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**Re: ACLU Comments in Support of Proposed Revisions to the  
Employer Information Report (EEO-1) FR Docket Number 2016-01544,  
Docket ID EEOC-2016-0002**

Dear Ms. Wilson:

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, disability, or national origin.

We have supported the Administration's past efforts to improve data collection as a tool for enforcing equal pay laws<sup>1</sup> and write today to support the Equal Employment Opportunity Commission's (EEOC) proposed revision of the Employer Information Report (EEO-1) to collect compensation data, beginning in 2017, from certain private employer and federal contractors. These changes are necessary and appropriate because wage discrimination is a consistent indicator of systemic infringement of equal employment opportunity. Data collection provided through this EEO-1 revision will deter pay disparities, facilitate compliance with equal pay

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<sup>1</sup> See ACLU, COMMENTS IN SUPPORT OF OFCCP'S PROPOSED COMPENSATION DATA COLLECTION TOOL (Jan. 5, 2015)  
[https://www.aclu.org/sites/default/files/field\\_document/aclu\\_comments\\_to\\_dol\\_ofccp\\_on\\_equal\\_pay\\_report\\_nprm\\_1\\_5\\_15\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_comments_to_dol_ofccp_on_equal_pay_report_nprm_1_5_15_final.pdf).

laws, and contribute to the effective federal enforcement of non-discrimination provisions. We also offer some suggestions for strengthening the proposed revision to ensure achievement of these goals.

## **I. The EEO-1 Revisions Are Needed to Address Serious Problems of Wage and Other Employment Discrimination.**

Despite long recognition of the scope and impact of the wage gap and pay discrimination at every stage of employment, these problems have persisted and merit the ongoing commitment of resources for their eradication. Women working full time and year round were paid only 79 cents for every dollar paid to their male counterparts and the disparity for women of color is even more severe. This wage gap has remained stagnant for nearly a decade.<sup>2</sup> Race and ethnicity-based wage inequality is similarly entrenched in the American workplace. In 2013, African Americans employed full-time were paid a median weekly total of \$629, and Latino workers received a median salary of only \$578 compared to \$802 for white workers. No significant progress has been made in narrowing these wage gaps over the past 40 years.

Yet pay discrimination remains difficult to detect in the first instance. About 60 percent of workers in the private sector nationally are either contractually forbidden or strongly discouraged from discussing their pay with their colleagues.<sup>3</sup> Because pay often is cloaked in secrecy, when a discriminatory salary decision is made, it is seldom as obvious to an affected employee as a demotion, a termination, or a denial of a promotion. Employees are discouraged from gathering information that would suggest they have experienced pay discrimination, and which undermines attempts to challenge such discrimination and reduce the gender wage gap. Punitive pay secrecy policies and practices allow this form of discrimination not only to persist, but to become institutionalized. Consequently, government enforcement and employer self-evaluation are critical to combat compensation discrimination. Collecting and making publicly available compensation data from private employers and larger federal contractors would greatly assist both these strategies.

The revised EEO-1 will help EEOC and OFCCP tackle discrimination by private employers and large federal contractors. First, this data collection will empower the agencies to target their limited enforcement resources toward more detailed oversight of those employers who are most likely to be engaging in pay discrimination. This will greatly enhance the effectiveness and efficiency of EEOC's and OFCCP's pay discrimination enforcement efforts. In addition, other forms of unlawful gender and race discrimination can manifest as gaps in compensation. For example, if hiring discrimination keeps women out of higher paying jobs in a company, or harassment systematically pushes women out of male-dominated, highly paid jobs, the result may be gender pay gaps within the firm. If African American employees, for example, are scheduled for fewer work hours, this also would be reflected in pay gaps. Collecting compensation data allows for more targeted enforcement of a range of antidiscrimination protections.

