Shareholder Alissa A. Horvitz, Esq. appears before the United States House of Representatives

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Statement of

Alissa A. Horvitz, Esq.

before the

United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions

Hearing on

"Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions"
April 18, 2012

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to speak with you today regarding the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

I am a shareholder in the Washington D.C. office of Littler Mendelson, P.C. and one of the two co-chairs of our OFCCP Practice Group. My practice is devoted to working with companies that choose to do business with the federal government and to helping them to comply with the equal opportunity laws that OFCCP enforces.

My testimony today is based on my own personal views and does not reflect the views of Littler, its attorneys, or of any other organization or client.

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The OFCCP is the Department of Labor agency charged with ensuring that companies receiving federal dollars in the form of contracts -- not grants or federal financial assistance -- are practicing their two-fold obligation:

> (1) to engage in affirmative action by using good faith efforts to increase the representation of qualified females, minorities, individuals with disabilities and veterans in candidate or applicant pools when opportunities become available; and
> (2) to ensure that when the company's decision makers have an opportunity to make a decision – to hire, to promote, to terminate, to set compensation – that they are doing so fairly and in accordance with the principles of equal employment opportunity.

OFCCP's mission is an important one, and one that I would not want to see eliminated. It performs this mission by engaging in compliance assistance and by conducting random audits known as compliance reviews. OFCCP conducts roughly 4,000 compliance reviews per year.

The Dollar Threshold Should Be Raised

Different compliance obligations are triggered depending on the value of the federal contract, but in my opinion, the dollar threshold to impose these obligations is far too low for the burden placed on companies.

When the aggregated value of all the company's federal contracts in a 12- month period exceeds a mere $10,000, onerous record keeping and subcontractor flow down obligations are triggered.

At a mere $50,000 from one single contract (not an aggregate), the company must prepare two written affirmative action plans – one for women and minorities, which plan includes extensive annual data analyses, and a second plan for individuals with disabilities. Because $50,000 is the dollar threshold that triggers written affirmative action plans, contracts above this dollar threshold are subject to audit.

With a single contract worth $100,000, the obligation to prepare an affirmative action plan for veterans is triggered, and contractors must also undertake the separate obligation to ensure that throughout the organization, including establishments and facilities at which no government contract work is performed, every job vacancy is listed with requisite state and local job banks, unless the job is a temporary job lasting 3 days or less, unless it is a senior management or high-level executive position, or it will be filled with an internal candidate. It does not matter whether the state and local workforce agencies are amply funded, or not, or are able to refer the employer any qualified candidates, or not.

I know that being a federal government contractor has repeatedly been heralded as a privilege and not a right. However, I also understand that many in the business community (and especially the small business community) are incredibly frustrated because being a government contractor under the current OFCCP administration has become so overwhelmingly burdensome under the existing regulatory framework, and is anticipated to become significantly and substantially more burdensome if OFCCP's proposed regulations are adopted without change. Several of my clients have terminated their relationship with the federal government when their contracts ended and others are making the decision not to get into the relationship with the government because of the immense start-up costs, burdens, hurdles and compliance barriers that OFCCP has placed in their path. I am thoroughly convinced that more companies would be willing to contract with the government if, at lower contract dollar values, they could be exempted from these onerous provisions. It would drive up competition and drive down taxpayer costs. In my opinion, the dollar threshold to impose affirmative action plan obligations should be raised from the current threshold of $50,000 to a tiered approach based on contract value starting at $250,000, and the implementation time before OFCCP can select the company for an audit should be extended from its current 120 days to 12 months, if not longer.

I do not believe that raising the dollar threshold, which triggers the heavy administrative burdens, will cause otherwise law-abiding companies, already subject to other federal and state nondiscrimination laws, to begin engaging in intentional discrimination if their contracts are below that value.

I am advocating for audit exemptions for companies that do not have contracts worth at least $1,000,000 in the first year working with the government. If the contract is worth $500,000, the company could be audited after two years. If the contract is worth $250,000, it could be audited after completing its third year. Congress needs to give smaller and medium businesses that are new to these obligations adequate time to evaluate the profit margin from these contracts and to take steps to comply with OFCCP's obligations.

