

Even were I to reach the merits of the motion, I would deny it.

The parties agree that OFCCP's request for information is akin to an administrative subpoena. The Fourth Amendment applies to administrative subpoenas. *See, See v. City of Seattle*, 387 U.S. 541, 543-44 (1967). The touchstone of the Fourth Amendment is "that the disclosure sought shall not be unreasonable." *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946).

As the Supreme Court observed:

"It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

Donovan v. Lone Steer Inc., 464 U.S. 408, 415 (1983) (quoting *See*, 387 U.S. at 544); *see U.S. v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement . . . that the disclosure sought shall not be unreasonable'" (citation omitted).)

The scope of judicial review in an administrative subpoena enforcement proceeding is "quite narrow."⁴ But the government must still answer some questions. "The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *Id.* An administrative subpoena may not be "too indefinite or broad." *Peters v. United States*, 853 F.2d 692, 699 (9th Cir. 1988). Even if other criteria are satisfied, "a Fourth Amendment 'reasonableness' inquiry must also be satisfied." *See Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 444 n. 5 (9th Cir. 1994).

For purposes of an OFCCP compliance evaluation, reasonableness has been held to require that the data sought is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *United Space Alliance*, 824 F. Supp. 2d at 93, citing *Lone Steer*, 464 U.S. at 415.⁵

⁴ *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (*en banc*), *overruled on other grounds as recognized in Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

The parties here agree that OFCCP's current request for information is akin to an administrative subpoena. OFCCP is not demanding an intrusion into Google's offices or access to its personnel, a demand that could be viewed as an administrative warrant. (Indeed, OFCCP completed a two-day onsite review to which Google consented). For an administrative subpoena, the government meets Fourth Amendment demands by showing only reasonableness; it need not show probable cause. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984); *United Space Alliance*, 824 F. Supp. 2d at 92.

⁵ I reject OFCCP's argument that Google's agreement to the contract terms described above is a complete waiver of its Fourth Amendment rights. "Fourth Amendment waiver is only to specific items sought at the time of the waiver; otherwise, it must meet standards required for an administrative subpoena – There has been a waiver of some Fourth Amendment rights, but not all; it doesn't give the government carte blanche to access anything." *U.S. v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1113 (9th Cir. 2012).

To determine whether the demands of an administrative subpoena are unduly burdensome, some courts have looked to whether satisfying the demands would threaten normal operation of the business. But the Eleventh Circuit has cogently explained that, while this is one formulation, it cannot be followed as a rigid rule. *EEOC v. Royal Caribbean*, 771 F.3d 757, 763 (11th Cir. 2014). As the court held:

A district court is authorized to “weigh such equitable criteria as reasonableness and oppressiveness” and that “this rubric impl[ies] a balancing of hardships and benefits.” The use of “such ... criteria” and the plural of “hardship” and “benefit” clearly indicates that a district court may consider a number of factors in this analysis, rather than requiring specific types of evidence on a single factor. *See also [EEOC v.] United Air Lines*, 287 F.3d [643] at 653 [7th Cir. 2002] (noting that cases such as *Bay Shipbuilding* have suggested a party must show that compliance would threaten normal business operations but explaining “that scenario is more illustrative than categorical” and “[w]hat is unduly burdensome depends on the particular facts of each case and no hard and fast rule can be applied to resolve the question” (internal quotation marks omitted)); *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994) (“Essentially, this court’s task is to weigh the likely relevance of the requested material to the investigation against the burden to Ford of producing the material.”).

EEOC v. Royal Caribbean, 771 F.3d at 763 (citation omitted).

OFCCP argues that, as I evaluate the burden on Google, I should consider that Google has huge resources. OFCCP asserts that Google’s parent corporation’s market value is over \$500 billion and that it reported revenues in 2016 of \$90 billion. But none of this is relevant.

Google has no access to its parent corporation’s assets. Even if it did, market capitalization is the value of the shares that shareholders hold; it is not an asset of the corporation. It reflects such factors as the investing public’s expectations for future growth of the corporation. That factor is often more important in Silicon Valley and other growing companies than factors such as current assets, liabilities, profits, and losses. Revenue has meaning only when compared to expenditures. For example, in 2007, General Motors had revenue of \$180 billion (twice the revenue of Google’s parent in 2016), but it reported a net loss of \$43.3 billion and was soon in bankruptcy.

Moreover, Google has obligations other than complying with OFCCP demands. The federal government had estimated revenues for fiscal 2016 of about \$3.5 trillion. For that fiscal year, the U.S. Department of Labor had a discretionary budget of about \$13.2 billion. But I do not expect that OFCCP could spend a significant portion of either federal revenues or the DOL budget on a single OFCCP compliance review.

I am focused more on OFCCP’s allegation in its complaint (signed on December 29, 2016) that, as of that date, GSA had paid Google \$600,000 on this contract in two and one-half years. Google contends that compliance with just OFCCP’s demand for a compilation of interview

notes on about 54,000 job interviews will cost Google over \$1 million.⁶ And this is only one of the items OFCCP is demanding. If Google is correct and if OFCCP is entitled to an order requiring Google to comply with the full extent of its demands, it begins to appear that the GSA contract had a poison pill that would rob Google of the benefits of the contract: namely, compliance with OFCCP's demands will far exceed all of Google's gross revenue under the contract.

I must consider that a compliance review is only that: an investigation to determine whether the contractor has complied with its anti-discrimination and affirmative action obligations. There has been no finding of wrongdoing. This is not litigation that the government is prosecuting based on investigative findings. And even if it were, proportionality is now a cornerstone of discovery and could be a basis for a protective order limiting discovery.⁷

Based on this record, I cannot conclude as a matter of law that OFCCP's requests in their entirety are both relevant to the compliance review and not unreasonably burdensome. OFCCP's proof falls short on the following items, which I offer by way of example and not as a necessarily complete list:

The employee records sought ("including starting salary, starting position, starting 'compa-ratio,' starting job code, starting job family, starting job level, starting organization, and changes to the foregoing") are unlimited as to time. Google was incorporated in 1998. The government contract was agreed to in June 2014. Although a worker's starting salary – and later adjustments to that salary – obviously relate to compensation, OFCCP has not shown how a starting salary 19 years ago – and 16 years before the government contract – is relevant to its proper purpose in a compliance review. To the extent that this information is relevant, when it concerns more than 20,000 employees whose work histories must be searched, it would appear to be unreasonably burdensome, given its extremely limited possible relevance. I cannot decide the question on summary decision.

OFCCP has established that it is entitled to review Google's compliance with its obligations under its affirmative action plan and that its affirmative action plan extends to more than 20,000 employees at its headquarters facility in Mountain View, California. Google could have asked OFCCP to allow it to develop an affirmative action plan that would be based on employees' functions rather than the geographically-based establishment in which they work. That might have limited the breadth of the affirmative action plan. But Google did not do that. OFCCP thus is acting within its authority to define the scope of the compliance review to include Google's entire Mountain View workforce. My review of the scope must be narrow and deferential. And

⁶ Perhaps Google will prefer to provide OFCCP access to the raw interview notes and allow OFCCP to do the compilation.

⁷ See Fed. R. Civ. P. 26(b)(1): "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." See also, 29 C.F.R. § 18.51(b)(4) (mandating that judges limit discovery when disproportionate).

I am persuaded that OFCCP need not engage in an iterative process with Google, explaining the status of the investigation when it requests further information.⁸

But, given the broad scope of the compliance review OFCCP has elected to do, a problem arises as to whether OFCCP has requested so much material as to be unduly or unreasonably burdensome, when less would be sufficient. The second "snapshot" requires Google to produce for each of over 19,000 employees base salary or wage rate; hours worked in a typical workweek; other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime; additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade; and documentation and policies related to compensation practices, particularly those that explain the factors and reasoning used to determine compensation. To this OFCCP has added: bonus earned, bonus period covered, campus hire or industry hire, competing offer, current compa-ratio, current job code, current job family, current level, current manager, current organization, date of birth, department hired into, education, equity adjustment, hiring manager, job history, locality, long-term incentive eligibility and grants, market reference point, market target, name, performance rating for the past 3 years, prior experience, prior salary, referral bonus, salary history, short-term incentive eligibility and grants, starting compa-ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, stock monetary value at award date, target bonus, total cash compensation, and any other factors related to compensation.

The data OFCCP requests meet the deferential standard for relevance. But, even accepting that Google has extraordinary capability to search and create databases, OFCCP's request that this extensive information be supplied for a second "snapshot" date requires some showing that it is not unduly burdensome. Had GSA paid Google \$600 million on this contract, not \$600,000, it would be a different analysis, but that is not the history of this contract.

Moreover, the snapshot OFCCP demands contains one requirement that lacks any specificity: OFCCP demands that, for the thousands of employees, Google add to the requested database "Any other factors related to Compensation." OFCCP must determine what information it wants and describe it with sufficient specificity for OFCCP to know what it must do to comply. OFCCP has interviewed a significant number of Google managers. It should have asked what factors Google considers when setting compensation. OFCCP could also ask Google to prepare a list of factors it considers when setting compensation. But Google is not required to anticipate

⁸ On an administrative subpoena, the focus is "on the breadth of the subpoena rather than the motivation for its issuance." *United Space Alliance*, 824 F. Supp. 2d at 91; see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (administrative agency may issue an administrative subpoena "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not").

what OFCCP might someday conclude is “related to compensation” and therefore should have been produced.

Order

For the foregoing reasons, OFCCP’s motion for summary judgment is DENIED.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

OFCCP v. GOOGLE INC.

2017-OFC-00004

EX. A

**TO DEFENDANT'S PRE-HEARING
STATEMENT**

OFCCP v. Google Inc. (Case No. 2017-OFC-00004)
Parties' Stipulated Facts

1. Google is a wholly-owned subsidiary of Alphabet, Inc. It offers, among other things, Internet advertising services. It is headquartered at 1600 Amphitheatre Parkway in Mountain View, CA.
2. Since at least June 2, 2014, Google has had 50 or more employees.
3. On June 2, 2014 Google was awarded a contract of \$100,000 or more (Contract No. GS07F227BA for "Advertising and Integrated Marketing Solutions" from the General Services Administration ("AIMS Contract")).
4. The AIMS Contract consists of four sets of documents: (1) the Government's solicitation, a true and correct copy of which is identified as Hearing Exhibit 1; (2) Google's offer, dated July 2, 2013; (3) Google's Final Proposal Revision, submitted May 6, 2014, a true and correct copy of which is identified as Hearing Exhibit 2; and (4) the relevant Standard Form 1449 and its continuing pages, a true and correct copy of which is identified as Hearing Exhibit 3.
5. The AIMS Contract contains provisions requiring Google to comply with Executive Order 11246, VEVRAA, and the Rehabilitation Act and the implementing regulations promulgated pursuant to each. Under the AIMS Contract, Google agreed to, among other things, "comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor" and

permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.
6. Google sent a letter dated April 23, 2014 to the General Services Administration regarding the company's offer in response to Solicitation Number 7FCB-H2-070541-B, Refresh 16. A true and correct copy of that letter is identified as Hearing Exhibit 4.
7. On or about September 30, 2015, Google received a scheduling letter from OFCCP's San Jose District Office, notifying the company that its Mountain View facility had been "selected . . . for a compliance evaluation" in the form of a "compliance review." A true and correct copy of that scheduling letter and its attachment is identified as Hearing Exhibit 5.
8. For the purpose of the hearing, Google will not assert a defense based on how OFCCP selected the Company for the compliance evaluation at issue in this proceeding, nor does Google assert that OFCCP failed to follow its neutral selection process in selecting Google for the compliance evaluation at issue in this proceeding.

