



## Testimony

Before the Subcommittee on Civil Rights  
and Human Services, Committee on  
Education and Labor, House of  
Representatives

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# EQUAL EMPLOYMENT OPPORTUNITY

## Progress Made on GAO Recommendations to Improve Nondiscrimination Oversight, but Challenges Remain

Statement of Cindy Brown Barnes,  
Director, Education Workforce and Income Security

# GAO Highlights

Highlights of [GAO-19-719T](#), a testimony before the Subcommittee on Civil Rights and Human Services, Committee on Education and Labor, House of Representatives

## Why GAO Did This Study

Several federal laws, executive orders, and regulations seek to promote equal employment opportunity by prohibiting employers from discriminating in employment on the basis of race and gender, among other things, and generally require companies contracting with the federal government to comply with affirmative action and other equal employment opportunity provisions. The EEOC and OFCCP are the primary federal agencies that enforce these requirements. Although federal law also generally prohibits employment discrimination based on religion, faith-based organizations may hire based on religion. Some federal grant programs contain statutory restrictions prohibiting this practice; however, since a 2007 DOJ legal opinion, federal agencies have allowed faith-based grantees to use RFRA as a basis for seeking an exemption to allow religious-based hiring.

GAO has issued three reports since September 2016 that address equal employment opportunity (GAO-16-750, GAO-18-69, and GAO-18-164). This testimony is based on these three reports and discusses 1) OFCCP and EEOC's progress in addressing prior GAO recommendations and 2) equal employment opportunity exemptions for faith-based organizations.

To update the status of prior recommendations, GAO reviewed agency guidance and documentation and interviewed agency officials.

View [GAO-19-719T](#). For more information, contact Cindy Brown Barnes at (202) 512-7215 or [brownbarnesc@gao.gov](mailto:brownbarnesc@gao.gov).

September 2019

## EQUAL EMPLOYMENT OPPORTUNITY

### Progress Made on GAO Recommendations to Improve Nondiscrimination Oversight, but Challenges Remain

#### What GAO Found

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Commission (EEOC) face challenges in overseeing compliance by employers and federal contractors with applicable federal equal employment opportunity requirements. In its 2016 report, GAO made six recommendations to OFCCP and in its 2017 report made five additional recommendations to OFCCP and one to EEOC to strengthen program oversight. OFCCP has implemented four recommendations, but seven require additional agency action to be fully implemented, as does the one to EEOC. For example:

- In 2016, GAO found that OFCCP's oversight was limited by reliance on contractors' voluntary compliance with affirmative action plan requirements. OFCCP has taken steps to develop a new web portal for collecting those plans annually, but has not yet obtained Office of Management and Budget approval for the collection or launched the portal. GAO also found OFCCP's oversight was limited by a lack of timely staff training. OFCCP has taken steps to implement a new training curriculum, but has not yet implemented its new learning management system that will help ensure timely and regular training.
- In 2017, GAO found that EEOC had not consistently captured information on industry codes, which limits EEOC's ability to identify trends by industry sector and conduct sector-related analyses. EEOC has not yet completed development of its Employer Master List that will include industry codes. GAO also found that OFCCP's methodology for identifying equal employment disparities by industry might not accurately identify industries at greatest risk of noncompliance with affirmative action and nondiscrimination requirements. OFCCP has taken steps to develop a new methodology, but needs to further refine it to ensure that it will identify industries at greatest risk.

From fiscal years 2007 through 2015, few faith-based grantees sought an exemption from nondiscrimination laws related to religious-based hiring under the Religious Freedom Restoration Act of 1993. In October 2017, GAO found that the Departments of Justice (DOJ), Health and Human Services (HHS), and Labor (DOL) had awarded funding to at least 2,586 grantees through at least 53 grant programs that restricted grantees from making employment decisions based on religion. The number of relevant grant programs could be higher because GAO could not identify all such programs due to data limitations. Across the three agencies, GAO identified 117 grantees that were potentially faith-based organizations (FBO). Of the 117 potential FBOs, nine DOJ grantees were FBOs certified as being exempt from statutory restrictions on religious-based hiring. All three agencies required grantees seeking an exemption to self-certify that they were eligible for the exemption, but the agencies' processes for reviewing and approving exemption requests varied. In August 2019, OFCCP issued a proposed rule to clarify the scope and application of the religious exemption to help organizations with federal contracts and subcontracts and federally assisted construction contracts and subcontracts better understand their obligations.

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Chairwoman Bonamici, Senior Republican Comer, and Members of the Subcommittee:

I am pleased to be here today to discuss the challenges facing the federal government in conducting oversight to ensure that employers meet federal equal employment opportunity requirements. Various federal laws, executive orders, and regulations promote equal employment opportunity by prohibiting employers from discriminating in employment on the basis of race and gender, among other things, and generally require companies contracting with the federal government to comply with affirmative action and other equal employment opportunity provisions. The U.S. Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) within the U.S. Department of Labor (DOL) are the primary federal agencies that enforce these requirements.

My statement today will focus on three GAO reports examining equal employment opportunity. In particular, I will be discussing our findings and agencies' progress in addressing our recommendations from a September 2016 report in which we examined OFCCP's oversight of federal contractor compliance with nondiscrimination requirements,<sup>1</sup> and a November 2017 report in which we examined OFCCP and EEOC's efforts to increase equal employment opportunity and affirmative action in the technology sector.<sup>2</sup> I will also be discussing findings from an October 2017 report in which we examined the number of faith-based grantees who sought exemptions from nondiscrimination laws related to religious-based hiring and recent action by OFCCP to clarify the exemption—we made no recommendations in that report.<sup>3</sup>

To conduct the work for these three reports, we analyzed program data and reviewed relevant federal laws, executive orders, regulations and guidance. We also interviewed agency officials, academics, and representatives from employers, as well as civil rights and advocacy

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<sup>1</sup> GAO, *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*, [GAO-16-750](#) (Washington, D.C.: Sept. 22, 2016).

