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EXAMINING RECENT ACTIONS BY THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, DECEMBER 4, 2013

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HEARING ON RECENT ACTIONS BY THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

Wednesday, December 4, 2013
House of Representatives,
Subcommittee on Workforce Protections,
Committee on Education and the Workforce,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Hunter, Rokita, Bucshon, Hudson, Courtney, Fudge, and Pocan.

Staff present: Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Senior Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; Daniel Murner, Press Assistant; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Juliane Sullivan, Staff Director; Alexa Turner, Legislative Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Jody Calemine, Minority Staff Director; Melissa Greenberg, Minority Staff Assistant; Julia Krahe, Minority Communications Director; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Michael Zola, Minority Deputy Staff Director; and Mark Zuckerman, Minority Senior Economic Advisor.

Chairman WALBERG. A quorum being present, the committee will come to order.

Good morning. I would like to thank our witnesses for joining us.

I would also like to extend a special welcome to Director Shiu. This is our first opportunity to hear from you, and I appreciate your willingness to sit down further, beyond this. That is always helpful. Thank you for taking the time to be with us today as we examine your agency's regulatory actions.

The Office of Federal Contract Compliance Programs is charged with enforcing the affirmative action and nondiscrimination employment requirements governing federal contractors. It is a tremendous responsibility that affects more than 20,000 businesses and roughly one out of every five American workers. Any government agency with this much influence should exercise its authority judiciously, especially at a time when so many cannot find full-time employment.

I hope my colleagues will keep this in mind as we examine two regulations adopted by OFCCP in September.

Last year a number of witnesses shared their concerns about the proposed regulations with the committee. They described how the rules would add an unprecedented amount of new paperwork on top of existing reams of reporting requirements.

Regulations would also set arbitrary hiring goals for certain classes of workers, but the agency has the power to revoke a contract if employers fail to meet those so-called goals. In addition, witnesses discussed the fact that the agency is essentially requiring workers to disclose a disability before they have been offered employment, even though the Americans with Disability Act clearly prohibits this type of invasive inquiry.

Unfortunately, OFCCP failed to address these and other concerns in the final regulations. Today's witnesses will discuss in greater detail why the regulations remain problematic and how they will impact the nation's workplaces.

I also hope to discuss why workers and job creators deserve a completely new regulatory approach. Dana Bottenfield, a witness at a previous hearing, accurately described the problems that exist in the current process. As a human resources professional for St. Jude Children's Research Hospital, Dana characterized the current structure as, and I quote—"all stick and no carrot."

Dana explained existing rules, and I quote again—"impose a level of expense of time and money that is far in excess of what is necessary to accomplish effective affirmative action." She concluded her statement by saying, quote—"Our team is not focused on providing a fair and diverse workplace, but instead, surviving our next audit."

No doubt the experience of St. Jude is similar to the vast majority of federal contractors: They want to follow the rules and do the right thing, but too often they are tied up in unnecessary investigations or tripped up by excessive red tape.

Director Shiu, we should be working together to find ways to streamline this regulatory mess. We should be discussing solutions that would make it easier for employers to follow the law and easier to identify those who don't. We should be developing enforcement policies that promote the best interests of workers and the best use of taxpayer dollars.

Regrettably, the Obama administration has pursued a different agenda. Instead of simplifying the process, the administration creates more confusion and uncertainty. Instead of working together, the department refuses to provide adequate responses to our most basic oversight questions. Delivering documents weeks late on the eve of a national holiday and days before an oversight hearing that are ultimately nonresponsive is an insult to this committee and its oversight responsibilities.

Finally, instead of smart enforcement practices, the administration is doing less with more. Since 2009 OFCCP has received a 30 percent funding increase and hired roughly 29 percent more staff. Yet compared to the prior administration, OFCCP is conducting fewer compliance evaluations and fewer audits.

Even more striking are the outcomes. Between 2004 and 2008 the Bush administration recovered more than $250 million in fi-

nancial remedies. However, the Obama administration has collected a total of just $57 million.

In the face of all these challenges, OFCCP wants to expand its reach through regulatory fiat. Health care providers now fear they will be forced to inherit OFCCP's regulatory burden because they serve some of our nation's most vulnerable citizens.

I have introduced legislation, H.R. 3633, that will ensure hospitals and doctors reimbursed through federal health care programs are not unilaterally designated contractors and subject to OFCCP's dictates. I hope my colleagues will oppose this bureaucratic overreach by supporting the Protecting Health Care Providers from Increased and Administrative Burdens Act.

Federal contractors have a moral and legal obligation to ensure employment discrimination is not tolerated in their workplaces. OFCCP has an obligation as well, to enforce the law fairly and effectively. Unfortunately, more regulations, more spending, more staff, and fewer results have become the agency's track record. The men and women who rely on OFCCP to enforce these critical policies deserve better. For their sake, I strongly urge the administration to change its course.

With that, I will now recognize the senior Democratic member of the subcommittee, my friend Representative Joe Courtney, for his opening remarks.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning. I'd like to thank our witnesses for joining us. I would also like to extend a special welcome to Director Shiu. This is our first opportunity to hear from you. Thank you for taking the time to be with us today as we examine your agency's regulatory actions.

The Office of Federal Contract Compliance Programs is charged with enforcing the affirmative action and nondiscrimination employment requirements governing federal contractors. It is a tremendous responsibility that affects more than 20,000 businesses and roughly one out of every five American workers. Any government agency with this much influence should exercise its authority judiciously, especially at a time when so many cannot find work. I hope my colleagues will keep this in mind as we examine two regulations adopted by OFCCP in September.

Last year a number of witnesses shared their concerns about the proposed regulations with the committee. They described how the rules would add an unprecedented amount of new paperwork on top of existing reams of reporting requirements. The regulations would also set arbitrary hiring "goals" for certain classes of workers, but the agency has the power to revoke a contract if employers fail to meet these so-called goals. In addition, witnesses discussed the fact that the agency is essentially requiring workers to disclose a disability before they've been offered employment, even though the Americans with Disabilities Act clearly prohibits this type of invasive inquiry.

Unfortunately, OFCCP failed to address these and other concerns in the final regulations. Today's witnesses will discuss in greater detail why the regulations remain problematic and how they will impact the nation's workplaces. I also hope to discuss why workers and job creators deserve a completely new regulatory approach.

Dana Bottenfield, a witness at a previous hearing, accurately described the problems that exist in the current process. As a human resources professional for St. Jude Children's Research Hospital, Dana characterized the current structure as "all stick and no carrot." Dana explained existing rules "impose a level of expense of time and money that is far in excess of what is necessary to accomplish effective affirmative action." She concluded her testimony by saying, "Our team is not focused on providing a fair and diverse workplace, but instead surviving our next audit."

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Finally, instead of smart enforcement practices, the administration is doing less with more. Since 2009 OFCCP has received a 30 percent funding increase and hired roughly 29 percent more staff. Yet compared to the prior administration, OFCCP is conducting fewer compliance evaluations and fewer audits. Even more striking are the outcomes. Between 2004 and 2008, the Bush administration recovered more than $250 million in financial remedies. However, the Obama administration has collected a total of just $57 million.

In the face of all these challenges, OFCCP wants to expand its reach through regulatory fiat. Health care providers now fear they will be forced to inherit OFCCP's regulatory burden because they serve some of our nation's most vulnerable citizens. I have introduced legislation, H.R 3633, that will ensure hospitals and doctors reimbursed through federal health care programs are not unilaterally designated contractors and subject to OFCCP's dictates. I hope my colleagues will oppose this bureaucratic overreach by supporting the Protecting Health Care Providers from Increased Administrative Burdens Act.

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I will now recognize the senior Democratic member of the subcommittee, Representative Joe Courtney, for his opening remarks.

Mr. COURTNEY. Thank you, Mr. Chairman, and thank you for holding this hearing today and for the witnesses for all joining us this morning and to talk about what I think is the primary focus, which are two new regulations which have been issued by the Department of Labor after a protracted process, which again got, actually, pretty high marks from groups and individuals as diverse as former Governor Tom Ridge, who complimented the department for listening to some of the input, which again, was recounted here by the chairman at prior hearings and came out with an outcome today that basically strengthen job discrimination protections for individuals with disabilities and men and women who have served this country in the armed forces.

These rules, which are primarily nonpunitive and aspirational goals to help federal contractors monitor and evaluate their progress to ensure that they are abiding by civil rights laws. Taken together, these rules have a very simple message: If you are a veteran who served our country as a volunteer, even if you suffered a disabling injury, we have your back.

These rules say that you deserve a fair shot to compete for a private sector job free of discrimination or bias based on your veteran status or disability. And these rules also say that if you are one of more than 50 million disabled Americans you, too, should deserve a fair shot at a job with a federal contractor, free of discrimination against you because of a disability.

With the cooperation of federal contractors, the Department of Labor's rules are a game-changer for veterans and disabled individ-

uals, providing them with 715,000 additional private sector job opportunities. And as you can see from the chart across the room, based on extensive analysis, the Department of Labor estimates that there will be over 200,000 job opportunities for veterans, particularly those from Iraq and Afghanistan, and over 500,000 for individuals with disabilities because of this rule.

Mr. Chairman, the many challenges veterans and individuals with disabilities face in the job market are well-documented. The household wages of those with disabilities is less than half of those of households without a disability, and almost a third of those individuals have incomes below the poverty level, compared to 12.5 percent of those who do not.

As we will hear today, recent veterans face significantly higher unemployment rates than nonveterans, despite the fact that Congress has passed the Hiring Our Heroes Act and the Veterans Hiring Tax Credits. I see those initiatives, which, again, give incentives to employers to hire veterans, as dovetailing perfectly with, again, these nonpunitive aspirational goals which the department has put forth.

For male Gulf War-Era II veterans 18 to 24 the unemployment rate today is 20 percent, four points higher than nonveterans in that age group. For all Gulf War-Era II veterans the unemployment rate is almost 10 percent.

This is simply unacceptable for the brave men and women who served our country and we need to do much more.

As many of you heard me at a number of other hearings, I am lucky enough to represent a district with a shipyard—an electric boat shipyard, which, in my opinion, builds the most complex vessels in the world that sustains human life in an environment that does not sustain human life, and does it with a nuclear powered system. Almost 20 percent of that workforce are veterans.

Again, they didn't just seek to achieve the aspirational goals that we are discussing here today; they doubled it. And frankly, if they had the opportunity to hire more veterans, even those who carry combat-related disabilities, they would do it in a heartbeat because the fact of the matter is that the skills of teamwork, discipline, specialized skills that are imparted in the military, are something that America's workforce should not view as a burden or employers as a burden, but frankly, as an opportunity of growth and fulfilling, again, some of the workforce challenges that our nation faces.

And again, these rules, which again, I want to emphasize, are nonpunitive and aspirational, are a good start to achieve that goal. I commend all the advocates in the disability community and veterans community that have helped support the issuance of these final rules.

Now again, the chairman has raised some issues that maybe are not directly related to these particular regulations which were issued, and again, I think they deserve a very thorough vetting here today and look forward to working with you in terms of addressing some of those issues.

But again, this morning there was a shipbuilding caucus, which is a bipartisan group of members that General James Amos, who is the commandant of the Marine Corps, spoke for an hour, and I was telling him about a disabled veteran in my district who lives

in the next town over who is a double amputee, stepped on a landmine in Afghanistan—very difficult, challenging recovery. Again, the general visited him on numerous occasions at Walter Reed, which was unbelievably appreciated by his family.

But I was telling him that he and I played golf the other day—Corporal Cairn, double amputee. He was hitting the ball 250 yards off the tee straight down the middle, much to my dismay, because I was in his foursome.

But, you know, to me, again, it just demonstrated that, you know, you give people the opportunity and again, with some of the unbelievable advances in medicine that have taken place right now, these are folks that have a lot more to give, not only to themselves and their families but also to our country. And that really should be the focus of today's hearing is to try and work with these rules to take advantage of just great Americans who can do a lot for our country.

And with that I yield back.

[The statement of Mr. Courtney follows:]

Prepared Statement of Hon. Joe Courtney, Senior Democratic Member, Subcommittee on Workforce Protections

Mr. Chairman:

I want to thank the witnesses for their participation and testimony today regarding civil rights and federal contracting.

The main topics of discussion today are two rules recently finalized by the Department of Labor to strengthen job discrimination protections for individuals with disabilities and the men and women who serve their country in the armed forces.

Specifically, the rules set forth non-punitive, aspirational goals to help federal contractors monitor and evaluate their progress to ensure that they are abiding by civil rights laws.

Taken together, these rules have a very simple message. If you are a veteran who served our nation for love of country, even if you suffered a disabling injury, we have your back.

These rules say you deserve a fair shot to compete for a private sector job, free of discrimination or bias based on your veteran status or disability.

And these rules also say, if you are one of the more than 50 million disabled Americans, you too should deserve a fair shot at a job with a federal contractor, free of discrimination against you because of your disability.

With the cooperation of federal contractors, the Department of Labor's rules are a game changer for veterans and disabled individuals, providing them 715,000 additional private sector job opportunities.

As you can see from the chart across the room, based on extensive analysis, the Department of Labor estimates there will be over 200,000 job opportunities for veterans, and over 500,000 for individuals with disabilities because of this rule.

Mr. Chairman, the many challenges veterans and individuals with disabilities face in the job market are well documented.

The household wages of those with disabilities is less than half of those households without a disability. Almost a third of individuals have incomes below the poverty level, compared to 12.5 percent of those who do not.

As we will hear today, recent veterans face significantly higher unemployment than non-veterans.

For male Gulf War-era II veterans, 18 to 24, the unemployment rate is now 20 percent, 4 points higher than non-veterans in that age group. For all Gulf War-era II vets, the unemployment rates is almost 10 percent.

This is simply unacceptable for the brave men and women who served our country, and we need to do much more.

These rules are good start. And I commend all the advocates in the disability community and veteran community that helped support the issuance of these final rules.

I look forward to hearing the testimony today.

Chairman WALBERG. I thank the gentleman. I thank you for bringing an important face to this hearing, as well—and not the face of necessarily—how in the world did you golf in that cold state at this time of year anyway? Michigan we couldn't do that, but no, seriously, to bring a face to what we are trying to deal with in the most appropriate way is a great thing. Thank you.

Pursuant to rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted into the official hearing record.

It is now my pleasure to introduce our distinguished witnesses. First and foremost, Ms. Patricia Shiu is Director of the Office of Federal Contract Compliance Programs at the Department of Labor.

Thank you for being with us today.

Mr. David Fortney is cofounder of the law firm Fortney & Scott in Washington, D.C., and is testifying on behalf of the H.R. Policy Association.

Welcome.

Mr. Thomas Shanahan is vice president and general counsel of the University of North Carolina in Chapel Hill, North Carolina.

Mr. Brian Fitzgerald is president and chief executive officer of Easter Seals New Jersey in East Brunswick, New Jersey.

Welcome.

Mr. Curt Kirschner is a partner at Jones Day in San Francisco, California and is testifying on behalf of the American Hospital Association.

Welcome.

Before I recognize each of you to provide your testimony let me briefly explain our lighting system. You will have 5 minutes to present your testimony. The lights are according, starting out with green; yellow being 1 minute remaining; red, we hope you have wrapped up by then. If not, please do it as quickly as possible.

The same will be true for the questioning of my colleagues and myself to keep it to the 5-minute, especially when we have a full panel like this and a topic of great concern and interest to discuss.

At this point I recognize Director Shiu for her testimony. Thank you.

Microphone, please. Hit the microphone.

STATEMENT OF MS. PATRICIA A. SHIU, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DEPARTMENT OF LABOR, WASHINGTON, D.C.

Ms. SHIU. There we go.

Chairman WALBERG. Great.

Ms. SHIU. Okay. Good morning, Chairman Walberg, Ranking Member Courtney, and distinguished members of the subcommittee. Thank you for inviting me to discuss the critical work of the Office of Federal Contract Compliance Programs, which I have been privileged to lead since 2009.

It is an honor to testify before the elected representatives of the American people we both serve—with Mr. Fitzgerald, a veteran

who now serves people with disabilities in New Jersey and with my other colleagues on this panel.

OFCCP enforces the civil rights of the nearly one-quarter of American workers who work for federal contractors and subcontractors. We enforce three longstanding laws that prohibit employment discrimination by contractors and require them to take affirmative action to advance employment opportunities for qualified women, minorities, veterans, and people with disabilities. Our jurisdiction covers almost 200,000 business establishments which receive $500 billion in federal contracts.

When we find discrimination we take action to correct it and provide relief to the affected workers. Over the past 5 years we negotiated $57 million in back wages and interest and nearly 10,000 job offers on behalf of 90,000 workers affected by discrimination.

Today I would like to focus on two of the laws we enforce, known as VEVRAA and Section 503. These laws require equal employment opportunity and affirmative action for protected veterans and people with disabilities.

The regulations under these two laws have not always worked to improve employment opportunity as Congress had intended. We are far from fulfilling what Vice President Biden called our sacred obligation to our returning veterans who have sacrificed so much and who deserve good jobs when they return home. Yet post-9/11 veterans are still more likely to be unemployed than nonveterans and people with disabilities are still disproportionately found among the unemployed and those too discouraged to look for work.

In September, OFCCP updated these rules to increase dramatically their effectiveness by clarifying expectations and facilitating compliance with the law. These rules provide, for the very first time ever, specific aspirational metrics for hiring qualified veterans and people with disabilities—metrics that are similar to those that have long been used to promote equal opportunities for women and minorities.

I believe that what gets measured gets done, and metrics are essentially management tools that measure progress and inform decision-making.

These new rules are a win-win. If contractors achieve the metrics, more than 200,000 veterans and almost 600,000 workers with disabilities could have new job opportunities in the first year alone.

According to the Department of Defense, more than 1 million members of the armed services will be transitioning to civilian jobs over the next 5 years—roughly 200,000 per year. Our new rule could dramatically improve the employment prospects of many of those returning veterans each year.

In addition, the new rules will benefit contractors by helping them successfully identify, hire, and retain well-qualified workers, as well as increasing their access to new markets.

These outcomes benefit not only our workers and workplaces, but ultimately, our communities and the national economy, as well.

The VEVRAA rule requires contractors to use either a national hiring benchmark of 8 percent or an alternative benchmark that they select based on various factors. The Section 503 rule sets a na-

tional 7 percent goal for individuals with disabilities in every job category.

Neither the benchmark nor the goal is a rigid or inflexible quota. Quotas are expressly forbidden.

Instead, the metrics are used to measure the effectiveness of contractors' outreach and recruitment efforts. When we find companies that have not achieved these metrics we work with them to review the critical steps that lead to the successful identification, hiring, and retention of qualified vets and people with disabilities.

And I am particularly proud of our rule-making process. We conducted a 4-year-long open and transparent process that included town halls and advanced notice of proposed rule-making, two NPRMs, hundreds of comments, countless meetings, and we engaged the full panoply of OFCCP stakeholders. And we listened, as evidenced by the many changes we made to the proposed rules in response to our stakeholders' concerns.

I was pleased to see those efforts recognized by former Secretary of Homeland Security Tom Ridge in an op-ed that appeared in the Wall Street Journal 1 week after the rules were published. He commended OFCCP for following a model process to create a rule that has a real impact on improving employment while at the same time providing flexibility to companies in how best to achieve the new hiring standards.

We know that workers are our nation's greatest resource and the United States has among the most talented, innovative, and hard-working people in the world, and they are the engine of our economic recovery. That is why the Department of Labor and OFCCP are so fully committed to ensuring that American workers have the opportunities that would allow them and their employers to flourish.

Mr. Chairman, that concludes my statement. Thank you very much, again, for the opportunity to testify. I am happy to answer any questions you may have.

[The statement of Ms. Shiu follows:]

TESTIMONY

DIRECTOR PATRICIA A. SHIU

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
UNITED STATES DEPARTMENT OF LABOR

BEFORE THE
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

DECEMBER 4, 2013

Introduction

Good morning Chairman Walberg, Ranking Member Courtney, and distinguished Members of the Subcommittee. Thank you for the opportunity to testify before you today on the critical work the Department of Labor's ("Department") Office of Federal Contract Compliance Programs ("OFCCP") is doing to protect and promote equal employment opportunity for America's workers.

As you know, OFCCP is a worker protection agency, responsible for enforcing the civil rights of nearly one-quarter of American workers. OFCCP's mission is to protect workers and promote diversity through equal employment opportunity laws in Federal contractors' and subcontractors' workforces. OFCCP has jurisdiction over 170,000-plus establishments that profited from approximately $700 billion in government contracts in 2012. These companies are held to the fair and reasonable standard that discrimination must never be a factor in their hiring, promotion, termination, compensation, and other employment decisions.

With jurisdiction over so many employees and companies, the work OFCCP does to level the playing field has a ripple effect across the entire labor market and affects the lives of thousands of women, minorities, individuals with disabilities, protected Veterans, and their families. Over the past five years, OFCCP has reviewed the employment practices of facilities that employ nearly 9 million workers; negotiated $57 million in back wages and interest and almost 10,000 potential job offers on behalf of 90,000 workers affected by discrimination; and signed over 4,000 conciliation agreements with contractors.

Background on OFCCP

OFCCP is a critical part of the Federal Government's efforts to enforce civil rights, including Veterans' rights. The Agency enforces, for the benefit of job seekers and wage earners, the contractual promise of equal employment opportunity (both nondiscrimination and affirmative action) required of those who do business with the Federal Government. This is consistent with the Secretary's vision of promoting and protecting opportunity. OFCCP executes its mission as an enforcement agency by administering and enforcing three legal authorities that require equal employment opportunity and affirmative action: (1) Executive Order 11246, as amended ("the Executive Order" or "EO 11246"); (2) Section 503 of the Rehabilitation Act of 1973, as amended ("Section 503"), 29 U.S.C. 793; and (3) the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended ("VEVRAA"), 38 U.S.C. 4212.

EO 11246 prohibits Federal contractors and Federally-assisted construction contractors and subcontractors (hereafter, "contractors") who have a contract of at least $10,000 with the Federal Government from discriminating in employment on the basis of race, color, religion, sex, or national origin. This includes discrimination in rates of pay or benefits, among other things. For contractors with 50 or more employees and a Federal contract of at least $50,000, the Executive Order also requires contractors to develop, maintain, and implement an affirmative action program to ensure that that job applicants and employees are treated fairly in all aspects of the employment process.

Section 503 protects the employment rights of individuals with disabilities. Like the Executive Order regulations, Section 503 regulations require Federal contractors with Government contracts of at least $50,000 and 50 employees to develop, maintain, and implement affirmative action programs to ensure that qualified individuals with disabilities are afforded equal employment opportunity in all aspects of employment.

VEVRAA sets forth the requirements for nondiscrimination against Veterans by Federal contractors. Section 4212(a) (1) prohibits Federal contractors from discriminating against specified categories of Veterans and requires contractors to take affirmative action to employ, and advance in employment, those Veterans. Federal contractors with a contract of at least $100,000 and 50 or more employees are required to develop, maintain, and implement affirmative action programs to employ and advance in employment protected Veterans.

Over the past few years, OFCCP has focused on three priorities:

- improving the efficiency, effectiveness, and transparency of enforcement activities;
- implementing long-needed regulatory reform; and
- broadening outreach to agency stakeholders.

Enforcement

Over the past several years, the Department has taken a number of important steps to improve its enforcement efforts, including updating enforcement and evaluation protocols, updating the Federal Contract Compliance Manual, modernizing the Directive System, strengthening the Functional Affirmative Action Program, and providing quality training and technical assistance to contractors. These initiatives clarify, update, or otherwise improve the tools that OFCCP's compliance officers use to conduct desk audits, onsite investigations, and focused reviews; to pursue remedies for employees or applicants who suffer discrimination; and to conduct stakeholder education. All initiatives thus work to the benefit of the contractors that we regulate, the workers we protect, and the government we serve.

Outreach

With regard to outreach to stakeholders, OFCCP spends thousands of hours each year providing training and technical assistance to Federal contractors and subcontractors. This is done to facilitate their successful compliance with their obligations under the law. In FY 2012, OFCCP hosted 874 compliance assistance events that provided contractors with the tools to understand and comply with the laws it enforces. Because small businesses and first-time Federal contractors are less likely to have knowledge about OFCCP's requirements or the resources to acquire that knowledge, this year we chose to focus compliance assistance on those groups, with the result that more than a third of our FY 2012 compliance assistance events were directed specifically at small businesses and first-time Federal contractors.

In addition, through extensive outreach efforts, OFCCP seeks to ensure input from stakeholders on the entire range of OFCCP activities, from policy development to enforcement methodologies to legal interpretations. An example is our regular engagement with the leadership of both the National Industry Liaison Group (NILG) and the various regional industry liaison groups throughout the country. NILG is one of the premier employer associations on affirmative action and equal employment opportunity in the United States, with improving communications between OFCCP and its members (comprised of small, mid-size and large Federal contractors and employers across the country) as one of its main purposes.

Outreach is also undertaken to make sure that workers understand OFCCP is available as their resource. At both the national and local levels, OFCCP proactively reaches out to community-based groups, Veterans' service organizations, labor unions, employer associations, civil rights leaders, contractors, subcontractors, and the workers directly affected by its protections. In FY 2012, OFCCP hosted more than 1,200 outreach events, engaging thousands of stakeholders.

Regulatory Reform: Final Rules Under VEVRAA and Section 503

When I first began as OFCCP Director, our office's regulations under VEVRAA and Section 503 were badly in need of updating. For example, the VEVRAA regulations were not responsive to the high levels of post-deployment Veterans returning from Gulf War-era II engagements; the Section 503 regulations did not reflect changes made by the Americans with Disabilities Act Amendments of 2008.

Moreover, these laws have not always worked as intended. People with disabilities, who have an enormous contribution to make to our economy, are still disproportionately represented among the unemployed and those out of the workforce entirely. Meanwhile, post-9/11 Veterans, who have risked life and limb on our behalf, are more likely to be unemployed than non-Veterans. Updating these regulations to increase their chances of finding meaningful work is critical to fulfilling what Vice President Biden called our "sacred obligation" to our returning Veterans, and especially Veterans with disabilities, who have sacrificed so much for our country.