9. On or about November 19, 2015, Google submitted a cover letter as well as its Executive Order 11246 Affirmative Action Plan, Affirmative Action Plan for Individuals with Disabilities, and Affirmative Action Plan for Covered Veterans for its Mountain View, California facility to OFCCP.
10. By email dated November 24, 2015 from Daniel V. Duff to Gregory Smith, Google provided its response to Itemized Listing Number 19 of the Scheduling Letter to OFCCP, which consisted of an Excel spreadsheet containing individualized compensation data for the 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015; the spreadsheet contained the following column titles: Employee ID; Hire Date; Race; Gender; Job Title; EEO-1 Category; Job Group; Location; Salary; Merit Increase; Annual Bonus; Bridging Bonus; Commission – Quarter 1; Commission – Quarter 2; Commission Quarter - 3; Commission – Quarter 4; Commission Adjustment; Sales Bonus Payment; EMG Award; Fix Term Incentive; Holiday Bonus; ENG Mission Control Bonus; On Call Pay; Patent Pay; Peer Recognition Pay; Referral Bonus; Retention Bonus; Sign On Bonus; Spot Recognition Pay; Google Ventures Bonus; and Waze Referral Bonus.
11. By email dated December 29, 2015 from Daniel V. Duff to OFCCP Compliance Officer Carolyn Mcham Menchyk, Google provided additional compensation data for the 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing the data previously provided and the following new column titles: State; Job Grade; FT/PT %; FT/PT Hours; FLSA; Department.
12. By email dated February 5, 2016 from Daniel V. Duff to OFCCP Compliance Officer Carolyn Mcham Menchyk, Google provided additional compensation data for the 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing the data previously provided and the following new column titles: RSUs.
13. By email dated April 8, 2016 from Daniel V. Duff to OFCCP Assistant District Director Agnes Huang, Google provided additional compensation data for the 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing the data previously provided and the following new column titles: Award Date = 01apr2015; Award Date 01jul2015; Award Date = 01oct2014; Award Date = 03dec2014; Award Date = 03jun 2015; Award Date = 09Sept2014; Award Date = 04feb2015; Award Date = 04Mar2015; Award Date = 05aug2015; Award Date = 05nov2014; Award Date = 06may2015; and Award Date= 07jan2015.
14. On June 1, 2016, OFCCP requested that Google produce:
 - a. “a compensation database with a 9/1/2014 snapshot,” for all employees in Google’s corporate headquarters affirmative action plan (“AAP”) as of September 1, 2014, including all factors OFCCP previously requested for employees in its corporate headquarters AAP as of

September 1, 2015, as well as the additional factors set forth in OFCCP's June 1, 2016 letter;

- b. "job history" and "salary history" for all employees in Google's corporate headquarters AAP as of September 1, 2015, and for all employees in Google's corporate headquarters AAP as of September 1, 2014; and
- c. the "names" and "employee contact information" for all employees in Google's corporate headquarters AAP as of September 1, 2015, and for all employees in Google's corporate headquarters AAP as of September 1, 2014 (hereinafter "the Subject Items/Demands").

A true and correct copy of the letter requesting these items is identified as Hearing Exhibit 6.

- 15. After receipt of OFCCP's June 1, 2016 letter, Google sent a letter to OFCCP on June 17, 2016. A true and correct copy of that letter is identified as Hearing Exhibit 7.
- 16. On June 23, 2016, OFCCP Assistant District Director Agnes Huang responded to Google's June 17, 2016 letter. A true and correct copy of that letter is identified as Hearing Exhibit 8.
- 17. On June 30, 2016, Google sent a letter to OFCCP Deputy Regional Director Jane Suhr. A true and correct copy of that letter is identified as Hearing Exhibit 9.
- 18. By Biscom web-based message dated August 1, 2016, Google provided additional compensation data for 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing data previously provided and the following new column headers: Department Hired Into; Campus or Industry Hire; Date of Birth; Hiring Manager; Pay Locality; Market Reference Point; 2013 Performance Rating; 2014 Performance Rating; 2015 Performance Rating; Job Code; Job Family; and) Level; Manager; Organization; Current Compa Ratio; 2013 Bonus Target; 2014 Bonus Target; and 2015 Bonus Target.
- 19. On September 2, 2016, Google sent a letter to OFCCP's Assistant District Director. A true and correct copy of that letter is identified as Hearing Exhibit 10.
- 20. On or around September 16, 2016, OFCCP served a notice to show cause why enforcement proceedings should not be initiated ("Show Cause Notice"). A true and correct copy of that Show Cause Notice is identified as Hearing Exhibit 11.
- 21. On October 19, 2016, Google sent a letter to OFCCP, responding to the Show Cause Notice. A true and correct copy of that letter is identified as Hearing Exhibit 12.

22. On November 9, 2016, OFCCP Regional Director Janette Wipper responded to Google's October 19, 2016 letter. A true and correct copy of that letter is identified as Hearing Exhibit 13.
23. On November 29, 2016, the parties held a teleconference regarding the Show Cause Notice.
24. On December 6, 2016, Google sent a letter to OFCCP Regional Director Janette Wipper to follow up on the November 29, 2016 teleconference. A true and correct copy of that letter is identified as Hearing Exhibit 14.
25. On December 20, 2016, counsel for OFCCP wrote Google about potential enforcement proceedings being initiated based on the parties' dispute over the Subject Items/Demands. A true and correct copy of that letter is identified as Hearing Exhibit 15.
26. On December 28, 2016, Google responded to OFCCP's counsel's December 20 letter. A true and correct copy of that letter is identified as Hearing Exhibit 16.
27. Since OFCCP requested the Subject Items in June 2016, the parties have exchanged multiple communications and held several teleconferences regarding the Subject Items/Demands. For instance, the parties held teleconferences on June 14, 2016; August 25, 2016; September 22, 2016; and November 29, 2016, and counsel for OFCCP and counsel for Google held a teleconference on December 23, 2016. During these teleconferences, the parties discussed their positions regarding the Subject Items/Demands.
28. For the purposes of the hearing, Google will not assert a defense that OFCCP failed to conciliate.
29. By Biscom web-based message dated January 1, 2017, Google provided additional compensation data for 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing data previously provided and the following new column titles: Award Type 01apr2015; Award Type 01jul2015; Award Type 01oct2014; Award Type 03dec2014; Award Type 03Jun2015; Award Type = 03sep2014; Award Type 04feb2015; Award Type 04mar2015; Award Type 05aug2015; Award Type 05nov2014; Award Type 06may2015; Award Type 07Jan2015.
30. By Biscom web-based message dated on or around February 1, 2017, Google provided citizenship and visa-related data for more than 20,000 employees, producing an Excel spreadsheet containing the following column titles: employee ID, country of citizenship, secondary country of citizenship, visa (yes/no), visa type, and place of birth.

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

OALJ Case No. 2017-OFC-00004

OFCCP No. R00197955

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Case Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31

contractor's establishments and may cover less than the contractor's total employee population across facilities. 41 C.F.R. § 60-2.1(d). As such, the size of the review depends on how the contractor organizes its workforce for AAP purposes.³ See 41 C.F.R. § 60-2.1(d). In reviewing compliance, OFCCP "examine[s] the contractor's personnel policies and activities for the two years preceding the initiation of the review." Government Contractors, Affirmative Action Requirements, 62 Fed. Reg. 44174, 44178 (Aug. 19, 1997).

As particularly relevant here, the Implementing Regulations specify how the personnel and employment records a contractor must keep (as specified in 41 C.F.R. § 1.12(a)) are used in compliance evaluations, providing that OFCCP is entitled to review "documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations." 41 C.F.R. § 60-1.20(a)(2). Crucially, specifically in the context of compliance evaluations, the regulations declare that the records "*are relevant* until OFCCP makes a final disposition of the evaluation." *Id.* § 60-1.12(a) (emphasis added).

STATEMENT OF UNCONTESTED FACTS

1. Google is a wholly-owned subsidiary of Alphabet, Inc. It offers, among other things, Internet advertising services. It is located at 1600 Amphitheatre Parkway in Mountain View, CA. Complaint ¶ 2; Answer ¶ 2.
2. At all times relevant hereto, Google has had 50 or more employees and has had at least one contract with the federal government of \$100,000 or more, including Contract No.

³ Typically, AAPs cover a single establishment of a covered-contractor that has 50 employees or more. 41 C.F.R. § 60-2.1(d). However, contractors may request that OFCCP permit it to organize its AAPs based on functional or business units, known as a Functional Affirmative Action Program ("FAAP"). See *id.* § 60-2.1(e); OFCCP Directive 2013-01. In the instant matter, Google has not requested a FAAP and as such, OFCCP appropriately is reviewing compliance with the Executive Order for the entire establishment selected for review.

Thus, even under the Fourth Amendment administrative subpoena framework, which Google has sought to apply, Google's refusal to produce the Subject Items is meritless. Google is required by contract and regulation to produce the Subject Items, and OFCCP's request does not run afoul of the Fourth Amendment. Google must disclose the Subject Items promptly.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in OFCCP's favor and issue an order directing Google to produce within 14 days:

- a. a database containing information on the company's compensation of its employees (*i.e.*, "compensation snapshot"), as of September 1, 2014;
- b. as identified in the Show Cause Notice, job and salary history for employees in a September 1, 2015 compensation snapshot that Google had produced and the requested September 1, 2014 snapshot, including starting salary, starting position, starting "compa-ratio," starting job code, starting job family, starting job level, starting organization, and changes to the foregoing; and
- c. the names and contact information for employees in the previously-produced September 1, 2015 snapshot and the requested September 1, 2014 snapshot.

Respectfully submitted,

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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

OALJ Case No. 2017-OFC-00004

OFCCP No. R00197955

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**Office of Administrative Law Judges
San Francisco, Ca**

**PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

Case Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31

teleconference); *see also* Pl.'s Briefing re Authority, Ex. A. Although Google has never satisfied its duty under § 60-1.20(f), OFCCP has complied with that regulation.

V. **OFCCP Will Not Provide Any Testimony Disclosing Its Preliminary Findings or Aspects of the Ongoing Investigation.**

Google clearly communicated its intent to force OFCCP to disclose its preliminary investigative findings in this compliance evaluation, which will compromise OFCCP's current investigation and those in the future.²⁶ Having been denied twice in requesting disclosure of those findings, Google undoubtedly will try a third time if any evidentiary hearing is permitted. Google, through its vexatious conduct, should not be allowed to leverage any hearing to obtain the agency's protected information and benefit from its obstruction.

To be clear, if any hearing is ordered, OFCCP witnesses will not offer any testimony regarding its internal deliberations concerning the ongoing compliance evaluation, including its preliminary findings. This testimony is wholly unnecessary to determining whether the Subject Items were properly requested. Moreover, as explained in OFCCP's opening brief, such testimony would invade the agency's deliberative process and investigatory files privileges and any work product protection. Pl.'s Mem. of P&A at 14-15.