<sup>2</sup> GAO, *Diversity in the Technology Sector: Federal Agencies Could Improve Oversight of Equal Employment Opportunity Requirements*, [GAO-18-69](#) (Washington, D.C.: Nov. 16, 2017).

<sup>3</sup> GAO, *Faith-Based Grantees Few Have Sought Exemptions from Nondiscrimination Laws Related to Religious-Based Hiring*, [GAO-18-164](#) (Washington, D.C.: Oct. 5, 2017)

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organizations. To update the status of recommendations from our September 2016 and November 2017 reports, we reviewed agency reports on their related actions, publicly available information on related new or revised agency policies and procedures and interviewed agency officials. More detailed information on our objectives, scope, and methodology for the three reports discussed in this statement can be found in the issued reports.

We performed the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

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### Federal Requirements Related to Equal Employment Opportunity and Affirmative Action

Private companies are generally prohibited by federal law from discriminating in employment on the basis of race, color, religion, sex, national origin, age, and disability status.<sup>4</sup> Additionally, federal contractors and subcontractors are generally required to take affirmative action to ensure that all applicants and employees are treated without regard to race, sex, color, religion, national origin, sexual orientation, and gender identity, and to employ or advance in employment qualified individuals

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<sup>4</sup> Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers with 15 or more employees from discriminating in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e(b), 2000e-2(a). The Age Discrimination in Employment Act of 1967 prohibits employers from discriminating in employment on the basis of age, defined as being age 40 and over. 29 U.S.C. §§ 623, 631(a). The Americans with Disabilities Act of 1990 prohibits employers with 15 or more employees from discriminating in employment on the basis of disability. 42 U.S.C. §§ 12111(5), 12112. Whether a specific employer is covered under these statutes depends on whether the employer meets the requirements under each statute, as well as applicable agency regulations and case law.

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with disabilities and qualified covered veterans.<sup>5</sup> EEOC enforces federal antidiscrimination laws, and OFCCP enforces affirmative action and nondiscrimination requirements for federal contractors. EEOC and OFCCP share some enforcement activities and have established a memorandum of understanding (MOU) to minimize any duplication of effort.

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## U.S. Equal Employment Opportunity Commission

The EEOC enforces Title VII of the Civil Rights Act of 1964, as amended, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. EEOC also is responsible for enforcing other federal laws that prohibit discrimination in employment based on age and disability, among other characteristics.<sup>6</sup> EEOC investigates charges of employment discrimination from the public, litigates major cases, and conducts outreach to prevent discrimination by educating employers and workers. EEOC also pursues a limited number of cases each year designed to combat systemic discrimination, defined by the agency as patterns or practices where the alleged discrimination presented by a complainant has a broad impact on an industry, profession, company, or geographic location. EEOC can also initiate a systemic investigation under Title VII with the approval of an EEOC commissioner provided the commissioner finds there is a reasonable basis for the investigation.<sup>7</sup> In fiscal year 2018, EEOC resolved about 90,558 charges of discrimination, secured more than \$505 million for victims of discrimination, and filed 199 lawsuits.<sup>8</sup>

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<sup>5</sup> Executive Order 11246 prohibits covered federal contractors from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. It also requires these contractors to take affirmative action to ensure that equal employment opportunity is provided in employment without regard to these protected characteristics. Section 503 of the Rehabilitation Act of 1973 (Section 503) requires covered federal contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. 29 U.S.C. § 793. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) requires covered contractors to take affirmative action to employ and advance in employment qualified covered veterans. 38 U.S.C. § 4212(a). Whether a particular contractor is subject to Executive Order 11246, Section 503, or VEVRAA, and if so, what specific requirements apply, may vary depending on factors such as the size of the contract, the type of contract, and the number of employees who work for a contractor.

<sup>6</sup> For example, EEOC enforces the Age Discrimination in Employment Act of 1967 and Title I of the Americans with Disabilities Act of 1990, among other laws.

<sup>7</sup> 42 U.S.C. § 2000e-5(b), 29 C.F.R. § 1601.11.

<sup>8</sup> EEOC reported it resolved 97,443 charges and 139 lawsuits in fiscal year 2016.

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## Office of Federal Contract Compliance Programs

The OFCCP within DOL is responsible for ensuring that about 200,000 federal contractor establishments comply with federal nondiscrimination and affirmative action requirements. Under Executive Order 11246 and other federal laws and regulations, covered federal contractors and subcontractors are prohibited from discriminating in employment on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin and are required to take affirmative action to help ensure that all applicants and employees are treated without regard to these factors. OFCCP also enforces Section 503, and the affirmative action provisions of VEVRAA, which require covered contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities and covered veterans, respectively.

OFCCP uses two approaches to ensure compliance with federal equal employment and affirmative action requirements—enforcement and compliance assistance. OFCCP's enforcement program primarily involves conducting evaluations of contractors' compliance with federal requirements and these evaluations represent the preponderance of agency activity. In 2015, OFCCP compliance officers conducted 2,345 compliance evaluations, which represented about 2 percent of federal contractor establishments in its jurisdiction. OFCCP has since significantly decreased the number of compliance evaluations it conducts. In fiscal year 2018, OFCCP completed 812 compliance evaluations, which is 65 percent fewer than in fiscal year 2015.<sup>9</sup> Since fiscal year 2016, OFCCP has adopted a strategy of conducting fewer compliance evaluations and prioritizing larger systemic cases. Since OFCCP can only evaluate a small fraction of federal contractors each year, the agency also carries out compliance assistance efforts, including issuing guidance, conducting outreach concerning nondiscrimination requirements, and providing compliance assistance to contractors.