Employment discrimination contributes to the underutilization of qualified workers, such as individuals with disabilities and Veterans, and contributes to broader societal problems such as income inequality and poverty. The median household income for "householders" with a disability, aged 18 to 64, was $25,420, compared with a median income of $59,411 for households with a householder who did not report a disability.[1] Data show that individuals with disabilities are more likely to be below the poverty threshold with 28.8 percent of individuals, ages 18 to 64, with a disability in poverty in 2011 compared to 12.5 percent of those individuals

[1] Income, Poverty and Health Insurance Coverage in the United States: *2011*, Current Population Reports, issued September 2012, http://www.census.gov/prod/2012pubs/p60-243.pdf (last accessed July 8, 2013), p. 10. A "householder" is the person (or one of the people) in whose name the home is owned or rented and the person to whom the relationship of other household members is recorded. Typically, it is the head of a household. Only one person per household is designated the "householder." The changes in household real median income for the two groups between 2011 and 2012 were not statistically significant. The median income for households with disabilities was $25,974 compared to $61,103 for householders without a disability.

without a disability.[2] These data are not statistically different in 2012.[3] Controlling for age and race, we found that private-sector workers with a disability, on average, earn less than their counterparts without a disability. The mean hourly wage of those with a disability is $17.62 (with a median of $13.73) compared to $21.67 (median $16.99) for those without a disability.[4]

As for employment of Veterans, although progress has been made, the number of unemployed Veterans still remains too high, and substantial disparities in unemployment and pay rates continue to persist, especially for some categories of Veterans. We ask so much of these men and women: to put their careers on hold, leave their loved ones behind and embark on dangerous missions around the world. The men and women that serve this Nation do so willingly and without hesitation. They are a shining example of America at its best and deserve a hero's welcome and, at the very least, a good job when they return home.

Yet many Veterans face substantial obstacles in finding employment once they leave the military. This is particularly true for more recent Veterans. According to the Bureau of Labor Statistics (BLS), the annual unemployment rate for post-September 2001 Veterans, referred to as "Gulf War-era II Veterans," is higher than the rates for all Veterans and for non-Veterans. BLS data on the 2012 employment situation of Veterans show that about 2.6 million of the nation's Veterans had served during Gulf War-era II.[5] In 2012, the unemployment rate for Gulf War-era II Veterans was 9.9 percent compared to non-Veterans at 7.9 percent.[6] However, the unemployment rate, in the same year, for male Gulf War-era II Veterans age 18 to 24 was 20.0 percent, higher than the rate for non-Veterans of the same age group (16.4 percent).[7]

OFCCP is working to address these problems by ensuring individuals have an equal opportunity to find and secure good jobs that will lead to lasting careers. To address the intractable barriers facing many Veterans and people with disabilities, in September, OFCCP issued final rules under Section 503 and VEVRAA. These rules are designed to increase dramatically the effectiveness of OFCCP's efforts, and those of Federal contractors, to eliminate workplace discrimination against people with disabilities and protected Veterans and to increase their employment opportunities.

As Secretary Perez has said, the steps we are announcing will ensure that qualified workers have more meaningful opportunities to find, secure and keep good jobs. By strengthening

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[2] *Income, Poverty and Health Insurance Coverage in the United States: 2011*, Current Population Reports, issued September 2012, Table 3: People in Poverty by Selected Characteristics: 2010 and 2011, http://www.census.gov/prod/2012pubs/p60-243.pdf (last accessed July 8, 2013).

[3] *Income, Poverty and Health Insurance Coverage in the United States: 2012*, Current Population Reports, issued September 2013, Table 3: People in Poverty by Selected Characteristics: 2011 and 201 http://www.census.gov/prod/2013pubs/p60-245.pdf (last accessed Sept. 2013).

[4] To derive these figures, OFCCP ran wage regressions using the natural log of effective hourly wages calculated as real income divided by usual hours per week and weeks per year. All OFCCP models used ACS 2008-2010 Public Use Microdata (PUMS).

[5] U.S. Bureau of Labor Statistics, Economic News Release, "Employment Situation of Veterans Summary 2012," March 20, 2013, http://www.bls.gov/news.release/vet.nr0.htm (last accessed Aug. 8, 2013).

[6] Id., "Table A: Employment situation of the civilian non-institutionalized population 18 years and over by Veteran status, period of service, and sex, 2011-2012 annual averages."

[7] Id.

longstanding regulations under VEVRAA and Section 503, the new rules will ensure that qualified individuals with disabilities and Veterans have more meaningful opportunities to find, secure and keep good jobs. Moreover, both rules apply to protected Veterans with disabilities.

For the first time, these rules provide metrics – management tools that inform decision-making and help contractors measure their progress toward achieving equal opportunity for people with disabilities and protected Veterans. We are clarifying expectations, making legal requirements more effective, and facilitating compliance with the law.

These new rules are a win-win:

- They will benefit Veterans and people with disabilities, who belong in the economic mainstream of the nation but have faced unfair barriers in the job market. In fact, if Federal contractors reached the Section 503 goal and the benchmark in VEVRAA in the first year, they could employ an additional 205,500 protected Veterans under the VEVRAA rule and an additional 594,580 individuals with disabilities under the Section 503 rule. Eliminating the overlap between these two populations, it is estimated that the overall number of hires across both rules would be over 700,000.

- In addition, the new rules will benefit employers who do business with the Federal Government, increasing their access to a large, diverse pool of qualified workers. The tangible and intangible benefits of investing in the recruitment and hiring of individuals with disabilities and Veterans also include access to new markets by developing a workforce that mirrors the general customer base; lower turnover based on increased employee loyalty; lower training costs resulting from lower turnover; and increased productivity by hiring the best qualified person for the job.

The final rules were lauded by a number of groups, including the National Organization on Disability, Easter Seals, the American Association of People with Disabilities, Health & Disability Advocates, and the National Council on Disability.

Given a fair opportunity, Veterans and people with disabilities, including Veterans with disabilities, can work, can be productive citizens, can contribute as taxpayers and can advance economically. These outcomes benefit not only our workplaces, our Veterans, and people with disabilities themselves, but also our communities, and ultimately our national economy.

Finally, of course, the new rules will benefit the entire nation, as they help us fulfill the American promise of equal opportunity for all. With this general backdrop, I will touch upon several key provisions of the Section 503 and VEVRAA regulations.

Section 503 of the Rehabilitation Act of 1973: Discrimination Based on Disability

The new regulations, published in the Federal Register on September 24, 2013, reflect some of the best thinking of both the disability rights community and Federal contractors. The regulations resulted from a collaborative process that included:

- Multiple town hall meetings, webinars, and listening sessions with individuals from the contractor community, state employment services, disability organizations, and other interested parties to understand the features of the Section 503 regulations that worked well, those that could be improved, and possible new requirements that could help to effectuate the overall objective of increasing employment opportunities for individuals with disabilities with Federal contractors;

- An Advanced Notice of Proposed Rulemaking (ANPRM), published in the Federal Register on July 23, 2010, requesting public comment regarding potential ways to strengthen the Section 503 affirmative action regulations;

- A Notice of Proposed Rulemaking (NPRM), published in the Federal Register on December 9, 2011, seeking comment on a number of specific proposals that would strengthen the regulations implementing Section 503. The NRPM was published for a 60-day public comment period;

- A 14-day extension of the public comment period in response to stakeholder requests; and

- Numerous meetings with OFCCP and Administration officials afforded interested stakeholders an opportunity to provide input pursuant to the regulatory process.[8]

OFCCP received and considered more than 400 comments from the public in developing the final Section 503 regulations. The final regulations remain true to the agency's core objectives as they existed almost three years ago when we first began this rulemaking process:

- The regulations provide contractors the ability to conduct meaningful self-assessments of their employment practices by requiring that they collect data and analyze it to improve their policies and practices. This includes requiring contractors to invite applicants to voluntarily self-identify as an individual with a disability at the pre-offer stage of the hiring process, in addition to the existing requirement that contractors invite applicants to voluntarily self-identify after receiving a job offer, and collecting data on who applied for jobs and the number of individuals with disabilities they hire in order to create greater accountability for employment decisions and practices;

- The regulations support awareness and voluntary compliance. Contractors are required to provide their subcontractors notice of their nondiscrimination obligations and the need to take affirmative steps to recruit and hire a diverse, qualified workforce; and

- The regulations incorporate existing disability law; specifically, the regulations implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008. The ADAAA amended the definition of disability in Section 503 to the same extent that it amended the ADA, and became effective on January 1, 2009.

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[8] These meetings are documented through OMB's ROCIS system, and further information on these meetings is available at http://www.whitehouse.gov/omb/oira_1250_meetings.

In addition, the regulations assist contractors in measuring their ongoing progress through the use of a yardstick, in this case a 7 percent utilization goal for individuals with disabilities. The 7 percent goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of a particular group. Quotas are expressly forbidden. Instead, the goal is a management tool that informs decision-making and provides for accountability. Failing to meet the disability utilization goal, alone, is not a violation of the regulation and it will not lead to a fine, penalty, or sanction.

We used the NPRM as a vehicle for obtaining feedback and ideas on a range of approaches for improving the Section 503 regulations. At the final rule stage, OFCCP adopted a strategic, focused, and practical approach that weighed the potential benefits of some provisions against the estimated cost and burden of compliance associated with them.

First of all, to ensure that contractors have adequate time to make changes to their business systems and processes that place them in a position to optimize the employment prospects of both Veterans and people with disabilities, these rules will become effective 180 days after publication. In addition, both rules also provide a phase-in period of up to 12 months for current contractors to develop affirmative action programs (AAPs) in compliance with the new regulatory requirements.

We also eliminated or modified a number of proposals that were in the NPRM, and to which commenters had objected, in order to provide contractors with greater flexibility and to reduce the estimated cost of compliance. For example, we created flexibility both in the recruitment options available to contractors and in various personnel policies related to complying with their affirmative action and nondiscrimination obligations.

In addition, the agency added a provision to reflect sensitivity to the concerns of smaller contractors about meeting the aspirational goal due to the small size of their workforce. The final regulations provide small contractors, those with 100 or fewer employees, the option of using the 7 percent goal at the workforce level instead of at the job-group level. This minimizes the burden on small contractors, while still providing them with a yardstick by which to measure the effectiveness of their efforts to recruit and hire individuals with disabilities.

Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA): Discrimination Against America's Veterans

As with our Section 503 rulemaking, the final VEVRAA rule resulted from a collaborative process that included:

- Multiple town hall meetings, webinars, and listening sessions;
- A NPRM published in the Federal Register on April 26, 2011, with a 60-day public comment period;

- A 14-day extension of the public comment period in response to stakeholder requests; and

- Numerous meetings with OFCCP and Administration officials afforded interested stakeholders an opportunity to provide input pursuant to the regulatory process.[9]

OFCCP received more than 100 comments on the NPRM, covering a broad range of issues. The new regulations, published in the Federal Register on September 24, 2013, reflect a consideration of comments of all our stakeholders. Because the two rules substantially parallel each other, most of the NPRM proposals eliminated in the Section 503 Final Rule were also eliminated in the VEVRAA Final Rule. The Final Rule also eliminated the requirement that contractors affirmatively ask disabled Veterans if they require a reasonable accommodation, retaining the requirement in the existing rule that contractors must take part in an interactive process regarding accommodation and should, but are not required to, seek the advice of the applicant regarding such accommodation.

The VEVRAA Final Rule focuses on provisions that strengthen the obligation of covered Federal contractors to take affirmative measures to recruit, hire and promote qualified Veterans. Among the most important provisions in the Final Rule is the provision creating a national hiring benchmark against which contractors can measure the effectiveness of their recruitment and outreach efforts. Contractors may still, as proposed in the NPRM, use an alternative approach of creating their own annual hiring benchmark that reflects their unique hiring circumstances. We believe that offering this alternative approach toward the use of benchmarks provides contractors a greater degree of flexibility. Specifically, the final VEVRAA rule:

- Assists contractors in measuring their progress in recruiting and employing Veterans through the use of a yardstick, in this case either an 8 percent benchmark in the first year or, at their option, a self-set goal based on available and relevant data;

- Creates greater accountability through meaningful self-assessment for employment decisions and practices by requiring that contractors maintain several quantitative measurements and comparisons for the number of Veterans who apply for jobs and the number of Veterans they hire. Having this data will also assist contractors and OFCCP in measuring the effectiveness of contractors' outreach and recruitment efforts.

- Opens doors to increased job opportunities by providing knowledge and support to Veterans seeking jobs. This is achieved by improving the effectiveness of the VEVRAA requirement that contractors list their job openings with the appropriate state employment service agency – first, by requiring that contractor job listings be provided in a format that the state agency can access and use to make the job listings available to job seekers; and second, by clarifying the relationship between the contractor, its agents, and the state employment services that provide priority referral of protected Veterans.

[9] These meetings are documented through OMB's ROCIS system, and further information on these meetings is available at http://www.whitehouse.gov/omb/oira_1250_meetings.

- Provides knowledge of, and supports voluntary compliance by subcontractors with their obligations by requiring prime contractors to include specific, mandated language in their subcontracts alerting subcontractors to their responsibilities as Federal contractors.

- Creates flexibility for contractors when they are establishing formal relationships with organizations that provide recruiting or training services to Veterans. The relationships or "linkage agreements" can be established to meet the contractors' specific needs, while assuring outreach to Veterans seeking employment.

- Repeals outdated and obsolete regulations at 41 CFR Part 60-250 that apply to contracts entered into before December 1, 2003, that do not meet the coverage threshold of Part 60-300 and have not been modified since. OFCCP believes that all such contracts have either expired or been modified, and that there is, therefore, no longer a need for the Part 60-250 regulations.

Next Steps

In the coming year, OFCCP will continue implementing its three strategies to ensure compliance among Federal contractors: effective enforcement, implementing regulatory reform, and external engagement. These strategies are part of an ongoing effort to facilitate the success of contractors in complying with our existing and new regulations. Stakeholder relationships are even more important as the agency begins its transition from rulemaking to rule implementation in the Section 503 and VEVRAA programs. We anticipate extensive further engagement with the stakeholder communities in connection with implementation of the Section 503 and VEVRAA rules, and specifically will provide contractor training and technical assistance to facilitate success under these new regulations, both leading up to as well as after the rules become effective. In addition, we will engage with the Federal Acquisition Regulatory Council to have the newly revised VEVRAA and 503 regulations incorporated into the Federal Acquisition Regulation to ensure contractor awareness and compliance.

In this vein, building upon the results of our ongoing customer service initiative, we will focus on providing ongoing compliance assistance and training and support to the contractors that we regulate. We are also committed to continuing collaboration with these stakeholders as we do so.

Conclusion

Workers are our nation's greatest resource. The United States has among the most talented, most innovative, and most hard-working people in the world, and they are the engine of our economic recovery. That is why the Department of Labor and OFCCP are so fully committed to ensuring that American workers are afforded the opportunities and working conditions that will allow them and their employers to flourish.

Chairman WALBERG. Thank you.

We recognize Mr. Fortney now for your 5 minutes of testimony.

STATEMENT OF MR. DAVID FORTNEY, CO–FOUNDER, FORTNEY & SCOTT, LLC, WASHINGTON, D.C., TESTIFYING ON BEHALF OF H.R. POLICY ASSOCIATION

Mr. FORTNEY. Thank you, and good morning. Chairman Walberg and Ranking—

Chairman WALBERG. Microphone on? Thank you.

Mr. FORTNEY. And good morning again, Chairman Walberg, Ranking Member Courtney, and honorable members of the Subcommittee on Workforce Protections. Thank you again for your interest in these very important developments.

And I am appearing today on behalf of the H.R. Policy Association to discuss specifically the 503 regulations addressing individuals with disabilities. Let me briefly take a moment to introduce the H.R. Policy Association, which has a longstanding and very proud history of being supportive and involved in assisting individuals with disabilities to find meaningful employment.

The association is comprised of 350 of the largest corporations in the United States. These companies employ more than 10 million employees in the U.S. and nearly 9 percent of the private workforce, and indeed, offer employment to 20 million employees worldwide.

The H.R. Policy members have a strong history of supporting affirmative action and have been intimately involved in the development of effective programs to deal with individuals with disabilities, including the recent amendments to the Americans with Disabilities Act that have been widely accepted. In the initial statement, in the limited time I have, I would like to focus on several areas of concern, though, that we do have with respect to the 503 regulations.

First, let me note that the regulations are an improvement from what had been proposed in some of the initial concerns. With that being said, though, there still are remaining concerns.

With respect to the goal, and with all due respect to Director Shiu, our concern remains that the goal, as it is administered, may, in fact, become a quota. And let me tell you why we have the concern. Because the language, although it states that it will be a goal, look beyond and, in fact, how the goals historically have been administered. Because as Director Shiu has explained, and certainly the OFCCP carries out in the field, what gets measured is what gets done.

We know in the field and in practice that if you fall short of that 7 percent, what is going to happen? The agency is going to impose what is called a conciliation agreement and require that a numerical goal be achieved. That effectively operates as a quota.

Now, that is not just supposition on our part. We have an example under the law today involving a contractor, G–A Masonry, involving veterans.

The department determined that their outreach efforts were insufficient. The answer was, "Here is a numerical target. You must hire the following number of veterans in order to demonstrate you are making sufficient outreach efforts."

That, we submit, is how a goal becomes a quota. That should not be allowed to proceed and we are concerned.

Second, under these new rules contractors will be required to ask every applicant whether he or she has a disability, and this is before they are offered a job. Now, that has not been the requirement of this land for over 30 years. The Americans with Disabilities Act specifically prohibits that type of inquiry and we have a longstanding, proud culture where we have focused on individuals' abilities, not their disabilities, in assessing whether they meet the basic qualifications of the job.

These are concerns that we have expressed repeatedly. We have asked for a safe harbor to be made. If this is going to be required, at least amend the ADA. Do something to make clear that we won't as a result of complying with the regulation, now face litigation as a result.

What we have received so far is a letter from staff counsel at the EEOC saying, "I think this will not violate the ADA." I might add, her letter failed to note that the same counsel in 1996 wrote a letter stating it would violate the ADA to make such inquiries.

And unfortunately, when we have asked the Department of Labor whether in the event that our member companies comply with this new regulation and face litigation, will the department have our back, will they come and file an amicus brief to support us in court, we have been told no, the department can't make that commitment either.

So we are concerned. This is an issue that could easily and should have been addressed; it would have avoided these concerns.

I think that one of the aspects that would assist so that these issues don't pile up and get sorted out through prolonged litigation that costs members needless resources would be if there could be periodic reporting to this committee by this agency. That way, we could know in real time, perhaps every 6 months, what the agency is doing and how they are implementing these rules.

So with that, I thank you and be happy to answer any questions you may have.

[The statement of Mr. Fortney follows:]

Statement

by

DAVID S. FORTNEY, ESQ.
FORTNEY & SCOTT, LLC
COUNSEL FOR HR POLICY ASSOCIATION

Before the

House Education and the Workforce Committee
Subcommittee on Workforce Protections

Hearing on

Office of Federal Contract Compliance Programs Oversight

DECEMBER 4, 2013

13-96

CHAIRMAN WALBERG, RANKING MEMBER COURTNEY AND HONORABLE MEMBERS OF THE SUBCOMMITTEE:

On behalf of the members of the HR Policy Association ("HR Policy" or the "Association"), I want to thank you for the opportunity to appear before you today to provide the Association's views on the U.S. Department of Labor's Office of Contract Compliance Programs ("OFCCP" or the "Agency"), focusing specifically on the recently issued final rule implementing revisions to the non-discrimination and affirmative action regulations for Section 503 of the Rehabilitation Act of 1973 ("Section 503") that govern federal contractors. I am David S. Fortney, a shareholder with Fortney & Scott, LLC ("FortneyScott"), and I am counsel to the HR Policy Association. In a separate capacity, I serve as co-founder of the OFCCP Institute, which provides national training programs addressing the latest OFCCP developments and strategies for effective compliance, and assists the contractor community in responding to rapidly changing compliance challenges. FortneyScott is a law firm representing and counseling clients including numerous federal contractors on the full spectrum of workplace-related matters, and the firm has been recognized as one of the leading D.C. metro management employment law firms in the "Best Law Firms" evaluations by U.S. News & World Report.

HR Policy Association is the lead organization representing chief human resource officers of major employers. The Association consists of more than 350 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, Association member companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. They have a combined market capitalization of more than $7.5 trillion.

Most HR Policy member companies are federal contractors and are subject to OFCCP regulations. Moreover, as with all other federal contractors, the OFCCP affirmative action and non-discrimination regulations typically apply to all of their operations, not just those operations performing work under federal contracts, even if a relatively miniscule percentage of the company's workforce is engaged in that work. As a result, OFCCP's regulations and enforcement efforts govern a significant portion of the U.S. jobs and workplaces. OFCCP estimates that the number of regulated contractor establishments is 251,300 (employing one-fifth of the entire U.S. labor force, or 26.6 million American workers), although there are arguments that this number is higher.[1]

HR Policy and its members strongly support affirmative action, including the goal of having qualified individuals with disabilities in the workforces of government contractors. Indeed, HR Policy members have been at the forefront of employer efforts to adopt and expand the basic principles of fundamental fairness and a "level playing field" for all applicants and employees. At every stage in the long history of affirmative action, HR Policy members have been leaders in achieving the goals of affirmative action by recruiting and hiring people on a non-discriminatory basis without regard to membership in any protected group.

Introduction – the 503 Regulations and Broader Concerns

Today, I would like to focus my testimony primarily on OFCCP's Final Regulations, announced on August 27, and published in the Federal Register September 24, implementing Section 503 of the Rehabilitation Act of 1973 regarding non-discrimination and affirmative

action in the employment of qualified individuals with disabilities.[2] Within the broader context of rapidly expanding governmental "fine-tuning" of the private sector, the new 503 regulations clearly show why there is a growing concern among the federal contractor community regarding the goals of OFCCP's policies, their practicality, and the manner in which OFCCP conducts its enforcement efforts.

At the outset, the HR Policy Association acknowledges that there were a number of improvements in the final rule over what was proposed in December 2011, and we fully acknowledge and appreciate that the costs and administrative burdens of compliance will be less than they would have been under what was proposed. However, HR Policy remains very concerned about the impact of the rule on workplace cultures and efforts to integrate those with disabilities into the workforce, efforts that are motivated not just by trying to comply with federal requirements but because they simply are the right thing to do.

Perhaps, most significantly, for the first time, the final rule sets a goal that **seven percent of every job group in each establishment** in a large contractors' workforce be composed of persons with disabilities. In order to provide the statistical basis for determining whether this goal is being met, contractors will be required to ask every single applicant and employee whether he or she has a disability. If that applicant or employee does not identify her- or himself as having a disability, the contractor may override the employee's response if the individual has an "obvious" or "known" disability. HR Policy's membership is deeply concerned about the disruptive impact this new self-identification rule will have on the current workplace culture of inclusion, which focuses on individuals' **abilities**—not their disabilities—and assists those with disabilities in performing the essential functions of the job by providing reasonable accommodations, often well beyond the minimum requirements of the Americans with Disabilities Act, as recently amended ("ADA").

Before engaging in a detailed discussion of the final rule, I would note that the negative response to the proposed rule from HR Policy's membership was strong enough that its Board of Directors authorized the Association to prepare for a potential lawsuit to seek to block the final rule in federal court if it were substantially similar to the proposed rule. The HR Policy Association Board has concluded that, for most federal contractors, the legality of the rule is more likely to be determined by how it is enforced by OFCCP. So, at least for the time being, we have decided not to institute a legal challenge.

Finally, federal contractors have growing concerns about the manner in which the OFCCP is fulfilling its mission, as illustrated by the method by which the Agency promulgated the 503 regulations. First, the Agency failed to collaborate with key stakeholders in an effective manner to develop a full understanding as to how these regulations would function in the workplace. Second, in promulgating these revised rules, the Agency has disregarded conflicting statutory requirements. And third, because the Agency has disregarded legal requirements and other expert subject matter expertise and recommendations, federal contractors now face significant ambiguity and uncertainty with regard to their compliance obligations and OFCCP's enforcement standards.

The Association's Commitment to Effective Workplace Disability Policies

The HR Policy Association has a long-standing commitment to the development of a workable and effective federal policy regarding the employment of individuals with disabilities. Because of that commitment, the last time Congress addressed federal workplace disability policy, we were actively engaged in the enactment of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). The Association's engagement began after a bill was introduced with broad bipartisan support to correct certain court decisions interpreting the ADA, which most agreed would or should not be allowed to stand because they narrowed the definition of "disability." The original ADAAA bill was strongly opposed by employers because, in the view of many, it expanded the definition of "disability" so broadly as to effectively deem almost every minor impairment a covered "disability." With strong encouragement by Congressional leaders, including then-Majority Leader Steny Hoyer (D-MD), who recognized that HR Policy's concerns were genuine, the business community and disability rights groups decided to collaborate to seek an alternative they could both support. Thus, the task of the groups was to find a way to reverse the court decisions with a scalpel, not a meat cleaver.

In seeking a workable alternative to the original ADAAA legislation, the Association was guided closely by the HR Policy Association's Employment Rights Committee which provides significant experience and expertise from many of the leading federal contractors among its members. As a result, the Association was able to tap into a deep understanding of the practical impact of the legislation on employers' operations. The result of the negotiations, in which the Association played a critical role, was a more evenly balanced approach that was ultimately passed by Congress as the ADAAA. As a result of these efforts, the ADAAA enjoys nearly universal support from both sides of the aisle. The ADAAAA reversed specific judicial decisions but minimized disruption of the workplace by ensuring that the "reasonable accommodations" employers would have to provide under the ADA would be limited to the more severe conditions the ADA was originally intended to address.

OFCCP's Failure to Engage Effectively with the Federal Contractor Community

When the OFCCP issued the proposed revisions to the Section 503 regulations, HR Policy Association approached the issue with the same willingness to engage with the OFCCP, the disability rights organizations and other stakeholders in seeking to increase the employment of individuals with disabilities through effective non-discrimination and affirmative action policies. In stark contrast to the collaborative efforts welcomed during the drafting of the ADAAA, the Agency was not receptive to the efforts of the stakeholders. The Agency's failure to collaborate resulted in a lost opportunity to achieve the kind of consensus that resulted in the successful passage of the ADAAA. Although the Agency fulfilled the basic statutory rulemaking requirements, it failed to solicit meaningful input from key stakeholders. The collaborative, consensual model used in drafting the amendments to the ADA resulted in successfully expanding protections to individuals with disabilities while garnering support from both the government agencies and the contractor community. This model could have been—and should have been—implemented by the OFCCP to create revised Section 503 regulations that would further increase the interest in employment opportunities for individuals with disabilities, while also ensuring that the regulations are drafted in a manner that encourage compliance.

The regulations, as issued, fail to take into account a number of legal and practical obstacles that federal contractors now face. As a result, a litigation challenge of the regulations already has been initiated by the Associated Builders and Contractors, Inc., representing the construction industry concerns.[3] In the pending judicial review the regulations are being challenged as being arbitrary, burdensome and imposing unauthorized data collection and utilization requirements, and also raises specific concerns of the construction industry. On behalf of the HR Policy members, we too share many of these same concerns.

The HR Policy Association filed two sets of comments with the OFCCP during the very brief comment period after the rule was proposed. Due to the limited time frame provided, the Association was not afforded sufficient time to gain a thorough understanding of the potential impact of the rule on its members prior to submitting the comments.

Soon after the notice and comment period, the Association conducted five regional full-day meetings with its members, exploring every aspect of the proposal. What was learned from these sessions was published in a report entitled *CHRO Views on OFCCP's Disability Affirmative Action Proposal*. In a nutshell, this report reiterated the Association's members' shared goal of increasing employment and integration into the workforce of those with disabilities but noted the Association's well-documented conclusion that the rules, as proposed by the OFCCP, would be costly, counterproductive to the goal and unworkable.