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<sup>2</sup> NAT'L WOMEN'S LAW CTR., THE WAGE GAP IS STAGNANT FOR NEARLY A DECADE 1 (2015), [http://nwlc.org/wp-content/uploads/2015/08/wage\\_gap\\_is\\_stagnant\\_9.23.15.pdf](http://nwlc.org/wp-content/uploads/2015/08/wage_gap_is_stagnant_9.23.15.pdf), <http://nwlc.org/resources/wage-gap-stagnant-nearly-decade/>

<sup>3</sup> INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (2014), [http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at\\_download/file](http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file).

Second, both the process of responding to the data collection tool and the more effective and targeted approach to enforcement that the tool permits will spur more employers to proactively review and evaluate their pay practices and address any unjustified disparities between employees. By incentivizing and facilitating such employer self-evaluation, the revised EEO-1 Report will increase voluntary employer compliance with discrimination laws. Employees and employers alike will benefit from the elimination of discrimination in pay practices absent litigation or other formal enforcement mechanisms, which can be expensive and time-consuming.

## **II. The EEO-1 Report Is An Appropriate Vehicle for Collecting Pay Data.**

We support the decision to collect pay information through the EEO-1 and to share it across agencies. Doing so minimizes the compliance burden for regulated employers and directly responds to concerns previously raised by the employer community. When OFCCP previously proposed collecting compensation data from federal contractors through a separate tool on a different reporting schedule from the EEO-1,<sup>4</sup> employer representatives urged the agencies to coordinate their data collection through a single, unified instrument.<sup>5</sup> The proposed EEO-1 revision accomplishes this goal, avoiding duplication of effort or wasted costs for either employers or enforcement agencies.

By utilizing the long-established EEO-1 job categories, reliance on the EEO-1 also allows reporting of pay data without requiring employers to master and implement new methods of categorizing job titles within their workplace. Instead, employers can make use of existing systems by which they associate job titles with EEO-1 job categories, thus simplifying reporting. Use of the EEO-1 categories, rather than an employer's own job titles or job classification system, will also facilitate the consistent comparison of pay disparities in each job category among employers in a given industry and geographic area and will facilitate analysis of compensation data for entire industries. This will help EEOC and OFCCP to develop a better understanding of which industries have the most significant pay disparities, as well as which employers within each industry have the largest pay gaps, and to target enforcement resources accordingly. In addition, it will enable EEOC and OFCCP to better assess the extent to which sex-based compensation discrimination affects women's entry into non-traditional industries, and more generally to better understand the relationship between gender segregation in the workforce and pay discrimination.

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<sup>4</sup> U.S. Department of Labor, Office of Federal Contract Compliance Programs, Non-Discrimination in Compensation; Compensation Data Collection Tool, Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. 49398 (Aug. 10, 2011); U.S. Department of Labor, Office of Federal Contract Compliance Programs, Government Contractors, Requirement to Report Summary Data on Employee Compensation, Notice of Proposed Rulemaking, 79 Fed. Reg. 46561 (Aug. 8, 2014).

<sup>5</sup> See SAGE COMPUTING, INC., EEOC SURVEY SYSTEM MODERNIZATION WORK GROUP MEETING 2 (Mar. 2012), <http://www.eeoc.gov/employers/eo1survey/survey-modernization.pdf>; see also, e.g., Equal Employment Advisory Council, *Comments on the Office of Federal Contract Compliance Programs' Proposed Requirement to Report Summary Data on Employee Compensation* (Jan. 5, 2015); Society for Human Resource Management and the College and University Professional Association for Human Resources, *Comment on Advanced Notice of Proposed Rulemaking Related to Non-Discrimination in Compensation 3-4* (Oct. 11, 2011).

Use of the EEO-1 also enables the calculation and comparison of compensation data by gender within racial/ethnic groups, and by racial/ethnic groups within genders. The substantial pay gaps experienced by women of color compared to their white, non-Hispanic male and female counterparts demonstrate that unequal pay is a problem that has both gender and racial/ethnic dimensions. Importantly, use of the EEO-1 will capture these interacting impacts.

