, opposite-gender families in which women's wages are lower than men's and in single-parent, female-headed families. See Leticia Miranda, ‘Historic and unprecedented’: Women have been hit hardest by coronavirus layoffs, NBC News (Jun. 8, 2020), <https://www.nbcnews.com/business/business-news/women-hit-hardest-coronavirus-layoffs-are-we-heading-she-cession-n1226256>; BLS of Labor Statistics, Labor Force Statistics from the Current Population Survey CPS CPS Program Links A-10. Unemployment rates by age, sex, and marital status, seasonally adjusted (Accessed Sept 9, 2020), <https://www.bls.gov/web/empstat/cpseea10.htm>; Claire Cain Miller, Nearly Half of Men Say They Do Most of the Home Schooling, 3 Percent of Women Agree, (May 6, 2020), <https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html>; National Women's Center, Four Times More Women Than Men Dropped Out of the Labor Force in September (October 2020), <https://nwlc.org/resources/four-times-more-women-than-men-dropped-out-of-the-labor-force-in-september/>. In addition, among women who work in “essential jobs” in the crisis, lack of access to guaranteed paid leave for health or caregiving may also contribute to job losses or workplace retribution.

People of color — especially Black women and Latinas — have been hardest hit by the pandemic itself in terms of both health and job losses; and their future employment and earnings are likely to suffer as well. <https://www.nbcnews.com/business/business-news/women-hit-hardest-coronavirus-layoffs-are-we-heading-she-cession-n1226256>; BLS of Labor Statistics, Labor Force Statistics from the Current Population Survey CPS CPS Program Links A-10. Unemployment rates by age, sex, and marital status, seasonally adjusted (Accessed Sept 9, 2020), <https://www.bls.gov/web/empstat/cpseea10.htm>; Claire Cain Miller, Nearly Half of Men Say They Do Most of the Home Schooling, 3 Percent of Women Agree, (May 6, 2020), <https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html>; National Women's Center, Four Times More Women Than Men Dropped Out of the Labor Force in September (October 2020), <https://nwlc.org/resources/four-times-more-women-than-men-dropped-out-of-the-labor-force-in-september/>. In addition, among women who work in “essential jobs” in the crisis, lack of access to guaranteed paid leave for health or caregiving may also contribute to job losses or workplace retribution.

# Reporting and Public Disclosure of Compensation and Wage Gap Metrics by Gender, Race, and Ethnicity

The proposed executive order would require certain federal contractors to analyze, identify, and report compensation gaps by race, ethnicity, and gender in order to uncover these inequities, and focus employer attention upon interrogating and remedying them. This would: (1) further advance the federal government's interest in nondiscrimination in federal contracting, including nondiscrimination in compensation, (2) enable the OFCCP to focus compliance audits and enforcement efforts more efficiently, and (3) help ensure taxpayer dollars are not being used to support companies with policies and practices that unnecessarily perpetuate race and gender pay disparities and failed to reflect closely on their occupational segregation and compensation practices.

Mandating the collection and public disclosure of gender, race, and ethnicity-based wage gap and compensation metrics from federal contractors will increase the likelihood of employer self-evaluation and the correction of any unjustified disparities between employees. Disclosure requirements are a key driver of pay audits internationally. Indeed, according to a recent survey of businesses in the U.K., which implemented a public disclosure requirement in 2018, “54% of U.K. respondents cite pay data reporting requirements from federal/national and regional governments as external drivers for them to perform pay equity analyses, versus 28% for their U.S. counterparts.”<sup>10</sup>

Reporting and public disclosures are likely to encourage employers to implement practices proactively to help prevent pay disparities in the first instance, and to develop a diverse workforce, both of which advance the federal government's interest in nondiscrimination. A diverse workforce and equitable employment practices can confer a wide array of benefits on a company, including decreased risk of liability, access to the best talent, increased employee satisfaction and productivity, increased innovation, an expanded consumer base, and stronger financial performance.<sup>11</sup> Competitive—and thus equal—pay is critical for recruiting and retaining a diverse workforce and high performers, particularly for younger women workers.<sup>12</sup> And when workers are confident they are being paid fairly, they are more likely to be engaged and productive,<sup>13</sup> which will increase the value the federal government receives on its contracts.

Moreover, making some wage gap measures publicly available can promote employer compliance with equal pay standards in a number of important ways. Employers can use the data to evaluate their own metrics and pay practices, and set industry benchmarks within a specific geographic area. Workplace equality advocates can more efficiently direct their own enforcement, outreach, and public education activities to industries or regions where pay disparities are most egregious. Individual employees can find out if they are working in an industry or region where they are more at risk of experiencing pay disparities, and be prompted to investigate further to ensure that they are being treated fairly. They also can better understand pay trends with their region and

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<sup>10</sup> See Harv. Bus. Rev. Analytic Serv., Pulse Survey: *Navigating the Growing Pay Equity Movement: What Employers Need to Know About What To Do* 3 (2019), <https://hbr.org/sponsored/2019/10/why-your-company-needs-to-implement-pay-equity-audits-now>.

<sup>11</sup> Id.; See Vivian Hunt, Dennis Layton, & Sara Prince, *Why Diversity Matters*, McKinsey & Co. 9-13 (Jan. 2015) (finding diverse workforces correlate with better financial performance, because diversity helps to recruit the best talent, enhance the company's image, increase employee satisfaction, and improve decision making, including fostering innovation); Sylvia Ann Hewlett, Melinda Marshall & Laura Sherbin, *How Diversity Can Drive Innovation*, Harv. Bus. Rev. (Dec. 2013), <https://hbr.org/2013/12/how-diversity-can-drive-innovation>. Conversely, companies that fail to address gender wage disparities and discriminatory employment practices could damage their reputation and brand among consumers, leading to a loss of profits and shareholder value. Natasha Lamb & Will Klein, *A Proactive Approach to Wage Equality is Good for Business*, Employment Relations Today (Summer 2015), <http://arjuna-capital.com/news/a-proactive-approach-to-wage-equality-is-good-for-business/> [Proactive Approach].