While the proposed regulations were pending, the Association sought repeatedly, on its own and with other members of the business community, to engage with the Department of Labor to find an alternative approach, much like what had been successfully done with the ADAAA in 2008. Notwithstanding Secretary Thomas Perez's expression during his first week in office of a commitment to "collaboration, consensus-building and pragmatic problem-solving," and the 20 months between issuance of the proposed rules and the announcement of the final rules, the HR Policy Association's requests for collaborative meetings were ignored.[4] Although the Agency complied with the technical mandates of the notice and comment requirements, it failed to follow a process which was aimed at ensuring the development of robust discussion surrounding proposed regulations. The Agency's steam-rolled process left the contractor community without an effective voice.

Modification to the proposed rules only occurred after the Office of Management and Budget ("OMB") agreed to meet with some of the very same stakeholders OFCCP ignored. The OMB officials listened to these stakeholders and the final regulations reflect modifications addressing some of the most significant concerns raised at those meetings.

OFCCP's failure to engage in dialogue with the Association's stakeholders resulted in a fundamental lack of understanding of how contractors conduct their business operations including, but not limited to, the manner in which they conduct recruiting and hiring as well as the manner in which contractors are able to collect, retain and report recruiting and hiring data.

The contractor community does not operate in the outdated and outmoded manner envisioned by the OFCCP. Thus, the new regulatory outreach and recruitment mandates fail to consider that the contractor community's connections and recruiting practices take place through the use of technology, internet based recruiting and external recruiters. The new data analysis file requirements reveal that this Agency is uninformed about a typical company's hiring procedures

and document retention needs. The OFCCP appears to believe that many reports, data and statistics will be available at the touch of a button and shows no willingness to understand the level of change these new regulations will require. Contractors are overhauling their entire recruiting procedure, reallocating human resource functions, and reassembling their budgets just as a first step in the internal implementation process. If the OFCCP had met with stakeholders and engaged in a collaborative effort similar to the ADAAA approach, it would have realized the final regulations create a paperwork and recordkeeping exercise—not workable efforts to promote non-discrimination and affirmative action in the workplace. The recordkeeping requirements of the Section 503 regulations, alone, demonstrate the Agency's focus on audit trails and enforcement, instead of on the true purpose of the statutory requirements of Section 503, which is the advancement of employment opportunities for individuals with disabilities.

Despite the Association's disappointment in the Department of Labor's failure to take a collaborative approach and understand the contractor community, we remain hopeful that the Agency will take steps to educate itself on the way the contractor community operates.

The Association's members stand ready to comply to the extent possible with the new regulations and we are mildly heartened by some of the improvements and modifications of the proposed rule. Having said that, we still believe the rule could have a profoundly negative cultural impact on the workplace. Much of that impact will be determined by how OFCCP enforces the rule.

A "Sea Change" in Enforcement - Abandoning the "Good Faith Efforts" Standard

As stated at the outset, HR Policy and its members strongly support affirmative action and the goal of increasing the employment of qualified individuals with disabilities in the workforces of government contractors. HR Policy members are the companies who have made affirmative action a reality. These are the companies who demonstrate their commitment to fairness and diversity in employment every day. For these reasons, we are very troubled by a fundamental tenet of the final rule. Today, employers properly focus their recruitment and application process on the **abilities** of employees and applicants insofar as they match the employer's needs for the skills and talents necessary for the development and delivery of the company's products and services. Without question, non-discrimination and affirmative action play a significant role in this process. In stark contrast, however, the new rules force employers to focus on the **dis**abilities of employees and applicants. Moreover, this fundamental change in the nation's employment policies leads to what our members view as not only highly inappropriate, but also likely unlawful lines of inquiries. As will be discussed further below, employers will now be required to ask employees and job applicants, on multiple occasions, whether they have any disabilities, including prior to a job offer.

What is of particular concern is that the new Section 503 final rule assumes that good faith efforts are insufficient and that numerical results also must be considered. As OFCCP Director, Patricia Shiu, said when issuing the proposal, affirmative action "can no longer be defined by 'good faith' efforts."[5] Instead, she characterized the proposed rule as a "sea change" in the enforcement of Section 503. This statement raises strong concerns among federal contractors, who believe they are already showing a strong commitment to the goals of Section 503. If good faith efforts are no longer sufficient, what, short of illegal hiring quotas, is to be expected of the federal contractor community?

Achievement of the Seven Percent "Goal"

The Association and its members unabashedly agree with the goal of advancing career opportunities for individuals with disabilities. As we have noted, the Association's member companies are already committed to this goal and are making good faith efforts to achieve it. Their concern is that the creation of a seven percent goal has now been turned into a numerical target which, depending upon how it is enforced by OFCCP, easily could become an illegal quota.

The final rule requires that federal contractors design their workforces with the "goal" of reaching certain numerical representations; namely, that seven percent of all persons in each of the company's job groups, at each establishment, would be individuals with disabilities.[6] When proposed, OFCCP asserted that the seven percent utilization goal "should be attainable by complying with all aspects of the affirmative action requirements."[7] In a survey done by HR Policy of chief human resource officers, 80 percent of the companies who reported they were a federal contractor responded that the OFCCP's proposed goal of having seven percent of all employees in each of the company's job groups be persons with disabilities would be "virtually impossible." There are several reasons why HR Policy Association members reach this conclusion.

First, the "goal" is not based on availability data. There is simply no data to provide assurances that there is an available and qualified workforce with disabilities to meet employers' needs **in each job group**, whether on a national level, or on the local or even regional level from which these companies undertake their hiring. Indeed, in its final ADAAA rule, the EEOC states, "Based on the available data, it is impossible to determine with precision how many individuals have impairments that will meet the current definition of substantially limiting a major life activity or a record thereof" (*i.e.*, the key component of the definition of "disability").[8] Even in the Notice of Proposed Rulemaking ("NPRM"), the OFCCP itself acknowledged that the "best" source of disability data has very serious limitations.[9] Moreover, in the final rule, the OFCCP recognizes that "for some jobs in some locations availability of qualified individuals may be less than seven percent."[10] Nonetheless, OFCCP has dictated a single, numerical target applicable across the U.S.—again, a "one size that fits none."

HR Policy's members' concern that there will not be a sufficient qualified workforce to meet the regulatory "goals" is bolstered by the federal government's own employment percentages. First of all, the employment of individuals with disabilities by the federal government itself is below seven percent, both government-wide (5.9%) and within various agencies after years of presidential initiatives to increase hiring.[11] Moreover, this does not account for the likely shortcomings within each job group, for which there is no data.

One can assume from this data that the federal government either is not making a good faith effort to achieve its own goals or, more likely, that those goals are simply unachievable. Either explanation undermines the credibility of the final rule.

A major obstacle to employers being able to meet the seven percent goal is the existing disincentives in the Social Security Disability Insurance program. This program effectively precludes 8.8 million individuals who receive disability payments from participating in the workforce on a full-time basis because their benefits are conditioned on their abstention from

employment if they earn more than $12,120 per year. In effect, this imposes a cap on the number of individuals with disabilities who are available to work more than 30 hours per week year-round.[12] OFCCP, again, opted to simply ignore these facts in imposing its seven percent goal.

In the final rule, the OFCCP sought to assuage employers' concerns by asserting that the "goals" are not hard and fast quotas, and that they are "aspirational."[13] It is understandable as to why the Agency would want to clarify that the goal is not a quota—*there is no apparent legal authority under Section 503 of the Rehabilitation Act that permits the federal government to set numerical employment requirements.* Moreover, affirmative action requirements which operate as a quota are generally unlawful and subject to the highest level of judicial scrutiny.[14]

Yet, the language used in the proposed rule, and in its preamble, raised legitimate concerns among federal contractors that the goal would be enforced as if it was, in effect, a quota. The proposed rule stated that a failure to reach the numerical goal would lead to the imposition of "'action-oriented programs' designed to correct any identified problems and attain the established goal."[15] Moreover, the OFCCP made it clear in the proposed rule that failure to meet the goal would lead to further enforcement activity:

> It is also important to point out that such a determination [failure to reach the goal], whether by OFCCP or the contractor, will not impede or prevent OFCCP from finding that one or more unlawful discriminatory practices caused the contractor's failure to meet the utilization goal. In such a circumstance, OFCCP will take appropriate enforcement measures.[16]

As has been settled law for decades, threats of enforcement, threats of increased government oversight, threats of increased recordkeeping and threats of heightened monitoring combine to pressure companies to seek proportional representation, that is, to meet a quota.[17] In several public statements about the proposed rule, OFCCP Director Shiu made it clear that the Agency fully intended to bring this level of pressure to bear on contractors to ensure they met the "goal," stating that "what gets measured gets done."[18] In an interview, Director Shiu further stated: "You've got to measure what you're doing, figure out where you're falling down, and fix it. Our ultimate sanction is debarment."[19]

Thus, it is no surprise that in HR Policy's annual chief human resource officer survey soon after the proposed rules were issued, 82 percent said they either believed the proposed goal was a quota or would have to treat it as one to avoid enforcement actions and debarment.

With this as the backdrop, we were encouraged by the final rule and its preamble in which OFCCP appeared to recognize that whether the goal was in effect an illegal quota could largely be determined by how it is enforced. Thus, there was a notable change in the tone of the final rule in this regard, with the following statement in the preamble:

> This goal is not a quota . . . Instead, the goal is a management tool that informs decision-making and provides real accountability. Failing to meet the disability utilization goal, alone, is not a violation of the regulation and it will not lead to a fine, penalty, or sanction. . . . More specifically, the final rule identifies steps for the contractor to take to ascertain whether there are impediments to equal

> employment opportunity and, if impediments are found, to correct any identified problems. If no impediments are identified, then no corrective action is required. The goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.20

However, a careful reading of the final regulation and supporting materials makes clear that the OFCCP will assess good faith efforts based on the resulting composition of the workforce.[21] Falling short of the required seven percent is likely to result in a formal Conciliation Agreement that requires a contractor to meet the seven percent target, which then results in the goal being enforced as an unlawful quota.

No Deference to Guiding Law: The Self-Identification Requirement

OFCCP's attempt to use a regulation to override conflicting rules of law is illustrated in the imposition of new obligations that require employers to ask applicants to disclose whether they have disabilities. The new obligations in the 503 regulations pose a direct conflict with the statutory prohibitions of the ADA on such pre-employment offers. HR Policy Association members have strong objections to the pre-employment self-identification requirements in the revised regulations, as well as concerns about the potential consequences that these requirements will have.

Under the new 503 regulations, contractors are required to invite job applicants to identify themselves as having a disability, at the pre-offer stage, using a prescribed form which has yet to be issued in final form by the OFCCP. In addition, at least once every five years, contractors will be required to invite all of the company's existing employees to identify themselves as having a disability, using the same form. For many of the same reasons expressed above, we believe this will have a profoundly negative cultural impact, while also exposing contractors to potential ADA lawsuits from applicants, notwithstanding attempts by the OFCCP and the Equal Employment Opportunity Commission ("EEOC") to reassure contractors of the legality of these inquiries.

If there is one thing employers are well-versed on regarding the Americans with Disabilities Act, it is that they cannot ask any questions at the pre-offer stage that would cause an applicant or employee to reveal his/her disability status. The ADA clearly states: "Pre-employment ... [employers] shall not conduct a medical examination *or make inquiries of a job applicant* as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."[22] Even the OFCCP's own website, explains that pre-offer disability related questions are not permissible under Section 503. Under the website's section entitled "Frequently Asked Questions for the Employer" the Agency stated that "Section 503 and VEVRAA [the Vietnam Era Veterans Readjustment Assistance Act] prohibit employers from asking applicants disability-related questions (*i.e.*, questions that are likely to elicit information about a disability) and from conducting medical examinations of applicants until after a conditional job offer is made."[23]

The OFCCP seeks to address this concern in the preamble by relying on non-regulatory guidance from the EEOC. The preamble cites a letter from the Legal Counsel of the Equal Employment Opportunity Commission referencing EEOC regulations and its ADA Technical Assistance Manual both indicating that, notwithstanding the language of the statute cited above,

the ADA permits employers to "invite" applicants to voluntarily self-identify pursuant to a requirement under another Federal law or regulation and/or for purposes of the employer's affirmative action program.[24] The letter is posted on OFCCP's website, though, interestingly, is not referenced in the aforementioned FAQ section. Nor is a previous letter from the same EEOC Legal Counsel mentioned by OFCCP which states "a contractor cannot cite Section 503 as justification for making pre-offer inquiries regarding self-identification."[25] While the latest letter from the EEOC *may* provide a defense for contractors against any actions brought by the EEOC, the ADA also allows a private right of action, which comprises the significant majority of ADA cases in the courts. Ultimately, federal contractors will have to hope that the federal courts provide deference to the EEOC's latest letter on this issue and not to its previous letter, a result which is by no means guaranteed. Interestingly, I have asked the OFFCP as to whether federal contractors can anticipate that the OFCCP or the EEOC will join as *amici* in defending federal contractors, if contractors face private ADA claims based on undertaking the pre-employment inquiries required by the 503 regulation. My question has yet to be answered by the Agency.

The ADA's prohibition against inquiring about disabilities pre-offer also makes sense from a proper recruitment perspective. Employers try to abstain from asking invasive questions that many individuals feel is an infringement on their privacy, both during the interview process and during the term of the employee's employment. Moreover, the employer wants to ensure, for both legal and ethical reasons, that it is clear to the applicant that they are being considered entirely on the basis of their ability to perform the job, not on whether they have a disability; while recognizing that if the individual, who, once hired, happens to have a disability, a reasonable accommodation may be required.

In fact, some of the groups representing individuals with disabilities expressed similar concerns in the comments on the NPRM. For example, Health & Disability Advocates stated they were "not in support of the OFCCP's requirement that contractors invite all job applicants to self-identify as having a disability *before* receiving a job offer, since we are concerned that individuals with 'hidden' disabilities will be reluctant to self-identify at all."[26] The American Council of the Blind said "[m]any applicants and employees are likely to be wary about disclosing needlessly detailed information about their disabilities, even with anonymous self-identification."[27] And the Governor's Commission on Disabilities in Rhode Island recommended the "[i]nvitation to self-identify should be modified by delet[ing] all of [proposed] subsection (a)"—the proposed pre-offer self-identification requirement.[28]

In its rush to issue these regulations, the OFCCP has provided contractors with incomplete information about how the pre-employment inquiries will operate. At this point, we do not yet know what the self-identification form will look like so we can only comment on what has been proposed and is now at the OMB for review. We note that although OFCCP has shown a limited willingness to engage with the contractor community on the proposed form, and at this stage, than was the case with the 503 regulations themselves, we do not know whether this "interactive dialogue" will have a fruitful outcome for all involved.

Perhaps the most troubling aspect of the proposed form is that is does not give applicants a chance to refuse the invitation entirely. The proposed form offers only two options: "YES, I HAVE A DISABILITY (or have previously had a disability)" or "NO, I DON'T WISH TO IDENTIFY AS HAVING A DISABILITY." There is no opportunity to state you are not

disabled and no opportunity to decline to answer. It is as if the distorted underlying premise is that everyone is disabled and just needs a chance to say so.

Further, the proposed form presents an inaccurate, partial and misleading definition of "disability." OFCCP assumes the legal definition of "disability" is simple and clear. That is not so. The definition is a functional one that depends upon whether a "physical or mental impairment ... substantially limits [a] major life activit[y]."[29] This is an individualized determination done on a case-by-case basis, and, unlike most other protected classes, may also vary over time depending on the individual's condition. Indeed, the definition of disability is so elusive that it has taken countless judicial opinions, numerous Supreme Court rulings and two lengthy statutes—including substantial legislative amendments—to bring us to our current understanding, such as it is. The reality is that, except in the most clear-cut cases, most people are likely to have no idea if they meet the statutory definition.

To compound the difficulty, the employee self-identification responses are all unverified, so the information provided may be fundamentally flawed. Some who have a disability may not wish to make such a disclosure for privacy or other reasons. Others may believe a positive disclosure will weigh against them; still others may think this same response will be a benefit. Thus, the results of unverified surveys and responses to invitations to self-identify will not provide *reliable* data that accurately reflect the numbers of individuals with a disability in the workforce. Yet, an employer's ability to meet the goals will likely hinge upon the responses to self-identification forms provided by job applicants and employees. Indeed, the results of such instruments could be much higher or lower than the actual number of persons with a disability in a contractor's workforce—let alone by each job group.

The OFCCP has sought to address these concerns by allowing the contractor, in some instances, to determine for itself that the applicant or employee is an individual with a disability if it is "known" to the employer or "obvious." "Known" disabilities would include statements by the individual or requests for reasonable accommodations. The preamble includes two examples of "obvious" disabilities: blindness or missing limbs. The preamble further states that contractors may not guess or speculate on this.[30]

However, the line between "obvious" and "speculation" can be a fine one when the legal definition of disability generally includes numerous mental and physical conditions, including not only blindness, but epilepsy, autism, HIV/AIDS, bipolar disorder and major depression, among others. Moreover, there is a genuine question as to how OFCCP auditors will verify employer assertions that a disability is "obvious." Will this require a personal meeting between the auditor and the employee to verify the employer's good faith assessment? A meeting which will not be well-received by someone who has deliberately chosen not to identify his or her disability status? Although we understand that OFCCP was seeking to address some of the concerns raised by contractors, unfortunately this addition will raise a whole new set of problems, particularly if some employers, seeking to ensure that the seven percent "goal" is met, are over-eager in applying these exceptions.

Finally, the complexity of the legal ambiguities in the proposed self-identification form is compounded by the fact that the entire form as submitted to OMB is written at a post-graduate degree reading level (requiring 16+ years of education to understand the form[31]) and, thus, is largely unintelligible to most of those who are invited to use it. Clearly, the OFCCP chose to

ignore the requirement provided by the Department of Labor elsewhere (under ERISA, for example, and regarding pensions and benefits) that information "be written in a manner calculated to be understood by the average plan participant."[32] Were OFCCP to use that standard, the only available option is to discard the proposed form and start anew. Even then, the challenge to come up with a form that enables respondents to assess their disability status under the law would be a formidable one.

Thus, in short, the reliability of the self-identification form—which will be the touchstone for determining contractors' performance in meeting the utilization goals—is highly questionable for a number of reasons:

- The applicant/employee may not be aware that he/she has a disability, based either on a misunderstanding of the law and the form itself—quite understandable given the complexity—or the fact that they have not yet been diagnosed with a disability that is not readily apparent;

- The applicant/employee may have a personal preference for not revealing a particular disability to anyone other than a physician, therapist or other professional for privacy reasons;

- The applicant/employee may strongly believe that a key part of overcoming a disability is to refuse to acknowledge it, even to him/herself;

- An applicant/employee may believe, however irrationally, that an employer's awareness of a disability could negatively impact her/his ability to be hired or promoted; and

- An applicant/employee without a disability may believe, however irrationally, that an employer believing he/she has a disability could positively impact his/her ability to be hired or promoted either to comply with OFCCP requirements or to avoid a discrimination claim.

Many of these reasons are even stronger when intellectual and psychological disabilities are involved because of their "hidden" nature. Moreover, because regrettably these mental disabilities are often coupled with a social stigma that may not apply to physical disabilities, individuals are even less likely to disclose them.

The self-identification requirements in the revised regulations are another illustration of the Agency's failure to understand the world in which its stakeholders operate their businesses. The OFCCP views contractor compliance issues solely through the narrow focused lens of OFCCP compliance, absent any concern or respect for the complex web of statutory and regulatory requirements that contractors are faced with from other government agencies or the realities of human nature.

Several Significant Administrative and Paperwork Concerns Addressed in the Final Rule

Notwithstanding our strong concerns about the final rule and its implementation, we would be remiss if we did not acknowledge the improvements reflected in the final rule which have substantially reduced the administrative burden of compliance.

Among the costly administrative burdens imposed by the proposed rule, one of the most significant was evisceration of the so-called "Internet Applicant Rule." That Rule has helped large companies, who receive hundreds of thousands, if not millions, of expressions of interest in jobs annually over the Internet, manage their OFCCP compliance. Under the proposed 503 rules, contractors would have been required to send self-identification invitations to **everyone** who expressed an interest in a position, **regardless** of their qualifications for the position.

In a major concession to the concerns raised by contractors, the preamble provides guidance on how contractors may invite Internet applicants to self-identify as an individual with a disability in a manner that is consistent with the Internet Applicant Rule. From an administrative cost perspective, this is perhaps the most welcome improvement over the proposed rules for large employers. We would add, however, that these assurances exist *only in the preamble* to the rule. Clearly, having them codified in the regulation itself would be preferable, and we strongly encourage OFCCP to do so. Alternatively, the OFCCP can make a conforming amendment to the Internet Applicant Rule[33] to include applicants under the new 503 and protected veteran regulations.

Another significant administrative burden imposed by the proposed rule was a requirement that, if a job applicant identified him/herself as having a disability, the contractor would be required to consider the applicant for all available positions for which the applicant might be qualified, if the applicant were not hired for the position to which he/she initially applied. Fortunately, the final rule drops the requirement of consideration for other positions.

The Companion 4212 Regulations for Protected Veterans

While this testimony is focused on the Section 503 regulations, we also note that the OFCCP has simultaneously promulgated new regulations under Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA") that include new obligations for hiring protected veterans. The 4212 regulations include numerical targeting requirements similar to those in the 503 regulations, in the form of an eight percent hiring "benchmark" for protected veterans.[34]

The OFCCP's conclusions and analysis in the 4212 regulations mirror some of the fundamental shortcomings in the 503 regulations. Similar to the Agency's failure to fully assess the statutory conflict between the ADA and the 503 regulations, in the new 4212 regulations, the OFCCP failed to reconcile the impact of hiring veterans—who are mostly males—with the resulting disparities from not hiring females and the potential liabilities for running afoul of Title VII's prohibition on gender discrimination. In the preamble, OFCCP refused to fully address the legally conflicting obligations employers may face and failed to address the concerns about the impact of the hiring benchmark for veterans.[35] Additionally, consistent with the shortcomings in the data relied on in developing the Section 503 regulations' utilization goal, OFCCP failed to consider relevant data in establishing the eight percent hiring benchmark. In fact, the Agency ignored data that federal contractors currently are required to provide to the Department in their Vets 100A annual reports, because the Agency did not believe that such data on employment levels of veterans was an "appropriate source."[36] The Association's member companies are fully committed to maximizing the employment opportunities for veterans; however, we remain concerned with the underlying data and methods that were used to promulgate the eight percent hiring benchmark in the 4212 regulations.

The 503 and 4212 Regulations Illustrate the OFCCP's Growing Disregard of Governing Law

The significant shortcomings in the development of the Section 503 regulations highlight what appears to be a broad and consistent pattern in which the OFFCP has demonstrated a failure to properly recognize and follow legal requirements and guidance that conflict with the OFCCP's desired approach. The result is that the federal contractors now face growing ambiguity and uncertainty in meeting their OFCCP-enforced compliance obligations. The OFCCP's disregard for guiding legal principles in its enforcement and policy decisions create unnecessary burdens and costs for federal contractors.

The OFCCP's disregard of statutory requirements in the new 503 and 4212 regulations is yet another example of a continuing pattern by the Agency to disregard the rule of law, as evidenced by the Agency's posture in recent enforcement claims asserted against a federal contractor. In *OFCCP v. VF Jeanswear LP*, the OFCCP brought an action against a contractor for discriminating against Non-Asians.[37] As the Judge in the case recognized, such a position is without any basis in Title VII principles, as Non-Asians are not a protected group, and have never been a recognized protected group under the statute. Ultimately, the Judge held that OFCCP's comparison of Asians to "Non-Asians" was not legally actionable, stating "[t]he regulations put government contractors on notice of what is required of them in order to comply with the Executive Order. They are prohibited from employee selection procedures with a disparate impact on a 'race' or 'ethnic group.' The 'non-Asian' category upon which the Plaintiff has proceeded is neither a race nor an ethnic group, either by regulatory definition or as used in common parlance."[38] This promulgation of inconsistent theories under the guise of Title VII principles put contractors on uncertain and inconsistent ground.

Similarly, in announcing the new compensation enforcement program, embodied in the OFCCP's Directive 307[39] that was issued February 28, 2013, the Agency ignored the detailed and recently-issued National Academy of Sciences ("NAS") study that was requested by the EEOC on the government's collection of compensation data and the pursuit of enforcement actions.[40] The NAS study recommendations included a pilot program and the enhancement of the government's ability to retain highly confidential data, but these recommendations were not taken into consideration.[41] Instead, OFCCP has opted to continue efforts to issue a compensation data collection tool.

Further, the Agency already is enforcing the existing affirmative action recruitment and outreach requirements for veterans as a quota.[42] In a recent investigation where a contractor failed to hire a "sufficient" number of protected veterans, and absent any allegations of unlawful discrimination, OFCCP required the contractor, G-A Masonry Corporation, to hire additional veterans before it could consider any other qualified applicants simply because there was an "insufficient" number of veterans employed. We fear we are learning what Director Shiu meant when she said, "what gets measured gets done." In other words, when the unjustified goals are not met, the result is enforcement as a quota.

Contractors want to be compliant with their affirmative action and non-discrimination obligations but they need to understand those obligations. The OFCCP has failed to provide such guidance. Moreover, when the OFCCP insists on enforcing the goals as a quota, most federal contractors simply do not have the financial or other means to defend themselves, and

they are forced to pay monies, including back wages, for claims that have no basis in law or in fact.

While we have not yet seen how the OFCCP plans to implement Section 503 requirements, we are deeply concerned that we will see a continuation of the demonstrated track record of ignoring guiding legal principles; all of which leaves contractors in an ambiguous and uncertain position.

The Final Word Has Yet to Be Written

Even in the current regulatory environment, it is disappointing, at the least, that the Agency unabashedly promotes unsupported legal theories and issues regulations that are in conflict with statutory obligations, resulting in inconsistent outcomes. More than ever, federal contractors are faced with unnecessary and ambiguous burdens in meeting their OFCCP-enforced obligations.

Accordingly, in light of OFCCP's record, I respectfully submit that as part of this Subcommittee's oversight, the Subcommittee should require the OFCCP to provide periodic reports on its conduct, activities and analyses. Such reports could be provided on a six-month basis so that any inconsistent and legally unsupported actions of the Agency can be identified and addressed at an early stage. Periodic reports by OFCCP to this Subcommittee would assist the contractor community in avoiding protracted and expensive proceedings that result in cases like *VF Jeans* and the quotas imposed against G-A Masonry Corporation.

