



AMERICAN BENEFITS
COUNCIL

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Submitted via email to oir_submission@omb.eop.gov
Submitted electronically at <http://www.regulations.gov>

Joseph B. Nye
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Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
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RE: FR Doc. 2016-16692: Comments on the EEOC's Notice of Submission of Revisions to the Employer Information Report for OMB Review

Dear Mr. Nye:

The American Benefits Council ("Council") appreciates this second opportunity to provide comments on the Equal Employment Opportunity Commission's ("EEOC") proposal to revise the Employer Information Report (EEO-1) to begin the collection of employee pay data.¹ The Council first submitted comments on April 1, 2016, in response to the EEOC's original announcement of its intention to submit to the Office of Management and Budget (OMB) a request for a three-year Paperwork Reduction Act approval of the revised EEO-1 data collection.² As explained in more detail below, we very much appreciate the changes made to the proposal, but the Council and its members continue to have strong concerns regarding the utility of the proposed pay data collection and the unwarranted burden it would impose on employers.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either directly sponsor or

¹ 81 Fed. Reg. 45,479 (July 14, 2016).

² 81 Fed. Reg. 5,113 (Feb. 1, 2016). The Council's comments dated April 1, 2016, are attached as Appendix A and are also available on [www.regulations.gov](https://www.regulations.gov/document?D=EEOC-2016-0002-0215) (<https://www.regulations.gov/document?D=EEOC-2016-0002-0215>).

provide services to retirement and health plans that cover more than 100 million Americans.

The current EEO-1 is used by certain private industry employers with 100 or more employees and federal contractors with 50 or more employees to report the number of employees they have in ten job categories by seven categories of race and ethnicity and by sex. The EEOC's proposal would require such employers with 100 or more employees to also report employees' W-2 earnings and hours worked within 12 specified pay bands for each job category. The EEOC states in the preamble to its final proposal (the "30-Day Notice") that the addition of pay data to the EEO-1 is "intended to support the EEOC's pay discrimination investigations by collecting ... pay data to identify pay disparities that may result from discriminatory practices or policies."³

As we stated in our comments dated April 1, 2016, the Council and its members support efforts to reduce discrimination in the workplace, and we understand that new approaches aimed at uncovering discrimination should be explored. However, while we appreciate the changes that the EEOC made to its initial proposal, we remain very concerned that the collection of overly simplified employee pay data will result in the improper targeting of individual employers for investigation of their pay practices, and that the substantial burdens of the additional reporting will far outweigh the very marginal utility that the data will provide.

Because the 30-Day Notice fails to adequately address our most significant concerns, we urge the OMB to raise concerns with the EEOC's proposed revisions to the EEO-1 because they fail to "strike[] a balance between collecting information necessary ... and guarding against unnecessary or duplicative information that imposes unjustified costs on the American public."⁴ We respectfully request that the EEOC instead consider alternative and more appropriate methods of identifying discriminatory pay practices. Alternatively, at a minimum, we suggest that the EEOC test its proposed pay data collection requirements with a small sampling of employers in order to examine whether the utility of the data for the EEOC's purposes outweighs the substantial burden that will be imposed on employers.

The Council submitted comments to the EEOC regarding three areas of concern with respect to the EEOC's initial notice of its proposal (the "60-Day Notice"): (1) the lack of utility of the pay data proposed to be collected; (2) the proposal's burden on employers; and (3) data confidentiality. With respect to each of these issues we have provided below a summary of the comments we submitted on the 60-Day Notice followed by additional comments the Council has in response to the 30-Day Notice.

³ 81 Fed. Reg. 45,480.

⁴ 81 Fed. Reg. 45,481.

COMMENTS RELATED TO DATA UTILITY CONCERNS

- **Summary of the Council's Comments on the 60-Day Notice:** The EEOC's analysis of W-2 earnings and hours worked, without any additional data on other factors that commonly affect pay rates, such as level of education and years of experience, will be of little to no use in effectively and fairly targeting individual employers for potentially discriminatory pay practices. The Council expressed its significant concern that a government investigation could be triggered based on a data set that is insufficient to draw conclusions about an employer's pay practices with any level of confidence.

Information and studies that were referenced and/or considered by the EEOC during its development of its proposal revealed significant issues with the proposed data collection and emphasized the need to clearly articulate how the data collection can and will be analyzed. However, such steps had apparently not yet been taken by the EEOC in advance of publishing the 60-Day Notice despite those strong recommendations. For example, a study commissioned by the EEOC from the National Academy of Sciences ("NAS Report") considered a range of scenarios under which additional non-discriminatory data regarding pay would be collected. The NAS Report further revealed that a former EEOC commissioner commented that pay data collected on the EEO-4 report (which is collected in a manner similar to that being proposed for the EEO-1) did not allow for precise comparisons and that the broad job categories are "so broad that they are rarely if ever used to conduct wage disparity analysis."⁵

We urged the EEOC in our April 1 comment letter to (1) propose a precise plan for how it would analyze any pay data collected, (2) conduct a pilot study with large and small employers in order to test its proposed analytical methods, and (3) re-evaluate whether collecting pay data on the EEO-1 is the best way forward in identifying possible pay discrimination, or if alternative options should be pursued. We recommended that one alternative simply be for the EEOC to continue its current practice of collecting pay data from individual employers on a case-by-case basis to support an investigation that was prompted by other means.

