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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.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DEFENDANT'S MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
ITS MOTION TO CERTIFY FOR
IMMEDIATE APPEAL TO THE
ADMINISTRATIVE REVIEW
BOARD THIS COURT'S ORDER
REGARDING THE TEMPORAL
SCOPE OF LITIGATION**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND.....	2
A. OFCCP’s Investigation And Conciliation Efforts Were Directed At Specific And Limited Timeframes	2
B. OFCCP’s Complaint Alleges Violations That Were Neither Investigated Nor Conciliated.....	3
C. This Court Overrules Oracle’s Objections And Permits OFCCP To Pursue Claims Of Liability Extending To The Hearing And Continuing Thereafter	3
III. ARGUMENT.....	4
A. The Court’s Ruling On The Temporal Scope Of Liability Presents Controlling Questions Of Law	5
B. There Are, At A Minimum, Substantial Grounds For Differences Of Opinion Concerning The Court’s Ruling On Temporal Scope Of Liability	7
C. An Immediate Appeal Of The Temporal Scope Ruling Would Materially Advance The Ultimate Termination of The Litigation.....	14
IV. CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anderson v. Block</i> , 808 F.2d 145 (8th Cir. 1986)	14
<i>Brickman v. Facebook, Inc.</i> , 16-cv-751, 2017 WL 1508719 (N.D. Cal. Apr. 27, 2017)	5
<i>In re Cement Antitrust Litig.</i> , 673 F.2d 1020 (9th Cir. 1981)	5
<i>Church of Scientology v. United States</i> , 920 F.2d 1481 (9th Cir. 1990)	11
<i>Clark-Dietz & Assocs.-Eng'rs, Inc. v. Basic Constr. Co.</i> , 702 F.2d 67 (5th Cir. 1983)	7
<i>Couch v. Telescope Inc.</i> , 611 F.3d 629 (9th Cir. 2010)	7
<i>EEOC v. CRST Van Expedited, Inc.</i> , 679 F.3d 657 (8th Cir. 2012)	11, 12, 14
<i>EEOC v. Bloomberg L.P.</i> , 967 F. Supp. 2d 801 (S.D.N.Y 2013)	12
<i>EEOC v. Dillard's Inc.</i> , No. 08-cv-1780, 2011 WL 2784516 (S.D. Cal. July 14, 2011)	12
<i>EEOC v. Harvey L. Walner & Assocs.</i> , 91 F.3d 963 (7th Cir. 1996)	11
<i>EEOC v. Original Honeybaked Ham Co.</i> , 918 F. Supp. 2d 1171 (D. Colo. 2013)	12
<i>Garner v. Wolfenbarger</i> , 430 F.2d 1093 (5th Cir. 1970)	5
<i>Kuehner v. Dickinson & Co.</i> , 84 F.3d 316 (9th Cir. 1996)	5
<i>Mach Mining, LLC v. EEOC</i> , 135 S. Ct. 1645 (2015)	10

<i>McFarlin v. Conseco Servs., LLC</i> , 381 F.3d 1251 (11th Cir. 2004)	14
<i>OFCCP v. Bank of America</i> , 1997-OFC-16, 2010 WL 1776983 (ARB Apr. 29, 2010)	4, 5, 6, 7, 15
<i>OFCCP v. Bank of America</i> , 1997-OFC-16 (ARB Mar. 31, 2003)	8
<i>OFCCP v. City Public Service of San Antonio</i> , 1989-OFC-5 (Ass't Sec'y Jan. 18, 1995)	8
<i>OFCCP v. Google</i> , 2017-OFC-4 (ALJ July 14, 2017)	6
<i>OFCCP v. Honeywell, Inc.</i> , 1977-OFC-3, 1993 WL 1506966 (Sec'y June 2, 1993)	12, 13, 14
<i>OFCCP v. Uniroyal, Inc.</i> , 1977-OFC-1, 1979 WL 258004 (Sec'y June 28, 1979)	13
<i>Reese v. BP Exploration (Alaska) Inc.</i> , 643 F.3d 681 (9th Cir. 2011)	7, 14
<i>Richter v. Advance Auto Parts</i> , 686 F.3d 847 (8th Cir. 2012)	14
<i>S.E.C. v. Credit Bancorp, Ltd.</i> , 103 F. Supp. 2d 223 (S.D.N.Y. 2000)	14
Constitutional Provisions	
U.S. Const. amend. IV	8
Statutes, Regulations, and Rules	
28 U.S.C. § 1292(b)	1, 2, 4, 7, 14
29 C.F.R. § 18.33	1
41 C.F.R. § 60-1.12(a)	10
41 C.F.R. § 60-1.20	8
41 C.F.R. § 60-1.20(a)	8, 9
41 C.F.R. § 60-1.20(b)	9
41 C.F.R. § 60-1.24(c)	8, 9

