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Dear Ms. Suhr and Ms. Wipper,

We write to call to your attention to the widespread exclusion of women directors from employment in directing episodic television and feature films. The entertainment industry is dominated by large studios, a number of which are federal contractors, or subsidiaries of federal contractors, that must comply with Executive Order 11,246.¹ We request that the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") initiate an investigation and, if appropriate, compliance evaluation or directed compliance review, into federal contractors' systemic failure to hire women directors for film and television directing jobs, and failure to fulfill their obligation to take affirmative action to ensure equal opportunity, in violation of Executive Order 11,246 and Title VII.²

A large body of statistical evidence reveals dramatic disparities in the hiring of women directors in film and television; women are effectively excluded from directing big-budget studio films and seriously under-represented in television directing. The ACLU has interviewed or collected information from 50 women directors.³ We have learned that women are systematically excluded from or underemployed in directing jobs as a result of:

- studios', networks', and producers' intentional and discriminatory failure to recruit, consider, and hire qualified women directors;

¹ Exec. Order No. 11,246, 30 FR 12319 (Sept. 24, 1965), *reprinted as amended in* 79 FR 20749 (Apr. 8, 2014).

² 42 U.S.C. § 2000e-2(a) *et seq.*

³ The majority of these women currently prefer to remain anonymous and are not identified in this letter. However, many of the women have stated to us that if a civil rights enforcement agency were to open an investigation, they would likely speak with investigators.

- use of discriminatory recruiting, selection and screening procedures that have the effect of shutting women out, such as word-of-mouth recruiting and use of short lists on which women are under-represented;
- reliance on, and perpetuation of, sex stereotyping in hiring and evaluation of women;
- ineffective programs within the industry to increase hiring of women and people of color that do not lead to women getting directing jobs;
- lack of enforcement of internal industry agreements to increase the hiring of women and people of color.

Published statements by women directors bolster the statistics and anecdotal evidence we have gathered that point to systemic discrimination.

In the 1970s, OFCCP, along with other federal civil rights agencies, took action to address employment discrimination in Hollywood. Despite these efforts, gender disparities in hiring directors have become worse over time. Investigating and initiating compliance evaluations or directed reviews to address a pattern or practice of discrimination against women directors on the part of large studios with significant federal contracts, it is necessary, well within the agency's authority, and consistent with OFCCP's mission of enforcing equal employment opportunity in the federal contracting sector. OFCCP should further investigate the failure of these contractors to fulfill their obligations to take affirmative action to ensure equal opportunity. It may be appropriate to initiate corporate management compliance evaluations, because directing is a mid-level or senior "glass ceiling" position.⁴ The entertainment industry employs a large number of people and makes products that profoundly shape our culture and the perception of women and girls. Such statistically severe gender bias in this large and important industry is a civil rights problem worthy of OFCCP's serious renewed attention.

Qualified Women Directors Face a Systemic Pattern and Practice of Discrimination and Exclusion from Directing Film and Television.

Women directors are subjected to discriminatory practices, including recruiting practices that exclude them, failure to hire qualified women directors based on overt sex stereotyping and implicit bias, and the use of screening mechanisms that have the effect of shutting women out. The available statistics paint a picture of stark disparities that are "a telltale sign of purposeful discrimination."⁵ These "gross statistical disparities" are of the magnitude that courts have held "alone may . . . constitute *prima facie* proof of a pattern or practice of discrimination."⁶

When it comes to film, the large studios have virtually shut women out of directing big-budget movies for years, and the problem is not improving with time:

- Only 1.9% of directors of the top-grossing 100 films of 2013 and 2014 were women.⁷ Of the 1,300 top-grossing films from 2002-2014, only 4.1% of all directors were women.⁸

⁴ 41 C.F.R. § 60-2.30.

⁵ *Teamsters v. United States*, 431 U.S. 324 n.20 (1977).

⁶ *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

⁷ Stacy L. Smith et al, *Gender Inequality in Popular Films*; USC Annenberg, 1, 4, 7-8 (2014); Stacy L. Smith et al., *Exploring the Careers of Female Directors: Phase III 4* (Sundance Institute & Women in Film's Female Filmmakers Initiative 2015), <http://www.sundance.org/pdf/artist-programs/wfi/phase-iii-research---female-filmmakers-initiative.pdf> (hereinafter *Careers of Female Directors Phase III*).

⁸ *Careers of Female Directors: Phase III 4*.

- In 2014, women were only 7% of directors on the top 250 grossing films. This number is 2 percentage points lower than it was in 1998.⁹

Women are also excluded from directing episodic television.

- In an analysis of more than 220 television shows, representing about 3500 total episodes, women were only 14% of directors in 2013-2014.¹⁰

In an alarming number of cases, employers shut women out of television work entirely:

- A whopping 70 television shows (31%) had *no* women directing even a single episode in the 2013-2014 season. 20% of shows had women directing no more than 10% of episodes.¹¹
- In 2013-2014, more than 30% of networks (31 networks) had no women directing any episodes in any of their shows. The same is true at the production-company level – approximately 31% of production companies (47 companies) had no women directing a single episode in any of their shows.¹²

These statistics reveal what the Supreme Court has called “the inexorable zero” – a figure, representing “the glaring absence” of women that is highly indicative of systemic employment discrimination.¹³ But even beyond “zero,” the numbers of women are low in television directing.