- **30-Day Notice:** Although we appreciate that the 30-Day Notice expands upon the discussion contained in the 60-Day Notice with respect to how the EEOC intends to utilize the pay data collected on the EEO-1, we are very concerned that the EEOC provided more details without addressing our core concern that the EEOC's proposal lacks the utility that would justify its additional burdens. Our specific concerns with the EEOC's response in the 30-Day Notice include the following:

⁵ See pages 3-5 of the Council's April 1, 2016, comment letter for additional details.

- The EEOC continues to refer to the same studies in the 30-Day Notice that it did in the 60-Day Notice to support its proposal despite the limitations and concerns of those studies as highlighted in our April 1, 2016, comment letter. The 30-Day Notice fails to respond to the specific limitations and concerns that we identified.
- The EEOC claims that the tests it conducted to evaluate the usefulness of collecting the proposed pay data “supported the EEOC’s conclusion that these statistical tests provide insights that are *useful*” for the EEOC’s purposes (emphasis added).⁶ The EEOC fails to address *how* useful the data would be. Our concern, as expressed in our initial comments, is that the modicum (if any) of usefulness of the pay data proposed to be collected would not at all justify the additional time and expense that employers will incur in reporting on an expanded EEO-1, and that the EEOC should pursue other alternatives for identifying pay discrimination. The EEOC should be required to meet a higher standard in showing that the utility of its proposal justifies its costs. OMB’s mission to guard against “unjustified costs” requires more than an unsupported agency statement that the proposal will be “useful.”
- Similarly, the EEOC further attempts to justify its proposal by stating that research regarding the use of pay bands “suggests” that critics disputing the usefulness of the EEOC’s choice of statistical tests are incorrect.⁷ Again, the Council and our members urge the OMB not to approve the EEOC’s proposal simply because the EEOC has identified research “suggesting” that our concerns are incorrect. The research relied on by the EEOC does not evaluate the usefulness of the statistical tests in the context of a cost/benefit analysis, which is ultimately the key question at stake with respect to the EEOC’s proposal. At a minimum, a mere suggestion that the EEOC’s approach would indeed be useful may warrant a pilot study, but it does not justify rolling out the new EEO-1 pay data requirements to thousands of EEO-1 filers without further study and review.

COMMENTS RELATED TO EMPLOYER BURDEN CONCERNS

- *Summary of the Council’s Comments on the 60-Day Notice:* The EEOC’s proposal would dramatically increase the number of reporting cells on the EEO-1 from 140 to 3,360. When estimating that the proposal would only minimally

⁶ 81 Fed. Reg. 45,490.

⁷ 81 Fed. Reg. 45,490.

increase employers' reporting burden, the EEOC relied heavily on its assumption that employers will have access to information technology systems that will automate much of the work. However, not all employers will have access to such technology (as the 30-Day Notice later acknowledged), and even those that do have access may face significant expenses in reprogramming their systems.

The NAS Report, which was considered by the EEOC in the development of its proposal, concluded that the addition of earnings data to the EEO-1 in a manner similar to the collection of earnings data on the EEO-4 "could be expected to *nearly double the current burden on employers*" (emphasis added),⁸ calling the additional employer burden "not an inconsequential increase." As a result, we urged the EEOC to conduct a pilot with large and small employers in order to better estimate what the actual burden of its proposal would be prior to moving forward with a revised EEO-1. We also asked that the EEOC consider additional steps to reduce the burden for employers. We expressed that such steps are especially critical where the expected utility of the data proposed to be collected is very low.

- **30-Day Notice:** In response to comments received on the 60-Day Notice, the EEOC described in the 30-Day Notice several adjustments it made to the Paperwork Reduction Act burden estimates. Those changes include accounting for the time spent annually on the EEO-1 by a range of employees including executives, HR professionals, and clerical support. As a result of the adjustments, the 30-Day Notice estimates that the addition of the pay data reporting component to the EEO-1 will increase the annual burden hour costs of completing the EEO-1 by more than \$25 million *each year*. The 30-Day Notice further estimates a one-time implementation burden of more than \$27 million. Those revised estimates are much higher than the burden estimates provided in the 60-Day Notice, which indicates an additional annual burden of approximately \$4.7 million,⁹ and estimates one-time implementation costs of just over \$23 million.

⁸ NAT'L RESEARCH COUNCIL, COMM. ON NAT'L STATISTICS, COLLECTING COMPENSATION DATA FROM EMPLOYERS 62 (Nat'l Academies Press 2012) (*available at* http://www.nap.edu/openbook.php?record_id=13496) (hereinafter referred to as the "NAS Report").

