



December 9, 2016

*Via Certified Mail, Return Receipt Requested (#7015 0640 0001 7126 0350)
and Electronic Mail*

Erin M. Connell
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The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669

Re: Oracle America, Inc., Redwood Shores, California (OFCCP No. R00192699)

Dear Ms. Connell:

At our conciliation meeting on October 6, 2016, Oracle agreed to provide a more thorough rebuttal response to OFCCP's findings set forth in the Notice of Violations (NOV). Following the meeting, on October 31, 2016, Oracle submitted a letter to OFCCP with "...information and documentation¹ OFCCP asked Oracle to provide [during the conciliation meeting] with regard to the recruiting and compensation issues in the NOV." See 10/31/2016 Ltr. at 1. We have carefully reviewed this submission. For the reasons discussed at the conciliation meeting and again below, the Agency will refer this matter for enforcement proceedings to the Solicitor's Office.

* * *

As an initial matter, Oracle's latest submission fails to rebut the violations in the NOV. Oracle responded to the overrepresentation of Asians in recruiting and hiring activity for technical positions, for example, with references to outreach efforts and "various" unexplained recruiting actions. Additionally, Oracle responded to widespread gender and race salary disparities across thousands of technical employees in the same job title with a handful of select cohort comparisons. Oracle has not submitted additional data, competing statistics, or other evidence explaining the significant statistical disparities in recruiting and hiring, or compensation. Nor has Oracle provided persuasive legal authority in support of its positions.

¹ Such documentation includes: a screenshot of Oracle's career site, and select performance appraisals.

1) Oracle has Failed to Rebut OFCCP's Findings with Respect to Recruiting and Hiring Discrimination.

On March 11, 2016, OFCCP issued the NOV to Oracle. In the NOV, OFCCP describes the recruiting and hiring discrimination violations uncovered at Oracle's headquarters facility, and the classes of applicants and employees impacted. It also describes the substantial evidence of discrimination – including gross disparities in recruiting, hiring and compensation at significant standard deviations across technical jobs – that was uncovered during the review. After issuing the NOV, OFCCP provided additional explanation and information during conciliation, including through correspondence and during the October 6, 2016 meeting.

In response to OFCCP's finding that Oracle has a discriminatory preference for Asians, particularly Asian Indians, compared to non-Asians (Whites, Hispanics, and Blacks), Oracle takes issue with OFCCP's use of U.S. Census data in determining availability. However, using U.S. Census data and other workforce data reflecting the potential applicant pool to evaluate recruiting and hiring decisions for U.S. jobs is consistent with Title VII and relevant case law. *See, e.g., Heldt v. Tata Consultancy Servs.*, 2015 U.S. Dist. LEXIS 126131 (N.D. Cal. Sept. 18, 2015) (“Plaintiffs allege that, as a result of TCS's discrimination, its United States workforce consists of approximately 95% persons of South Asian descent, race, and/or national origin, compared to 1-2% of the United States population.”); *Koehler v. Infosys Techs. Ltd. Inc.*, 2015 U.S. Dist. LEXIS 60907, 18-19 (E.D. Wis. May 8, 2015) (denying motion to dismiss case alleging that the significant disparity in the defendants' racial demographic statistics gives rise to the inference that this practice resulted in discrimination based on race or national origin, and reflects the defendants' preference to recruit and hire persons of South Asian race and of Indian, Bangladeshi, and Nepalese national origin); *Castaneda v. Pickard*, 648 F.2d 989, 1003 (5th Cir. Tex. 1981) (“[I]n cases such as this one where there is an allegation that the employer's discriminatory practices infect recruiting, the process by which applications are solicited, such applicant flow data cannot be taken at face value and assumed to constitute an accurate picture of the relevant labor market. Discriminatory recruiting practices may skew the ethnic composition of the applicant pool.”).

