

April 1, 2016

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

**Re: Comments of the Retail Industry Leaders Association on the EEOC's
Proposed Revisions to the Employer Information (EEO-1) Report**

Dear Ms. Wilson:

The Retail Industry Leaders Association (RILA) submits these comments in response to the Equal Employment Opportunity Commission's (EEOC's or Commission's) proposed revision of the Employer Information (EEO-1) Report as published in the Federal Register on February 1, 2016.¹ As discussed more fully below, although RILA and its members strongly support tools to end discriminatory practices, we doubt that the EEOC's EEO-1 proposal will yield relevant information. Accordingly, we recommend that the EEOC withdraw its proposal or else modify it as set forth herein.

RILA is a trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad. Nearly all of RILA's members are employers subject to Title VII of the Civil Rights Act of 1964 and covered by the annual EEO-1 reporting requirements. As detailed below, the Commission's proposal will significantly impact these members.

Executive Summary

RILA and its members strongly support equal employment opportunity and have adopted

¹ Equal Employment Opportunity Commission, Proposed Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113.

policies that prohibit discriminatory practices, including discrimination in compensation. Although we support the EEOC's efforts to enforce the law against bad actors, we do not believe that the Commission's proposed revisions to the EEO-1 Report will be useful in this endeavor. Instead, if adopted, the proposal will likely lead to enforcement efforts based on "statistics of interest" that require significant resources to investigate (and defend) but that will ultimately be found to be unrelated to any unlawful conduct.

Indeed, past efforts by other agencies to glean enforcement data from employer wage information have not led to the desired results, and there is nothing to suggest that the EEOC's efforts will fare any better. EEOC's choice to examine compensation based on W-2 wages -- a measure that includes too many variables to be useful -- heightens the probability that the proposed data collection simply will not help identify, remedy or deter unlawful discrimination. The EEOC had opportunities to demonstrate that its proposed approach would collect valuable data. Indeed, a National Academy of Sciences (NAS) Report commissioned by the EEOC set forth just such options, but the agency chose not to pursue them.²

RILA is also concerned that the EEOC's burden estimates significantly understate the cost of compliance at least in part because of the improper methodology used by the Commission. The EEOC could reduce these burdens by choosing the recommendations made below, including by adopting pay rate or annualized compensation instead of W-2 wages or by allowing employers to calculate W-2 wages based on a calendar year instead of the method currently proposed. Finally, we urge the Commission to take additional steps to guarantee confidentiality of data that is viewed as sensitive by both employers and employees.

I. The proposal is unlikely to identify unlawful pay practices effectively.

Although this is the EEOC's first proposal to collect summary compensation data, the federal government has done so before. As discussed more fully below, the Department of Labor's (DOL's) experience is instructive. Moreover, the problems that DOL encountered will

² National Research Council of the National Academies, *Collection Compensation Data from Employers* (2012).

be exacerbated by some of the specific aspects of the EEOC's proposal, including the measure of earnings chosen by the Commission and the simple fact that the EEOC is not seeking to collect summary compensation on similarly situated individuals. Given these very serious concerns, the EEOC should have taken additional steps to demonstrate that its proposal would have greater probability of success than the DOL's failed efforts.

A. *The DOL's effort to collect summary compensation data resulted in high rates of both false positives and false negatives.*

Government efforts to collect compensation data from employers to guide enforcement efforts is not new. The corollary, of course, is that the problems associated with constructing a summary compensation data collection tool to help with enforcement of nondiscrimination laws are not new, either. The example most relevant to the EEOC's current proposal is the DOL's collection of summary compensation data from employers for a five-year period from 2000 to 2004 through the DOL's Office of Federal Contract Compliance Programs (OFCCP). The data collection was part of the Equal Opportunity (EO) Survey.