⁹ Because the 60-Day Notice did not explicitly estimate the additional annual burden that would be imposed by the pay data component, we derived the \$4.7 million figure from the data contained in the 60-Day Notice as follows: The 60-Day Notice estimated that 60,886 filers would complete the revised EEO-1 (i.e., the EEO-1 with the addition of pay data) in 2017 and 2018. The 60-Day Notice further estimated the annual hour burden for those filers at 6.6 hours, and it estimated the annual hour burden for employers who would not complete the pay data component (i.e., contractor employers with 50-99 employees) at 3.4 hours. Using the difference of 3.2 hours as the additional hour burden imposed by the addition of pay data reporting, the additional annual cost is estimated as 3.2 hours x 60,886 filers x \$24.23 wage rate = \$4,720,856.90.

The Council appreciates the EEOC's willingness to revise its annual burden estimates in response to feedback received on the 60-Day Notice. However, the revised estimates only serve to call into greater question whether that critical balance between collecting necessary information and preventing unjustified costs has been struck. We believe that the questionable and unproven utility of the data fails to justify the increased employer burden at this time, and we urge the OMB to carefully analyze whether the additional reporting burden is justified. New reporting requirements that cost employers an additional \$25 million per year (in addition to implementation costs) warrant careful evaluation and should be tested (both with respect to their usefulness and the accuracy of the burden estimates) prior to their across-the-board implementation.

COMMENTS RELATED TO CONFIDENTIALITY CONCERNS

- **Summary of the Council's Comments on the 60-Day Notice:** The current EEO-1 consists of less sensitive and somewhat more public information than what the revised EEO-1 would contain. The addition of employee pay data to the EEO-1 would transform the report into one that contains highly sensitive employer data warranting heightened efforts to keep the data confidential, not only from a data security perspective, but also from a data disclosure perspective.

Due to the sensitive pay data involved, the Council recommended that, in accordance with the EEOC's expressed intentions,¹⁰ the EEOC should conduct a re-examination of the rules for testing statistical confidentiality for publishing aggregate data *prior to* requiring the reporting of employee pay data. The EEOC should then provide employers with an opportunity to review and comment on whether the process proposed to be used by the EEOC contains sufficient safeguards.

- **30-Day Notice:** In the 30-Day Notice, the EEOC acknowledged that it received public comments on the 60-Day Notice expressing concern about data privacy because an individual's pay could be disclosed if, for example, the employee was one of only a few employees matching a particular race/ethnicity background and gender in a particular cell on the EEO-1 and the EEO-1 report were disclosed.¹¹ Although the 30-Day Notice responded to other confidentiality concerns regarding data security and the rules for sharing confidential information with other agencies, it appears that the EEOC failed to address the aggregate data disclosure concern described above.

¹⁰ 81 Fed. Reg. 5,115 n18.

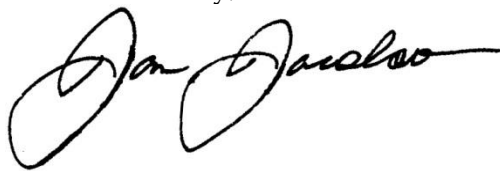
¹¹ 81 Fed. Reg. 45,491.

The Council and our members continue to be very concerned that the disclosure of aggregate data collected on the EEO-1 could reveal very sensitive and confidential pay data with respect to individual employees as described above. We urge the OMB not to approve the EEOC's proposed revisions to the EEO-1 until the EEOC takes steps to prevent such an outcome by addressing the confidentiality concerns expressed by employer stakeholders during a 2012 work group (as described in the 60-Day Notice) even if pay data were only published in aggregated form.¹²

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Again, we appreciate the opportunity to provide comments to the OMB and the EEOC with respect to the EEOC's final proposal to begin collecting employee pay data from certain employers on the EEO-1. If you have any questions or would like to discuss these comments further, please contact me at 202-289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson", written in a cursive style.

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

¹² 81 Fed. Reg. 5,115.

APPENDIX A



AMERICAN BENEFITS COUNCIL

April 1, 2016

Filed electronically at <http://www.regulations.gov>

Bernadette Wilson
Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street N.E.
Washington, D.C. 20507

Re: Comments on Proposed Revision of the Employer Information Report (EEO-1) to Collect Employee Pay Data

Dear Ms. Wilson:

The American Benefits Council (“Council”) appreciates the opportunity to provide comments on the utility and expected burden of the Equal Employment Opportunity Commission’s (“EEOC”) proposal to revise the EEO-1 to newly include the collection of employee pay data.¹ Currently, certain private industry employers with 100 or more employees and federal contractors with 50 or more employees are required to report annually on the EEO-1 the number of employees they have in ten job categories by seven categories of race and ethnicity and by sex. The EEOC recently announced that it intends to seek approval from the Office of Management and Budget to require that, beginning in 2017, private industry and federal contractor employers with 100 or more employees also report on the EEO-1 employees’ W-2 earnings and hours worked within 12 specified pay bands for each job category.²

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

¹ 81 Fed. Reg. 5,113 (Feb. 1, 2016).

