

5 February 1988
OCA 88-0379

MEMORANDUM FOR: Director, Equal Employment Opportunity
[redacted] MSD/OGC
FROM: [redacted] Legislation Division
Office of Congressional Affairs
SUBJECT: Federal Equal Employment Opportunity Reporting
Act of 1987, H.R. 3330

STAT

1. The House Employment Opportunities Subcommittee of the Education and Labor Committee will hold a hearing on the above-captioned bill (attached) on 9 February 1988. The bill requires that an agency transmit to the Equal Employment Opportunity Commission (EEOC) a written five-year plan which contains information regarding applications for employment, hiring, training, and promotions. Annual reports concerning the status and update of the plan must also be submitted, which may prompt the EEOC to require the agency to identify and remove barriers to equal employment opportunity and to develop additional affirmative action goals and timetables. The bill also gives the EEOC authority to subpoena employees who have information it desires, as well as to conduct onsite examinations at least once every five years and onsite audits.

2. By memorandum dated 10 November 1987 (attached), [redacted] of the Office of Personnel indicated actions the Agency should take with respect to this proposed legislation to protect its authorities. We ask that you review the bill at your earliest convenience and relay to us any other problems the bill poses to the Agency so that we may seek appropriate relief as soon as possible. You may telephone me on [redacted]

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Attachments

OCA/Leg [redacted] (5 February 1988)

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Distribution:

- Original - Addressees (w/att)
- 1 - [redacted] (CAP/OP) (w/att)
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- 1 - OCA/Leg/Subject File: EEO
- 1 - RH Signer
- 1 - OCA Read

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100TH CONGRESS
1ST SESSION

H. R. 3330

To require Federal entities that are subject to title VII of the Civil Rights Act of 1964 to file with the Equal Employment Opportunity Commission plans and reports regarding their compliance with such title; and to compel such entities to file such plans and reports.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 1987

Mr. MARTINEZ (for himself, Mr. HAWKINS, Mr. HAYES of Illinois, Mr. FORD of Michigan, Mr. BIAGGI, Mr. FRANK, Mr. FUSTER, Mr. FAUNTROY, Mr. FOGLIETTA, Mr. KASTENMEIER, Mr. GEJDENSON, Mr. HOYER, and Mr. BATES) introduced the following bill; which was referred jointly to the Committees on Education and Labor and Post Office and Civil Service

A BILL

To require Federal entities that are subject to title VII of the Civil Rights Act of 1964 to file with the Equal Employment Opportunity Commission plans and reports regarding their compliance with such title; and to compel such entities to file such plans and reports.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Federal Equal Employ-
5 ment Opportunity Reporting Act of 1987".

1 SEC. 2. FINDINGS.

2 The Congress finds that—

3 (1) Federal entities have failed to ensure that
4 their labor forces are fully representative of the general
5 labor force of the United States;

6 (2) although EEO groups have made some
7 upward movement in Federal employment, they contin-
8 ue to be underrepresented in several occupational cate-
9 gories in the Federal Government when compared to
10 the civil labor force;

11 (3) although equal employment opportunity has
12 existed as a policy in the Federal Government for 40
13 years, and although since 1979 Federal entities have
14 removed numerous artificial barriers to employment,
15 personnel patterns and practices remain in effect that
16 have a negative impact on employees and applicants
17 for employment because of their race, color, sex, and
18 national origin;

19 (4) there are numerous barriers to the employ-
20 ment opportunities of women and minorities in the
21 Federal Government which need to be eliminated from
22 current personnel practices;

23 (5) the equal employment opportunity analyses,
24 reporting requirements, standards, and level of effort
25 expected of non-Federal employers have not been ap-
26 plied to the Federal entities; and

1 (6) although the vast majority of Federal entities
2 are firmly committed to providing equal employment
3 opportunity for all of their employees, equal employ-
4 ment opportunity programs and affirmative action ef-
5 forts have not been given the level of priority neces-
6 sary to eliminate the deleterious effects of past and
7 present discriminatory personnel procedures.

8 **SEC. 3. FIVE-YEAR PLANS AND PERIODIC REPORTS ON FED-**
9 **ERAL COMPLIANCE WITH TITLE VII OF THE**
10 **CIVIL RIGHTS ACT OF 1964.**

11 (a) **FILING REQUIREMENT.**—In the 90-day period be-
12 ginning on the first October 1 in each period of 5 fiscal years,
13 the head of each Federal entity shall transmit to the Equal
14 Employment Opportunity Commission a written plan that
15 contains the data specified in subsection (b). Each datum
16 specified in subsection (b) applicable to a fiscal year in the
17 appropriate period of 5 fiscal years shall be set out separately
18 with respect to—

- 19 (1) the application of individuals for employment,
 - 20 (2) the hiring of individuals,
 - 21 (3) the training of employees, and
 - 22 (4) the promoting of employees,
- 23 by each separate component, and each separate installation,
24 of such entity and, additionally, by such entity as a whole.
25 Such plan shall be transmitted together with a certification

1 that is made by the officer or employee of such entity who is
2 designated to exercise direct supervisory authority over the
3 implementation of equal employment opportunity activities
4 and that specifies whether such officer or employee approves
5 or disapproves the contents of such plan.