- Only 13% of directors in 2013-14 in prime-time network TV were women.¹⁴ When combining network, cable, and Netflix, women still comprised only 13% of directors.¹⁵

⁹ Martha M. Lauzen, *The Celluloid Ceiling: Behind-the-Scenes Employment of Women on the Top 250 Films of 2014*, San Diego State Uni. Center for the Study of Women in Television & Film 2015, 1-2 (2014); See also Brent Lang, *Number of Female Directors Falls Over 17 Year Period, Study Finds* (Jan. 13, 2015), <http://variety.com/2015/film/news/number-of-female-directors-falls-over-17-year-period-study-finds-1201402686/>.

¹⁰ Directors Guild of America, *DGA Report: Employers Make No Improvement in Diversity Hiring in Episodic Television* (Sept. 17, 2014), <http://www.dga.org/News/PressReleases/2014/140917-Episodic-Director-Diversity-Report.aspx>.

¹¹ Directors Guild of America, 2014 DGA Episodic Director Diversity Report (by % of Episodes Directed by Women) (Sept. 17, 2014), <http://www.dga.org/~media/Files/Press%20Releases/2014/DiversityReportCOMBFEMALE917.ashx>. The Directors’ Guild of America collected data that it used in this report, which included relevant percentages of women directors. The ACLU used this data to calculate additional statistics and percentages of women directors. We can share our spreadsheets and calculations with OFCCP upon request. The links to several spreadsheets created by the Directors’ Guild of America, including this one, can be found at the bottom of this page: <http://www.dga.org/News/PressReleases/2014/140917-Episodic-Director-Diversity-Report.aspx>.

¹² *Id.*

¹³ *Teamsters*, 431 U.S. at 342 n.23.

¹⁴ Martha M. Lauzen, *Boxed In: Employment of Behind-the-Scenes and On-Screen Women in 2013-2014 Prime-time Television*, San Diego State Uni. Center for the Study of Women in Television & Film 2014 at http://womenintvfilm.sdsu.edu/files/2013-14_Boxed_In_Report.pdf.

¹⁵ *Id.*

- In the 2013-2014 season, only ten shows had women directing 50% or more of episodes – an exceedingly rare phenomenon.¹⁶
- For more than half of broadcast comedies and dramas, in an assessment of more than 1000 television shows in 2011-2012, women directed 10% or fewer episodes.¹⁷

The employment opportunity outlook for women directors of color is even more dire.

- From 2007–2012 the 500 top-grossing movies employed 565 directors – only 2 of whom were African-American women.¹⁸
- Women of color directed only 2% (73 of 3,558) of episodes in 2013-14.¹⁹

Hiring disparities in television start at the entry level. A recent study of first-time directors over five years revealed that only 18% of those given a chance to direct their first episode are women.²⁰

These statistics are even more concerning than they appear, because a problem oft-cited by women directors is that only a small handful of women is hired over and over again. One landmark study of the top 600 grossing films between 2007 and 2013 found only 22 unique female directors of those films.²¹ One filmmaker and director with nearly 30 television credits elaborated: “Though it is documented that 12% of episodic television is directed by women, when credits are examined by name, this number does not seem to represent how many different woman are directing, only the total number of episodes. By name analysis, it appears as if only about the same 15 to 20 women directors are hired again and again.”²²

The failure to hire women directors in film and television cannot be attributed to a lack of qualified or interested women. Women are well represented in prominent film schools such as USC, NYU, and UCLA; while hard numbers are hard to come by, estimates place the number of women students focusing on directing as roughly equal to the number of men.²³ As one woman who runs a

¹⁶ DGA, *supra* note 11.

¹⁷ Darnell Hunt & Ana-Cristina Ramon, *2014 Hollywood Diversity Report: Flipping the Script* (UCLA Bunche Center 2014), 16. Our independent analyses of the DGA report referenced in note 11 also found this to be true of the 2013-2014 shows included in that data set.

¹⁸ Jonathan Handel, *Women Still Underrepresented in Film and TV, Study Says* (Feb. 19, 2014), <http://www.hollywoodreporter.com/news/women-still-underrepresented-film-tv-681485>.

¹⁹ DGA, *supra* note 10.

²⁰ *DGA Five-Year Study of First-Time Directors in Episodic Television Shows Women and Minority Directors Face Significant Hiring Disadvantage at Entry Level* (Jan. 8, 2015), <http://www.dga.org/News/PressReleases/2015/150108-DGA-Five-Year-Study-of-First-Time-Directors-in-Episodic-Television.aspx>.

²¹ Smith et al, *supra* note 7, at 4-7.

²² Rachel Feldman, “An Open Letter to TV Showrunners: There Are Over 1200 Experienced, Accomplished Women Directors Waiting to Be Hired,” *Women and Hollywood* (July 17, 2014).

²³ Lang, *NYU Students Celebrate Women in Film at Fusion Festival*, *Variety* (Feb. 26, 2015), <http://variety.com/2015/film/news/nyu-students-celebrate-women-in-film-at-fusion-festival-1201442164/>; Elizabeth M. Daley, Dean, USC School of Cinematic Arts, *Women in Hollywood: Are the Numbers Changing?* Huffington Post Blog (July 12, 2010) available at <http://www.huffingtonpost.com/elizabeth-m-daley/women-in-hollywood--are b 639786.html>.

program promoting women's films said, women have had "some success in the film school area, but once they get out of film school and finish their short films, that's when they're reaching some barriers."²⁴ Despite substantial numbers of women in the filmmaking pipeline, the perception remains strong among industry executives and employers that there are "not enough" women directors and that women lack ambition or interest in directing.²⁵