In your letter, Oracle also argues that OFCCP is required to identify specific recruiting practices that are the root cause of the adverse impact in both recruiting and hiring practices. OFCCP does not agree that it is required to identify every practice that contributes to the disparities—particularly in light of Oracle's failure to provide relevant data and information requested during the review. Nonetheless, the gross disparities uncovered in the review alone provide compelling evidence of Oracle's discriminatory recruiting and hiring practices. *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).

Specifically, an analysis of Oracle's Professional Technical 1, Individual Contributor (“PT1”) applicant data uncovered gross disparities between the expected applicant rate (availability) and the actual applicant rate. In these entry-level technical roles, the Asian applicant rate was over 75%, compared to less than 30% in the available workforce in the relevant labor market. Among Oracle's college applicants, the overrepresentation of Asians was even more extreme: the Asian

applicant rate was 85% in 2013 and 92% in 2014. Based upon this data, OFCCP found race disparities in Oracle’s recruiting practices against African American, Hispanic and White applicants at **-8, -10, and -80 standard deviations**, respectively.

Similarly, OFCCP found gross disparities between the available workforce in the relevant U.S. labor market² and Oracle’s hires in PT1. In PT1 roles, OFCCP found race disparities in Oracle’s hiring practices against African American, Hispanic and White applicants at **-4, -3, and -28 standard deviations**, respectively.

The following chart highlights these comparisons.

**Comparison of Relevant U.S. Market Data and
Oracle Applicant, Hiring, and Workforce Data in PT1 Job Group**

PT1 Job Group	% Asian	% Non-Asian
<i>U.S. Labor Market Data for Software Developers</i>	28.8%	71.2%
Oracle Applicant Flow Data	75.8%	24.2%
Oracle Hiring Data	82%	18%
Oracle Workforce Data	73.9%	26.1%

Notably, even with such a skewed applicant pool in favor of Asians, Oracle’s Asian hiring rate significantly exceeded it -- *by more than 6%*. Compared to approximately 75% Asian applicants (and 74% Asian incumbents), Oracle hired over 82% Asians in PT1 roles during the review period. To date, Oracle has provided no explanation for the gross disparities between Asians and non-Asians in its recruiting and hiring practices, nor any other rebuttal to this evidence.

Additional evidence, including anecdotal evidence, also reinforces that these gross statistical findings are not due to chance. OFCCP has obtained statements from confidential sources evincing Oracle’s reputation as favoring Asians, specifically Asian Indians. Such a reputation both constitutes additional evidence of discrimination, and justifies relying on availability data. *See EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1282-1283 (11th Cir. Fla. 2000) (discussing a company’s actions and resulting reputation on potential applicants, stating “that Joe's hiring decisionmakers systematically excluded female applicants from consideration, that over time this male-only preference became common knowledge, and that eventually most potential, qualified,

² See Oracle’s Reasonable Recruitment Labor Area Distributions for PT1. Oracle’s recruitment area for PT1 jobs is nationwide based upon AAP and evidence gathered in compliance review. *See*, U.S. Census, *Percentage of Foreign-Born Information Technology (IT) Workers: 2014* (<https://www.census.gov/content/dam/Census/library/publications/2016/acs/acs-35.pdf>), U.S. Census data already incorporates the international characteristics and work authorization requirements related to software developers in the U.S. For example, in 2014, software developers, applications and systems software, were 39% foreign born in the U.S. *See also* EEO-1 data (<https://www.eeoc.gov/eeoc/statistics/reports/hightech/>).

female applicants self-selected out of Joe's hiring process precisely because of its reputation for intentional sex discrimination.”).