6 (b) DETAILED CONTENTS OF PLANS.—For each fiscal
7 year in the period of 5 fiscal years referred to in subsection
8 (a), the following data shall be included in each plan required
9 by such subsection:

10 (1)(A) For each EEO group, a workforce utiliza-
11 tion analysis which shows, for each year in the period
12 of 5 fiscal years ending immediately before the 90-day
13 period in which such plan is required by subsection (a)
14 to be filed, whether underrepresentation, underutiliza-
15 tion, or adverse impact exists.

16 (B) If no adverse impact exists for an EEO group
17 for a fiscal year because the rate of selection of mem-
18 bers of such EEO group is based on small numbers
19 and is not statistically significant, then a workforce uti-
20 lization analysis which shows for such EEO group, for
21 the period of 5 fiscal years ending immediately before
22 the 90-day period in which such plan is required by
23 subsection (a) to be filed, whether adverse impact
24 exists.

1 (2) For each EEO group, affirmative action goals
2 for each employment category for which underrepre-
3 sentation, underutilization, or adverse impact exists in
4 any fiscal year in the period of 5 fiscal years ending
5 immediately before the 90-day period in which such
6 plan is required by subsection (a) to be submitted.

7 (3) A plan of action for each fiscal year in the
8 period of 5 fiscal years beginning on the first day of
9 the 90-day period in which such plan is required by
10 subsection (a) to be filed, including a timetable, outlin-
11 ing all of the steps that will be taken—

12 (A) to eliminate barriers, identified in the
13 analyses carried out under paragraph (1), to equal
14 employment opportunity, and

15 (B) to achieve the goals formulated under
16 paragraph (2).

17 (4) The estimated cost of carrying out such plan,
18 stated separately for each fiscal year in the period of 5
19 fiscal years beginning on the first day of the 90-day
20 period in which such plan is required by subsection (a)
21 to be filed.

22 (5) All other data deemed by the Commission to
23 be necessary for the Commission to monitor equal em-
24 ployment opportunity and affirmative action.

1 (c) REPORTS ON FEDERAL COMPLIANCE WITH TITLE
2 VII.—(1) For each fiscal year (other than the first fiscal
3 year) in the period of 5 fiscal years beginning on the first day
4 of the 90-day period in which a plan is required by subsection
5 (a) to be filed, each Federal entity shall submit in the 90-day
6 period beginning October 1 of such fiscal year an annual
7 report concerning the status and update of the entity's plan
8 submitted under subsection (a), including an update on
9 progress made in the preceding fiscal year in achieving the
10 goals and timetables specified in such plan.

11 (2) After reviewing such entity's progress under such
12 plan, if a continuing manifest imbalance is found by the Com-
13 mission, the Commission shall require such entity—

14 (A) to take additional steps to identify and remove
15 barriers to equal employment opportunity, and

16 (B) to develop additional affirmative action goals
17 and timetables.

18 (d) PUBLIC NOTICE.—The Commission shall publish in
19 the Federal Register—

20 (1) not later than June 1 of 1988 and of each 5th
21 calendar year thereafter, the identity of each Federal
22 entity that fails to submit, in the 90-day period ending
23 30 days before such date, the plan required by section
24 3(a), and

1 (2) not later than January 31 of a fiscal year, the
2 identity of each Federal entity that fails to submit
3 timely the report required by section 3(c) to be submit-
4 ted for such fiscal year.

5 (e) REPORT TO CONGRESS.—The Commission shall
6 submit a report annually to the Congress and to the Presi-
7 dent describing the affirmative action efforts of each Federal
8 entity and such entity's compliance with this Act.

9 SEC. 4. ENFORCEMENT.

10 (a) AUTHORITY OF EQUAL EMPLOYMENT OPPORTUNI-
11 TY COMMISSION.—The Commission shall have the following
12 powers and duties, in addition to any other powers and duties
13 vested in the Commission under any other law:

14 (1) If a Federal entity fails to submit a plan or
15 report required by subsection (a) or (c) of section 3
16 before the expiration of the 90-day period specified in
17 such section, then not later than December 31 of the
18 fiscal year in which the respective plan or report is re-
19 quired to be filed the head of such entity (or the desig-
20 nee of the head of such entity) shall—

21 (A) submit to the Commission a written
22 statement of reasons explaining the failure to
23 submit such plan or report timely, or

24 (B) request an informal hearing before the
25 Commission to state such reasons orally.

