

U.S. Department of Labor

Office of Federal Contract Compliance Programs
Pacific Regional Office
90 7th Street, Suite 18-300
San Francisco, California 94103



April 21, 2016

Via Electronic and U.S. Certified Mail, Return Receipt Requested

Gary R. Siniscalco
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The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669

**RE: Compliance Evaluation of Oracle America, Inc.,
Redwood Shores, California; OFCCP No. R00192699**

Dear Mr. Siniscalco:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) received your April 11, 2016 correspondence. You reject the Agency's request to meet and engage in a good faith and timely conciliation discussion in order to attempt to reach an acceptable resolution of the Notice of Violation. You also erroneously suggest that the Agency has not properly conducted this compliance evaluation, nor substantiated its findings of systemic discrimination against Oracle.

Contrary to your position, OFCCP has provided ample evidence supporting the Agency's findings against Oracle.¹ In the Notice of Violation and accompanying attachment (NOV), OFCCP describes its systemic discrimination findings and supporting analyses of Oracle's employment records and other evidence.² For example, it specifically describes the evidence relied upon in its analyses, including Oracle's *own* applicant and employee databases, written policies and other evidence *not withheld or*

¹ OFCCP has provided additional information responsive to Oracle's 57 questions, attached to its April 11, 2016 correspondence to the Agency, where appropriate, in the enclosed Appendices.

² See, e.g., NOV at p. 2 (OFCCP conducted an "... analysis of ORACLE's applicant data and appropriate workforce availability statistics" [which is later defined as] "... Software Developers, Applications & Systems Software Occupation in the United States is based upon 2006-2010 Census and/or 2013-2014 DOL, Bureau of Labor Statistics' Labor Force Statistics."); and Attachment A at pp. 1-3 ("OFCCP conducted statistical analysis of the employment records Oracle America, Inc. ("Oracle") provided to OFCCP during its equal employment opportunity investigation of Oracle's facility in Redwood Shores, California... Oracle provided OFCCP with one year of compensation data that included Oracle employees who were employed at the relevant facility on January 1, 2014.").

created solely in response to this audit by Oracle.³ It further describes the methodology and variables used in the regression analyses, allowing Oracle to replicate them.⁴

The NOV also provides the results of OFCCP's statistical analyses, which are well-above the two standard deviations accepted as evidence of systemic discrimination.⁵ For example, OFCCP's analyses uncovered:

- gross disparities against non-Asian applicants, particularly African American, Hispanic and White applicants, at -8, -10, and -80 standard deviations, respectively, in recruiting practices;
- gross disparities against non-Asian applicants, particularly African American, Hispanic and White applicants, at -4, -3, and -28 standard deviations, respectively, in hiring practices; and
- gross disparities against African American, Asian American, American and female employees, at -2, -6.6, -7.1, and -8.4 standard deviations, respectively, in compensation practices.⁶

Because OFCCP has met its burden, Oracle now bears one. However, in the April 11, 2016 letter to the Agency, Oracle, through its counsel, fails to provide any evidence to rebut the NOV.⁷ Only two

³ Oracle's submission of information created solely for the purpose of this audit (e.g., the post hoc "explanation" of its compensation philosophy and practices not reflected in written documents nor policies kept in the ordinary course of business, or the newly-created "variables" such as "work flow unit" inserted into its compensation database "for OFCCP only") is not credible evidence.

⁴ See, e.g., Attachment A at pp. 1-3 ("OFCCP analyzed Oracle employees' compensation data by Oracle job function using a model that included the natural log of annual salary as a dependent variable, and accounted for differences in employees' gender, work experience at Oracle, work experience prior to Oracle, full-time/part-time status, exempt status, global career level, job specialty, and job title.")

⁵ A disparity in treatment that is two standard deviations is acceptable as evidence of discrimination. See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 496-497 n.17 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308-309 n.14 (1977); *Segar v. Smith*, 738 F.2d 1249, 1283 (D.C. Cir. 1984) cert.denied, 471 U.S. 1115 (1985).

⁶ Gross statistical disparities alone, like the disparities uncovered here, are compelling proof of systemic discrimination. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); 29 U.S.C. §§ 621-34 (2012).