Oracle's reputation is consistent with its recruiting efforts for engineering roles, which target Asian Indians. (See, e.g., <http://gadgets.ndtv.com/apps/news/oracle-says-its-second-largest-workforce-is-in-india-716257>; <http://www.cxotoday.com/story/why-india-is-becoming-so-important-for-oracle/>; <https://blogs.oracle.com/TheOracleBlog/oracle-invests-in-india-future>; <http://timesofindia.indiatimes.com/business/india-business/75-of-management-is-from-India-Oracle-CEO/articleshow/50938387.cms>). Oracle also publicizes its recruitment priorities on its career website. On the site, the company describes how it recruits directly from India for entry-level software positions in the U.S.³ It does so despite the oversupply of STEM graduates in the U.S. -- U.S. colleges graduate 50% more students than are hired into computer engineering jobs each year in the U.S.⁴

Oracle also has a longstanding and well-known preference of sponsoring H1B visas almost exclusively for employees from Asia and particularly India. Over 92% of all Oracle H1B employees are Asian. Such preference is most pronounced in entry-level technical roles (or PT1 roles). Nearly one third of Oracle's PT1 workforce are H1B employees, compared to 13% of Oracle's overall workforce. Across Oracle headquarters, approximately 90% of H1B employees work in PT1 roles. Cf., *Koehler*, 2015 WL 2168886 at *7 (denying motion to dismiss allegations that H1B visa practices had disparate impact based on race).

Consequently, Oracle's PT1 workforce at the time of the review was overwhelmingly Asian:

Comparison of U.S. Market Data and Oracle Workforce Data in PT1 Job Group

PT1 Job Group	% Black	% Asian	% Hispanic	% White
U.S. Labor Market Data for Software Developers	4.1%	28.8%	5.3%	65.3%
Oracle Workforce Data in PT1 Job Group	0.9%	73.9%	1.9%	22.5%

³ https://blogs.oracle.com/campusrecruitment/entry/my_journey_from_college_to; Oracle 10K Annual Report 6/2014, “We continually focus on improving our cost structure by hiring personnel in countries where advanced technical expertise and other expertise are available at lower costs.” (<https://www.sec.gov/Archives/edgar/data/1341439/000119312514251351/d725622d10k.htm>)

⁴ Economic Policy Institute, *Guestworkers in the high-skill U.S. labor market: An analysis of supply, employment, and wage trends*, “For every two students that U.S. colleges graduate with STEM degrees, only one is hired into a STEM job,” (<http://www.epi.org/publication/bp359-guestworkers-high-skill-labor-market-analysis/>); Code2040, *Tech's Opportunity Gap*, “While 18% of CS degrees are awarded to Blacks and Latino/as, just 9.2% of tech industry workers are Black or Latino/a.” (http://www.lpfi.org/wp-content/uploads/2015/04/code2040_lpfi_final.pdf).

Despite the heavy concentration of Asians in Oracle's workforce, Oracle relied on word-of-mouth recruiting practices, which further perpetuated already existing disparities.⁵ In PT1, most successful employment referrals (or referrals that lead to a hire) originate from Asians. For technical jobs, approximately 74% of successful referrals come from PT1 employees, and approximately 80% of the referrals come from Asians. Oracle's reliance on employee referrals contributed to a skewed applicant pool in favor of Asians.

Based on the above information and other relevant evidence, relying on actual applicant data in this matter would be wholly inappropriate, as it ignores Oracle's systemic and discriminatory preference in favor of Asians as against other races, and the tainted applicant pool resulting from it.

⁵ Oracle's Employee Referral Program "pays referral bonuses to US employees who successfully refer individuals who are hired for work at Oracle in North America." Oracle Employee Handbook page 43. See, e.g., *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1436 (9th Cir. 1984)(nepotism and word of mouth hiring led to segregated departments and justified use of labor statistics); *United States v. Ga. Power Co.*, 474 F.2d 906, 926 (5th Cir. 1973) (holding that the employer's word-of-mouth recruiting practice must be supplemented or changed, and encouraging public advertising); *Thomas v. Wash. County Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990) (holding that nepotistic and similar practices in a predominantly white work force may operate to exclude outsiders); *EEOC v. FAPS, Inc.*, 2014 U.S. Dist. LEXIS 136006 (D.N.J. Sept. 26, 2014) ("EEOC has provided evidence meant to prove that FAPS relied on word-of-mouth recruiting, and that such recruitment resulted in a relatively small number of minority applicants. At this stage of the proceedings, such evidence must be considered 'circumstantial evidence which helps establish a reasonable inference of an employer's discriminatory treatment of blacks as a class.'"). See also, *U.S. Equal Employment Opportunity Commission, Questions and Answers About Race and Color Discrimination in Employment*, http://www.eeoc.gov/policy/docs/qanda_race_color.html:

How can employers avoid racial discrimination when recruiting?