Women who break in to the industry and get hired for their first job, or make a first independent film are systematically underemployed by the large studios thereafter: they find it harder to obtain steady employment compared to similarly qualified male directors. Women do relatively better in lower-dollar sub-sectors, such as independent film and documentary film: nearly a quarter of directors at Sundance independent film festival have been women,²⁶ and women direct about a third of documentary films.²⁷ Yet their success in these feeder sectors does not translate into studio opportunities and employment with large contractors, as it does for male directors; women directed under 5% of box office hits from 2002 to 2014.²⁸ Even when their work earns critical acclaim and festival awards, women report that their success does not as easily parlay into additional work or studio jobs with covered federal contractors. Women's statements have been confirmed by research demonstrating a 25% gap between the percentage of women directors at the Sundance Film Festival (26.9%) in 2014 and the percentage of women directors on the year's top 100 films (under 1.9%).²⁹ Women report being treated as tokens³⁰ and being judged more harshly than their male peers.

Women Identified Numerous Barriers to Getting Hired.

Women Directors Face Overt Disparate Treatment and Sex Stereotyping.

Overt sexism remains a real, concrete barrier. When employers fail to recruit, consider, or hire for particular types of projects based on stereotypes about women's abilities, the traits a man or woman typically has, or assumptions about the types of projects for which they are best suited, these

²⁴ Shaunna Murphy, *Want to See More Women at the Oscars? It Starts at Sundance*, MTV News (quoting LunaFest program manager Suzy Stark German) (Jan. 24, 2015), <http://on.mtv.com/1CPbrfu>.

²⁵ *Careers of Female Directors Phase III* 17-18.

²⁶ Stacy L. Smith et al., *Exploring the Barriers and Opportunities for Independent Women Filmmakers Phase I and II*, 11, 17 (Sundance Institute & Women in Film's Women Filmmakers Initiative 2014).

²⁷ Martha M. Lauzen, *Independent Women: Behind-the-Scenes Employment on Festival Films in 2013-14*, San Diego State Uni. Center for the Study of Women in Television & Film 2015, 1 (2014).

²⁸ V Renée, *Why Are Women Directors Having (Relative) Success in Independent Film, But not in Hollywood?* No Film (May 6, 2013), <http://nofilmschool.com/2013/05/female-directors-indie-film-hollywood>; *Careers of Female Directors Phase III* 4.

²⁹ *Careers of Female Directors Phase III* 4.

³⁰ A "token" is someone whose group – here, women – represents a small proportion (under 15%) of a workforce where that group has historically been excluded. Tokens experience discrimination as a result of heightened visibility, having their competence disregarded, and being judged by a double standard. See generally Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights into Gender and Context* 38 *Law & Human Behavior* 58, 59 (2014).

employers are engaging in sex discrimination in violation of Title VII³¹ and Executive Order 11246.³² OFCCP's regulations further require employers, when recruiting and hiring for jobs from which women "have previously been excluded," to take affirmative action to recruit women—not continue to refuse to hire them.³³

It is widely known that some employers do not hire women directors. Women have publicly reported being told "we don't hire women," or "we tried hiring a woman once."³⁴ One award-winning film director with whom we spoke said that she was told in a meeting that a particular showrunner "doesn't hire women." Another director said that producers and studio executives repeatedly told her agent "not to send women" for consideration for particular jobs. A third director was told by a network executive to avoid a show that was not "woman friendly."

Employers steer and pigeonhole women to particular types of projects and exclude them from others, based on sex stereotypes. Nearly every woman with whom we spoke had either experienced directly or was aware of the widespread perception that women are better suited to and typically only considered for projects that are "women-oriented," such as romantic comedies, women-centered shows, or, commercials for "girl" products. This perception was recently confirmed in a study interviewing industry executives and sales agents, nearly half of whom stated that films directed by women were limited to particular genres and market segments, but believed the more profitable market segments, such as action and comic-book films, were male-driven and -created.³⁵ Women are often not considered or passed over for films or TV shows in the action and horror genres, or that require special effects, in favor of men with less experience. A report published by the Sundance Institute and Women in Film described this bias, finding that half of decisionmakers interviewed said some genres like action and horror "may not appeal" to women directors.³⁶

These stereotypes affect women throughout their career, even for women who get the rare chance to prove their ability to direct action and special effects. One successful television director told us she stopped directing feature films because the only jobs offered to her were "stereotypically women's films." Even after making a rare successful leap to television and getting hired to work on two prominent action-oriented television shows, people still told her agent that she wasn't being considered for action jobs because "she [couldn't] really do action." Others reported being told, inaccurately, that they lacked enough special effects experience. Two commercial directors told us that they only get work on "girls" or "feminine" products and are not considered for work for "boys" or "men's" products. One working director put it this way:

"When it comes to who's hiring. . . I think it starts with 'we just feel more confident that the guys are going to be able to do this stuff.' I happen to be doing an episode that's all about cars. They thought guys would know more about cars, but I happen to know a lot about cars. . . . There are these biases that you hear about and you feel. I know half a dozen women directors

³¹ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

³² OFCCP recently elaborated on the ongoing importance of sex-based stereotyping in perpetuating inequality in the workplace, calling it "one of the most significant barriers" to equality. OFCCP, Notice of Proposed Rulemaking, *Discrimination on the Basis of Sex*, 80 Fed. Reg. 5246, 5252 (Jan. 30, 2015).

³³ 41 C.F.R. §§ 60-20.2, 20.3, 20.6.

³⁴ See, e.g., *What's it Like to be a Black, Female Director in Hollywood? Take 2* (Feb. 19, 2014), <http://www.scpr.org/programs/take-two/2014/02/19/36114/whats-it-like-to-be-a-black-female-director-in-hol/> (interview with director Angela Robinson)[hereinafter Angela Robinson Interview].