In conclusion, we want to emphasize once again that the Association's members share the goal of increasing the employment of individuals with disabilities. Moreover, we do not question the motives of the Agency in seeking to maximize the impact of Section 503 of the Rehabilitation Act in achieving those goals. What we will object to is if the Agency continues to impose a "one size fits all" approach which, in fact, is a "one size fits none" standard. This is an approach that simply ignores the realities of the workplace and fails to recognize the barriers to employment that are well beyond the control and purview of any federal contractors. It remains to be seen exactly how the Agency will implement the goals and benchmarks under 503 and 4212. Although we are encouraged by many of the words that appeared in the preamble to the final rule, the Agency's recent failure to follow the rule of law gives the contractor community cause for concern. Therefore, we reiterate our suggestion that this Subcommittee closely monitor the Agency's actions to ensure that the law is followed. We look forward to working with the Agency and with your Subcommittee to ensure that result.

Endnotes

[1] 78 Fed. Reg. at 58714 (2013). Federal contractors estimate that the number of affected establishments was at least 10 percent greater, and we believe that the OFCCP's estimate understates the number of establishments that must comply.

[2] 78 Fed. Reg. 58682 et. seq. (2013).

[3] Docketed at 1:13-cv-01806, United States District Court for the District of Columbia, November 19, 2013.

[4] Work in Progress: The Official Blog of the United States Department of Labor, available at http://social.dol.gov/blog/day-one/.

[5] *See, e.g.*, Patricia Shiu, Director, OFCCP, Address to 2011 NILG Conference (July 27, 2011), available at http://www.dol.gov/ofccp/addresses/Director_address_to_NILG_July272011.htm.

[6] 78 Fed. Reg. at 58745 (2013).

[7] 76 Fed. Reg. at 77099 (2011).

[8] 76 Fed. Reg. at 16990 (2011).

[9] 76 Fed. Reg. at 77069 (2011). There are several limitations, including: (1) the definition of disability used by the American Community Survey ("ACS") is not as broad as the Rehabilitation Act and the ADA; (2) the number of individuals with disabilities in the ACS does not encompass all individuals with disabilities as defined under the broader definition in section 503 and the ADAAA; (3) the ACS disability data cannot be broken down into as many job titles, or as many geographic areas as the data for race and gender; and (4) contractors will not be able to use the job groups established under Executive Order 11246 to establish goals for individuals with disabilities.

[10] 78 Fed. Reg. at 58706 (2013). Further, OFCCP rejected Census Data, sponsored by the U.S. Department of Labor, on employment of individuals with disabilities stating that it was impractical. *See* 78 Fed. Reg. at 58704 (2013).

[11] EEOC, "Annual Report on the Federal Work Force Part II, Work Force Statistics, Fiscal Year 2010," available at: http://www.eeoc.gov/federal/reports/fsp2010_2/upload/Annual-Report-on-the-Federal-Work-Force-Part-II-PDF.pdf. Although in some federal agencies individuals who report they have a disability account for more than seven percent of their total workforces, government-wide the percentage is just 5.9 percent. Those agencies with less than seven percent include: HUD (6.8%), OPM (6.6%), Labor (6.1%), HHS (5.0%), Education (5.0%), Transportation (5.0%), State (3.9%), Homeland Security (3.8%), and Justice (3.2%).

[12] *See* "OFCCP's Proposed Disability 'Goal' Ignores Key Employment Barriers For Persons With Disabilities," HR Policy Association Policy Brief 12-45, May 29, 2012, available at http://www.hrpolicy.org/downloads/2012/12-45_Social_Security_Barriers.pdf.

[13] 78 Fed. Reg. at 58685 (2013).

[14] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (ruling that affirmative action requiring a 10 percent set aside for minority contractors is subject to highest level of judicial scrutiny); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (invalidating 30 percent contract set aside for minority-owned businesses); *University of California v. Bakke*, 438 U.S. 265 (1978) (invalidating admission plan setting aside 16 slots for minorities).

[15] 76 Fed. Reg. at 77071 (2011).

[16] *Id.*

[17] *See Bakke,* 438 U.S. at 289 (opinion of Powell, J.) (noting that regardless of whether the limitation at issue is described as "a quota or a goal," it is "a line drawn on the basis of race and ethnic status"). *Accord MD/DC/DE Broadcasters Associations, et al. v. FCC,* 236 F.3d 13 (D.C. Cir. 2001) (record-keeping and reporting of employment statistics were deemed a coercive and "powerful threat," almost certain to pressure companies to seek proportional representation); *Chamber of Commerce v. Dep't of Labor,* 174 F.3d 206, 210 (D.C. Cir. 1999) (noting that agency "is intentionally using the leverage it has by virtue solely of its power to inspect. The Directive is therefore the practical equivalent of a rule that obliges an employer to comply or to suffer the consequences; the voluntary form of the rule is but a veil for the threat it obscures."); *Wessmann v. Gittens*, 160 F.3d 790,794 (1st Cir. 1998) (attractive labeling cannot alter the fact that any program which induces schools to grant preferences based on race and ethnicity is constitutionally suspect); *Lutheran Church-Mo. Synod v. FCC,* 141 F.3d 344, 354 (D.C. Cir. 1998) (articulating similar sentiments regarding employment preferences).

[18] "Shiu: Contractors Who Miss Disability Goals Face Debarment," Federal News Radio, Dec. 12, 2011, available at http://www.federalnewsradio.com/?nid=491&sid=2666234.

[19] "Rewriting the Rules," Ability Magazine, February/March 2012, available at http://www.abilitymagazine.com/Patricia-Shiu-OFCCP.html.

[20] 78 Fed. Reg. at 58683; 58686 (2013).

[21] 78 Fed. Reg. at 58710 (2013).

[22] 42 U.S.C.A § 12112(d)(2).

[23] Department of Labor, Office of Federal Contractor Compliance Programs, Frequently Asked Questions for the Employer, "What Questions May Employers Ask on an Employment Application and What Questions Are Employers Prohibited From Asking?" available at http://www.dol.gov/ofccp/regs/compliance/faqs/emprfaqs.htm. (last visited September 20, 2013).

[24] EEOC Opinion on the Invitation to Self-Identify, available at http://www.dol.gov/ofccp/regs/compliance/sec503/OLC_letter_to_OFCCP_8-8-2013_508c.pdf.

[25] Equal Employment Advisory Council, Re: Comments of the Equal Employment Advisory Council, on the Office of Federal Contract Compliance Programs' Notice of Proposed Rulemaking Pertaining to Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, February 21, 2012, available at http://www.regulations.gov/#!documentDetail;D=OFCCP-2010-0001-0398.

[26] Health & Disability Advocates, Re: Comments on Proposed Regulations Implementing Section 503 of the Rehabilitation Act, RIN 1250-AA02, February 16, 2012, available at http://www.regulations.gov/#!documentDetail;D=OFCCP-2010-0001-0488.

[27] The American Council of the Blind, Comments of the American Council of the Blind regarding the Notice of Proposed Rulemaking Section 503 of the Rehabilitation Act of 1973, as amended Affirmative Action and Non-discrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, February 21, 2012, available at http://www.regulations.gov/#!documentDetail;D=OFCCP-2010-0001-0383.

[28] Rhode Island and Providence Plantations, Executive Department, Governor's Commission on Disabilities, Comments on December 9, 2011, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a Notice of Proposed Rulemaking (NPRM) in the Federal Register, February 7, 2013, available at http://www.regulations.gov/#!documentDetail;D=OFCCP-2010-0001-0277.

[29] 42 U.S.C.A. § 12102 (1).

[30] 78 Fed. Reg. at 58692 (2013).

[31] The OFCCP Institute performed a Flesch Reading Ease and Flesch-Kincaid readability test on the proposed form which reflected a post-graduate degree reading level. The conclusion of this test was communicated to the OFCCP.

[32] 29 C.F.R. § 2520.102-2 (a).

[33] 41 C.F.R. § 60-1.3.

[34] 78 Fed. Reg. 58614 *et. seq.* (2013).

[35] 78 Fed. Reg at 58638-58639 (2013). After acknowledging that the question of the impact that the proposed hiring benchmark for veterans would have on women was raised by multiple commenters, the OFCCP responded by simply providing information on the minority composition of the prospective veteran applicants. OFCCP failed to identify any data or a substantive response to the gender impact question.

[36] 78 Fed. Reg. at 58640 (2013).

[37] In the Matter of: *Office of Federal Contract Compliance Programs, US Department of Labor v. VF Jeanswear LP*, 2011-OFC-00006 (August 5, 2013) available at http://www.oalj.dol.gov/Decisions/ALJ/OFC/2011/OFCCP_-_ATLANTA_GA_v_VF_JEANSWEAR_LIMITED_2011OFC00006_(AUG_05_2013)_141447_CADEC_SD.PDF.

[38] *Id.* at pg.7.

[39] Office of Federal Contract Compliance Programs Compensation Directive 307, available at http://www.dol.gov/ofccp/regs/compliance/directives/Dir307_508c.pdf.

[40] *See* Regulation Rescinding Compensation Guidance, 78 Fed. Reg. 13508 *et. seq.* (2013).

[41] National Academy of Sciences Report, available to download at http://www.nap.edu/catalog.php?record_id=13496.

[42] *See* attached G-A Masonry Corporation Conciliation Agreement.

Conciliation Agreement
Between the United States Department of Labor
Office of Federal Contract Compliance Programs
And
G-A Masonry Corporation
7014 Hughes Avenue
Crestwood, Kentucky 40014

PART I: General Provisions

1. This Agreement is between the Office of Federal Contract Compliance Programs (hereinafter OFCCP) and G-A Masonry Corporation (hereinafter G-A Masonry).

2. The violation identified in this Agreement was found during a compliance evaluation of G-A Masonry at its construction project worksite located at Camp Lejeune, North Carolina which began on November 20, 2009, and it was specified in a Notice of Violation issued March 19, 2009. OFCCP alleges that G-A Masonry has violated the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212), and its implementing regulations at 41 CFR Chapter 60 due to the specific violation cited in Part II below.

3. This Agreement does not constitute an admission by G-A Masonry of any violation the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212), as amended and its implementing regulations.

4. The provisions of this Agreement will become part of G-A Masonry's Affirmative Action Program (AAP). Subject to the performance by G-A Masonry of all promises and representations contained herein and in its AAP, the named violation in regard to the compliance of G-A Masonry with all OFCCP programs will be deemed resolved. However, G-A Masonry is advised that the commitments contained in this Agreement do *not preclude future determinations of noncompliance based on a finding that the* commitments are not sufficient to achieve compliance.

5. G-A Masonry agrees that OFCCP may review compliance with this Agreement. As part of such review, OFCCP may require written reports, inspect the premises, interview witnesses, and examine and copy documents, as may be relevant to the matter under investigation and pertinent to G-A Masonry's compliance. G-A Masonry shall permit access to its premises during normal business hours for these purposes.

6. Nothing herein is intended to relieve G-A Masonry from the obligation to comply with the requirements of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212), and their implementing regulations, or any other equal employment statute or executive order or its implementing regulations.

7. G-A Masonry agrees that there will be no retaliation of any kind against any beneficiary of this Agreement or against any person who has provided information or assistance, or

who files a complaint, or who participates in any manner in any proceedings under Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212).

8. This Agreement will be deemed to have been accepted by the Government on the date of signature by the Regional Director for OFCCP, unless the Director, OFCCP, indicates otherwise within 45 days of the Regional Director's signature on this Agreement.

9. If, at any time in the future, OFCCP believes that G-A Masonry has violated any portion of this Agreement during the term of this Agreement, G-A Masonry will be promptly notified of that fact in writing. This notification will include a statement of the facts and circumstances relied upon in forming that belief. In addition, the notification will provide G-A Masonry with 15 days from receipt of the notification to respond in writing, except where OFCCP alleges that such a delay would result in irreparable injury.

   Enforcement proceedings for violation of this Agreement may be initiated at any time after the 15-day period has elapsed (or sooner, if irreparable injury is alleged) without issuing a Show Cause Notice.

   Where OFCCP believes that G-A Masonry has violated this Conciliation Agreement, OFCCP may seek enforcement of this Agreement itself and shall not be required to present proof of the underlying violations resolved by this Agreement.

   Liability for violation of this Agreement may subject G-A Masonry to sanctions set forth in 41 CFR 60-300.66 and/or other appropriate relief.

PART II: Specific Provisions

VIOLATION: G-A Masonry failed to take affirmative action to employ qualified individuals without discrimination based on their status as disabled veterans, recently separated veterans, other protected veterans or Armed forces service medal veterans in all employment practices, specifically recruitment, advertising, job application procedures and hiring, as required by 41 CFR 60-300.5(a)1 and 41 CFR 60-300.20(a) and (b). G-A Masonry failed to immediately list with the North Carolina Employment Security Commission (hereinafter NCESC) all employment openings that existed at the time of the execution of its federal contract and those which occurred during the performance of its contract, as required by 41 CFR 60-300.5(a) 2-3.

As a result, the NCESC was unable to refer to G-A Masonry for employment consideration 79 available qualified veteran Laborers during the period March 1, 2009 to through October 31, 2009. When the 79 available veteran Laborers enrolled with NCESC are combined with G-A Masonry's walk-in applicants and those referred by *other means for Laborer vacancies, we note the following:* From a pool of 114 non-veteran Laborer applicants, G-A Masonry hired 102 non-veterans (90%) for Laborer positions. During the same period, from a pool of 80 available veterans (including 79 listed with the NCESC and one walk-in), G-A Masonry hired one veteran (1%) for a

Laborer position. This disparity in selection rates adverse to veteran applicants is statistically significant at the level of 12.21 standard deviations, with a shortfall of 41 veterans.

Additionally, the NCESC was unable to refer to G-A Masonry for employment consideration five available qualified veteran Brick Layers/Masons during the period March 1, 2009 through October 31, 2009. When the five available veteran Brick Layer/Masons enrolled with NCESC are combined with G-A Masonry's walk-in applicants and those referred by other means for Brick Layer/Mason vacancies, we note the following: From a pool of 104 Brick Layer/Mason non-veteran applicants, G-A Masonry hired 77 non-veterans (74%) for Brick Layer/Mason positions. During the same period, from a pool of eight available veterans (including five listed with the NCESC and three who applied onsite), G-A Masonry hired three Veterans (38%) for Brick Layer/Mason positions. This disparity in selection rates adverse to veteran applicants is statistically significant at the level of 2.20 standard deviations, with a shortfall of two veterans.

Accordingly, OFCCP finds that G-A Masonry's failure to comply with its mandatory job listing requirements and its failure to recruit and provide employment to qualified veterans had a discriminatory affect against 84 available veterans not recruited for or hired into Laborer and Brick Layer/Mason positions, in violation of 41 CFR 60-300.5(a) 1, 2 and 3.

REMEDY: On November 20, 2009 G-A Masonry began listing its openings with the NCESC. On November 30, 2009 G-A Masonry confirmed in written communication its agreement to list, recruit and make offers of employment from available veterans through the NCESC. G-A Masonry agreed to make offers to 41 veteran Laborers and two veteran Brick Layers/Masons.

G-A Masonry will list its job openings with the State Employment Security Commission (SESC) during such time as it is a covered federal contractor in all of the areas where it is conducting work. G-A Masonry will recruit and make offers of employment to qualified veterans until a total of 43 qualified veterans have accepted job offers for 41 Labor vacancies and two Brick Layer/Mason vacancies or until G-A Masonry is no longer a covered federal contractor, whichever occurs first. G-A Masonry will make job offers to qualified veterans in the order that the SESC refers them. Employment is contingent upon each referred veteran's successfully completing G-A Masonry's post-offer selection and screening process. The criteria for selecting or rejecting any veteran will be no more stringent than those used by G-A Masonry during the review period March 1, 2009 through October 31, 2009. G-A Masonry will provide each veteran referred for a Laborer vacancy, post offer, with a copy of Attachment A—Laborer, "Release of Claims under the Vietnam Era Veterans' Readjustment Assistance Act." G-A Masonry will provide each veteran referred for a Brick Layer/Mason vacancy, post offer, with a copy of Attachment B—Brick Layer/Mason, "Release of Claims under the Vietnam Era Veterans' Readjustment Assistance Act."

G-A Masonry Corporation
Conciliation Agreement

G-A Masonry will make all job offers in writing as vacancies occur, but no later than 180 days after the Regional Director, OFCCP signs this Agreement. New hires must agree upon a start date no more than 14 days from the date of receiving the written job offer. Any new hire who fails to report to work on the start date and time scheduled, without prior approval by G-A Masonry, will be treated as having rejected the job offer. All hiring decisions, including job offers made and documentation of reasons for rejection, will be available for review by OFCCP.

G-A Masonry will hire referred veterans at the current starting rates of pay for the Laborer and Brick Layer/Mason positions into which they are hired. G-A Masonry will provide veterans hired as Brick Layers/Masons with benefits, which are valued at 9% of the daily pay rate, subject to standard eligibility requirements.

G-A Masonry will disburse $32,800.00 in back pay and $1,486.45 in interest, for a total financial settlement of $34,286.45, provided that the 41 referred veterans for Labor vacancies, post-offer, execute the "Release of Claims under the Vietnam Era Veterans' Readjustment Assistance Act." The money will be divided equally among referred veterans and paid to each in two lump sums, less appropriate legal deductions; the first lump sum will be the back pay and the second lump sum will be interest.

G-A Masonry will disburse $2,763.36 in back pay, $248.70 in benefits and $125.21 in interest, for a total financial settlement of $3,137.27, provided that the two veterans referred for Brick Layer/Mason vacancies, post-offer, execute the "Release of Claims under the Vietnam Era Veterans' Readjustment Assistance Act." The money will be divided equally between two referred Veterans and paid to each in two lump sums, less appropriate legal deductions; the first lump sum will be comprised of back pay and back benefits and the second lump sum will be interest.

Each veteran's share of this payment will be reduced by withholdings for federal income tax, state, and/or local income tax, and the veteran's share of FICA. Each veteran shall receive an IRS Form W-2 for his or her share of the back pay and benefits and an IRS Form 1099 for his or her share of the interest amount.

G-A Masonry will distribute the monetary settlement as described above, to the veterans no sooner than 45 days and no later than 180 days after the Regional Director signs this Agreement and all efforts to have veterans referred have been exhausted. G-A Masonry will complete the process of monetary disbursement and hires, and will provide OFCCP with evidence of job offers, hires, copies of pay slips showing legal deductions and cancelled checks, as indicated in Part III of this Agreement.

G-A Masonry will not retaliate, harass, or engage in any form of reprisal or other adverse action against any referred veteran based on or in relation to the terms or provisions of this Agreement.

G-A Masonry will review, at least annually, and revise, as needed, its selection procedures to ensure that this violation does not recur.

G-A Masonry Corporation
Conciliation Agreement

FUTURE CONDUCT: G-A Masonry will not repeat the above violation.

PART III: Reporting

G-A Masonry shall submit **three reports**, as stated below, to Carley Hicks, Jr., Assistant District Director—Raleigh, United States Department of Labor, Office of Federal Contract Compliance Programs, 4407 Bland Road, Suite 270, Raleigh, North Carolina, 27609.

The **first report** shall be due 60 days after the date on which the Regional Director, OFCCP signs this Agreement. The **second report** shall be due 120 days after the date on which the Regional Director, OFCCP signs this Agreement. The **third report** shall be due 180 days after the date on which the Regional Director, OFCCP signs this Agreement. Each report shall contain the following information:

1. Documentation of listings with the SESC for vacancies.
2. Documentation of all referred veterans and job offers.
3. Documentation of any declined job offer by a referred veteran.
4. Documentation of monies disbursed to each veteran who executed a "Release of Claims under the Vietnam Era Veterans' Readjustment Assistance Act," including copies of the canceled checks and pay slips showing gross amount of back pay and legal deductions.

TERMINATION DATE: This Agreement will expire 90 calendar days after OFCCP receives the third and final report required in Part III above or on the date that the District Director gives notice to G-A Masonry that it has satisfied its reporting requirements, whichever occurs earlier, unless OFCCP notifies G-A Masonry in writing prior to the end of the 90-day period that G-A Masonry has not satisfied its reporting requirements pursuant to this Agreement.

G-A Masonry Corporation
Conciliation Agreement

PART IV: Signatures

The person signing this Conciliation Agreement on behalf of G-A Masonry Corporation personally warrants that he is fully authorized to do so, that G-A Masonry Corporation has entered into this Conciliation Agreement voluntarily and with full knowledge of the effect thereof, and that execution of this Agreement is fully binding on G-A Masonry Corporation. This Conciliation Agreement is hereby executed by and between the Office of Federal Contract Compliance Programs and G-A Masonry Corporation.

Date: 4/23/2010

Mr. Eugene George
President
G-A Masonry Corporation
7014 Hughes Avenue
Crestwood, Kentucky 40014

Date: 4-26-2010

[TC]

Compliance Officer—Raleigh
Office of Federal Contract Compliance Programs

Date: 4/27/2010

for **Carley Hicks, Jr.**
Assistant District Director—Raleigh
Office of Federal Contract Compliance Programs

Date: 4/27/2010

Bradley A. Anderson
District Director—Charlotte
Office of Federal Contract Compliance Programs

Date: 29 April 2010

Evelyn Teague
Regional Director—Southeast
Office of Federal Contract Compliance Programs

G-A Masonry Corporation
Conciliation Agreement

Attachment A
Laborer

RELEASE OF CLAIMS
UNDER THE VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT

In consideration of the payment to me of at least $836.00 (less deductions required by law) by G-A Masonry Corporation (hereinafter G-A Masonry), which I agree is acceptable, and also in consideration of the Conciliation Agreement between G-A Masonry and the Office of Federal Contract Compliance Programs (hereinafter OFCCP), I, _____ agree to the following:

I.

I understand that the amount of $836.00 set forth above is the minimum gross amount of my portion of the monetary settlement between OFCCP and G-A Masonry, and that the actual payment to me will be reduced, in part, to account for legally required payroll deductions such as income tax withholding and Social Security contributions. I understand that this payment will be reflected on an Internal Revenue Service Form W-2 and a Form 1099 at the end of the calendar year in which the payment is made. Monies reported on the Form 1099 will not be reduced for taxes or other payroll deductions and I understand that I may owe income taxes on the amounts reported to me on the Form 1099.

II.

In exchange for the monetary amount set forth above, I hereby waive, release and forever discharge G A Masonry, its predecessors, related entities, subsidiaries, and organizations, and its and their directors, officers, employees, agents, successors, and assigns, of and from any and all actions, causes of action, damages, liabilities, and claims arising out of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212), which I or my representatives (heirs, executors, administrators, or assigns) have or may have which relate in any way to my selection for employment by G A Masonry at any time prior to the effective date of the Release.

III.

I understand that G-A Masonry denies that it treated me unlawfully or unfairly in any way and that G-A Masonry entered into the above-referenced Conciliation Agreement with OFCCP in the spirit of conciliation and to bring closure to the Compliance Evaluation initiated by OFCCP on November 20, 2009. I further agree that the payment of the aforesaid sum by G-A Masonry to me is not to be construed as an admission of any liability by G-A Masonry.

IV.

I declare that I have read this Release and that I have had a full opportunity to consider and understand its terms and to consult with my advisors. I further declare that I have decided of my own free will to sign this Release.

V.

I understand that, if I do not sign this Release, I will not be entitled to receive any of the financial or other relief provided in the Conciliation Agreement.

IN WITNESS WHEREOF, I have set my hand to this _____ day of _____, _____.
Day Month Year

_____
Signature

G-A Masonry Corporation
Conciliation Agreement

Attachment B
Brick Layer/Mason

RELEASE OF CLAIMS
UNDER THE VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT

In consideration of the payment to me of at least $1,568.00 (less deductions required by law) by G-A Masonry Corporation (hereinafter G-A Masonry), which I agree is acceptable, and also in consideration of the Conciliation Agreement between G-A Masonry and the Office of Federal Contract Compliance Programs (hereinafter OFCCP), I, _____ agree to the following:

I.

I understand that the amount of $1,568.00 set forth above is the minimum gross amount of my portion of the monetary settlement between OFCCP and G-A Masonry, and that the actual payment to me will be reduced, in part, to account for legally required payroll deductions such as income tax withholding and Social Security contributions. I understand that this payment will be reflected on an Internal Revenue Service Form W-2 and a Form 1099 at the end of the calendar year in which the payment is made. Monies reported on the Form 1099 will not be reduced for taxes or other payroll deductions and I understand that I may owe income taxes on the amounts reported to me on the Form 1099.

II.

In exchange for the monetary amount set forth above, I hereby waive, release and forever discharge G A Masonry, its predecessors, related entities, subsidiaries, and organizations, and its and their directors, officers, employees, agents, successors, and assigns, of and from any and all actions, causes of action, damages, liabilities, and claims arising out of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212), which I or my representatives (heirs, executors, administrators, or assigns) have or may have which relate in any way to my selection for employment by G A Masonry at any time prior to the effective date of the Release.

III.

I understand that G-A Masonry denies that it treated me unlawfully or unfairly in any way and that G-A Masonry entered into the above-referenced Conciliation Agreement with OFCCP in the spirit of conciliation and to bring closure to the Compliance Evaluation initiated by OFCCP on November 20, 2009. I further agree that the payment of the aforesaid sum by G-A Masonry to me is not to be construed as an admission of any liability by G-A Masonry.

IV.

I declare that I have read this Release and that I have had a full opportunity to consider and understand its terms and to consult with my advisors. I further declare that I have decided of my own free will to sign this Release.

V.

I understand that, if I do not sign this Release, I will not be entitled to receive any of the financial or other relief provided in the Conciliation Agreement.

IN WITNESS WHEREOF, I have set my hand to this _____ day of _____, _____.
Day Month Year

_____
Signature

Chairman WALBERG. Thank you.

Mr. Shanahan, welcome and recognize you for 5 minutes of testimony.

STATEMENT OF MR. THOMAS C. SHANAHAN, VICE PRESIDENT AND GENERAL COUNSEL, THE UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, NORTH CAROLINA

Mr. SHANAHAN. Thank you, Mr. Chairman and members of the subcommittee. I appreciate the opportunity to testify today regarding the impact of OFCCP compliance on the mission and operations of the 17-campus University of North Carolina system.

The university is strongly committed to equal opportunity in employment. We enroll more than 220,000 students across our 17 campuses and we employ 55,000 people in hundreds of different job classifications.

We share the goals that underlie OFCCP's regulatory activities and the university's policies and employment practices reflect our commitment. But as part of the higher education sector, UNC institutions are also part of one of the most highly regulated industries in the United States and we face increasing regulations with significant compliance costs. The laws and regulations within OFCCP's enforcement authority are just a few among hundreds of regulations and other requirements at the federal level alone that apply to the university system.

What this means is that our campuses have to allocate limited resources to employ compliance specialists and other professionals in order to understand and meet regulatory requirements imposed across numerous areas. And we have to do this while addressing serious budget challenges.

The university receives much of its financial support from the state of North Carolina, and by necessity the budgets adopted by North Carolina's General Assembly over the last 5 years have contained significant reductions in appropriations per student. We have responded to these challenges by prioritizing core academic and teaching programs and allocating cuts primarily to operational areas, but when it does become essential to fill compliance-related positions, our campuses face the difficult choice of allocating scarce resources to compliance rather than to teaching, research, or service—part of our mission.