OFCCP collected summary compensation data from nearly 90,000 employer establishments during the life of the survey. Employers subject to the survey requirements found the survey burdensome and doubted it helped OFCCP target enforcement resources. OFCCP contracted with an independent consultant, Abt Associates, to assess the utility of the survey. Abt found that using the survey, 93 percent of those identified as possibly engaging in systemic discrimination were false positives, meaning that most employers selected for audit using the EO Survey were not engaging in unlawful practices.³ The study also found a very high rate of false negatives, meaning that the EO Survey did not identify a sufficient number of employers actually engaging in discrimination. Taken together, the EO Survey proved no better than chance at selecting employers for audit. For these reasons, the burdens imposed on respondents could not be justified and use of the survey was discontinued.⁴

³ Abt Associates, An Evaluation of OFCCP's Equal Opportunity Survey (2005) at 33.

⁴ Office of Federal Contract Compliance Programs, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, Equal Opportunity Survey, Final Rule, 71 Fed. Reg. 53,032 (Sept. 8, 2006).

Given the failure of the DOL’s effort to construct a meaningful compensation data collection tool based on summary pay data, we question why the EEOC’s approach will prove any more fruitful. While the EEOC has proposed a different method of collecting summary data, as discussed below, these methods are no more likely to yield information that will help EEOC in detecting unlawful conduct. It is incumbent upon the EEOC to demonstrate that its data collection tool—which will impact far more employers than the DOL’s EO Survey, and impose greater burdens —will produce more relevant data. EEOC has not met, and cannot meet, that standard here.

B. Pay data based on W-2 earnings are not likely to yield information that will help EEOC identify unlawful pay practices.

The EEOC’s proposal would require employers to segment the workforce into twelve pay bands in each of the ten EEO-1 job categories. Employers must determine which pay band employees are to be counted in based on W-2 earnings. The proposal states that EEOC and OFCCP believe that W-2 wages are the best measure of compensation because W-2 wages provide a more comprehensive report of earnings at the employee level than other definitions.⁵ In addition, some witnesses at the Commission’s March 16 public hearing on the proposal also favored this standard because of its breadth.⁶

It is certainly true that W-2 wages include numerous types of pay and benefits. The scope of W-2 wages reflects policy decisions made by Congress that, in part, are designed to encourage employers and employees to engage in specific conduct, such as participating in a 401(k) plan. However, the breadth of factors included in W-2 wages also makes the measure significantly less likely to reflect inappropriate pay practices than other measures, such as base pay. W-2 wages include many factors that have nothing to do with employer decisions, such as individual decisions about which benefit plan to participate in or whether to work overtime. They also

⁵ 81 Fed Reg. at 5116.

⁶ See, for example, written testimony of Emily J. Martin, National Women’s Law Center, *available at* <http://www.eeoc.gov/eeoc/meetings/3-16-16/martin.cfm>.

include a multitude of other factors that may be set by different corporate policies, by collective bargaining agreements, by requirements set by state or local mandate, or by different officials within a company. Including all of these components in the measure of earnings makes it less likely that any one particular factor that is influenced by unlawful practices will be detected. It also makes it more likely that any observable difference in pay by demographic group is the result of chance or other legitimate factors and not a result of unlawful pay practices.

For these reasons, the use of W-2 wages as the measure of compensation further decreases the low likelihood that the EEOC's proposal will accurately identify employers engaged in pay discrimination.

C. Summary compensation data does not promote the compare similarly situated individuals.

As noted at EEOC's March 16 hearing, reporting summary compensation data by EEO-1 job category suffers from a significant flaw in that people included within the same data field may well have very different jobs and job qualifications that are not appropriate for comparison under nondiscrimination law.⁷ For example, by definition the category of sales workers includes, in addition to retail salespersons, advertising sales agents, insurance sales agents, real estate brokers and sales agents, wholesale sales representatives, securities, commodities, and financial services sales agents, and telemarketers, among others.⁸

The challenge of reporting summary data is that each reported group will include many different types of workers who are simply not similarly situated. Within each group, individual jobs will vary significantly as will the characteristics of each individual within those jobs. Some will have more experience, some more education. Some will be more efficient. Some will be part time workers, some full time, and some will be seasonal workers. None of these characteristics

⁷ See, for example, written testimony of Camille A. Olson, Seyfarth Shaw, *available at* <http://www.eeoc.gov/eeoc/meetings/3-16-16/olson.cfm>.