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<sup>9</sup> These evaluations resulted in \$16.4 million in monetary remedies for applicants and employees subject to systemic employment discrimination in hiring, compensation, and other employment practices. This was the third highest year on record, according to OFCCP.

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OFCCP's regulations generally require that covered contractors prepare and maintain an affirmative action program (AAP).<sup>10</sup> Contractors must also comply with certain recordkeeping requirements; for example, under Executive Order 11246, covered contractors are required to maintain records pertaining to hiring, promotion, layoff or termination, rates of pay, and applications, among other records.<sup>11</sup> Under OFCCP's Executive Order 11246 regulations, an AAP is a management tool that is designed to ensure equal employment opportunity, with an underlying premise that the gender, racial, and ethnic makeup of a contractor's workforce should be representative of the labor pools from which the contractor recruits and selects.<sup>12</sup> An AAP must also include practical steps to address underrepresentation of women and minorities, such as goals for expanding employment opportunities to these groups in instances in which they are underrepresented.<sup>13</sup> Companies must create an AAP for each business establishment—generally, a physical facility or unit that produces goods or services, such as a factory, office, or store for the federal contractor.<sup>14</sup>

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Religious Freedom  
Restoration Act of 1993  
(RFRA)

Each year the federal government provides billions of dollars to organizations that provide social services to needy families and individuals. Some of these funds are provided through competitive grants to faith-based organizations (FBO), which may include religious groups, like churches, mosques, synagogues, and temples, or charitable organizations affiliated with religious groups.

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<sup>10</sup> Generally, non-construction contractors that have 50 or more employees and a contract above \$50,000 are required to prepare an AAP within 120 days of the commencement of the contract, and annually update the AAP. Under Executive Order 11246 and Section 503, this threshold is \$50,000. Under VEVRAA, all contractors with 50 or more employees that are otherwise covered under VEVRAA must prepare and maintain an AAP. See generally 41 C.F.R. §§ 60-2.1 to 60-2.35 (implementing Executive Order 11246 requirements), 41 C.F.R. §§ 60-300.40 to 60-300.45 (implementing VEVRAA requirements), and 41 C.F.R. 60-741.40 to 60-741.47 (implementing Section 503 requirements).

<sup>11</sup> 41 C.F.R. § 60-1.12.

<sup>12</sup> 41 C.F.R. § 60-2.10(a)(1).

<sup>13</sup> 41 C.F.R. § 60-2.10(a)(1).

<sup>14</sup> 41 C.F.R. § 60-2.1(b). A contractor must develop and maintain a written AAP for each of its establishments if it has 50 or more employees.

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In some instances, FBOs believe it is necessary to hire only individuals who share their religious beliefs in order to carry out their mission. Title VII of the Civil Rights Act of 1964 generally prohibits employment discrimination based on religion.<sup>15</sup> However, section 702(a) of the Act exempts FBOs with respect to basing employment decisions on religion, thereby permitting FBOs to intentionally, and exclusively, hire individuals who share their religious beliefs.<sup>16</sup> In light of this exemption, FBOs that receive federal grant funding or that contract with the federal government have also generally been permitted to make employment decisions based on religion.<sup>17</sup> OFCCP is responsible for ensuring that federal contractors comply with federal nondiscrimination requirements and provides compliance assistance to the entities it oversees, including guidance related to this exemption.

There are, however, certain federal grant programs that are subject to statutory restrictions that prohibit recipients from using grant funding, in whole or in part, to discriminate or deny employment on the basis of religion, among other factors. In June 2007, the Department of Justice's Office of Legal Counsel issued an opinion in a particular case stating that the Religious Freedom Restoration Act of 1993 (RFRA) could be reasonably construed to require an agency to exempt FBOs from statutory requirements that restrict federal grantees from hiring on the basis of religion. Pursuant to that opinion, and the RFRA, certain federal agencies have permitted FBOs that receive funding under a program that is subject to a statutory restriction on religious-based hiring to certify that they are exempt from such restrictions, allowing these FBOs to engage in

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<sup>15</sup> Pub. L. No. 88-352, tit. VII, 78 Stat. 253, 255 (codified at 42 U.S.C. §§ 2000e et seq.).

<sup>16</sup> See 42 U.S.C. § 2000e-1(a).

<sup>17</sup> Some agency regulations explicitly state that a religious organization's exemption from the federal prohibition on employment discrimination on the basis of religion in section 702(a) of the Civil Rights Act of 1964 is not forfeited when the organization receives financial assistance from the government. See, e.g., 24 C.F.R. § 5.109(i) (HUD); 28 C.F.R. § 38.5(e) (DOJ); 29 C.F.R. § 2.37 (DOL); 34 C.F.R. § 75.52(g) (Education); 45 C.F.R. § 87.3(f) (HHS); see also 41 C.F.R. § 60-1.5(a)(5) (providing that federal contractors and subcontractors that are religious entities are exempt from the federal prohibition on employment discrimination on the basis of religion). FBOs that receive federal funding are subject to other religious nondiscrimination requirements. For example, FBOs may not use funds for explicitly religious activities such as worship, prayer, or proselytizing, and all services offered by FBOs receiving federal funds must be provided to qualified beneficiaries regardless of the religious or nonreligious belief of the individuals. See, e.g., 24 C.F.R. § 578.87; 28 C.F.R. § 38.5(a); 29 C.F.R. § 2.33; 42 C.F.R. § 54a.4; 45 C.F.R. § 87.3.



