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VIA FEDERAL eRULEMAKING PORTAL: <http://www.regulations.gov>

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

Re: Comment on the Equal Employment Opportunity Commission’s Proposed Revision of the Employer Information Report (EEO-1) by Berkshire Associates Inc.; ID: EEOC-2016-0002-0001/Federal Register Document Number: 2016-01544

Dear Ms. Wilson:

Berkshire Associates Inc. (“Berkshire”) submits the following comment in response to the proposal by the Equal Employment Opportunity Commission (“EEOC”) to seek a three year approval under the Paperwork Reduction Act (“PRA”) for an annual data collection tool which would require all employers with 100 or more total employees to provide summary compensation data and total hours worked for employees by job category listed in the Standard Form 100 (otherwise known as the “Employer Information Report EEO-1” or the “EEO-1 Report”) by race, ethnicity, and sex.

BACKGROUND ON BERKSHIRE AND ITS CLIENTS

Berkshire is a human resources consulting and technology firm specializing in affirmative action compliance and applicant data management. Berkshire’s clients vary in size from small establishments with one affirmative action plan (“AAP”) to nationwide employers with thousands of employees covered by multiple AAPs. These employers may file one EEO-1 Report each year or hundreds. Berkshire’s services are utilized by employers in a wide range of industries, including hospitality, food services, retail, information technology, manufacturing, professional services, health care, colleges, universities, and not-for-profit organizations. One of the clients for whom we file EEO-1 Reports, Exelon Corporation, testified at the EEOC’s hearing on this topic.

In business since 1983, Berkshire was one of the first companies to provide an automated way of preparing AAPs for employers. Hundreds of federal contractors and subcontractors, as well as other independent consultants, use Berkshire’s proprietary software to prepare compliant

AAPs on an annual basis. A certified small business enterprise, Berkshire also provides outsourcing and consulting services to employers, including federal contractors and subcontractors. Berkshire consultants help employers prepare thousands of AAPs every year and regularly assist employers during compliance reviews by the Office of Federal Contract Compliance Programs (“OFCCP”).

Berkshire also assists its clients with other reporting requirements, including the filing of thousands of EEO-1 Reports and the annual veteran employment report required by the Department of Labor’s Veterans’ Employment and Training Service. In 2015, Berkshire filed over 17,000 EEO-1 reports for over 120 clients. These reports covered more than 680,000 employees.

Berkshire has created a proprietary, commercial software product ‘BALANCEaap’ that is used to generate AAPs, EEO-1 Reports, and VETS-4212 Reports. Berkshire uses this product internally to generate EEO-1 Reports (both PDF copies for use when manually entering the data into the EEOC’s online system and the TXT file for data upload) for our consulting clients. In addition, Berkshire’s software clients also use our product to generate their reports. We estimate that it took over 345 hours to develop and test functionality in our software. In addition, we spent another 6 hours in September of 2015 to make updates to our software when the EEOC made unexpected changes to the requirements of the EEO-1 Report data file by requiring federal employer identification numbers (“FEIN”) for each establishment. This change was not communicated by the EEOC, and was noticed only after one of our staff members attempted to test a client’s data file.

Berkshire also regularly assists clients in conducting self-assessments of their compensation systems, including by performing statistical analyses of compensation practices. Berkshire prepares an average of 600 salary equity analyses each year for clients of various sizes. For example, in 2015, we completed salary equity analyses covering approximately 260,000 employees. The size of the employers we worked with ranged from 53 employees to over 25,000 employees.

On average, salary equity projects are active for 60 days. Depending on the size of the employer, the nature of the employee groups being reviewed, the issues raised by preliminary analyses, and the responsiveness of the client in investigating identified pay differences, a salary equity analysis may take Berkshire anywhere from five to over 30 hours to prepare. This time estimate does not include time spent by the client collecting the initial data to be analyzed, answering any data questions, or verifying whether there are legitimate explanations for any identified pay differences. When Berkshire performs salary equity analyses for its clients, we generally analyze the pay of employees by job title because we expect these individuals to be similarly situated in terms of the work they perform, although that is not always the case. If a client wishes to look at its pay system from a broader perspective, we may conduct analyses by pay grades. We rarely perform analyses by EEO-1 job category because the groupings are too broad to be meaningful.

In preparing these comments, Berkshire relied on its own experiences in assisting clients with affirmative action compliance, EEO-1 Report filing, and salary equity analyses for more than 20 years. Berkshire also surveyed its clients to gather additional data regarding the estimated burden of the agency’s proposal. Berkshire and its clients strongly support equal

employment opportunity and the importance of pay equity. To that end, we recognize the important roles the EEOC and OFCCP play in ensuring that employees are paid in a non-discriminatory manner, without regard to their sex, race, ethnicity, or other protected basis. While we support the EEOC's and OFCCP's commitment to rooting out all forms of employment discrimination, including compensation discrimination, based on our experience in preparing and filing EEO-1 Reports and performing salary equity analyses for clients, we are concerned that the proposed data collection will have limited utility. We also believe that the new reporting requirement will impose significant costs on employers.

Our comments primarily focus on the costs of the proposed data collection. However, we share the concerns about the limited utility of any uniform compensation data collection tool which have been expressed by the many other organizations who also regularly help employers with equal employment opportunity compliance. Rather than reiterate those concerns here, we specifically incorporate herein the comments of the United States Chamber of Commerce ("Chamber") regarding the limited practical utility of the proposal. Berkshire is an active member of the Chamber and shares that organization's concerns that the data collected by the EEOC will be meaningless for identifying those employers whose pay differences are likely to be because of discriminatory behavior. While we provide some suggestions below for how the EEOC might mitigate some of the costs associated with its proposal, we urge the agency to implement a more robust pilot program using actual employer compensation data to better evaluate both the utility and costs of the proposed tool before imposing a new annual reporting obligation on employers.