Most importantly, reporting of compensation data by gender and racial/ethnic groups within each of the ten job categories from the EEO-1 will allow EEOC and OFCCP to identify firms with racial or gender pay gaps within each job category that significantly diverge from their industry and regional peers for potential further detailed assessment. The EEO-1 categories are relatively broad, and a single category will typically comprise many jobs and occupations. Some have objected that as a result the pay gap measured in a particular EEO-1 job category for a particular employer will not strictly measure disparities in pay for “equal work” in many instances. This objection ignores the fact that the EEO-1 was never intended to act as an instrument precise enough to establish or prove violations of law without additional investigation. Rather, what the EEO-1 has done, and what compensation data collection will strengthen its capacity to do, is to establish gender and racial patterns within these job categories in the aggregate, thus allowing identification of firms that sharply depart from these patterns. In this way, the revised EEO-1 Report will provide EEOC and OFCCP a critical tool for focusing investigatory resources to identify pay discrimination within equivalent jobs, and will also flag deviations from compensation patterns that may be driven by other forms of discrimination that shut women or people of color out of higher-paying roles within a given job category.

Use of the EEO-1 as a reporting tool will also facilitate analysis of compensation data both company-wide and within each employer’s establishment, given that a separate EEO-1 report must be filed for each physical location in a multi-establishment company. Company-wide analysis will help draw attention to potential systemic discrimination that can affect many workers across an organization and enable meaningful analysis of the company’s pay practices even where the number of workers at each individual establishment is relatively small. On the other hand, establishment-level analysis will ensure that individual establishments that engage in pay discrimination cannot evade detection if the company as a whole has pay that is closer to equal.

### **III. Compensation Data Must Be Comprehensive.**

We support the incorporation of a data tool into the EEO-1 that provides a true picture of employees’ compensation, which necessarily includes pay that exceeds base salary.<sup>6</sup> Requiring

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<sup>6</sup> Under the Equal Pay Act compensation is similarly defined broadly: the term “wages” includes all payments made to [or on behalf of] an employee as remuneration for employment. The term includes all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. Fringe benefits are deemed to be remuneration for employment. . . . [V]acation and holiday pay, and premium payments for work on Saturdays, Sunday, holidays, regular days of rest or other days or hours in excess or outside of the employee’s regular days or hours of work are deemed remuneration for employment and therefore wage payments that must be considered in applying the EPA.

29 C.F.R. § 1620.10.

employers to report total W-2 earnings will provide a comprehensive picture of disparities in worker compensation. Moreover, since employers already collect and report W-2 wage data pursuant to federal law, inclusion of this information in the revised EEO-1 will impose a minimal additional burden.

A. *W-2 Earnings Provide More Comprehensive Compensation Data*

We agree with the EEOC and the conclusions of the independent pay pilot study (Pilot Study)<sup>7</sup> that of compensation measures considered, the W-2 provides the most comprehensive picture of earnings, with a minimal associated burden for employers. The National Academy of Sciences' EEOC-commissioned study (NAS Study)<sup>8</sup> and the subsequent Pilot Study considered both the compensation definitions used by the Bureau of Labor Statistics' Occupation Employment Statistics (OES) and by the W-2, among others, as a compensation measure for EEOC pay data collection, because these measures are the most widely known to employers and include various forms of compensation data. The OES compensation definition includes base rate of pay, hazardous duty pay, cost of living allowances, guaranteed pay, incentive pay, tips, commissions and production bonuses.<sup>9</sup> But it excludes certain important categories of compensation such as overtime pay, severance pay, shift differentials and nonproduction, year-end and holiday bonuses.<sup>10</sup>

The W-2 definition, in contrast, includes all earned income, including supplemental pay components (such as overtime pay, shift differentials, and nonproduction bonuses) and therefore offers a more comprehensive picture of earnings than the OES.<sup>11</sup> This comprehensive picture is critical because although compensation discrimination may manifest in workers' base salaries, it may also occur through discrimination in other less frequently measured forms of compensation such as bonuses,<sup>12</sup> commissions,<sup>13</sup> stock options, differential pay and opportunities for overtime. In fact, "female and minority employees have been virtually locked out of wealth-creating

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<sup>7</sup> SAGE COMPUTING, INC., FINAL REPORT (Sept. 2015), <http://eoc.gov/employers/eo1survey/pay-pilot-study.pdf> [hereinafter: PILOT STUDY].