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religious-based hiring, provided that they do not discriminate on other bases.

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## OFCCP and EEOC Could Improve the Effectiveness of their Processes to Ensure Employers Meet Equal Employment Opportunity Requirements

OFCCP and EEOC face challenges in conducting oversight efforts to ensure that employers meet applicable federal equal employment opportunity requirements. For example, in our September 2016 report, we found several shortcomings that limited OFCCP's oversight efforts, including weaknesses in OFCCP's compliance evaluation selection process, its reliance on voluntary compliance, and the lack of staff training. Also, in our November 2017 report, we found that OFCCP's planned methodology for identifying equal employment disparities by industry, such as the technology sector, might not accurately identify industries at greatest risk of potential noncompliance with affirmative action and nondiscrimination requirements. Additionally, we reported that while EEOC had identified barriers to recruitment and hiring in the technology sector as a strategic priority, it had not consistently captured information identifying specific industries when conducting investigations. EEOC's inability to capture this information using standard industry codes impeded its ability to conduct related analysis that could be used to more effectively focus its limited enforcement resources and outreach activities.

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## Weaknesses in the Compliance Evaluation Process Limited OFCCP's Ability to Ensure Federal Contractors' Nondiscrimination Compliance

In September 2016, we reported that about 22 percent of OFCCP's compliance evaluations of supply and service contractors found violations of some type and about 2 percent had discrimination findings, since 2010 (see figure 1). When OFCCP found violations during compliance evaluations, it often resolved those violations with conciliation agreements that outlined remedial action that contractors agreed to take.

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**Figure 1: Findings of OFCCP's Federal Contractor Nondiscrimination Compliance Evaluations, from Fiscal Years 2010-2015**



Source: Office of Federal Contract Compliance Program data. GAO-16-750. | GAO-19-719T

As a result of our work, we made six recommendations (see table 1). The agency has taken action to fully implement three of our recommendations: (1) to address the risk geographic imbalances in compliance evaluation assignments; (2) to review outreach and compliance assistance efforts and identify options for improving information provided to federal contractors; and (3) assess existing contractor guidance for clarity.<sup>18</sup> However, the agency has not taken action to fully implement our other three recommendations that focus on improving enforcement and compliance.

**Table 1: Status of GAO’s 2016 Recommendations to Strengthen the Office of Federal Contract Compliance Programs’ Oversight of Federal Contractors’ Nondiscrimination Compliance**

GAO Recommendations	Additional actions needed to implement recommendations
<b>Implemented</b>	
1. Make changes to the current scheduling list distribution process so that it addresses changes in human capital and does not rely exclusively on geographic location.	Recommendation implemented; no action needed.
2. Review outreach and compliance assistance efforts and identify options for improving information provided to federal contractors and workers to enhance their understanding of nondiscrimination and affirmative action requirements to ensure equal employment opportunities for protected workers.	Recommendation implemented; no action needed.
3. Assess existing contractor guidance for clarity to ensure that contractors have information that helps them better understand their responsibilities regarding nondiscrimination and affirmative action requirements to ensure equal employment opportunities for protected workers.	Recommendation implemented; no action needed.
<b>Not Fully Implemented</b>	
1. Make changes to the contractor scheduling list development process so that compliance efforts focus on those contractors with the greatest risk of not following equal employment opportunity and affirmative action requirements.	Ensure the process for developing the scheduling list is not weighted by prior scheduling list factors.
2. Develop a mechanism to monitor affirmative action plans (AAP) from covered federal contractors on a regular basis. Such a mechanism could include electronically collecting AAPs and contractor certification of annual updates.	Obtain Office of Management and Budget approval for collecting AAPs and launch the AAP portal for public use.
3. Provide timely and uniform training to new staff, as well as provide continuing training opportunities to assist compliance officers in maintaining a level of competence to help ensure quality and consistency of evaluations across regions and district offices.	Fully implement the new learning management system.

Source: [GAO-16-750](#) and Department of Labor. | GAO-19-719T

<sup>18</sup> See [GAO-16-750](#).

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With regard to the recommendations that have not been fully implemented, OFCCP has taken action to date as described below.

**Focus compliance evaluations on greatest violation risk.** We found the process OFCCP used to select contractors for compliance evaluations could not ensure that contractors with the highest risk of noncompliance were being selected. OFCCP's selection process was nonrandom and did not produce a generalizable sample of contractors for evaluation.<sup>19</sup> As a result, OFCCP was unable to draw conclusions about noncompliance risk in the overall federal contractor population. While the selection process included consideration of a number of neutrally applied factors, such as alphabetical order, employee count at the establishment, contract value, or contract expiration date, OFCCP was not able to identify which of these factors, or any factors, are associated with risk of noncompliance. Thus, OFCCP was unable to quantify the extent to which federal contractors in its jurisdiction are noncompliant, and did not have reasonable assurance that it was focusing its efforts on those contractors at greatest risk of not following equal employment opportunity or affirmative action requirements. Because OFCCP only conducts evaluations about 2 percent of federal contractor establishments in its jurisdiction, without an effective risk-based contractor selection process, OFCCP may be missing opportunities to evaluate whether there is a significant segment of contractors who may be more likely to violate nondiscrimination and affirmative action requirements, leaving workers potentially vulnerable.