² *Id.*

The Council and its members support efforts to reduce discrimination in the workplace, and we understand that new approaches aimed at uncovering discrimination should be explored. However, as described in more detail below, we are very concerned that the EEOC's proposal to collect overly simplified employee pay data, in a way that fails to account for any of the factors that commonly influence pay rates, will result in the improper targeting of individual employers for further investigation of their pay practices without any accurate basis for doing so. Moreover, in what would amount to a failure to satisfy the requirements of the Paperwork Reduction Act, the burden that will be imposed on employers by the additional reporting requirements will far outweigh the extremely marginal utility that the data will provide.

Due to our concerns, we urge the EEOC to withdraw its proposal and perform additional work, as suggested below, before reconsidering (1) whether the collection of pay data through the EEO-1 will be an effective way to identify potentially discriminatory pay practices, and (2) whether it can be accomplished in a manner in which the benefits outweigh the burdens.

SUMMARY OF THE COUNCIL'S COMMENTS

Utility Concerns

The analysis of W-2 earnings and hours worked, without any additional data on other factors that commonly affect pay rates, such as level of education and years of experience, will be of little to no use in effectively and fairly targeting individual employers for potentially discriminatory pay practices. We are very concerned that a government investigation could be triggered based on a data set so scant that it should not be used to draw conclusions about a single employer's pay practices with any level of confidence whatsoever.

As discussed below, information considered by the EEOC during its development of the proposal revealed significant issues with the proposed data collection and emphasized the need to clearly articulate how the data collection can and will be analyzed. However, such steps have apparently not yet been accomplished by the EEOC despite those strong recommendations. We therefore urge the EEOC to (1) propose a precise plan for how it would analyze any pay data collected, (2) conduct a pilot study with large and small employers in order to test its proposed analytical methods, and (3) re-evaluate whether collecting pay data on the EEO-1 is the best way forward in identifying possible pay discrimination, or if alternate options should be pursued. If those additional steps warrant the continued pursuit of employee pay data collection through the EEO-1, the EEOC should utilize the rulemaking procedures under the Administrative Procedure Act to allow the public an opportunity to comment

on a more complete and detailed proposal prior to moving forward with any revisions to the EEO-1.

Employer Burden Concerns

The EEOC's proposed revision of the EEO-1 would dramatically increase the number of reporting cells from 140 to 3,360. In estimating that the proposal would only minimally increase employers' reporting burden, the EEOC relies heavily on its assumption that employers will have access to information technology systems that will automate much of the work, including the reporting of W-2 wages on a non-calendar year basis. However, not all employers will have access to such technology, and even those that do may face significant expenses in reprogramming their systems.

As described in more detail below, feedback considered by the EEOC expressed caution regarding some of the burdens that employers may face. Thus, we urge the EEOC to conduct a pilot with large and small employers in order to better estimate what the actual burden of its proposal will be. We further ask that the EEOC consider additional steps to reduce the burden for employers. These steps are especially critical where the expected utility of the data proposed to be collected is very low.

Confidentiality Concerns

The addition of employee pay data to the EEO-1 would transform the report into one that contains highly sensitive employer data warranting heightened efforts to keep the data confidential. The EEOC should conduct its planned re-examination of the rules for testing statistical confidentiality for publishing aggregate data *prior to* requiring the reporting of employee pay data so that employers may review and comment on whether the process proposed to be used by the EEOC contains sufficient safeguards. In addition, the EEOC should take steps to ensure that the agencies with which it shares EEO-1 information have stricter confidentiality protections and penalty structures in place for the misuse or inappropriate disclosure of EEO-1 data.

COMMENTS RELATED TO THE UTILITY OF THE EEOC'S PROPOSAL

- 1. The analysis of employees' W-2 earnings and hours worked, without any additional data on factors that commonly affect pay rates, will be of little to no use in effectively and fairly identifying individual employers who may be engaging in discriminatory pay practices.**

The EEOC said that it, along with the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), had consulted with the Department of Justice ("DOJ") with respect to "how EEO-1 pay data would be used to assess complaints of discrimination, focus investigations, and identify employers with existing

pay disparities that might warrant further examination.”³ Yet, as noted above, the EEOC’s proposal would only require employers to report their employees’ total W-2 earnings within 12 pay bands and hours worked for each of the categories currently reported on in the EEO-1.

Our members are very concerned that the federal government could target them for investigation of potentially discriminatory pay practices based on data that is entirely void of any information regarding any of the numerous factors that commonly affect employee pay. These factors include:

- Education level;
- Years of experience in current job and prior work experience;
- Level of responsibility;
- Performance reviews over time and incentive payments;
- Differences due to overtime, shift differentials, regional rates of pay, job-related travel, tipped positions, bonuses, commissions, and retirement contributions; and
- Number of applicants and the employer’s difficulty in filling a position.