Google concedes that OFCCP's preliminary findings are protected by the investigatory files privilege and work product protection, challenging only OFCCP's assertion of the deliberative process privilege. *See* Opp'n at 25-28. Google argues the privilege does not apply because OFCCP it demands only "the factual results of these analyses." *Id.* at 27-28. However, simply labeling the results of OFCCP's statistical analyses as "factual" does not eviscerate the deliberative process privilege. Setting aside whether "factual results" can be distinguished from

²⁶ *See generally* Mot. to Remove from Expedited Proceedings (requesting discovery on this topic); 2/16/17 Sween Ltr. (requesting the same); *see also* Opp'n at 27-28 (detailing request for indicators of discrimination).

other results in statistical analyses, those results would still be protected by the privilege because “the disclosure of factual portions may reveal the deliberative process of selection . . . where the factual segments’ function was not merely summary but analysis as well[.]” *The Shinnecock Indian Nation v. Kempthorne*, 652 F. Supp. 2d 345, 372 (E.D.N.Y. 2009) (quoting *Lead Indus. Ass’n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 83 (2d Cir. 1979)) (internal quotation and revision marks omitted). Whatever “factual results” Google suggests arises out of OFCCP’s statistical regressions are not mere summaries, but are intertwined with the analyses.

OFCCP’s internal deliberations concerning the ongoing compliance evaluation, including its preliminary findings, are protected by the deliberative process and investigative files privileges, at the least. Google has not offered good cause to invade those privileges.

CONCLUSION

Google’s obstruction of OFCCP’s compliance evaluation and its repeated attempts to bore a permanent peephole into OFCCP’s investigative file must come to an end. For the foregoing reasons, the Court should reject Google’s persistent attempt to invade OFCCP’s investigative files and grant OFCCP’s motion.

Date: March 6, 2017

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UNITED STATES DEPARTMENT OF LABOR
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PLAINTIFF'S PRE-HEARING STATEMENT

Case Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31

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the bulk of what OFCCP requested to be relevant. Moreover, the Court has deprived Google of its primary argument on relevance, ruling that “OFCCP need not engage in an iterative process with Google, explaining the status the investigation when it requests further information.”

Summ. J. Order at 7. At the hearing, OFCCP will reinforce the relevance of the requested items, including through explaining that employees’ names and contact information are relevant because they enable the agency to speak to employees freely to ensure Google has complied with its equal opportunity obligations.

Because the hearing will be limited to whether OFCCP can establish the relevance of employees’ names and contact information and whether Google can prove an undue burden, OFCCP expects that the parties’ presentations will be complete on April 7. Following that presentation, the Court should grant OFCCP the requested relief, which includes directing Google to produce the following:

- a compensation database as of September 1, 2014 for the employees Google identified in its Affirmative Action Plan (“AAP”) that includes the data Google produced with respect to the September 1, 2015 compensation snapshot, along with the additional data requested in the June 1, 2016 letter;²
- the full job and salary history for the employees in Google’s September 1, 2015 compensation snapshot and the requested September 1, 2014 compensation snapshot,³ and

² The additional data identified in that letter are: bonus earned, bonus period covered, campus hire or industry hire, competing offers, current compa ratio, current job code, current job family, current level, current manager, current organization, date of birth, department hired into, education equity adjustment, hiring manager, job history, locality, long-term incentive eligibility and grants, market reference point, market target, name, performance rating for past 3 years, prior experience, prior salary, referral bonus, salary history, short-term incentive eligibility and grants, starting compa ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, stock monetary value at award date, target bonus, and total cash compensation. OFCCP also requested data on “other factors [Google uses] for compensation,” which was intended to permit Google to provide any other data it found relevant. *See, infra*, n.8.

³ Job and salary history is a subset of the data identified in the June 1, 2016 letter, including starting compa ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, prior salary, and prior experience.

- the names and contact information for the employees in the September 1, 2015 and the September 1, 2014 snapshots (hereinafter, the Subject Items).

II. List of Stipulated Facts

After conferring in good faith, the parties agreed to several stipulated facts, which are shown in Appendix A. Because those facts are voluminous, OFCCP summarizes several of the key stipulations below:

- Since at least June 2, 2014, Google has had 50 or more employees and a contract of \$100,000 or more (Stip. Facts Nos. 2-3), making it a federal contractor covered by the relevant recordkeeping and access requirements.
- Over six months, OFCCP and Google exchanged multiple letters and held several calls regarding the Subject Items (*see* Stip. Facts Nos. 14-17, 19-22, 24-27), demonstrating OFCCP's good faith efforts to resolve the parties' dispute.
- Google does not assert defenses based on how OFCCP selected it for a compliance review or whether OFCCP satisfied any duty to conciliate. *See* Stip. Facts Nos. 8, 28.

III. List of Disputed Facts

Based on the parties' stipulations and the Court's Summary Judgment Order, the following issues are the matters remaining in dispute:

- Whether employees' names and contact information are relevant to OFCCP's compliance evaluation; and
- Whether Google will face any undue burden or hardship in producing the Subject Items.

IV. Brief Statements of Applicable Law and Conclusions to Be Drawn from Testimony and Documents to be Offered

A. **Google is Subject to the Recordkeeping and Access Requirements Enforced by OFCCP.**

There is no dispute that Google is a covered federal contractor subject to the recordkeeping and access requirements under Executive Order 11246 ("Executive Order"), Section 503 of the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance

be subject to lesser requirements than those further along in their performing their contracts. There is no legal basis to discriminate among federal contractors based on where they are in their contract's term.¹⁸ Plainly, once a contractor meets the relevant regulatory contract threshold, that contractor must comply fully with the regulation.

Nonetheless, given the Court's announced interest in how much Google has received from federal business, OFCCP will be prepared at the hearing to present evidence on Google's attempts to obtain federal business and the substantial volume of such business. For instance, in 2010, Google sued the Department of Interior along with its reseller Onix Networking Corporation in an effort to obtain the Department's business. *See generally* Hrg. Ex. 208 (*Google, Inc. v. United States* complaint). Following that lawsuit, in 2012, a seven-year, the Interior Department awarded a \$34.9 million contract to Onix to provide Google's services. Hrg. Ex. 209 ("Google Wins U.S. Contract," *Wall Street Journal* article on \$34.9 million contract). Since receiving this 2012 contract, Google has obtained federal contracts valued over \$27 million, including the AIMS Contract. *See* Hrg. Ex. 2 at 3 (estimating \$5 million in annual sales under five-year AIMS Contract); Hrg. Ex. 203 (approx. \$2.6 million cloud subcontract) at 3.

D. In Addition to Being Irrelevant, OFCCP's Preliminary Findings Are Protected from Disclosure.

The Court has already established that OFCCP's preliminary findings have no bearing on whether the agency is entitled to those materials. As the Court has explained, "OFCCP need not engage in an iterative process with Google, explaining the status of the investigation when it

¹⁸ Even if the contract value were relevant to the analysis, the undue burdensome analysis would have to consider the *value* of the contract, not the amount *received* under the contract. *See, supra*, § IV.A. That value is defined by "the total amount of orders the parties reasonably anticipate to be placed during the life of the contract." *Star Machinery*, 1983 WL 509225, at *3. Tying compliance to the value of the contract anticipated by the parties makes more sense than comparing what was because it provides context to the contractor's agreement to comply with its equal opportunity obligations. For instance, here, Google agreed that it would be subject to compliance evaluations, and their attendant cost, when it sought and agreed to a \$25 million five-year contract with the GSA.

requests further information.” Summ. J. Order at 7 (citing *United Space Alliance v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011); *Morton Salt*, 338 U.S. at 652). Thus, OFCCP’s preliminary findings are irrelevant to this case.

Separate from being irrelevant, OFCCP’s preliminary findings and initial impressions are protected at least by the deliberative process and investigative files privileges, both of which are explained below.

1. The deliberative process privilege protects OFCCP’s internal discussions and analyses in the ongoing compliance evaluation.

“The deliberative process privilege covers communications that are pre-decisional and deliberative.” *Nat’l Sec. Archive v. CIA*, 762 F.3d 460, 463 (D.C. Cir. 2014). The privilege is based on the principle that if “agencies were to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.” *Id.* (citation omitted). “[A]gency officials should be judged by what they decided, not for matters they considered before making up their minds.” *Id.* (citation omitted).

Material is predecisional “if it was prepared in order to assist an agency decisionmaker in arriving at his decision.” *Carter v. U.S. Dep’t of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002) (citation omitted); *Nat’l Sec. Archive*, 762 F.3d at 463 (“To be pre-decisional, the communication (not surprisingly) must have occurred before any final agency decision on the relevant matter.”). Material is deliberative if it “is intended to facilitate or assist development of the agency’s final position on the relevant issue.” *Nat’l Sec. Archive*, 762 F.3d at 463; *see also United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000) (deliberative material is that which is “related to the process by which policies are formulated”).

Here, OFCCP’s preliminary findings and impressions are both predecisional and deliberative. They are predecisional because OFCCP has not yet determined whether Google has

complied with its equal opportunity obligations. They are deliberative as they are part of the process by which OFCCP is making that determination. Thus, the deliberative process privilege applies.

2. The investigative files privilege also protects OFCCP's internal analyses and deliberations in the ongoing compliance evaluation.

Google has not contested OFCCP's invocation of the investigative files privilege, which also protects OFCCP's internal analyses and deliberations. That privilege protects "informal investigatory material and preliminary determinations." *NLRB v. Silver Spur Casino*, 623 F.2d 571, 580 (9th Cir. 1980).¹⁹ As explained above, OFCCP's internal analyses and deliberations as part of the ongoing compliance evaluation constitute investigatory material and preliminary determinations.

V. Estimate of Amount of Time Required to Present Party's Case

As noted above, OFCCP will be proving the relevance of the Subject Items, while Google must prove its undue burden in producing them. Thus, OFCCP's case-in-chief will focus on explaining the Subject Items and their relevance, whereas Google's case-in-chief should focus on its undue burden.

Not including an opening and closing argument, OFCCP estimates that its case-in-chief will require approximately two hours to present evidence. OFCCP may present rebuttal evidence based on Google's presentation regarding its burden in its case-in-chief.

¹⁹ See also *Perez v. Blue Mountain Farms*, NO: 2:13-CV-5081-RMP, 2015 WL 11112414, at *3 (W.D. Wash. Aug. 10, 2015) (noting qualified investigative files privilege "applies to informal investigatory material and preliminary determinations") *Solis v. Seafood Peddler of San Rafael, Inc.*, Case No. 12-cv-0116 PJH (NC), 2012 WL 12547592, at *6 (N.D. Cal. Oct. 16, 2012) (same); *United States v. Graham*, 555 F. Supp. 2d 1046, 1048 (N.D. Cal. 2008) ("The Ninth Circuit has explained that the investigatory privilege applies to the 'informal deliberations of all prosecutorial agencies and branches of the government.'") (quoting *Silver Spur Casino*, 623 F.2d at 580).

VI. Any Appropriate Comments, Suggestions or Information

The parties have numbered the exhibits for the hearing in a manner intended to identify the offering party:

- **Hearing Exhibits 1-99:** Joint Exhibits
- **Hearing Exhibits 100-199:** Google's Exhibits
- **Hearing Exhibits 200-299:** OFCCP's Exhibits

To make the upcoming hearing more efficient, OFCCP respectfully requests that the Court accept the parties' joint exhibits into the evidentiary record without the need for formally offering the exhibit at the hearing.