<sup>8</sup> NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, COLLECTING COMPENSATION DATA FROM EMPLOYERS (2012), <http://www.nap.edu/catalog/13496/collecting-compensation-data-from-employers> [NAS STUDY]. The NAS Study reviewed the wage definitions in the Occupational Employment Statistics survey (OES) and the National Compensation Survey (NCS) and concluded that the OES definition should be considered for use because it was widespread, and because of a substantial overlap in the employers who report data to the OES and EEOC. NAS STUDY at 58.

<sup>9</sup> *Id.* at 56.

<sup>10</sup> *Id.*; PILOT STUDY, *supra* note 7 at 7.

<sup>11</sup> *Id.* at 7, 8. While reported W-2 wages include taxable benefits and pre-tax deductions driven by an individual employee's choices - such as mass transit and parking stipends/elections, 401(k) or retirement account contributions, and deferred compensation - these optional elements likely would not constitute a large enough part of compensation for most workers so as to create a disparity for the purposes of enforcement, nor is there reason to believe that men and women, or individuals of different races, would consistently make different choices in this regard and thus create gender or race pay disparities.

<sup>12</sup> See *King v. Univ. Health Care Sys.*, 645 F.3d 713 (5th Cir. 2011) (upholding a jury's conclusion that the employer violated the EPA when it failed to pay plaintiff anesthesiologist a bonus that it paid her male colleague).

<sup>13</sup> See *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1027 (6th Cir. 1983) (finding a compensation disparity under Equal Pay Act where the employer paid higher commission rate to males than females, even though total remuneration was substantially equal).

opportunities in most companies.”<sup>14</sup> Studies show that men receive stock options and bonuses at a rate twenty to thirty times that of women.<sup>15</sup> Studies also indicate that compensation for men consists of 85 percent salary and 15 percent stock options, profit sharing, and other bonuses, while compensation for women consists of 91 percent salary and 9 percent stock options, profit sharing, and other bonuses.<sup>16</sup>

For all these reasons, we do not support using the base rate of pay as an alternative measure of compensation for the purposes of the revised EEO-1. The base rate of pay is an employee’s initial rate of compensation, excluding extra compensation such as for overtime, bonuses, or an increase in the rate of pay. It changes only when a job changes or to adjust for shift differentials; by itself it does not reflect the total earned income of an employee at any given time.<sup>17</sup> It is not a dynamic or complete picture of an employee’s compensation and would not serve the purposes of the EEO-1. Data about base pay alone cannot capture instances where other types of compensation—such as stock options and bonuses—drive gender-based disparities in compensation, and would permit employers that discriminate using other forms of compensation to evade detection. Conversely, collecting data on W-2 pay will help root out disparities across the spectrum of take-home compensation. Accordingly, we support using a measure of earnings that collects as many forms of compensation as possible.

#### B. *Providing W-2 Earnings and Hours Data Will Not Unduly Burden Employers*

Requiring covered employers to report W-2 data in addition to the already-required ethnicity, race and gender of employees will not be unduly burdensome. First, federal law already requires employers to maintain and generate the information in W-2 forms that will be required for the revised EEO-1.<sup>18</sup> HRIS experts consulted for the Pilot Study reported that most major payroll software systems are preprogrammed to compile the data for generating W-2 forms. This led the Pilot Study to conclude that employers using such software to generate W-2 forms could report the proposed data with minimal additional burden.<sup>19</sup>

Second, while it is true that W-2 earnings data usually are generated at the end of the calendar year and the revised EEO-1 will require W-2 data to be reported in October, earnings information for employees is available to employers on a year to date basis, as the Pilot Study noted. Employers could use payroll reports to generate the necessary data, especially if they have automated payroll systems, with few additional complications.