COMMENTS ON THE PROPOSAL

I. THE EEOC'S PROPOSAL

Under the EEOC's proposal, covered employers with 100 or more employees (50 or more employees if a federal contractor or subcontractor) would continue to file the data required by the current EEO-1 Report – gender, race, and ethnicity information for each employee in ten EEO job categories ("Component 1" of the EEOC's proposal). Beginning in 2017, employers with 100 or more employees also would file a "Component 2" report, which would include W-2 wage and total hours worked information for all workers in each of the 10 job categories by race, ethnicity, and sex within 12 proposed pay bands. The proposed data collection would be filed for the headquarters and each establishment of a covered filer by September 30 of each year, along with a consolidated report.

Although the proposal does not specify, it is our understanding that the W-2 wage information to be reported is the same as that proposed by OFCCP in its earlier compensation data collection tool: the wage figure provided on Box 1 of each employee's W-2 Wage and Tax Statement. Total hours worked is defined as the number of hours worked by all employees in the job category by race, ethnicity, and sex within each of the 12 proposed pay bands. As a result, the reported W-2 wage and total hours worked data would not be a snapshot, as are the current reporting requirements for race, ethnicity, and gender. Instead, employers would report each employee's total hours worked and W-2 wage information for the 12-month period preceding the selected payroll snapshot date, which can be any payroll period occurring in the months of July through September of the filing year. Thus, in all cases, the W-2 wage and total hours worked information to be reported would cross two calendar years.

The agency's stated goals for the data collection are to (1) "assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities;" (2) develop unspecified "software tools and guidance for stakeholders to support analysis of published aggregated EEO-1 data;" and (3) "encourage employers to self-monitor and comply voluntarily if they uncover pay inequities."

II. THE CURRENT EEO-1 FILING PROCESS

Before commenting on the EEOC's proposal, we think it is critical that the EEOC understand the way most employers collect, verify, validate, and report data on the current EEO-1 Report. As outlined in the attached affidavit (Exhibit 1), the process—even using the EEOC's electronic filing system—is far more complicated than is reflected in the EEOC's current burden estimate of 3.4 hours per filer.

Generally speaking, the process begins with an employer's collection of race, ethnicity, and gender data from employees. Employers gather this data through a voluntary self-identification process whereby each employee is asked to voluntarily provide their race, ethnicity, and gender for reporting purposes. This data is collected from every new employee that enters the workforce in the given reporting period. Many employers also allow current employees to update this information at any time, even if previously reported. Increasingly, many more employees are declining to provide this information to their employer, particularly race information. In those cases, the employer is to use "employment records or observer identification to identify the race, ethnicity of ALL employees . . ." for the EEO-1 Report. In such cases, the employer often has to ask a manager at the particular facility if he or she can visually identify the person's gender or race/ethnicity.

Employers also have to assign each employee to one of the ten EEO-1 job categories. Many employers use the *EEO-1 Job Classification Guide* or the EEO-1 Census Codes Cross Walk to properly assign particular jobs to the ten broad job categories. In our experience, many employers need to update this information for at least a handful of jobs every filing cycle, either because the position is new and has not yet been classified by the employer, or because the job has changed, warranting a new classification. Like observer identification, assigning EEO-1 job category is typically a manual process, even if the data is ultimately stored electronically.

Once this information is collected, the data has to be maintained for reporting to the EEOC by September 30 of each year. Many employers use a human resource information system ("HRIS") for this purpose. Most HRIS store an employee's race, ethnicity, and gender information within each EEO-1 job category. This stored information is based on user input and is, therefore, subject to error, particularly at larger employers where multiple individuals may enter data into an HRIS. Moreover, smaller employers may not have an HRIS, and may instead simply store the self-identification information on paper forms that must be manually compiled and tabulated into the ten EEO-1 job categories each year.

Each EEO-1 Report filing cycle all covered employers must select a payroll snapshot date to begin the annual filing process. This payroll snapshot may be any payroll period between July 1 and September 30. Once a payroll period is selected, employers must gather the stored information regarding each employee's race, ethnicity, gender, and EEO-1 category. The employers Berkshire works with do this by compiling a roster of all employees who were

employed during the payroll period in question. Other employers may use a specific HRIS summary reporting function to extract the data needed to file their EEO-1 Reports. These employers also need access to the underlying detailed information for each employee in order to verify the data in the summary report (i.e. in order to identify by name the 15 Black females in EEO-1 job category 1.1). Still other employers gather this data manually by first identifying the employees employed during the relevant period, and then matching those employees with available race, ethnicity, gender, and EEO-1 job category information.

The next step is data validation. During this process, employers generally use visual observation to assign race, ethnicity, and gender to employees whose information is missing. Employers also must review and update EEO-1 job category assignments. Employers with more than one establishment must ensure that all employees are assigned to the correct establishment, and that the establishment information is complete and accurate. These employers also must update the EEOC's online system listing of establishments. In our experience, the period of time needed for thorough data verification and validation can be extensive, often requiring three to four times the estimated 3.4 hours of time.

Once these steps are complete, the employer is finally ready to submit its EEO-1 Reports. Although there are technically three filing methods, most employers tend to use one of two methods: (1) manual entry into the EEOC's online filing system or (2) batch uploading of files by email to the EEOC. Most, if not all, single establishment employers file their EEO-1 Reports using the first method. In our experience, even larger multi-establishment employers use this method. In fact, Berkshire itself uses this method whenever the number of EEO-1 Reports to be filed is less than about 20 reports per filer. If an employer has an HRIS, there is typically a standard report that they can generate to then use as a guide when manually entering their information into the online system. Importantly, even though the EEOC's online system is electronic, and a report can be generated from an HRIS, the actual entering of the required information into each cell of the current report requires manual keying.

A smaller number of clients generate a prescribed TXT or CSV file and use the "data upload" process. Berkshire generally uses this process whenever 20 or more EEO-1 Reports will be filed for a single employer. Once the TXT or CSV file is generated, it must be tested using the EEO-1 Survey site. If an employer has more than 2,000 establishments, they must break up the file and test it in batches. This is a cumbersome and time-consuming process.