<sup>12</sup> A recent survey found that the top reasons Millennials and Gen Zs plan to leave their current employment in the next two years are “[d]issatisfaction with pay and lack of advancement and professional development opportunities.” The Deloitte Global Millennial Survey 2019 (2019), <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html>; Lauren Noel & Christie Hunter Arscott, *Millennial Women: What Executives Need to Know About Millennial Women* 4, ICEDR (2015), [http://www.icedr.org/research/documents/14\\_millennial\\_snapshot.pdf](http://www.icedr.org/research/documents/14_millennial_snapshot.pdf) (Millennial women leave jobs primarily for more compensation).

<sup>13</sup> Courtney Seiter, *The Counterintuitive Science of Why Transparent Pay Works*, Fastcompany.com (Feb. 26, 2016), <http://www.fastcompany.com/3056975/the-future-of-work/the-transparent-pay-revolution-inside-the-science-and-psychology-of-open->.

industries, and be empowered to seek and negotiate fair pay. Finally, public release of these metrics provides a strong incentive to employers to understand and be able to explain the drivers of any such gaps in their own workforces, and sharing their plans to move toward equity is also an important accountability mechanism that allows employers to be held to these plans by their employees and the broader public.

Research from abroad demonstrates the positive impact of publicly disclosing pay data and wage-gap reports.<sup>14</sup> For example, Denmark's 2006 Act on Gender Specific Pay Statistics mandates that companies with over thirty-five employees report on gender pay gaps. A recent study of the law showed that from 2003 to 2008, the gender pay gap at mandatory reporting firms shrank 7% relative to the pre-regulation wage gap.<sup>15</sup> In Australia, reporting requirements apply to companies with one hundred or more employees. The pay gap has declined by more than four percentage points between 2013, when reporting began, and 2019—though a report issued in 2018 showed uneven results across industries with little progress in sectors such as accommodations and food service; health care and social assistance; and information, media and telecommunications.<sup>16</sup>

As of 2018, the United Kingdom requires public and private employers with at least 250 employees to annually submit to the U.K. Equality and Human Rights Commission, and publish on a publicly accessible website, information designed to show whether there is a difference in the average pay of their male and female employees, including: (1) the mean and median hourly rate of pay, (2) bonus pay paid to male and female employees, (3) proportions of male and female employees who were paid bonus pay, and (4) the proportions of male and female employees in preset pay bands by quartiles.<sup>17</sup> The government developed a guidance for employers regarding the collection and calculation of relevant data, and provided a portal on the government's website for submitting the data.<sup>18</sup> The data is publicly available and searchable on both a U.K. government website and various media websites.<sup>19</sup>

Since 2018, more than 10,000 companies have complied with the new regulation, including multinational US-based companies with U.K. operations such as Apple, Adobe, and JP Morgan. Media organizations analyzed the data by employer, industry, and pay quartile, and published the results, publicly revealing the companies with the largest disparities.<sup>20</sup> Many companies also filed publicly accessible action plans, demonstrating that the reporting requirement spurred companies to explain their data and develop a plan to address disparities.<sup>21</sup>

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<sup>14</sup> For an overview of this legislation, see Nat'l Women's Law Ctr., Promoting Pay Transparency to Fight the Gender Wage Gap: Creative International Models (Mar. 2020), <https://nwlc-ciw49ixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/International-Pay-Transparency-Models-v2.pdf>; Fawcett Society, the Global Institute for Women's Leadership and Thomson Reuters Foundations, Gender Pay Gap Reporting: A Comparative Analysis (Sept. 2020), <https://www.kcl.ac.uk/giwl/assets/gender-pay-gap-reporting-a-comparative-analysis.pdf>.

<sup>15</sup> Morten Bennedsen, et al., Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them, Harv. Bus. Rev. (Jan. 23, 2019), <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them>.

<sup>16</sup> Australia's Gender Pay Gap Statistics 2020, <https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics-2020>; Progress Report, 2017-18, Australian Government WGEA (2019), <https://www.wgea.gov.au/sites/default/files/documents/wgea-progress-report-2017-18.pdf>.

<sup>17</sup> The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, 2017 No. 172, (U.K.), [http://www.legislation.gov.uk/uksi/2017/172/pdfs/uksi\\_20170172\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/172/pdfs/uksi_20170172_en.pdf); What is the Equality Act?, Equality and Human Rights Commission (Oct 30, 2017), <https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>; Gender Pay Gap Reporting, GOV.UK (Jan. 28, 2019), <https://www.gov.uk/government/news/gender-pay-gap-reporting>.

<sup>18</sup> The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, 2017 No. 172 (U.K.), <https://www.legislation.gov.uk/uksi/2017/172/made/data.pdf>; Report your gender pay gap data, GOV.UK, <https://www.gov.uk/report-gender-pay-gap-data>

<sup>19</sup> See Search and compare gender pay gap data, GOV.UK, <https://gender-pay-gap.service.gov.uk/>; Lucy Meakin & Hayley Warren, Second Year of U.K. Gender Pay Gap Reporting Indicates Little Has Changed So Far, Bloomberg (Apr. 4, 2019), <https://www.bloomberg.com/graphics/2019-uk-gender-pay-gap/>. The U.K. government recently suspended reporting requirements due to the effects of the COVID-19 pandemic. Lucy Meakin & Jeremy Diamond, Coronavirus Pauses U.K. Gender Pay Gap Reporting Ahead of April Deadline, Bloomberg, Apr. 3, 2020, <https://www.bloomberg.com/news/articles/2020-04-03/uk-gender-pay-gap-reporting-is-paused-because-of-pandemic>.