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<sup>14</sup> Cyrus Mehri & Ellen Eardley, *21<sup>st</sup> Century Tools for Advancing Equal Opportunity: Recommendations for the Next Administration* 7, (AMERICAN CONSTITUTION SOCIETY) (2008), <https://www.acslaw.org/files/Mehri%20FINAL.pdf>.

<sup>15</sup> Alyssa Lebeau, *The New Workplace Woman: “Are We There Yet?”* (BUSINESS WOMAN) (Fall 2001).

<sup>16</sup> *Id.*

<sup>17</sup> PILOT STUDY, *supra* note 7 at 8.

<sup>18</sup> 26 C.F.R. § 31.6051-1

<sup>19</sup> PILOT STUDY, *supra* note 7 at 8, 101. The Pilot Study acknowledged that some companies may need to make a one-time capital investment to write a software program to import data from payroll programs into the HRIS system. PILOT STUDY, *supra* note 7 at 8.

#### **IV. Reporting of Total Hours Worked Will Enhance the Usefulness of the Pay Data Collected.**

The EEOC's proposal to collect the total number of hours worked by the employees in each EEO-1 pay band will allow the calculation and comparison of mean compensation both per person and per hour for each gender and racial/ethnic group within each job category. As the Pilot Study recognized, collection of total hours worked by each employee in addition to wages is critical to an analysis of pay differences.<sup>20</sup> Collecting this data will allow OFCCP and EEOC to account for pay differences due to variation in the number of hours worked among employees in a pay band, sharpening pay comparisons both between different groups in an employer's workforce and between different employers. Collection of total hours worked also will permit an analysis that accounts for periods of unemployment or less than full-time work, including part-time, temporary and seasonal work. This is especially important since women constitute two-thirds of part-time workers in the U.S.,<sup>21</sup> and almost half of all temporary workers.<sup>22</sup>

Hours worked data is also available to employers. Employers must keep records of hours worked for all employees not exempt from the Fair Labor Standards Act.<sup>23</sup> With regard to the collection of total hours worked by exempt employees, EEOC suggests use of an estimate of 40 hours per week for full-time, salaried exempt workers. We support this approach in those instances where an employer does not collect actual hours worked or have a different standard full-time workweek. The 40-hour workweek is a widely accepted definition<sup>24</sup> and is a reasonable approximation of full-time work, with the understanding that not all full-time salaried exempt employees work precisely 40 hours per week.<sup>25</sup> The proposal appropriately seeks to minimize the burden on employers by not requiring them to collect additional data where they do not already.

On the other hand, where an employer does track exempt employees' hours, or requires some standard number of hours of work per week for an exempt employee other than 40 hours, the employer should report that number. Indeed, the Pilot Study noted that most payroll systems maintain the total hours worked by each employee, so reporting such information would impose a minimal burden on employers that use those systems. In other instances, employers may not track exempt employees' hours, but may require a standard number of hours other than 40 for full-time employees (*e.g.*, 37.5 or 45) or a standard number of hours for part-time employees.

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<sup>20</sup> *See id.* at 42-43, 59.

<sup>21</sup> U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *Women of Working Age*, Chart 22 (2015), [http://www.dol.gov/wb/stats/latest\\_annual\\_data.htm](http://www.dol.gov/wb/stats/latest_annual_data.htm) (last visited Mar. 8, 2016).

<sup>22</sup> Nicholson, J., *Issue Brief: Temporary Help Workers in the U.S. Labor Market*, (U.S. DEP'T OF COMMERCE ECONOMICS AND STATISTICS ADMIN) (July 2015), <http://www.esa.doc.gov/sites/default/files/temporary-help-workers-in-the-us-labor-market.pdf>.