In addition, despite the Administration's repeated statements that it was going to be more transparent, the current OFCCP administration has been decidedly non-transparent in critical aspects. For example, on December 16, 2010, OFCCP issued Directive 293, which purported to set forth the circumstances under which OFCCP would assert jurisdiction over various health care providers and pharmaceutical suppliers. As of April 16, 2012, when these remarks were written, that directive still was nowhere to be found on OFCCP's website. OFCCP's recent enforcement settlement with Federal Express was posted on OFCCP's media page the same day as the settlement was announced, but significant and desperately-needed guidance to the health care industry is available only if you obtain a copy of the directive through other means.

OFCCP also issued Directive 289 on June 4, 2010, which sets forth how compliance officers are supposed to be evaluating pay during routine compliance reviews, but this directive is not available to contractors, either. Contractors are expected to evaluate employees' pay annually to ensure that there are no gender, race, or ethnicity-based disparities, but OFCCP has not published any information or guidance that sets forth how it is going to evaluate compensation during audits, and yet from June 2010 through at least the beginning of this year, OFCCP was using this new protocol in audits.

How are companies who want to do the right thing and be in compliance, proactively, supposed to do that when OFCCP does not publish the directives it later enforces and without advising government contractors how to self-evaluate their own data? In my experience, when some companies have gone to OFCCP's district offices to attend compliance assistance seminars and meetings, and have asked how OFCCP is evaluating compensation, OFCCP's district offices have not provided an answer. It seems fundamentally contrary to notions of due process that companies could be accused of violating OFCCP's regulations when the Agency doing the enforcing has failed to identify the benchmarks and standards that companies should follow.

Compliance Burdens

Once the value of all the company's contracts over the course of 12 months exceeds $10,000, there are two compliance burdens that begin:

(1) the obligation to notify all subcontractors and vendors that they, too, may have affirmative action obligations if the work they perform is necessary to the performance of a government contract (41 CFR Section 60-1.4(a)(7)); and
(2) the extraordinary record keeping obligations set forth in section 60-1.12.

For example, if one small research lab in a large hospital enters into a research contract with an agency of the federal government, then the entire hospital is required to ensure that for each and

every position it seeks to fill – both internally and externally – it must implement a way to track every single expression of interest in employment that it receives.

- If a recruiter does not look at the expression of interest, the company must develop a way to default that application to "not considered."
- If the recruiter looks at the resume or electronic application, the recruiter must evaluate the candidate's credentials to determine if the candidate is qualified or not.
- If the candidate is not qualified, the company must still maintain a record of that application for two years from the making of the record or the hiring decision, whichever is later.
- If the company is a small business, and the value of its contract is more than $10,000 but less than $150,000, it is obligated to keep those records for only one year.
- For each qualified candidate, the company must be able to identify every stage of the hiring process that the candidate made it through, and for every qualified candidate who is not hired, the burden is on the employer to have documentation that explains why the qualified candidate was not hired.
- For each qualified candidate, the employer must solicit the applicant's race and gender. If, over time, a sufficient percentage of candidates voluntarily elects not to disclose that information, OFCCP might substitute labor market availability for actual data in an effort to find that the contractor is engaging in discrimination against females or a racial subgroup.
- The contractor must develop a mechanism to solicit race and gender, then ensure that the actual decision makers do not have access to that information, but cross reference the hidden information back to the candidate's application every year for purposes of evaluating whether managers – who did not have access to race and gender information – nonetheless rejected a disproportionate percentage of applicants based on race or gender, even though they did not have access to that information unless and until the candidate was interviewed.
- If the contractor does have records of who applied, OFCCP might go to the state workforce agency and locate expressions of interest that the agency collected and deem them to be potential victims of hiring discrimination, even though there is no proof that the employer actually considered those individuals for employment.