⁸ EEO-1 Instruction Booklet at 6, *available at* http://www.eeoc.gov/employers/eo1survey/upload/instructions_form.pdf.

will be reported on EEOC's summary compensation report. All of these characteristics, and numerous others, are required for an appropriate analysis to determine whether individuals are similarly situated and, ultimately, whether they have been unlawfully compensated.

D. The EEOC's failure to take steps called for by the National Academies of Sciences casts further doubt on the efficacy of the proposed survey.

As detailed above, we are uncertain that a summary compensation data collection tool can be developed that would help enforcement agencies with their efforts to enforce nondiscrimination laws. The fact that the EEOC has largely ignored important advice included in a 2012 report from the National Academy of Sciences about how a compensation data collection tool might be more effectively designed only heightens our concern that the proposed survey will be ineffective. Two examples of how the Commission did not follow these recommendations include the failure to adopt a comprehensive strategy for use of a summary compensation data report and the failure to conduct an effective pilot study.

1. No comprehensive plan has been developed.

The first recommendation made in the NAS Report was for the Commission, working with other enforcement agencies, to develop a comprehensive plan for the use of earnings data before initiating any data collection. The Report observed that the enforcement agencies had only articulated a general statement of purpose: that compensation data would be used to target employers for investigation regarding compliance with nondiscrimination laws. The enforcement agencies had not addressed the specific ways in which collected data would be assembled, assessed, compared, and used in a targeting operation.⁹

While the EEOC acknowledges this recommendation in its proposal, it does not describe any specific plan as to how its proposed data collection will be used. Instead, the EEOC has merely stated that it has consulted with other enforcement agencies as to how pay data might be used to "assess complaints of discrimination, focus investigations, and identify employers with

⁹ NAS Report at 2.

existing pay disparities that might warrant further examination.” In addition, the EEOC has stated that, at some point in the future, it hopes to develop “statistical tools” and “software tools” that will allow investigators to compare pay distributions in order to identify “statistics of interest.”¹⁰

A vague plan to identify and examine “statistics of interest” (itself an undefined term) using undeveloped tools is no substitute for the comprehensive plan called for in the NAS Report. As recognized in the Report, neither the burdens of the EEOC’s proposal nor its potential benefits can be properly determined without a comprehensive plan describing how pay data will be integrated into compliance and enforcement programs.

By failing to develop a comprehensive plan that explains how pay data will be used for enforcement purposes, the EEOC has abdicated its responsibility to show how the data collection tool might be useful for enforcement purposes.

2. An appropriate pilot study was not conducted.

The second recommendation made in the NAS Report was for the Commission to initiate a pilot study “to test the collection instrument and the plan for the use of the data.”¹¹ The EEOC’s proposal states that it commissioned an independent contractor to conduct a pilot study. According to the proposal:

The Pilot Study made technical recommendations about several central components of a data collection, including: The unit of pay to be collected; the best summary measures of central tendency and dispersion for rates of pay; appropriate statistical test(s) for analyzing pay data; and the most efficient and least costly methods for transmitting pay data from employers. The Pilot Study also estimated employer burden hour costs and the processing costs associated with the recommended method of collection.¹²

¹⁰ 81 Fed. Reg. at 5115, 5118.

¹¹ NAS Report at 3.

¹² 81 Fed. Reg. at 5114.

This summary description of the study the EEOC commissioned is misleading. The study commissioned by the EEOC and prepared by Sage Computing is not a pilot study in the normal sense of the term. To be sure, the Sage Report discusses statistical tests at some length. However, Sage did not ask any actual employer to submit pay data by any method under consideration by the Commission. If an actual pilot study had been conducted, we would expect that the Report would include a discussion of data reported by employers, burdens employers had in collecting and reporting the data, and the extent to which the data helped identify unlawful pay practices, or at least the extent to which the data helped identify (and then describe) “statistics of interest.” Instead, the Report discusses statistical analyses generally and analyses performed on synthetic data. Further, the Report’s discussion of employer burden hour costs, at less than a single page, is not based on any actual collection of data using the proposed EEO-1 Report, but appears to be based on a conversation with no more than a handful of actual (albeit unidentified) employers.

The Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) has established guidelines regarding when agencies may wish to conduct pilot studies and the procedures that agencies may wish to consider.¹³ The guidance discusses the benefits of pretests, pilot studies, and pilot tests, among other procedures noting that:

These kinds of tests may provide critical information necessary to ensure the quality of the data and smoothness of operations needed in the full-scale information collection. They can provide essential information to the agency and result in higher data quality than would have been achieved without them and may be the only vehicle for measuring the effects of different changes an agency is considering implementing.¹⁴

While OIRA’s guidance discusses the value of pretests and pilot studies, it does not once

¹³ Memorandum by John D. Graham, Administrator, Office of Information and Regulatory Affairs, to the President’s Management Council, Jan. 20, 2006, and attached Questions and Answers When Designing Survey’s for Information Collections (hereinafter OIRA Memorandum), *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/pmc_survey_guidance_2006.pdf.

¹⁴ *Id.* at 17.

reference performing a pilot study on synthetic data, a decision the EEOC states that it made so that it did not need to seek OMB approval.¹⁵

We understand that performing a proper pilot study of a sufficient sample of employers would have required the Commission to seek OMB approval under the Paperwork Reduction Act, a process that could have taken a few extra months.¹⁶ However, a few extra months seems like a small price to pay for a process that could have given the Commission real evidence of whether it was on the right track in developing its survey. Instead, if the Commission's proposal is put into place, the first test will be its nationwide rollout in 2017 to more than 67,000 employers¹⁷ and their nearly 1.5 million establishments.¹⁸

II. The Commission vastly understates the cost of compliance.

The estimate of the burden that would be imposed by the proposal is inaccurate for several reasons. First, the Commission has inappropriately changed its methodology in how it assesses costs. The Commission also has made incorrect assumptions about the effort that will be required to develop systems to report demographic, payroll, and hours worked records. Finally, the Commission's estimate about the time that it will take employers to collect and report pay data is unreasonably low.

A. The Commission used the "cost per establishment" figure as a surrogate for "cost per company."

Historically, EEOC has estimated that completion of the EEO-1 Report takes employers an average of 3.4 hours *per establishment*. In its proposal, the Commission has changed its methodology to estimate employer burdens not by establishment but company-wide.¹⁹ Incredibly, the EEOC assumes that employers will now spend 3.4 hours *per company* to comply

¹⁵ 81 Fed. Reg. at 5114 n.17.

¹⁶ OIRA Memorandum at 44.

¹⁷ 81 Fed. Reg. at 5119 n.55.

¹⁸ See EEOC Informal Discussion Letter of February 18, 2016, *available at* http://www.eeoc.gov/eeoc/foia/letters/2016/title_vii_revision_eo1_report_2_18.html.

¹⁹ 81 Fed. Reg. at 5120.

with the current requirement to submit EEO-1 data by job group and demographic category, no matter how many EEO-1 Reports the employer must file. Our informal survey of RILA members indicates that this assumption is inappropriate and vastly underestimates the burdens associated with submitting information currently required.

RILA members include employers of all sizes, from relatively small employers to some of the largest employers in the United States. However, no RILA member reports spending 3.4 hours or less in order to comply with current EEO-1 requirements. On the low side, we have some members that reported complying with current requirements in 100 to 150 hours per employer. On the high side, RILA members reported spending approximately 4500 hours of in-house time plus \$230,000 in outside vendor costs per year in order to comply. The vast differences among employers are certainly partially attributable to the number of establishments maintained by the employer, but also the number of new hires made in a year, the types and number of Human Resources Information Systems (HRIS) systems employed, and the extent to which the data need to be corrected, adjusted, or simply manually calculated in order to comply.

It is our assessment that the Commission's historical approach that calculated burden estimates on a per-establishment level was more accurate than the proposed approach and helped address differences in costs attributable to employer size. While there may be some economy that comes from submitting multiple establishment reports, larger employers and those with a relatively large number of new hires spend significantly more time collecting demographic information, classifying jobs, and following up on incomplete data. There is little economy of scale apparent in these tasks essential to accurate reporting.