The test site reviews the data and lets the employer know if there are issues with any particular establishments. If there are errors for existing establishments, it will report the EEO-1 Unit Number and let the employer know the reason for the error or warning. These issues then need to be researched and fixed in either the employer's HRIS or within their vendor's EEO-1 Reporting tool. Unfortunately, if the error or warning is occurring at a new location, the test system can only tell the employer the line in the text file that is returning the error or warning. It requires the employer to then open the TXT or CSV file in a compatible program to look for the specific line of data to determine what correction needs to occur. After fixing the error, the employer must log back into the system and test the file again.

Once the file is appropriately tested, the EEOC requires that employers email the data file along with the closed location spreadsheet. The EEOC does not provide a secure transmission site for this purpose. Once the file is emailed, employers typically receive an automatic response

letting them know they will be contacted once the file has been uploaded. Our experience is that there is a 1-2 month lag between when the file is emailed to the EEOC and when it is uploaded to the EEO-1 Report online system. After the file is uploaded, employers must log into the online system and review the results of the upload. Our experience is that although the file was tested and accepted, at least 20% of the establishments are marked as ‘Incomplete’ and require a manual review.

Under either filing system, once all data checks are completed, the employer must certify the EEO-1 Reports for that year. In doing so, the employer must affirm that all reports are accurate and prepared in accordance with instructions. Importantly, the EEO-1 Report itself specifically states that “WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE, TITLE 18, SECTION 1001.”

III. EEOC’S REVISED BURDEN ESTIMATE FOR THE CURRENT FILING PROCESS IS INACCURATE.

Until this proposal, the EEOC estimated the burden of filing the current EEO-1 Report on a “keystroke” basis. Accordingly, the EEOC previously estimated the burden of filing the current EEO-1 Report – which requires 180 cells of data entry per filed report – at 3.4 hours per report filed. In its current proposal, however, the EEOC dramatically revises this burden estimate to a mere 3.4 hours per filer, regardless of the number of EEO-1 Reports each filer may need to submit.

As the above summary of the steps required to file the current EEO-1 Report illustrates, it is virtually impossible for any filer to collect, verify, validate, and report data on the current EEO-1 Report in 3.4 hours. EEOC’s revised estimate seems to focus solely on the reporting element, while completely ignoring the extensive collection, verification, and validation process that employers undertake to be able to file and certify their EEO-1 Reports. Underlying the EEOC’s revised burden estimate is the mistaken assumption that the agency’s online filing system somehow allows employers to conduct all of these tasks at the click of a button. As noted above, however, the data collection, verification, and validation process is a time-intensive manual process, requiring updates each year because the employees being reported on are not the same, nor do employees remain in the same job categories or locations. As a result, the reports do not magically become easier to file after the first year of reporting – each reporting year demands nearly the same level of data collection, verification, and validation. Moreover, for most employers, even the annual reporting element requires manual keying, since most employers do not use the batch upload method.

To illustrate the complexity of filing EEO-1 Reports, Berkshire examined its available data regarding the amount of time it took our company to file 2015 EEO-1 Reports for clients of various sizes. As noted above, in 2015, Berkshire filed over 17,000 EEO-1 reports for over 120 clients. These reports covered more than 680,000 employees. More than 50% of the time, it took us more than 3.4 hours to file the EEO-1 Reports of a particular client. Our time varied based not only on employer size and number of reports filed, but also because of the number of HRIS systems utilized by the client, the number of workplace changes, such as acquisitions or mergers that took place, and the integrity of the initial data provided to us by the client. Accordingly, it did not take more time for just large employers. Filing the EEO-1 Reports for some small employers who filed only a handful of EEO-1 Reports also required more than 3.4 hours.

Importantly, our time estimates do not include the time it took our clients to initially collect race, ethnicity, and gender information from employees, to update EEO-1 job category information, or to answer any of our data verification and validation questions. Because many of our client's EEO-1 Reports are prepared in conjunction with affirmative action obligations, Berkshire also is able to gain data verification efficiencies through its process, since the data is used for two purposes. As a result, the above time estimates underreport the amount of time it might otherwise take for us to process this data and for our clients to verify and validate these data elements.

Berkshire also conducted an informal survey of its clients who file their own EEO-1 Reports. In terms of filing methods, 87 of those who responded indicated that they manually entered their data into EEOC's online filing system, while 17 stated that they used the batch upload system.¹ Of the 105 who provided us with information about their 2015 EEO-1 Report filing experience, more than 80% indicated that it took them more than 3.4 hours to file their EEO-1 Reports. Almost 25% of responders indicated that it took more than 4 times the amount of time EEOC estimated. All respondents who indicated it might take fewer hours manually entered data into EEOC's online system and reported a total workforce of less than 1,000 employees.

In light of the above empirical data, we urge the EEOC to revisit its burden estimate of the current EEO-1 Report requirements before it adds more requirements. To obtain a more realistic estimate of the time it takes to file the current EEO-1 Report, EEOC could implement a voluntary survey tool for the 2016 filing cycle. Each filer could be asked to complete a survey that collects relevant burden information after certifying their 2016 EEO-1 Reports. The survey could ask how long it took the employer to collect, verify, validate, and report data on the current EEO-1 Report. The survey also could ask for information about the number of employees who assisted with the process, from those who collected the data, to those who verified or reviewed the data, to those who filed the data with the EEOC. This data could then be used to build a more detailed and reliable estimate of the costs of the proposed revisions.