1 (2)(A) The authority of the Commission under sec-
2 tion 710 of the Civil Rights Act of 1964 (42 U.S.C.
3 2000e-9) to summon witnesses and compel the produc-
4 tion of evidence includes the authority to subpoena any
5 employee of the United States who has custody of any
6 information which the Commission determines to be
7 necessary or appropriate to enable it to carry out any
8 duty imposed under this Act and to compel the produc-
9 tion of such evidence by such employee.

10 (B) The authority of the Commission under such
11 section to apply for the aid of a district court of the
12 United States to summon witnesses and compel the
13 production of evidence includes the authority to seek
14 such aid to summon employees of the United States as
15 witnesses and to compel the production of evidence re-
16 ferred to in subparagraph (A).

17 (C) For purposes of any civil action relating to a
18 subpoena issued by the Commission to summon a wit-
19 ness or to compel the production of any evidence re-
20 ferred to in subparagraph (A), the limitation contained
21 in section 705(b)(2) of the Civil Rights Act of 1964 (42
22 U.S.C. 2000e-4(b)(2)) shall not apply.

23 (3) Taking into consideration the statement of rea-
24 sons required by paragraph (1), the Commission shall
25 issue an order requiring the head of such entity to

1 submit such plan or report to the Commission not later
2 than March 31 of such fiscal year.

3 (4) If such entity does not comply with the order
4 issued under paragraph (3) by the Commission, then
5 not later than April 30 of such fiscal year the Commis-
6 sion shall commence a civil action, in its own name, in
7 the United States District Court for the District of Co-
8 lumbia to compel the head of such entity to submit
9 such plan or report.

10 (5) Notwithstanding section 518 of title 28,
11 United States Code, the General Counsel of the Com-
12 mission, or any employee of the Commission designat-
13 ed by the General Counsel, shall conduct and argue
14 civil actions commenced by the Commission under this
15 Act, and appeals from such civil actions, in the courts
16 of the United States (as defined in section 451 of such
17 title).

18 (b) PRIVATE CAUSE OF ACTION.—If the Commission
19 does not comply with paragraphs (3) and (4) of subsection (a),
20 then not later than the expiration of the 2-year period begin-
21 ning on April 30 of the fiscal year in which an entity is re-
22 quired by section 3(a) to file a plan or report, any—

23 (1) employee of, or applicant for employment
24 with, such entity, or

1 (2) labor organization accorded recognition under
2 section 7111 of title 5, United States Code, by such
3 entity,
4 may commence a civil action in an appropriate court of the
5 United States to compel the head of such entity to submit
6 such plan or report. The court shall allow a reasonable attor-
7 ney's fee, and any reasonable cost of suit (including expenses
8 relating to travel, copying of documents, and expert wit-
9 nesses), to any such employee, applicant, or labor organiza-
10 tion that prevails in such civil action.

11 **SEC. 5. ONSITE EXAMINATIONS AND AUDITS.**

12 (a) **ONSITE EXAMINATION.**—With respect to not less
13 than 1 component or installation of each Federal entity, the
14 Commission shall examine on the site where such entity,
15 component, or installation is located, the program manage-
16 ment, data collection monitoring and evaluation, personnel
17 practices, barrier analysis, employee training and recruit-
18 ment, and sexual harassment prevention measures of such
19 entity. Such examination shall be carried out not less fre-
20 quently than once in each 5-year period beginning after the
21 date of the enactment of this Act.

22 (b) **AUDIT.**—(1) The Commission shall conduct a full
23 program audit of each Federal entity that—

24 (A) is required by this Act to comply with subsec-
25 tions (a) and (c) of section 3 and that—

1 (i) fails to develop and implement an effective
2 affirmative action plan, or

3 (ii) fails to demonstrate that it is making suf-
4 ficient progress in carrying out such plan, or

5 (B) receives in any year complaints from a sub-
6 stantial number of the employees of such entity alleg-
7 ing a violation of title VII of the Civil Rights Act of
8 1964.

9 (2) Notwithstanding paragraph (1), the Commission
10 shall conduct full program audits of not fewer than 5 Federal
11 entities each year.

12 (3) The Commission shall communicate its proposed
13 audit findings to the head of the Federal entity audited and
14 shall allow such entity an opportunity to respond to such
15 findings before such findings are issued by the Commission.