³⁵ *Careers of Female Directors Phase III* 15-16.

³⁶ Smith et al., *supra* note 26, at 31.

that are great with action and love it like I do, but they think you won't be in there and get that testosterone feel, or won't be able to hit the male marketplace."

Every woman who mentioned gender stereotyping pointed out that the stereotypes only operate against women: plenty of men are hired to direct romantic comedies and commercials for "feminine" products.

Implicit Bias Pervades the Hiring Process at Many Levels.

Unconscious bias pervades the hiring process and continues once women are on set. Illegal disparate treatment can occur not only where an "employer consciously intended to base [its actions on a prospective employee's gender] but also where the employer "simply did so because of unthinking stereotypes or bias."³⁷ The risk of unconscious bias discrimination is particularly high where employers use the kinds of highly subjective hiring and evaluation practices or networking/relationship-based hiring practices that predominate in the entertainment industry.³⁸

Women often reported the pervasive perception that hiring women directors is viewed as more "risky" than hiring men; even men with less experience. This perception is particularly harmful where multiple decisionmakers must agree each time a director is hired, and each decisionmaker is wary of hiring outside the standard (male) norm. The former head of a major studio summed it up this way:

"For a woman to direct a movie in Hollywood, she has to go through so many layers of rejection by the powers that be – I suppose including myself – that it is harder to get to that point. So you can't just create something. And I think there is a whole unconscious mountain. . . I think the whole system is geared for [women] to fail."³⁹

As a longtime producer recently said, "There's a great deal of reticence giving a woman [director] a chance. And the statistics support that fact."⁴⁰

Many women reported that even after some initial success, they are not hired consistently, their careers do not take off or stall quickly, and they are not trusted with bigger-budget projects at the same rate as their male peers. Research confirms that a significant percentage of industry executives believe women "can't handle" big films with large crews.⁴¹ In film, women who win prestigious awards at film festivals for their independent work are nonetheless denied opportunities to direct big-budget films (told they lack "experience") that their male peers are given. We spoke with at least a dozen women who won prestigious awards for their first films, but then their careers immediately

³⁷ *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999); *accord*, OFCCP, Notice of Proposed Rulemaking, *supra*, 80 Fed. Reg. at 5252.

³⁸ See e.g., *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (finding "subjective" hiring practices can be discriminatory because of "subconscious stereotypes and prejudices"); *accord* 41 C.F.R. § 60-3.14 (noting "the possibility of bias in subjective evaluations").

³⁹ Dorothy Pomerantz, *Sony's Amy Pascal On Closing The Money Gap Between Men And Women In Hollywood*, *Forbes Magazine* (May 22, 2013), <http://www.forbes.com/sites/dorothypomerantz/2013/05/22/sonys-amy-pascal-on-closing-the-money-gap-between-men-and-women-in-hollywood/>.

⁴⁰ Inkoo Kang, *Producer Gale Anne Hurd: Sexism Against Women Directors Hasn't Changed Since the '80's*, *Women and Hollywood*, *Indiewire* (Feb. 17, 2015), <http://blogs.indiewire.com/womenandhollywood/producer-gale-anne-hurd-sexism-against-women-directors-hasnt-changed-since-the-80s-20150217>.

⁴¹ *Careers of Female Directors Phase III 21-22*.

stalled, whereas their male colleagues who had won those awards got big-budget film work or commercial work right away. One working director explained to us:

“You have meetings about potential projects where studio executives say things like ‘well, it’s hard to have you direct it because it’s such a big budget film. You don’t have the experience.’ Instead of seeing that I’ve done five feature films. But a guy can be hired off of one feature film that’s low budget. . . . Women are ghettoized into doing these smaller films and then people think that’s all we want to do.”

Another Oscar-nominated woman who has had some success in the film world told us:

“After my film won multiple awards at the South by Southwest film festival, one reviewer said, essentially, ‘[t]his is the kind of movie that gets a director every studio knocking on her door.’ But the truth was, studios were not knocking. I was going into meetings Somehow I ended up for two years interviewing for things and not getting them or being attached to something that didn’t end up going to production.”

A number of other women directors have spoken out publicly about this particular form of discrimination.⁴² Both research and the anecdotal evidence we gathered show serious gender disparities in opportunities, even for women whose films debut at prestigious festivals.⁴³

Women also have a more difficult time finding film financing. As one director who won recognition for a film this year has put it: “women have to convince men to trust them with money.”⁴⁴ This form of discrimination results in women being disproportionately represented in and pigeonholed into doing only smaller, independent or documentary films.⁴⁵ Women who do make independent films “are relegated to less financially lucrative platforms” by distributors and are less likely to have their films distributed by the Studio Specialty / Mini Major companies, which are associated with the major studios and have the broadest reach.⁴⁶ Researchers have documented “the fiscal cliff women face as they move from independent to more commercial fare.”⁴⁷

In television, many women reported that when they are hired for directing work they are treated as though they are filing the one slot begrudgingly reserved for a woman, and that they consistently get fewer episodes and jobs overall than their equally qualified male peers. At least three women reported that they believe they get only one episode a season on a show, where often men get more, because showrunners, production companies and studios know they should at least hire one

⁴² See, e.g., Craig Lindsey, “Julie Dash and the Ongoing Struggle of Black Women Filmmakers.” *Indy Week*, Sept. 7, 2011. <http://www.indyweek.com/indyweek/julie-dash-and-the-ongoing-struggle-of-black-women-filmmakers/Content?oid=2650131>.