<sup>20</sup> See Aleksandra Wisniewska, et al., Gender Pay Gap: women still short-changed in the UK, Financial Times (Apr. 23, 2019), <https://ig.ft.com/gender-pay-gap-uk-2019/>; Lucy Meakin & Hayley Warren, Second Year of U.K. Gender Pay Gap Reporting Indicates Little Has Changed So Far, Bloomberg (Apr. 4, 2019), <https://www.bloomberg.com/graphics/2019-uk-gender-pay-gap/>. Analyses of the pay quartile data demonstrate that in most companies, women are underrepresented in higher paying jobs and overrepresented in low paying jobs. See Daniella McGuigan, Gender Pay Gap Reporting—Happy Anniversary?, Nat'l L. Rev. (Apr. 5, 2019), <https://www.natlawreview.com/article/gender-pay-gap-reporting-happy-anniversary>.

<sup>21</sup> Hannah Murphy, UK pay data force companies to mind the gender gap, Financial Times (Sept. 26, 2017), <https://www.ft.com/content/dd21e03e-634a-11e7-8814-0ac7eb84e5f1> (e.g., "After digging into its pay data, Virgin Money drew up several initiatives to improve gender balance generally in its highest ranks.").

Companies are also creating public-facing web pages with their metrics, and publicly acknowledging the importance of gender equality for the overall good of the workforce.<sup>22</sup>

## III. Background and Current State

Preventing nondiscrimination in employment and with respect to compensation has long been an aim of federal contracting. In 1965, President Lyndon B. Johnson took the first steps to root out discriminatory hiring practices among federal contractors by issuing Executive Order 11246, which required affirmative action policies, and prohibited contractors from making employment decisions on the basis of race, color, religion, or national origin. Today, after subsequent amendments, EO 11246 prohibits discrimination on the basis of sex, sexual orientation, or gender identity as well.

Federal contractors are obligated to follow rules prohibiting discrimination, and some federal contractors have affirmative obligations related to hiring women, people of color, people with disabilities, and veterans, as well. Federal contract law imposes AAP requirements, which include identifying compensation disparities, and conducting self-audits on federal contractors or first prime subcontractors with fifty or more employees and a contract of at least \$50,000.<sup>23</sup>

## **Obama Administration EEOC and OFCCP Efforts**

As discussed above, federal contractors large enough to be subject to AAP requirements are supposed to be consistently evaluating their compensation practices and correcting for disparities. Recognizing the need for action on achieving pay equity, the Obama administration spent significant energy on this issue. Soon after taking office, the administration launched an Equal Pay Task Force. In 2011, the Obama DOL's OFCCP issued an Advanced Notice of Proposed Rulemaking on equal pay reporting,<sup>24</sup> it received 7,800 comments in response.<sup>25</sup> As follow-up, in 2014—at the same time that President Obama issued Executive Order 13665, which prohibits federal contractors from retaliating against employees who discuss their compensation (non-retaliation EO)—the Obama administration issued a Presidential Memorandum directing the Department of Labor to issue a rule that “would require Federal contractors and subcontractors to submit to DOL summary data on the compensation paid their employees, including data by sex and race.”<sup>26</sup>

DOL issued a proposed rule later in 2014, but, after considering comments from the employer community and assessing internal agency limitations as well as a desire not to duplicate work at the OFCCP and EEOC, the agency determined instead that (1) data should be disclosed to the EEOC rather than DOL, and (2) the

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<sup>22</sup> See, e.g., J.P. Morgan, 2017 UK Gender Pay Gap Report 2017 (2017), <https://www.jpmorgan.com/global/disclosures/gender-pay-gap-uk>; McKinsey & Co., UK Gender Pay Gap report 2018 (2018), <https://www.mckinsey.com/uk/our-people/uk-gender-pay-gap-report>; Cisco, Cisco UK ~~Gender~~ Gap Report (2018), [https://www.cisco.com/c/dam/en\\_us/about/inclusion-collaboration/uk-gender-pay-gap-report.pdf](https://www.cisco.com/c/dam/en_us/about/inclusion-collaboration/uk-gender-pay-gap-report.pdf).

<sup>23</sup> 41 C.F.R. §60-2.1.

<sup>24</sup> U.S. Department of Labor, Office of Federal Contract Compliance Programs, Non-Discrimination in Compensation; Compensation Data Collection Tool, Advanced Notice of Proposed Rulemaking. (Aug. 10, 2011), <https://www.govinfo.gov/content/pkg/FR-2011-08-10/pdf/2011-20299.pdf>

<sup>25</sup> Memorandum for the Secretary of Labor, Presidential Memorandum -- Advancing Pay Equity Through Compensation Data Collection (April 8, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/04/08/presidential-memorandum-advancing-pay-equality-through-compensation-data>.<sup>26</sup>

<sup>26</sup> Id. The memorandum further instructed, “In doing so, you shall consider approaches that: (1) maximize efficiency and effectiveness by enabling DOL to direct its enforcement resources toward entities for which reported data suggest potential discrepancies in worker compensation, and not toward entities for which there is no evidence of potential pay violations; (2) minimize, to the extent feasible, the burden on Federal contractors and subcontractors and in particular small entities, including small businesses and small nonprofit organizations; and (3) use the data to encourage greater voluntary compliance by employers with Federal pay laws and to identify and analyze industry trends. To the extent feasible, you shall avoid new record-keeping requirements and rely on existing reporting frameworks to collect the summary data. In addition, in developing the proposal you should consider independent studies regarding the collection of compensation data.”