OFCCP has taken steps to improve its contractor selection process, but has not fully implemented either this 2016 recommendation or a related recommendation we made in 2017 that it assess the quality of its proposed methods to incorporate consideration of disparities by industry before selecting contractors for compliance evaluation. Beginning in fiscal year 2020, contractors will be able to apply to the Voluntary Enterprise-wide Review Program (VERP), which aims to remove top-performing

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<sup>19</sup> OFCCP's process for selecting contractors for compliance evaluations must comply with applicable Fourth Amendment requirements for administrative searches. In general, to be consistent with the Fourth Amendment, the agency must select a contractor based on: (1) specific evidence of an existing violation, (2) reasonable legislative or administrative standards that have been met with respect to that particular contractor, or (3) an administrative plan containing specific neutral criteria. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. 1981). According to OFCCP officials, a neutral selection is not necessarily random.

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contractor participants from the pool of contractors scheduled for compliance evaluations.<sup>20</sup> OFCCP also recently implemented a new scheduling list (the list of contractor establishments selected for evaluation) methodology based on research on closed cases from the previous five years (2014-2018). Thirty-three percent of the new scheduling list was comprised entirely of contractor establishments from the three industries with the highest rates of violation based on this sample of closed cases. However, the scheduling lists of the previous 5 years included nonrandom selections of contractor establishments that included a number of neutrally applied factors. If OFCCP's goal is to prioritize contractors at highest risk of noncompliance, this new scheduling methodology may not achieve this, because contractors selected will be weighted towards prior neutrally applied selection factors, such as employee count, in addition to violation risk. Further, while VERP may remove some compliant contractors from the scheduling list pool, without overwhelming volunteer participation, it will do little to help identify those most likely to violate. Consequently, it remains unclear whether contractors with the highest risk of not following equal employment opportunity and affirmative action requirements will be selected for compliance reviews.

**Monitor affirmative action programs.** In 2016 OFCCP relied significantly on voluntary compliance by federal contractors, and this approach could not ensure that contractors were complying with basic requirements like developing and maintaining an AAP. By signing a qualifying federal contract, covered contractors are required to develop an

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<sup>20</sup> In February 2019, OFCCP issued a new directive that facilitates and confirms enterprise-wide (corporate-wide) compliance by high-performing federal contractors and those aspiring to reach the top through individualized, corporate-wide compliance assistance. The program will be voluntary for federal contractors and will recognize two tiers of contractors. The top tier will include top performing contractors with corporate-wide model diversity and inclusion programs. The next tier will consist of OFCCP compliant contractors that will receive individualized compliance assistance to become top performers. Criteria for the top tier will be more stringent. The program will present an alternative to OFCCP's establishment-based compliance evaluations with a focus on recognizing contractors that have comprehensive, corporate-wide inclusion and compliance programs. Contractors will apply to the program electronically beginning in fiscal year 2020. During the application process, OFCCP will conduct compliance reviews of the contractor's headquarters location as well as a sample or subset of establishments.

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AAP within 120 days of contract commencement and update it annually.<sup>21</sup> However, OFCCP had no process for ensuring that the tens of thousands of establishments that had signed a qualifying federal contract do so.

OFCCP has taken steps towards implementing a mechanism to monitor AAPs but has not fully implemented this recommendation. In 2018 OFCCP contracted with an information technology vendor to develop a web-based portal to allow contractors to upload their AAPs electronically for convenience, increased compliance, and for OFCCP review and resource prioritization. Officials anticipate delivery of the portal by the close of fiscal year 2019. Simultaneously, according to officials, OFCCP has developed the necessary information collection request to obtain approval from OMB to collect all contractors' AAPs annually. The agency anticipates that OMB approval will be timely to align with completion of the AAP portal.

**Facilitate timely compliance officer training.** In 2016, we found that OFCCP may not be providing timely training for new compliance officers. According to OFCCP officials, budget constraints had made it difficult to hold timely centralized training for new compliance officers. In half of the regions we visited, compliance officers or management officials we spoke with noted that this training was not provided in a timely manner after new officers are hired. For example, one compliance officer told us they worked for 8 months before receiving formal training. In one district office, compliance officers we spoke with explained that the lack of uniform, timely training made compliance officers feel unprepared when they began their job. Further, without providing timely training to new compliance officers, OFCCP cannot ensure consistency in its enforcement efforts across its offices.

OFCCP has taken steps to improve its training program, but has not fully implemented this recommendation. In 2018, OFCCP retained an expert

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<sup>21</sup> As previously mentioned, only contractors that meet the applicable thresholds are required to comply with the AAP requirements. In general, under Executive Order 11246 and Section 503, the AAP requirements apply to contractors with 50 or more employees and a contract of \$50,000 or more; under VEVRAA, the AAP requirements apply to contractors with 50 or more employees and a contract of \$150,000 or more. Under OFCCP's regulations, agencies shall require each bidder or prospective contractor to state, in the bid or in writing at the outset of negotiations for the contract, whether it has developed and has on file AAPs at each establishment, among other things. 41 C.F.R. § 60-1.7(b)(1). However, OFCCP is not able to verify the actual development of the AAP or whether it is being updated annually, according to OFCCP officials.

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consultant to assess its national training program and standardize its training development and evaluation process. The assessment was completed in 2019 and a plan of action was created to address any program gaps, according to agency officials. Officials reported that the plan of action was fully implemented in fiscal year 2019 and OFCCP obtained a 5 year International Association for Continuing Education and Training (IACET) accreditation for its program. OFCCP officials told us they are developing a learning management system that will allow new compliance officers easy access to training soon after the hiring. OFCCP plans for the system to include the development of course requirements by level of competence— basic, intermediate, and advanced. OFCCP officials told us they plan to roll out the new system in January 2020.