16 (4) Each such audit of a Federal entity shall include a
17 thorough examination of the strategies, procedures, accom-
18 plishments, management, resources, alternative strategies,
19 and commitment of such entity with respect to affirmative
20 action.

21 (5) Not later than 1 year after the Commission com-
22 mences a civil action under section 4(a)(4) against an entity,
23 the Commission shall conduct a full program audit of such
24 entity.

1 **SEC. 6. ISSUANCE OF RULES.**

2 Not later than 90 days after the date of the enactment
3 of this Act, the Commission shall issue rules to carry out this
4 Act.

5 **SEC. 7. LIMITATIONS.**

6 (a) **EVIDENCE.**—The failure of a Federal entity, or any
7 component or installation of such entity, to achieve a goal or
8 timetable specified under section 3(b) shall not constitute con-
9 clusive proof that such entity has violated title VII of the
10 Civil Rights Act of 1964.

11 (b) **CONSTRUCTION OF ACT.**—No provision of this Act
12 may be construed to require any Federal entity to comply
13 with any quota applicable to—

- 14 (1) the recruiting of individuals for employment,
15 (2) the hiring of individuals,
16 (3) the training of employees, or
17 (4) the promoting of employees.

18 **SEC. 8. DEFINITIONS.**

19 For purposes of this Act—

20 (1) the term “adverse impact” means a rate of se-
21 lection of individuals who are members of a particular
22 EEO group that is less than 80 percent of the rate of
23 selection of individuals in the group with the highest
24 rate of selection, except that such term—

25 (A) shall include a rate of selection of indi-
26 viduals who are members of a particular EEO

1 group greater than 79 percent of the rate of selec-
2 tion of individuals in the group with the highest
3 rate of selection if—

4 (i) the difference between such greater
5 rate and the rate of selection of individuals in
6 the group with the highest rate of selection
7 is significant in both statistical and practical
8 terms, or

9 (ii) the actions of the Federal entity in-
10 volved discourage applicants disproportion-
11 ately on grounds of race, color, sex, or na-
12 tional origin, and

13 (B) shall not include a rate of selection of in-
14 dividuals who are members of a particular EEO
15 group lower than such 80 percent if—

16 (i) such lower rate is based on small
17 numbers and is not statistically significant, or

18 (ii) special recruiting or other programs
19 cause the pool of EEO group candidates to
20 be atypical of the normal pool of applicants
21 from such group,

22 (2) the term "affirmative action goal" means a
23 numerical target that—

1 (A) represents the results of good faith ef-
2 forts to be undertaken to eliminate underrepresen-
3 tation, underutilization, and adverse impact, and

4 (B) is based on the number of individuals in
5 an EEO group needed to eliminate underrepresen-
6 tation, underutilization, and adverse impact in
7 each employment category,

8 (3) the term "agency" (except when such term
9 appears as part of the term "executive agency") means
10 any authority of the United States,

11 (4) the term "Commission" means the Equal Em-
12 ployment Opportunity Commission,

13 (5) the term "component" means—

14 (A) an organizational subunit that has not
15 fewer than 500 employees and an executive offi-
16 cer who is vested with appointment authority for
17 most of such employee positions, or

18 (B) an agency that has fewer than 500 em-
19 ployees,

20 (6) the term "employee" has the meaning given
21 to it in section 701(f) of the Civil Rights Act of 1964
22 (42 U.S.C. 2000e(f)) and includes employees and appli-
23 cants for employment who are or would be paid from
24 nonappropriated funds, except that with respect to a

1 labor organization such term has the meaning given to
2 it in section 7103(a)(2) of title 5, United States Code,

3 (7) the term "employment category" means—

4 (A) a grade grouping within a pay plan, oc-
5 cupational series composed of more than 50 indi-
6 viduals, or occupational group, or

7 (B) trainees, non-supervisory employees, first
8 level supervisors, mid-level managers, or senior
9 executives,

10 (8) the term "Federal entity" means—

11 (A) a military department, as defined in sec-
12 tion 102 of title 5, United States Code,

13 (B) an executive agency, as defined in sec-
14 tion 105 of title 5, United States Code,

15 (C) the United States Postal Service or the
16 Postal Rate Commission,

17 (D) a unit of the legislative or judicial branch
18 of the Federal Government that has positions in
19 the competitive service, or

20 (E) the Library of Congress,

21 (9) the term "installation" means a part of a Fed-
22 eral entity that is geographically separate from the
23 headquarters of such entity and that employs more
24 than 100 individuals,