UNC institutions devote significant resources to OFCCP compliance now. We estimate we employ at least 30 individuals whose primary duties involve OFCCP-related compliance across our campuses.

This estimate doesn't include efforts of academic administrators and other staff whose work includes tasks that are tied to the requirements found in Executive Order 11246 and the statutes enforced by OFCCP. It also doesn't account for the I.T. systems and business processes that have been purchased, modified, and improved over time in order to perform these compliance functions in an efficient manner.

In recent years a small number of UNC campuses have undergone compliance evaluations by OFCCP and we have responded to the agency in a prompt and comprehensive manner and have found

OFCCP investigators to be knowledgeable and professional in their conduct.

We also find that the process of preparing for and responding to compliance evaluations is lengthy, time-consuming, and resource-intensive. The time from the beginning of a review until its conclusion can extend for 2 years or more, and during that time thousands of hours of UNC staff time can be consumed in responding to requests for information and documents from OFCCP. At some campuses these compliance evaluations have consumed one or more full-time employees for extended periods of time.

Based on input from our campuses, the multiple new and enhanced record keeping, data collection, and compliance requirements contained in the Section 503 and VEVRAA final rules will further increase our compliance costs. And our campuses believe that these costs will include hundreds of hours of staff time ranging from 100 or more hours at our smallest units to several hundred hours at our larger research institutions.

We appreciate that OFCCP adjusted its annual compliance cost and effort estimates based on comments received during the rulemaking process, but we still project the need to devote the equivalent of an estimated 20 additional full-time personnel to revising systems to comply with the new regulations and to complying with the requirements once those new systems are established.

In addition, we expect that the new requirements will require the expenditure of yet more funds to reprogram, purchase, or upgrade existing management systems, alter record-keeping practices, and to revise current operational procedures, resulting in several thousand dollars in additional costs.

Once again, we support the efforts to increase employment opportunities for individuals with disabilities and protected veterans. Moreover, in keeping with its mission for and on behalf of the people of the state of North Carolina, the university is committed to ensuring that employment opportunities are extended to individuals without regard to race, gender, disability, or protected veteran status.

It is far from clear, however, that the substantial data collection, record keeping, and other process requirements prescribed by OFCCP in the final rules will achieve these desired outcomes without substantial cost burdens to the university.

Thank you.

[The statement of Mr. Shanahan follows:]

The University of North Carolina
GENERAL ADMINISTRATION - SPANGLER CENTER
POST OFFICE BOX 2688, CHAPEL HILL, NORTH CAROLINA 27515-2688
Telephone: (919) 962-1000

Constituent Universities
Appalachian State University
East Carolina University
Elizabeth City State University
Fayetteville State University
North Carolina Agricultural and Technical State University
North Carolina Central University
North Carolina State University at Raleigh
University of North Carolina at Asheville
University of North Carolina at Chapel Hill
University of North Carolina at Charlotte
University of North Carolina at Greensboro
University of North Carolina at Pembroke
University of North Carolina at Wilmington
University of North Carolina School of the Arts
Western Carolina University
Winston-Salem State University
Constituent High School
North Carolina School of Science and Mathematics
An Equal Opportunity/ Affirmative Action Employer

Statement by Thomas C. Shanahan
Vice President for Legal Affairs and General Counsel
The University of North Carolina

Before the

House Education and the Workforce Committee
Subcommittee on Workforce Protections

Hearing on

Examining Recent Actions by the Office of Federal Contract Compliance Programs

December 4, 2013

Chairman Walberg, Ranking Member Courtney, and members of the Subcommittee. My name is Tom Shanahan. I am Vice President for Legal Affairs and General Counsel of the 17-campus University of North Carolina System. I am testifying today about the costs and institutional compliance requirements associated with OFCCP regulation and enforcement and the impact of those costs and requirements on the educational mission and operation of the University of North Carolina.

I serve as the University of North Carolina system's senior legal officer, providing advice and counsel to the president, the University system's Board of Governors, and senior University staff on all legal and policy issues affecting the University. In addition, I oversee the development and implementation of policies and procedures to promote University-wide awareness of and compliance with applicable federal, state, and local laws, regulations, and administrative requirements. Prior to becoming Vice President and General Counsel, I was Associate Vice President for Legal Affairs, responsible for the University system's employment and benefits law matters. Before joining the University in 2010, I served for 10 years as an attorney and manager with the U.S. Department of Labor. During my career with the Labor Department, I handled and supervised OFCCP-related litigation as a trial attorney and as Deputy Regional Solicitor in the Atlanta region of the Office of the Solicitor. I also served as Deputy Regional Director for the Employee Benefits Security

In my statement today, I will describe UNC's commitment to equal opportunity in employment and then discuss the context in which we seek to meet that commitment, with reference to the regulatory and compliance costs faced by institutions of higher education. I will conclude by offering some specific thoughts on the recently enacted OFCCP final regulations associated with hiring protected veterans and individuals with disabilities and their expected impact on UNC.

The University of North Carolina is Committed to Equal Opportunity in Employment

The University of North Carolina is a multi-campus public university composed of 17 institutions,[1] including the nation's first public residential high school for students gifted in mathematics and science, and six historically minority institutions. The 32-member UNC Board of Governors and President Tom Ross, along with the boards of trustees and chancellors of the constituent institutions, guide the mission and work of this important asset of the State of North Carolina. The University currently enrolls more than 220,000 undergraduate, graduate, and professional students. Each component of UNC shares in the overall mission to discover, create, transmit, and apply knowledge to address the needs of individuals and society. Employing approximately 55,000 people in hundreds of occupational categories, UNC accomplishes its mission through instruction, research, and public service, which contributes to solving societal problems and enriches the quality of life in North Carolina.

Our mission is rooted in the Constitution of the State of North Carolina, which provides for the establishment of the University and instructs that the benefits of the University of North Carolina are, as far as practicable, to be extended to the people of the State free of expense. In the fulfillment of this important mission, UNC seeks to develop and support the talents of all members of the UNC community and the citizens of North Carolina. Accordingly, UNC is committed to ensuring equality of opportunity in employment and promotion throughout the University and all of its constituent institutions, and supports the goal of improving outreach to and employment opportunities for qualified individuals in all occupational categories.

The University's Board of Governors has affirmed its commitment to equality of opportunity in *The Code* of the University, which provides that admission to,

[1] The University of North Carolina consists of the following institutions: The University of North Carolina at Chapel Hill; North Carolina State University; Appalachian State University, East Carolina University; Elizabeth City State University; Fayetteville State University; North Carolina Agricultural and Technical State University; North Carolina Central University; UNC Asheville; UNC Charlotte; UNC Greensboro; UNC Pembroke; UNC Wilmington; University of North Carolina School of the Arts; Western Carolina University; Winston-Salem State University; and the North Carolina School of Science and Mathematics, a residential high school for gifted students.

employment by, and promotion in the University of North Carolina and all of its constituent institutions shall be on the basis of merit, and that there shall be no discrimination against any person on the basis of race, color, religion, sex, national origin, age, disability, or veteran status. This commitment is reflected and repeated in the policies, operations, and practices of each of the constituent institutions.

As part of its commitment to equal opportunity, UNC seeks to recruit, employ, and promote individuals with disabilities, military service members, and protected veterans. We support, without reservation, the goal of improving outreach to and employment opportunities for these individuals in all parts of the University. Indeed, the University continues to seek every opportunity to enhance its outreach and accomplish these goals through partnerships within and outside North Carolina. North Carolina is home to Fort Bragg, the Nation's largest Army post, and Marine Corps Base Camp Lejeune. North Carolina also hosts service members stationed at Cherry Point, New River, Seymour Johnson Air Force Base, Coast Guard Station Elizabeth City, and with the North Carolina National Guard. North Carolina is home to 106,461 active duty service members and their 144,718 spouses and children. North Carolina's National Guard and Reserve population is 24,093. According to the Veterans Administration, 771,654 veterans reside in North Carolina. The individuals with disabilities and protected veterans who attend and are employed by UNC institutions are integral to UNC's mission of teaching, research, and service.

UNC Institutions Face Increasing Regulation and Significant Compliance Costs

As components of a system of public higher education, UNC institutions are part of one of the most regulated industries in the United States.[2] Like other institutions in the higher education sector, UNC campuses are subject to law and regulation by the federal and state governments. In addition to government regulations, our institutions must also understand and comply with rules, policies, regulations, and requirements of many other educational, research, and accrediting organizations.

Viewed in context, the laws and regulations within OFCCP's enforcement and regulatory authority are among the hundreds of laws, regulations, agency guidelines, and other requirements applicable to universities that exist at the federal level alone.[3] The laws and regulations at the federal level have, for the most part, been enacted over the last 60 years, to serve a variety of purposes and interests. Some of the laws and

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[2] See, Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749, 751 (2010).

[3] For a partial list of federal laws, regulations, circulars, executive orders and other requirements applicable to higher education institutions, see http://counsel.cua.edu/fedlaw/index.cfm, which is part of the Campus Legal Information Clearinghouse (CLIC), a collaborative effort of The Catholic University of America's Office of General Counsel and the American Council on Education (ACE).

executive agency regulations are specific to higher education, and are designed to ensure accountability and transparency in areas such as financial aid, research, and student affairs matters. Others exist primarily to define and protect the interests of the federal government as a research funder, granting entity, or purchaser of services. Other laws, executive orders, and regulations, such as those enforced by OFCCP, the Equal Employment Opportunity Commission, the Department of Labor, and the Department of Homeland Security, are not intended specifically for the higher education sector, but apply across all industries and sectors in order to support and address important societal interests and goals, such as equality of employment opportunity and nondiscrimination.

Regardless of the purposes and sources of federal law and regulation in the higher education sector, public colleges and universities face substantial regulatory burdens that carry significant costs. I offer three observations about these burdens and costs that apply to the University of North Carolina in particular and to higher education institutions in general, in order to set the context for my remarks about OFCCP's regulatory and enforcement efforts.

First, the number and complexity of laws and regulations applicable to public systems of higher education have continued to increase over time, especially since the middle of the 20th century. There has been no period that I am aware of when regulations have been reduced. Each year brings additional legislative mandates, which are then meticulously detailed by the regulatory authority and activity of executive branch agencies, including the Departments of Education, Labor, Health & Human Services, and Homeland Security, among many others.

Second, the scope and complexity of our institutions have continued to expand, along with the expectations of students, taxpayers, and government oversight entities as to the results our institutions should deliver in the areas of teaching, research, and service. Major public colleges and universities, like those in the UNC system, educate and house tens of thousands of undergraduate, graduate, and professional students, engage in major groundbreaking and innovative research, deliver life-saving medical care, operate police departments with full law enforcement authority, and develop and transfer technology and intellectual property for commercialization and other uses. Each of these functions is subject in one way or another to regulation by federal and state entities.

Third, the expansion of regulatory and legal oversight of higher education institutions in recent decades has necessitated the development of administrative structures and staffing within colleges and universities that are focused almost solely on institutional compliance with the range of applicable laws, regulations, policies, and guidance. Major public higher education institutions now require staffs of specialists skilled in the complexities of regulatory compliance across numerous areas, including athletics, financial aid, human resources, equal opportunity, student affairs, research

compliance, international law, export law, copyright, patent law, environmental rules, and taxation, to name a few, in order to meet the expectations associated with the various laws and rules and also to avoid the sometimes significant costs associated with noncompliance.

The University of North Carolina Must Carefully Allocate Limited Resources to Regulatory Compliance

The staffing structures of the 17 UNC institutions reflect the demands imposed on them by voluminous, multi-layered and sometimes conflicting federal regulation. Like other institutions, we employ attorneys, compliance specialists, auditors, and other professionals throughout our operations in order to understand and meet the regulatory requirements that have been imposed. Moreover, our costs in terms of personnel and other resources needed to comply with both existing and new regulation and enforcement have continued to increase, as might be expected in proportion to the legal and regulatory activities of the federal government.

The University of North Carolina receives much of its financial support from the State of North Carolina. As a result, the costs of compliance and oversight associated with heavy regulation have imposed even greater challenges in recent years, as the legislature in North Carolina responded to the effects of the global recession. By necessity, the budgets adopted by North Carolina's General Assembly over the last five (5) years contained significant reductions in appropriations to the University of North Carolina, as the State took steps to prudently manage resources and address State priorities in the face of declining revenues. As a result, UNC has seen cumulative reductions in appropriations per student in excess of twelve percent (12%) over that time period and other cuts in excess of $500 million. Throughout this period, UNC responded by prioritizing core academic and teaching programs, sought to allocate cuts primarily to operational areas, and continued its efforts to improve efficiency throughout its operations.

Given these real and significant pressures, UNC institutions face a two-fold challenge. First, at the same time that federal agencies continue to increase their regulatory requirements and step up enforcement efforts, campuses have been addressing cuts to State appropriations by attempting to protect academic and mission-related functions wherever possible. This prioritization means that campuses have had to cut or leave unfilled many nonacademic and operational positions, including compliance-related positions, which would help them meet the ever-increasing regulatory burden. Second, when it becomes essential to fill compliance-related positions or incur compliance costs, campuses face the difficult choice of allocating scarce resources to compliance and operational activities, rather than to teaching, research, or service.

These factors provide the context for my comments regarding OFCCP's current regulatory and enforcement activities and the new requirements that will be imposed by the final regulations implementing Section 503 of the Rehabilitation Act of 1973 and the final regulations promulgated under Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).

University Institutions Devote Significant Resources to OFCCP Compliance

UNC system campuses rely on systems, processes and skilled employees to comply with multiple legal obligations and regulatory requirements within OFCCP's enforcement authority. For example, UNC campuses and other institutional components of the UNC system are responsible for and already perform the following activities:

- Prepare and update an affirmative action plan in compliance with federal and state requirements.

- Conduct analyses of hiring, promotion, and termination practices and take corrective action where appropriate. Take affirmative action to recruit and place females, minorities, Vietnam-era veterans and the disabled, and document those steps. Identify areas of underutilization and make good faith efforts to increase representation.

- Document steps taken to recruit minorities/females.

- Notify suppliers and vendors of the institution's government contractor status and that the supplier/vendor may be covered by applicable affirmative action requirements.

- Submit annual EEO data to the Integrated Postsecondary Education Data System (IPEDS), the core postsecondary education data collection program for the National Center for Education Statistics at the Institute for Education Services within the U.S. Department of Education.

- File annually the Vets-100 Report.

- List all job openings as required with the local Employment Security Commission office.

- Post notices as required, and include the equal employment opportunity language in advertisements for employees.

- Comply with record retention requirements with respect to materials related to hiring, assignment, promotion, demotion, transfer, layoff,

termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, or other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes.

- Conduct audits of compensation systems.

The University of North Carolina already employs as many as 30 individuals across its campuses and components whose primary duties involve the actions described above, along with other efforts to comply with Executive Order 11246, as amended (EO 11246), Section 503 of the Rehabilitation Act of 1973, as amended (Section 503), 29 U.S.C. 793; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA), 38 U.S.C. 4212. Our estimate does not include the efforts of academic administrators, hiring committee members, and other staff whose work includes tasks that are tied to requirements found in EO 11246 and the statutes enforced by OFCCP. Moreover, the estimate includes personnel only. It does not account for information technology systems, forms, and business processes that have been purchased, modified, and improved over time in order to perform OFCCP-related compliance functions in the most efficient and effective manner possible.

Responding to OFCCP Compliance Evaluations Requires Additional Resources

In recent years, a small number of UNC campuses have undergone compliance evaluations by OFCCP. In each instance, campuses have endeavored to respond to OFCCP's scheduling letters and any subsequent requests for information in a prompt and comprehensive manner. The responsible personnel at each campus have found that they generally are able to establish positive working relationships with OFCCP investigators and supervisory personnel during the evaluation, which enable the agency and the campus to complete their work as expected by OFCCP. Our experience has been that OFCCP investigators are knowledgeable with respect to applicable regulatory requirements, and professional in their conduct.

We also find, however, that the process of preparing for and responding to OFCCP compliance evaluations is lengthy, time consuming and resource intensive. The time from the beginning of a review until its conclusion can extend for two years or more. During that time, thousands of hours of UNC staff time are consumed in responding to requests for information and documents from OFCCP, and organizing it in the particular format requested by the agency. At some campuses, OFCCP compliance evaluations have consumed one or more full time employees for extended periods of time. The work that would have been performed by those employees must be assigned to others or deferred until OFCCP concludes its evaluation.

OFCCP's compliance evaluations typically include multiple requests for information and documents. In some instances, once the campus provides information to OFCCP, weeks or months will pass with no response from the agency, perhaps due to the investigator's workload or other factors. In some instances, OFCCP replaces or reassigns an investigator during a compliance evaluation. UNC campuses have found that such reassignments often result in additional requests for records and information that largely duplicate previous requests that have already been fulfilled or additional time delays while the new investigator reviews the materials already provided. While campuses always work diligently to fulfill those requests and recognize the legitimate need of the investigator to have access to necessary information, such duplicative requests add yet more cost and time to the compliance process.

UNC campuses have discovered that some OFCCP audits, while lengthy with long periods of inactivity on the part of OFCCP, are punctuated by requests from the agency for large volumes of information and records, with short response deadlines. These periods of intense activity appear at times to be driven by OFCCP's internal performance and accountability metrics, including deadlines for quarterly and year-end enforcement results reporting and case age statistics. Such factors require campuses to devote yet more resources to ongoing evaluations in order to ensure that OFCCP receives the correct data as requested.

Finally, UNC campuses undergoing compliance evaluations by OFCCP have faced the challenge of explaining some of the unique characteristics and organization of university employment and organization to OFCCP investigators. OFCCP staff is generally not familiar with important concepts of faculty-shared governance or the faculty recruitment, promotion, and tenure processes that prevail on most university campuses and are required as part of our accreditation standards. For example, campus compliance personnel must explain to OFCCP personnel that the promotion of a tenured or tenure-track faculty member from assistant professor to associate professor is not the same either in concept or in practice as a competitive promotion event might be in other industries. In addition, campus personnel must explain why people that appear to have similar job titles do not necessarily fall within the same categories or salary ranges. A "Director" in Alumni relations, for example, is very different than a "Director" of the Nuclear Plant on a campus.

The Final Rules Implementing Section 503 and VEVRAA Will Increase Compliance Costs

Based on input from UNC's constituent institutions and affiliated entities, the multiple new and enhanced recordkeeping, data collection, and compliance requirements contained in the Section 503 and VEVRAA final rules promulgated by OFCCP will require hundreds of hours of staff time across the UNC system, ranging from one hundred or more hours at the smallest establishments and institutions, to several hundred hours at UNC's larger research institutions. UNC institutions will also face the need to purchase or upgrade existing management information systems, alter

recordkeeping practices, and revise current operational procedures or create new ones, resulting in several thousand dollars in additional costs.

UNC's commitment to ensuring equality of opportunity in employment and promotion throughout the university system is central to its mission. Consistent with their commitments, UNC constituent institutions and affiliated entities utilize a variety of approaches, tailored to their specific missions and job categories, to identify, hire, retain, and promote the best qualified people, including individuals with disabilities. With these goals in mind, several UNC entities have reviewed OFCCP's adoption of a national utilization goal for employment of individuals with disabilities and the establishment of benchmarks for employment of protected veterans. The University believes that the new rules provide little support or assistance in their outreach and employment efforts with respect to individuals with disabilities and protected veterans, but that the data collection and tracking processes required by both rules will substantially increase costs.

As others have noted, OFCCP's decision to establish a single national utilization goal has at least two problems. First, the target percentage is based primarily on disability data collected from responses to brief questions that are part of the Census Bureau's American Community Survey (ACS). There is no apparent relationship between the ACS questions and the definition of "disability" that OFCCP and the Equal Employment Opportunity Commission (EEOC) enforce under Section 503 of the Rehabilitation Act and the Americans with Disabilities Act, as amended. Moreover, OFCCP has focused on contractor obligations with respect to those employees who *voluntarily* choose to *self-identify* as individuals with disabilities. Like other employers, UNC recognizes that individuals with disabilities often prefer not to share information concerning their disability status. It is far from clear that the utilization goal selected by OFCCP will approximate in any meaningful way the availability of individuals with disabilities in the national workforce.

OFCCP's decision to require a national utilization goal and apply it to each job group essentially presupposes that individuals with disabilities are available in equal proportions in all occupational categories, regardless of geographic location or industry. UNC's constituent institutions and affiliated entities employ individuals in hundreds of occupational categories, ranging from housekeepers and craft workers to specialized professors and researchers. We do not see that a national utilization goal is useful or appropriate for organizations of the size, complexity, and multiple occupational categories that we see in higher education generally, or in the UNC system. As a practical matter, UNC institutions report that they expect to derive no benefit or assistance at all to their recruitment, hiring, and utilization goals as a result of a single national utilization goal. As a result, UNC institutions will be required to shoulder the substantial regulatory requirements associated with gathering and keeping information necessary to compare our workforce to the utilization goal, while potentially deriving little to no practical utility from such efforts.

Similarly, the final VEVRAA rule requires University of North Carolina institutions to establish annual hiring benchmarks, either based on the national percentage of veterans in the workforce (currently eight percent(8%)), or based on the best available data and factors, as specified in the regulations. As with the Section 503 rule, UNC institutions will be required to document, track, analyze, and update annually several quantitative comparisons for the number of individuals who apply for jobs and the number of individuals with disabilities and protected veterans they hire. In addition, both the VEVRAA and Section 503 rule require pre- and post-offer invitations to self-identify, with attendant documentation requirements, as well as documentation of outreach and recruitment efforts.

UNC appreciates that OFCCP adjusted its total annual compliance cost and effort estimates based on comments received during the rulemaking process for the Section 503 and VEVRAA rules. Nonetheless, UNC projects that it will need to devote an estimated twenty (20) additional full-time equivalent personnel to revising systems to comply with the new regulations and to complying with the new requirements once the new systems are established. In addition, UNC expects that the new requirements will require expenditure of additional funds to reprogram or purchase existing systems to meeting compliance requirements. As described in my earlier comments, these costs are difficult for UNC institutions to absorb, given adjustments in state appropriations and the mission-critical needs surrounding teaching, research, and services.

Conclusion

The University of North Carolina supports efforts to increase employment and promotional opportunities for individuals with disabilities and protected veterans. Moreover, in keeping with its mission for and on behalf of the people of the State of North Carolina, the University remains committed to ensuring that employment opportunities are extended to individuals without regard to race, gender, disability, protected veterans status or other discriminatory bases. The University will continue to seek opportunities to partner with public and private organizations to identify the best-qualified individuals for the University workforce, and will thereby work to achieve the outcomes that we understand OFCCP hopes to achieve through its regulatory and enforcement agenda. It is far from clear, however, that the substantial data collection, record-keeping, and other process requirements prescribed by OFCCP in the Section 503 and VEVRAA provide the best way to achieve these desired outcomes.

The University of North Carolina joins with other contractors in urging appropriate review and oversight of OFCCP's regulatory and enforcement activity. The University of North Carolina seeks to advance the nondiscrimination goals of Section 503, VEVRAA, and EO-11246, but is hampered in doing so when agency rules do not take account of the nature of our workforce and the significant compliance and cost pressures we face as a public system of higher education.

Chairman WALBERG. Thank you.

Mr. Fitzgerald, welcome, and you are recognized for your 5 minutes.

STATEMENT OF MR. BRIAN FITZGERALD, CHIEF EXECUTIVE OFFICER, EASTER SEALS NEW JERSEY, EAST BRUNSWICK, NEW JERSEY

Mr. FITZGERALD. Mr. Chairman and members of the subcommittee, my name is Brian Fitzgerald. I am the president and CEO of Easter Seals New Jersey, a nonprofit that helps individuals with disabilities, veterans, and other New Jersey residents achieve their potential, including helping them find employment. Thank you for inviting me to testify how final rules announced by the Department of Labor will help veterans and people with disabilities have meaningful opportunities to compete for jobs with federal contractors.

My entire professional career has focused on the employment for people with disabilities and veterans. I joined Easter Seals in 1975 as a vocational counselor, where I helped people with disabilities develop skills to find and maintain jobs. In 1989 I became CEO of Easter Seals New Jersey.

Over these nearly 40 years I have relied on the training, decision-making, and responsibilities I learned in the military. In 1967 I joined the United States Army and served as an infantry officer until 1972.

When I left I struggled to translate my military skills to the civilian workforce. I spent several months job hunting but I failed to get noticed to prove I was qualified.

I ran into the barriers veterans face today when their only previous work experience is the military. I had leadership; I had skills; I had discipline. But I couldn't turn that experience into a job.

My first break came thanks to a college buddy. His company had an open position and he asked me to apply. My friend went to bat for me. I got a call for an interview and later a job offer.

My buddy's intervention didn't guarantee me a job or even an interview, but that warm handoff to a willing recipient ensured my resume got noticed and was fairly considered.

The Rehabilitation Act and the Vietnam Era Veterans' Readjustment Assistance Act help ensure job applicants with disabilities and who are veterans have a fair shot at employment. These laws prohibit employment discrimination and require federal contractors to affirmatively recruit and hire qualified veterans and individuals with disabilities.

The final rules represent the logical step in meeting our nation's longstanding commitment of promoting and protecting employment opportunities for these populations. They set a hiring benchmark for veterans and a utilization goal for people with disabilities, as well as the data categories contractors can use to measure their recruitment and hiring strategies.

Some may ask whether we need to set measures and hiring goals and benchmarks since the protections and affirmative action rules are already in place. The answer is yes. I have been in management long enough that what gets measured gets done.

Employment is critical to a veteran's successful transition. It is the foundation to their successful transition to civilian life. Once employed, health care and ability to have a home follows.

Employment also leads to greater independence for individuals with disabilities. Despite national efforts and good intentions, people with disabilities continue to face double-digit unemployment and veterans still struggle to find jobs.

My written testimony features a female veteran from New Jersey who struggles to find work. She is depressed and frustrated that no one will give her a chance. We are helping her through our new women veterans program.

Why do these two populations struggle to find work? The female veteran pointed out to stigma, bias, and fear on the part of prospective employers.

Unfamiliarity with veterans is also an issue. My written testimony highlights a company interested in hiring veterans, yet their H.R. manager questioned whether veterans fit into the company's participatory culture, given the command and control and top-down culture of the military.

Older veterans and workers with disabilities often find similar employer apprehension.

Easter Seals works to match qualified job seekers with New Jersey businesses. When we do, companies come back looking for similarly-qualified candidates, but the key was getting the company to first consider the person. The final rules will ensure companies are actively recruiting and reviewing candidates from these populations.

Like from my first experience, these changes don't guarantee a job or an interview, but they help assure contractors are effectively recruiting these candidates and that qualified candidates are seriously considered. These rules will provide veterans and people with disabilities with the chance to compete for jobs at companies that receive federal funding.