41 C.F.R. § 60-1.26	8, 9
41 C.F.R. § 60-1.26(a).....	10
41 C.F.R. § 60-1.26(b)(1).....	9
41 C.F.R. § 60-1.28	9
41 C.F.R. § 60-1.33	9
<i>Delegation of Authority & Assignment of Responsibility,</i> 77 Fed. Reg. 69,378 (Nov. 16, 2012)	4
<i>Government Contractors, Affirmative Action Requirements, Executive Order</i> <i>11246,</i> 62 Fed. Reg. 44,174 (Aug. 19, 1997)	8, 9, 11
Other Authorities	
Executive Order 11246.....	1, 2, 4, 8, 10
OFCCP, Federal Contract Compliance Manual (Oct. 2014).....	11
16 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3930 (3d ed.).....	5, 14

Pursuant to 29 C.F.R. § 18.33, Defendant Oracle America, Inc. (“Oracle”) respectfully submits the following Memorandum in Support of its Motion to Certify for Immediate Appeal to the Administrative Review Board this Court’s Order regarding the Temporal Scope of this Litigation dated August 14, 2017, and entered on August 16, 2017. Oracle asks this Court to certify the order for immediate appeal and state that 28 U.S.C. § 1292(b)’s requirements have been met.

I. INTRODUCTION

Before the Office of Federal Contract Compliance Programs (“OFCCP”) can bring an action against a federal contractor, it must first comply with a series of pre-suit obligations imposed by the regulations promulgated under Executive Order 11246. The goals of these regulations are to ensure agency investigation and to promote pre-suit resolution of any violations OFCCP identifies during its investigation. OFCCP thus must, before filing suit, investigate and bring to a defendant’s attention the specific violations the defendant must remedy to comply with the Executive Order. That maximizes the chances of resolving violations through informal conciliation rather than formal, expensive, and time-consuming litigation in tribunals such as this.

Here, OFCCP has undermined this scheme by pursuing alleged violations that arise from conduct that was not part of OFCCP’s compliance review. As such, they were not investigated by OFCCP before filing suit and thus could not have been conciliated. OFCCP’s desire to sweep aside the conciliation requirement is laid bare by its efforts to litigate claims that might arise up to and through the hearing and possibly even beyond. Any violation occurring after OFCCP’s investigation closed is one which, by definition, OFCCP could not have investigated. That is all the more so for claimed violations that arose only after OFCCP’s complaint—to say nothing of potential *future* violations that OFCCP wants to prosecute in this case that have not yet occurred.

In setting the scope of Oracle’s potential liability beyond the investigative period and into the future, this Court has allowed OFCCP to sue first, investigate second, and conciliate never, contravening the regulatory scheme OFCCP says it is enforcing. Accepting OFCCP’s approach means *more than tripling* the scope of liability: Oracle will now have to defend itself against not only allegations arising within the two years investigated (parts of 2013 and 2014), but also

against charges of discrimination in all of the uninvestigated years since—from 2014 through 2018, and extending all the way through to a date of a far-in-the-future decision.

This dramatic expansion of the scope of liability is just the sort of issue that warrants immediate review under § 1292(b). This court’s order implicates important questions of law concerning the application of the regulations promulgated under Executive Order 11246. These issues are controlling because they determine whether an entire class of alleged violations, employees, and applicants—making up the majority of this litigation—are categorically not at issue in this case. In Oracle’s view, OFCCP’s approach (accepted by this Court) rests upon critical legal defects—which are, at a minimum, subject to dispute and must be resolved immediately.

II. FACTUAL BACKGROUND

A. OFCCP’s Investigation And Conciliation Efforts Were Directed At Specific And Limited Timeframes.

On September 24, 2014, OFCCP selected Oracle’s headquarters “for a compliance review under Executive Order 11246.” Scheduling Letter at 1 (Sept. 24, 2014); Am. Compl. ¶ 6. OFCCP’s review focused on Oracle’s hiring and compensation practices. OFCCP analyzed applicant and hiring data for the period from January 1, 2013 through June 30, 2014. *See* Notice of Violation (“NOV”) at 1-2 (March 11, 2016). The only employment data (relating to applicants, hires, promotions, and terminations) that OFCCP requested was for that period. *See* Scheduling Letter, Itemized Listing at 2. OFCCP also requested and analyzed compensation data from 2014, only. *Id.* at 3.