Respectfully submitted,

Date: March 28, 2017

NICHOLAS GEALE
Acting Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

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June 5, 2017

VIA HAND DELIVERY

The Honorable Steven B. Berlin
United States Department of Labor
Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

Re: *OFCCP v. Google Inc.*, Case No. 2017-OFC-00004, Redacted
Plaintiff's Post-Hearing Brief

Your Honor:

As indicated in the cover-letter OFCCP submitted with Plaintiff's Post-Hearing Brief on June 2, 2017, and consistent with this Court's April 7, 2017, request for redacted versions of briefs for the public record (see 4/7 Hearing Transcript at 16:17-25), OFCCP hereby submits a redacted copy of its Post-Hearing Brief. The redacted Brief omits each and every reference to the Exhibits identified by Google in their pending Motion to Seal Exhibits. As this version of the brief does not include any information subject to the sealing Order, OFCCP does not intend to treat this Brief as sealed absent an Order from the Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ian H. Eliasoph". The signature is written in a cursive style and is positioned above a horizontal line.

Ian H. Eliasoph
Counsel for Civil Rights

cc (via email): Lisa Barnett Sween, Esq.
Matthew Camardella
Daniel Duff
Antonio Raimundo

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

OALJ Case No. 2017-OFC-00004

OFCCP No. R00197955

PLAINTIFF'S POST-HEARING BRIEF

Case Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31

III. In September 2015, OFCCP Initiated a Compliance Evaluation of Google's Mountain View Headquarters, Which Includes a Comprehensive Analysis of Google's Compensation Practices.

On September 30, 2015, OFCCP opened a compliance evaluation into Google's Mountain View headquarters. ALJ Ex. ¶ 7; *see generally* Ex. 5. A compliance evaluation entails "a comprehensive analysis and evaluation of a contractor's employment practices." Hrg. Tr. (Wipper) at 33:19-21; *see also* 41 C.F.R. § 60-1.20(a)(1).

The current compliance evaluation has a review period that spans from September 2013 through at least September 2015. Hrg. Tr. (Wipper) at 35:15-36:3 (explaining timeframe and that period may go beyond September 2015 if OFCCP identifies any violations). The review encompasses the over 21,100 employees Google included in its affirmative action program ("AAP"). *Id.* at 34:14-18, 38:15-18. Google did not request to use a functional affirmative action program ("FAAP") for its Mountain View headquarters, which are "often approved" and could have resulted in narrower groups of employees being subject to a compliance evaluation. *Id.* at 34:22-35:1 (discussing FAAP alternative), 39:4-19 (explaining FAAPs and how a request for one is "often approved"), 119:24-120:8 (explaining potential for narrower reviews with FAAPs).

OFCCP reviews contractors' compensation practices based on its Directive 307, a publicly published document that describes for federal contractors and other interested parties how the agency evaluates compensation practices. Hrg. Tr. (Wipper) at 36:5-13. Among other things, the Directive instructs OFCCP investigators that "when you're investigating compensation, you should be looking at all employment practices that have an impact on pay." *Id.* at 36:18-20. It also provides that, in conducting an evaluation, the agency considers "the factors the Agency believes are relevant and legitimate and also the factors that the Contractors asserts are relevant to pay practices and pay decisions." *Id.* at 36:22-25. Directive 307 also

provides that evaluations of compensation practices are done on a case-by-case basis, and that principles established under Title VII of the Civil Rights Act guide OFCCP's analysis. *Id.* at 158:21-159:3.

As part of the current compliance evaluation, among other things, OFCCP has analyzed compensation data Google produced in 2015 and interviewed with human resources personnel. Information obtained through both led OFCCP to request the additional materials at issue in this expedited proceeding.

A. Google's 2015 compensation data revealed systemic compensation disparities against women across the Mountain View workforce.

In the September 30, 2015 letter advising Google of the compliance evaluation, OFCCP made an initial request for data. *See* Joint Ex. 5 at 1. Google produced this initial set of data in late 2015. ALJ Ex. 1 ¶¶ 10-11.

Prior to June 2016, OFCCP reviewed Google's data production, which revealed "systemic disparities against women pretty much against the entire workforce." Hrg. Tr. (Wipper) at 48:4-5; *id.* at 128:6-11 (explaining OFCCP reviewed data before making June 2016 requests). The initial "indicators that were consistently adverse to women" were widespread. *Id.* at 132:1-7.

Having observed across-the-board disparities, OFCCP sought to determine how long such disparities existed and the cause of the observed compensation inequalities. *See, e.g., id.* at 40:21-24, 41:7-10 (explaining need "to find out what the cause of those disparities are"). As Regional Director Janette Wipper explained, "if we're looking at a disparate impact claim . . . we want to understand what's causing the disparity as well as how we can propose to correct it." *Id.* at 47:7-9.

preliminary findings is wholly irrelevant; she was explaining the overall process of the review, demonstrating that OFCCP was following its normal procedures and requesting items clearly relevant to its view of the facts.

CONCLUSION

For the reasons set forth within, the record evidence and testimony fully support OFCCP's authority and entitlement to the information contained in the Subject Items. As Google has failed to proffer the requisite evidence to justify withholding the requested information, OFCCP respectfully asks that this Court order Google to come into compliance by producing all documents responsive to OFCCP's Subject Requests.

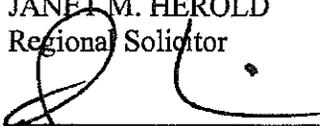
Date: June 2, 2017

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Respectfully submitted,

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Regional Solicitor



IAN ELIASOPH
Counsel for Civil Rights

JEREMIAH MILLER
Senior Trial Attorney

HAILEY MCALLISTER
Trial Attorney

U.S. Department of Labor

Office of Federal Contract Compliance Programs
San Jose District Office
96 North 3rd Street, Suite 410
San Jose, CA 95112-7709



VIA CERTIFIED MAIL
7001 1140 0000 5048 9833
RETURN RECEIPT REQUESTED

OMB NO. 1250-0003
Expires March 31, 2016

September 30, 2015

Sundar Pichai
CEO
Google, Inc.
1600 Amphitheatre Parkway
Mountain View, CA 94043-1351

Dear Mr. Pichai:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), selected your facility located at 1600 Amphitheatre Parkway, Mountain View, California for a compliance evaluation. We are conducting this compliance evaluation under the authority of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973,¹ the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974² and their implementing regulations in 41 CFR Chapter 60.³ In addition to determining your compliance with these authorities, we will also verify your compliance with the regulations issued by the Veterans' Employment and Training Service (VETS) requiring contractors covered under Section 4212 to file an annual report on their employment and hiring of protected veterans.⁴

A compliance evaluation is initiated as a compliance review. The compliance review may progress in three phases: a desk audit, an on-site review, and an off-site analysis. OFCCP describes the phases of a compliance review in its regulations at 41 CFR Chapter 60.⁵ For the desk audit, please submit the following information:

1. a copy of your current Executive Order Affirmative Action Program (AAP) prepared in accordance with the requirements of 41 CFR § 60-1.40, and 41 CFR § 60-2.1 through § 60-2.17;
2. a copy of your current Section 503 and Section 4212 AAPs prepared in accordance with the requirements of 41 CFR § 60-741.40 through § 60-741.44 and 41 CFR § 60-300.40 through § 60-300.44, respectively; and

¹ 29 U.S.C. § 793 (2006).

² 38 U.S.C. § 4212 (2006).

³ E.O. 11246, *as amended*, 3 CFR 339 12319 (1965); Section 503 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. 793 (2006); Vietnam Era Veterans' Readjustment Assistance Act of 1974, *as amended*, 38 U.S.C. 4212 (2006).

⁴ The VETS regulations require Federal contractors to submit either or both the VETS-100 and the VETS-100A Federal Contractor Report on Veterans' Employment. See 41 CFR § 61-300.10.

⁵ 41 CFR §§ 60-1.20(a), 60-300.60(a), and 60-741.60(a).

3. the support data specified in the enclosed Itemized Listing.

Please submit your AAPs and the support data specified in the enclosed Itemized Listing to the address listed on page one of this letter as soon as possible, but no later than 30 days from the date you receive this letter. Pursuant to 41 CFR § 60-1.12(e), failure to preserve complete and accurate records constitutes non-compliance with your obligations as a Federal contractor or subcontractor. Once the evaluation begins, you are required to maintain all personnel and employment records described in the regulations enforced by OFCCP until the final disposition of the evaluation.⁶

We encourage you to submit your information in an electronic format to reduce the amount of time it takes to complete our evaluation of your establishment. Should you opt to email your submissions, use email address smith.gregory@dol.gov.

You should be aware that OFCCP may initiate enforcement proceedings if you fail to submit AAPs and support data that represent a reasonable effort to meet the requirements of the regulations in 41 CFR Chapter 60.

Rest assured that OFCCP considers the information you provide in response to this Scheduling Letter as sensitive and confidential. Therefore, any disclosures we may make will be consistent with the provisions of the Freedom of Information Act.⁷

Please contact Gregory Smith at (408) 283-5484 if you have any questions concerning the compliance evaluation.

Sincerely,



Gregory Smith
District Director

Enclosure (1)
Itemized Listing

Cc: Scott Williamson (via mail and email: scwilliamson@google.com)
Compliance Program Manager

⁶ 41 CFR §§ 60-1.12(a), 60-300.80(a), and 60-741.80(a).

⁷ 41 CFR § 60-1.20(g); Freedom of Information Act, *as amended*, 5 U.S.C. § 552 (2009).

ITEMIZED LISTING

Executive Order 11246

1. An organizational profile prepared according to 41 CFR § 60-2.11.
2. The formation of job groups (covering all jobs) consistent with criteria given in 41 CFR § 60-2.12.
3. For each job group, a statement of the percentage of minority and female incumbents as described in 41 CFR § 60-2.13.
4. For each job group, a determination of minority and female availability that considers the factors given in 41 CFR § 60-2.14(c)(1) and (c)(2).
5. For each job group, the comparison of incumbency to availability as explained in 41 CFR § 60-2.15.
6. Placement goals for each job group in which the percentage of minorities or women employed is less than would be reasonably expected given their availability as described in 41 CFR § 60-2.16.

Section 503

7. Results of the evaluation of the effectiveness of outreach and recruitment efforts that were intended to identify and recruit qualified individuals with disabilities (IWDs) as described in 41 CFR § 60-741.44(f).
8. Documentation of all actions taken to comply with the audit and reporting system requirements described in 41 CFR § 60-741.44(h).
9. Documentation of the computations or comparisons described in 41 CFR § 60-741.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year.
10. The utilization analysis evaluating the representation of IWDs in each job group, or, if appropriate, evaluating the representation of IWDs in the workforce as a whole, as provided in 41 CFR § 60-741.45. If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year progress.

Section 4212 (VEVRAA)

11. Results of the evaluation of the effectiveness of outreach and recruitment efforts that were intended to identify and recruit qualified protected veterans as described in 41 CFR § 60-300.44(f).

12. Documentation of all actions taken to comply with the audit and reporting system requirements described in 41 CFR § 60-300.44(h).

13. Documentation of the computations or comparisons described in 41 CFR § 60-300.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year.

14. Documentation of the hiring benchmark adopted, the methodology used to establish it if using the five factors described in § 60-300.45(b)(2). If you are six months or more *into your current AAP year on the date you receive this listing*, please also submit information that reflects current year results.

Support Data

15. Copies of your Employer Information Report EEO-1 (Standard Form 100 Rev.) for the last three years.⁸

16. A copy of your collective bargaining agreement(s), if applicable. Include any other documents you prepared, such as policy statements, employee notices or handbooks, etc. that implement, explain, or elaborate on the provisions of the collective bargaining agreement.