- **Word-of-mouth employee referrals-** Word-of-mouth recruitment is the practice of using current employees to spread information concerning job vacancies to their family, friends, and acquaintances. *Unless the workforce is racially and ethnically diverse, exclusive reliance on word-of-mouth should be avoided because it is likely to create a barrier to equal employment opportunity for racial or ethnic groups that are not already represented in the employer's workforce.*
- **Homogeneous recruitment sources -** *Employers should attempt to recruit from racially diverse sources in order to obtain a racially diverse applicant pool. For example, if the employer's primary recruitment source is a college that has few African American students, the employer should adopt other recruitment strategies, such as also recruiting at predominantly African American colleges, to ensure that its applicant pool reflects the diversity of the qualified labor force.*

2) *Oracle has Failed to Rebut OFCCP's Findings with Respect to Compensation Discrimination.*

With respect to the compensation violations, Oracle still has not provided a competing statistical analysis to rebut OFCCP's regressions. Rather, Oracle continues to insist that, notwithstanding its own decision to categorize employees for compensation practices and decisions, those categories have no bearing on whether those employees are comparable. Setting aside Oracle's apparent attempt to disavow its own salary-determination process, Oracle's argument relies on an overly strict interpretation of Title VII case law. Title VII does not require, as Oracle suggests, a near identical set of duties among those employees being compared.

As cases Oracle cited state, Title VII "does not require equal work" to prove compensation discrimination. *See Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 772 (7th Cir. 2007); *Hooper v. Total System Servs., Inc.*, 799 F. Supp. 2d 1350, 1364 (M.D. Ga. 2011). Rather, Title VII requires only that comparators' jobs be comparable. *Hooper, Inc.*, 799 F. Supp. 2d at 1364 (citation omitted); *see also Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 343 (4th Cir. 1994) (noting "relaxed standard of similarity between male and female-occupied jobs" in Title VII compensation discrimination cases); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 598 (11th Cir. 1994) (same). This analysis requires only that "the members of the comparison group are sufficiently comparable [to the focus group] to suggest" discrimination occurred. *Crawford v. Ind. Harbor Belt R. Co.*, 461 F.3d 844, 846 (7th Cir. 2006).

Consistent with Directive 307, OFCCP relied in part on Oracle's salary-determination system to evaluate whether employees were comparable. Under that system, according to materials Oracle provided and statements by Oracle personnel, employees are organized by the types of jobs they perform. On its face, such systemic categorization renders employees within a given category comparable for purposes of Title VII's relaxed similarity standard. Indeed, Oracle fails to explain how, for its compensation practices and decisions, its system of comparing and organizing employees is sufficient, but for OFCCP's purposes, it is not.

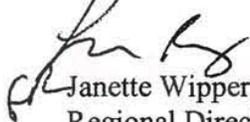
The select examples Oracle cites in its letter are not persuasive. Oracle only provides decontextualized details regarding these select employees, ignoring how these individuals were given the same job title, notwithstanding their purported differences. Further, the examples also raise more concerns. For instance, Oracle highlights at least two instances where pay disparities are purportedly based on males performing management duties, with females relegated to "clerical work" or non-leadership roles. *See* 10/31/2016 Ltr. at 10-11.

To date, Oracle has not responded fully to OFCCP's requests for records related to its compensation practices, leading OFCCP to presume that such missing records only support OFCCP's findings of violations. If there is additional material Oracle wants OFCCP to consider in the context of its compensation practices, such materials must be produced promptly.

* * *

For the reasons set forth herein, OFCCP has referred this matter for enforcement proceedings to the Solicitor's Office.

Sincerely,


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Regional Director

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