OFCCP then issued a Notice of Violation on March 11, 2016, with respect to Oracle’s hiring, recruiting, and compensation practices. Its findings as to hiring and recruiting were limited to the investigative period of January 1, 2013, through June 30, 2014. NOV at 1-2. As to compensation, OFCCP expressed concerns about violations going beyond 2014, NOV at 3-6, but its analysis was similarly limited in time—based only on 2014 data. NOV, Att. A at 1-3.

Claiming that “conciliation efforts have failed to resolve the violations” stated in the Notice of Violation, OFCCP issued a “Notice to Show Cause ... why enforcement proceedings should not be initiated.” Show Cause Notice at 3 (June 8, 2016). Just as in the Notice of

Violation, the Show Cause Notice was limited to the compliance review period. *Id.* at 4-15.

B. OFCCP's Complaint Alleges Violations That Were Neither Investigated Nor Conciliated.

OFCCP filed a complaint on January 17, 2017. The complaint is based on the same investigation periods as the Notice of Violation and Show Cause Notice. Again, as to hiring, OFCCP alleged a disparity based on data from January 1, 2013 to June 30, 2014. *Am. Compl.* ¶ 10. OFCCP's analysis of Oracle's compensation practices was based "on 2014 data." *Id.* ¶¶ 7-9. The complaint concedes that it "attempted to conciliate" only those violations identified as of the filing of the Notice of Violation. *Id.* ¶ 17.

Nevertheless, OFCCP alleged violations outside of the review period. The complaint alleges that "beginning from at least January 1, 2013 and on information and belief, going forward to the present, Oracle utilized and, on information and belief, continues to utilize a recruiting and hiring process that discriminated against qualified ... non-Asians." *Id.* ¶ 10. As to compensation, OFCCP alleged discrimination in pay from "at least January 1, 2014, and on information and belief, from 2013 going forward to the present." *Id.* ¶¶ 7-9.

C. This Court Overrules Oracle's Objections And Permits OFCCP To Pursue Claims Of Liability Extending To The Hearing And Continuing Thereafter.

Oracle has repeatedly disputed OFCCP's attempts to expand the scope of the suit beyond OFCCP's investigation. Oracle moved for judgment on the pleadings to dismiss claims beyond the investigative period and objected to OFCCP's blanket requests for documents from January 1, 2013 to the present. In response, OFCCP sought a ruling on the temporal scope of discovery.

This Court denied Oracle's motion for judgment on the pleadings, *see* MJP Order at 1-2 (June 19, 2017), and granted OFCCP's discovery motion, *see* Disc. Order at 1-2 (June 19, 2017). At the same time, the Court recognized that "neither the [C]ourt nor the parties can properly prepare for a hearing unless the relevant period under court review ends before the hearing begins. No one will be in any position to offer or analyze data that is changing even as the hearing is going forward." *Id.* at 2. Thus, the Court ordered the parties "to show cause, if any, why the [C]ourt should not fix the filing date of the Complaint in this matter, January 17, 2017,

as the last date of Defendant's alleged non-compliance with Executive Order 11246 (as amended), and associated regulations, which the [C]ourt should consider in this action." See ALJ Order to Show Cause (June 19, 2017).

Oracle resisted setting the filing of the complaint as the cutoff because the appropriate date, consistent with the regulations under the Executive Order, is the close of the investigation period, i.e. June 30, 2014 for hiring and December 31, 2014 for compensation. Oracle's Resp. at 1 (June 30, 2017). Alternatively, Oracle argued that, at the very least, the Court should set the date to when OFCCP served the Notice of Violation, on March 11, 2016. *Id.* at 2. OFCCP disagreed with the dates proposed by Oracle and with those proposed by this Court, arguing instead that there should be no cutoff. OFCCP asked this Court to "consider Oracle's non-compliance with the Executive Order through the date of its decision." OFCCP's Resp. at 7 (June 30, 2017).