requirement should apply to all private employers of a certain size, not just federal contractors.<sup>27</sup> Ultimately, in January 2016, the administration announced that the EEOC would issue “a proposal to annually collect summary pay data by gender, race, and ethnicity from businesses with 100 or more employees.”<sup>28</sup> It explained that this new approach would “help focus public enforcement of our equal pay laws and provide better insight into discriminatory pay practices across industries and occupations” and was meant to “expand on and replace” the proposed DOL rule.<sup>29</sup> The EEOC’s EEO-1 reporting form (Component 2) would be used to collect compensation data by gender, race, ethnicity, and job category, beginning in 2017. This mandate did not include a public disclosure requirement.

## Trump Administration Response

The Trump administration halted reporting of compensation data in 2017, before collection began. Following litigation initiated by the National Women’s Law Center and Democracy Forward, EEOC was ordered to collect compensation information from employers for 2017 and 2018, and did so.

In 2019, the EEOC proposed, and OMB subsequently approved, a revision to the EEO-1 form that eliminated future Component 2 reporting, pending further analysis of the utility of the collection. In 2019, rather than waiting for any such analysis, OFCCP peremptorily announced that it would neither seek nor rely on the Component 2 compensation data collected by the EEOC for its enforcement efforts.<sup>30</sup> Finally, in the summer of 2020, the EEOC announced it had contracted with the National Academy of Science, Engineering and Medicine’s Committee on National Statistics to select an expert panel to evaluate the utility of the 2017 and 2018 compensation data it collected pursuant to court order.

In 2021, advocates will likely seek reinstatement of EEOC Component 2 pay-data collection, which would be a complement to the pay-gap reporting proposed in this memo,<sup>31</sup> although Democrats are not slated to take control of the Commission until mid-2022, which means action is unlikely to happen quickly.

## Legislative Efforts to Compel Corporate Reporting and Disclosures of Pay Data and Wage-Gap Information

States and localities have led a variety of efforts—through legislation and executive action—to compel corporate reporting and/or disclosure of compensation data or wage gap information. California just enacted a law largely mirroring the EEO-1 Component 2 data collection, requiring private employers with one hundred or more employees to report annually pay data by gender, race, and ethnicity, based on the EEO-1 pay bands and job categories, to the state Department of Fair Employment and Housing.<sup>32</sup>

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<sup>27</sup> 79 Fed. Reg. 46561, <https://www.federalregister.gov/documents/2014/08/08/2014-18557/government-contractors-requirement-to-report-summary-data-on-employee-compensation>.

<sup>28</sup> The White House, FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act, (January 29, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>

<sup>29</sup> Id.

<sup>30</sup> EEOC has suspended the collection of EEO-1 Component 1 (workforce demographic) reporting requirements for 2020 due to the pandemic.<sup>31</sup> Paige Smith, Two Republicans Confirmed to EEOC, Solidifying GOP Majority, Bloomberg Law (Sept. 20, 2020), <https://news.bloomberglaw.com/daily-labor-report/eeoc-nominee-andrea-lucas-confirmed-solidifying-gop-majority>

<sup>32</sup> SB 973 (2019–2020 Reg. Sess.), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB973](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB973), <https://www.gov.ca.gov/2020/09/30/governor-newsom-takes-final-action-of-2020-legislative-season/>.

Similar to the concept proposed in this memo, a number of jurisdictions require state or city contractors to affirmatively report employee pay data as a condition of applying for a contract, or maintaining a contract.<sup>33</sup> In many of these jurisdictions, such as New Jersey, public works and service contractors are required to report on numbers of employees broken down by gender, race, and compensation data across job categories and/or pay bands.<sup>34</sup> Minnesota requires that businesses seeking or having contracts for goods and services of \$500,000 or more with the state must submit an “equal pay compliance statement,” signed by the chair of the board or the CEO, to the Minnesota Commissioner of Human Rights in order to contract with the state; Minnesota does not require reporting or disclosure of the underlying data, although this data could be requested as part of an audit.<sup>35</sup>

Congress has considered relevant legislation related to pay data reporting. Most recently, in April 2019, the U.S. House of Representatives passed H.R. 7, the Paycheck Fairness Act (PFA), by a vote of 242-187; seven Republicans joined every Democrat in supporting the bill. PFA contains a provision requiring private employers with one hundred or more employees to report employee compensation data via the EEO-1 form, among many other provisions aimed at reducing and addressing pay discrimination.

In 2019, as a presidential candidate, Senator Harris proposed that companies with one hundred or more employees be required to disclose pay data to the EEOC, and certify that they are paying men and women who perform comparable roles equally. Companies that are unable to certify would be fined 1% of their annual profits for every 1% of the wage gap that still exists.<sup>36</sup> Senator Harris’ proposal also included a ban on companies relying on or seeking an applicant’s salary history.

As noted above, countries around the world have begun to pass legislation requiring analysis and disclosure of compensation data, as well—and research shows the positive effects of pay data and wage-gap reporting and public disclosure mandates. Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Norway, Spain, Sweden, and the United Kingdom have all taken steps to require analysis, reporting, and either government or public disclosure of compensation by gender.<sup>37</sup> Research from Denmark,<sup>38</sup> Australia,<sup>39</sup> and the U.K.<sup>40</sup> show significant effects, though there are uneven results by industry and sector in some cases.