At the $50,000 level, and as part of the written affirmative action plan for women and minorities, employers are expected to perform three sets of data analyses:

(1) a comparison of employment against availability,
(2) analyses of hiring rates, promotion rates and termination rates to ensure that those rates do not differ significantly for men compared to women, or any one racial sub group against all other racial subgroups, and
(3) a compensation analysis.

Under the goal-setting compliance obligation, for any grouping of titles in the workforce (which grouping the employer has discretion in developing), if the contractor's employment of females and minorities is less than reasonably expected, the employer is obligated to set a hiring goal. There are no fines or penalties for not meeting the goal, but there is an obligation on the part of

the employer to identify the goal in its written affirmative action plan under the "Identification of Problem Areas" section of the plan, and there is an obligation for the employer to develop an "action oriented program" for each group with a goal, designed to improve the representation of qualified females or minorities when opportunities arise in the future. If the employer hires externally for such vacant positions, initiatives might include the use of new recruiting sources, outreach to organizations that help to place qualified females and minorities, and the like. If the employer tends to promote from within, then ensuring that women and minorities are trained and mentored could be examples of action-oriented programs for those job groups.

Still at the $50,000 level, government contractors also have obligations under the regulations that implement Section 503 of the Rehabilitation Act of 1973, which deals with individuals with disabilities. Employers are required to include the EO Clause in each of their covered contracts or subcontracts. Employers must make available the entire written affirmative action program to any employee or applicant for employment upon request.

Employers must also include the following sections and legal commitments in a written affirmative action program under Section 503:

1. Prepare an equal opportunity policy statement that indicates the Chief Executive Officer's commitment and that it is updated annually.
2. Review personnel processes to ensure they provide for careful and systematic consideration of the job qualifications of applicants and employees with disabilities.
3. Establish a schedule for the periodic review of all physical and mental job qualification standards to ensure that qualification standards are job related and do not screen out otherwise qualified disabled applicants and employees.
4. Make reasonable accommodation to the physical and mental limitations of otherwise qualified individuals with disabilities unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.
5. Develop and implement procedures to ensure that its employees are not harassed because of any disability.
6. Undertake appropriate outreach and positive recruitment activities to recruit qualified individuals with disabilities.
7. Ensure adequate internal support from supervisory and management personnel to encourage them to take the actions necessary to meet the contractor's affirmative action obligations, and disseminate its policy internally.
8. Design and implement an audit and reporting system that measures the effectiveness of the contractor's affirmative action program.
9. Designate an official to be assigned responsibility for implementing the contractor's affirmative action program.
10. Train all personnel involved in the recruitment, screening, selection, promotion, evaluation, and discipline systems to ensure that the contractor's commitments are implemented.

At $100,000, the Veterans obligations begin. They largely overlap with the Section 503 regulations, but the additional obligation to list every nonexecutive, non-temporary, and non-internal position with the employment service delivery systems is a tremendous burden for small businesses who, after subtracting expenses from revenue, often cannot afford a third-party vendor costing tens of thousands of dollars annually, who can scrape the employer's website for new vacancies and ensure that they are posted properly. It is also an unreasonable burden for employers seeking highly skilled professionals, to be forced to use these one-stop employment service delivery systems because the candidates being referred are not likely to be qualified. A university looking for a Ph.D. assistant professor candidate in physics still has to list that assistant professor job with the unemployment office or it is a violation of the Veterans' regulations that OFCCP enforces. A hospital looking for a Neurosurgeon has to list that vacancy with the one-stop employment service delivery system.

In sum, these burdens are currently imposed on all companies doing business with the government at very low thresholds. Profits from low-dollar contracts do not begin to cover the costs of ensuring that each one of these obligations is met within 120 days of signing the contract, or the in case of the mandatory job listings, on the date that the contract is signed.

Compliance Reviews

In my experience OFCCP's conduct during compliance reviews is one of the principal reasons why more companies do not want to contract with the government. There is no current compliance manual that defines how audits ought to be conducted, which has led to OFCCP's compliance officers conducting these audits very differently across OFCCP's six regions. For almost two years now, OFCCP has made representations to the contractor community that it is revising and republishing the manual.