B. The Commission underestimates the cost of designing a system to report demographic data by pay band.

The EEOC's proposal estimates that employers will incur a one-time cost averaging 8 hours at \$47.22 per hour to develop queries in existing HRIS and payroll systems that will

generate demographic head counts by pay band.²⁰ This estimate, totaling less than \$400 per employer, significantly underestimates the true cost.

Based on feedback from RILA members, one-time costs for developing programs, queries, and the like to report by pay bands will be significantly more expensive. Even for the few companies who already keep compensation data in the same system with demographic data, one-time costs of \$5,000 to \$10,000 are expected. On the other hand for many employers the costs will be significantly higher.

Many employers project that complying with the proposal will require significant revisions to systems likely to take months of work and tens of thousands of dollars, or more. Several RILA members reported that the timeframe for developing and implementing these systems changes would take from six months to one year. Making modifications to large corporate IT systems involves significant planning and will involve individuals from many components of a company, including senior leadership who may ultimately have to decide whether to prioritize this project in order to meet compliance deadlines while deferring other planned initiatives.

While most of our members have not yet arrived at a concrete estimate of the costs associated with this component of the proposal, it is clear that the costs are considerably greater than the \$400 per employer estimated in the proposal.

C. The Commission underestimates the annual burden of collecting and reporting pay data.

The Commission estimates that those employers who will be required to report pay data and hours worked under its proposal will incur burdens, on average, of 6.6 hours per employer. This includes one hour for reading instructions and 5.6 hours for collecting, verifying, validating, and reporting data. We cannot estimate the time needed to read the instructions for the report

²⁰ 81 Fed. Reg. at 5120 n.60.

because no copy of the Commission's proposed instructions was included with the proposal, but one hour seems inadequate.

Some employers estimate that pulling W-2 data mid-year will be just as costly as the annual exercise that employers are now required to undertake each January to compile W-2 statements for each employee that worked in the prior tax year. This exercise can take hundreds of hours or more per employer. This is further evidenced by the Department of Treasury's estimate that the W-2 form takes employers an average of 30 minutes *per employee* to complete.²¹

As to the costs of collecting, verifying, validating, and reporting data, our initial estimates are significantly higher than the estimated 5.6 hours per employer. Indeed, all of our members spend more time than this to comply with current requirements. While our initial assessment is that the proposal may triple current costs, we do not yet have a consensus about exactly how burdensome the new requirements will be. We will continue to analyze the expected cost of compliance and hope to supplement these estimates at a later stage of this proceeding.

III. If the proposal is not withdrawn, modifications should be made to increase clarity and reduce burdens.

For the reasons discussed above, we believe the EEOC's proposal should be withdrawn. However, if the Commission proceeds with its proposal, the final version should be revised to increase clarity and reduce unnecessary burdens on respondents. We recommend using pay rate or annualized compensation to measure compensation. If the Commission decides to retain W-2 wages as the measure of compensation, employers should be allowed to report W-2 wages based on a calendar year. We also urge the Commission to consider less frequent reporting and provide flexibility for employers if hours worked must be reported for salaried workers. Finally, we recommend defining key terms and publishing, for notice and comment, a copy of the proposed

²¹ The Treasury Department's latest supporting statement requesting an extension of the information collection request for the W-2 form is available at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201309-1545-019.

instructions.

A. *Collecting data by pay rate dramatically reduces burdens.*

The Commission's proposal expands the EEO-1 Report from requiring employers to report job group and demographic data in 180 data fields to 1,830 data fields by the inclusion of 12 pay bands. An additional 1,830 data fields are required to track hours worked. However, if the EEOC modified the proposal to measure compensation based on pay rate or annualized compensation, hours worked would not need to be collected. This would reduce the number of data fields on the proposed report to 1,830 immediately saving significant costs.

Further, by using a measure of pay that most employers keep in HRIS systems along with EEO-1 related information, employers will not need to develop and deploy a patch, bridge, or other program solution to match up HRIS data with payroll data, resulting in additional significant savings.