Most pay differences between employees can be explained by one or more of the factors listed above (or by any number of other legal, nondiscriminatory factors). Although there could be some utility in analyzing the pay data proposed to be collected at an aggregate level, it would be very inappropriate to use such minimalist data to target individual employers for potential wrongdoing.

The EEOC described in its proposal a study that it commissioned from the National Academy of Sciences (“NAS Report”) to assess how to “most effectively collect pay data to support its wage discrimination law enforcement efforts.”⁴ In comments regarding the utility of the data items to be collected for use in screening individual employers for possible pay discrimination, the NAS Report states that “[i]n addition to the information already requested for the EEO-1 report...a [revised EEO-1 report] would collect pay...and possibly other information, such as employees’ years of service” (emphasis added).⁵ The NAS Report further states that “more complex” pay data collection models

³ *Id.* at 5,115.

⁴ *Id.* at 5,114.

⁵ NAT’L RESEARCH COUNCIL, COMM. ON NAT’L STATISTICS, COLLECTING COMPENSATION DATA FROM EMPLOYERS 62 (Nat’l Academies Press 2012) (*available at* http://www.nap.edu/openbook.php?record_id=13496) (hereinafter referred to as the “NAS Report”).

might include “more elaborate controls for education and labor force experience.”⁶ And, “[s]till more complex models” might contain more elaborate controls for detailed occupational categories, previous experience, and qualifications.⁷ In other words, the NAS Report, in considering the utility of any pay data to be collected, clearly considered under a range of scenarios that information regarding non-discriminatory factors affecting pay would be included in any statistical analysis conducted by the EEOC. However, that clearly would not be accomplished through the EEOC’s proposed revision to the EEO-1.

In addition, the NAS Report, in describing a pilot study that the NAS Report recommended the EEOC conduct, recommends that “the pilot would test the collection of additional variables that are relevant to a firm’s practices. For example, age and years-on-the-job variables could assist in controlling for the legitimate effect of these characteristics on wages.”⁸ Although the EEOC briefly made reference in its proposal to what it called the “various alternative approaches for reporting compensation, which ranged from highly detailed to general” that were considered by the NAS Report and the EEOC’s ensuing pilot study, EEOC nonetheless concluded that “[a]lthough these options would reduce ambiguity and help assess the existence of potential discrimination, they also raise significant confidentiality and burden concerns.”⁹

We appreciate the EEOC’s consideration of confidentiality and burden concerns, which we agree are very important to take into account, but it is not acceptable for the government to subject individual employers to targeted investigations based on what even the EEOC admits would be ambiguous data. The EEOC currently collects pay data from state and local governments on the EEO-4 in a manner similar to that being proposed for the EEO-1 (*i.e.*, annual salary is to be reported on the EEO-4 within eight pay bands across eight job categories by race/ethnicity and by sex). Alarmingly, the NAS Report reveals that in 2011, then-EEOC commissioner Stuart Ishimiru addressed the NAS panel that prepared the report and shared that the wage data collected on the EEO-4 have “some limitations” in that the wages are reported in broad intervals that do not allow for precise comparisons, and the job categories – which appear to be no more broad than those used in the EEO-1 – are “so broad that they are rarely if ever used to conduct wage disparity analyses.”¹⁰ Even more alarming is that the NAS Report goes on

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 3.

⁹ 81 Fed. Reg. at 5,117.

¹⁰ NAS Report at 28. The job categories on the EEO-4 consist of the following: (1) officials and administrators; (2) professionals; (3) technicians; (4) protective service workers; (5) paraprofessionals; (6) administrative support (including clerical and sales); (7) skilled craft workers; and (8) service-maintenance. The job categories on the EEO-1 consist of the following: (1) executive/senior level officials and managers; (2) first/mid-level officials and managers; (3) professionals; (4) technicians; (5) sales

to state that “[d]espite these [data] limitations, the [EEO-4] reports are used extensively by the [DOJ] for administrative and enforcement purposes.”

As indicated above, we are very concerned about the lack of utility that the EEOC’s proposal will provide in accurately identifying potential pay discrimination. Many additional factors are required in order to conduct a proper, telling analysis. On the other hand, as the EEOC has acknowledged, collecting the additional pay-related information that would make the analysis meaningful would be overly burdensome for employers (and, as we describe below, our members are already concerned about the burden associated with the current proposal). Thus, neither option – proceeding with the proposal in its current form or requiring information on additional pay-related factors – is a workable solution. We urge the EEOC to instead consider other alternatives for identifying potentially discriminatory pay practices that do not involve additional reporting on the EEO-1. Such alternatives could include simply continuing the EEOC’s practice of collecting pay data from individual employers on a case-by-case basis to support an investigation that was prompted by other means.

2. Using an estimate of 40 hours per week for salaried employees will result in even less reliable analysis with respect to the identification of potentially discriminatory pay practices and will be more likely to produce false positives.

