

GAO Report Assesses OFCCP Progress and Indicates Annual AAP Collection Not Far Off

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The Government Accountability Office (GAO) recently released a [report](#) (the “2019 Report”) evaluating the Office of Federal Contract Compliance Program’s (OFCCP) implementation of the GAO’s [2016](#) and 2017 recommendations for improving oversight of contractor compliance. The 2019 Report concludes that OFCCP has implemented only 4 of the GAO’s 11 recommended changes.

The key findings and recommendations in the GAO’s 2019 Report are described below, but perhaps the most interesting aspect of the 2019 Report is its revelation of OFCCP’s plan to require the annual submission of contractors’ affirmative action programs (“AAPs”). GAO had previously found that many (or even most) contractors were not preparing their annual AAPs, and recommended OFCCP develop a “mechanism” to monitor federal contractors’ compliance with the AAP requirements “on a regular basis.”

The 2019 Report reveals that OFCCP is about to do just that. According to the report, OFCCP is creating an online portal through which contractors can submit their AAPs annually. In addition, OFCCP is reportedly developing an information collection request to have the Office of Management and Budget (OMB) approve the annual collection of contractor AAPs.

We have been warning contractors [for some time](#) that [OFCCP expects AAP compliance](#) and will have little tolerance for contractors who they find have failed to comply. It now appears that soon OFCCP will not have to audit a contractor to learn if it has prepared an AAP; it will know by virtue of whether the contractor has submitted its AAP to the agency via a web portal. Moreover, based on prior statements, and GAO criticisms, OFCCP will likely use these AAP submissions (or the absence of such submissions) to target contractors for compliance evaluations.

We will continue to monitor this development and share any news when it breaks.

OFCCP Fully Implemented Three of the GAO's 2016 Recommendations

The 2019 Report states that OFCCP has fully implemented the GAO's 2016 recommendations concerning: (1) "the risk geographic imbalances in compliance evaluation assignments;" (2) "outreach and compliance assistance efforts and [] options for improving information provided to federal contractors;" and (3) "[the clarity of] existing contractor guidance." According to the report "no further action [is] needed" to address these areas.

OFCCP Has Failed to Fully Implement Four of the GAO's 2016 Recommendations

1. Changing the Contractor Scheduling List to Focus on Contractors With Greatest Risk of Non-Compliance

The 2019 Report notes that while OFCCP has taken steps to implement the [Voluntary Enterprise-Wide Review Program](#) (VERP), and a new scheduling list methodology, these steps may be inadequate to ensure compliance efforts target the contractors most at risk for non-compliance. The 2019 Report observed that OFCCP's new methodology's heavy reliance on previously utilized neutral selection factors may impede its ability to prioritize the highest risk contractors in compliance evaluations. Similarly, the 2019 Report stated that VERP would likely "do little" to identify contractors most likely to violate nondiscrimination requirements "without overwhelming volunteer participation." The 2019 Report recommended that OFCCP "[e]nsure the process for developing the scheduling list is not weighted by prior scheduling list factors" in order to fully implement the 2016 recommendations.

2. Developing a Mechanism to Regularly Monitor AAPs

While the 2019 Report found that OFCCP had not fully implemented this recommendation, it also revealed that the OFCCP is on the verge of implementing an online portal through which contractors can submit their AAPs. The 2019 Report states that OFCCP “anticipates delivery of the portal by the close of fiscal year 2019.” The report also revealed that OFCCP is developing an information collection request for the annual collection of contractor AAPs and “anticipates that OMB approval will be timely to align with completion of the AAP portal.” The 2019 Report recommends OFCCP obtain OMB approval and launch the new AAP portal for public use.

3. Providing Timely, Uniform, and Continuing Training to Staff

The 2019 Report indicates that OFCCP’s recent attempts to standardize its training and evaluation process have not fully implemented GAO’s 2016 recommendation. The 2019 Report notes that OFCCP retained an expert consultant in 2018 and fully implemented an action plan to “address any program gaps” in 2019. The 2019 Report observed that OFCCP was “developing a learning management system that will allow new compliance officers easy access to training soon after [] hiring.” The 2019 Report recommends implementing the new system in order to fully comply with GAO’s 2016 recommendations.

OFCCP Fully Implemented Only One of GAO’s Five 2017 Recommendations

The GAO made five additional recommendations to OFCCP in November 2017. The 2019 Report finds OFCCP has fully implemented its recommendations to “take steps toward requiring contractors to disaggregate demographic data for the purpose of setting placement goals in [] AAP[s]”. The 2019 Report concluded that OFCCP fully implemented this recommendation “by providing guidance to contractors regarding the option to include more specific goals in their AAPs.”

The GAO pointedly notes “[t]he agency has not taken action to fully implement our other four recommendations that focus on improving oversight.”

Four 2017 Recommendations for OFCCP to Address

1. Analyze Internal Process Data From Closed Evaluations to Better Understand Cause of Delays in Compliance Evaluations

In 2017, the GAO found “OFCCP did not analyze data on closed evaluations to understand the root causes of delays in its compliance review process that may be straining its resources and inhibiting OFCCP’s efforts to identify potential discrimination.” The 2019 Report notes OFCCP had concluded that procedures outlined in its Active Case Enforcement Directive (DIR 2011-01) caused delays, but criticized OFCCP insofar as it failed to show “this conclusion resulted from the recommended analysis of internal process data from closed evaluations.” The 2019 Report indicates OFCCP officials are continuing to study the causes of delays and potential policies to address them, but does not comment on the effectiveness of the agency’s efforts. The 2019 Report states that OFCCP needs to “[d]emonstrate...internal policy changes are addressing the root causes of delays based on data analysis of actual evaluations” to fully comply with GAO’s 2017 recommendation.

2. Assess the Methods Used to Consider Industry Disparities in Compliance

In 2017, the GAO questioned the accuracy of OFCCP’s methodology for identifying disparities by industry. The 2019 Report states OFCCP contends that it is “exploring the use of U.S. Census Bureau and administrative data to refine its selection process to focus on industries with a greater likelihood of noncompliance.” The GAO notes that OFCCP’s newly implemented scheduling methodology – which incorporates industries with the highest violation rates as a factor – should be further refined by OFCCP after it completes the most recent cycle of compliance evaluations.

3. Evaluate Establishment-Based Approach to Compliance Reviews

The 2019 Report found OFCCP had submitted revisions to its process for selecting contractors for compliance reviews to the OMB in June 2019. The 2019 Report did not specify the changes OFCCP had made to its process. The GAO recommends the OFCCP obtain approval for its revisions to fully comply with its 2017 recommendation.

4. Evaluate the Functional Affirmative Action Program

In 2017, the GAO recommended OFCCP evaluate the [Functional Affirmative Action Program](#) (FAAP) insofar as it could be a useful alternative to establishment-based Affirmative Action Programs. The 2019 Report indicates that OFCCP had taken steps to encourage contractors to use the FAAP program, but notes that “few contractors participate in this program and the agency has not conducted an evaluation of it.” The GAO observed “[e]valuating the FAAP could help OFCCP improve its ability to achieve its objectives and may provide broader insight for OFCCP’s overall enforcement approach.”

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