<sup>23</sup> 29 C.F.R. § 516.2.

<sup>24</sup> Although the Fair Labor Standards Act's overtime requirements do not apply to the exempt workers at issue here, the overtime rule does establish a useful benchmark of a 40-hour workweek as a standard measure of full-time work. 29 U.S.C. § 207(a).

<sup>25</sup> A 2014 Gallup poll of full-time, salaried workers indicated that of the workers surveyed, 37 percent worked 40 hours a week, and 59 percent worked 41 hours or more per week. The average workweek of the employees surveyed was 47 hours. GALLUP, WORK AND EDUCATION POLL (2014), <http://www.gallup.com/poll/175286/hour-workweek-actually-longer-seven-hours.aspx>. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION – FEBRUARY 2016, Table B-2 (Mar. 4, 2016), <http://www.bls.gov/news.release/empst.t18.htm> (average weekly hours and overtime of all employees on private nonfarm payrolls in February 2016 was 34.4 hours).

Employers should report that number if they do not track actual hours worked. In the absence of either an alternative standard relied on by the employer or actual data regarding hours worked by exempt employee, employers should rely on the assumption of a full-time 40-hour workweek. This suggestion is also responsive to critiques from employers, who objected to OFCCP's 2014 proposal<sup>26</sup> that contractors use across-the-board estimates of hours worked by exempt employees by reporting 2080 hours annually worked for all full-time, salaried exempt employees, and 1080 hours annually worked for all part-time employees. This alternative approach would permit employers who collect more detailed data or who rely on other definitions of full-time or part-time in their workforce to report more precise calculations.

## **V. The Compensation Data Collection Can Be Further Improved.**

The proposed revised EEO-1 will fill an important gap in the information currently available to EEOC and OFCCP, enhancing the enforcement of pay discrimination prohibitions. However, we urge EEOC to strengthen the effectiveness of the pay data collection further in the following ways:

1. Extend the requirement to submit W-2 pay data to federal contractors that have between 50 to 99 employees and are otherwise required to submit the EEO-1.<sup>27</sup> In 2013, small businesses held \$83.1 billion in federal prime contracts, representing nearly 23.4 percent of all federal contracts.<sup>28</sup> The critical importance of ensuring that recipients of public funds do not discriminate in pay practices justifies collecting compensation data from these smaller entities.
2. Require employers to report their pay data using additional, narrower pay bands. We support the decision to collect compensation data by counting and reporting the number of employees from each demographic group in each identified pay band, as a means of reporting that minimizes the burden on the employer while still capturing reliable and useful data. We also agree that in order to be useful, pay data must be collected in a larger number of bands than used by the EEO-4, as the EEO-4 includes all pay of \$70,000 or more in a single band, thus rendering invisible any pay disparities experienced by employees earning \$70,000 or more annually. The OES pay bands are a distinct improvement over the EEO-4 bands, in that the OES pay bands go up to \$207,999, with the final pay band including all pay of \$208,000 or above. However, even the OES pay bands will be unable to provide data on pay disparities for employees earning more than \$208,000. Data show that women up and down the income scale experience pay gaps compared to their male counterparts, including in highly paid roles such as attorneys, executives, and surgeons.<sup>29</sup> We therefore urge EEOC to add extra pay bands to collect pay data beyond \$208,000, for example between \$208,000 and \$300,000. We also note that OES pay bands cover

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<sup>26</sup> U.S. Department of Labor, Office of Federal Contract Compliance Programs, Government Contractors, Requirement to Report Summary Data on Employee Compensation, Notice of Proposed Rulemaking, 79 Fed. Reg. 46561 (Aug. 8, 2014).

<sup>27</sup> 41 C.F.R. § 60-1.7.

