



Bernadette Wilson
Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Re: Comments to the proposed revision of the employer information report (EEO-1) – Document Number: 2016-01544.

Dear Secretary Wilson:

On behalf of the National Small Business Association, the nation's oldest nonpartisan small-business advocacy organization, representing more than 65,000 small businesses nationwide, I write in opposition to the Equal Employment Opportunity Commission's (EEOC) proposed rule 2016-01544 published in the *Federal Register* on Feb. 1, 2016, which would revise the Employer Information Report (EEO-1) to request pay data from employers with more than 100 employees, along with certain federal contractors. While NSBA strongly supports nondiscrimination in compensation, we fear that adding these pay data provisions would place massive and unnecessary burdens on smaller employers and waste federal resources on fruitless "fishing expeditions" based on incomplete and misleading information.

Under the EEOC's proposal, employers would use employees' total W-2 earnings for a 12-month period looking back from a pay period between July 1st and September 30th. For each of the ten EEO-1 job categories, the proposed EEO-1 would have 12 pay bands. Employers would have to tabulate and report the number of employees whose W-2 earnings for the prior 12 months fall within each pay band. Further, to distinguish full-time employees from part-time employees and those who have worked less than a full year, employers also must report actual hours worked for all the employees in each pay band and EEO-1 category, again by gender and minority status, for this same non-calendar 12-month period.

The complexity and burden accompanying these new requirements by forcing reporting for the ten EEO-1 categories, two genders and the 12 pay bands alone would create 240 new categories within which to slot employees. Further, when including race and ethnicity reporting, in addition to gender and pay bands, with totals, there are over 1800 cells/categories that employers must populate with data they do not presently keep. The EEOC severely underestimates the administrative burden this will place on smaller businesses—it would increase employers' data collection and reporting burdens well beyond the

EEOC's stated estimates. As it is, smaller businesses disproportionately face higher annual regulatory costs of \$7,454 per employee per year. A small business's ability to operate efficiently and free of unnecessary and ineffective regulatory burdens is critical for it to compete, and to maintain and create jobs across the country.

While the EEOC's proposal suggests that collecting high-level, aggregated pay data will somehow identify "pay discrimination," instead, it will most often reveal disparities in pay that are not explained by any information in the form, but are easily understood in light of normal business factors. The EEOC will be collecting pay data on very different kinds of employees gathered within the same pay band and then falsely assuming, for purposes of statistical analysis, that all of the employees under analysis are 'similarly situated.' The EEOC will not, however, be analyzing similarly situated employees, because even people with the same job title may focus more heavily on one factor of the job than their colleagues, and many different job titles are combined in EEO-1 job categories and pay bands. Years of service, experience, promotions, shift differentials, and overtime hours worked, as well as bonuses paid, will all affect overall compensation and may serve to make the actual compensation paid appear disparate. None of these factors will be addressed in the initial stages of reporting. Instead, employers will be forced to submit overwhelming quantities of useless information that will undoubtedly lead to false indications of potential pay disparity. Then employers will have to follow up with even more data, documents, and information to prove they are not, in fact, discriminating against protected classes. All of this will take time and cost money, not to mention adding another layer of bureaucracy to government operations. The time the EEOC spends chasing after false positives is time it could better spend on real discrimination.

An additional issue in reporting hours is that salaried employee hours are not even tracked by most small employers and the proposed rule does not contain a specific method for reporting their hours. No "estimating" will help overcome the fundamental problem of lack of actual data. Finally, small employers also less commonly have HRIS systems that can handle cross-year aggregation.

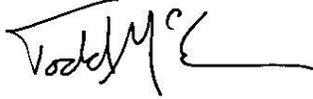
NSBA's members fear that if the proposed rule goes into effect, they will need to spend an extraordinary amount of time gathering and inputting the information requested by the EEOC. And, without the opportunity to explain their decision-making process, employers also may be more likely to face baseless pay discrimination lawsuits. Small businesses that are already following the law simply do not have the resources to defend against misguided and burdensome bureaucratic inquiries into their legitimate pay practices, let alone expend thousands of dollars to defend against meritless lawsuits regarding the same. Systems are already in place for employees to complain if they believe they are being discriminated against; we should allow those systems to work rather than sifting through exponentially large amounts of data from employers, the vast majority of whom are already following the law, when the data will not even identify the "bad apples."

For example, two employees otherwise identical but of different genders (to simplify, assume they are the only ones in their job category) have the same hours but different pay bands. These employees

know that one works regular hours, while the other, with the same base hourly rate, works varying hours with heavy overtime some weeks and few hours the rest of the year. The employer and the employees understand that there is no equal pay violation, but an uninformed outsider looking at the new EEO-1 form would see “obvious” discrimination. The employer would be subjected to extra work to explain and could be held up to false accusations of discrimination in news accounts.

Before the final rules are adopted, NSBA urges you to reexamine the impact this proposal will have on small employers and work to ensure that these employers can continue to operate their businesses in compliance with the law with minimal disruption from regulators, and no further addition to their costs of compliance with paperwork requirements.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd McCracken". The signature is stylized with a large, sweeping initial "T" and a long horizontal line extending to the right.

Todd McCracken
President & CEO