The most onerous aspect of OFCCP's compliance reviews is the scrutiny it gives to non-hired applicants.

Using twelve (12) months of data from the employer's HRIS or payroll system, the employer is expected to know for each vacancy it filled, who was the qualified applicant pool. The employer is required to evaluate hiring rates of women against men, and every racial group against all other racial groups that comprise 2% of the labor force or 2% of the employer's workforce. If any of these applicant and hire equations reveals statistically significant differences in hiring rates, the OFCCP compliance officers are trained to follow up with the employer and obtain a substantial amount of underlying data, including all resumes, applications, interview notes, and the like to evaluate whether the employer's decisions were based on legitimate, nondiscriminatory reasons. The burden is on the employer to have all this documentation going back two years (unless it is a small business with fewer than 150 employees) because if it does not, OFCCP will presume that the information would have been unfavorable to the employer. It will launch burdensome information requests for every application that the employer included on its applicant flow log, and it will come onsite to the employer's premises to interview HR managers, recruiters, hiring managers, and hired employees. In my experience, in its search for anecdotal evidence, it will also interview rejected applicants.

Many employers have had to invest in expensive electronic applicant tracking systems in order to maintain this information. To make it easier for recruiters to fill positions and record the reasons why an applicant might not be the most qualified person for the job, many of these applicant tracking systems use disposition codes – a code to indicate why the applicant was rejected.

OFCCP affords employer applicant flow log disposition codes little to no deference in audits. If the employer's human resource managers coded applications as "not qualified," "unstable work history," "lacks relevant experience," OFCCP compliance officers will likely attempt to substitute their judgment for the employer's judgment and include those rejected candidates in OFCCP's remedies if the employer hired only one person whose resume or application appeared to include "unstable work history" or lacking in relevant experience. Again, in my experience, a number of OFCCP compliance officers equate even the littlest inconsistency in an employer's hiring process with intentional discrimination.

When the hiring rates for women are greater than the hiring rates for men, or the hiring rates for minorities are greater than the hiring rate for nonminorities, OFCCP will still pursue information requests if those hiring rates are statistically significantly different. It apparently does not matter whether the employer had a goal for women or minorities, and tried to increase the percentage of qualified females or minorities in the candidate pools. If the employer's hiring rates are not proportional based on the applicant population, OFCCP will follow up in audits. I have found that there is most definitely a perception among the equal employment opportunity and diversity professionals charged with compliance that there is a no-win situation with many of OFCCP's compliance officers. These auditors are apparently approaching audits as if the employer is presumed to have discriminated and presumed to have lost records.

If the employer fails to maintain complete and accurate records that will explain the nonselection of all qualified candidates, OFCCP will seek back pay remedies on behalf of the non-hired applicants who appear on paper to be just as qualified as the hired employees. When OFCCP is pursuing an adverse impact in hiring case, the applicant flow data base is very important. It forms the basis for the OFCCP's argument as to who applied, who was qualified, who wasn't interviewed, who wasn't hired. In too many recent cases, I have found that OFCCP will develop its own database, make its own judgment about whether an applicant was qualified or not, and refuse to discuss the database. The applicant flow database – which forms the basis for the OFCCP's assertion of monetary relief – is "off the table." There is no room for negotiation with the Agency in these situations. If the employer "accepts" the database, it is responsible for locating all non-hired applicants and affording them monetary back pay relief. Every non-hired applicant has to get added to the employer's payroll for purposes of paying back pay and withholding taxes, and then once the checks are cut, the alleged victims of discrimination are removed from the payroll so that they are not inadvertently counted in future affirmative action plan reports.

When an employer with incomplete records is accused of violating the Executive Order and OFCCP's regulations, and OFCCP seeks to negotiate a conciliation agreement, I have found the employer is facing an Agency that will not negotiate a reasonable settlement offer. In my experience, OFCCP begins settlement negotiations under the presumption that the non-hired

candidates could never have found other, alternative employment, even at the minimum wage, until much later in the negotiating process. Opening offers seem artificially inflated. Indeed, OFCCP in the current administration frequently asks the employer to begin negotiations by coming up with the amount it is willing to pay; OFCCP does not open negotiations by valuing the non-hired applicants' alleged loss and adjusting for median tenure or wage mitigation.

