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From: Swirky, Maria <mswirky@orrick.com> on behalf of Siniscalco, Gary R. <grsiniscalco@orrick.com>
Sent: Wednesday, September 21, 2016 12:39 PM
To: Atkins, Hea Jung K - OFCCP
Cc: Siniscalco, Gary R.
Subject: Compliance Review of Oracle America, Inc., Redwood Shores; CA OFCCP No. R00192699
Attachments: [HQCA] May 25, 2016.pdf; [HQCA] April 11, 2016.pdf; [HQCA] June 29, 2016.pdf

Categories: Red Category

Via Email and U.S. Mail

Hello Ms. Atkins,

I am Mr. Siniscalco's Assistant. He is in Montana this week He asks that I send you the attached in response to your September 16 email.
Thank you.

Dear Hea Jung,

This letter responds to your September 16 letter, which we received by email at 2:45 pm. In that letter, which responded to mine earlier on September 16, you take the position that any conciliation in this matter is now conditioned upon Oracle providing a "substantive rebuttal analysis" within three business days. As you know, this is an abrupt change in position by OFCCP. Just one week earlier, on September 9, 2016, you sent another letter in which you invited Oracle to engage in conciliation, and asked that I contact you by September 16 to initiate that process. Your September 9 invitation to conciliate did not condition OFCCP's offer to conciliate on Oracle providing any further analyses. On September 16, 2016, Oracle accepted OFCCP's conciliation invitation and suggested October 6, 2016 for an in person meeting. Given this sequence of events, you can imagine Oracle's surprise when it received a letter from you just a few short hours later, suddenly demanding a "substantive rebuttal analysis" as a condition of conciliation, and accelerating the date of any potential conciliation meeting to September 27, 28 or 29.

Not only does OFCCP's action contradict its stated desire to "engage in a good faith, mutual conciliation process and a productive meeting," but Oracle already has provided a substantive rebuttal analysis to the Agency's March 11, 2016. Moreover, Oracle has met its burden to show cause as to why enforcement proceedings should not be initiated.

On April 11, 2016, we advised the Agency that the March 11 letter failed to provide information allowing Oracle to understand the Agency's factual and statistical findings. As such, we requested that the Agency detail its findings and provide additional information. On April 21, the agency provided some cursory information. Despite the lack of detail and substantive evidence or analysis, Oracle, on May 25, 2016, provided a position statement that address numerous procedural and substantive failings that have plagued this evaluation process, leading to a procedurally and substantively defective NOV.

Copies of the April 11 and May 25 letters are attached. Among other things, the May 25 response set forth Oracle's positions including (1) OFCCP's failure to follow its own procedures during the investigation; (2) the

NOV's procedural deficiencies; (3) OFCCP's substantive failure to establish disparate impact discrimination; (4) clear evidence of OFCCP's substantive failure to establish under Title VII and Directive 307 that employees were similarly situated for purposes of compensation discrimination; and (5) OFCCP's substantive failure to take into account legitimate business related reasons for the alleged disparities. Indeed, the May 25 response is accompanied by a cover letter giving a road map to the 18-page rebuttal analysis. As explained in that letter, Part I of the analysis details the Agency's procedural failures, but Parts II and III (e.g., the majority of the response) detail the Agency's substantive failings. Accordingly, there is no question that Oracle has rebutted the Agency's findings, both procedurally and substantively.

Moreover, the cover letter to the position statement ended with this express offer "[w]e would be pleased to engage in further dialogue and discussion as may be appropriate." OFCCP responded in a peremptory manner by completely ignoring Oracle's substantive response and issuing a Show Cause Notice on June 8, 2016, that purported to assert that Oracle had offered no rebuttal and that conciliation "efforts" had failed.

In response to the Show Cause Notice, in a June 29, 2016 letter, Oracle again detailed its position, and met its burden to show cause as to why enforcement proceedings should not be initiated. Oracle's June 29 response explained that the Agency had not met its legal burden regarding its statistical model and requested again that the Agency provide supporting evidence and data. We also pointed out, inter alia, that OFCCP's assertion of a failure of conciliation efforts was demonstrably false. To date, the Agency has provided little further evidence related to the findings in the March 11 letter, has insisted on an additional "substantive rebuttal analysis", and has not provided any proposed remedies, monetary or otherwise for each of the alleged violations set forth in the NOV.

Oracle's concerns about whether it will be afforded a reasonable opportunity to engage in an transparent, reasonable and good faith conciliation process are further heightened by this most recent exchange as OFCCP has suddenly shifted the conditions for conciliation as stated in your September 16 afternoon email. On September 9, based on Oracle's detailed response to the SCN, you acknowledged a willingness to again engage in conciliation, and you concluded that letter by requesting that Oracle "... provide further information for OFCCP to consider or . . . schedule a conciliation meeting." Oracle responded, as requested, by agreeing to schedule a conciliation and proposed October 6. We also explained why that was the best and most feasible early date to meet. Then, just hours after we responded on the 16th, in your 2:45 p.m. reply, OFCCP changed its position and now insists on both a rebuttal statement by September 21, 2016 and a meeting on September 27, 28 or 29. This inconsistency does not comport with a desire to engage in a "good faith, mutual conciliation process."

Not only does the Agency's shifting positions on the terms of a meeting indicate a lack of willingness to engage in an evenhanded process, but also the proposed timing of the meeting shows unreasonable agency conduct. Oracle's offer to meet on October 6 was a good faith attempt to agree to a date that ensured that all appropriate Oracle personnel would be able to attend and ensure a productive initial conciliation meeting. In order to arrange that date, we coordinated the schedules of appropriate persons from Oracle and Orrick who would and could attend a conciliation meeting. Coordinating dates have been a significant challenge not only based on schedules but also the Agency's concurrent onsite reviews which have NOW totaled five during the summer months, including the current onsite in Bozeman, Montana. Oracle offered the earliest meeting date available to all required parties to ensure that the meeting would be productive. OFCCP has completely ignored that date without any explanation and suggests the September dates mentioned above.

Nonetheless, if you wish to meet sooner without all of the Oracle representatives present, we will accede to your meeting preference and will do so on September 28 at 10:00 a.m. PDT.
However, Oracle is not open to OFCCP now conditioning a conciliation meeting on providing any further "substantive rebuttal analysis" by September 21, 2016. As explained above, Oracle has responded as fully as possible given the defective nature of the agency's process and the resulting NOV. In particular, Oracle's May

25, 2016 response includes both a procedural and substantive rebuttal analysis. To the extent that any further rebuttal is warranted, we would anticipate presenting such positions to you at the appropriate time.

Please confirm the September 28 meeting date and time.

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