Thank you for the opportunity to testify. I will be pleased to answer any questions.

[The statement of Mr. Fitzgerald follows:]

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Testimony of

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Chairman Walberg, Ranking Member Courtney and Members of the Subcommittee,

My name is Brian Fitzgerald. I am the president and CEO of Easter Seals New Jersey. Thank you for inviting me to testify before this distinguished panel about the employment needs of veterans and people with disabilities and how final rules announced by the U.S. Department of Labor (DOL) will help to ensure these underserved populations have fair and meaningful opportunities to compete for jobs with businesses who do work for the federal government.

Many of you are familiar with Easter Seals and our mission of providing help, hope and answers to people with disabilities, veterans and other Americans and their families. Easter Seals was formed in 1919 by a parent who found his Ohio community was unable to meet the service needs of his son who was seriously injured in an accident. From that humble beginning, Easter Seals has expanded to provide exceptional services in communities across the country, including in New Jersey and in every state represented by Members on this Subcommittee (except the Northern Mariana Islands).

Easter Seals New Jersey is one of 72 community-based Easter Seals affiliates. Since 1948, Easter Seals New Jersey has helped New Jersey families through quality, person-centered services and supports, ranging from housing and care coordination to mental health and autism services. Easter Seals New Jersey specializes in job training and employment services, such as job development, placement and on-the-job supports. Last year, Easter Seals New Jersey assisted thousands of individuals and their families, nearly 15 percent of whom benefited from Easter Seals employment programs.

Today's hearing focuses on an area that I have worked in my entire professional career: employment for people with disabilities and veterans. I joined Easter Seals in 1975 as a vocational counselor where I worked directly with individuals with disabilities to help them develop skills and to find and maintain jobs. From there I moved up within the organization taking on new responsibilities as director of vocational training programs, vice president of vocational services and chief operations officer. In 1989, I was named Easter Seals New Jersey's president and CEO. The last several years, we have expanded our services to veterans as part of Easter Seals' Military and Veterans Initiative to help address the unmet employment and other needs of U.S. service members returning home from the wars in Iraq and Afghanistan.

My interest in social services and in helping others grew from my earlier service in the United States Military. In 1967, I joined the U.S. Army directly out of college and served as an infantry leader in Vietnam. First as a rifle platoon leader and later as captain of a combat support company, my responsibility was the care, direction and feeding of the men under my command. As those of you who have served know, the military takes care of its own. So it was a natural transition to go from the military to social services, which also focuses on caring for and assisting others. I attribute my success at growing Easter Seals New Jersey from a small $16 million operation to

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a $100 million, 1,800-employee organization to the training, decision-making, and responsibility I learned and developed in the military.

However, like many of the stories we hear today, I also struggled to translate my military skills and experience to the civilian workforce. I left the U.S. Army in May of 1972 and, other than a short two-week respite, I spent the next several months job hunting full-time, responding to job notices and submitting cover letters and resumes. Of course, this was all before email and the Internet and so my daily ritual was to open my mailbox to await rejection letters that would drip in weekly, sometimes daily. This went on for about five months, with an occasional job interview in between the many form letters I received indicating the jobs were filled by other applicants. In a bit of irony, my last U.S. Army assignment was helping fellow soldiers match their military occupation specialties with civilian jobs when they exited the military. Despite my direct experience in the area and what I felt were demonstrable skills, I failed to break through, to get noticed, to land that first opportunity to prove I was qualified and right for the position. I ran into the barrier that many transitioning service members face today when their only previous work experience is also exclusively military related. I had leadership. I had skills. I had discipline. But I couldn't translate that experience into a business management job. At that time, there was even less assistance in helping service members prepare for the transition to the civilian world.

My first big break came thanks to a college buddy of mine. He left the military three years earlier and worked for a major insurance company in New Jersey. He knew I was looking for work and thought I would be good for a manager position that was open in another department. My friend went to bat for me. He talked to his boss and convinced him to give my resume to the head of that department. A few days later I got a call to schedule an interview, which was later followed by a job offer. My buddy's intervention didn't guarantee me a job or even an interview, for that matter. But the little extra help, that warm handoff to a willing recipient, did help to ensure my resume got noticed and was fairly considered.

The bipartisan Rehabilitation Act of 1973 (Rehab Act) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) were designed to ensure job applicants with disabilities and applicants who are veterans have a fair shot at employment. For decades, these laws have prohibited employment discrimination on the basis of veteran status or disability and have required federal contractors and subcontractors to affirmatively recruit, hire, and promote qualified veterans or individuals with disabilities. Easter Seals supports the final Section 503 and VEVRAA rules because they represent the logical next step in meeting our nation's long commitment of promoting and protecting employment opportunities for veterans and people with disabilities. Most significantly, the rules set a hiring benchmark (for veterans) and utilization goal (for people with disabilities) that federal contractors will have to work toward to comply with long-standing law. The rules also set up a means to measure the effectiveness of an organization's recruitment and hiring strategies through the internal data that these organizations will now collect. These new requirements simply add metrics and measurements, not rigid quotas, to ensure that the strategies contractors put in place to recruit and review qualified veterans and individuals with disabilities are effective and meet the intent of the law.

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Some may ask whether we need to set and measure hiring goals and benchmarks since the protections and affirmative action rules are already in place. To me, the answer is simple: yes. I have been in management long enough to know that what gets measured gets done. I participate regularly in a CEO peer-to-peer group in New Jersey where we talk about various management and business issues. Whether your line of work is social services, business or politics, successful people set goals and regularly measure them to determine what is working, what is not and whether you need to adjust slightly to meet a goal. The data categories set up in the final rules provide CEOs and managers with another measurement tool they can use to evaluate the effectiveness of one of their required objectives. Successful implementation of these rules is not only good for the qualified jobseeker. Success also means the company has a strong, qualified and diverse workforce that is representative of the community the company operates in.

Easter Seals has made employment for people with disabilities and veterans a nationwide priority. Employment is a critical element in the successful transition of a returning service member. In addition, employment helps individuals with disabilities achieve greater independence and the chance to fully participate in and contribute to society. Easter Seals New Jersey partners with large and small businesses in New Jersey to help them meet their staffing needs. For example, a New Jersey water conditioning company came to Easter Seals looking for help in finding a qualified employee. We found a perfect match that just a few years earlier would have seemed impossible. David, a 39-year-old New Jersey man, was referred to Easter Seals New Jersey with no job experience. He suffered from intense fear and anxiety and was later diagnosed with agoraphobia, a condition that causes a person to be afraid of new situations and environments, as well as open spaces. An Easter Seals employment service specialist worked with David to develop his social skills and overcome his fear of public settings. Through Easter Seals' packaging and fulfillment services program, David mastered in-house assembly and packaging responsibilities, as well as warehouse operation duties. This was about the time we heard from the water conditioning company and we made the connection. He was hired full-time and, a short time later, was promoted to warehouse manager (nearly doubling his pay). He now accompanies coworkers on installation jobs in the community which, before working with Easter Seals, would have been considered impossible. His employer said that "Dave is an asset" and that they "don't know what we would do without his help." We believe the Section 503 and VEVRAA rules will strengthen our business partnerships and our efforts to introduce qualified candidates to businesses with job openings.

Despite targeted hiring fairs, enormous goodwill among the business community and key national efforts like the National Governors Association's "A Better Bottom Line" disability employment initiative or the VOW to Hire Heroes Act legislation, people with disabilities continue to face double digit unemployment and veterans still struggle to find meaningful employment. The Bureau of Labor Statistics' (BLS) found in its 2012 Employment Situation of Veterans summary that unemployment was much higher for Gulf War-era II veterans (9.9%) compared to non-veterans (7.9%) as well as for male veterans ages 18 to 24 (20% unemployment) compared to non-veterans of the same age group (16.4%). BLS also reported in its most recent monthly employment status report (Table A-6) that the unemployment rate in October 2013 for people with disabilities (12.8%) was nearly twice the unemployment rate for people without disabilities (6.7%). The labor force participation during the same

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month was just as dismal. Only 2 in 10 Americans with disabilities were in the labor force in October 2013 compared to almost 7 in 10 Americans without disabilities.

One of those people struggling to find work is a young female veteran from New Jersey. She entered the military following 9/11 and honorably served for several years. While on active duty, she suffered substantial ailments. She went to college after exiting the military and earned a bachelor's degree. However, she has been unsuccessful in gaining employment in her field. She points to stigma, bias and fear on the part of the prospective employers as reasons she has not been able to find a job. "No one is willing to give me a chance," she said. Repeated roadblocks and a series of recent health-related concerns have left her depressed and frustrated. She was recently introduced to Easter Seals New Jersey where we are working to address her wellness concerns and are making preparations to help her succeed in finding meaningful employment.

There are a multitude of reasons why employment rates for these important populations lag behind other American workers. Easter Seals New Jersey is stepping up its efforts to address the unemployment challenges this young female veterans and others face in our state. This summer, we launched a new Military and Veterans Initiative to assist female veterans, the fastest growing veteran population. The U.S. Department of Veterans Affairs (VA) estimates that, in New Jersey alone, approximately 33,000 female veterans will return home after their military service. Female veterans are at two times greater risk to become homeless than their non-veteran counterparts and three times at greater risk to live in poverty, according to VA research from the National Center on Homelessness among Veterans. Our goal is to help address their needs during transition and assisting them in their efforts to find employment is the first step to help in their reintegration.

Companies are also responding to this great need and, in some cases, are turning to Easter Seals for help to meet their employment and hiring goals. One company recently approached Easter Seals New Jersey seeking our employment expertise to help the company recruit, hire and retain veterans in their workforce. We met with the company's senior human resource (HR) manager who, after identifying her company's goal, expressed reservations about whether veterans fit into the company's participatory culture given the command and control, top-down culture of the military. This was a company whose leadership had identified hiring veterans as a priority but yet, due to lack of familiarity, had this perspective. It is an educational process that starts with just one positive hiring experience. Older veterans and workers often find the same employer apprehension as they try to break back into the workforce. The senior employment program we operate at Easter Seals uses internship-like work experiences as a way to introduce a qualified candidate to an employer to help breakdown misconceptions. Companies have come back to us after having found success with the veteran or individual with disabilities we found for them and have ask for more candidates like them. But the key was getting the company or HR manager to consider the person in the first place. The changes in the final rules will help ensure qualified candidates – who have traditionally struggled to break through the employment process – to get noticed and considered. Like my experience with my college buddy, these changes don't guarantee a person will get a job or an interview, but it helps assure the company is effectively recruiting these candidates and that qualified candidates are seriously considered.

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Thank you again for the opportunity to testify before the Subcommittee. My interest in the rules and their successful implementation are based on my experience as a veteran who struggled to find a job and also based on my professional work in addressing the employment needs of people with disabilities and veterans as well as the staffing needs of businesses in New Jersey. Easter Seals believes that everyone has a valuable contribution to make to their community and that the Section 503 and VEVRAA rules could help to significantly move the needle on disability and veterans' employment. Easter Seals stands ready to assist in the implementation of these rules by helping to connect federal contractors that have job openings with qualified veterans and individuals with disabilities who seek employment. Together, we can help to put veterans, who have served our nation, and people with disabilities, who represent a significant part of our society, in the best position to succeed.

Thank you. I will be pleased to answer any questions.

Chairman WALBERG. Thank you, Mr. Fitzgerald.

Mr. Kirschner, recognized for your 5 minutes of testimony.

STATEMENT OF MR. CURT KIRSCHNER, PARTNER, JONES DAY, SAN FRANCISCO, CALIFORNIA, TESTIFYING ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION

Mr. KIRSCHNER. Good morning, Chairman Walberg, Ranking Member Courtney, and distinguished members of the subcommittee. I am Curt Kirschner, a partner of the Jones Day law firm, and today I am testifying on behalf of the American Hospital Association, with its over 5,000 member hospitals. Thank you for the opportunity to testify.

My comments today will briefly summarize a critical issue facing our nation's hospitals. A more thorough discussion of this issue is included in AHA's written testimony submitted to the subcommittee, which I request to be introduced into the record.

Recently, the OFCCP has sought to expand aggressively its jurisdiction over hospitals without advance notice to those hospitals and without their agreement or consent. The agency's attempt to expand its jurisdiction is based on hospitals providing medical care pursuant to federally funded health benefit plans, including TRICARE, the health benefit plan for servicemembers and their families; and FEHBP, the health plan covering federal employees and their families.

The OFCCP is seeking to cover hospital providers participating in the managed care plan options within TRICARE and FEHBP despite the fact that the government agencies that actually administer those programs—the Department of Defense and the Office of Personnel Management—continue to assert, through their own regulations, that such hospitals are not government contractors.

To be clear, the concerns of our nation's hospitals with the OFCCP's position has nothing to do with being subject to nondiscrimination laws. Hospitals already are and will continue to be governed by numerous federal, state, and local nondiscrimination laws regardless of whether they are considered federal contractors.

Rather, the concerns expressed here are based on the massive record-keeping obligations and sometimes crushing regulatory burdens that the OFCCP unknowingly imposes on hospitals as a result of their being deemed federal contractors as a result of providing medical care to servicemembers and federal employees.

The OFCCP's position is a significant departure for the agency. For many years, including both the Clinton and Bush administration, the agency's position on this issue has been consistent with that of the DOD and the OPM—that is, that hospitals participating in TRICARE or FEHBP are not considered federal contractors. Now the OFCCP's current position conflicts with both the regulations of the OPM and the DOD, and it also conflicts with the Grant Act, the U.S. law that excludes payments such as those received from federally funded health benefit plans from the definition of what constitutes a federal procurement contract.

The OFCCP's recent expansion of jurisdiction over hospitals is untenable for a number of other reasons. First, there is no reasonable explanation for the agency's abrupt change in position. The federal benefit plans at issue have been—including their managed

care components—have been consistent and not substantively changed for many years.

In fact, the only recent legal change that occurred was the 2011 adoption of section 715 of the National Defense Authorization Act, which explicitly sought to limit the OFCCP's jurisdiction over hospital providers participating in TRICARE. Despite this new limiting statute, the OFCCP has argued that this law does not actually deprive the agency of jurisdiction over hospitals participating in the TRICARE program.

The agency's proposed dichotomy between managed care and fee-for-service plans makes no sense. Under the agency's view, a medical procedure performed at one hospital, pursuant to a TRICARE plan that is participating in a plan with managed care options, would cause the hospital to be considered a federal contractor.

On the other hand, the same procedure performed at a hospital that participates in a TRICARE plan that is a fee-for-service plan would not cause the hospital to be a federal contractor. Such different treatment of hospitals providing essentially the same care is illogical.

Moreover, the ambiguity created by the OFCCP's position will inevitably lead to costly and unnecessary litigation over the agency's jurisdiction, diverting precious resources that would otherwise be available for patient care.

In conclusion, the delivery of patient care, whether provided as part of a fee-for-service or managed care contract, should not be deemed to be a federal contract. Therefore, the AHA fully supports H.R. 3633, the Protecting Health Care Providers from Increased Administrative Burdens Act, introduced yesterday by Chairman Walberg. This bill would help maintain a robust network of health care providers for servicemembers, federal employees, and their families by providing clear legal guidance that the care rendered to them under federally funded programs would not unknowingly and incorrectly classify the providers as federal contractors.

Thank you for the opportunity to provide these comments.

[The statement of Mr. Kirschner follows:]

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Statement
of the
American Hospital Association
before the
Subcommittee on Workforce Protections
of the
Education and the Workforce Committee
of the
U.S. House of Representatives

Hearing on
"Examining Recent Actions by the Office of Federal Contract Compliance Programs"

The OFCCP's Jurisdictional Land Grab: The OFCCP's Unwarranted Expansion of Jurisdiction over Hospitals Providing Care for Service Members and other Federal Employees

December 4, 2013

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our 43,000 individual members, the American Hospital Association (AHA) appreciates the opportunity to submit this statement to the Education and the Workforce Committee's Subcommittee on Workforce Protections as it examines "Recent Actions by the Office of Federal Contract Compliance Programs" (OFCCP).

The OFCCP has sought to expand aggressively its jurisdiction over health care providers, including providers participating in federal health care programs that, for many years, have been acknowledged by the OFCCP *not* to provide a jurisdictional basis for federal contractor status. The OFCCP now asserts that hospitals participating in certain unspecified components of TRICARE, the health care program for military service members and their families, and the Federal Employees Health Benefit Program (FEHBP), the health care program for civilian employees and their families, are federal contractors subject to its regulatory scheme. This assertion would, if accepted, convert virtually overnight a majority of our nation's hospitals into federal contractors, without advance notice to or agreement by those hospitals. The OFCCP's current position is not only inconsistent with the views of the federal agencies that administer TRICARE and FEHBP, but is also legally incorrect, will engender unnecessary and distracting litigation, and will divert precious resources that otherwise should be directed towards patient care.

To be clear, our nation's hospitals are not seeking to be excluded from coverage by nondiscrimination laws. These federal, state and local laws are and will remain applicable to hospital employers. Rather, the concerns expressed here are with the significant and sometimes crushing regulatory burden that the OFCCP imposes on employers that meet its definition for being a federal contractor.

Rather than pursue its expansionary tactics, the OFCCP should revert to the clear guidelines that the agency had in place for many years, under which hospitals providing care to participants in federally funded health benefit programs, including FEHBP, TRICARE and Medicare, were not considered federal contractors.

Given that the OFCCP has given no indication that it intends to revert to its prior clear and correct jurisdictional position, Congress should adopt legislation directing this outcome. Legislation would clarify for all concerned that recipients of payments from the Federal Government related to the delivery of health care services to individuals shall not be treated as Federal contractors by the OFCCP based on the work performed or actions taken by such individuals that resulted in the receipt of such payment. This type of legislation would help maintain a robust network of health care providers for service members, federal employees, and their families, by giving clear legal guidance that the care rendered to them under these federally funded programs would not unknowingly and incorrectly classify the providers as federal contractors.

THE OFCCP'S ATTEMPTS TO EXPAND ITS JURISDICTION OVER HEALTH CARE INSTITUTIONS

The OFCCP's expansionist agenda is based primarily on hospital participation in federally funded health benefit plans offered under TRICARE, FEHBP and Medicare Parts C and D. TRICARE, which is administered by the Department of Defense (DOD), provides health benefits for approximately 9.63 million military service members and their families. The DOD has reported to Congress that approximately 3,300 hospitals participate in TRICARE, a solid majority of the more than 5,700 hospitals registered in the U.S. According to the Office of Personnel Management (OPM), FEHBP covers more than 8 million current and former federal employees and retirees and their family members. Medicare is sponsored by the Centers for Medicare & Medicaid Services (CMS) and provides health insurance for about 50.7 million people. About 27 percent of Medicare participants (or more than 13 million people) are enrolled in Medicare Part C. The OPM and the CMS have not published the number of hospitals participating in FEHBP or Medicare Parts C and D, but the AHA understands that many U.S. hospitals provide patient care services under these federally funded programs.

The OFCCP's recent attempts to expand its jurisdiction has focused on the managed care components of these health plans. Generally speaking, "managed care," a term that has been in use since the early 1980s, refers to a system of health care that controls costs by placing limits on physicians and hospital fees and by restricting in some way the patient's choice of physicians and hospitals. A Health Maintenance Organization (HMO) and a Preferred Provider Organization (PPO) are examples of health plans that include managed care components.

Like many health plans offered in the private sector, the three federally funded health programs at issue offer a variety of plan options, many of which include managed care components. TRICARE, for example, offers an overlapping mix of more than 10 plan options, which include both a traditional indemnity or fee-for-service option (containing little, if any, managed care components), and PPOs and HMOs. FEHBP includes almost 300 plan options, running the gamut from pure indemnity plans to restrictive HMOs, with numerous options in between. Medicare includes both traditional indemnity plans under Parts A and B, as well as managed care components under Parts C and D. Given the wide variety of options provided under TRICARE and, especially, FEHBP, there is no clear dichotomy between "managed care" and "fee-for-service" options under TRICARE and FEHBP. (Appendix A includes additional background information on each of these federally funded programs.)

Through pending litigation, the OFCCP has asserted jurisdiction over hospitals that participate in certain unspecified managed care plans offered under federally funded health benefit programs. In addition, the OFCCP has issued internal directives that confirm the agency's strategy to gain jurisdiction over an untold number (but certainly a majority) of hospitals operating in the U.S.

OFCCP's Litigation to Expand its Jurisdiction. Until fairly recently, the OFCCP's jurisdiction was fairly well-settled not to cover hospitals participating in federally funded health benefit programs. For example, since the 1990s, the OFCCP has acknowledged that it does not have jurisdiction over hospitals participating in Medicare because Medicare provider payments are considered federal financial assistance and not a government contract. (*See Partridge v. Reich*, 141 F.3d 920, 925-26 (9th Cir. 1998); *see also* OFCCP Directive No. 189 (1993) ("OFCCP considers health care institutions that provide services to Medicare and Medicaid beneficiaries as recipients of federal financial assistance and not as contractors").)

More than 10 years ago, the OFCCP sought to extend its jurisdiction to cover hospitals participating in the FEHBP program. After the Administrative Review Board (ARB) rejected OFCCP's claims in *In Re Bridgeport Hosp.*, ARB Case No. 00-034 (DOL Admin. Rev. Bd. Jan. 31, 2003), the agency backed down and acknowledged that it did not have jurisdiction over hospitals participating in the FEHBP. (*See* OFCCP Directive 262 (2003) ("OFCCP cannot use FEHBP coverage as a basis to assert jurisdiction over a health care provider").)

Despite the OFCCP's prior acknowledgement of its jurisdictional limits based on hospital participation in federally funded health benefit programs, the agency brought litigation against two hospitals based on their participation in TRICARE and FEHBP. In *OFCCP v. Florida Hospital of Orlando*, the agency brought an action against Florida Hospital asserting that, as a result of the hospital's agreement to provide health care services to TRICARE beneficiaries pursuant to an agreement it had with a private company responsible for administering the TRICARE program, the hospital was a covered federal subcontractor. Following a decision by an Administrative Law Judge (ALJ) accepting the OFCCP's argument, Congress passed Section 715 of the *National Defense Authorization Act for Fiscal Year 2012* (NDAA), which was signed

into law by President Obama.[1] NDAA included various amendments to the TRICARE program, including a provision exempting TRICARE network providers from federal contractor status.

Instead of honoring and enforcing the new law, the OFCCP continued to pursue a finding of federal contractor status against Florida Hospital, arguing to the ARB that NDAA did not act as a complete bar to a finding of federal contractor status based on participation in TRICARE. The OFCCP even suggested that the Secretary of Labor's authority should exceed that of Congress in this area, by arguing that "Congress usurped [the Secretary of Labor's] authority by limiting whether TRICARE network providers could be considered subcontractors under . . . the laws enforced by OFCCP." (*See* Plaintiff OFCCP's Resp. to ARB's Request for Briefing on the Impact of Section 715 of the National Defense Authorization Act, ARB Case No. 11-011 (filed Mar. 13, 2012).) After the ARB rejected the OFCCP's arguments, the OFCCP filed a petition for rehearing, again asserting that Congress's legislative act did not foreclose OFCCP's arguments of federal contractor status based on Florida Hospital's participation in TRICARE. This time, the ARB found in favor of the OFCCP on this issue, but remanded the case back to the ALJ for further findings regarding whether participation in TRICARE amounts to federal financial assistance that is not a federal contract. The case remains pending before the ALJ, five years after the OFCCP first brought the action.

Similarly, in *OFCCP v. UPMC Braddock*, the agency brought an action alleging that hospitals that had an HMO contract to provide health care services to FEHBP participants were federal subcontractors subject to OFCCP jurisdiction. Following an appeal by UPMC Braddock after a ruling by the ARB in favor of OFCCP, the District Court agreed with OFCCP's decision. That 2013 decision currently is on appeal to the D.C. Circuit Court of Appeals.

OFCCP Internal Directives. On Dec. 16, 2010, the OFCCP issued internally, but did not publicly publish, Directive 293, a document summarizing the agency's initiatives for how it intended to carry out its coverage assessments of health care providers. Directive 293 stated that health care providers that participate in a managed care program within TRICARE are covered federal subcontractors, regardless of other factors, including the DOD's position to the contrary, and also that health care providers who, pursuant to HMO contracts, provide services to FEHBP beneficiaries are covered federal subcontractors, regardless of OPM's position to the contrary. Directive 293 also included the OFCCP's first formal statement that participating in Medicare Part C (Advantage) or Medicare Part D (covering prescription drugs plans) may subject a health care provider to the agency's jurisdiction. Directive 293 expressly superseded the two prior directives of the agency that excluded completely jurisdiction based on participation in Medicare (Directive 189) and FEHBP (Directive 262).

On April 25, 2012, the OFCCP rescinded (at least nominally) Directive 293. In Directive 301, the agency stated that, while rescission of Directive 293 was warranted in light of "recent legislation and related development in pending litigation," the OFCCP reaffirmed that it would "continue to use a case-by-case approach to make coverage determinations in keeping with its regulatory principles applicable to contract and subcontract relationships and OFCCP case law."

[1] Pub. Law No. 112-81, 125 Stat. 1298 (Dec. 31, 2011).

In addition, Directive 301 reiterated that its rescission of Directive 293 "at this time" "should not be interpreted as reinstating prior Directive Numbers 189 and 262." Thus, even though the OFCCP formally rescinded Directive 293, the agency has not retreated from the positions laid out in Directive 293. In fact, the OFCCP's arguments in the pending litigation confirm that it continues to adhere to the jurisdictional positions set forth in Directive 293.[2]

THE OFCCP'S PROPOSED JURISDICTIONAL EXPANSION OVER HOSPITALS WOULD BE MASSIVE AND UNPRECEDENTED, LEADING TO SIGNIFICANT JURISDICTIONAL DISPUTES

If the OFCCP's current agenda is upheld, the expansion of its jurisdiction would be unprecedented. With regard to the TRICARE program alone, more than 3,330 hospitals and clinics provide coverage to more than 9.6 million TRICARE beneficiaries.[3] If all of these providers are included within the agency's current definition of "federal subcontractor," the OFCCP's jurisdiction will expand to cover almost 60 percent of the registered hospitals in the U.S. And this does not even account for the numerous hospitals and health care providers that serve the more than 8 million FEHBP beneficiaries that would be considered federal contractors under the agency's new policy.