17. Information on your affirmative action goals for the immediately preceding AAP year and, where applicable (see below), progress on your goals for the current AAP year.⁹

For the immediately preceding AAP year, this report must include information that reflects:

- a. job group representation at the start of the AAP year, (i.e., total incumbents, total minority incumbents, and total female incumbents);

⁸ 41 CFR § 60-1.7.

⁹ 41 CFR § 60-1.12(a), 41 CFR § 60-2.1(c) and 41 CFR § 60-2.16.

- b. the percentage placement rates (% goals) established for minorities and women at the start of the AAP year; and
- c. the actual number of placements (hires plus promotions) made during the AAP year into each job group with goals (i.e., total placements, total minority placements, and total female placements. For goals not attained, describe the specific good faith efforts made to achieve them.

If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects progress on goals established in your current AAP year, and describe your implementation of action-oriented programs designed to achieve these goals.¹⁰

18. Data on your employment activity (applicants, hires, promotions, and terminations) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information in (a) through (c) below for at least the first six months of the current AAP year. You should present this data by job group (as defined in your AAP) or by job title.¹¹

- a. Applicants and Hires: For each job group or job title, this analysis must consist of the total number of applicants and the total number of hires, as well as the number of African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, White, and the number of female and male applicants and hires. For each job group or job title applicants for whom race and/or sex is not known, should be included in the data submitted

However, if some of your job groups or job titles (most commonly, entry-level) are filled from the same applicant pool, you may consolidate your applicant data (but not hiring data) for those job groups or titles. For example, where applicants expressly apply for or would qualify for a broad spectrum of jobs (such as "Production," "Office," etc.) that includes several job groups, you may consolidate applicant data.

- b. Promotions: For each job group or job title, provide the total number of promotions by gender and race/ethnicity.¹² Also, include a definition of "promotion" as used by your company and the basis on which they were compiled (e.g. promotions to the job group, from and/or within the job group, etc.). If it varies for different segments of your workforce, please

¹⁰ 41 CFR § 60-1.12 and 41 CFR § 60-2.17(c).

¹¹ 41 CFR § 60-1.12, 41 CFR § 60-2.11-12, 41 CFR § 60-2.17(b)(2) and (d)(1), and 41 CFR §§ 60-3.4 and 3.15.

¹² The term "race/ethnicity" as used throughout the Itemized Listing includes these racial and ethnic groups: African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, and White.

define the term as used for each segment. If you present promotions by job title, include the department and job group from which and to which the person(s) was promoted.

- c. Terminations: For each job group or job title, provide the total number of employee terminations by gender and race/ethnicity. When presenting terminations by job title, include the department and job group from which the person(s) terminated.

19. Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of the date of the workforce analysis in your AAP. Provide gender and race/ethnicity information and hire date for each employee as well as job title, EEO-1 Category and job group in a single file.¹³ Provide all requested data electronically, if maintained in an electronic format. See Note 1, below.

- a. For all employees, compensation includes base salary and or wage rate, and hours worked in a typical workweek. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.
- b. You may provide any additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.
- c. Documentation and policies related to compensation practices of the contractor should also be included in the submission, particularly those that explain the factors and reasoning used to determine compensation.

20. Copies of reasonable accommodation policies, and documentation of any accommodation requests received and their resolution, if any.

21. Your most recent assessment of your personnel processes, as required by 41 CFR § 60-300.44(b) and § 60-741.44(b), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment.

22. Your most recent assessment of physical and mental qualifications, as required by 41 CFR § 60-300.44(c) and § 60-741.44(c), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment.

¹³ 41 CFR § 60-2.17(b)(3) and (d).

NOTES

NOTE 1: If any of the requested information is computerized, you must submit it in an electronic format that is complete, readable, and useable. Please use caution when submitting large electronic files. Check with the OFCCP Compliance Officer and your system administrator to ensure adherence to administrative and system guidelines.

Note 2: According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1250-0003. We estimate that the average time required to complete this information collection is 27.9 hours per response, including the time for evaluating instructions, searching existing data sources, gathering and maintaining the data needed, and completing and evaluating the collection of information.

Send any comments concerning this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

U.S. Department of Labor

Office of Federal Contract
Compliance Programs
Los Angeles District Office
1640 S. Sepulveda Blvd., Suite 440
Los Angeles, CA 90025



VIA EMAIL

June 1, 2016

Mr. Daniel Duff
Attorney At Law
Jackson Lewis P.C.
58 S. Service Road, Suite 250
Melville, NY 11747

Re: Google Corporation - Mountain View, California

Dear Mr. Duff:

Thank you for the opportunity to gain further insight into Google's personnel practices. As we continue with the compliance review process additional data will be requested as necessary.

At this time, we are requesting the addition of specific data factors to the existing compensation database, as well as copies of specific documents and records. Please find our request detailed in the attachment below.

This data must be provided to the agency by June 22, 2016. If there are any questions, please contact us. Thank you.

A handwritten signature in black ink, appearing to read "Agnes Huang". The signature is stylized and cursive.

Agnes Huang
Assistant District Director

cc: Scott Williamson, Integrity Program Manager (scwilliamson@google.com)

ER336

ATTACHMENT

Compensation Factors to be added to Existing Database

- Bonus Earned
- Bonus Period Covered
- Campus Hire or Industry Hire
- Competing Offer
- Current Compa Ratio
- Current Job Code
- Current Job Family
- Current Level
- Current Manager
- Current Organization
- Date of Birth
- Department hired into
- Education
- Equity Adjustment
- Hiring Manager
- Job History
- Locality
- Long-term incentive eligibility and grants
- Market Reference Point
- Market Target
- Name
- Performance rating for past 3 years
- Prior Experience
- Prior Salary
- Referral Bonus
- Salary History
- Short-term incentive eligibility and grants
- Starting Compa Ratio
- Starting Job Code
- Starting Job Family
- Starting Level
- Starting Organization
- Starting Position/Title
- Starting Salary
- Stock Monetary Value at award date
- Target Bonus

- Total Cash Compensation
- Any other factors related to Compensation

Compensation Database with 9/1/2014 Snapshot

Please provide a compensation database with a 9/1/2014 snapshot, including the compensation factors previously requested and the additional factors listed above.

Additional Documents/Records with Effective Dates Included

- Bonus targets for past 3 years
- Complaints filed in past 3 years (internal and external by name, race, gender, job title, manager, department, basis, and status)
- Complete, un-redacted or altered compensation policies and guidelines and training materials maintained in the course of business.
- Copy of market survey, salary survey, or industry survey used by Google to determine salary, grade, level, or other forms of pay
- Employee contact information
- Employee Guide – for Compensation, Performance Appraisals
- FMLA Policy
- Hiring / promotion / termination policies and guidelines and training materials
- Job/Pay Level Listing – Education/Experience equivalency
- Listing of all Job Families, Job Codes and positions within
- Manager Guides – for Compensation (base, merit, stock, bonus, Performance Appraisals, Hiring
- Merit algorithm or matrix for past 3 years
- New hire guideline for equity award
- Organization charts – Compensation, Global Business, People Operations (Recruiting, Staffing; etc.
- Pay Locality Guide
- Performance review policy and guidelines, and training materials
- Public Access Files and LCAs filed from 9/1/13 – 8/31/15
- Recruiter Guides – for Recruiting and Hiring
- Screenshot and instruction on GComp, Workday, Prosper and Perf



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*through an affiliation with Jackson Lewis P.C., a Law Corporation

June 17, 2016

VIA EMAIL (huang.agnes@dol.gov)
PRIVILEGED & CONFIDENTIAL

Ms. Agnes Huang
Assistant District Director
United States Department of Labor
Office of Federal Contract Compliance Programs
1640 S. Sepulveda Blvd, Ste 440
Los Angeles, CA 90025

**Re: OFCCP Compliance Evaluation: Google Mountain
View Facility**

Dear Assistant District Director Huang:

Thank you for your time earlier this week. As you requested, we are writing on behalf of Google Inc. ("Google" or the "Company"), to summarize the Company's concerns regarding OFCCP's June 1, 2016 post-onsite requests for additional data, information and/or documentation related to compensation in connection with the above referenced compliance evaluation.

I. Brief Summary

As discussed on our June 14, 2016 conference call, OFCCP's June 1, 2016 requests for additional information related to compensation substantially increases the scope and scale of this compliance review. Since Google already has provided a significant amount of compensation data to OFCCP, including total compensation data for all 21,114 employees within Google's Mountain View affirmative action plan as of September 1, 2015, the Company understandably wishes to better understand the basis and need for the Agency's recent requests. To date, OFCCP has not disclosed any information about what compensation issues, if any, it has identified during the first eight months of this review. This lack of transparency unreasonably prevents Google from evaluating the relevance of the Agency's requests, working collaboratively with OFCCP to identify potential alternative, more efficient means of resolving such issues, and/or determining whether any reasonable limitations might be appropriate.

We outline below in greater detail Google's concerns with OFCCP's requests and ask that OFCCP agree to be more forthcoming regarding the issues, if any, it may have identified regarding compensation. In addition, as you requested, we have categorized the Agency's requests into five different groups in the hope of facilitating future collaborative discussions about the relevance and scope of the requests.

II. History of Audit Prior to OFCCP's Post-Onsite Data Requests

On September 30, 2015, OFCCP sent a scheduling letter to Google announcing a compliance evaluation of the Company's Mountain View facility. In accordance with the scheduling letter, Google submitted its current Executive Order 11246, Vietnam Era Veterans' Readjustment Act of 1974 and Section 503 of the Rehabilitation Act of 1973 affirmative action plans to the Agency for review. In addition, Google provided OFCCP with a complete response to Item 19 of the scheduling letter, providing 31 items of individualized compensation data for more than 21,000 employees.

OFCCP subsequently made a series of requests for additional information and documentation from Google, including, *inter alia*, a description of each item of compensation data included in the Item 19 submission, equity data for all employees, and various policies and procedures. In addition, OFCCP requested the applicant flow logs applicants applicable to 27 of Google's job groups. Google has complied with all of these requests in full.¹

In March 2016, OFCCP requested a two day onsite to interview various Google management and human resources employees regarding the Company's policies and procedures related to compensation and hiring. Google fully cooperated with the Agency during the onsite, which took place on April 27, 2016 and April 28, 2016. OFCCP interviewed numerous management and human resources officials who provided the Agency with detailed, consistent and clear descriptions of Google's hiring and compensation processes.

III. Detailed Description of Google's Concerns with OFCCP's Post-Onsite Requests Related to Compensation

On June 1, 2016, OFCCP sent two separate post-onsite requests for additional information and documentation to Google. Google already has provided complete responses to the first set of requests, which sought additional information related to Google's hiring practices.