<sup>28</sup> SMALL BUSINESS ADMINISTRATION. GOVERNMENT-WIDE PERFORMANCE: FY2013 SMALL BUSINESS PROCUREMENT SCORECARD (2014), [https://www.sba.gov/sites/default/files/files/FY13\\_Government-Wide\\_SB\\_Procurement\\_Scorecard\\_Public\\_View\\_2014-04-28.pdf](https://www.sba.gov/sites/default/files/files/FY13_Government-Wide_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf).

<sup>29</sup> U.S. CENSUS BUREAU, 2014 AMERICAN COMMUNITY SURVEY, Table 1 (Full-Time, Year-Round Workers and Median Earnings in the Past 12 Months by Sex and Detailed Occupation: 2014) (2016), [http://www.census.gov/people/io/publications/table\\_packages.html?eml=gd&utm\\_medium=email&utm\\_source=govdelivery](http://www.census.gov/people/io/publications/table_packages.html?eml=gd&utm_medium=email&utm_source=govdelivery).



extremely wide pay ranges of \$34,839 and \$44,199. In order to provide more meaningful information regarding pay disparities, reflecting the EEO-1's distinct purpose, we urge that pay data be collected in more narrow pay ranges, with no single pay band covering a range of more than 20 percent of the lowest salary captured by that band, allowing for more granular analyses.

3. Regularly adjust the pay bands used (either by continuing to track the OES or by adjusting for changes in inflation and the employment distribution) in order to provide the most relevant data.

4. Revise the EEO-5 form to collect compensation data from public elementary and secondary school districts and to update the EEO-4 form to collect compensation data from state and local governments using the same pay bands ultimately utilized for the EEO-1. Because pay discrimination is not limited to a particular sector of the economy, compensation data collection should not be so limited.

#### **VI. EEOC and OFCCP Must Ensure That Pay Discrimination Is Not Insulated From Review Because It Is Commonplace Within An Industry.**

The success of this effort will depend on whether EEOC and OFCCP consistently use the predictive information when making decisions around targeted enforcement. Doing so will not only increase the effectiveness of enforcement activities that root out discrimination, but also incentivize employers to engage in proactive self-evaluations of their pay practices and improve their compliance with equal pay standards. We therefore strongly support the proposal to establish industry-level standards for pay disparities and to use deviations from these standards to identify potential pay discrimination.

However, given the persistence of gender and racial pay gaps across the economy, being above or close to an industry standard does not mean that pay discrimination does not exist within an employer's workforce. We therefore also urge the agencies to affirm that while a deviation from industry standards will be a factor in decisions about conducting enforcement activities, other important considerations can and will come into play. For example, in some instances, enforcement attention may be appropriately focused on entire industries with sizeable gender pay gaps (rather than just the worst performing employers within those industries).

#### **VII. Making Industry-Level Summaries of Compensation Data Available to the Public Is an Essential Complement to the Compensation Data Collection.**

We strongly support the plan to make aggregate data gathered from the revised EEO-1 reports available to the public. Doing so will promote employer compliance with equal pay standards in a number of important ways. With these aggregate data in hand, workplace equality advocates can more efficiently direct their own enforcement, outreach, and public education activities to industries or regions where pay disparities are most egregious. Individual employees can discover if they are working in an industry or region where they are more at risk of experiencing pay discrimination, and be prompted to investigate further to ensure that they are being treated fairly. They also can better understand pay trends within their region and industries, thus empowering them to seek and negotiate fair pay. And making these aggregate data public will facilitate and incentivize voluntary employer compliance with equal pay protections, by

providing benchmarks that employers can use to evaluate their own pay practices and to publicly promote their successes in achieving pay equity.

We further urge EEOC to not only provide average pay disparities by occupational category in given industries and/or regions, but also other relevant information such as the range of pay disparities. Unequal pay is a ubiquitous phenomenon in many industries and regions, and even the average performers within a group may still have problems with pay discrimination in their workforces. We therefore should be encouraging employers, in conducting self-evaluations of their pay practices, to strive to be even better than the average among their peers.