The OFCCP's assertion of jurisdiction over any given hospital does not rest on notice to that hospital or even the consent of that hospital. Rather, any health care provider with a contract that the agency deems to constitute a federal contract is, by operation of law, subject to the OFCCP's jurisdiction. The OFCCP has made clear that "we didn't know" and "we didn't consent," and even "we were told explicitly we weren't a federal subcontractor by the agency that is directly responsible for the program," are not valid defenses to a failure to comply with the agency's regulations and compliance obligations.[4]

The OFCCP's proposed "case by case" approach to determining federal contractor status based on the specific type of TRICARE or FEHBP plan that covers the care provided by a particular hospital inevitably will lead to confusion and jurisdictional disputes. The OFCCP has never explained which of the more than 10 health plan options provided under TRICARE or the almost 300 options under FEHBP would give rise to federal contractor status. The agency also has

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[2] *See, e.g.*, *OFCCP v. Florida Hosp. of Orlando*, Case No. 11-011 (ARB July 22, 2013) (discussing OFCCP's arguments in favor of a majority ruling from the ARB that its jurisdiction extends to TRICARE providers); *UPMC Braddock v. Harris*, 2013 WL 1290939 (D.D.C. Mar. 30, 2013) (discussing the Secretary of Labor's arguments in favor of the OFCCP's right to assert jurisdiction over hospitals providing care to FEHBP participants through HMO plans).

[3] DEPARTMENT OF DEFENSE, EVALUATION OF THE TRICARE PROGRAM: ACCESS, COST, AND QUALITY, FISCAL YEAR 2013 REPORT TO CONGRESS 9, *available at* http://www.tricare.mil/tma/congressionalinformation/downloads/TRICARE%20Program%20Effectiveness%20(FY%202013).pdf [hereinafter DOD REPORT TO CONGRESS].

[4] *See* OFCCP Jurisdiction Webinar (Dec. 3, 2009), *available at* http://www.dol.gov/ofccp/Presentation/Jurisdiction_SOL_Webinar.pdf.

never clearly explained why it would have no jurisdiction over a hospital providing care under Medicare Parts A and B and certain plan options under TRICARE and FEHBP, yet expansive jurisdiction over other hospitals that provide care under Medicare Parts C and D and certain other unspecified plans under TRICARE and FEHBP.

The OFCCP's current guidelines for establishing federal contractor status will lead to illogical hair splitting. For example, under the OFCCP's standards, a tonsillectomy performed at Hospital A for a child of a service member who participates in a TRICARE plan option with a managed care component would cause Hospital A to be considered a federal contractor, while the same procedure at Hospital B for a child of a service member who participates in a fee-for-service TRICARE plan would not cause Hospital B to be considered a federal contractor. Such differing treatment of hospitals providing essentially the same care is illogical and troubling, particularly given the OFCCP's utter lack of guidance regarding which TRICARE and FEHBP plans contain sufficient elements of "managed care" such that the participating hospital would now be considered a federal contractor.

Through its prior internal directives, the OFCCP avoided this ambiguity and hair splitting by refusing to differentiate federal contractor status based on the particularities of the specific FEHBP health plan option through which a beneficiary obtains care. For the past decade and more, the OFCCP took the common sense approach, which it has now abandoned, that a hospital providing care through *any* of the plans offered by FEHBP or under Medicare was not considered a federal contractor based on this fact alone.

WHAT PROMPTED THIS CHANGE BY THE OFCCP?

The OFCCP's policy change regarding the scope of its jurisdiction is hugely significant for our nation's hospitals. Despite the potential impact of the agency's current agenda, no changes in the structure of the federal health benefit programs or the law occurred that could have prompted this change.

While ongoing modifications to the TRICARE and FEHBP programs occur frequently, the basic structure of these programs, including the presence of managed care components in the offered plans, have existed for decades. The Military Health System has included managed care components since at least the 1980s.[5] Indeed, the TRICARE program itself was implemented in 1995 to improve health care delivery to beneficiaries "primarily through managed care support contracts...."[6] The basic "triple option benefit" of TRICARE, providing the choice between three types of plans, two of which are managed care-type plans, remains substantively the same today as when first implemented. Managed-care options also have been included within the FEHBP since its inception, with a proliferation of different types of managed care plans in the 1990s. The model of the FEHBP, in which government subsidized premiums are used to

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[5] DEP'T OF DEFENSE, MHS HISTORY, http://www.health.mil/About_MHS/History.aspx (last visited Sept. 20, 2013).

[6] 60 Fed. Reg. 52,095, 52,095 (Oct. 5, 1995)

purchase competing private plans, has not changed for decades. Managed care plans such as PPOs and HMOs were offered in the FEHB at least as early as 1998, and continue to be offered today.[7]

Similarly, with respect to legislative changes, nothing explains the OFCCP's new agenda. Other than NDAA, which restricted the scope of federal contractors for TRICARE providers, the statutory law defining contractor status has not substantively changed for decades. The last significant change in the law in this area occurred in 1977, when the *Federal Grant and Cooperative Agreement Act of 1977*, 31 U.S.C. §§6301 *et seq.* (the Grant Act) was passed to provide agencies guidelines for how to classify the relationships between the government and federal fund recipients.

Even though no substantive changes in the federal programs or applicable law have occurred that could explain the shift in the OFCCP's position of its own jurisdiction, the agency's recent assertion of jurisdiction over hospitals participating in TRICARE, FEHBP and Medicare represents a sea change for which no precedent exists. In fact, under both the Bush Administration (2000 – 2008) and the Clinton Administration (1992 – 2000), the OFCCP consistently excluded contractor status from being based on FEHBP and Medicare participation by hospitals.

In the AHA's view, the OFCCP's new agenda is not a good faith interpretation of congressional intent nor faithful abidance by the law. Rather, it represents an aggressive land grab by OFCCP aimed at a wholesale expansion of its jurisdiction over our nation's hospitals, which is both inconsistent with the positions taken by the federal agencies administering the health benefit programs at issue and without advance notice to, or agreement by, the participating hospitals.

THERE IS NO BASIS IN THE LAW FOR THE OFCCP'S CHANGED POSITION

The OFCCP's assertion of jurisdiction over health care providers that participate in these programs has no basis in law and is inconsistent with the position taken by the very agencies responsible for administering these programs. For more than 25 years, the OPM, the agency responsible for administering FEHBP, has expressly provided through its regulations that direct health care providers are not federal subcontractors.[8] For more than 10 years, the OFCCP has

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[7] *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999, Pub. L. No. 105-77, 111 Stat. 1465 (Oct. 21, 1998) (excluding from certain coverage requirements Personal Care's HMO); National Defense Authorization Act for Fiscal Year 2000, § 703, Pub. L. No. 106.65, 113 Stat. 512, 682 (Oct. 5, 1999) (directing the Department of Defense Secretary to review coverage offered by at least 10 of the most subscribed private health plans under the FEHBP, "at least 5 of which shall be managed care organizations"). OPM, HEALTHCARE, http://www.opm.gov/healthcare-insurance/healthcare/ (last visited Sept. 20, 2013).

[8] *See* 48 C.F.R. § 1602.170-15 ("Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor, *except for providers of direct medical services or supplies pursuant to the Carrier's health benefits plan.*" (emphasis added).

acquiesced to that interpretation, even issuing a policy directive reiterating its validity.[9] As a result, for decades, numerous health care providers have entered into contracts to provide care for federal employees under the well-founded assumption that they were *not* federal contractors.

Similarly, interagency conflict exists with the DOD due to the OFCCP's assertion of jurisdiction over TRICARE participants. Like the OPM, the DOD has explicitly exempted TRICARE providers from federal subcontractor status. Through its own regulations, the DOD has designated TRICARE reimbursements as a form of federal financial assistance, which does not constitute a federal contract subject to OFCCP regulations.[10]

The OFCCP's new agenda conflicts directly with the longstanding regulations of the OPM and the DOD. Each executive agency should not be free to construct its own definitions of who is and is not a "federal contractor." Instead, uniform statutory criteria should be applied to avoid, as here, conflicting administrative interpretations of federal contractor status. In fact, Congress in the Grant Act expressly laid out those statutory criteria.[11]

Under the Grant Act, TRICARE, FEHBP and Medicare reimbursements do not qualify as federal "procurement contracts" but instead are forms of federal financial assistance. Under the Grant Act, a procurement contract exists where the principal purpose of the relationship is to acquire "property or services for the direct benefit or use of the United States Government." Clearly, health benefit plan reimbursements are not for the direct benefit or use of the government. Instead, common sense and the language of the relevant legislation establishes that, literally, the "beneficiaries" of TRICARE are the service members, veterans and eligible dependents who receive medical services – that is, the benefits of the program. Likewise, the "beneficiaries" of FEHBP are federal employees, retirees and their families. These arrangements are analogous to Medicare, where the government makes payments to hospitals for the benefit of "that portion of the public entitled to Medicaid or Medicare coverage." The OFCCP's attempt to differentiate the FEHBP and TRICARE programs from those understood to constitute federal financial assistance, on the basis of "managed care" versus "fee-for-service" arrangements, is not supported by the Grant Act or any other legislative act.

In fact, the OFCCP appears to be largely ignoring congressional directives for establishing federal contractor status. While the agency certainly has the authority to apply its own

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[9] *See* OFCCP Policy Directive, 262 (Mar. 17, 2003) (clarifying that "health care providers having a relationship with FEHBP participants are not covered under the OFCCP's programs based solely on that relationship").

[10] *See* 32 C.F.R. § 56.7(b)(21) (pursuant to Section 504, designating payments under Title 10, Chapter 55 of the United States Code as federal financial assistance); TRICARE OPERATIONS MANUAL AT CHANGE 108, ch. 1, sec. 5, para. 5.1 (all hospitals "determined to be authorized providers under TRICARE are subject to the provisions of Title VI") (updated Sept. 19, 2013).

[11] *See* 31 U.S.C. §§ 6301–6305. The OFCCP itself has previously relied on the Grant Act to differentiate between recipients of federal financial assistance and the two categories of payees, when it applied Grant Act criteria to determine that a Fire Department was a recipient of federal financial assistance, not a contractor subject to its jurisdiction. *See Partridge v. Reich*, 141 F.3d 920 (9th Cir. 1998).

regulations, it must do so within a statutory grant of authority. Congress has repeatedly exercised its right to determine who is and is not a federal contractor,[12] and Section 715 of the NDAA is only one of the more recent examples of Congress doing so. Unfortunately, rather than accept this legislative direction that hospitals participating in TRICARE should not be considered federal contractors, the OFCCP expended considerable litigation energies seeking to explain to the ARB why a statutory directive did not override the agency's own regulation. The result has been years more of litigation against Florida Hospital, with a case that is now back before an ALJ nearly five years after it was originally filed. The length, scope and expense of the lawsuits against hospitals providing care to federal employees, service members and their families is an incredible waste of resources, both for the government and for the hospitals.

THIS IS NOT AN ISSUE OF COMPLIANCE WITH NONDISCRIMINATION LAWS BUT RATHER, WITH THE SIGNIFICANT BURDEN IMPOSED BY THE REGULATORY SCHEME

Numerous legal obligations and regulatory burdens flow from a finding that an entity is a federal contractor. The Department of Labor, for instance, enforces seven laws that apply to federal contractors, including Executive Order 11246, Section 503 of the *Rehabilitation Act* (Section 503), the *Vietnam Era Veterans' Readjustment Assistance Act of 1974* (VEVRAA) , the *Davis-Bacon and Related Act*, the *McNamara O'Hara Service Contract Act*, the *Walsh-Healey Public Contracts Act*, and the *Contract Work Hours and Safety Standards Act* (Title I), many of which have extensive data collection and affirmative action requirements. These substantial, and in many instances duplicative regulations, are costly and burdensome for hospitals to implement, diverting desperately needed resources from patient care.

Current Regulations Affecting Hospitals. Already, hospitals are subject to myriad laws and regulations. Dozens of federal entities have authority to regulate hospitals, subject to little or no coordination, and at least 10 of these agencies have jurisdiction over hospitals with respect to workforce issues alone, including but not limited to the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, and the Office of Civil Rights at the U.S. Department of Health and Human Services. Hospitals are additionally subject to extensive regulation at the state and local level, including by licensure agencies, state Medicaid programs, boards of medicine, attorneys general, and state labor and employment agencies.

In part as a result of such extensive regulation, hospitals spend more than 20 percent of their revenues on administrative costs. The costs facing hospitals are only expected to increase with the implementation of significant, multi-stage compliance obligations under the *Patient Protection and Affordable Care Act* and other recent legislative reforms. The obligation to meet evolving federal requirements for implementation of electronic health records (EHR) is further straining the budgets of cash-strapped hospitals. For example, beginning next year, Medicare-

[12] *See* Grant Act, 31 U.S.C. §§6301; Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C, § 4212,

participating hospitals that have not implemented an EHR system meeting certain objectives will be penalized with reduced reimbursements on all Medicare claims. Eventually, the widespread adoption of EHRs has the potential to save time and improve treatment outcomes. Implementing an EHR system, however, can cost a hospital between $20 million and $200 million, depending on the organization's size. Even hospitals that already have EHRs in place may face costs as high as $10 million to upgrade their systems in accordance with federal requirements.

Importantly, each dollar spent on administrative costs is money that cannot be used to fulfill a hospital's primary mission: that is, providing quality patient care. In an environment where costs are high and capital is scarce, hospitals should not be required to divert additional funds toward complying with the OFCCP's extensive and costly regulatory scheme. This is particularly true where, as here, the agency has not demonstrated a particular need to impose upon hospitals affirmative action obligations that go significantly further than the antidiscrimination laws that already apply to all employers, including Title VII of the *Civil Rights Act of 1964*, 42 U.S.C. § 2000e *et seq.*, the *Americans with Disabilities Act*, 42 U.S.C. § 12111 *et seq.*, the *Uniformed Services Employment and Reemployment Rights Act*, 38 U.S.C. § 4301 *et seq.*, and numerous state and local laws and regulations.

OFCCP Regulatory Burdens. The OFCCP estimates that each designated federal contractor will spend an average of 103.18 hours per year complying with the agency's affirmative action requirements. The agency significantly underestimates its burden obligations imposed on government contractors.

Hospitals already subject to the OFCCP's jurisdiction as federal contractors report that they spend significantly more time complying with the agency's demands than estimated. For example, the OFCCP estimates that a contractor will spend an average of 33.7 hours each year conducting an update of its required Affirmative Action Plan (AAP). By contrast, St. Jude Children's Research Hospital offered congressional testimony that, as a federal contractor, the hospital spends more than 500 hours (or $58,000) per year updating and maintaining the goals of its AAP.[13] This time includes compiling the raw data for the AAP and submitting it to an outside consultant to create a plan. The hospital then spends additional hours reviewing the plan and taking steps to implement it.

These meticulous steps are not only required by the OFCCP but are also increasingly important as the agency becomes more aggressive in conducting compliance reviews. Indeed, St. Jude estimates that the number of hours that it spends updating its AAP rises to as many as 1,000 hours during an audit year—time that may be spread over a period as long as eight months. Contractors can be audited every two years. This process can be so burdensome that employers feel that they are "not focused on providing a fair and diverse workplace, but instead [on] surviving [their] next audit."

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[13] *Reviewing the Impact of the OFCCP Program's Regulatory & Enforcement Actions: Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions. Comm. on Educ. & the Workforce*, 112th Cong. 2–3 (2012) (prepared Testimony of Dana C. Bottenfield, St. Jude Children's Research Hospital), *available at* http://edworkforce.house.gov/uploadedfiles/04.18.12_bottenfield.pdf.

Costs of compliance with OFCCP regulations will be further increased by the implementation of recently issued regulations that impose new documentation requirements on federal contractors and require them to set hiring benchmarks and utilization goals for, among others, individuals with disabilities. Specifically, federal contractors must now, on an annual basis, document: (1) the number of applicants who self-identify as individuals with disabilities, or who are otherwise known to be individuals with disabilities; (2) the total number of job openings and total number of jobs filled; (3) the total number of applicants for all jobs; (4) the number of applicants with disabilities hired; and (5) the total number of applicants hired. These computations and comparisons must be maintained for a period of three years, and made available to the OFCCP at its request. Contractors are subject to enforcement action if they fail to set these goals, and if contractors fail to meet them, they will be required to take specific and detailed steps to develop action-oriented programs designed to correct any identified "problem areas." The OFCCP has estimated that implementing these new regulations alone could cost the economy more than $1 billion.[14]

In addition to monitoring the implementation of affirmative action plans, OFCCP jurisdiction entails other significant tasks and associated costs. For example, federal contractors must regularly monitor the availability of women and minorities in their respective recruiting areas, implement "job outreach initiatives," establish applicant flow procedures, install costly computer programs to respond to OFCCP information requests, and, most recently, be prepared to respond to extensive agency audits and associated litigation threats regarding the appropriateness of their compensation system and procedures. Indeed, recent OFCCP initiatives in the latter area have resulted in the imposition of new compensation comparator requirements in undefined and ever-changing job groupings.[15]

HOSPITALS ARE BEING FACED WITH INCREASINGLY DIFFICULT CHOICES REGARDING WHETHER TO PROVIDE SERVICES TO MILITARY AND FEDERAL EMPLOYEES

With the imperative for health care providers to do more with less, hospitals will be forced to make difficult choices related to patient care if the OFCCP's agenda is allowed to continue. On the one hand, hospitals may choose to continue to provide care for service members and other federal employees, expending the significant additional resources necessary to comply with the OFCCP's complex regulatory scheme. Hospitals choosing this option will find their ability to offer services to patients, including service members and their families reduced, as they are

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[14] *See* OFCCP Final Rule to Improve Job Opportunities for Protected Veterans, *Regulatory Procedures and Burden Analysis* (estimating first-year costs in a range of $177,296,772 to $483,560,138, and recurring costs in subsequent years of $120,386,058 to $347,617,359) http://www.dol.gov/ofccp/regs/compliance/vevraa/vevraa_regulatory_procedures_qa_508c.pdf; OFCCP Final Rule to Improve Job Opportunities for Individuals with Disabilities, *Regulatory Procedures and Burden Analysis* (estimating first-year costs in a range of $349,510,926 to $659,877,833, and recurring costs in subsequent years of $162,371,816 to $395,258,387), *available at* http://www.dol.gov/ofccp/regs/compliance/section503/503_regulation_procedures_qa_508c.pdf.

[15] *See* OFCCP Policy Directive, 307 (Feb. 28, 2013), *available at* http://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm.

forced to divert their money and labor away from patient care to comply with paperwork burdens and regulatory costs.

On the other hand, certain hospitals may decide to opt out of federal assistance programs, such as TRICARE or FEHBP, limiting the health care options available to service members, federal employees and their families. The DOD already has recognized and reported a trend that fewer health care providers are accepting new TRICARE participants.[16]

As a third option, hospitals may choose to continue to offer services to service members and federal employees, but object to the OFCCP's assertion of jurisdiction. Hospitals deciding to challenge the agency's assertion of jurisdiction, however, run the substantial risk of being caught up in seemingly endless and costly litigation battles with the OFCCP, as the *Florida Hospital* and *UPMC Braddock* cases illustrate.

CONCLUSION

In the end, the delivery of patient care, whether provided as part of a fee for service or managed care contract, should not be deemed to be a federal contract. Rather, hospital participation in federally funded health care programs, including TRICARE, FEHBP and Medicare, should remain designated as federal financial assistance excluded by Congress from OFCCP jurisdiction.

Given that the OFCCP does not appear to be prepared to revert to the simple and understandable jurisdictional standards that the agency had in place for many years, legislation should be adopted that would clarify these jurisdictional standards. Legislation should be enacted providing that the OFCCP may not treat health care providers as federal contractors based on their delivery of health care services provided to individuals covered under TRICARE, FEHBP, or other federally funded health care benefit plans. The OFCCP's recent actions have indicated that such direct and unequivocal direction from Congress is necessary to stop its jurisdictional overreach. Anything less direct may risk falling victim to the OFCCP's interpretive gymnastics, similar to the OFCCP's response to Section 715 of the NDAA.

We look forwarding to working with this subcommittee to address the real concerns our nation's hospitals face due to the expansionist jurisdictional agenda of the OFCCP.

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[16] Dep't of Defense, GAO Report, 13-364, *TRICARE Multiyear Surveys Indicate Problems with Access to Care for Nonenrolled Beneficiaries* (Apr. 2013), *available at* http://www.gao.gov/assets/660/653487.pdf.

APPENDIX A
DESCRIPTIONS OF TRICARE, FEHBP, AND MEDICARE

TRICARE. TRICARE is a health care program that is part of the Military Health System, which provides health services support to the nation's military.[17] TRICARE covers care provided directly in more than 400 military treatment facilities, and care "purchased" through civilian providers and institutions.[18] The first version of TRICARE was enacted in 1956 and authorized the DOD to contract with civilian healthcare plans to provide healthcare services to active-duty and retiree members of the military and their dependents.[19] In 1966, these benefits were extended to retired military personnel, their families, and certain surviving family members.[20] This early version was called the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS).[21] In response to escalating costs and general beneficiary dissatisfaction with CHAMPUS, the DOD initiated a program in the 1980s called the CHAMPUS Reform Initiative (CRI) to provide more options to beneficiaries in their military healthcare choices.[22] The CRI was one of the first programs to offer managed care options as part of the CHAMPUS program.[23] After the CRI proved successful, it was extended nationwide and renamed as TRICARE in the 1990s.[24]

Today, TRICARE is managed by the *TRICARE Management Activity* (TMA).[25] The TMA is organized into four geographic regions, and has partnered with a regional contractor in each region to maintain a network of health service providers to support beneficiaries.[26] A network provider is a health care provider that contracts with a TRICARE regional contractor, and agrees to submit claims on behalf of beneficiaries and to accept the TRICARE allowable charge for health services provided to beneficiaries.[27] Providers submit claims to the regional contractor,

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[17] DOD REPORT TO CONGRESS, *supra* note 3, at 4.

[18] DOD REPORT TO CONGRESS, *supra* note 3, at 1.

[19] Dependents' Medical Care Act, Pub. L. No. 84-569, 70 Stat. 250 (1956) (current version at 10 U.S.C. § 1071 (2012)).

[20] Military Medical Benefits Amendments of 1966, Pub. L. No. 89-614, 80 Stat. 862 (1966) (current version at 10 U.S.C. § 1071 (2012)).

[21] 32 C.F.R. part 199 (1986).

[22] DEP'T OF DEFENSE, MHS HISTORY, http://www.health.mil/About_MHS/History.aspx (last visited Sept. 20, 2013).

[23] *Id.*

[24] 32 C.F.R. § 199.17 (2012).

[25] DEP'T OF DEFENSE, TRICARE: ABOUT US, http://www.tricare.mil/Welcome/AboutUs.aspx (last updated Aug. 2, 2013).

[26] *Id.* The regional contractors are as follows: North Region, Health Net Federal Services, LLC; South Region, Humana Military, a division of Humana Government Business; West Region, United Healthcare Military & Veterans; and Overseas Region, International SOS.

[27] TRICARE OPERATIONS MANUAL AT CHANGE 108, ch. 5, sec. 1, para. 2.3 (updated Sept. 19, 2013).

and the regional contractor makes government-funded reimbursement payments directly to the provider.[28]

Health care providers that receive "federal financial assistance" must operate without discrimination based on race, color, national origin, or disability under statutes including Title VI of the *Civil Rights Act of 1964* (Title VI) and Section 504 of the *Rehabilitation Act of 1973* (Section 504).[29] The DOD has designated TRICARE reimbursements as a form of federal financial assistance.[30] More generally, the DOD has stated that any program or activity that provides "services, financial aid, or other benefits to individuals" is a form of federal financial assistance.[31]

TRICARE covers active duty service members and retirees of the seven uniformed services, their family members and survivors, and National Guard and Reserve members and their families.[32] For the 2013 fiscal year, TRICARE is projected to cover 9.63 million total beneficiaries, and to have 477,891 network individual providers in the purchased care system.[33] The total cost of the TRICARE program is estimated to be approximately $50 billion for 2013, including $16 billion for private sector purchased care alone, or approximately 7.1 percent of total DOD expenditures.[34]

TRICARE offers more than 10 health plans to its beneficiaries, but each of these plans is based on some combination of benefits found in three primary options: TRICARE Standard, TRICARE Extra, and TRICARE Prime.[35] TRICARE Standard is the successor to CHAMPUS and allows beneficiaries to see whichever provider they choose, but requires them to pay an annual deductible and cost share (co-insurance) for service provided.[36]

TRICARE Extra is an option that operates similar to a Preferred Provider Organization (PPO).[37] Beneficiaries who obtain care from network providers pay the same deductible as under

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[28] TRICARE REIMBURSEMENT MANUAL AT CHANGE 89, ch. 1, sec. 1, paras. 2.1 & 2.2 (updated Sept. 19, 2013).

[29] Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (prohibiting program or activity discrimination based on race, color, or national origin); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (same for disability).

[30] *See supra* note 10 and accompanying text.

[31] 32 C.F.R. § 195.2(e) (pursuant to Title VI of the Civil Rights Act of 1964, defining programs or activities deemed to constitute federal financial assistance).

[32] DEP'T OF DEFENSE, TRICARE: ELIGIBILITY, http://www.tricare.mil/Welcome/Eligibility.aspx (last updated Aug. 2, 2013).

[33] DOD REPORT TO CONGRESS, *supra* note 3, at 9.

[34] *Id.* at 17–18.

[35] *Id.* at 4.

[36] *Id.*

[37] *Id.*

TRICARE standard, but their cost share is reduced by 5 percent and the network provider files the claim on the beneficiary's behalf.[38]

TRICARE Prime is another managed care option, but operates like a Health Maintenance Organization (HMO).[39] Enrollees choose or are assigned a primary care manager who helps manage the patient's care and arranges for necessary specialty provider services.[40] Enrollees can obtain care from providers other than through their primary care manager, but must pay a significantly higher deductible and cost share than under TRICARE Standard to do so.[41]

The Federal Employees Health Benefits Program (FEHBP). The FEHBP was created in 1960 to provide healthcare access to federal civilian employees and is administered by the OPM.[42] The OPM seeks to provide a wide range of health plan options to federal employees.[43] In so doing, the OPM contracts with private plan carriers to provide access to healthcare.[44] Carrier, as defined by the OPM, refers to all entities with which the OPM contracts, including HMOs and more traditional health insurers.[45] Each year the OPM and the plan carrier negotiate the rates paid to the carrier.[46] This rate is paid through amounts withheld from beneficiaries' paychecks, plus a government contribution of up to 75 percent of the total premium.[47] Each plan carrier is responsible for reviewing and paying claims from beneficiaries and providers filed under the plan.[48] Managed care plan carriers such as PPOs and HMOs then contract with health providers in an effort to reduce costs and improve quality of care.[49]

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Federal Employees Health Benefits Act of 1959, Pub. L. No. 86-382, 73 Stat. 708 (1959); 5 C.F.R. part 890. *See* OPM, HEALTHCARE, http://www.opm.gov/healthcare-insurance/healthcare/ (last visited Sept. 20, 2013) (describing FEHBP); 52 Fed. Reg. 16,032, 16,033 (May 1, 1987) ("OPM . . . contracts as an employer for health benefits on behalf of Federal employees.").

[43] 76 Fed. Reg. 38,282, 38,284 (June 29, 2011).

[44] OPM CARRIER HANDBOOK 3, *available at* http://www.opm.gov/healthcare-insurance/healthcare/carriers/reference/carrier-handbook.pdf (last revised Mar. 2003).

[45] 48 C.F.R. § 1602.170-1.