IV. THE TIME AND COST OF COMPLYING WITH THE PROPOSED REVISIONS TO THE EEO-1 REPORT

Berkshire also believes that the EEOC has significantly underestimated the costs of complying with the proposed collection of compensation and hours worked information. In its proposal, the EEOC estimates that it will take each filer 6.6 hours to file all required EEO-1 Reports. This estimate is, again, without regard to the number of reports that each filer may have to submit. The EEOC estimates that this work will be performed by an administrative employee, earning \$24.23 per hour, for a total cost per filer of \$159.92. The EEOC also estimates that each filer will spend 8 hours in one-time costs to develop queries related to Component 2 in existing HRIS systems. The EEOC estimates that this work will be performed by one person at a wage rate of \$47.22 per hour, for a total one-time implementation burden of \$377.76 per filer.

¹ Two stated they utilized paper filings. Because respondents were not required to answer every question, the number of respondents who answered this question is different than the number of respondents who estimated the amount of time it took them to complete their EEO-1 Reports.

A. The first year implementation costs are far greater than estimated

Requiring that employers provide W-2 wage information would require extensive research and data entry for most employers. Many employers do not maintain W-2 wage information, EEO-1 job category, and race, gender, and ethnicity information in a single, centralized system or database. In light of this, we believe that many of the small to mid-size employers we work with will have to manually compile this information on an annual basis. For larger employers, where manual tabulation is simply not possible, responding to a compensation data collection tool that requires reporting of W-2 wage information by EEO-1 job category will require a capital investment in new systems or programs. The EEOC significantly underestimated the burden associated with these tasks in its proposal.

Our informal survey of clients indicated that more than 1/3 of those who responded do not currently use the same HRIS and payroll provider. Regardless of whether the same or different vendors were used for HRIS and payroll reporting, more than 85% of respondents estimated that it would cost more than \$378 to implement the proposed changes at their workplace. The costs rise exponentially for larger employers, who may have multiple different HRIS, payroll, and timekeeping systems for different employees, geographic areas, or business units. For example, it is not uncommon for companies that recently merged to utilize multiple HRIS and payroll providers. Yet many of these entities still must file their EEO-1 Reports in a consolidated fashion, thereby requiring that these employers not only integrate one to three IT systems, but many, many more.

As a vendor who will also need to revise its software if this proposal is finalized, Berkshire estimates that it will require a total of 252 hours to update our software to comport with the proposed changes. Berkshire estimates that two members of our Client Services team will need to review the EEOC's final data requirements to advise our product development team on the necessary revisions; this is likely to require a minimum total of four hours. Berkshire further estimates that at least three members of our product development team will need to be involved with reprogramming and testing our software module to comport with these revised specifications. We estimate that reprogramming will require a total of 160 hours of time. We also estimate that Client Services team members will spend an additional eight hours of time reviewing and commenting on draft programming modules before the revised product is finished. Finally, Berkshire estimates that 80 hours will be spent testing the revised software to ensure that it works as intended.

B. The annual burden of filing Component 1 and 2 is significantly more than estimated

The EEOC estimates that it will take each filer 6.6 hours to file both components of the EEO-1 Report. In reaching this estimate, the EEOC estimates that it will take one hour for each filer to read the instructions and 5.9 hours to collect, verify, validate, and report data on both Component 1 and Component 2. The agency provides little detail as to how it arrived at these burden estimates, but it is clear that the agency relied on the same misguided assumption that it did when recalculating the current burden costs. As noted above, electronic filing, rather than paper filing, does not eliminate the need for filers to manually key the data into each relevant cell

for each establishment, headquarters, and establishment report. Given this fact, it seems highly unlikely to us, based on our experience in filing hundreds of EEO-1 Reports each year, that an employer who files a mere 5 EEO-1 Reports will be able to collect, verify, validate, and report data in the 18,300 cells required for both Component 1 and Component 2 (3,660 cells per EEO-1 Report x 5 EEO-1 Reports) in 5.9 hours or less.

Those clients who responded to our informal survey agreed with our conclusion. Of the 91 providing a response, about 96% believe that it will take more than 6.6 hours to collect, verify, validate, and report data on both Component 1 and Component 2 of the EEO-1 Report. More than 60% of these clients estimated that it would require at least 16 hours per year to file the revised report, with many suggesting that the revised report would take more than 30 hours to file. Almost 84% of the clients who responded to questions about the cost of annual report filing estimated the cost to be greater than the \$160 per filer estimated by the EEOC.

Furthermore, if the EEOC believes that the “mere reporting” of compensation data is likely to encourage employers to self-monitor and comply voluntarily if they uncover pay inequities, it cannot be the case that the EEOC also believes that a single administrative employee paid \$23.24 per hour will collect, verify, validate, and report the data required by the proposed data collection. Quite simply, the agency cannot simultaneously minimize the burden of the proposed data collection by saying a low-level administrative employee will handle the reporting and then, in the same breath, maximize the benefit of the proposed data collection by asserting that the proposed reporting will encourage employers to voluntarily address any pay disparities identified through the reporting process. While working with employers to perform in-depth salary equity analyses, it is Berkshire’s experience that numerous individuals are involved in compiling the required data, researching any preliminary results, evaluating the identified reasons for any pay differences, and determining whether remedial measures should be taken. These individuals may range from a data entry clerk to a human resource professional to a compensation specialist to an internal or external legal counsel. As noted above, Berkshire’s salary equity projects are often active for 60 days or more, and consume many, many hours of vendor and client time.

In sum, understanding the reasons for raw wage disparities, and determining whether any part of such disparities is due to race or gender, is far more complicated than suggested by the EEOC’s annual burden estimate. Because Title VII protects both men and women, and individuals of all races, employers cannot simply adjust the wages of employees because of an identified raw wage gap without fully satisfying themselves that legitimate, nondiscriminatory reasons cannot explain the difference in pay, thereby justifying remedial action. It is disingenuous of the EEOC to suggest that employers will use this reporting requirement to actively monitor their pay practices, while also estimating that an administrative employee will perform all of this work in 6.6 hours.