OFCCP audits can proceed quickly, some closing in less than 30 days. The more common scenario, however, is that an OFCCP audit can last more than a year. Our law firm has at least four audits that are approximately five years old. OFCCP currently is seeking regulatory authority to expand the temporal scope of a compliance review. Right now, OFCCP can review two years' of data looking back from the date that the employer receives its audit letter. OFCCP is proposing to increase the scope of the audit so that the audits can stay open indefinitely. I understand that many in the contractor community have strongly opposed that provision in the proposed veterans and 503 regulations, and Congress ought to step in and ensure that audits cannot cover a data period more than the current two-year period going back from the date the audit letter is received.

Compensation

The other issue that has frustrated government contractors in my experience is OFCCP's position on compensation. Although OFCCP has no standards or guidance to employers about how it will evaluate compensation in audits, OFCCP compliance officers have been focusing on every job title where there is a 2% or $2000 difference and requiring the contractor to justify the difference. If the employer wants to justify the difference based on prior relevant experience, it needs to produce a resume or application supporting that difference. If the employer wants to justify the difference based on performance, it needs to have performance evaluations.

Because of how OFCCP enforces its unpublished, stealth directive on compensation, labor market demands and economic factors are not taken into consideration by compliance officers pursuing information requests.

Most employers present their compensation data in an audit by job title because in most workplaces, individuals who are placed into the same title often (but not always) are doing similar work. At the first phase of the audit, when an employer is required to provide summary compensation, the OFCCP compliance officer looks to see if there are any job titles with 2% or $2000 differences. If just one title has this 2% or $2000 difference, OFCCP has sent out a form letter seeking additional information from the government contractor for every job title in the establishment being audited. It does not matter whether the job has one single incumbent, or all incumbents in the job title are all the same race or the same gender. OFCCP demands that the employer produce the additional information on everyone, and if the employer does not have the information stored in an easily retrievable human resource information system or payroll system, the OFCCP will come on site, demand the production of employee personnel files, and it will build this data base itself.

This focus on whether there are current differences in average pay, however, has no basis in Title VII compensation law. Under Title VII, as amended by the Lilly Ledbetter Fair Pay Act of 2009,

a plaintiff in litigation must be able to point to a decision that the employer made that was discriminatory. OFCCP, despite its stated intention to follow Title VII principles when it investigates compensation, is not doing that. OFCCP is focused on whether there are disparities or differences in current pay. If there are differences in pay, then I have found that OFCCP immediately shifts the burden of producing a nondiscriminatory reason back onto the employer -- for every job in the workplace with a 2% or $2000 difference. Employers with tens of thousands of employees in one AAP are spending months trying to justify current compensation, pulling thousands of paper and electronic files, looking at resumes and applications, refreshing their recollections as to why pay was initially set as it was decades ago. Employers that have acquired new companies with very different salary structures are not given recognition for how long legacy differences in pay are allowed to exist.

What OFCCP compliance officers ought to be focusing on are employer decisions made during the audit time frame, typically a 12-month period preceding the audit letter's receipt. When the government contractor had an opportunity to hire someone, or promote someone, or make salary increases, did it do so fairly and in accordance with equal employment principles?

In addition, during an onsite visit, OFCCP interviews managers responsible for setting compensation and employees to build a record of everything that the employees do that are the same. OFCCP compliance officers typically do not focus on parts of the job that are different, and the employer may not have an attorney or management representative in employee interviews to ensure that the compliance officer's questions are fair, objective and balanced. In short, OFCCP's approach to compensation is not transparent, not consistent, not well-defined, and arbitrary in audits. The notion that OFCCP can develop some type of web-based, data up-loadable tool in a one-size-fits-all approach is the wrong approach, in my opinion. It is not going to enable OFCCP to hone in on compensation decisions that were made unlawfully based on race, ethnicity, or gender, and it is going to place unreasonable documentation and record keeping burdens on already-thinned human resource and equal opportunity staff, who are trying to comply with these laws and regulations.