In its proposal, the EEOC requested comments on how employers should report hours worked for salaried employees. One approach the EEOC suggested was that employers use an estimate of 40 hours per week for full-time salaried employees. We agree with and appreciate the EEOC’s decision not to propose that employers begin tracking the actual hours worked of salaried employees. However, using an estimate such as 40 hours per week for all salaried employees is likely to understate or overstate actual hours worked – in some cases significantly – and could lead to even more unwarranted presumptions of wrongdoing. As discussed above, the collection of pay information consisting of only two factors (W-2 earnings and hours worked) is already insufficient to produce any meaningful analysis with respect to potentially discriminatory pay practices. By using the same approximation of hours worked for all salaried employees, the result is effectively a one-factor analysis based on W-2 earnings only. This is highly concerning when a federal investigation of an employer for potential wrongdoing could be initiated based on flawed data.

Similar to our recommendation above, we suggest that the best way for the EEOC to proceed with its efforts to identify and resolve discriminatory pay practices is to collect detailed pay information from employers only in the course of an investigation prompted through other means.

workers; (6) administrative support workers; (7) craft workers; (8) operatives; (9) laborers and helpers; (10) service workers.

- 3. Prior to revising the EEO-1, the EEOC needs to clearly articulate how the collection of W-2 earnings and hours worked can and will be analyzed in a meaningful way that justifies its use in identifying potentially discriminatory pay practices of individual employers.**

The EEOC's proposal states that the NAS panel that produced the NAS Report "recognized the potential value for enforcement of collecting pay data from employers by sex, race, and national origin through a survey such as the EEO-1," but also that the panel "emphasized the importance of a definitive plan for how the data would be used in coordination with other equal employment opportunity (EEO) enforcement agencies."¹¹ Notably, what the NAS Report further stated was that the panel "found no evidence of a clearly articulated plan for using the earnings data if they are collected: *the fundamental question that would need to be answered is how earnings data should be integrated into the compliance programs that have to date been triggered mainly by a complaint process, which, in their absence, includes relatively few complaints about pay matters*" (emphasis added).¹²

Based on the EEOC's proposal, which acknowledges that much work is left to be done by the EEOC in preparation of its use of the data, it does not appear that the EEOC has yet addressed the "fundamental question" identified by NAS regarding how the data collected should be used in compliance efforts. We believe this fundamental question is even more critical when one considers that, as explained above, it appears that the NAS Report expected that *some attempt* to collect data on explanatory factors (such as an employee's years of service) would be collected in addition to rate of pay and hours worked.

Instead of addressing the NAS Report's recommendation to prepare a comprehensive plan for the use of any data collected prior to initiating the data collection, the EEOC simply states in its proposal that the EEOC and OFCCP "plan to develop statistical tools that would be available to staff on their computers, to utilize the EEO-1 pay data for [purposes of assessing complaints of discrimination]."¹³ The Council and our members are very concerned that the EEOC does not appear to have a clearly articulated plan yet for how the pay data collected on the EEO-1 could appropriately be used for its intended purposes. This is particularly concerning to us for the reasons noted above in that critical information with respect to legitimate explanatory factors that influence pay will not be part of any analysis the EEOC conducts of the revised EEO-1 data.

Due to the foregoing, we respectfully urge the EEOC to develop and present a plan for the use of the data proposed to be collected so that the public has an opportunity to

¹¹ 81 Fed. Reg. at 5,114.

¹² NAS Report at 87.

¹³ 81 Fed. Reg. at 5,115.

review and comment on a more complete proposal. However, we believe that even the best statistical analysis possible will not make up for the fact that highly relevant factors are missing from the analysis. Once the EEOC takes the opportunity to determine what its analysis would entail, we urge the EEOC to reconsider whether the proposal in its current form would be of any utility at all.

4. The EEOC should conduct a pilot with large and small employers and real pay data in order to analyze whether the data collected will be useful for its intended purpose.

The EEOC described in the proposal its use of a pilot study, using synthetic pay data, which assisted the EEOC in formulating its proposal and “will” guide the EEOC’s development of analytic techniques to make use of the data collected. But apparently absent from the EEOC’s work leading up to its proposal is the use of a pilot study with real employers, both large and small, to test the collection of real data and its usefulness in identifying potential pay discrimination by an employer. We urge the EEOC to conduct such a pilot.

As described in the NAS Report, the OFCCP had long been interested in developing a similar screening tool to help the agency identify potential problems of pay discrimination.¹⁴ In early 2000, the OFCCP distributed an “Equal Opportunity Survey” on a pilot basis to 7,000 contractors. The survey included the collection of data on annual monetary compensation and tenure for four groups: minority females; nonminority females, minority men, and nonminority men. The compensation data was collected based on the EEO-1 job categories applicable at that time. Once the survey proceeded past the pilot stage, the OFCCP hired an outside contractor to further evaluate the quality and usefulness of the data. The NAS Report describes that based on the contractor’s evaluation, “OFCCP concluded that the EO Survey did not improve deployment of enforcement resources toward contractors most likely to be out of compliance.”¹⁵

We respectfully request that, prior to implementing any changes to the EEO-1 to require the collection of pay data, the EEOC conduct a pilot study involving large and small employers in order to better evaluate whether and how the data collected may be useful in targeting enforcement actions. Given the similarities between the EEOC’s proposal and the survey tested by the OFCCP, we find it reasonable to expect that the EEOC would also find that the data it collects will not be useful for its intended purpose. It would be far preferable for all parties involved to test this question through a pilot rather than after a full implementation of the EEOC’s proposal.