V. THE IMPORTANCE OF SECURE FILING AND CONFIDENTIALITY

Based on our experiences with the current EEO-1 Report filing process, Berkshire is concerned that the EEOC has not sufficiently evaluated how it will safely collect and appropriately use the proposed wage information. There are two reasons for our concerns: (1) the current lack of a secure transmission portal for sending the data to the government; and (2) the lack of guaranteed confidentiality once the data is submitted.

First, Berkshire believes that the EEOC has significantly underestimated the changes that might need to be made to the current report filing system before it will be ready to securely and efficiently collect the proposed data from employers. We think it is likely that many more employers will seek to use the batch upload feature if the proposed revisions are finalized, because of the sheer increase in the number of data cells that would otherwise need to be manually entered into the EEOC's electronic system. Under the current EEO-1 Report, employers manually enter 180 data cells for each establishment. Under the proposal, employers would need to manually enter more than 3,600 data cells for each establishment. Because of the magnitude of change in the number of data entry cells, we believe that many more employers will seek to use the batch upload filing method.

Currently, employers must email their batch upload to the EEOC without the ability to encrypt or password protect the file since there is no mechanism for providing a password to the receiver. EEOC does not provide a secure transmission site for this purpose. Berkshire respectfully submits that this approach, while perhaps adequate for the collection of employee race, ethnicity, and gender information, is wholly inadequate for the transmission of sensitive pay data. Other agencies that require the submission of W-2 wage data provide secure channels for transmission. *See, e.g.,* Internal Revenue Service website, available at <https://www.irs.gov/uac/efile-with-Commercial-Software> (last visited March 22, 2016) noting that electronically filed submissions that are uploaded rather than entered directly in the IRS' online system are "securely transmitted through an IRS-approved electronic channel . . . because e-mail is not as safe as our secure channels." In evaluating the feasibility of a more secure portal, the agency should keep in mind that many employers have firewalls that prohibit or severely restrict the transmission of data over the Internet, including the size of files that may be transmitted. Similarly, any electronic submission system should be designed to permit secure encryption of data and password protection for all data uploads.

The EEOC's cost estimates do not appear to include the creation of a secure transmission method for sending these batch files to the agency. The only identified costs to the government are increases to the EEOC's internal staffing costs and the cost of the current contract with EEOC's designated vendor. *See also* OFCCP's FY 2017 Congressional Budget Justification, available at <http://www.dol.gov/sites/default/files/documents/general/budget/CBJ-2017-V2-10.pdf> noting OFCCP's FY16 plans to establish a secure file transfer protocol site to allow federal contractors to securely submit AAP data, including compensation information, to the agency. We also do not believe that an employer should be responsible for encrypting its own data, as was suggested at the public hearing. In our experience, most employers do not currently have a secure transmission site of their own. Indeed, most of Berkshire's clients use our secure transmission site for sending and receiving sensitive information to us. If the EEOC continues to maintain that data security is the responsibility of filers, EEOC should then add the cost of employer creation of a secure file transfer site for this purpose in its burden estimates.

Second, Berkshire recommends that the EEOC and the OFCCP take more concrete steps to protect the confidentiality of employee pay data from a cybersecurity attack or otherwise unauthorized disclosure. The EEOC's proposal, even after exempting employers with less than 100 total employees and accounting for the fact that the collected pay data is reported by pay band, would still gather very specific compensation information by specific establishments, including very small establishments. For many small employers, and even larger employers with

small establishments or few employees in certain EEO-1 job categories, reporting data in this manner will result in the reporting of individual, employee-level data, albeit by pay band. The EEOC's proposal also indicates that the EEOC will publish the compensation data of employers in an aggregated format, and testimony provided at the public hearing revealed that the agency regularly makes establishment-level EEO-1 data available to some unspecified group of academic researchers.

Based on our experience with helping employers provide individual employee-level compensation data to the OFCP during compliance reviews, we know that compensation data is especially sensitive and confidential – to both employees and employers. Release of an individual's compensation information – through the Freedom of Information Act (“FOIA”), by intentional misappropriation, or through a database of aggregate compensation information – poses serious concerns to the employers with whom Berkshires works. Likewise, it is not hard to imagine that many employees would not want to have their compensation information made publicly available because of a cyber security breach of the EEO-1 Report filing system. Although we understand that the EEO-1 Report online filing system has not been breached heretofore, it also did not contain such valuable data as it will going forward. For this reason, Berkshire urges the EEOC not to move forward with the implementation of any compensation data collection tool until appropriate data security safeguards are developed, tested, and perfected to ensure protection of employees' pay data.

We also urge the EEOC to develop protocols for safely transmitting this information to OFCCP, other federal civil rights agencies, and state and local fair employment practices agencies. All data should be submitted via a secure file transmission site. The receiving agency should have to certify that it will maintain the data on a secure internal site. In the case of the OFCCP, the agency should take affirmative steps to provide this data more protection than is provided under the current Freedom of Information Act process, which provides that such data will be produced unless the employer makes timely affirmative objections. For example, we are aware of instances where the OFCCP has sent an employer's EEO-1 data to a different employer during a compliance review. We also are aware of instances where the agency has “lost” personnel activity information because it was stored on an individual computer of a former employee, on a laptop taken home by employees who work remotely, or for other reasons. If the OFCCP does not believe it has the authority to offer employers and employees the same confidentiality protections afforded by Title VII of the Civil Rights Act of 1964, as amended, we suggest that the OFCCP seek an amendment to Executive Order 11246 in order to ensure such protection.

VI. SUGGESTIONS FOR MINIMIZING THE FILING BURDEN

Although we question whether a uniform compensation data collection tool of any kind will be useful because of the complexity of pay decisions, we do believe there are some steps the EEOC could take to minimize the burden of an annual data collection tool.

A. Change the wage unit to be reported

Under the EEOC's current proposal, employers would be required to report W-2 wage information for employees. The agency's proposed collection of W-2 wage information is misplaced for several reasons. First, the proposal will not allow the government to compare

comparable compensation data points, and is inconsistent with the manner in which most employers currently evaluate salary equity issues. Second, the proposal does not appropriately minimize the burden on employers, when other more readily available data points would allow the EEOC an adequate window into employer's pay decisions.