⁴³ Manohla Dargis, *Making History*, *The New York Times* (Dec. 3, 2014), <http://www.nytimes.com/2014/12/07/movies/ava-duvernay-makes-a-mark-with-selma.html>; Manohla Dargis, *In Hollywood, It’s a Men’s, Men’s, Men’s World*, *The New York Times* (Dec. 24, 2014), http://www.nytimes.com/2014/12/28/movies/in-hollywood-its-a-mens-mens-mens-world.html?_r=0; *Careers of Female Directors Phase III* 13-14.

⁴⁴ Nsenga Burton, *Black Women and the Hollywood Shuffle*, *The Root*, <http://www.theroot.com/articles/culture/2010/08/black-women-filmmakers-struggle-in-hollywood.html?page=0,0> (Aug. 6, 2010) (quoting Ava Duverney, who subsequently directed *Selma*).

⁴⁵ Manohla Dargis, *In Hollywood, It’s a Men’s, Men’s, Men’s World*, *supra* note 43.

⁴⁶ *Careers of Female Directors Phase III* 10-13.

⁴⁷ *Id.* at 4.

woman because hiring none at all looks bad. One successful woman director with nearly 60 television credits summed it up to us this way:

“If I go onto a series, there will be one job for a woman, and they’ll feel like, oh, we filled our quota. One job out of 13 or 22. And I’ll be the one woman. And you’re competing for this one slot that they feel they have to offer.” Yet, “With the guys, I hear, oh, they’re never prepared. The crew says: ‘It’s such a relief to have you here.’ You turn around next season, and the guys will be doing three episodes and you won’t be asked back. And that’s what you live with all the time.”

One director with nearly 50 television credits explained the phenomenon this way:

“Decisions [about hiring] are made by the showrunner. And the showrunner is not always but most often a man, and they hire their friends. Their friends, not surprisingly, are men . . . And so the networks and the studios will pressure these guys to hire a woman, and they will hire *one* woman, because they have to, or they’ll hire two women, out of 22 episodes, because they have to, and then maybe they’ll hire one back. And then they’ll hire none. There are plenty of shows that I have been up for and had good meetings on, where I don’t get hired and I think, “Why? I’m capable, I’m qualified, I did my homework. I check all the boxes – I can work with actors. I can work with difficult people. I can do action. So what box is missing?” There really isn’t one. Then statistics come out and you see that particular show hasn’t hired a woman. There’s only one conclusion.”

Another director was told at a meeting for a television directing job, “We already hired a woman this season.” The statistics largely support this perception. As noted above, the pool of women who get hired repeatedly for more than one or two episodes on a show is quite small.

Numerous women reported that women are judged more harshly by employers, often getting only one chance to succeed whereas their male peers may still find success after some failure. This is a difficult barrier to overcome in an industry in which many more projects will fail than succeed. One successful TV director said: “You just have to do better, with less complaining. And experience and survive three times as much judgment” as male directors. One award-winning and Oscar-nominated director who has made multiple films and has one TV credit put it: “You can’t ask of every woman in the profession to be such an outstanding pioneer that she just has to be 20 or 30 times better and never have a failed movie, which is something she can’t control in the first place. It’s unfair to ask women to be like J.K. Rowling is in the writing world to have success. Why can’t we be judged in the way the guys are judged?” Another director stated that “often women will get a shot, but they won’t get a second shot. Whereas men often will.... men often get a lot more chances to ‘fail’ than women do.”⁴⁸

Practices Used in Hiring and Recruitment Have a Discriminatory Effect on Women.

Ostensibly neutral employment practices have the effect of keeping women out of the workforce. Title VII prohibits “employment practice[s] that cause a disparate impact on the basis of ... sex” unless the employer can show that the practice is “job related for the position in question and consistent with business necessity” and this necessity cannot be accomplished by use of an alternative.⁴⁹ The law thus bans “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”⁵⁰ OFCCP’s regulations deem “use of any selection procedure which

⁴⁸ Angela Robinson interview, *supra* note 34.

⁴⁹ 42 U.S.C. §2000e-2(k).

⁵⁰ *Lewis v. City of Chi.*, 560 U.S. 205, 211 (2010) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

has an adverse impact on the hiring [or] promotion ... of members of any ... sex” “to be discriminatory” unless justified and validated.⁵¹ Moreover, OFCCP’s regulations contemplate ensuring that contractors, as well as the labor organizations and employment agencies with whom they work to allocate jobs, will comply with OFCCP’s fair hiring standards, including with respect to selection procedures.⁵²

One such selection procedure is employers’ widespread reliance upon “lists” of directors when deciding whom to hire or seriously consider for directing jobs. These lists, which are widely used in the industry, disproportionately exclude women; in a recent study, industry executives and agents asked to name who appear on such lists most frequently named zero women directors.⁵³ The chair of one major studio, which appears to have significant federal contracts, described this problem to *The New York Times*: the hiring team starts with a list of candidates, but women aren’t on the list in numbers. “When we start our interview process what I find is, more often than not, that the majority of candidates are male.”⁵⁴ Numerous institutions within the chain of employment are culpable in utilizing these lists that result in the exclusion of women directors – lists come from talent agencies, production companies, and studios. The Directors Guild (DGA or Guild) itself reportedly uses short lists to recommend directors for particular projects, but the lists are not transparent or publicly available.

One successful TV director explained how women directors can be dropped from these lists:

“When I stopped directing television for a year, the percentage of women directing television dropped by a third. There are that few of us. I can name the women who work, and I can also name the women who came up with me, dropped off the list and never got back on.”