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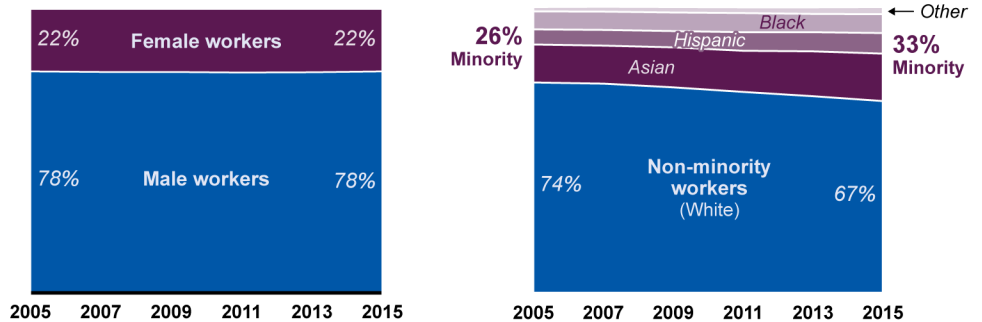
**Weaknesses in Oversight Efforts Impact EEOC's and OFCCP's Effectiveness in Ensuring Nondiscrimination and Equal Employment Opportunity in the Technology Sector**

In November 2017, we reported that the estimated percentage of minority technology workers had increased from 2005 to 2015, however, while we found statistically significant increases in the numbers of Asian and Hispanic workers, no growth had occurred for either female or Black workers (see figure 2). Further, female, Black, and Hispanic workers remain a smaller proportion of the technology workforce—mathematics, computing, and engineering occupations—compared to their representation in the general workforce. These groups have also been less represented among technology workers inside the technology sector—those companies that have the highest concentration of technology workers in such industries as computer systems design and software publishing—than outside the technology sector such as retail or finance companies. In contrast, Asian workers were more represented in these occupations than in the general workforce.<sup>22</sup>

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<sup>22</sup>[GAO-18-69](#)

**Figure 2: Estimated Percentages of Technology Workers by Gender and Race/Ethnicity, 2005-2015**



Source: GAO analysis of American Community Survey (ACS) data from the U.S. Census Bureau. GAO-18-69. | GAO-19-719T

Note: Changes from 2005 to 2015 were statistically significant at p-value <0.05 except for changes for female, male, and Black workers. All population estimates have Relative Standard Errors of less than 7 percent. "Other" includes American Indian or Alaskan Native, and "Two or More Races." White, Black, Asian, and "Other" categories include only non-Hispanic members.

As a result of our work, we made one recommendation to EEOC and five recommendations to OFCCP (see table 2). EEOC has taken action, but not fully implemented our recommendation on identifying missing standard industry classification data from its handling of charges. By providing guidance to contractors regarding the option to include more specific goals in their AAPs, OFCCP has taken actions to implement one of our six recommendations—to take steps toward requiring contractors to disaggregate demographic data for the purpose of setting placement goals in the AAP. The agency has not taken action to fully implement our other four recommendations that focus on improving oversight, as shown in table 2 and discussed below.

**Table 2: Status of GAO’s 2017 Recommendations to Improve the Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs’ Oversight of Equal Employment Opportunity Requirements in the Technology Sector**

GAO Recommendations	Additional actions needed to implement recommendations
<b>Implemented</b>	
1. Office of Federal Contract Compliance Programs (OFCCP) should take steps toward requiring contractors to disaggregate demographic data for the purpose of setting placement goals in the affirmative action plan (AAP) rather than setting a single goal for all minorities, incorporating any appropriate accommodation for company size. For example, OFCCP could provide guidance to contractors to include more specific goals in their AAP or assess the feasibility of amending their regulations to require them to do so.	Recommendation implemented; no action needed.
<b>Not Fully Implemented</b>	
1. The Equal Employment Opportunity Commission (EEOC) should develop a timeline to complete the planned effort to clean its database of charges and enforcement actions—referred to as the Integrated Mission System (IMS) data—for a one-year period and add missing industry code data.	Collect sufficient information through its Employer Master List and use it to analyze charge data by industry.
2. OFCCP should analyze internal process data from closed evaluations to better understand the cause of delays that occur during compliance evaluations and make changes accordingly.	Demonstrate that its internal policy changes are addressing the root causes of delays based on data analysis of actual evaluations.
3. OFCCP should assess the quality of the methods used by OFCCP to incorporate consideration of disparities by industry into its process for selecting contractor establishments for compliance evaluation. It should use the results of this assessment in finalizing its procedures for identifying contractor establishments at greatest risk of noncompliance.	Further refine new schedule methodology after completion of the most recent cycle of compliance evaluations.
4. OFCCP should evaluate the current approach used for identifying entities for compliance review and determine whether modifications are needed to reflect current workplace structures and locations or to ensure that subcontractors are included.	Obtain Office of Management and Budget approval for revising how it identifies entities for compliance reviews to reflect current workplace structures and locations or subcontractors.
5. OFCCP should evaluate the Functional Affirmative Action Program (FAAP) to assess its usefulness as an effective alternative to an establishment-based program, and determine what improvements, if any, could be made to better encourage contractor participation.	Evaluate the FAAP to assess its usefulness as an effective alternative to AAP.

Source: GAO-18-89, Department of Labor, and EEOC. | GAO-19-719T



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With regard to the recommendations that have not been fully implemented, EEOC and OFCCP have taken action to date as described below.

**Capture standard industry classifications on charges.** In our November 2017 report, we found that EEOC could not analyze charge data by industry to help identify investigation and outreach priorities. This was inconsistent with EEOC strategic planning documents and EEOC Inspector General reports which, had emphasized the importance of analyzing charge data by industry. EEOC's inability to analyze charge data by industry limits EEOC's ability to identify trends by industry sector and conduct sector-related analyses that could be used to more effectively to focus its limited enforcement resources and outreach activities. EEOC has taken some action towards addressing missing industry code data, but has not taken actions sufficient to fully implement this recommendation. As part of an effort to overhaul its data system, EEOC has begun developing an Employer Master List that will provide a source of employer information, including industry codes, but EEOC told us that it has not yet completed this effort. It anticipates this system will be more fully developed by spring 2020.