W-2 wages are defined broadly by the IRS to include payments by an employer to an employee for parking and mass transit stipends, military stipends, relocation and travel stipends, expense reimbursements, 401(k) contributions, severance payments, deferred compensation, and profit sharing, in addition to any wages. The 2016 General Instructions for Forms W-2 and W-3, are available online at <https://www.irs.gov/pub/irs-pdf/iw2w3.pdf> (website last visited March 22, 2016). As a result, the W-2 wage information reported in Box 1 includes payments to employees that are driven by reasons other than the employer's decision as to how much total compensation an employee has the potential to earn. Because of this, collecting W-2 wage data will not allow the EEOC or OFCCP to evaluate comparable compensation data points – a key issue if the agencies want to use the data to identify pay disparities that may be based on race or sex.

In helping employers conduct salary equity analyses, Berkshire has never once used W-2 wage information as the basis for analysis, nor has a client ever asked us to analyze employee pay using that unit of analysis. This fact seriously undermines one of the EEOC's stated objectives for the proposed data collection, which was to encourage employers to use the collection process as an opportunity to proactively examine their own pay practices. When conducting salary equity analyses, Berkshire generally begins each salary equity analyses by first looking at base pay because this allows clients to analyze more comparable data points. Another reason W-2 wage information is not used is because W-2 earnings data may not align with an employer's AAP year or the employee's performance review process, which is when most of our clients typically perform large-scale salary equity analyses. Although Berkshire has helped clients evaluate other pay components, such as bonuses or commissions, or the availability of overtime, we often conduct these analyses after first analyzing base pay.

The primary challenge with using a wage unit other than base pay is that the pay can be heavily influenced by employee choice, rather than the wage opportunity offered by the employer. For example, two Professional employees, one male and one female, may earn the exact same base pay, bonus and other compensation, but if the female contributes fully to her 401(k) account and the male employee does not, it will appear that the male employee is earning almost \$20,000 more. Providing hours worked for these two employees will shed no light on the legitimate, nondiscriminatory reason for the raw difference in pay. Likewise, while shift differential pay would be included in the W-2 wage amount, the proposed data collection does not include a way for employers to indicate which shift each employee worked, even though employee shift selection may be an important reason for any raw pay differences between men and women. Accounting for these decisions in a robust salary equity analyses would require coding of these employee choices – an impossible task for employers.

Providing W-2 wage information is also problematic because the EEO-1 report is intended to be a "snapshot" of an employer's workforce – what the workforce looks like in a given payroll period. Unlike employee race and gender information, which generally does not change, an employee's pay is fluid and changes regularly. An employee's pay can change within a single 12 month period for a myriad of reasons, such as promotions, other career changes, merit or cost of living increases, or excused leaves of absence. These types of changes will

greatly impact the W-2 wage information reported for that employee in a particular 12 month period, even where a snapshot approach would show that he or she is earning the same as employees of different races and genders performing the same or similar work during the relevant payroll period.

There are a myriad of examples that illustrate these challenges. For example, if a female is promoted into a higher role mid-year, her W-2 wage information will necessarily be lower than others who have been working in the same position the full 12 months, even if she is being paid the same total compensation. Similarly, two employees may have the same stock options available to them, but may choose to cash them out in two different reporting years. Using W-2 wages would make it appear that one employee received significantly more compensation than the other, even though both had the same benefits. Likewise, two sales employees may report different W-2 wage information in a calendar year if one of the sales employees receives a \$25,000 signing bonus that year. This will be the result even if the other employee received the same \$25,000 signing bonus when he or she began employment in a different calendar year. In each of these examples, providing hours worked information will not account for the legitimate, nondiscriminatory reason for the difference in pay.

Given these limitations, Berkshire believes that annualized base salary or wage rate is a more meaningful data point to collect, if a compensation reporting obligation is implemented. Importantly, taking this approach removes the significant tension between the current “snapshot” approach of the EEO-1 Report and the agency’s current proposal. This approach also significantly minimizes the burden on filers because annualized base salary information is regularly maintained in most employers’ HRIS systems, where race, ethnicity, gender, and EEO-1 job category information is already stored. Thus, using annualized base salary or wage rate information eliminates the employer time required to gather W-2 wage information spanning two calendar years from a separate payroll system. It also eliminates the need for employers to integrate their existing payroll, timekeeping and HRIS systems, of which there may be many different ones at larger employers. Indeed, collecting annualized base salary eliminates the need to collect hours worked information altogether, which reduces the number of cells to be completed per establishment by half. Eliminating the requirement to report total hours worked also allows employers to more comfortably certify the accuracy of their reports because most employers do not collect actual hours worked information for their exempt employees.

B. Change the reporting period

If the EEOC decides to continue to require W-2 wage information, then Berkshire recommends that the EEOC change the reporting period to a calendar year reporting system. Doing so would better harmonize the reporting requirements with reporting of W-2 wage information already provided to other federal agencies, such as the IRS. Under this approach, all employers would use the same snapshot date – December 31 of each year. Employers would then report the data for each employee on the payroll on December 31 sometime in the next calendar year. This would be significantly less burdensome than the current proposal because employers would not need to aggregate W-2 wage and hours worked information over two calendar years before reporting it to the EEOC. This approach also is consistent with the manner in which most

payroll systems store W-2 wage information, which is generally used to prepare W-2 Wage and Tax Statements for the IRS.²

C. Exempt additional small establishments from reporting Component 2 data

To further minimize confidentiality and burden concerns, Berkshire recommends that the EEOC exempt small establishments of larger employers from having to file Component 2 data. For example, EEOC could exempt larger employers from having to provide Component 2 data on the establishment-level report of those locations with less than 50 employees (those that are filed as Type 6 or 8 reports). Berkshire encourages the EEOC to consider eliminating the requirement to provide establishment-level Component 2 data for any establishment of 100 or less employees. For larger employers, this data could be reported on the employer's consolidated report, much like race, ethnicity, and gender are now. Taking one of these approaches better addresses the confidentiality concerns of employees and employers, which are more pronounced in small data samples. These approaches also lower the burden on filers by significantly reducing the number of cells to be completed. We also believe these approaches are consistent with the reasons underlying EEOC's decisions to exempt employers with less than 100 total employees from the requirement altogether.