Another practice that disadvantages women is reliance on who-you-know or “word-of-mouth” recruiting for directing jobs, which can have an unlawful disparate impact on women seeking jobs.⁵⁵ This practice limits women’s job opportunities in Hollywood, because “individual stakeholders in the industry (typically white and male) look to surround themselves with other individuals with whom they feel comfortable, ... [who] tend to think and look like the former, thereby reproducing an industry culture that routinely devalues the talents of minorities and women.”⁵⁶ Both lists and reliance on “who you know” exclude women directors, because industry leaders under-estimate eligible women directors when they rely solely on memory.⁵⁷

The Talent Agencies that Represent and Refer Directors for Jobs Under-Represent Women.

Successful directors are, by and large, represented by a small number of talent agencies, which refer their director clients for jobs on television and in film. Women report that many of the leading agencies, from whom studios and networks do the bulk of hiring, are reluctant to represent women,

⁵¹ 41 C.F.R. § 60-3.3(A).

⁵² 41 C.F.R. §§ 60-1.9; 60-3.1.

⁵³ *Careers of Female Directors Phase III* 17-18.

⁵⁴ Dargis, *In Hollywood, It’s a Men’s Men’s Men’s World*, *supra* note 43.

⁵⁵ See, e.g., *United States v. Brennan*, 650 F.3d 65, 126 (2d Cir. 2011) (“recruiting practices [such as] word-of-mouth recruiting, and limited advertising” may be “prohibited by Title VII”).

⁵⁶ Darnell Hunt & Ana-Cristina Ramon, *2015 Hollywood Diversity Report: Flipping the Script* (UCLA Bunche Center 2015), 54 (hereinafter “2015 Bunche Center Report”) (describing the phenomenon and reporting that women are underrepresented 8 to 1 among film directors and that film studio senior management remains 83% male).

⁵⁷ *Careers of Female Directors Phase III* 18.

represent fewer women than men, and often do not include women directors on many of their lists when they refer directors to employers. The agencies play a gatekeeping function,⁵⁸ and also provide cover to networks who can blame the lack of women directors on the fact that the agencies do not supply them with a list.

One woman director was told by an executive (employer) that his studio only hires directors through these agencies – in this way, the employers seek to pass the buck for the discriminatory outcome to the agencies. One woman director with whom we spoke relayed how an agent admitted to her that agents often don't want to represent women because women do not get as much work. Another director was told by an agent that it's common knowledge that agents don't like to represent women because they don't make as much money as male directors. A recent report by UCLA confirms the important gatekeeping role of the top agencies in contributing to the diversity problem in Hollywood, including for directors.⁵⁹ Another recent report found that nearly a fifth of film sellers, including agents and managers, mentioned doubt concerning women directors' abilities as a barrier, perhaps explaining their reluctance to put women forward for jobs.⁶⁰

Our civil rights laws have long recognized the potential for discrimination in the gatekeeping function performed by third-party employment agencies and therefore prohibit employment agencies from discriminating based on sex, including in "fail[ing] or refus[ing] to refer for employment" people based on sex.⁶¹ OFCCP regulations provide that employment agencies referring people for employment with federal contractors should not utilize selection procedures that have an unlawful adverse impact, and that such agencies should comply with OFCCP guidelines in addressing adverse impacts.⁶²

Internal Industry Efforts to Increase Hiring of Women are Ineffective and Some Practices May Perpetuate Discrimination.

The Directors Guild of America (DGA or Guild) represents directors and it has a number of diversity committees, including a Women's Steering Committee.⁶³ The DGA has made some efforts to increase the hiring of women and people of color for directing jobs. The DGA and the Association of Motion Picture and Television Producers (AMPTP) have agreements concerning diversity that require those who employ directors (1) to "make good faith efforts to increase the number of working ethnic minority and women Directors," and other members of the directorial team, (2) to report to the DGA on compliance, (3) to comply with antidiscrimination laws, and (4) to give the DGA various mechanisms of enforcement power.⁶⁴ The DGA has used the data it obtains from employers to produce

⁵⁸ 2015 Bunche Center Report, *supra* note 56, at 35.

⁵⁹ *Id.* at 35-41.

⁶⁰ *Careers of Female Directors Phase III* 22.

⁶¹ 42 U.S.C. § 2000e-2(b).

⁶² 41 C.F.R. § 60-3.10.

⁶³ A director must have a job with a DGA signatory employer to be eligible for Guild membership. DGA Website, Membership Department, at <http://www.dga.org/The-Guild/Departments/Membership/Joining-the-DGA.aspx>; <http://www.dga.org/The-Guild/Diversity.aspx>.

⁶⁴ Basic Agreement, Article 15 (non-discrimination terms covering directors and directorial team in film and television.), at <http://www.dga.org/~media/Files/Contracts/Agreements/2011%20BA%20sc/015ba2011article15.pdf>; Freelance Live and Tape Television Agreement, Article 19, at <http://www.dga.org/Contracts/Agreements/FLTTA2011.aspx> (non-discrimination terms covering

an annual report on the number of women and people of color hired to direct television each year. The DGA also reportedly meets with employers to discuss matters of diversity and discrimination.