⁷ Because Oracle's counsel appears to apply the wrong legal standard in his correspondence responding to the systemic discrimination findings at issue, the applicable law is provided herein. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Segar v. Smith*, 738 F.2d 1249, 1285-1286 (D.C. Cir. 1984); 29 U.S.C. §§ 621-34 (2012); 3-55 Labor and Employment Law § 55.03, LEXIS, Matthew Bender ("...a different pattern of proof has emerged for class actions and "pattern or practice" suits. When the plaintiff in a ... case is a class of individuals or the [government] ... the four-part prima facie showing called for in *McDonnell Douglas* is not directly apposite. At the liability stage of the proceedings, it is simply too cumbersome and too inefficient to require each class member or each affected employee to individually present the facts required for a *McDonnell Douglas* prima facie case.")

Accordingly, in order to rebut OFCCP's systemic discrimination findings, Oracle cannot respond with questions about individuals. Instead, it must respond with statistical evidence either demonstrating how OFCCP's statistical analysis

paragraphs of the five-page letter address the substantive discrimination violations at issue.⁸ Even then, those two paragraphs only seek information from the Agency. The letter's attachment serves an additional 57 questions on the Agency – seeking predominantly irrelevant,⁹ privileged,¹⁰ or premature¹¹ information – while Oracle continues to withhold any substantive response to the NOV.

Without evidence offered to satisfy Oracle's evidentiary burden, OFCCP's findings remain unrebutted. Should Oracle and its counsel continue to withhold rebuttal evidence to the NOV, the Agency may conclude that none exists.¹²

was flawed, or providing a nondiscriminatory explanation or business necessity for the observed systemic disparities. Failure to provide rebuttal evidence essentially concedes the violations. *See Segar*, 738 F.2d at 1288 (When an employer "...introduced no evidence to support its purported nondiscriminatory explanation, this rebuttal fails as a matter of law.")

⁸ Instead of responding to the substantive violations at issue, most of the letter focuses upon mischaracterizing communications and the compliance evaluation record, while condemning government officials for conducting an audit of Oracle. *See* 41 C.F.R. 60-1.32. Moreover, Oracle counsel's repeated statements about disclosure of findings prior to issuance of a NOV or during an exit conference are a red herring. No such requirements exist. Again, the Agency will continue to attempt to redirect all parties' communications to the substantive issues, rather than unfounded and irrelevant diversions presented by Oracle counsel.

⁹ At this stage, individual comparator information is not the focus, particularly when the employer has not even produced a proper rebuttal to statistical evidence of systemic discrimination. *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (In the liability phase of a pattern and practice case, "the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking." ... The Government is not required to offer evidence "that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy.")

¹⁰ Questions seeking information about "other factors considered" or "rejected;" "different models, iterations and computations... run besides the three listed...;" and "the statistical results of all other models and computations conducted" is subject to the deliberative process privilege and other privileges. *See, e.g. DOI v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8 (2001) ("[D]eliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."); *Guzman v. City of Chicago*, 2011 U.S. Dist. LEXIS 1730, *11 (N.D.Ill. 2011) (oral communications and discussions covered by deliberative process privilege).

¹¹ *See e.g., Clean Earth Remediation and Construction Services Inc. v. American International Group Inc.*, 245 F.R.D. 137, 141 (S.D.N.Y. 2007) ("a number of cases have held that interrogatories seeking identification of all facts supporting a particular allegation are inherently improper.") (citing, *inter alia*, *Grynberg v. Total S.A.*, 2006 WL 1186836, at *6-7 (D. Col. 2006); *Convolve Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 173 (S.D.N.Y. 2004) (Francis, M.J.); *Thompson v. United Transp. Union*, 2000 WL 1375293 (D. Kan. 2000)).

¹² *See Segar*, 738 F.2d at 1288 (When an employer "...introduced no evidence to support its purported nondiscriminatory explanation, this rebuttal fails as a matter of law."); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 653-654 (5th Cir. 1983), cert. denied, 466 U.S. 927(1984) ("defendant must do more than raise theoretical objections to the data or statistical approach taken; instead, the defendant should demonstrate how the errors affect the results"); *EEOC v. Gen. Tel. Co.*, 885 F.2d 575, 579-582 (9th Cir. 1989) cert. denied, 498 U.S. 950 (1990) ("[T]he defendant

OFCCP again requests that Oracle provide a rebuttal to the NOV, through statistical evidence, which explains how OFCCP's statistical analyses are flawed, or why a nondiscriminatory reason or business necessity explains the observed systemic disparities. Please provide such information by May 4, 2016.¹³ In the event Oracle fails to meet its rebuttal burden, OFCCP will initiate proceedings with the appropriate enforcement agency.