On August 16, 2017, this Court issued its order setting the temporal scope of the litigation. The Court departed from what it earlier thought would be an appropriate cut-off and instead accepted OFCCP's position: OFCCP is permitted to try to prove "discrimination on the part of the Defendant ongoing to the time of the hearing and continuing." See Continuing Liability Order at 2 (Aug. 14, 2017). No limit was set on how far into the future liability could extend, though the Court did require that OFCCP "obtain all evidence and data it will use to prove its allegations of ongoing discrimination prior to the close of fact discovery." *Id.*

III. ARGUMENT

When "an administrative law judge has issued an order, of which a party seeks interlocutory review, it is appropriate for the judge to follow the procedure established in [28 U.S.C. §] 1292(b) for certifying interlocutory questions for appeal from federal district courts to appellate courts." *OFCCP v. Bank of Am.*, 1997-OFC-16, 2010 WL 1776983, at *2 (ARB Apr. 29, 2010); accord *Delegation of Authority & Assignment of Responsibility to the Administrative Review Board*, 77 Fed. Reg. 69,378, 69,379 (Nov. 16, 2012). An order is subject to immediate appeal under § 1292(b) when it involves (1) a controlling question of law, (2) for which there is a substantial ground for difference of opinion, and (3) an immediate appeal would

materially advance the litigation. *Bank of Am.*, 2010 WL 1776983, at *2. This Court's order setting the scope of Oracle's potential liability meets that standard, and this Court should certify that order for immediate appeal to the Administrative Review Board (the "Board").

A. **The Court's Ruling On The Temporal Scope Of Liability Presents Controlling Questions Of Law.**

Controlling Question. The question raised here is plainly controlling. A question is controlling if the "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981). One example of when the standard is met, but by no means the only one, is an "order which, if erroneous, would be reversible error on final appeal." *Id.* (citation omitted); *accord Brickman v. Facebook, Inc.*, No. 16-cv-751, 2017 WL 1508719, at *2 (N.D. Cal. Apr. 27, 2017). An issue is also controlling when interlocutory reversal would save the parties and the court time and expense—such as when "an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal" of the suit. *See Garner v. Wolfenbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970); *accord Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996); 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3930 (3d ed.) ("[A] question is controlling, even though its disposition might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants.").

Resolving the question whether OFCCP can bring suit, litigate, and ultimately seek to hold Oracle liable for supposed violations that OFCCP has neither investigated nor conciliated pre-suit will undoubtedly impact the outcome of the litigation as well as the remaining proceedings in this Court. If OFCCP's complaint must be limited to those claims and supposed violations from the period it investigated, it would dictate much of the outcome of this case. That is, an immediate appeal could definitively resolve in Oracle's favor all claims for violations after the investigative period, which is to say all claims of violations after 2014. It makes no sense to wait to resolve that question until the end of the case. If OFCCP cannot pursue liability beyond the period investigated, a delayed appeal could require overturning this Court's recommended

decision and remanding for still more proceedings (because this Court's ruling could be based on aggregating data from the investigative period and data from outside the investigative period).

Resolution of this issue would also have ramifications for fact discovery, expert witnesses, the trial, and the recommended decision. The breadth of the hearing would immediately shrink several times over. As to recruiting and hiring, the class of people who would allegedly have been aggrieved and thus could potentially be witnesses would be limited to applicants in 2013 and 2014, rather than anyone who has applied to be an employee of Oracle any time from the beginning of 2013 until the hearing. As to compensation, the class of alleged victims would be limited to a subset of people who were employees of Oracle in January 1, 2014, again rather than anyone who has been an employee on or since January 1, 2014. From an evidentiary standpoint, the data the experts would review would be limited to what is relevant to a two-year window (or smaller), rather than stretching five years or more. Emails, policies, memoranda, and other documentary evidence about periods after the investigation would cease to be relevant.¹

Put simply, resolution of this issue could save the parties and this Court tremendous time and expense. The burdens go beyond the significant time and money that go into producing so many years of data and other evidence. The government has made clear their intention to seek the personal, private information of persons who were employees of Oracle during the timeframe at issue, which would, of course, burden those employees' privacy interests. It is far better to resolve finally the issue of the scope of the litigation now, which in addition to reducing the expenses of discovery, would impact who and how many employees are at issue and avoid the needless production—and potential inadvertent public disclosure, *see OFCCP v. Google*, 2017-OFC-4, at 30-33 (ALJ July 14, 2017)—of sensitive private information.

Question of Law. Not only are these questions controlling, they are also pure questions of law. A question is one of law when it involves “the determination of ‘the meaning of a statutory or constitutional provision, regulation, or common law doctrine.’” *Bank of Am.*, 2010 WL 1776983, at *4 (citation omitted). An immediate appeal is permitted if the case turns on a

¹ To be clear, OFCCP may still seek discovery of materials from outside the period of investigation, but only if it demonstrated their relevance to claims arising inside the period of investigation.

“pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record.” *Id.* (citation omitted). So long as the questions to be appealed do not “appear to be merely fact-review questions,” immediate appeal may be appropriate. *See Clark-Dietz & Assocs.-Eng’rs, Inc. v. Basic Constr. Co.*, 702 F.2d 67, 69 (5th Cir. 1983).