Labor unions or “other representatives of workers” are intended to “cooperate with, and to comply in the implementation of” Executive Order 11246.⁶⁵ In addition, federal contractors are required to take affirmative action to ensure equal opportunity. Those with fifty or more employees and contracts of \$50,000 or more must maintain affirmative action plans that track placement of women in particular job groups.⁶⁶

Industry agreements between the Guild and employers, and affirmative efforts on the part of employers, have not proved effective in appreciably increasing the number of women directors who actually get work, as the DGA’s own statistical reports reveal. Information about the DGA’s actual enforcement of the diversity agreements is not publicly available. However, women reported a widespread perception that the DGA leadership did not prioritize increasing the number of women directors hired and at times has expressed hostility or blocked efforts of female members to make the issue a higher priority.

The DGA has also worked with studios to create fellowship or “shadowing” programs aimed at increasing diversity, but these programs have been, at best, ineffective at reducing gender disparities in hiring of directors and, at worst, perceived by women directors as patronizing and a double-standard. The programs are described as providing women and people of color who have not yet broken into directing with opportunities to shadow experienced directors on set, with networking and mentoring opportunities and training.⁶⁷ However, we spoke with at least 10 women who had participated in these highly selective programs and every one told us that the programs were too small, too hard to get into, and, most importantly, did not lead to employment opportunities for most women—instead, as one woman put it, these programs are “window-dressing.” The programs do not guarantee a job for those who complete them and do not translate into jobs for most participants. One woman told us that of her cohort of 15 at one of the programs, only two women parlayed the experience into work opportunity.

Many women, particularly experienced directors, view these programs as condescending to women, especially where women directors are required to participate as an express or implied condition of getting work, while comparably experienced men are not. We learned of directors with significant directing experience being put through the programs. One director put it this way:

For those of us who have been in the business for a while, who have managed against tremendously difficult odds to make movies or find employment in TV, even accumulate long lists of awards along the way . . . these [programs] are a slap in the face and just another way to humiliate a group of people who are already being marginalized by a flawed and bias[ed] establishment. Imagine having to watch filmmaker peers with an equal or often inferior list of

directors and directorial team in live productions and projects shot on videotape). These agreements were made after the DGA sued two studios for failing to hire women and people of color. The district court judge denied the plaintiffs’ class certification motion and dismissed the DGA as a class representative, finding the DGA had conflicting interests and evidence indicated that the DGA was partially responsible for any alleged discrimination at issue, given its own practices. *See Directors Guild of America v. Warner Bros.*, 1985 U.S. Dist. LEXIS 16325 (C.D. Cal. 1985). It is our understanding that the parties then reached a settlement which led to the diversity agreements.

⁶⁵ 41 C.F.R. § 60-1.9.

⁶⁶ *See* 41 C.F.R. §§ 60-1.40(a)(1), 2.1-2.16.

⁶⁷ <http://www.dga.org/The-Guild/Diversity.aspx>.

credits simply being handed an episode of TV to direct while you are being told to go back to film school first, which may or may not enhance your chances of landing the same exact job. All because you are the wrong gender and/or skin color.

The sentiment that the shadowing programs are disrespectful to women and just another unnecessary and biased “hoop” women directors have to jump through is widely held.⁶⁸ Many men get their first television directing jobs without going through this extra hoop.

Some described the programs as futile. One woman relayed a particularly troubling experience: This director, who had previous experience directing a film and a TV movie, during her time shadowing a TV director, was pulled aside by two female crew members and warned that the Directing Producer didn’t like women, didn’t hire women directors, and the one time he had hired a woman director in the history of the show, he made her work environment miserable and set her up to fail. After completing the program, she met with the Directing Producer to pitch herself for directing a future episode. While the conversation was friendly, at the end, the Directing Producer informed her that this particular show was “too hard” for women directors, that the crew was hard on women directors, and that the one time he had tried a woman director “she had done a poor job and . . . he felt sorry for her.”

A number of women pointed to ways in which the DGA perpetuates discriminatory hiring practices. The most common complaint was that the DGA did not actively advocate enough for the hiring of women directors and, when it did, promoted or referred only a small handful of women members. The DGA maintains a list of “experienced women and minority directors” that it provides to production companies⁶⁹, but a number of the women we spoke to believe that the DGA under-includes women when it provides short-lists of recommended directors to prospective employers, and that this undercuts its claim that it is attempting to get more women hired. A related complaint is that the DGA refers a small number of women repeatedly to employers, excluding most women.

Title VII prohibits labor organizations from discriminating against members on the basis of sex.⁷⁰ Specifically, labor organizations cannot “limit, segregate, or classify its membership or applicants for membership . . . fail or refuse to refer for employment” in a way that would tend to “deprive” or “limit” employment opportunities because of the individual’s sex.⁷¹ OFCCP’s regulations require it to use best efforts to ensure that any representatives of workers comply with Executive Order 11246, which includes tracking the impact of their selection procedures on women’s employment and eliminating any adverse impact on women.⁷²

OFCCP Should Investigate and Conduct Compliance Evaluations or Directed Reviews with Contractor Employers, Employment Agencies, and Worker Representatives that Have a Pattern of Discriminating Against Women Directors.

Statistical and anecdotal evidence shows that women directors face discriminatory barriers to employment. Some employers have particularly dismal records with regard to hiring women: not just when looking at one show for one season, or films in one year, but consistently over time and across

⁶⁸ Rachel Feldman, *Me and My Shadow*, Dec. 6, 2012, at <http://www.womendirectorsinhollywood.com/me-my-shadow/>.

⁶⁹ <http://www.dga.org/News/PressReleases/2012/092712-DGA-Report-Assesses-Director-Diversity-in-Hiring-Practices.aspx>.

⁷⁰ 42 U.S.C. § 2000e-2(c)(1).

⁷¹ 42 U.S.C. § 2000e-2(c)(2).