**Use data on closed evaluations to address delays.** In our November 2017 report, we found that OFCCP did not analyze data on closed evaluations to understand the root causes of delays in its compliance review process that may be straining its resources and inhibiting OFCCP's efforts to identify potential discrimination. This evaluation could help OFCCP determine whether changes are needed in its own internal policies and processes, as well as guide OFCCP's selection of improved methods for obtaining complete, accurate, and timely documentation from federal contractors. OFCCP has taken actions but it does not fully address this recommendation. In June 2019, OFCCP officials reported that OFCCP's procedures outlined in the Active Case Enforcement Directive (DIR 2011-01) caused delays in case closures, but it does not indicate that this conclusion resulted from the recommended analysis of internal process data from closed evaluations. OFCCP officials reported that the agency's aged case rate—defined as a case which is open for more than 730 days and has not been referred for further enforcement—has dropped from 27.7 percent in fiscal year 2017 to 20.9 percent in fiscal year 2019, though they did not report any corresponding change in case outcomes. In September 2019, OFCCP officials told us they continue to study causes and how to address delays with effective policies that make the agency more efficient.

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**Assess the methods used to consider industry disparities in compliance.** In our November 2017 report, we found that OFCCP's current methodology for identifying disparities by industry—using data from the American Community Survey—may not have accurately identified industries at greatest risk of potential noncompliance with nondiscrimination and affirmative action requirements. In its agency response to our November 2017 report, OFCCP officials reported that the agency was exploring the use of U.S. Census Bureau and administrative data to refine its selection process to focus on industries with a greater likelihood of noncompliance. OFCCP has taken some action, but has not fully implemented this recommendation. In January 2019, DOL officials reported that DOL had revised its scheduling methodology to include industries with the highest rates of violations. OFCCP published the scheduling list in March 2019 and its field offices started scheduling cases in May 2019. OFCCP stated it will continue to monitor results from this revised scheduling methodology to determine its effectiveness. It will be important for OFCCP to refine these methods based on its experiences with them. This new process is a step toward focusing efforts on industries at greater risk of potential noncompliance with nondiscrimination or affirmative action requirements.

**Evaluate establishment-based approach to compliance evaluations.** In our November 2017 report, we found that OFCCP had made no changes to its establishment-based approach since OFCCP was founded in 1965. However, OFCCP officials acknowledged the changing nature of a company's work can involve multiple locations and corresponding changes in the scope of hiring and recruitment. OFCCP has taken some action, but has not fully addressed this recommendation. In fiscal year 2019, OFCCP evaluated its current approach for identifying subcontractors for review. OFCCP stated that the current approach does not reliably include subcontractors in the pool from which contractors are scheduled because there is no government or public database that captures the complete universe of subcontractors and other important data. In June 2019, OFCCP submitted revisions to its process to the Office of Management and Budget (OMB) for approval.

**Evaluate the Functional Affirmative Action Program.** In November 2017, we found that OFCCP had not evaluated its Functional Affirmative Action Program (FAAP)—an alternative affirmative action program for a business function or unit that may exist at multiple establishments or multi-establishment contractors. OFCCP offered the FAAP so that companies could move away from establishment-based reviews, which may be more appropriate for some multi-establishment contractors.

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However, few contractors participate in this program and the agency has not conducted an evaluation of it. OFCCP has taken some action, but has not fully implemented this recommendation. OFCCP has taken steps to encourage contractors to use the FAAP program without fully evaluating it as an alternative to the establishment-based program. Evaluating the FAAP could help OFCCP improve its ability to achieve its objectives and may provide broader insight for OFCCP's overall enforcement approach.

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## Few Faith-based Grantees Certified They Were Exempt from Statutory Restrictions on Religious-based Hiring

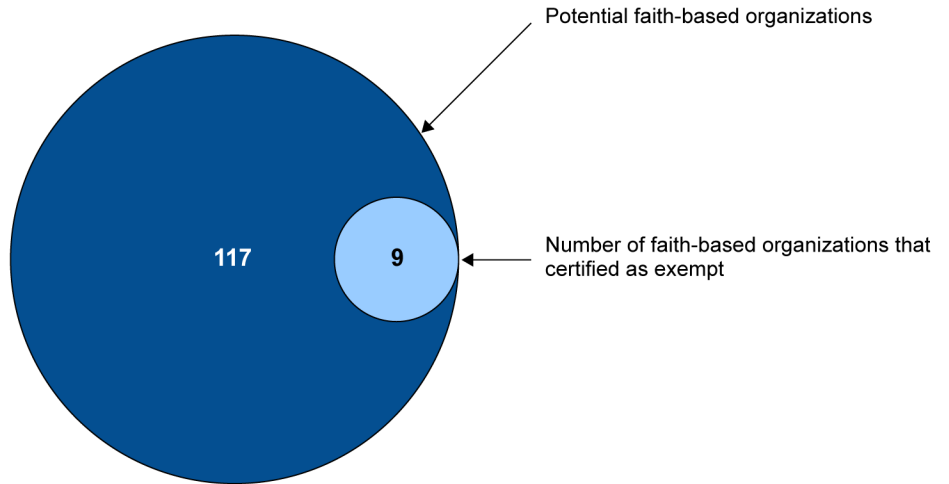
In our October 2017 report, we found that from fiscal years 2007 through 2015, 9 of the 117 potential FBOs we identified across HHS, DOJ, and DOL, certified that they were exempt based on RFRA from nondiscrimination laws related to religious-based hiring (see fig. 3).<sup>23</sup> As a result, the nine FBOs were allowed to consider a prospective employees' religious faith when making employment decisions. All nine of the FBOs were awarded funding by DOJ primarily through the agency's Justice Programs, and collectively received approximately \$3.2 million, which is less than 1 percent of the \$804 million in grants that DOJ awarded that were subject to statutory restrictions from fiscal years 2007 to 2015. HHS, DOJ, and DOL awarded funding to at least 2,586 grantees through 53 grant programs that were subject to statutory restrictions on religious-based hiring.<sup>24</sup> The number of relevant grant programs could be higher because GAO could not identify all such programs due to data limitations.