Whether OFCCP may include in its complaint, and seek to prove in litigation, potential violations it has not investigated or conciliated before bringing suit is exactly the sort of threshold legal question appropriate for immediate review under § 1292(b). Oracle simply requests that the Board determine OFCCP’s obligations under the regulations promulgated under the Executive Order. That can be done without a detailed inquiry into the factual record. It is undisputed—and undisputable—that OFCCP did not investigate during its investigative period any violation that occurred after the investigation period—including supposed violations after OFCCP filed its complaint and future violations that have not yet occurred.

B. There Are, At A Minimum, Substantial Grounds For Differences Of Opinion Concerning The Court’s Ruling On Temporal Scope Of Liability.

A substantial ground for difference of opinion exists where there is some basis to conclude that the “appeal involves an issue over which reasonable judges might differ.” *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (citation omitted). That standard is met if, for example, courts have already disagreed on an issue’s resolution and there is no precedent that controls the outcome in that tribunal. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). It is also met where “novel and difficult questions of first impression are presented.” *Id.* (quoting 3 Fed. Proc., L. Ed. § 3:212 (2010)).

The questions raised by this Court’s order easily meet this standard. OFCCP did not investigate any of the post-June 30, 2014-hiring claims and the post-2014 compensations claims as part of OFCCP’s compliance review. Nor did OFCCP conciliate on all the claims and violations it is asserting and intended to assert. OFCCP’s post-*complaint* claims could not have been conciliated because the filing of the complaint marks the time when conciliation efforts have ended. And, of course, OFCCP could not conciliate violations that have not yet occurred. By permitting OFCCP to pursue those claims, this Court’s ruling breaks new ground, stretches OFCCP’s

authority under the regulatory scheme, and departs from precedent limiting agency authority in indistinguishable contexts. Oracle respectfully submits that reasonable jurists could disagree about whether OFCCP's approach is consistent with those regulations and that precedent.²

Before OFCCP can bring suit against a contractor, the regulations enacting Executive Order 11246 require OFCCP to investigate and attempt to conciliate any violations OFCCP found during its investigation and wishes to raise in a complaint initiating an administrative enforcement action. Indeed, the regulations describe a multi-step process in which any efforts to enforce the Executive Order in this Court must follow efforts at conciliation, *see* 41 C.F.R. § 60-1.26; *accord id.* § 60-1.24(c), which in turn is a process governed by what OFCCP discovers during its investigation, *id.* § 60-1.20.

The regulations begin with detailed provisions setting out the manner by which OFCCP can discover potential violations of the Executive Order. Given concerns about unfettered evaluations of contractors, the agency carefully delineated OFCCP's investigative authority. *Government Contractors, Affirmative Action Requirements, Executive Order 11246*, 62 Fed. Reg. 44,174, 44,180 (Aug. 19, 1997).³ The regulations provide that OFCCP has the authority "to determine if the contractor maintains nondiscriminatory hiring and employment practices" by "conduct[ing] compliance evaluations." 41 C.F.R. § 60-1.20(a). The regulations offer several avenues for compliance evaluation. As is relevant here, OFCCP has the authority to investigate a contractor's compliance with the Executive Order by conducting a multi-stage "compliance review." *Id.* § 60-1.20(a)(1). That is no pro forma requirement or trivial undertaking. A compliance review represents a "comprehensive analysis and evaluation of the hiring and employment

² Beyond the regulations and this precedent, the procedural history of this case proves that reasonable minds could differ on OFCCP's authority to pursue violations it did not investigate or conciliate. It took three rounds of briefing, and three orders by this Court, to settle on the time frame for the litigation. In the briefing leading up to this Court's order, four cut-offs were proposed. After initially proposing the date of the complaint in its Order to Show Cause, this Court changed its mind and adopted a different scope for the litigation.

³ The regulations place limits on investigations in part to avoid the Fourth Amendment concerns that ever-expanding investigations not governed by neutral investigative criteria would pose. *OFCCP v. City Public Service of San Antonio*, 1989-OFC-5, at 9-12 (Ass't Sec'y Jan. 18, 1995); *OFCCP v. Bank of Am.*, 1997-OFC-16, at 12-13 (ARB Mar. 31, 2003). This very case illustrates the Fourth Amendment dangers that arise when OFCCP disregards its regulations: OFCCP sold Oracle a narrow, Fourth Amendment-compliant investigation only to expand that investigation through discovery after filing its complaint.

practices of the contractor.” *Id.* Nothing in the regulations suggests that OFCCP can bring a lawsuit against a contractor without first engaging in such investigatory efforts. Indeed, as the regulations set forth, it is critical to all the steps that follow that OFCCP first know at this early, pre-suit stage what violations it has found. *Id.* §§ 60-1.20(b), 60-1.24(c)(2)-(3), 60-1.28.