¹⁴ NAS Report at 34.

¹⁵ *Id.* at 36.

Another reason we recommend conducting a pilot study with real employers is to analyze whether – as the EEOC hopes – employers will take the opportunity through their data reporting process to evaluate their own pay data and self-correct for any discriminatory practices that they identify. However, the OFCCP found that its survey did not lead to greater self-awareness or encourage self-evaluations.¹⁶ Not only might EEOC’s additional objective not be realized, but we are further concerned that employers might alter their otherwise nondiscriminatory pay practices in an attempt to avoid the mere appearance of pay discrimination – an outcome that is unlikely to be economically sound, and could even create perverse effects. Imagine, for example, a long-tenured group of skilled males working in what has historically been a male-dominated field. If their employer hires a few younger females to join that group and learn the same job, the employer could be targeted for further investigation because the females, as recent hires with no experience, are paid significantly less than the long-tenured males.

COMMENTS RELATED TO THE BURDEN IMPOSED BY THE PROPOSAL

As discussed above, the Council believes that the potential value of the EEOC’s proposal is so minimal – and potentially even counterproductive to promoting gender equality in the workplace – that the EEOC should not proceed with adding the collection of pay data to the EEO-1. Even if the data collected were to have some practical utility, as discussed below, that utility will not outweigh the extra burden the process will impose on employers.

5. The addition of pay data to the EEO-1 could substantially increase the reporting burden for many employers.

The NAS Report concluded that the addition of earnings data to the EEO-1 in a manner similar to the collection of earnings data on the EEO-4 “could be expected to *nearly double the current burden on employers*” (emphasis added).¹⁷ The report observed that “[t]his is not an inconsequential increase in response burden.” Under the EEOC’s proposal, the revised EEO-1 would contain 1,680 potential data cells to report the number of employees by job category, pay band, race/ethnicity, and sex. An *additional* 1,680 potential data cells would also be completed to indicate the number of hours worked for each corresponding cell indicating the number of employees. Given the dramatic increase in the number of reporting cells under the EEOC’s proposal, we are concerned that the increased burden could be much more than doubled.

¹⁶ *Id.*

¹⁷ *Id.* at 71.

Increasing the number of data cells that an employer must account for from 140 cells (as found on the current EEO-1) to 3,360 cells is extremely substantial.¹⁸ In its proposal, the EEOC describes a work group that it formed in 2012 to seek input about updating the EEO surveys, including a discussion of adding pay data to the EEO-1.¹⁹ While the EEOC described the work group report as reflecting feedback from participants that “the burden of reporting pay data would be minimal for EEO-1 filers,”²⁰ a review of the work group’s entire report reveals that the following feedback was also received:²¹

- EEO-1 respondents were not in favor of reporting pay data;
- A company’s ability to spend money on a specific software tool or module impacts the cost/burden model with respect to the collection of pay data;
- Because it is not easy to get to the underlying database to make changes, it “will be quite burdensome to make any changes”; and
- The reporting of means is easier than reporting pay bands (yet, the EEOC proposal would require reporting by pay bands).

As suggested by the work group’s report, the burden imposed on employers by the EEOC’s proposal is largely dependent on the ability of an employer to automate the generation of an EEO-1 through its human resources information technology system. Employers with such capability will incur what could be significant costs in modifying their systems to accommodate the report, while employers without a robust technology system – more likely those employers with fewer employees – will face the enormous task of computing data for up to 3,360 cells in a manual or semi-automated fashion.

As noted above, the EEOC did not perform a pilot study using real employers, and therefore it lacks actual data to estimate what the burden of its proposal is. As a result, the EEOC requested data on the employer staff time needed to collect and report pay

¹⁸ The 140 cell count on the current EEO-1 (Section D) is derived from multiplying the number of job categories by the number of race/ethnicity categories and by the number of sexes (*i.e.*, $10 \times 7 \times 2 = 140$). References made by other parties to 150 cells on the current EEO-1 include the number of cells attributed to the additional column and two rows in Section D for calculating column and row totals and for indicating the previous year’s total. Our reference to 3,360 cells on the revised EEO-1 is calculated by multiplying the 140 cells on the current EEO-1 by 12 pay categories and by 2 parts (one part on which to indicate the number of employees in a particular cell, and a second part on which to indicate the number of hours worked). Similarly, references by others to 3,660 cells on the revised EEO-1 include the additional column and rows for calculating totals and indicating the previous year’s total.