### **VIII. The Proposed Data Collection Will Not Unduly Burden Employers.**

Federal law already requires contractors to maintain much of the information that would be required under the revised EEO-1. Employers must generate W-2 forms for their paid employees<sup>30</sup> and keep records of hours worked for all employees not exempt from the Fair Labor Standards Act.<sup>31</sup> The relevant universe of employers is already required to submit EEO-1 reports that include information by gender, race/ethnicity, and job grouping categories.<sup>32</sup>

The burden that compiling and reporting this largely pre-existing information pursuant to the proposed rule will impose on employers is therefore minimal, particularly given that HRIS software developers can be expected to quickly create systems for automatic collecting and reporting of these data. In comparison, great benefits will accrue for employees and employers because of this proposed rule. As discussed above, these data will be crucial to enhancing the effectiveness of enforcement activities on behalf of employees who are victims of pay discrimination and other forms of discrimination reflected in compensation. Further, the reporting requirement may actually reduce the ultimate burdens of enforcement on law-abiding employers because it will improve EEOC's and OFCCP's ability to direct their investigatory efforts toward employers most likely engaged in pay discrimination.<sup>33</sup>

### **IX. Conclusion.**

The ACLU appreciates the opportunity to submit comments on this critically important issue and we applaud EEOC for its continued leadership on equal pay. We strongly support the proposed revisions to the EEO-1 and urge their swift adoption and implementation to ensure the new data collection begins in 2017.

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<sup>30</sup> 26 C.F.R. § 31.6051-1.

<sup>31</sup> 29 C.F.R. § 516.2.

<sup>32</sup> 41 C.F.R. § 60-1.7.

<sup>33</sup> Also, ensuring equal pay for female and minority workers can be good for businesses in terms of increasing consumer spending power and promoting employee satisfaction, productivity and retention. *See, e.g.* U.S. Senate Committee on Health, Education, Labor & Pensions. "Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act", (April 1, 2014) 113th Cong. (statement of ReShonda Young, Operations Manager and Corporate Vice President, Alpha Express, Inc. & Founder and Owner, Popcorn Heaven), <http://www.help.senate.gov/imo/media/doc/Young5.pdf>; Heidi Hartmann, Jeffrey Hayes, & Jennifer Clark, *How Equal Pay for Working Women would Reduce Poverty and Grow the American Economy* 1, INST. FOR WOMEN'S POLICY RESEARCH (2014), <http://www.iwpr.org/publications/pubs/how-equal-pay-for-working-women-would-reduce-poverty-and-grow-the-american-economy/> (finding that the U.S. economy would have produced additional income of more than \$447 billion in 2012 if women received pay equal to their male counterparts); Dow Scott, Tom McMullen, & Mark, *Reward Fairness: Slippery Slope or Manageable Terrain?* 2, (WORLDATEWORK) (2011), <http://www.worldatwork.org/waw/adimLink?id=53154>.

As EEOC develops and finalizes plans for the revised EEO-1, we also urge concerted efforts to continue to protect individuals' privacy. Information reported by employers containing personally identifying data must not be publicly disseminated, except with the prior assent of concerned employees or as otherwise permitted in connection with the resolution of a complaint, charges, or litigation against an identifiable person's employer. These protections are vital to ensuring that employees' personal information is not handled inappropriately or made public. However, none of these controls prevents the long-term storage and publication of aggregate, non-identifiable data that is essential to civil rights monitoring and enforcement.

Should you have any questions, please contact Vania Leveille, senior legislative counsel, at [vleveille@aclu.org](mailto:vleveille@aclu.org) or Gillian Thomas, senior staff attorney, at [gthomas@aclu.org](mailto:gthomas@aclu.org).

Sincerely,

A handwritten signature in black ink that reads "Karin Johanson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Karin Johanson  
National Political Director