After comprehensive investigation, if OFCCP concludes that “deficiencies are found to exist,” OFCCP “shall” then make “reasonable efforts” to address those deficiencies and “secure compliance through conciliation and persuasion.” *Id.* § 60-1.20(b). Only after OFCCP has undergone such reasonable efforts to “resolve[]” the violations uncovered during the investigation through “informal means” (i.e., conciliation) can OFCCP obtain approval for, and bring a lawsuit against, a federal contractor in this Court. *Id.* § 60-1.24(c)(2)-(3); *see id.* § 60-1.33 (describing the conciliation process for circumstances where “a compliance review” by OFCCP “indicates a material violation of the equal opportunity clause”). Consistent with that framework, OFCCP can initiate administrative enforcement proceedings when OFCCP finds “violations [that] have not been corrected in accordance with the conciliation procedures ... or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate.” *Id.* § 60-1.26(b)(1); *accord* § 60-1.24(c)(3) (“Where any ... compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the Deputy Assistant Secretary shall proceed in accordance with § 60-1.26 [i.e., enforcement proceedings].”). In short, OFCCP is “required to make reasonable efforts to secure compliance through conciliation.” *Government Contractors, Affirmative Action Requirements, Executive Order 11246*, 62 Fed. Reg. at 44,184 (observing that it would be incorrect to read § 60-1.26(b)(1) as “eliminat[ing] the duty to conciliate”).

In addition to there being no doubt that conciliation is essential to the regulatory scheme, the emphasis on conciliation is also demonstrated in the Executive Order itself. The Executive Order provides that the Secretary “shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted.” Exec. Order No.

11246, § 209(b), 30 Fed. Reg. 12,319 (Sept. 24, 1965). Robust conciliation efforts are critical to serving the substantive mission of the Executive Order: eliminating unlawful discrimination. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1654-55 (2015). Accepting a rule that undermines OFCCP’s obligation to conciliate, and overlooks the role of judicial review of that obligation, would raise serious questions. *Id.* at 1651-53.

Beyond setting out these procedural requirements, the regulations further underscore the importance of investigation and conciliation by cabining the circumstances in which a violation may be found and for whom relief might be sought. Specifically, as relevant here, a violation must be based on “[t]he results of a compliance evaluation.” 41 C.F.R. § 60-1.26(a)(1)(ii). OFCCP has the authority to seek relief only “for victims of discrimination identified during a complaint investigation or compliance evaluation.” *Id.* § 60-1.26(a)(2). By linking relief for violations to the findings during the investigation and conciliation efforts, the regulations leave little doubt that OFCCP is obliged to determine, prior to litigation, what violations it will litigate if it cannot successfully conciliate them. There can be no place for expanding the scope of litigation to violations discovered after the investigation concluded.

OFCCP has supplied no basis for reading out of the regulations and the Executive Order these limits on its authority. OFCCP points to no regulation that affirmatively permits the approach it advocates—namely, alleging violations based on conduct that occurred outside the period of the compliance evaluation and thus was not investigated, all with the hope that OFCCP might uncover during civil discovery in the administrative-enforcement proceedings the evidence necessary to prove such violations.⁴

In fact, OFCCP’s own understanding of its regulatory obligations reveals that it does not think that its approach is valid. OFCCP recognizes in its Federal Contract Compliance Manual that conciliation must take place and that conciliation deals only with violations found during the investigation and memorialized by the Notice of Violation. OFCCP, *Federal Contract*

⁴ The only regulation OFCCP has cited to support its view that it can pursue in litigation claims it did not investigate or conciliate is 41 C.F.R. § 60-1.12(a). But that regulation says no such thing. The regulation is not even about the scope of liability; it is about contractor records retention.

Compliance Manual § 8F, at 264 (Oct. 2014) (notice of violation “must include all violations requiring corrective action”); *id.* § 8F01, at 264 (notice of violation used to “initiate the conciliation and resolution process”). As OFCCP has said in formal rulemaking, its manual is critically important as it “contains the policy guidance interpreting the Executive Order and regulations, as well as agency instructions for implementing the regulatory provisions.” *Government Contractors, Affirmative Action Requirements, Executive Order 11246*, 62 Fed. Reg. at 44,180; *cf. Church of Scientology v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990) (“an administrative agency is required to adhere to its own internal operating procedures” including those printed in an internal manual). In the absence of regulatory support for its position, and in light of this departure from its past understanding of its obligations, it is certainly the case that, at a minimum, reasonable jurists could reject OFCCP’s argument that it can pursue violations that were neither investigated nor conciliated before it filed the lawsuit.