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<sup>33</sup> See N.M. Exec. Order No. 2009-049 (Dec. 18, 2009), <https://www.generalservices.state.nm.us/uploads/FileLinks/864df4748b2440569b3af8a95ce155d8/ce2009-049.pdf>; N.Y. Exec. Order No. 162 (Jan. 2017), <https://www.governor.ny.gov/news/no-162-ensuring-pay-equity-state-contractors>; A.B. 1, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Pub. L. 1945, c.169, and supplementing 1952, c.9 (C.34:11-56.1 et seq.) (2018)), [http://www.njleg.state.nj.us/2018/Bills/A0500/1\\_I1.HTM](http://www.njleg.state.nj.us/2018/Bills/A0500/1_I1.HTM); <https://www.nj.gov/oag/dcr/downloads/030220-Equal-Pay-Act-Guidance-Appendices-Only.pdf>; Albuquerque, N.M., Ordinance 15-47 (May 21, 2015), <https://cabq.legistar.com/LegislationDetail.aspx?ID=2242779&GUID=5f9F9F24-2151-4912-85D3-5B8ADB27F29A&FullText=1>; San Francisco, Cal., The San Francisco Equal Pay Ordinance (Dec. 23, 2015), <https://sf-hrc.org/sites/default/files/Report%20on%20the%20Equal%20Pay%20Ordinance.pdf>.

<sup>34</sup> See New Jersey Equal Pay Act, New Jersey Department of Labor and Workforce Development (n.d.), <https://www.nj.gov/labor/equalpay/equalpay.html>

<sup>35</sup> See Minn. Stat. Ann. § 363A.44; FAQs on Equal Pay Certificate, [https://mn.gov/mdhr/assets/Equal\\_Pay\\_FAQ-2017\\_tcm1061-297767.pdf](https://mn.gov/mdhr/assets/Equal_Pay_FAQ-2017_tcm1061-297767.pdf).

<sup>36</sup> Li Zhou, Kamala Harris’s plan to close the gender wage gap, explained, Vox, May 21, 2019, [https://www.vox.com/20EEOC has suspended EEO-1 Component 1 \(workforce demographic\) reporting requirements for 2020 due to the pandemic.19/5/21/18632793/kamala-harris-gender-pay-gap-fines-iceland](https://www.vox.com/20EEOC has suspended EEO-1 Component 1 (workforce demographic) reporting requirements for 2020 due to the pandemic.19/5/21/18632793/kamala-harris-gender-pay-gap-fines-iceland).

<sup>37</sup> For an overview of this legislation, see Nat'l Women's Law Ctr., Promoting Pay Transparency to Fight the Gender Wage Gap: Creative International Models (Mar. 2020), <https://nwlc-ciw49ixgw5bab.stackpathdns.com/wp-content/uploads/2018/06/International-Pay-Transparency-Models-v2.pdf>; Fawcett Society, the Global Institute for Women's Leadership and Thomson Reuters Foundations, Gender Pay Gap Reporting: A Comparative Analysis (Sept. 2020), <https://www.kcl.ac.uk/giwl/assets/gender-pay-gap-reporting-a-comparative-analysis.pdf>; Pratt, L., (13 Oct. 2020), Spanish ~~introduces~~ law for businesses to disclose gender pay gap figures, Employee Benefits, <https://employeebenefits.co.uk/spanish-government-pay-gap-law/#:~:text=The%20new%20regulation%2C%20announced%20on,report%20to%20address%20gender%20equality>.

<sup>38</sup> Morten Bennedsen, et al., Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them, Harv. Bus. Rev. (Jan. 23, 2019), <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them>.

<sup>39</sup> Australia's Gender Pay Gap Statistics 2020, <https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics-2020>; Progress Report, 2017-18, Australian Government ~~W~~Equality Agency (2019), <https://www.wgea.gov.au/sites/default/files/documents/wgea-progress-report-2017-18.pdf>.

<sup>40</sup> The Fawcett Society et al., Gender Pay Gap Reporting: A Comparative Analysis (2020), <https://www.kcl.ac.uk/news/uk-lags-behind-other-countries-on-gender-pay-gap-reporting>.

## IV. Proposed Action

In order to further the government’s interest in promoting nondiscrimination in hiring, and utilization of public federal contracting dollars in ways that do not reinforce discriminatory practices, and to promote economy and efficiency in federal contracting, the President should issue an Executive Order directing DOL’s OFCCP to promulgate a rule that:

- (1) requires companies that would be subject to AAP requirements to certify that, as federal contractors, they will annually conduct a pay audit that meets standards that will be promulgated by OFCCP in order to be eligible for federal contracts;
- (2) expands AAP requirements to require submission of mean and median compensation and compensation gaps by gender, race, and ethnicity overall and within job categories by gender, race and ethnicity—and a narrative explanation of the drivers of the gaps and the measures being taken to close them to OFCCP prior to finalizing a federal contract and, for multi-year contracts, annually thereafter; and
- (3) requires annually updated public disclosure of aggregate overall mean and median compensation gaps by gender, race, and ethnicity, and a narrative explanation of the drivers of these gaps and the measures being taken to close them on the company’s website for the duration of the federal contract

This proposal builds on requirements placed on certain federal contractors to establish, maintain, implement and analyze the results of an Affirmative Action Plan (AAP) to ensure active efforts to hire and promote women and people of color. As set out in 41 C.F.R. § 60-2.10 (General purpose and contents of affirmative ~~at~~programs), Affirmative Action programs:

contain a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the workforce of the contractor and compare it to the composition of the relevant labor pools. Affirmative action programs also include action- oriented programs. If women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool, the contractor's affirmative action program includes specific practical steps designed to address this underutilization. Effective affirmative action programs also include internal auditing and reporting systems as a means of measuring the contractor's progress toward achieving the workforce that would be expected in the absence of discrimination. 41 C.F.R. § 60-2.10(a)(1).