Sincerely,



Hea Jung Atkins

cc: Shauna Holman-Harries (via email: shauna.holman.harries@oracle.com)
Director Diversity Compliance, Oracle America, Inc.

Juana Schurman (via email: juana.schurman@oracle.com)
Vice President and Associate General Counsel, Oracle America, Inc.

Enclosure

cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff's statistics."); *Bazemore v. Friday*, 478 U.S. 385, 399-400, 403-404 n.14 (1986).

¹³ Please note that arguments of counsel, affirmations of good faith in making individual decisions, cohort comparisons, and critiques absent an alternative analysis that demonstrates a *different outcome in favor of Oracle* are insufficient to rebut OFCCP's statistical evidence of systemic discrimination. See footnote 12.

APPENDIX A

For questions 1-11, please see responses below.

1. *Please state how OFCCP determined that Asian Indians, and Asians generally, were favored in recruiting.*

Please refer to the NOV ("An analysis of ORACLE's applicant data and appropriate workforce availability statistics show that ORACLE favored Asian applicants, particularly Asian Indians, in recruiting at a standard deviation as significant as +85. ORACLE disfavored non-Asian applicants in recruiting, particularly African American, Hispanic and White applicants, at standard deviations as significant as -8, -10, and -80, respectively."... "An analysis of ORACLE's hiring data and appropriate workforce availability statistics show that ORACLE favored Asian applicants, particularly Asian Indians, in hiring at a standard deviation as significant as +30. ORACLE disfavored non-Asian applicants in hiring, particularly African American, Hispanic and White applicants, at standard deviations as significant as -4, -3, and -28, respectively. Evidence gathered during the compliance evaluation demonstrates that ORACLE's discriminatory recruiting and hiring practices skewed the racial composition of the applicant flow data to favor Asians, particularly Asian Indians, and disfavored other racial groups for PT1 roles. In order to further analyze ORACLE's recruitment and hiring practices for PT1 roles, OFCCP made multiple requests to ORACLE for copies of all application materials for all expressions of interest, including but not limited to names of hiring managers, employee referrals, requisition dates, hire dates, and copies of job postings and job requirements. Because ORACLE failed to provide complete and accurate information in response to OFCCP's multiple requests, OFCCP presumes that the information not produced would have been unfavorable to ORACLE.")

2. *Please identify who OFCCP determined were "qualified" African-Americans, Hispanic and White ... applicants" who were discriminated against in recruiting.*

Please refer to applicant data submitted by Oracle on October 28, 2014 as part of Oracle's AAP submission.

3. *For those identified in #2 above, please identify all those OFCCP identified as qualified persons discriminated against in hiring.*

Please refer to applicant data submitted by Oracle on October 28, 2014 as part of Oracle's AAP submission.

4. *Please describe with specificity the recruiting actions that OFCCP determined were discriminatory.*

This question is improper and/or premature while Oracle continues to deny access to relevant information and withhold any substantive response to the NOV.

See, e.g., 41 C.F.R. §§ 60-1.43, 60-300.81, and 60-741.81; Clean Earth Remediation and Construction Services Inc. v. American International Group Inc., 245 F.R.D. 137, 141 (S.D.N.Y. 2007) ("a number of cases have held that interrogatories seeking identification of all facts supporting a particular allegation are inherently improper.")

5. *Please provide the underlying statistical data and actual computations used by OFCCP to determine the standard deviations in violation #1.*

Please refer to applicant data submitted by Oracle on October 28, 2014 as part of Oracle's AAP submission. Statistical results are referenced in the NOV.

6. *Please describe with specificity what facts OFCCP relied upon in finding that Oracle "disfavored non-Asian applicants in hiring."*

Please refer to the response to question 4.

7. *Please describe specifically what facts OFCCP "gathered during compliance evaluation (to demonstrate) that Oracle's discriminatory recruiting and hiring practices showed the racial composition of the applicant flow data to favor Asians, particularly Asian Indians."*

Please refer to the response to question 4.

8. *Please describe with specificity how OFCCP identified any individuals referenced in violation #1 as Asian Indians.*

Applicant surnames, citizenship/visa status, and Labor Condition Applications and supporting information submitted to the U.S. Department of Labor by Oracle were used to determine country of origin.

9. *Please identify the multiple requests made by OFCCP for "copies of all application materials, etc."*

Please refer to the Pending Information Requests provided to Oracle on March 29, 2016, including dates of data requested and missed deadlines.