Case law from the EEOC context likewise casts doubt on whether OFCCP has the authority to bring suit for alleged violations it did not investigate or conciliate. Operating under analogous legal requirements, the EEOC has been unable to persuade courts to grant it the authority to expand the scope of litigation to violations beyond those that it investigated or conciliated pre-suit. *See, e.g., EECO v. CRST Van Expedited, Inc.*, 679 F.3d 657, 672-76 (8th Cir. 2012). As in this context, the EEOC has an obligation to participate in a multi-step procedure before bringing suit. *Id.* at 672. Upon receiving a charge claiming a violation, the EEOC must first “investigate the charge and determine whether there is reasonable cause to believe that it is true.” *Id.* If such cause does exist, the EEOC must attempt to “remedy the objectionable employment practice through the informal, nonjudicial means of conference, conciliation, and persuasion.” *Id.* (citation and quotation marks omitted).

Given that unified scheme, and the “strong emphasis on administrative, rather than judicial, resolution of disputes,” *id.* at 674 (citation omitted), the Eighth Circuit held that the EEOC must limit its enforcement complaint to “unlawful conduct it has uncovered during the course of its investigation.” *Id.* (quoting *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir.

1996)). The agency “must discover such ... wrongdoing *during the course of its investigation*” —not after the investigation has concluded and the complaint has been filed—because violations must be “*subject to a conciliation proceeding.*” *Id.* (quotation marks omitted). “Absent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate.” *Id.* at 676. Moreover, if the agency is not limited to what was discovered in its investigation, the agency is perversely incentivized to undergo only limited investigations as a gateway to be able to later use civil discovery to engage in a “fishing expedition to uncover more violations.” *Id.* at 675 (quotation marks omitted). Accordingly, an agency (like EEOC or OFCCP) that is required to investigate and find reasonable cause before suing can “obtain relief for instances of discrimination that it discovers during an investigation of a timely charge”—not “through a process of discovery that follows [filing] a complaint.” *Id.* at 675 n.12 (citation and quotation marks omitted).⁵

Given the similarity between the EEOC and OFCCP requirements, it would make little sense for courts to treat them differently. Indeed, in a case OFCCP cites and this Court has acknowledged, the Secretary of Labor has found instructive how courts have treated EEOC proceedings. *See OFCCP v. Honeywell, Inc.*, 77-OFC-3, 1993 WL 1506966, at *7 (Sec’y June 2, 1993) (looking to “comparable situations under Title VII” to interpret OFCCP’s authority). At a minimum, that the OFCCP regulations can be read in a way consistent with the requirements found in the EEOC context—such that investigation and conciliation must precede suit—means that reasonable jurists could come out differently on whether OFCCP’s complaint is appropriate.

Nothing about this Court’s various orders on the temporal scope of this case suggests that the issue has already been settled by the Board or Secretary. Indeed, in concluding that OFCCP can bring claims for violations that were not investigated and conciliated, this Court did not address the regulations, which it deemed not controlling, or the persuasive EEOC precedent that the Secretary of Labor has previously deemed helpful in determining OFCCP’s obligations.

⁵ The Eighth Circuit is not alone in being unwilling to permit the EEOC to expand its complaint beyond those claims it actually investigated. *See EEOC v. Dillard’s Inc.*, No. 08-CV-1780, 2011 WL 2784516, at *5-8 (S.D. Cal. July 14, 2011); *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 810-16 (S.D.N.Y. 2013); *EEOC v. Original Honeybaked Ham Co.*, 918 F. Supp. 2d 1171, 1177-80 (D. Colo. 2013).

Disc. Order at 1-2. Instead, this Court relied on two prior Department of Labor decisions, neither of which is directly on point. See Disc. Order at 2 (citing *OFCCP v. Uniroyal, Inc.*, 77-OFC-1, 1979 WL 258004 (Sec’y June 28, 1979)); MJP Order at 3-4 (citing *Honeywell*, 1993 WL 1506966). Neither definitely resolves the critical question here of whether OFCCP may seek to prove violations it neither conciliated nor investigated—and thus these authorities leave ample room for reasonable jurists to disagree with the approach adopted here.