Part of a contractor’s “commitment to equality” includes monitoring and evaluating “its employment decisions and compensation systems to evaluate the impact of those systems on women and minorities.”<sup>41</sup> As set out in 41 C.F.R. § 60-2.10(a)(b), an AAP is required to include quantitative analyses that include an organizational structure profile (with employees identified by gender and race), job group analysis, placement of incumbents in job groups, availability analyses, and placement goals. An AAP must also identify personnel responsible for implementation, identification of problem areas, action-oriented programs, and periodic internal audits.<sup>42</sup>

41 C.F.R. §60-2.17(b)(3) requires contractors to evaluate compensation systems for “gender-, race- and ethnicity-based disparities” and (d)(2) specifies that internal audit procedures should be used to “[m]onitor

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<sup>41</sup> 41 C.F.R. § 60-2.10(a)(2).

<sup>42</sup> 41 C.F.R. § 60-2. The Department of Labor provides a sample AAP at: [https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/AAPs/Sample\\_EO11246\\_AAP\\_final\\_01.03.18\\_Contr508.pdf](https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/AAPs/Sample_EO11246_AAP_final_01.03.18_Contr508.pdf)

records of all personnel activity, including referrals, placements, transfers, promotions, terminations, and compensation, at all levels to ensure the nondiscriminatory policy is carried out.” A sample AAP provided by DOL further illustrates contractors’ obligations to review pay practices as part of their internal audit practices, and to maintain records related to the contractor’s compensation system, but does not require or provide an illustration of specific processes, or the reporting of information.<sup>43</sup>

## Legal Authority and Implementation

The proposed action builds upon the foundation laid by Executive Order 11246, which was originally issued in 1965 and has been amended several times, with two purposes: to prohibit employment discrimination in federal contracting and—as noted above—to encourage a subset of federal contractors to take affirmative action proactively to ensure equal opportunity in employment. With recent amendments related to sexual orientation and gender identity, EO 11246 currently prohibits employment discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, and national origin against employees and applicants by covered federal contractors and subcontractors.<sup>44</sup> EO 11246’s nondiscrimination provisions served as the legal basis for the Department of Labor’s prohibition on federal contractors retaliating against employees who discuss their compensation with co-workers (Executive Order 13665, the “non-retaliation EO”).

Courts have uniformly recognized that EO 11246 promotes economy and efficiency in federal procurement, and thus lies within the President’s authority pursuant to the Federal Property and Administrative Services Act (FPASA).<sup>45</sup> FPASA provides the President the legal authority to issue executive orders to promote the “economy” and “efficiency” in federal contracting.<sup>46</sup> FPASA directly provides that “[t]he President may prescribe policies and directives that the President considers necessary to carry out this subtitle.”<sup>47</sup> For decades, presidents of both parties have used this authority to issue executive orders that impact federal contracts and the employment practices of federal contractors.

To invoke this authority, the President must assert that the action in question promotes economy and efficiency in federal procurement. During the Obama administration, supporting this assertion required two components: (1) the Council of Economic Advisors conducted an assessment of economy and efficiency to accompany each proposed executive order, and (2) the Office of Legal Counsel at the Department of Justice signed off on that assessment before the administration published the order.

The proposed action would fulfill the government’s interest in nondiscrimination, and the FPASA economy and efficiency requirements by encouraging companies to examine and correct pay inequities that may subject them to litigation. As the Department of Labor explained when it proposed a rule in 2014, focused on compensation disclosure, “OFCCP believes that the publication of data for contractors to use would significantly promote deterrence and voluntary compliance with their obligations under Executive Order 11246. The advancement of the societal goals of nondiscrimination in the workplace, and closing the pay gap, are the by-products of deterrence and compliance.”<sup>48</sup> The proposed action would also help OFCCP target investigations and enforcement of EEO laws, thus increasing the efficient use of the agency’s limited resources.

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<sup>43</sup> Id.

<sup>44</sup>Executive Order 11246, as amended. <https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended>

<sup>45</sup> E.g., Contractors Ass’n of E. Pa. v. Sec’y of Lab., 442 F.2d 159, 170 (3d Cir. 1971); United States v. Miss. Power & Light Co., 638 F.2d 899, 905 (5th Cir. 1981); Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1514 (11th Cir. 1985); United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 466-67 (5th Cir. 1977), vacated on other grounds by 436 U.S. 942 (1978); Farkas v. Tex. Instr., Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967), cert. denied, 389 U.S. 977 (1967); Farmer v. Phil. Elec. Co., 329 F.2d 3 (3d Cir. 1964); Leg. Aid Soc. v. Brennan, 381 F. Supp. 125, 130 (N.D. Cal. 1974).

<sup>46</sup> P.L. 81-152, 63 Stat. 377 (June 30, 1949) (codified in Title 40 (government-wide) and Title 41 (civilian agencies) of the US Code). For more background, see Vanessa K. Burrows & Kate M. Manuel, Presidential Authority to Impose Requirements on Federal Contractors (2011), available at <https://fas.org/sgp/crs/misc/R41866.pdf>.

<sup>47</sup> 40 U.S.C. § 121.

<sup>48</sup> U.S. Department of Labor, Government Contractors, Requirement To Report Summary Data on Employee Compensation (Aug. 8, 2004).