10. *Please explain why OFCCP compliance staff made no request to review application materials on site.*

OFCCP is not required to review all documents during onsite. *See* 41 CFR 60-1.20(a)(2).

11. *Please identify the non-Asian counterparts who were equally or more qualified for the PT roles filled by Individual Contributors.*

Please refer to the response to question 4.

Questions 12-24, and 28-31 appear to address confidential sources, the deliberative process and other privileged matters. The question also raises concerns about Oracle's engagement in the conciliation process. Most notably, Oracle puts forth questions seeking potentially confidential and privileged information, which go beyond the Agency's disclosure requirements in conciliation, but continues to withhold relevant information, a rebuttal analysis or other written response to the Notice of Violations.

12. *Did OFCCP (or its statistician) look only at the factors referenced in the statistical summary in Attachment A to the NOV?*
13. *Were other factors considered? If so, which ones?*
14. *Were other factors rejected? If so, why?*
15. *How many different models, iterations, and computations did the statistician run besides the three listed in Attachment A?*
16. *What were the statistical results of all the other models and computations conducted by the statistician?*
17. *Oracle was unable to replicate the analysis, methodology and results in Attachment A. Please provide it with all the necessary information, data, descriptions of methodology, etc., sufficient to allow Oracle to replicate the results in Attachment A.*
18. *Please describe with specificity the data used in Attachment A with regard to "work experience at Oracle" and "work experience prior to Oracle." If these simply mean "time at Oracle" and "time working prior to Oracle," please explain the reason for use of these time frames.*
19. *Because of the relatively small groups of employees, did OFCCP or its statistician do any statistical tests to ensure that practical significance was not at play?*
20. *If other factors were considered and rejected by OFCCP, what did the results show using the factors that were rejected? In other words, did OFCCP consider a factor that explained or reduced the disparity and then reject it?*
21. *For just the model used in Attachment A, OFCCP made computations for each role and for each protected group. How many roles and how many analyses were done using the Attachment A model?*
22. *Directive 307 allows OFCCP to use different groupings of jobs, roles, job titles, etc., to develop PAGs. How many different PAGs did OFCCP develop and consider as part of its statistical analysis? What facts were considered to determine if the roles or job titles in the PAGs comprised only comparators?*
23. *Directive 307 states that in every case there are three key questions to answer. Once a measurable difference is found, questions b and c are as follows: b) is the difference in compensation between employees who are comparable under the contractor's wage or salary system and c) Is there a legitimate (i.e. non-discriminatory) explanation for the difference?*
28. *What did OFCCP do to answer questions b and c and what actual facts and information did it obtain? Did OFCCP consider performance in assessing pay differences? If not, why not?*
29. *Did OFCCP consider relevant job experience, business lines (for example, work on PeopleSoft products v. cloud v. fusion), criticality of the role or product to Oracle, or market factors? If not, why not?*
30. *For each finding in the NOV, state whether the finding constitutes unlawful disparate treatment or disparate impact?*

31. *The NOV refers variously, and in summary fashion, to evidence in personnel records, interviews, complaints, anecdotes but is lacking in any details or specific information of any kind. Please identify or explain what facts or information was found that supports each of the alleged violations 2-5.*

For questions 25-27, please see responses below.

25. *If OFCCP did identify comparators, who are they as referenced in the NOV where it states variously that respective protected class members (Females, Blacks, Hispanics non-Americans) were paid less than similarly situated (males, Asians, whites)?*

Please refer to the compensation database that Oracle submitted to OFCCP for the referenced protected class members and comparators.

26. *Why did OFCCP never give Oracle an opportunity to provide legitimate explanations under question c?*

OFCCP provided Oracle with numerous opportunities to provide its position. Please refer to email correspondence that Ms. Holman-Harries sent to OFCCP on 10/28/2014, 12/11/2014, and 03/12/2015. Additionally, the NOV states that OFCCP requests Oracle to engage in conciliation discussions to resolve the violations, which Oracle refused.

27. *What did OFCCP do to answer question c?*

OFCCP did not find any legitimate explanation for the observed systemic disparities. Now Oracle bears the burden to rebut OFCCP's systemic discrimination findings by either demonstrating how OFCCP's statistical analysis was flawed, or providing a nondiscriminatory explanation or business necessity of the observed systemic disparities.

For questions 32-39, please see OFCCP email to Oracle on March 29, 2016.