⁷² 41 C.F.R. §§ 60-1.9; 60-3.6; Exec. Order, *supra* note 1.

many projects. The directors we interviewed reported that women routinely encounter discriminatory recruiting, selection, and hiring procedures, sex stereotyping, and neutral screening practices that have a discriminatory adverse impact. Internal industry mechanisms for addressing the problems, including both DGA initiatives and any affirmative action initiatives undertaken by employers that are federal contractors, have not proved successful. Real change is needed to address this entrenched and long-running problem of discrimination against women directors. External investigation and oversight by government entities tasked with enforcing civil rights laws is necessary to effectuate this change.⁷³

OFCCP has authority to investigate and conduct compliance evaluations in industries with systemic bias—indeed, “cases involving groups of people or indicating patterns of discrimination are generally investigated” by OFCCP.⁷⁴ OFCCP can conduct “directed reviews,” initiated by its National Office, “based on reports of alleged violations.”⁷⁵ OFCCP may also refer matters to the Solicitor of Labor recommending institution of administrative enforcement proceedings.⁷⁶ Under a Memorandum of Understanding with the EEOC, the two agencies coordinate enforcement, and OFCCP may investigate systemic discrimination.⁷⁷

Investigating systemic sex discrimination against women directors, conducting compliance evaluations, and initiating directed reviews and, if necessary, pursuing enforcement proceedings is consistent with OFCCP’s mission of ensuring equal opportunity, promoting affirmative action, and eradicating the glass ceiling at federal contractor employers.

Investigating systemic discrimination against women directors is not unprecedented, either for federal civil rights agencies or for OFCCP in particular. In the 1960s, the EEOC held hearings on equal opportunity for both women and people of color in film and television, and requested that the Department of Justice litigate to combat discrimination in the entertainment sector under Title VII.⁷⁸ The EEOC’s hearings identified barriers facing women and people of color, including their exclusion from “rosters,” or lists, of eligible employees, compounded by their exclusion from craft and trade unions and guilds. The Justice Department investigated and agreed that a pattern of discrimination existed and that litigation was warranted, and it entered into settlement agreements with the Association of Motion Picture and Television Producers, as well as a number of unions. Women were not included in the agreement, because there were too few of them in the work force to begin with.⁷⁹

⁷³ Note that we are simultaneously asking the U.S. Equal Employment Opportunity Commission (“EEOC”) and California’s Department of Fair Employment and Housing to consider action as well.

⁷⁴ Exec. Order, *supra* note 1; EEO and Affirmative Action Guidelines for Federal Contractors Regarding Race, Color, Gender, Religion, and National Origin, *available at* <http://www.dol.gov/ofccp/regs/compliance/fs11246.htm>; Federal Contract Compliance Manual, *available at* http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf.

⁷⁵ OFCCP, Federal Contractor Selection System Questions & Answers, *available at* <http://www.dol.gov/ofccp/regs/compliance/faqs/fccsfaqs.htm>.

⁷⁶ 41 C.F.R. §§ 60-1.26(b); 60-30.5(a).

⁷⁷ Memorandum of Understanding between U.S. Department of Labor and Equal Employment Opportunity Commission, 7(b), http://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm.

⁷⁸ California Advisory Committee to the United States Commission on Civil Rights, *Behind the Scenes: Equal Employment Opportunity in the Motion Picture Industry* (Sept. 1978) at 11-14 (summarizing early history of efforts by anti-discrimination agencies to enforce civil rights mandates in Hollywood).

⁷⁹ *Id.* at 11-14.

The EEOC helped monitor compliance with these agreements but monitoring and enforcement ceased after 1976.⁸⁰

OFCCP and General Services Administration (GSA), to which OFCCP had delegated compliance authority, also investigated the studios in the early 1970s. In 1976, they found Universal under-utilized women and minorities in a number of job categories and reached a monitoring and reporting agreement.⁸¹ Thereafter, the GSA reviewed other major studios including Warner Brothers, Columbia, MGM, Paramount, 20th Century Fox, and Disney.⁸² These efforts did not specifically address discrimination against women directors, nor did they create significant long-term improvements in hiring bias in the industry.

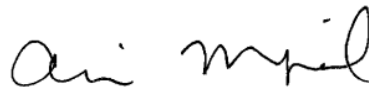
Decades have passed and gender disparities remain as stark as they were in the 1970s. Throughout, the major industry players have had significant federal contracting business. OFCCP should return its attention and investigatory powers to these serious disparities. OFCCP should examine the publicly available statistics and other information about hiring in the possession of the major studios, networks, other federal contractors that employ women directors, and the DGA to identify employers with the most stark pattern and practice of failing to hire women for directing work. OFCCP should gather further evidence of the barriers – both intentionally discriminatory and selection procedures with a discriminatory adverse impact on women – that women directors systemically experience. OFCCP should examine the use of “lists” for hiring directors, and investigate any disparities as to who is required (formally or informally) to go through shadowing programs in getting episodes, in order to determine whether shadowing programs ostensibly aimed at boosting women directors end up further stifling their opportunities to be hired. OFCCP should examine the roles of employment agencies in failing to refer women for jobs. Based on available statistics and our own investigation, it is likely the agency will find systemic conduct that violates Title VII, Executive Order 11246, and OFCCP regulations.

We would be happy to meet with you to discuss these problems further. There are women directors who would like to meet with you as well.

Sincerely



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⁸⁰ *Id.* at 14, 36-37.

⁸¹ *Id.* at 38-39.

⁸² *Id.* at 15-32, 38-39.