After the White House issues an executive order, two agencies must issue rules implementing it: First, the Office of Federal Procurement Policy (OFPP) at the Office of Management and Budget must update the FAR to ensure that new contracts issued mirror the executive order's requirements. OFPP's rulemaking process requires relatively straightforward documentation, but involves consultation with the Federal Acquisition Regulatory Council (FARC), which is a particularly involved and bureaucratic multi-agency process requiring the agreement of councils for defense acquisition and civilian acquisition.<sup>49</sup>

Second, the Secretary of Labor (through the Office of Federal Contract Compliance Programs (OFCCP)) must promulgate regulations to implement and enforce the submission of compensation information. Explicitly empowering the Secretary in the executive order will trigger an additional agency-specific rulemaking. For example, the non-retaliation EO directed the Secretary of Labor to propose regulations to enforce the order within 160 days.<sup>50</sup> Because the FARC process is highly involved, the OFCCP rule will be issued before the FAR rule. This is desirable because the latter must properly incorporate the guidance provided by the former.

## Policy and Implementation/Capacity Considerations

Below we describe key decision points and considerations that will affect the scope, breadth, and efficacy of this proposed action.

### Policy Considerations Specific to the Executive Order

**Contractors subject to new obligations.** *Should this new compensation disclosure requirement apply to all federal contractors covered by EO 11246 or just federal contractors required to have an Affirmative Action Plan (AAP)?*

We propose these new obligations apply to contractors that are required to submit AAPs. Pay self-audit data would be part of the information that federal contractors are required to submit as part of their AAP obligations.<sup>51</sup> This approach—and other aspects of OFCCP's enforcement of federal contractors' nondiscrimination and affirmative action obligations—will be most effective if the OFCCP is provided resources to build a robust portal, engage in more compliance reviews, and have more capacity to bring actions and assess non-trivial penalties against contractors that fail to comply. Although collecting data from all federal contractors would be preferable from an equal pay perspective,<sup>53</sup> creating this new obligation only for those who are required to provide AAPs would still sweep in more companies than some state and international policies. The fifty-employee threshold may also help to address contractors' concerns with keeping data by job category anonymized, and allow for more statistically accurate comparisons across employee groups.

**Timing of audit and data reporting.** *Should a company (1) complete a pay audit in order to be eligible to compete for a contract, or (2) be required to certify that it will complete an audit if awarded the contract?*

As a condition of applying for a federal contract, we recommend that prospective contractors large enough to be subject to AAPs be required to certify that, if awarded a contract, they will undertake a pay audit pursuant to OFCCP-promulgated standards, and do so at least annually over the life of the contract.<sup>54</sup> DOL and FAR rules should set a reasonable time limit for completing the audit, reporting the results, and posting statistics on the contractor's website.

As a more rigorous and sweeping alternative, the EO could require prospective federal contractors to *complete* a pay audit in order to bid on a contract; this requirement would, by definition, mean that the obligation of a self-audit would extend to a universe beyond companies that have actually been awarded contracts. Having an audit completed and data submitted prior to the commencement of a contract would also provide a level of assurance that contractors have engaged in the self-reflection contemplated by the proposed EO and may be taking affirmative steps to correct disparities. However, this requirement would also slow bidding and create enforcement challenges. Instituting an audit as a precondition of applying for or bidding on a federal contract may also be onerous to smaller companies and dissuade smaller or less well-resourced firms—including women and minority-owned businesses—from competing for federal contracts.

**Pay-audit standards and practices.** *Should the federal government prescribe particular requirements that must be met in terms of what counts as an audit and how it is conducted?*

Either before or as part of rulemaking to implement the EO, the federal government should develop pay-audit rules that provide companies clarity on the minimum standards and requirements for a suitable audit, including guidelines for categorizing jobs, and for regression analyses that should be undertaken to control for appropriate factors, such as experience, that may be driving pay differences. Part of the process leading to the development of regulations implementing the EO should include consultation with auditors and companies that have conducted high-quality audits, a review of international standards, and prior federal government articulations of what an audit should include. OFCCP's prior Directive 307 should be the starting point for this work.

These new federal standards would replace [current guidance](#) for federal contractors regarding pay audits.<sup>55</sup> The current guidance, issued in 2018, rescinded guidance issued by OFCCP in 2013 (Directive 307), which prescribed more rigorous rules that the regulated community opposed.<sup>56</sup> Directive 307 itself rescinded looser Bush administration guidance from 2006. It sets out fairly rigorous requirements for the type of analyses that should be conducted but provides employers flexibility in determining the job categories they use for analysis.

**What data should be considered.** *Should audits require contractors to consider salary/wages, bonuses and stock/options separately, OR should the compensation data reflect W-2 earnings (which combine salary/wages and bonuses and omit the value stock/options)?*

Contractors have W-2 information readily available, and W-2 data was the basis for compensation reporting through EEO-1 Component 2.<sup>57</sup> W-2 data is used for reporting in New Jersey and California. However, looking only at base pay, or at base pay plus bonuses and other forms of compensation, such as employer contributions to tax-deferred FSA, HSA, and retirement accounts together (as W-2 data would do), obfuscates the source of substantial gaps and potential solutions. For example, a 2019 study of salaried U.S. workers that followed new hires from 2010 through 2016 by payroll processing company ADP, found lower pay at time of hire led to a salary gap that persisted over a six-year period. The study also found that bonuses for women were an average of two-thirds as large as those awarded to men with equal base pay, age, and tenure, and that the bonus gap was especially large for women aged forty to fifty.<sup>58</sup> In addition, a novel study of two companies with a strong commitment to pay equity that had achieved gender pay equity in base pay and bonuses, revealed stocks and options to be a major driver of gender gaps in total compensation.<sup>59</sup> Pay data reporting in other countries, such as the U.K., requires employers to report gaps in base pay and bonuses separately.