25 (10) the term "EEO group" means—

- 1 (A) white women,
2 (B) black men,
3 (C) black women,
4 (D) Hispanic men,
5 (E) Hispanic women,
6 (F) Asian American and Pacific Islander
7 men,
8 (G) Asian American and Pacific Islander
9 women,
10 (H) Native American and Alaskan Native
11 men, or
12 (I) Native American and Alaskan Native
13 women,
14 (11) the term "occupational group" means—
15 (A) a professional, administrative, technical,
16 clerical, or other series of employees, as defined in
17 chapter 720 of the Federal Personnel Manual
18 published by the Office of Personnel Management
19 on September 19, 1979, or
20 (B) a blue-collar job grouping, as defined in
21 the Federal Personnel Manual Supplement pub-
22 lished by the Office of Personnel Management on
23 June 21, 1984,

1 (12) the term "underrepresentation" means an
2 employment situation in which the percentage of em-
3 ployees of a particular EEO group—

4 (A) is less than the percentage of the mem-
5 bers of such EEO in the civilian labor force of the
6 United States, in the case of a Federal entity or a
7 component of such entity, or

8 (B) is less than the percentage of such EEO
9 group in the appropriate metropolitan area, in the
10 case of an installation of such entity, and

11 (13) the term "underutilization" means a situation
12 in which a particular EEO group is represented in an
13 employment category at a rate less than the rate of
14 representation of such EEO group throughout the
15 agency labor force as a whole.

16 **SEC. 9. EFFECTIVE DATE; EXTENSION OF TIME PERIODS.**

17 (a) **GENERAL EFFECTIVE DATE.**—Except as provided
18 in subsection (b), this Act shall take effect 90 days after the
19 date of the enactment of this Act.

20 (b) **EXTENSION OF TIME PERIODS.**—Notwithstanding
21 the time periods specified in section 3, if this Act is enacted
22 after October 1, 1987, then—

23 (1) each Federal entity required by section 3(a) to
24 file a plan for the period of 5 fiscal years that includes

1 fiscal year 1988 shall file such plan not later than 90
2 days after the date of the enactment of this Act,

3 (2) in the case of any such entity that fails to file
4 such plan in such 90-day period—

5 (A) not later than 90 days after the date of
6 the enactment of this Act, the head of such entity
7 (or the designee of the head of such entity)
8 shall—

9 (i) submit to the Commission a written
10 statement of reasons explaining the failure to
11 submit such plan timely, or

12 (ii) request an informal hearing before
13 the Commission to state such reasons orally,

14 (B) the Commission shall issue, not later
15 than 180 days after the date of the enactment of
16 this Act, an order under section 4(a)(3), and

17 (C) if such entity fails to comply with such
18 order, the Commission shall commence a civil
19 action under section 4(a)(4) not later than 210
20 days after the date of the enactment of this Act,

21 (3) if the Commission fails to comply with sub-
22 paragraphs (B) and (C) of paragraph (2), an employee,
23 applicant, or labor organization referred to in section
24 4(b) may commence a civil action under such section
25 not later than the expiration of the 2-year period be-

1 ginning 210 days after the date of the enactment of
2 this Act, and

3 (4) not later than 120 days after the date of the
4 enactment of this Act, the Commission shall publish in
5 the Federal Register, and report to the Congress, the
6 identity of each Federal entity that fails to file, before
7 the expiration of the 90-day period beginning on the
8 date of the enactment of this Act, the plan such entity
9 is required by subsection (a) to file in fiscal 1988.

○

10 November 1987

MEMORANDUM FOR: Office of Congressional Affairs

VIA: Deputy Director of Personnel for
Compensation, Automation, and Planning

FROM: Office of Personnel/Compensation, Automation,
and Planning

SUBJECT: HR 3330, Federal Equal Employment Opportunity
Act of 1987

1. You have requested comments on subject bill introduced on 22 September 1987. We understand that this bill has been introduced in Congress every year for the past several years.

2. The Agency is subject to Title VII of the Civil Rights Act of 1964 and we do submit equal opportunity plans thereunder. Nevertheless, the information provided by the Agency is presented in general terms in order to protect sensitive information and to adhere to the mandates of section 6 of the CIA Act of 1949.

3. If and when the bill is scheduled for a hearing, we request that the Agency be exempt from the on-site investigations and audits to be conducted by the Equal Employment Opportunity Commission (EEOC) as well as from the provision granting any employee, applicant or labor organization a private cause of action to compel submission of the required report. Further, we recommend that the phrase "to the extent permitted by law" be added to the requirement to submit a five year plan and yearly reports to the EEOC. This phrase sufficiently protects sensitive personnel information from undue disclosure.