However, Google's concerns described in this letter relate to the second set of requests (hereinafter "the Second Set of Post-Onsite Requests") related to compensation. (For

¹ OFCCP also demanded a list of the names of all 21,114 employees contained in the Item 19 submission. Google objected to this request on the basis of relevance and confidentiality. Ultimately, OFCCP agreed not to require the submission of the names, but reserved its right to revisit the issue later in the audit.

ease of reference, a copy of the Second Set of Post-Onsite Requests is attached hereto as Exhibit "A.") The Second Set of Post-Onsite Requests seeks the following: (1) 36 additional data points for each of Google's 21,114 employees on the September 1, 2015 current year snapshot; (2) a second compensation data base for the 19,539 Google employees on the September 1, 2014 prior year snapshot, including all factors previously requested, in addition to the 36 new data points requested on June 1, 2016; (3) six additional data points *as of the current date* for all Google employees in the workforce as of September 1, 2015; and (4) 19 additional document request/records related to both compensation and non-compensation personnel policies. The Second Set of Post-Onsite Requests include, without limitation, the name, personal contact information, complete salary and job history, education, prior experience, prior salary, date of birth, competing offers, locality, and numerous other data points for *all* of Google's employees within the Mountain View AAP as of both September 1, 2015 and September 1, 2014. (See Exhibit A for a complete list of all of items contained in the Second Set of Post-Onsite Requests). All told, OFCCP's Second Set of Post-Onsite Requests would require Google to produce well in excess of *two million* items of additional data to OFCCP by a due date of June 22, 2016.

On June 14, 2016, the parties held a teleconference to discuss Google's concerns with the relevance and sheer size of the Second Set of Post-Onsite Requests. During the call, Google noted that OFCCP's requests significantly and, perhaps, unnecessarily expand the scope and scale of this compliance evaluation, notwithstanding that the Agency had yet to disclose to Google the reasons for its requests or the existence of any issues related to the substantial compensation data already provided to the Agency. Understandably, Google respectfully requested OFCCP to provide a brief, but specific, description of the potential issues it had observed in the data provided to date. OFCCP responded that it was "not able to let [us] know exactly what [the Agency was] looking at." Google then requested OFCCP to at least identify the particular areas (e.g., job titles or job groups) where OFCCP was seeing issues, if any, as well as to identify the type of potential discrimination issues (e.g., gender, race, ethnicity issues). OFCCP responded that it had "no findings it was able to share," and that it would not limit the scope of its request in any way.

OFCCP's decision not to share any information regarding the compensation issues it has identified is extremely disappointing and runs contrary to OFCCP's recent pronouncements encouraging transparency between the Agency and federal contractors. Moreover, OFCCP cannot expand the scope of its investigation beyond the limitations set forth in Item 19 of the current Scheduling Letter without providing a reasonable basis for doing so. Google has the right to understand the specific nature and scope of the potential issues OFCCP claims to have identified to date before it undertakes such massive disclosure. The Company cannot be expected to take on faith the Agency's mere general statement that "issues" allegedly exist, without any description whatsoever of those same issues.

Accordingly, Google respectfully requests that the Agency identify: (1) the nature and extent of the purported issues, if any, OFCCP has found in the data/information already provided to the Agency, and (2) each specific area where these potential issues are found (e.g., a

list of the specific job groups, job titles, or other groupings where OFCCP purportedly has identified issues). We understand and do not object at this time to the fact that the Agency will not provide its actual analyses.

Google believes that such transparency is in the best interest of both parties. Not only is it consistent with the Agency's stated objective of fostering transparency between the Agency and contractors, but it will allow both parties to: (1) engage in a productive discourse regarding potential issues, (2) appropriately limit the investigation to areas where potential problems have been identified, (3) lesson the burden and costs of production for Google and unnecessary review by OFCCP; and (4) work to expeditiously resolve outstanding questions in a collaborative and efficient manner. Finally, open discourse facilitates a fair evaluation of the extent to which the Second Set of Post-Onsite Requests is warranted in light of any identified issues, and ensures that Google's due process and other rights are being appropriately protected.

IV. Categorization of Each Item of OFCCP's Second Set of Post-Onsite Requests

During the parties' June 14, 2016 teleconference, Google agreed to categorize each item in OFCCP's Second Set of Post-Onsite Requests into the following five groups in order to facilitate transparent discussions between the parties: (A) items irrelevant to OFCCP's investigation of compensation issues; (B) items not available or not readily available to Google and, therefore, carrying a high burden and cost of collection; (C) items needing clarification from OFCCP for Google to appropriately respond; (D) items Google already has provided to OFCCP; and (E) items Google is willing to provide to OFCCP, if available.

These categorizations are as follows:

A. Items Irrelevant to OFCCP's Investigation of Compensation Issues

- Current Compa Ratio
- Current Job Code
- Current Job Family
- Current Level
- Current Manager
- Current Organization
- Name
- Date of Birth
- Referral Bonus
- Market, Salary or Industry Surveys
- Employee Contact Information
- Public Access Files and LCAs Filed from 9/1/13 to 8/31/15

B. Items Not Available or Not Readily Available to Google and, Therefore, Carrying a High Burden and Cost of Collection²

- New Compensation Snapshot as of 9/1/2014
- Campus or Industry Hire
- Competing Offers
- Education
- Department Hired Into
- Long Term Incentive eligibility and grants
- Prior Experience
- Prior Salary
- Job and Salary History
- Equity Adjustments
- Short-Term Incentive Eligibility and Grants
- Starting Salary
- Starting Compa Ratio
- Listing of All Job Families Job Codes and Positions Within
- Hiring Manager
- Starting Job Code
- Starting Job Family
- Starting Level
- Starting Organization
- Starting Position/Title

C. Items Needing Clarification from OFCCP for Google to Appropriately Respond

- Market Target
- Screenshot and instruction on GComp, Workday, Prosper and Perf
- External/Internal Complaints Filed in Past Three Years
- Manager Guides for Compensation (Base, Merit, Stock Bonus, Performance Appraisals, Hiring)

D. Items Google Has Already Provided to OFCCP

- Bonus Earned
- Bonus Period Covered
- FMLA Policy

² Google acknowledges that if OFCCP clearly identifies specific issues with the compensation data it has submitted to OFCCP to date, that it may be appropriate for the Company to produce, to the extent available, some or all of the items listed in Section IV, Subsection B as they relate to the specific subset of employees identified by OFCCP as having been potentially impacted.

- Stock Monetary Value (Google has provided information sufficient for OFCCP to calculate a hypothetical value on the unvested stock)
- New Hire Guideline for Equity Award
- Total Cash Compensation (OFCCP can calculate from data already provided)
- Job Pay Level Listing/Education/Experience Equivalency

E. Items Google Is Willing to Provide to OFCCP, to the Extent Available and Not Already Provided

- Locality
- Market Reference Point
- Performance Ratings for Past Three Years.
- Target Bonus
- Bonus Targets for the Past Three Years
- Compensation Policies, Guidelines and Training Materials
- Employee Guide for Compensation, Performance Appraisals
- Merit Algorithm or Matrix for Past 3 Years
- Organizational Chart – Compensation, Global Business, People Operations
- Pay locality guide
- Performance Review Policy and Guidelines, and Training Materials
- Recruiter Guides – for Recruiting and Hiring

V. Conclusion

Based on the foregoing, Google respectfully requests that OFCCP review the substantial concerns the Company has outlined in detail above and provide the information related to any potential issues sought by the Company at this time. We are available to discuss this information with the Agency at its earliest convenience.

In the meantime, Google already has begun to collect the items, set forth in Section III, Subsection E above, to the extent they are available and have not already been provided, and will endeavor to produce them as soon as possible. Google will hold the remainder of OFCCP's Second Set of Post-Onsite Requests in abeyance pending the parties' future discussions regarding the issues set forth herein.



Ms. Agnes Huang
U.S. Department of Labor
June 17, 2016
Page 7

We appreciate the Agency's careful consideration of these issues and trust that reasonable solutions can be identified.

Very truly yours,

JACKSON LEWIS P.C.

A handwritten signature in black ink, appearing to read "Matthew J. Carnardella".

Matthew J. Carnardella

MJC/mjr

cc: Farha Haq Haq, (via e-mail - Haq.Farha@dol.gov)
Carolyn J. Mcham-Menchyk, (Mcham-Menchyk.Carolyn@dol.gov)
Scott Williamson (scwilliamson@google.com)

ER345

EXHIBIT A

U.S. Department of Labor

Office of Federal Contract
Compliance Programs
Los Angeles District Office
1640 S. Sepulveda Blvd., Suite 440
Los Angeles, CA 90025



VIA EMAIL

June 1, 2016

Mr. Daniel Duff
Attorney At Law
Jackson Lewis P.C.
58 S. Service Road, Suite 250
Melville, NY 11747

Re: Google Corporation - Mountain View, California

Dear Mr. Duff:

Thank you for the opportunity to gain further insight into Google's personnel practices. As we continue with the compliance review process additional data will be requested as necessary.

At this time, we are requesting the addition of specific data factors to the existing compensation database, as well as copies of specific documents and records. Please find our request detailed in the attachment below.

This data must be provided to the agency by June 22, 2016. If there are any questions, please contact us. Thank you.

Agnes Huang
Assistant District Director

cc: Scott Williamson, Integrity Program Manager (scwilliamson@google.com)

ER347

ATTACHMENT

Compensation Factors to be added to Existing Database

- Bonus Earned
- Bonus Period Covered
- Campus Hire or Industry Hire
- Competing Offer
- Current Compa Ratio
- Current Job Code
- Current Job Family
- Current Level
- Current Manager
- Current Organization
- Date of Birth
- Department hired into
- Education
- Equity Adjustment
- Hiring Manager
- Job History
- Locality
- Long-term incentive eligibility and grants
- Market Reference Point
- Market Target
- Name
- Performance rating for past 3 years
- Prior Experience
- Prior Salary
- Referral Bonus
- Salary History
- Short-term incentive eligibility and grants
- Starting Compa Ratio
- Starting Job Code
- Starting Job Family
- Starting Level
- Starting Organization
- Starting Position/Title
- Starting Salary
- Stock Monetary Value at award date
- Target Bonus

- Total Cash Compensation
- Any other factors related to Compensation

Compensation Database with 9/1/2014 Snapshot

Please provide a compensation database with a 9/1/2014 snapshot, including the compensation factors previously requested and the additional factors listed above.

Additional Documents/Records with Effective Dates Included

- Bonus targets for past 3 years
- Complaints filed in past 3 years (internal and external by name, race, gender, job title, manager, department, basis, and status)
- Complete, un-redacted or altered compensation policies and guidelines and training materials maintained in the course of business.
- Copy of market survey, salary survey, or industry survey used by Google to determine salary, grade, level, or other forms of pay
- Employee contact information
- Employee Guide – for Compensation, Performance Appraisals
- FMLA Policy
- Hiring / promotion / termination policies and guidelines and training materials
- Job/Pay Level Listing – Education/Experience equivalency
- Listing of all Job Families, Job Codes and positions within
- Manager Guides – for Compensation (base, merit, stock, bonus, Performance Appraisals, Hiring
- Merit algorithm or matrix for past 3 years
- New hire guideline for equity award
- Organization charts – Compensation, Global Business, People Operations (Recruiting, Staffing, etc.
- Pay Locality Guide
- Performance review policy and guidelines, and training materials
- Public Access Files and LCAs filed from 9/1/13 – 8/31/15
- Recruiter Guides – for Recruiting and Hiring
- Screenshot and instruction on GComp, Workday, Prosper and Perf

U.S. Department of Labor

Office of Federal Contract
Compliance Programs
Los Angeles District Office
1640 S. Sepulveda Boulevard, Suite 440
Los Angeles, CA 90025



VIA EMAIL

June 23, 2016

Mr. Matthew Camardella
Attorney
Jackson Lewis P.C.
58 South Service Road, Suite 250
Melville, NY 11747

Re: Google, Inc. Compliance Evaluation

Dear Mr. Camardella:

We are in receipt of your June 17, 2016 letter in which you detailed Google's concerns regarding OFCCP's June 1, 2016 request for additional information.