D. Develop a different reporting cycle for Component 2

Berkshire also recommends that the EEOC consider adopting a less frequent reporting cycle for Component 2 data. For example, the agency could create a rotating reporting cycle such that only a certain percentage of filers are required to file Component 2 information each year. After filing Component 2 data in any given year, that filer would not file Component 2 data again until the full rotation of filers had done so. The EEOC also could require that Component 2 be filed less frequently by all filers, such as every other year or every three to four years. Either of these approaches would better minimize the burden on filers, while still providing the EEOC with some access to compensation information.

E. Delay reporting of Component 2 data until 2018

As discussed above, the EEOC's proposal will require that some employers and all vendors make Information Technology system changes in order to collect, maintain, and report the proposed W-2 wage and hours worked information with existing EEO job category, race, ethnicity, and gender data. We believe that most employers will need at least twelve months between the date of any finalized data collection reporting requirement and the first required data collection in order to prepare for this new reporting requirement. While the agency's proposal currently provides that Component 2 will not be required any sooner than the 2017 filing cycle, the agency must recognize that the data that needs to be gathered for that report may cover W-2 wage and hours worked information for a period of time beginning as early as July 2016. To provide employers with a full implementation year to begin collecting, maintaining, and reporting the proposed data, data reporting on Component 2 should not begin until 2018. Taking this approach ensures that employers have a full year between the date the proposal is finalized and collection (not reporting) of the first required data elements. In addition, it allows employers

² Of course, this approach has limitations too. The most obvious one is that it would limit the EEOC's ability to compare workforce trends from prior year reports with those filed under the new reporting system.

adequate time to budget for these required compliance upgrades. Delaying implementation also allows employers sufficient time to confirm that they have made appropriate changes to their IT systems and that the changes will allow the employer to report the data in the format required by the EEOC.

CONCLUSION

Berkshire appreciates the opportunity to submit these comments to the EEOC. We would be happy to answer any questions you may have about the current EEO-1 Report filing process.

Respectfully submitted,

A handwritten signature in black ink that reads "Beth Ronnenburg". The signature is written in a cursive style and is positioned above the typed name and title.

Beth A. Ronnenburg
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Declaration of Beth A. Ronnenburg, SPHR, SHRM-SCP

I, Beth Ronnenburg, do hereby declare as follows:

Qualifications

1. I am over age of 18. I declare that the statements in this declaration are correct, of my own personal knowledge, and I am competent to testify concerning them.
2. My name is Beth Ronnenburg. I am President of Berkshire Associates Inc. Berkshire is a human resources consulting and technology firm that specializes in affirmative action. We prepare Affirmative Action Plans and EEO-1 Reports for federal contractors throughout the country. In 2015, we filed over 17,000 EEO-1 reports for over 120 clients. These reports covered more than 680,000 employees.

Description of the EEO-1 Report Process (Collecting, Verifying, and Validating Data)

3. Employers are required to collect ethnicity/race and gender for all of their employees. This process typically starts with an invitation for employees to self-identify once they are hired. According to the EEO-1 instructions, "if an employee declines to self-identify, employment records or observer identification may be used." The instructions also indicate that "Employment data must include ALL full-time and part-time employees who were employed during the selected payroll period..."
4. Employers also have to assign each employee to one of the ten EEO-1 job categories. Many employers use the *EEO-1 Job Classification Guide* or the EEO-1 Census Codes Cross Walk to properly assign particular jobs to the ten broad job categories. In our experience, many employers need to update this information for at least a handful of jobs every filing cycle, either because the position is new and has not yet been classified by the employer, or because the job has changed, warranting a new classification. Like observer identification, assigning EEO-1 job category is typically a manual process, even if stored electronically.

5. Once an employer chooses a payroll period for their annual EEO-1 Report submission, they must prepare the data by generating a roster that includes employee name/ID, race, gender, job code/title, EEO-1 category, and establishment identifier (if applicable). If the employer has multiple establishments, they must also collect establishment information, which includes establishment name, address, city, state, zip code, NAICS code, Federal Employer Identification Number (FEIN), EEO-1 Unit number, and DUNS number.
6. The next step is data validation. During this process the following checks must be completed:
 - Employers must confirm that all employees in the roster have a valid ethnicity and/or race and gender. If employees did not self-identify, employers undertake a variety of time-consuming efforts to appropriately identify their race, ethnicity, and gender. In most cases, this requires multiple follow-up inquiries for each employee with unknown race, ethnicity, and/or gender.
 - All job codes should be reviewed to ensure the EEO-1 category assignments are correct. Any new job codes must be assigned an appropriate EEO-1 category. Because this classification is often initially determined at the establishment level, many large employers confirm that all locations are using the same EEO-1 category for each job code as part of the data verification process.
 - Employers with multiple locations must also undertake the following specific tasks:
 - Ensure all employees in the roster have a valid establishment ID. Oftentimes employees who work from home (telework) need to be re-coded to a valid establishment and/or reviewed;
 - Ensure the establishment list includes all required information; and
 - Download the prior year location list from the EEO-1 survey website and update the establishment table with the new Unit ID #s for new locations that were filed in the prior year.

- Review all establishments with the same address to verify unique NAICS codes.