As noted earlier, EEOC has proposed measuring compensation based on W-2 wages because it is a comprehensive measure of earnings. Pay rate or annualized compensation is one of the most important factors that make up W-2 wages. While pay rate or annualized compensation is not as comprehensive as W-2 wages, we have no reason to believe that it will be any less helpful to the EEOC in carrying out its enforcement responsibilities under nondiscrimination laws. Admittedly, it is narrower and thus will not help EEOC determine, for example, in indicating whether stock options are awarded in an unlawful manner. However, this could well prove to be a strength as it would not muddle important aspects of pay with dozens of unrelated factors.

B. *Permit employers to report by calendar year if pay bands based on W-2 wages are used.*

If the Commission decides to retain W-2 wages as the measure of compensation, it should permit employers to use W-2 wages collected over a calendar year. Currently, the proposal requires employers to calculate W-2 wages for 12-months before a "snapshot" date

occurring in the third quarter of the calendar year.²² This means that employers will always be required to calculate W-2 wages at a different time from which they currently calculate such wages. Costs in pulling W-2 wages would be significantly reduced if employers had the option of using data aligned with the tax year.

C. Require reporting less frequently.

The NAS Report stated that an increase in reporting burden from 3.5 hours to 6.6 hours (which, as noted above, underestimates the actual time required) would not be an inconsequential increase in response burden. Consequently, “it would behoove EEOC to consider taking steps to reduce the increase in response burden.”²³ Among those suggestions made in the NAS Report was less frequent data collection or performing a rotating sample. As the NAS Report observed, the EEO-1 Reports are currently filed annually, but the EEO-1’s sister reports, the EEO-3, EEO-4, and EEO-5, are not. EEOC could reduce the reporting burden in its proposal by only requiring the EEO-1 Report to be filed every two or three years. Alternatively, EEOC could maintain the requirement to file the current EEO-1 annually, but only file the new compensation component every two or three years.

D. Omit or revise data collection requirements for exempt employees.

The proposal would require employers to report hours worked by employees that are exempt from minimum wage and overtime requirements under the Fair Labor Standards Act, but does not recommend any particular way in which employers should estimate such numbers. The proposal does state that the EEOC is “not proposing to require an employer to begin collecting additional data on actual hours worked for salaried workers, to the extent that the employer does not currently maintain such records.”²⁴

RILA agrees that the EEOC should not require employers to begin collecting data on hours worked for salaried workers as this would exponentially increase the cost of compliance

²² 81 Fed. Reg. at 5115.

²³ NAS Report at 71.

²⁴ 81 Fed. Reg. at 5117-18.

and would require significant, structural changes in the way in which many employers organize their workforce.

As to the manner of reporting hours worked for exempt employees, if this provision is retained, RILA urges the EEOC to provide employers with flexibility in determining the best proxy to use for reporting purposes. We recommend that EEOC allow employers to use a standard proxy such as 40 hours per week, or an employer's reasonable estimate about the hours typically worked by a group of workers.

E. Clarify the proposal by defining key terms, by making the proposed instructions available for public comments, and by explaining apparent inconsistencies.

Perhaps the most obvious area in which the proposal is unclear is in its lack of definitions of key terms such as W-2 wages and hours worked. The proposal does not define these terms in any way and the definitions are not necessarily intuitive. For example, should hours worked include hours not worked but paid, such as under a company policy? EEOC could provide significantly more clarity by proposing definitions for these terms. Better yet, EEOC could provide a copy of the proposed instructions that would accompany the proposed revised report and make the instructions available for notice and comment.

In addition, the precise scope of the new reporting requirement is unclear due to inconsistencies between the text of the proposal and the forms that EEOC has made available online. The proposal states that the proposed EEO-1 Report would have two components.²⁵ Component One would replicate the data grid currently required for covered employers to file. According to the proposal, all covered employers will continue to file Component One. Component Two includes a grid to report the number of employees by pay band, job group, and demographic group as well as a grid to report hours worked by pay band, job group, and demographic group. According to the proposal, Component Two is to be required of all employers with 100 or more employees. According to the proposal, employers required to

²⁵ 81 Fed. Reg. at 5115.

submit Component Two will also have to submit Component One.