Reinstate the Ombudsman

During prior OFCCP administrations, there was an Ombudsman – someone at OFCCP whose job it was to field concerns about inconsistent positions among the OFCCP's compliance officers and district officers and enable these types of concerns to be dealt with efficiently. In my view, it would be a positive development if the Ombudsman position could be reinstated.

Separate Facility Exemptions

Finally, I question why it takes approximately two years for OFCCP to evaluate an employer petition for a separate facility exemption. In 2002, OFCCP developed a process for companies (particularly retail companies) to apply for an exemption for those facilities not connected with a government contract. The idea behind the exemption was that if a clothing retailer, which had hundreds if not thousands, of stores in malls and shopping centers all across the nation, was also selling clothes to the military, for example, but only out of its corporate office or its distribution center, OFCCP could be petitioned to require the corporate office and the distribution center to

have to comply with all these rules and regulations, but OFCCP would grant the employer an exemption for all the small retail stores in the malls and shopping centers. It seemed to be a fair and reasonable approach to all these compliance burdens. I do not know how many pending separate facility exemption petitions are currently pending at OFCCP, but I do not understand why it should take upwards of 19 months, which is very burdensome for employers waiting for a response.

Functional Affirmative Action Plans (FAAPs)

OFCCP's regulations explain that an employer is expected to have a separate affirmative action plan for each facility with 50 or more employees. In some larger workplaces, the notion of having an AAP tied to a physical building is artificial. Workforces are spread out among several different physical buildings, but they report to the same executive. Splitting up the workforce into separate physical establishments makes it harder for that executive to appreciate whether his or her workforce has any employment goals for women and minorities, or whether when that executive's managers and directors made hiring, promotion, and termination decisions, those decisions were made fairly.

Rather, I believe it makes more sense for the employer to be able to prepare an affirmative action plan based on a functional organizational unit, like a division or department. OFCCP developed a process known as the Functional Affirmative Action Plan (FAAP) directive that allows an employer to petition OFCCP for permission to prepare its plans on a functional basis. In 2011, however, OFCCP revised the 2002 FAAP directive and required that all employers that previously had been granted permission to prepare plans on a functional basis had to re-apply for permission to prepare plans that way. A term or condition of the 2011 re-approval process is that the contractor agrees when audited to provide all applicant flow, hires, promotions, terminations, and compensation data in Microsoft Excel or Access, not pdf. There is no such obligation under other current regulations.

In addition, if the contractor wants to renew the FAAP agreement, at least two FAAP facilities will have to undergo a compliance evaluation during the three-year term of the FAAP approval. Thus, under OFCCP's new FAAP approval process, companies that wish to continue preparing AAPs on a functional basis are guaranteed to undergo at least two audits. If the company has only four functional agreements, it is 100% guaranteed to have 50% of its plans audited every three years, if it wants to continue doing business with the federal government and prepare its plans in a manner that makes more sense. The new directive comes across as harsh and punitive. It is clearly a game-changer for many companies that thought preparing plans on a functional basis was a better way to track and report employment data.

In conclusion, much has changed at OFCCP in the last several years. I appreciate the Agency's commitment to achieving its mission. However, I have seen that the contractor community is increasingly frustrated by the negative tenor of compliance reviews, the perception that compliance officers approach audits with an eye towards finding a violation and citing the employer for noncompliance, and the increased willingness to take contractors into enforcement if they are unwilling to agree to the often harsh negotiation tactics that OFCCP may employ at the conclusion of these reviews. We hope there is a greater willingness to be more objective,

less biased, and more conciliatory, especially when dealing with employers that truly are trying to do the right thing and be in compliance with the laws and regulations that OFCCP enforces. I contend that an open and clear communication of contractors' compliance obligations is a better use of OFCCP's resources and will go further in achieving the Agency's mission.