Submission of EEO-1 Reports

6. Multi-establishment employers must decide how they will file the reports for their locations that have less than 50 employees. They can choose to file either a 'Type 6' or Type '8' report. The Type 6 report just lists the establishment information and the total number of employees at the establishment. A Type 8 report is the same as the Type 4 report, which requires the completion of the detailed grid by EEO-1 category.
7. Employers next need to decide how they want to file the report. There are two primary options:
 - Manually enter the required information into the EEOC's online system. Most, if not all, single establishment employers file using this methodology. If an employer has an HRIS, there is typically a standard report that they can generate to then use as a guide when manually entering their information into the online system. It is our experience that a large number of multi-establishment employers also use this methodology.
 - Generate a prescribed TXT or CSV file and use the "data upload" process.

Submission Using the Manual Entry into the Online System

8. Employers log into the online system and review their list of establishments. New locations need to be added, and locations that have closed need to be marked as such.
9. Employers must then enter the employment details for each of their establishments. Separate reports are filed for the headquarters establishment (Type 3), establishments with 50 or more employees (Type 4), and establishments with less than 50 employees (Type 6 or Type 8). If the employer chooses to use Type 6 report for their establishments with less than 50 people, then they also need to manually enter the employment details for the consolidated report (Type 2).

10. Once all of the data is entered into the EEO-1 online system for all establishments, the employer is then prompted to 'certify' the reports.

Submission Using the Data Upload Option

11. According to Footnote 62 of the proposed EEO-1 Revision, the EEOC indicates that 2% of all filers use the data upload option. This option allows employers to generate a prescribed TXT or CSV file for a 'data upload.' Those files are typically created from their HRIS or EEO-1 vendor.

12. It has been our experience that files created from an employer's HRIS typically require customization to ensure that they are pulling the correct data. Also, it has been our experience that some HRIS do not provide the employer with the option to file Type 6 reports for establishments with less than 50 employees. The file defaults to the Type 8 format.

13. Berkshire has created a proprietary, commercial software product 'BALANCEaap' that is used to generate Affirmative Action Plans, EEO-1 Reports, and VETS-4212 Reports. We use this product internally to generate EEO-1 Reports (both PDF copies for use when manually entering the data into the online system, and the TXT file for data upload) for our consulting clients. In addition, software clients also use our product to generate their reports. We estimate that it took us over 345 hours to develop and test this functionality in our software. In addition, we spent another six hours in September of 2015 to make updates when the EEOC made unexpected changes to the requirements of the data file by requiring FEIN for each establishment. This change was not communicated to filers by the EEOC. One of our staff members noticed this new requirement when she attempted to test a client's data file. Berkshire had to notify the EEOC that the document on its website was not updated to reflect this change in the requirements.

14. Once the file is generated, it must be tested using the EEO-1 Survey site. Employers are required to log into the EEO-1 test system and have to enter their Login ID, password, company name, contact name, contact email, and contact phone number each time they need to test a file. If an employer

has more than 2,000 establishments, they must break up the file and test it in batches. This is a cumbersome and time-consuming process.

15. The test site reviews the data and lets the employer know if there are issues with any particular establishments. If there are errors for existing establishments, it will report the EEO-1 Unit Number and let the employer know the reason for the error or warning. These issues then need to be researched and fixed in either the employer's HRIS or within their vendor's EEO-1 Reporting tool. Unfortunately if the error or warning is occurring at a new location, the test system can only tell the employer the line in the text file that is returning the error or warning. It requires the employer to then open the TXT file in a compatible program to look for the specific line of data to determine what correction needs to occur.
16. Again, the process of resolving establishment-level errors was quite problematic in 2015. Without notice, the EEOC announced in August 2015 that it would not allow employers to file separate EEO-1 reports for establishments with the same address and NAICS code, even if the establishments had different FEINs. This caused many errors for employers and required numerous changes to ensure the submitted data fit these new requirements. The lack of notice by the EEOC prevented HRIS and other vendors from updating their systems in advance to ensure a smooth transition for employers.
17. In addition to the TXT file, employers are also required to create a 'Closed Location' file. They must compare the establishment list from the prior year submission to the current year submission and identify which establishments have closed. This list must include the EEO-1 Unit Number for these establishments.
18. Once the file no longer has errors, it is ready to be sent to the EEOC. EEOC requires that employers email the data file along with the closed location spreadsheet. EEOC does not use a secure file transfer site for this purpose nor is there a method for encrypting or password-protecting a file sent

to EEOC. Once the file is emailed, employers typically receive an automatic response acknowledging the receipt of the file and letting them know they will be contacted once the file has been uploaded.

19. In 2015, our experience is that there was a 1-2 month lag between when the file was emailed to the EEOC and when it was uploaded to the EEO-1 Report online system. For the 2015 reporting period, some files that were submitted prior to the deadline were not loaded until early 2016, and only after employers received a delinquent notice.

20. Once notification has been received that the file was uploaded, employers must log into the online system and review the results of the upload. Our experience is that, although the file was tested and accepted, at least 20% of the establishments are still marked as 'Incomplete' and require a manual review. A sampling of reasons why an establishment might be marked as "Incomplete" are as follows:

- Although a closed location file was submitted at the same time as the data file, in many cases, the EEOC failed to mark those locations as closed. This required the employer to manually click through those reports with no employees and mark them as closed.
- An establishment report also is marked as "Incomplete" whenever the employment count at the location was 35% greater or less than the count for the prior year. It again requires the employer to click through the report to verify that the employment count for that establishment is correct.
- An establishment report also is marked as "Incomplete" when the city name used in the address does not match the zip code, such as when the city name used was "St. Louis" versus "Saint Louis." Other instances flag if city/state/zip code do not match the current United States Postal Service zip code system, and this requires a manual correction.

21. Once all of the reports are marked as 'complete,' the employer is then able to certify the reports.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 31st day of March, 2016 at Columbia, MD.

A handwritten signature in cursive script that reads "Beth Ronnenburg". The signature is written in black ink and is positioned above a solid horizontal line that extends to the right of the signature.

Beth Ronnenburg
President, Berkshire Associates Inc.