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<sup>53</sup> For example, it would be ideal to line up compensation data reporting with EO 13665, which prohibits retaliation against employees who share compensation information. Like EO 11246, EO 13665 applies to "federal contractors and federally-assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year."

<sup>54</sup> This standard also follows the logic of the AAP rules. AAPs are not required for new contractors prior to receiving a federal contract. For firms that already have federal contracts, failure to have an AAP may lead to a finding that a contractor is "non-responsible," which could potentially affect the firm's ability to bid on future federal contracts. In practice, it isn't clear how often this happens, however. This is one reason why better overall attention to contractors' meeting their AAP obligations is so critical.

<sup>55</sup> "Directive 2018-5," U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, <https://www.dol.gov/agencies/ofccp/directives/2018-05>.

<sup>56</sup> See, e.g., Meredith Shoop & David Goldstein, OFCCP Reins in Compensation Analysis by Rescinding Directive 307 and Issuing New Guidance. Littler Mendelson. (Aug. 28, 2018), <https://www.littler.com/publication-press/publication/ofccp-reins-compensation-analysis-rescinding-directive-307-and-issuing>; *see also* [http://cdn2.hubspot.net/hub/208757/file-23413822-pdf/docs/understanding\\_directive\\_307\\_final.pdf](http://cdn2.hubspot.net/hub/208757/file-23413822-pdf/docs/understanding_directive_307_final.pdf).

**Job category definition.** *Should wage-gap reporting by job category to OFCCP use the job categories from the EEO-1, or should companies be given flexibility to determine how to aggregate job categories for this reporting that are tied to their industry or company?*

We propose the EO permit reporting by employer-specific job category, with EEO-1 job categories as an alternative that employers can use if they choose to do so. Directive 307—which we propose as the basis for the agency to determine pay audit standards—includes flexibility for employers to set their own job categories for analysis, taking into account the specific jobs within their workforce. Contractors are also permitted to self-define job categories in their AAP analysis. Employer-specific job categories can allow the most nuanced and careful analysis of equivalent roles within a company, which is important to determining whether unjustified pay disparities exist within a workforce. If possible, OFCCP’s guidelines for self-audit should include standards for job groupings that encourage and facilitate meaningful comparisons of any pay and pay gaps by job category among employers within an industry and across industries, maximizing utility for the purposes of contractors’ own comparisons, OFCCP’s compliance reviews and audits, and public understanding.

As an alternative, OFCCP could mirror EEO-1 component 2 reporting and report wage gaps by EEO-1 job category; Minnesota and New Jersey both use EEO-1 categories for their contractor equal-pay reporting requirements, and EEO-1 categories are well-known to OFCCP. On one hand, EEO-1 categories are useful but ultimately remain blunt instruments. On the other hand, use of employer-specific job categories prevents easy comparisons across employers, and also presents opportunities for gaming, as employers can seek to group employees strategically in order to hide gaps that may exist.

**Public disclosure.** *Which statistics should be disclosed to the public, and what narrative or explanation should accompany public reporting?*

The public has an interest in knowing about the employment and compensation practices of the companies that receive federal funds, and public reporting provides another incentive for employers to correct compensation gaps by gender and race.

Contractors should be required to report mean and median pay gaps by gender and race for the company overall, based on the job groupings used in their audit. Establishments could be combined in reporting, so that data is reported for the company overall, to make the data digestible and address confidentiality concerns. A plainly worded statement with overall metrics of compensation gaps by gender and race and an explanation of substantial median gaps—e.g., are they being driven by particular job categories? by gaps in salary or bonus, etc.? by particular policies that help some workers and hurt others?—would make the information more digestible. The company should also be required to include their plan for correcting disparities. This plan could then be used as part of an OFCCP compliance review, and could be used by the company itself to measure and report on its progress on an annual basis for the duration of its federal contract.

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<sup>57</sup> Memorandum for the Secretary of Labor, Presidential Memorandum -- Advancing Pay Equity Through Compensation Data Collection (April 8, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/04/08/presidential-memorandum-advancing-pay-equality-through-compensation-data>. <sup>58</sup> Mita Goldar, Christopher Ryan & Ahu Yildirmaz, *Rethinking Gender Pay Inequity in a More Transparent World*. ADP Research Institute. (January 2019), <https://www.adpri.org/wp-content/uploads/2020/08/21031403/Rethinking-Gender-Pay-Inequity-in-a-More-Transparent-World-Full-Report.pdf>

<sup>59</sup> Felice B. Klein, Ryan Hammond, Aaron D. Hill & Ryan Stice-Lusvardi, *The Road to Pay Inequity is Paved with Good Intentions: Examining the Gender Pay Gap in Employee Equity-Based Awards*, (Aug. 1, 2019), <https://journals.aom.org/doi/pdf/10.5465/AMBPP.2019.59>.

**Obligations to perform ongoing analysis.** *For multi-year contracts, how often should the contractor be required to repeat the analysis and report on changes?*

AAPs are to be updated annually. The same standard should apply to compensation reviews.

New Jersey's equal-pay reporting law for contractors requires potentially more onerously timed updates. Updates are required to be submitted "each time there is a significant change in any of the information that the employer is required to report pursuant to this section, or other significant change in employment status, including, but not limited to, medical leave of 12 weeks or more, hiring, termination for any reason, a change in part-time or full-time status, or a change in 'employee' or 'contractor' status)." Minnesota's weaker and less substantive law requires recertification every four years.

With respect to broader disclosure laws and international equal pay certifications, California's new law will require annual reporting for all companies with one hundred or more employees. Outside the U.S., the U.K. requires the submission of an annual report and public posting. Norway requires biannual submission and certification, and Iceland requires recertification every three years.

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