As discussed during our June 14, 2016 telephone conference, OFCCP has the authority to request information that is relevant to a determination of whether a contractor has complied with the requirements of the Executive Order and its accompanying regulations. Again, at this stage of the compliance evaluation, OFCCP is unable to share any preliminary findings or internal analyses. We assure you the reason is not due to "lack of transparency" or to "unnecessarily expand the scope and scale of this compliance evaluation," as you have argued. Rather, during the onsite review, OFCCP learned that it was missing critical pieces of information necessary to properly assess the data and information provided by Google.

We will address each category of documents that were outlined in your June 17 response:

A. Items Irrelevant to OFCCP's Investigation of Compensation Issues

All items requested in OFCCP's June 1, 2016 letter, are based on information obtained during the onsite interviews and documents provided by Google. Based on the onsite interviews with Google's compensation managers, OFCCP learned that compa ratio, market or industry surveys and job families are important factors that affect compensation—however, these were factors deemed "irrelevant" in your letter to OFCCP. A federal contractor's submission of complete, accurate, and consistent data is not voluntary; rather, it is a contractual obligation. "Where a compliance evaluation has been initiated, all personnel and employment records...are relevant until OFCCP makes a final disposition of the evaluation." (41 CFR §60-1.12). Given the disclosure by Google managers of factors important to compensation, we do not agree with your position that providing the data items requested are irrelevant to this review.

ER350

B. Items Not Available or Not Readily Available to Google and, Therefore, Carrying a High Burden and Cost of Collection

According to interviews conducted onsite, most of the compensation factors requested by the agency are stored electronically. For instance, Ms. Soo Jin Park, HCM Project Manager, stated that Workday contains job history and compensation history. Additionally, Mr. Ionas Porges-Kiriakou, Product Manager for People View, stated that gHire contains the applicant's resume. Mr. Frank Wagner stated that prior pay for new hire would be the type of information recruiters obtain and it may be stored in the applicant tracking system. Mr. Porges-Kiriakou further explained that reports are created "by writing SQL code for fields in the reporting system by way of a query and it produces a report." Given that we are requesting electronically stored data and there are reporting functions available that will eliminate the need for manual data entry, we do not agree with your position that providing the data carries a high burden and cost of production. Google must indicate, with specificity, the burden or cost of our information request.

C. Items Needing Clarification from OFCCP for Google to Appropriately Respond

- Market target: Please confirm whether market target is equivalent to market reference point. If so, we will retract this item.
- Screenshot and instruction on use of gComp, Workday, Prosper and Perf: Please provide screenshots showing how the data is stored. Please also provide user instructions for each system.
- External/Internal Complaints Filed in Past Three Years: Please provide all EEO complaints filed in past three years (internal and external by name, race, gender, job title, manager, department, basis and status).
- Manager Guides for Compensation (Base, Merit, Stock Bonus, Performance Appraisals, Hiring): Onsite interviews indicate Google created online guides for managers on these topics. We are requesting copies of the guides.

D. Items Google Has Already Provided to OFCCP

We will retract our request for:

- Bonus Earned
- Bonus Period Covered
- FMLA Policy

These items have not been provided:

- Stock Monetary Value: Google has provided information sufficient for OFCCP to calculate a hypothetical value on the unvested stock. However, Mr. Frank Wagner stated in his interview that Google "knows the value of the stock at the time of award." We are asking for actual value instead of hypothetical value because the data is known.
- New Hire Guideline for Equity Award: We were provided with a prepared narrative instead of actual guidelines. We are asking for the actual guidelines.
- Total Cash Compensation: Please provide the total compensation that includes base, bonus, equity, and other financial incentives.

- Job Pay Level Listing/Education/Experience Equivalency: Please provide policies/guidelines for new hires listing each pay level and the education/years of experience associated with each level.

Google cannot place a condition on its compliance with its federal obligations in exchange for disclosure of OFCCP's preliminary findings. Such condition from a contractor would constitute a denial of access in violation of 41 CFR §60-1.43, §60-300.81 and §60-741.81. Since 2007, Google has been the subject of five OFCCP compliance evaluations and has received over \$141 million dollars in federal contracts. During the course of this review alone, Google has been the recipient of over \$29 million dollars in federal contracts. By entering into a covered contract with the federal government and accepting taxpayer dollars, Google voluntarily agreed to the scope of any compliance evaluation of its headquarters' establishment. (41 CFR §60-2.1).

OFCCP will make every effort to take Google's concerns into consideration and engage in productive dialogue where possible. However, Google cannot engage in denial of access as a strategy to compel OFCCP to limit the scope of its review. The record of this review reflects that OFCCP has been reasonable in its prior requests and has narrowed the scope of information requests where possible.

As such, OFCCP is renewing its June 1, 2016 request with the addition of "Section D" and "Section E" which detail additional applicant flow data and information that is being requested.

In an effort to avoid issuance of a Show Cause Notice, please submit all information detailed in the attachment by COB, July 1, 2016. Thank you.

Sincerely,



Agnes Huang
Assistant District Director

cc: Daniel Duff, Attorney, Jackson Lewis P.C (daniel.duff@jacksonlewis.com)
Scott Williamson, Integrity Program Manager, Google, Inc. (scwilliamson@google.com)

ATTACHMENT

A. Compensation Factors to be added to Existing Database

- Campus Hire or Industry Hire
- Competing Offer
- Current Compa Ratio
- Current Job Code
- Current Job Family
- Current Level
- Current Manager
- Current Organization
- Date of Birth
- Department hired into
- Education
- Equity adjustment
- Hiring Manager
- Job History
- Locality
- Long-term incentive eligibility and grants
- Market Reference Point
- Market Target
- Name
- Performance Rating for past 3 years
- Prior Experience
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- Referral Bonus
- Salary History
- Short-term incentive eligibility and grants
- Starting Compa Ratio
- Starting Job Code
- Starting Job Family
- Starting Level
- Starting Organization
- Starting Position/Title
- Starting Salary
- Stock Monetary Value at award date
- Target Bonus
- Total Cash Compensation
- Any other factors related to compensation

B. Compensation Database with 9/1/2014 Snapshot

Please provide a compensation database with a 9/1/2014 snapshot, including the compensation factors previously requested and the additional factors listed above.

C. Additional Data with Effective Dates Included

- Bonus targets for the past three years
- Complaints filed in the past three years (internal and external by name, race, gender, job title, manager, department, basis and status)
- Complete, un-redacted or altered compensation policies and guidelines and training materials maintained in the course of business
- Copy of market survey, salary survey, or industry survey used by Google to determine salary, grade, level, or other forms of pay
- Employee contact information
- Employee Guide – for Compensation, Performance Appraisals
- Hiring / promotion / termination policies and guidelines and training materials
- Job/Pay Level Listing – Education/Experience equivalency
- Listing of all Job Families, job codes, and positions within
- Manager Guides – for Compensation (base, merit, stock, bonus, performance appraisals, hiring)
- Merit algorithm or matrix for past three years
- New hire guideline for equity award
- Organization charts – Compensation, Global Business, People Operations (Recruiting, Staffing, etc.)
- Pay Locality Guide
- Performance review policy and guidelines, and training materials
- Public Access Files and LCAs filed during 9/1/2013 – 8/31/2015
- Recruiter Guides – for Recruiting and Hiring
- Screenshot and instruction on gComp, Workday, Prosper and Perf

D. Applicants/Hires Database for Job Groups 211-216 only

Please add the following columns of data onto the existing applicant flow logs for all applicants in job groups 211-216:

- Department applied to
- Department hired into (if hired)
- Education
- Job Family
- Job Function
- Prior relevant work experience
- Requisition applied to
- Requisition hired into (if hired)

E. Interview Notes

- Please submit all applicant interview notes for job groups 211-216.



Representing Management Exclusively in Workplace Law and Related Litigation

Jackson Lewis PC, 68 South Service Road Suite 250 Melville, New York 11747 Tel 631 247-0904 Fax 631 247-0417 www.jacksonlewis.com	ALBANY, NY ALBUQUERQUE, NM ATLANTA, GA AUSTIN, TX BALTIMORE, MD BIRMINGHAM, AL BOSTON, MA CHICAGO, IL CINCINNATI, OH CLEVELAND, OH DALLAS, TX DAYTON, OH DENVER, CO DETROIT, MI GRAND RAPIDS, MI	GREENVILLE, SC HARTFORD, CT HOUSTON, TX HOUSTON, TX INDIANAPOLIS, IN JACKSONVILLE, FL KANSAS CITY REGION LAS VEGAS, NV LONG ISLAND, NY LOS ANGELES, CA MADISON, WI MEMPHIS, TN MIAMI, FL MINNEAPOLIS, MN	ARIZONA COUNTY, AZ BIRMGHAM, MI NEW ORLEANS, LA NEW YORK, NY PORTLAND, OR RICHMOND, VA SACRAMENTO, CA SAN ANTONIO, TX SAN DIEGO, CA SAN FRANCISCO, CA SAN JUAN, PR SEATTLE, WA ST. LOUIS, MO STAMFORD, CT TAMPA, FL WASHINGTON, DC REGION WHITE PLAINS, NY
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*through an affiliation with Jackson Lewis PC, a Law Corporation

June 30, 2016

VIA EMAIL (suhr.jane@dol.gov)
PRIVILEGED & CONFIDENTIAL

Ms. Jane Suhr
Deputy Regional Director
United States Department of Labor
Office of Federal Contract Compliance Programs
90 7th Street
Suite # 18-300
San Francisco, CA 94103-1516

Re: Re: OFCCP Compliance Evaluation: Google Mountain View Facility

Dear Deputy Regional Director Suhr:

On behalf of Google Inc. ("Google" or the "Company"), we are writing in response to OFCCP's June 23, 2016 letter in connection with the above-referenced compliance review.¹

As described in detail below, Google repeatedly has expressed its concerns, both orally and in writing, regarding the Agency's ongoing refusal to provide *any* meaningful information to the Company regarding its preliminary findings related to compensation in this compliance evaluation. Without this information, Google cannot properly evaluate OFCCP's extraordinarily broad and burdensome data and information requests sent on June 1, 2016. Moreover, failing to share such information deprives OFCCP and the Company of the opportunity to engage in a collaborative and open dialogue regarding alternative, yet sensible means of providing OFCCP the information it needs to conduct its compliance evaluation.

Accordingly, we write not only to respond to OFCCP's June 23, 2016 correspondence, but to request a teleconference with the Regional Office at its earliest convenience in an attempt to find a way to address the Company's concerns while preserving the Agency's ability to effectively evaluate Google.

¹ Copies of all correspondence referred to in this letter are attached hereto as Exhibit "A."

I. OFCCP's Erroneous Citations to Regulatory Provisions

In its June 23, 2016 correspondence, OFCCP first cites to 41 C.F.R. § 60-1.12 as justification for its data and information requests. However, § 60-1.12 is simply a record retention provision. It governs the types of records that a contractor must maintain, not what a contractor may have to produce during a compliance review. OFCCP also cites to 41 C.F.R. § 60-2.1 which addresses the scope and application of the requirement to prepare an Executive Order AAP for certain contractors. Since Google prepares AAPs in accordance with this section, we do not understand the relevance of this reference.