The relevant portion of *Uniroyal*, for example, stands only for the proposition that the scope of *discovery* may be broader than “the issues raised by the pleadings,” so long as the sought-after discovery was relevant “to subject matter of the suit.” 1979 WL 258004, at *9. That the period of discovery may be broader than the period of liability does not mean that the period of liability may be unlimited. The period of liability is determined by OFCCP’s pre-suit actions—its compliance with the prerequisites for filing suit.

Honeywell is similarly inapposite, because it does not address OFCCP’s obligations under the regulations, which is the principal basis for Oracle’s argument. Rather than grapple with OFCCP’s regulatory limits, the court simply resolved that OFCCP’s expansive complaint presented no due process concerns because the defendant had been put on notice of the violations alleged in the complaint. 1993 WL 1506966, at *5-6, *8-9. Significantly, before allowing OFCCP to proceed on those claims, the Secretary noted that there had in fact been an opportunity to conciliate all claims presented in the litigation, *id.* at *6, because those claims were grounded in the compliance review, *id.* at *8. Neither can be said for the claims here, and so *Honeywell* simply does not control.

Moreover, the language in *Honeywell* that OFCCP cites to suggest that the Secretary has made a more sweeping grant of authority is understood by courts to actually support Oracle. Here is the language from *Honeywell*: “[T]he complaint ... may encompass any discrimination like or reasonably related to the allegations of the *EEOC charge*, including new acts occurring during the pendency of the charge before EEOC.” See 1993 WL 1506966, at *7 (emphasis added). As *CRST* (relied on by Oracle) explains, that language serves only to explain that EEOC’s

complaint must always be tethered to what appears in the charge, which is the document that initiates the investigation. *See* 679 F.3d at 674-75. EEOC has authority to expand its complaint beyond the allegations in the initial charge, but only if the additional allegations are reasonably related to those in the charge and only if EEOC can demonstrate that it “discovered” any of the newly alleged “individuals [or] wrongdoing *during the course of its investigation.*” *Id.* at 674 (citation and quotation marks omitted). And so, reasonable jurists could well resist OFCCP’s attempts to read *Honeywell* as placing no limits on what violations might be asserted in its complaint and in the litigation.

This Court need not resolve how *Honeywell* must be interpreted. For the purposes of § 1292(b), it is enough that the same standard borrowed by the Secretary in *Honeywell* has since been interpreted by the Eighth Circuit in a way contrary to the broad approach OFCCP urges here. *Compare Honeywell*, 1993 WL 1506966, at *7 (citing, *inter alia*, *Anderson v. Block*, 807 F.2d 145, 148 (8th Cir. 1986)), with *CRST*, 679 F.3d at 674-75, and *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 852 (8th Cir. 2012) (noting subsequent narrowing of *Anderson*). That alone suffices to show that reasonable jurists can differ on this issue, which is all that is required.

C. An Immediate Appeal Of The Temporal Scope Ruling Would Materially Advance The Ultimate Termination of The Litigation.

To meet the final requirement, an immediate appeal need not resolve all claims in the case or otherwise “have a final, dispositive effect on the litigation” to be immediately appealable. *Reese*, 643 F.3d at 688. All that is necessary is that the immediate appeal materially advances the litigation. *Id.* That standard is met when resolving the controlling questions would “involve the possibility of avoiding trial proceedings, or at least curtailing and simplifying pretrial or trial.” 16 Wright & Miller, *supra*, § 3930; *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) (appeal materially advances the litigation when “resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation”).

For many of the same reasons the questions surrounding temporal scope are controlling, *supra* III.A; *S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000) (noting that “in practice” two questions are closely connected), their resolution would materially advance

the litigation. The temporal scope issue is at the heart of determining liability in this case. If the scope is narrowed, far fewer violations would be at issue at the hearing. That would mean fewer witnesses, smaller sets of data, and narrowed expert analysis. If an appeal must wait until the end of this litigation, all of the additional proceedings, related discovery, and hearing-preparation efforts may well have been for naught. In addition, because this appeal would resolve some of OFCCP's threshold obligations, an immediate appeal may well "encourage the parties to engage in voluntary mediation" or otherwise conciliate claims. *Bank of Am.*, 2010 WL 1776983, at * 5 (immediate appeal particularly appropriate when defendant "identifie[s] ... threshold legal issues, the resolution of which would encourage the parties to engage in voluntary mediation").

IV. CONCLUSION

For the reasons set forth above, this Court should certify its August 14, 2017, order regarding continuing violations for immediate review to the Board.

Dated: August 28, 2017

Respectfully submitted,

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