32. *For alleged violation #6, please describe the "in depth analysis" OFCCP believes is required and how Oracle "failed" to identify problem areas.*

33. *Please identify with specificity the "problem areas in its compensation system" that Oracle failed to identify.*

34. *For alleged violation #7, please describe with specificity the type of pay equity analysis Oracle failed to conduct in accordance with 41CFR 60-2.17(c).*

35. *For alleged violation # 8, please describe with specificity the nature and type of monitoring OFCCP contends (1) was not done and (2) must be done in accordance with 41 CFR 60-2.17(d).*

36. *For alleged violation #9, please identify which records Oracle failed to maintain and collect.*

37. *For alleged violation #9, please identify the adverse impact analysis not done as required by 41CFR60.1.12(a).*
38. *For alleged violation #10, please identify with specificity when and how OFCCP requested access to records.*
39. *For alleged violation #10, please identify with specificity each and every instance in which Oracle denied OFCCP access.*

For questions 40-42, OFCCP is available to provide any technical assistance needed by Oracle. Please contact the Greater San Francisco/Bay District Office if you intend to conciliate the matter.

40. *For all of the alleged violations 6-10, please specify what technical assistance OFCCP has available to provide to contractors.*
41. *For all of the alleged violations, please identify the person or persons in the SF region knowledgeable and experienced in providing technical assistance to contractors.*
42. *Please specify when and what technical assistance, if any, was ever offered to Oracle in connection with 6-10.*

APPENDIX B

For question 1, please see response below.

1. *What facts support OFCCP's determination that Oracle refused OFCCP access to prior year compensation data for all employees for PT1 role during the review period of January 1, 2013 through June 30, 2014?*

Prior year compensation data was requested on 7/30/15; 8/28/15; 9/21/15; 10/1/15; 10/14/15; and 11/2/15. To date, Oracle has yet to produce the data.

For questions 2–10 and 12, please see OFCCP's email to Oracle on March 29, 2016.

2. *What facts support OFCCP's determination that Oracle refused OFCCP access to complete hiring data for PT1 roles during the review period of January 1, 2013 through June 30, 2014?*
3. *What facts support OFCCP's determination that Oracle refused to provide data on April 27, 2015?*
4. *What facts support OFCCP's determination that Oracle refused to provide data on May 11, 2015?*
5. *What facts support OFCCP's determination that Oracle refused to provide data on May 28, 2015?*
6. *What facts support OFCCP's determination that Oracle refused to provide data on July 30, 2015?*
7. *What facts support OFCCP's determination that Oracle refused to provide data on October 1, 2015.*
8. *What facts support OFCCP's determination that Oracle refused to provide data on October 14, 2015?*
9. *What facts support OFCCP's determination that Oracle refused to provide data on November 2, 2015?*
10. *What facts support OFCCP's determination that Oracle refused to provide data on December 15, 2015?*
12. *What facts support OFCCP's determination that Oracle refused to provide complete compensation data for all relevant employees in the Information Technology, Product Development and Support roles for "the full review period" as noted in footnote 4.*

For questions 11-17, OFCCP is not required to review all documents during onsite. See 41 CFR 60-1.20(a)(2).

11. *For each refusal noted above, state all efforts made by OFCCP to arrange to review the documents onsite.*
12. *For each refusal noted above, state all efforts made by OFCCP to arrange to review the documents onsite.*
13. *What, if anything, did OFCCP do to review on-site the items referenced in footnote 4 that Oracle allegedly refused to provide?*

14. *What, if anything, did OFCCP say or do in response to seek access to information on site to the extent such effort is not described in response to questions 1 - 13 above?*
15. *Please identify the legal and regulatory basis for presuming data would be unfavorable (i.e. applying an adverse inference) in the NOV with regard to the refusal referenced in footnote 4.*
16. *What, if anything, did OFCCP do to review on-site the items referenced in footnote 4 that Oracle allegedly refused to provide?*
17. *What, if anything, did OFCCP say or do in response to seek access to information on site to the extent such effort is not described in response to questions 1 - 13 above?*
18. *Please identify the legal and regulatory basis for presuming data would be unfavorable (i.e. applying an adverse inference) in the NOV with regard to the refusal referenced in footnote 4.*

See 41 C.F.R. 60-1.12(e) ("Failure to preserve complete and accurate records as required by paragraphs (a) through (c) of this section constitutes noncompliance with the contractor's obligations under the Executive Order and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: Provided, That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from the circumstances that are outside of the contractor's control.")