More appropriately, OFCCP later cites to 41 C.F.R. §§ 60-1.43, 60-300.81, 60-741.81 for a contractor's obligations to produce records during a compliance evaluation. However, contrary to OFCCP's position, these sections do not allow OFCCP to request anything the Agency wishes during a compliance evaluation. To the contrary, these sections make clear that Agency requests are subject to reasonable boundaries. Specifically, § 60-1.43 provides in pertinent part that "[e]ach contractor shall permit the inspecting and copying of such books and account and records, including computerized records, and other material *as may be relevant to the matter under investigation and pertinent to compliance* with [Executive Order 11246]."² In taking the position that the Agency has the unfettered right to any data or records a contractor may possess during a compliance review, regardless of the need for such information, OFCCP renders this standard meaningless.

While Google does not claim to be the final arbiter of what records are both relevant and pertinent, the Company does have the right to determine if it believes the regulatory standards of relevance and pertinence have been satisfied. By refusing to share the underlying basis for its requests, OFCCP leaves Google with the choice of blindly accepting that the Agency's burdensome requests related to *everyone* in its over 21,000 employee workforce in scope for this compliance evaluation are reasonable and consistent with due process, or risk the issuance of the notice to show cause the Agency has threatened if Google does not fully comply with all of its requests by July 1, 2016.

Furthermore, Google simply does not understand why OFCCP would not act in a forthcoming and transparent manner. We fail to see any benefit the Agency derives from hiding the basis for its information requests. To the contrary, by unilaterally deciding not to share the basis for its requests, OFCCP appears to (1) run afoul of the very regulations OFCCP cites to support its position not to provide such information; (2) remove the ability to collaborate with Google to find the most effective and efficient manner of producing information needed to complete the current compliance review; (3) violate the Company's due process rights to be free from unreasonable searches and seizures; and (4) contradict recent statements from National Office officials calling for more open and transparent dialogue between OFCCP and contractors.

² §§ 60-300.81 and 60-741.81 contain similar language as it relates to reviews conducted pursuant to Section 503 and VEVRAA, respectively.

II. Further Explanation of the Grossly Burdensome Nature of Many of OFCCP's Requests

In its June 23, 2016 correspondence, OFCCP asks Google to further explain how its requests are overly burdensome. We do so below.

First, as stated in Google's June 17, 2016 correspondence, OFCCP seeks (1) 36 additional data points *for each of Google's 21,114 employees as of the September 1, 2015 current year snapshot*; (2) a second compensation data base for the 19,539 Google employees on the September 1, 2014 prior year snapshot, including all factors previously requested and the 36 new data points requested on June 1, 2016; and (3) six additional data points *as of the current date* for all Google employees in the workforce as of September 1, 2015. Accordingly, as indicated previously, OFCCP's Second Set of Post-Onsite Requests would require Google to produce well in excess of *two million* items of additional data by a due date of July 1, 2016.³

Second, OFCCP's vague and inaccurate references to purported statements made by Google representatives at the on-site in no way lessens the overly burdensome nature of OFCCP's requests. The Agency's statement that "most of the compensation factors are stored electronically" ignores the fact that a massive amount of the information requested by OFCCP is contained in hard copy documents that are merely scanned into Google's systems for recordkeeping purposes. For example, while gHire contains resumes and notes from applicants, the data that OFCCP has requested is contained within these documents, such as education, prior experience, competing offers, prior salary, etc., are not contained in unique data fields within gHire. Mr. Porges-Kirakou's statement regarding reports that may be created by "writing SQL code for fields in the reporting system by way of a query" refers only to running queries for *actual preexisting data fields* in gHire (e.g., date of hire). It does not refer to any process to somehow pull the data OFCCP seeks from scanned documents. Similarly, Frank Wagner's purported statement that prior pay for new hires "would be the type of information recruiters obtain and it *may* be stored in the ATS" in no way suggests that electronic queries can be run to obtain this data. The fact that recruiters *may* inquire into prior pay of applicants, and that such information *may* be recorded in notes that are scanned into and maintained in gHire, does not in any manner "eliminate the need for manual data entry" as OFCCP erroneously concludes.

Contrary to the Agency's mistaken belief, a significant portion of the data OFCCP has requested is not kept in unique data fields within Google's systems. The Company would need to manually pull such data from its systems, tabulate them, and enter them into a data base. For example, data requiring manual review and entry for employees on the September 1, 2015 and September 1, 2014 snapshot include:

³ This figure does not even include the millions of additional items of data and documentation requested by OFCCP in its June 23, 2016 correspondence related to over 235,000 applicants, including each applicant's prior experience and education, in Job Groups 211, 212, 213, 214, 215 and 216. OFCCP has provided Google *a mere seven* days to produce this additional data.

- **Competing Offer:** Would require a manual review of notes that would need to be pulled from gHire for each of the over 21,000 employees to determine what, if anything, was noted regarding competing offers, and then entry of same into a database. Assuming an average of 10 minutes per employee to pull, review and enter the information, this would take 3,500 hours.
- **Education:** Would require a manual review of resumes and notes that would need to be pulled from gHire for each of the over 21,000 employees to determine level of education achieved, and then entry of same into a database. Assuming an average of 10 minutes per employee to pull, review and enter the information, this would take 3,500 hours.
- **Prior Experience:** Would require a manual review of resumes and notes from gHire for each for each of the over 21,000 employees, in addition to the manual calculation of total prior experience from the job history section of each resume or from the notes, and then entry of same into a database. Assuming an average of 20 minutes per employee to make these calculations and enter them into a database, this would take 7,000 hours.
- **Prior Salary:** Would require a manual review of notes from gHire for each for each of over 21,000 employees to determine the prior salary, if provided, and then entry of same into a database. Assuming an average 10 minutes per employee for review and entry of the information obtained from the notes, this would take 3,500 hours.

As another example, data requiring manual review and entry for the over 235,000 applicants to Job Groups 211, 212, 213, 214, 215 and 216 include:

- **Education:** Would require a manual review of resumes and notes that would need to be pulled from gHire for each of over 235,000 employees to determine education and enter into a database. Assuming an average of 10 minutes per applicant to pull, review and enter the information, this would take 39,116 hours.
- **Prior relevant work experience:** Would require a manual review of resumes and notes from gHire for each for each of over 235,000 applicants in addition to the determine of what "relevant experience" is for each job applied to, followed by the manual calculation of total prior relevant experience from the job history section of each resume and from notes. Assuming an average of 25 minutes per applicant to make these determinations/calculations, and enter them into a database, this would take 97,916 hours.

In total, complying with just the requests listed above involves over 154,000 hours. Even assuming a 10 person team working on the project for 24 hours every day of the week including weekends, nonstop until completion, it would take a minimum of 641 days (more than 1.7 years) to complete this project. Moreover, even if the employees responsible for gathering this information earned only the California minimum wage, the cost to Google in producing this information could exceed 1.5 million dollars.

Google respectively submits that that the foregoing overwhelmingly demonstrates not only the burdensome nature of OFCCP's requests, but why both sides should work collaboratively to identify potential alternative, far more efficient means of resolving issues, and/or determining whether any reasonable limitations might be appropriate.

III. Items Needing Clarification

Google appreciates the clarification OFCCP provided in the Agency' June 23, 2016 correspondence relating to some of its data/document requests. With that clarification, the Company can share the following information.

First, Google does not utilize the terms "market target" and that any reference during the interviews to same in all likelihood was a reference to "market reference point."

Second, as noted below, Google will produce: (1) the market reference point for employees on the September 1, 2015 snapshot date; (2) a list of any formal BEO charges/complaints filed with federal, state or local fair employment practice agencies alleging race, gender, sexual harassment, disability, religious accommodation or national origin discrimination during the past three years; and (3) Manager Guides for Compensation (Base, Merit, Stock Bonus, Performance Appraisals, Hiring).

Third, Google remains unclear as to the meaning of OFCCP's request for "screenshots showing how data is stored in "GComp, WorkDay, Prosper and PERF," as well as to the relevance of OFCCP's request for user instructions for each system. We look forward to the opportunity to discuss these items with OFCCP during the teleconference requested herein.

IV. Items Google Already Has Produced

In its June 23, 2014 correspondence, OFCCP acknowledged that Google already provided bonus earned, bonus period covered and its FMLA policy, but challenges whether certain other items have been produced. These items are addressed below.

A. Stock Monetary Value

Agreeing that Google has produced sufficient data to calculate a hypothetical value of restricted stock units awarded, OFCCP seeks that "actual" monetary value of Google stock unit awards. As previously explained to the Agency, Google restricted stock vests in increments over time. Accordingly, the stock has no actual value at the time the award is

granted, Frank Wagner's purported statement that an employee "knows the value of the stock at the time of the award" refers only to the fact that a hypothetical value of the award can be calculated. As OFCCP states in its correspondence, Google already has provided the Agency with sufficient data to calculate this hypothetical value. Accordingly, the Company has fully responded to the Agency's request.

B. New Hire Guideline for Equity Award

With respect to the New Hire Guideline for Equity Award, the document provided to OFCCP is the actual guideline and not a narrative of same. Therefore, Google has fully responded to this request.

C. Total Cash Compensation

Google already has provided OFCCP with all the components that make up total compensation. Accordingly, the Agency has all the data necessary to calculate total cash compensation.

D. Job Pay Level Listing/Education/Experience Equivalency

Finally, regarding OFCCP's request for "Job Pay Level Listing/Education/Experience/Equivalency, please see Google's January 11, 2016 e-mail containing all documents Google maintains related to this request. Therefore, the Company has fully responded to this request.

V. Schedule for Production

Notwithstanding the significant concerns raised by Google with respect to OFCCP's production requests above, Google wishes to continue to cooperate with OFCCP in connection with this evaluation. Accordingly, Google will produce the following for all employees on the September 1, 2015 current year snapshot date, and to the extent it is available in its HRIS systems, by August 1, 2016:

- Campus or Industry Hire
- Date of Birth
- Department Hired Into
- Hiring Manager
- Locality
- Long Term Incentive Eligibility

- Market Reference Point
- Performance Rating for Past Three Years
- Short Term Eligibility
- Target Bonus
- Target Bonus for Past Three Years

Google also will produce the following documents, if any, by August 1, 2016:

- A list of any formal EEO charges/complaints filed with federal, state or local fair employment practice agencies alleging race, gender, sexual harassment, disability, religious accommodation or national origin discrimination during the past three years
- Compensation policies, guidelines and training materials, including manager guides for compensation (base, merit, stock, applicable to the period under review)
- Employee guides related to compensation & performance appraisals
- Hiring, promotion and termination policies, guidelines and training materials
- Merit algorithm/matrix for the past three years
- Pay locality guide
- Performance appraisal policies, guidelines and training materials
- Recruiter guides for recruiting and hiring

Google also will provide, to the extent available, the following fields of information for all applicants to Job Groups 211, 212, 213, 214, 215 and 216, by August 1, 2016:

- Department Applied To
- Department Hired Into (if hired)
- Job Family
- Job Function

- Requisition Applied To
- Requisition Hired Into (if hired)

VI. Conclusion

Google reiterates its desire to move this review forward in an efficient and effective matter. To that end, the Company respectfully asks that the Region carefully consider the concerns raised above and in its June 17, 2016 letter, and agree to a mutually agreeable date and time to discuss both the basis for, and possible ways to alleviate the burdens associated with, the Agency's requests. We are available to engage in such discussions with the Agency at its earliest convenience.

We appreciate the Agency's careful consideration of these issues and trust that reasonable solutions can be identified.

Very truly yours,

JACKSON LEWIS P.C.



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MIC/mjr

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