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<sup>23</sup> We use the language "potential FBOs" because we could not determine the complete universe of such organizations that were eligible to be primary recipients of grant funding or the amount of federal funds they received because DOJ, DOL, and HHS do not maintain and are not required to maintain information on whether an organization is an FBO. Our efforts to identify and count FBOs was further complicated by the lack of a federal-level definition of FBOs.

<sup>24</sup> [GAO-18-164](#). FBOs may also be eligible to be sub-grantees, but not primary grantees, for other grant programs that have statutory restrictions on religious-based hiring, but we did not include sub-grantees in the scope of our review.

**Figure 3: Number of Faith-Based Grantees Identified as Potentially Subject to Statutory Restrictions on Religious-Based Hiring and Those That Certified They Were Exempt from Restrictions, Fiscal Years 2007 – 2015**



Source: GAO analysis of Department of Health and Human Services, Department of Labor and Department of Justice data. GAO-18-164. | GAO-19-719T

We interviewed six of the nine faith-based grantees that certified that they were exempt from religious-based hiring restrictions.<sup>25</sup> Each of the six grantees emphasized the importance of hiring someone of the same religious faith to assist with grant activities. For example, the grantees said that hiring someone with the same religious faith was critical to their mission and organizational success, and if the RFRA exemption were not available, they may not have sought the grant. We also interviewed grantees from five of 35 potential FBOs that did not certify that they were exempt from statutory restrictions based on religious-based hiring to see if they were aware of the potential for an exemption. The five grantees said that they did not recall seeing information about the exemption option in the grant application or grant award documentation. They said that they also may not have been looking for the information because they were not considering religion in their hiring decisions.

HHS, DOJ, and DOL used various methods for informing grant applicants and recipients of the statutory restrictions on religious-based hiring and

<sup>25</sup> The three other grantees did not respond to our request to meet with them.

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their processes for obtaining an exemption from such restrictions. Specifically:

- DOJ had made this information available on agency web pages as well as in the documentation that is provided to grant recipients.
- DOL had a web page dedicated specifically to explaining statutory restrictions on religious-based hiring to faith-based grant applicants and recipients, which also covers the process for seeking exemptions from the restrictions.
- In addition to providing information in grant announcements, HHS provided all Substance Abuse and Mental Health Services grant applicants seeking funds for substance abuse prevention and treatment services with a form that cites laws and regulations governing religious organizations that receive grant funding, including the regulation that outlines the exemption process.

As we reported in 2016, DOJ, DOL, and HHS all required grantees that seek to make employment decisions based on religion to self-certify that they met requirements to be eligible for an exemption from statutory restrictions on religious-based hiring, but varied in how they reviewed and approved requests for approval. All three agencies required that faith-based grantees complete a form or some written request to demonstrate their eligibility for the exemption, but DOL is the only agency that reviewed and approved the requests. For example, DOL required that faith-based grantees submit their requests for the exemption for review and approval by the Assistant Secretary responsible for issuing or administering the grant. Conversely, while DOJ and HHS required that faith-based grantees submit a form or written request, respectively, neither reviewed nor approved the requests.

On August 15, 2019, OFCCP proposed regulations intended to clarify the scope and application of the religious exemption to help religious employers<sup>26</sup> with federal contracts and subcontracts and federally assisted construction contracts and subcontracts better understand their

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<sup>26</sup> Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677 (Aug. 15, 2019). According to the proposed rule, religious employers eligible for this exemption may include "not just churches but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose."

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obligations.<sup>27</sup> OFCCP proposes to add definitions of the following terms: exercise of religion; particular religion; religion; religious corporation, association, educational institution, or society; and sincere. In addition, the proposed rule states that the religious exemption should be construed to provide the broadest protection of religious exercise permitted under the Constitution and related laws, consistent with the administration policy to protect religious freedom. The stated intent of the proposed rule is to make clear that religious employers who contract with the federal government can condition employment on acceptance of or adherence to religious tenets, provided that they do not discriminate on other bases.

Chairwoman Bonamici, Senior Republican Comer, and Members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions you may have at this time.

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## GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact Cindy Brown Barnes, Director, Education, Workforce and Income Security Team at (202) 512-7215 or [brownbarnesc@gao.gov](mailto:brownbarnesc@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Blake Ainsworth, Amber Yancey-Carroll, Melinda Bowman, Sheranda Campbell, Sarah Cornetto, Mary Crenshaw, Helen Desaulniers, Holly Dye, Michael Erb, Monika Gomez, LaToya King, Joel Marus, Diana Maurer, Heidi Neilson, James Rebbe, Katrina Taylor, Rosemary Torres Lerma, Kathleen van Gelder, and Betty Ward Zukerman.

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<sup>27</sup> Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677 (Aug. 15, 2019).

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## Strategic Planning and External Liaison

James-Christian Blockwood, Managing Director, [spel@gao.gov](mailto:spel@gao.gov), (202) 512-4707, U.S. Government Accountability Office, 441 G Street NW, Room 7814, Washington, DC 20548



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