This appears straight forward enough. However, the sample forms that EEOC has made available on its website make it appear as if employers subject to Component Two will not need to report Component One. While the proposal characterizes a link²⁶ to the EEOC's website as "An illustration of the data to be collected by both Components 1 and 2," following the link to the EEOC's sample form shows a form that only includes Component 2.

It would significantly improve clarity if employers had a clear picture of the precise mechanics of the proposed reporting requirement.

V. The proposal fails to address confidentiality concerns sufficiently.

As the EEOC is well aware, many employers view information submitted on the current EEO-1 form as confidential. The EEOC must do more to ensure that proprietary and personally identifiable information is not released before the EEO-1 proposal is finalized.

- A. *EEOC should not share confidential EEO-1 Reports with agencies that do not agree to be bound by Title VII's sanctions for releasing confidential EEO-1 data.*

Title VII of the Civil Rights Act prohibits EEOC from publicly releasing information obtained on the EEO-1 Report and imposes criminal sanctions for EEOC employees who improperly release such data.²⁷ However, EEOC shares EEO-1 data with other agencies, such as the DOL's OFCCP that do not provide the same level of protection of company reported data. OFCCP, for example, will release contractor EEO-1 Consolidated Reports in response to a request under the Freedom of Information Act (FOIA) unless the contractor raises an objection under FOIA and goes through the time and expense of making such an objection. This was recognized in the NAS Report that urged EEOC to seek legislation to ensure that those with access to EEO-1 data are subject to the same confidentiality requirements as EEOC's own

²⁶ The link is http://www.eeoc.gov/employers/eeo1survey/2016_new_survey.cfm.

²⁷ 42 U.S.C. § 2000e-8(e).

staff.²⁸ However, EEOC has not sought such protections to enhance the security of EEO-1 data.

B. EEOC has not sufficiently addressed how it will protect individually identifiable data.

In addition to employer concerns with insufficient protections for sensitive company data, employees are concerned that their personally identifiable compensation data will be released. EEOC currently publishes aggregate EEO-1 data on its website. If pay data are reported as proposed, there will be situations in which just a few individuals will be included in a particular job category and pay band. As a result, the pay of those individual employees may be readily deduced.

EEOC's current practices do not attempt to mask data cells that report small numbers, making it possible to identify characteristics of individual employees. This is easily seen in a review of data on the EEOC's website. For example, searching EEOC's aggregated data for the last year available, 2014, by two-digit North American Industry Classification System (NAICS) code in the State of Virginia reveals several small data fields in NAICS Code 44 (Retail Trade). Looking at the data, we can see that although there are more than 120,000 workers described in the aggregate report, there is only a single Executive/Senior Level Executive who self-identifies as Native American. Similarly, there is only a single female technician who self-identifies as Native Hawaiian or Other Pacific Islander. We see similar small numbers in nearly every existing EEO-1 aggregation.

By further segmenting employee data into 12 new pay bands, this problem will only multiply. It will be comparatively easy to identify the pay bands of particular individuals by knowing just a few demographic characteristics about them. While EEOC has acknowledged this concern in a footnote,²⁹ it has not sufficiently explained what steps it will take to ensure that personally identifiable pay information will not be revealed.

²⁸ NAS Report at 5.

²⁹ 81 Fed. Reg. at 5115 n.18.

VI. Conclusion

The Retail Industry Leaders Association urges the EEOC to withdraw its proposed modifications of the EEO-1 Report because the proposal will not produce data that will help the EEOC with its enforcement efforts and therefore the burdens imposed by the proposal cannot be justified. If, however, the EEOC continues forward with its proposal, we strongly urge the Commission to take steps to ensure confidentiality and mitigate reporting burdens, such as by changing the measure of compensation to pay rate or annualized compensation and by not requiring employers to report hours worked. If the EEOC does not adopt this approach, we urge the Commission to not require employers to report hours worked for non-exempt employees. If W-2 wages are maintained as the measure of compensation, we urge the Commission to permit reporting by calendar year or less frequently than the usual schedule in the proposal.

Thank you for your consideration of these comments.

Sincerely,



Kelly Kolb

Vice President, Government Affairs