¹⁹ 81 Fed. Reg. at 5,114-15.

²⁰ *Id.* at 5,115.

²¹ SAGE COMPUTING, INC., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), EEOC SURVEY SYSTEM MODERNIZATION WORK GROUP MEETING, Draft Report at 2, 9 (Mar. 19, 2012) (*available at* <http://www.eeoc.gov/employers/eeo1survey/survey-modernization.pdf>).

data to “better enable the EEOC to quantify the burden of this aspect of this survey.”²² Similar to our comments on the utility of the data EEOC proposes to collect, we urge the EEOC to better determine what the burden on employers will be prior to implementing its proposed changes to the EEO-1.

6. Requiring the reporting of W-2 earnings for a 12-month period other than the calendar year will pose challenges for some employers.

Under the EEOC’s proposal, employers would be required to report total W-2 earnings for a 12-month period that is not a calendar year. The EEOC commented that although W-2 earnings data may not currently be compiled until the end of a year, generating a 12-month report “at any given point in time should not be complicated for employers with automated payroll systems.”²³ Alternatively, the EEOC suggested that an employer could use quarterly payroll reports to obtain the required data.

While it may be possible that reporting W-2 earnings on a non-calendar year basis could be a fairly simple task for those employers with access to the appropriate technology system, this question should be explored through a pilot study or other similar means. We have received feedback, however, that this might not be the case, and that rather it could be challenging for payroll systems to compile earnings data for a period that spans two calendar years.

COMMENTS RELATED TO CONFIDENTIALITY CONCERNS

The current EEO-1 consists of relatively less sensitive and somewhat more public information than what the revised EEO-1 would contain. In other words, one can observe a workplace to get an idea of how many males, females, and people of different races/ethnicities are employed by an employer. By requiring employers to begin reporting pay data on the EEO-1, the EEOC would be changing the EEO-1 into a report that contains highly confidential information that most employers do not want made public to their employees or competitors. As a result, our members are very concerned that the EEOC have an adequate plan to (1) prevent the publication of data except on an aggregate basis across all employers (or, at a minimum, on an industry-wide basis or through a means of similar scale), and (2) protect the confidentiality of any pay data collected both against data breaches and when permitting other parties access to the data. With 1,680 cells in which to indicate a particular employee’s job category, pay band, race/ethnicity, and sex, it would be a simple task in many cases for employees to determine in which cell they were placed – and the cells (and pay ranges) of their colleagues.

²² 81 Fed. Reg. at 5,116.

²³ *Id.* at 5,117.

The EEOC's proposal noted that the employer stakeholders who participated in the 2012 work group (as described above) expressed confidentiality concerns, *even if* pay data were only published in aggregate.²⁴ The EEOC provided in a footnote that "[t]o allay these concerns, the EEOC intends to re-examine the rules for testing statistical confidentiality for publishing aggregate data to make certain that tables with small cell counts are not made public."²⁵ In order to understand and determine whether the EEOC has taken sufficient steps to prevent reporting in a manner that would expose employers' confidential information, we ask the EEOC to conduct such re-examination prior to implementing its proposal and allow employers the opportunity to provide further comments on what the EEOC proposes as its methodology.

In addition to ensuring that the EEOC's methods of reporting EEO-1 pay data do not reveal sensitive information, we are concerned more generally about data protection, especially with respect to the threat of data breaches and the other agencies and groups with whom the EEOC shares its data. As described in the NAS Report, we understand that the EEOC shares EEO-1 report data with other federal agencies and state-level fair employment practices agencies ("FEPAs") through informal arrangements that are often not backed by the force of law.²⁶ Prior to making the EEO-1 data collection much more sensitive through the addition of pay data, we ask the EEOC to take steps to ensure that the agencies and any other persons with whom it shares information have confidentiality protections and penalty structures in place, similar to those that EEOC employees and researchers are subject to themselves, as well as vigilant procedures to protect against data breaches. As the NAS Report also indicates, those steps could include the pursuit of legislation to increase the protection afforded EEO-1 data.

* * *

The above comments reflect our and our members' primary concerns about the lack of utility that will be achieved through the EEOC's proposal and the corresponding burden on employers. As stated above, we believe that alternative methods of detecting and addressing discriminatory pay practices should be considered that do not involve reporting employee pay data on the EEO-1. Should the EEOC nevertheless move forward with its proposal, there are numerous other aspects of the proposal that would need clarification or modification in order to make the proposal actionable. In this regard, we commend to you the comments to be submitted by the National Payroll Reporting Consortium ("NPRC"), which address many of these technical points.

Again, we appreciate the opportunity to provide comments on the EEOC's proposal to revise the EEO-1 to begin collecting employee pay data from certain employers. If

²⁴ *Id.* at 5,115.

²⁵ *Id.* at 5,115 n.18.

²⁶ NAS Report at 84.

you have any questions or would like to discuss these comments further, please contact me at 202-289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council