[46] OPM Carrier Handbook, *supra* note 44, at 35.

[47] *Id.* at 35–46.

[48] 5 C.F.R. § 890.105.

[49] *See* OPM, BENEFITS ADMINISTRATION LETTER NO. 96-402 (Sept. 10, 1996), *available at* http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/1996/96-402.pdf.

The OPM's benefit contracts are considered federal acquisitions and are thus subject to the Federal Acquisition Regulation (FAR).[50] The OPM has the authority to implement FAR as it relates to the FEHBP to accommodate "the practical realities associated with the unique nature of health care procurements."[51] Pursuant to this authority, in 1987 the OPM promulgated the Federal Employee Health Benefits Acquisition Regulation (FEHBAR).[52] As part of this regulation, and to address concerns from a number of carriers, the OPM defined "subcontractor" to exclude "providers of direct medical services or supplies pursuant to the Carrier's health benefits plan."[53] According to the OPM, the subcontractor definition was added to clarify application of the regulation and because the OPM did not intend to review the records and approve each entity with which its plans contract.[54]

The FEHBP is "the largest employer-sponsored group health insurance program in the world, covering more than 8 million federal employees, retirees, former employees, family members and former spouses."[55] Almost 300 health plans are offered through the FEHBP, each with a separate provider network.[56] The total annual cost of the FEHBP is $43 billion.[57]

The plans provided under the FEHBP vary, including fee-for-service plans, PPOs and HMOs.[58] Under the fee-for-service plans, the plan reimburses the beneficiary or the health care provider for the cost of care, but the beneficiary is not limited in the providers he or she may choose to see.[59] All of these plans require pre-certification to admit patients to a hospital and preauthorization of certain procedures.[60] Some plans include a PPO, which allows the beneficiary to lower his or her out-of-pocket expenses by going to an in-network provider.[61]

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[50] *See generally* 48 C.F.R. ch. 16.

[51] 48 C.F.R. § 1601.301; *see also id.* §§ 1601.101(b), 1601.103; 52 Fed. Reg. 16,032, 16,037 (May 1, 1987).

[52] *See* 48 C.F.R. ch. 16.

[53] 48 C.F.R. § 1602.170-15. *See* 52 Fed Reg. at 16,032.

[54] 52 Fed. Reg. at 16,033, 16,035.

[55] OPM, FEHB PROGRAM HANDBOOK, "Introduction", *available at* http://www.opm.gov/healthcare-insurance/healthcare/reference-materials/#url=FEHB-Handbook (last visited Sept. 20, 2013) [hereinafter FEHB HANDBOOK].

[56] OPM, PATIENTS' BILL OF RIGHTS, http://www.opm.gov/healthcare-insurance/healthcare/reference-materials/#url=Bill-of-Rights (last visited Sept. 20, 2013); OPM, GUIDE TO FEDERAL BENEFITS 10 (2013), *available at* http://www.opm.gov/healthcare-insurance/healthcare/plan-information/guide/2013-guides/70-1.pdf.

[57] OPM, FEHB FACT SHEET (2012), *available at* http://www.opm.gov/healthcare-insurance/open-season/resources/factsheet.pdf.

[58] FEHBP HANDBOOK, supra note 55, "Health Plans."

[59] *Id.*

[60] *Id.*

[61] *Id.*

Under the HMO plans, beneficiaries must choose a primary care physician who coordinates care and pre-certification of admission to hospitals and preauthorization of procedures.[62] Health care is provided on a prepaid basis through designated providers within the HMO's geographic service area.[63] Some fee-for-service and HMO plans also provide a point-of-service option, which allows beneficiaries the option of going to a provider outside the plan's network to obtain care, in exchange for an increased deductible and cost share payment.[64]

Medicare. The Medicare program was first enacted in 1935 and provides health insurance benefits for individuals age 65 or older and certain disabled individuals.[65] The administration of the Medicare Program is delegated to the Administrator of the CMS.[66] The CMS establishes, maintains, and administers agreements with state agencies, service providers, and other intermediaries in administering the program.[67] These intermediaries enroll providers into the Medicare program, process Medicare claims, and contract with and make payments to health service providers.[68] Participating health service providers generally agree to submit claims on behalf of beneficiaries, to accept the Medicare-approved amount as full payment for covered services, and to bill beneficiaries only for their deductible and coinsurance amount.[69]

In 2012, Medicare covered about 50.7 million people, about 27 percent of whom were enrolled in Part C private health plans that "contract with Medicare to provide Part A and Part B health services."[70] As of February, 2013 there were 447 Medicare Advantage plans, including 298 HMOs, 135 total PPOs, and 14 private fee-for-service plans.[71] Total Medicare expenditures in 2012 were $574.2 billion.[72]

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[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (Aug. 14, 1935); 42 U.S.C. § 1395c.

[66] CMS, MEDICARE GENERAL INFORMATION, ELIGIBILITY AND ENTITLEMENT MANUAL (PUB. 100-01), ch. 1, para. 20 (rev. Oct. 26, 2012), *available at* http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/ge101c01.pdf [hereinafter CMS PUB. 100-01].

[67] *Id.* ch. 1, para. 30.1; CMS, MEDICARE MANAGED CARE MANUAL (PUB. 100-16), ch. 11 (rev. Jan. 7, 2011), *available at* http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/mc86c01.pdf.

[68] CMS PUB. 100-01, *supra* note 66, ch. 1, paras. 40, 50.

[69] MEDICARE.GOV, KEEPING COSTS DOWN WITH ASSIGNMENT, http://www.medicare.gov/your-medicare-costs/part-a-costs/assignment/costs-and-assignment.html (last visited Sept. 20, 2013).

[70] 2013 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICARE INSURANCE TRUST FUNDS 6, *available at* http://downloads.cms.gov/files/TR2013.pdf [hereinafter 2013 MEDICARE REPORT].

[71] MEDICARE PAYMENT ADVISORY COMMISSION, A DATA BOOK: HEALTH CARE SPENDING AND THE MEDICARE PROGRAM (June 2013), pg. 156, *available at* http://www.medpac.gov/documents/Jun13DataBookEntireReport.pdf.

[72] 2013 MEDICARE REPORT, *supra* note 70, at 6.

Medicare Part A provides protection against the costs of hospital, related post-hospital, home health service, and hospice care.[73] Part B is a voluntary supplemental insurance program, with government-subsidized premiums paid by enrollees, and helps pay for medically necessary and preventive services.[74] Part C, also known as Medicare Advantage, was created in 1997 to provide enrollees with more health plan choices.[75] A Medicare Advantage plan may be a traditional fee-for-service plan or a managed care plan, including but not limited to HMO and PPO plans.[76] Part D was added in 2006 and is a voluntary prescription drug benefit program, also with government-subsidized premiums paid by enrollees, for individuals entitled to benefits under Part A, or enrolled under Part B or Part C, or as a standalone benefit plan.[77]

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[73] 42 U.S.C. §§ 1395c – 1395i-5.

[74] 42 U.S.C. §§ 1395j – 1395w-5.

[75] Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (Aug. 5, 1997). The Program under Part C was originally called Medicare+Choice, but was later renamed Medicare Advantage with the amendments from the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003).

[76] 42 U.S.C. § 1395w-21(a)(2).

[77] 42 U.S.C. §§ 1395w-101 – 1395w-104. Part D was added by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003).

Chairman WALBERG. Thank you.

And I thank all of the panelists for your testimony. Give us a lot to work with in our questioning.

And before I recognize my colleagues for their 5 minutes of questioning, without objection, I ask that this letter from the Associated General Contractors of Americas addressing their concerns with the regulations be inserted in the record.

[The information follows:]

PAUL W. DIEDERICH, President
ALAN L. LANDES, Senior Vice President
CHARLES L. GRECO, Vice President
WM. BRIAN BURGETT, Treasurer
STEPHEN E. SANDHERR, Chief Executive Officer
DAVID LUKENS, Chief Operating Officer

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

December 4, 2013

The Honorable Tim Walberg
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Re: Examining Recent Actions by the Office of Federal Contract Compliance Programs

Dear Chairman Walberg:

On behalf of the Associated General Contractors of America (AGC), I want to thank you for holding a hearing "Examining Recent Actions by the Office of Federal Contract Compliance Programs." AGC is concerned that new federal contractor rules on affirmative action for certain veterans and individuals with disabilities were finalized despite a lack of federal data showing the rules are even needed.

A 2012 analysis of eight years of the most recent federal enforcement data found that only 0.02 percent of all federal contractors could be seriously suspected of discriminating against veterans or the disabled. In their effort to counter non-existent employment challenges, the administration developed the two rules that require federal contractors to take extensive measures to combat discriminatory practices the federal government already knows barely exist.

While the goals and objectives of the two rules are something that AGC supports and our members already meet, the regulations are unneeded. The Administration claimed these rules were necessary to address higher rates of unemployment among veterans and the disabled. Yet federal employment data shows that the annual average unemployment rate was lower for every category of veteran covered by this rule than the nonveteran unemployment rate. The only exception was the unemployment rate for "Gulf War era II" veterans which was slightly higher than for nonveterans (9.9 percent vs. 9.0 percent), likely because they returned to the work force during a protracted economic downturn. Federal data also shows that veterans of all ages are already more likely to be employed by construction firms than are non-veterans and indicates that people with disabilities (6.2 percent) are as likely to be employed in construction as people without disabilities (6.3 percent).

Given the lack of discrimination to justify these new measures, while some changes were made in the late stages of the regulatory rule-making process to lessen the burden on contractors, AGC remains concerned about the impact these rules will have on the construction industry.

Sincerely,

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Enclosure

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Analysis of Veterans' Unemployment Rates

Summary

The Office of Federal Contract Compliance Programs (OFCCP) has proposed regulations that it states would strengthen the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, on behalf of four categories of protected veterans: (1) special disabled veterans; (2) veterans of the Vietnam era; (3) veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized; and (4) recently separated veterans.

OFCCP has presented no evidence that veterans are being discriminated against in employment, or that additional affirmative action is required, let alone the extremely expensive and disruptive measures OFCCP is proposing. On the contrary, unemployment data show that **veterans—including categories of protected veterans—generally have comparable or lower rates of unemployment than nonveterans**.

- In 2012, **the annual average unemployment rate for all veterans was** 7.0%, **lower than the** 7.9% **rate for nonveterans.**
- In August 2012, **the unemployment rate for veterans with service-connected disability** was 6.5% **and the rate for veterans with disability ratings of 30% or** higher was 8.4%, both of which **were lower than the** 9.0% **rate for nonveterans**.
- In August 2012, **the unemployment rate for veterans of the Vietnam era** (plus the small number of Korean and Word War II era veterans still in the labor force) **was** 5.2%, **lower than the** 9.0% **rate for nonveterans.**
- In August 2012, **the unemployment rate for veterans of the Gulf War and other wars was** 7.0%, **lower than the** 9.0% **rate for nonveterans**.
- In 2012, **the annual average unemployment rate for Gulf War era II veterans** (the category that includes all recently separated veterans, plus veterans who separated up to 11 years earlier) **was** 9.9%, **slightly higher than the** 9.0% **rate for nonveterans**. The rates for veterans aged 18-24 and 25-34 was higher than for nonveterans of those ages but this difference may reflect sampling and nonsampling errors in the data and the weak labor market, which makes it particularly hard for new entrants to the labor force to be hired.

The construction industry, in particular, has always sought out and welcomed veterans as employees. **A higher share of employed veterans than nonveterans work in the construction industry.**

In addition, an analysis in 2012 by The Center for Corporate Equality of data on discrimination complaints that have been filed with OFCCP showed **there have been virtually no valid complaints about workplace discrimination against veterans**. Between 2004 and the first half of 2012, federal officials identified only 63 total instances of possible discrimination against veterans or people with disabilities among the 285,390 federal contractor establishments over which the OFCCP has jurisdiction.

Analysis of Veterans' Unemployment Rates

The Office of Federal Contract Compliance Programs (OFCCP) has proposed regulations that it states would strengthen the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, on behalf of specified categories of protected veterans. The rationale for affirmative action is that, without it, the specified categories would not receive equal treatment, in this case in employment by federal contractors.

OFCCP provides no evidence that any new rules are needed, let alone these proposed regulations, which would impose extreme costs, disruption to efficient operations, and risk of liability for employers that are already employing protected veterans in proportion to their share of the workforce. On the contrary, unemployment data show that veterans—including categories of protected veterans—generally have comparable or lower rates of unemployment than nonveterans.

The proposed regulation is particularly unnecessary in the case of the construction industry. The industry has long recruited, hired and retained veterans at higher rates than other industries.

In lieu of citing relevant evidence, the proposed regulation only asserts:

> Increasing numbers of veterans are returning from tours of duty in Iraq, Afghanistan, and other places around the world, and many are faced with substantial obstacles in finding employment upon leaving the service. A March 2010 report from the Bureau of Labor Statistics found that the 2009 annual average unemployment rate for veterans 18-24 years old was 21.1%, compared with 16.6% for non-veterans in that age group. The unemployment rate for veterans 25 to 34 years old was 11.1%, compared with 9.8% for non-veterans in that age group.[1]

As a careful reading of Bureau of Labor Statistics (BLS) data shows, OFCCP has made a very selective and misleading use of unemployment data. As OFCCP states, "the purpose of the [VEVRAA], as amended, 38 U.S.C. 4212 (Section 4212), is twofold. First, Section 4212 prohibits employment discrimination against specified categories of veterans by Federal government contractors and subcontractors. Second, it requires each covered Federal government contractor and subcontractor to take affirmative action to employ and advance in employment these veterans." [2] Even if a comparison of unemployment rates between protected categories and others is a valid way of demonstrating the presence of employment discrimination or a lack of affirmative action, OFCCP has not provided such a comparison.

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[1] Federal Register, Vol. 76, No. 80 (April 26, 2011), p. 23358
[2] *Ibid.*, p. 23358

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OFCCP and BLS categories of veterans

The categories specified in the proposed regulation are: "(1) Special disabled veterans; (2) veterans of the Vietnam era; (3) veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized; and (4) recently separated veterans."[3] As discussed below, the data for three of these categories do not show consistently higher unemployment rates, while the sample size for the fourth group is too small to allow any valid conclusion.

BLS posts either monthly or annual average unemployment rates for several categories of veterans, as well as nonveterans. As categorized by BLS,

> Veterans are men and women who served on active duty in the U.S. Armed Forces and were not on active duty at the time of the survey. Nonveterans never served on active duty in the U.S. Armed Forces. Veterans could have served anywhere in the world during these periods of service: Gulf War era II (September 2001-present), Gulf War era I (August 1990-August 2001), Vietnam era (August 1964-April 1975), Korean War (July 1950-January 1955), World War II (December 1941-December 1946), and other service periods (all other time periods). Veterans are counted in only one period of service, their most recent wartime period. Veterans who served in more than one wartime period are classified in the most recent one. Veterans who served in both a wartime period and any other service period are classified in the wartime period.[4]

In its monthly employment situation report, BLS provides unemployment rates for nonveterans and veterans 18 years and over from each of these service periods (Table A-5). On its website, BLS provides unemployment rates by age cohort for nonveterans, total veterans and Gulf War era II veterans (Table A-40). In its annual report, "Employment Situation of Veterans," BLS provides additional data either for a single month (most recently, August 2012) or as an annual average (most recently, 2012). The analysis below relies on the latest annual or monthly data (July 2013 if available or August 2012). Rates for veterans and nonveterans are not seasonally adjusted, unlike the "headline" seasonally adjusted rate that is widely reported in the media.

Unemployment rates for all veterans

The one piece of data that OFCCP cites is both incomplete and very outdated, reflecting annual averages that are nearly four years old. The latest data, for July 2013, were posted by BLS on August 5.[5] The rate for all veterans was 6.4%, compared with 7.3% for nonveterans. The rates for 18-24-year-olds were 17.4% for veterans and 14.1% for nonveterans. The rates for 25-34-year-olds were 6.8% for veterans and 7.7% for nonveterans. The rates for 35-44-year-olds were 5.7% for veterans and 5.8% for nonveterans. The rates for 45-54-year-olds were 6.8% for veterans and 5.2% for nonveterans. The rates for persons 65 and over was 5.8% for veterans and 4.1% for nonveterans. In summary, in July 2013, the overall rate for veterans was lower than for nonveterans, as was the rate for one of the two age cohorts cited in the proposed regulation (25-34-year-olds).

In any case, OFCCP provides no rationale for selecting those two age cohorts, which are not closely related to the protected categories listed in the proposed regulation. In fact, there are unemployment rates available for groups that correspond more closely to the protected categories. Those data do not show any evidence of discrimination. In fact, like the overall unemployment rate for veterans, rates for protected categories in many cases are close to, or lower than, rates for nonveterans.

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[3] *Ibid.*, p. 23359

[4] U.S. Department of Labor, Bureau of Labor Statistics, "Employment Situation of Veterans—2012," March 20, 2013, http://www.bls.gov/news.release/pdf/vet.pdf, Table 5

[5] U.S. Department of Labor, Bureau of Labor Statistics, "Labor Force Statistics from the Current Population Survey," Table A-40 (online only), http://www.bls.gov/web/empsit/cpseea40.htm, *accessed August 5, 2013*

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Unemployment rates for protected categories

1. Special disabled veterans

Under the proposed rules, special disabled veteran means:

(i) A veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Department of Veterans Affairs for a disability: (A) Rated at 30 percent or more; or (B) Rated at 10 or 20 percent in the case of a veteran who has been determined under 38 U.S.C. 3106 to have a serious employment handicap; or (ii) A person who was discharged or released from active duty because of a service-connected disability. (2) Serious employment handicap, as used in paragraph (w)(1)(B)) of this section, means a significant impairment of a veteran's ability to prepare for, obtain, or retain employment consistent with such veteran's abilities, aptitudes and interests.[6]

Table 6 in the BLS publication "Employment Situation of Veterans--2012" shows the employment status of veterans with different service-connected disability ratings: less than 30%, 30 to 50%, 60% or higher, disability rating not reported, without service-connected disability, and presence of disability not reported. The definition of "special disabled veterans" under Section 4212 would appear to encompass all veterans with a 30% or higher disability rating, plus an undetermined fraction of veterans with a less than 30% disability rating.

In August 2012 (the most recent available month), the unemployment rate for veterans with service-connected disability was 6.5%.[7] The combined rate for veterans with disability ratings of 30 to 50% and 50% or higher was 8.4%.[8] The unemployment rate for all nonveterans age 18 and over was 9.0%.[9] In other words, by either measure of disability, the unemployment rate that approximates the category "special disabled veterans" is lower than the rate for nonveterans.

2. Veterans of the Vietnam era

In Table A-5 of its monthly employment situation report, BLS reports the unemployment rate for "World War II, Korean War, and Vietnam-era veterans." BLS's definition of Korean War era veterans covers those who last served on active duty in January 1955. The youngest of these veterans would have been 18 years old in January 1955 and 75 years old in August 2012. World War II-era veterans, defined as those who last served in December 1946, would have been at least 83 years old in August 2012. Thus, the veterans in this BLS category who were still unemployed and looking for work were almost entirely Vietnam-era veterans.

The unemployment rate for World War II, Korean War, and Vietnam-era veterans in August 2012 was 5.2%, compared with a 9.0% rate for all nonveterans age 18 and over.[10] The most recent data are for July 2013, when the rates were 6.7% for World War II, Korean War, and Vietnam-era veterans and 7.3% for nonveterans.[11] Again, the data do not show that veterans are being discriminated against.

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[6] Federal Register, Vol. 76, No. 80 (April 26, 2011), p. 23394
[7] *"Employment Situation of Veterans—2012,"* Table 6
[8] Author's calculation from data in *ibid.*, Table 6
[9] U.S. Department of Labor, Bureau of Labor Statistics, "Employment Situation—August 2012," September 7, 2012, http://bls.gov/news.release/archives/empsit_09072012.pdf, Table A-5
[10] "Employment Situation of Veterans," Table 6
[11] U.S. Department of Labor, Bureau of Labor Statistics, "Employment Situation—July 2013," August 2, 2013, http://bls.gov/news.release/archives/empsit_08022013.pdf, Table A-5

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3. Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized

BLS does not categorize individuals as to whether they served during a war or in a campaign or expedition for which a campaign badge has been authorized. However, BLS does report unemployment rates for "veterans of other service periods" than the Gulf and other war eras. By subtracting this category from total veterans, it is possible to approximate the Section 4212 protected category.

In August 2012, Gulf and other war era veterans had a combined unemployment rate of 7.0%[12], compared with a 9.0% rate for nonveterans. In July 2013, Gulf and other war era veterans had a combined unemployment rate of 6.4%,[13] compared with a 7.3% rate for nonveterans. Once again, the data do not show that veterans are being discriminated against.

4. Recently separated veterans

Recently separated veterans are veterans who completed service within the previous 12 months. All such veterans since late 2002 would be included in the BLS category of Gulf War era II veterans, which covers veterans whose service ended in October 2001 or later. But that BLS category now covers far more veterans discharged over a year ago than ones discharged in the past 12 months.

As noted earlier, BLS also provides monthly average unemployment rates for veterans and nonveterans in several age ranges: 18-24, 25-34, 35-44, 45-54, 55-64 and 65 and over. If most military personnel are at least 18 when they enlist and serve for at least two years, then most 18-21-year-old veterans would be recently separated, as would many 22-24-year-olds. Some Gulf War era II veterans in older age groups would also be recently separated.

In July 2013, the unemployment rate (annual average) for Gulf War II era veterans ages 18-24 was 17.4%, compared with a 14.1% rate for nonveterans in the same age group.[14] The rate for veterans was three percentage points lower than the 2009 average cited in the proposed regulation, and the increment over the nonveteran rate was 3.3 percentage points, not 4.5 points as in 2009. While 3.3 points might seem like a noteworthy disparity, there is a wide range of uncertainty regarding the young veterans' rate, and it should be viewed with caution.

BLS calculates unemployment rates each month based on responses from a sample of 60,000 households, known as the Current Population Survey (CPS), which are weighted to represent the entire civilian noninstitutional population age 16 and over. Of that total, unemployed Gulf War era II veterans age 18-24 constituted 28,000 out of 234 million persons age 18 and over in July 2013, or 0.012%.[15] In a sample of 60,000, 0.012% amounts to just 7 respondents. As BLS explains in "Employment Situation of Veterans—2012":

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[12] Author's calculation from "Employment Situation of Veterans—2012," Table 6
[13] Author's calculation from "Employment Situation—July 2013," Table A-5
[14] "Labor Force Statistics from the Current Population Survey," Table A-40
[15] *Ibid.*

> **Reliability of the estimates.** Statistics based on the CPS are subject to both sampling and nonsampling error. When a sample, rather than the entire population, is surveyed, there is a chance that the sample estimates will differ from the true population values they represent. The component of this difference that occurs because samples differ by chance is known as *sampling error*....The CPS data also are affected by *nonsampling error*. Nonsampling error can occur for many reasons, including the failure to sample a segment of the population, the inability to obtain information for all respondents in the sample, the inability or unwillingness of respondents to provide correct information, and errors made in the collection or processing of the data.[16]

In other words, the actual unemployment rate for 18-24-year-old veterans could differ from the 17.4% calculated rate by several percentage points. Even the actual rate for 18-24-year-old nonveterans, which is based on 2.9 million unemployed persons, could be somewhat larger or smaller than 14.1%.

As noted, the category "recently separated veterans" also includes some Gulf War era II veterans older than 24. The July 2013 unemployment ages 25-34 were 6.8% for Gulf War era II veterans and 7.7% for nonveterans—quite different from the 11.8% and 9.9% rates in 2009 cited in the proposed regulation.[17]

It is not possible to calculate from publicly available BLS data the unemployment rates for recently separated veterans in these (or older) age cohorts. But, given how much lower the overall rate is for each of the older cohorts (between 5.7% and 6.8%), the rate for all recently separated veterans is likely to be lower than the rate for the 18-24-year-olds, and likely to be closer—perhaps equal—to the rate for nonveterans. Thus, it is not reasonable to conclude that a statistically significant difference in unemployment rates exists between recently separated veterans and others on the basis of a tiny sample that both (a) includes some 22-24-year-old veterans who were not recently separately and (b) excludes some older veterans who were recently separated.

Qualifications of young veterans

Even if recently separated 18-24-year-old veterans do, in fact, have higher unemployment rates than nonveterans of the same age, that fact does not imply discrimination or lack of affirmative action on the part of employers. While their service provides veterans with many opportunities, the training they receive and skills they develop may not be immediately transferable to the civilian labor market, especially for veterans who have recently returned from service outside the U.S. Meanwhile, their nonveteran counterparts may have more opportunity to learn about job openings, continue education and training, and work in internships or jobs that make them more employable. The requirements imposed by the proposed regulation would do nothing to address these issues and, in fact, would detract from the amount of time and money employers could devote to recruiting and training veterans.

Construction and veterans

The construction industry has a long record of recruiting and hiring veterans. Recent data show that veterans are slightly more likely than nonveterans to be employed in construction. Specifically, in 2012, 5.4% of employed veterans worked in the construction sector, compared with 4.9% of nonveterans.[18]

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[16] "Employment Situation of Veterans," Technical Note
[17] "Labor Force Statistics from the Current Population Survey," Table A-40
[18] *Ibid.*, Table 5

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Unfortunately, the long slump in construction has meant that the industry has not been hiring nearly as many workers as it did before the recession. In fact, the recession began earlier, ended later, and has been much steeper in construction than in the overall economy. Construction employment (seasonally adjusted) topped out in March 2006 at 7.7 million and declined 30% until bottoming out at 5.4 million in January 2011.[19]

The industry's recovery since early 2011 has been slow and uneven. Total hires in construction averaged 5.4 million per year from 2000 through 2006 but only 4.0 million per year in 2010 through 2012. Meanwhile, total hires in the economy have risen for three years in a row, increasing 12% from 46 million in 2009 to 52 million in 2012.[20] As a result, young veterans (and nonveterans) are more likely to be employed outside of construction than they were previously. In 2012, 4.5% of all employed Gulf War era II veterans were employed in construction. That was still close to the industry's share of nonveteran employment despite the lack of ability to hire recently, and was a sign of the industry's weak economic condition, not of discrimination.

Other evidence

It is striking that OFCCP did not rely on its own compliance information in providing a justification for imposing additional burdens on employers. An examination of the complaints filed with OFCCP and their resolution shows that there is no record of discrimination.

Specifically, in July 2012, the Center for Corporate Equity issued a report, "A Review of OFCCP Enforcement Statistics Related to Section 503 of the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act" that analyzed OFCCP enforcement data between 2004 and the first half of 2012[21]. OFCCP identified only 63 total instances of possible discrimination against veterans or people with disabilities among the 285,390 federal contractor establishments over which the OFCCP has jurisdiction. The report found that federal officials, when responding to reported complaints, determined that only 0.02 percent of all federal contractors could be seriously suspected of having discriminated against veterans or people with disabilities. The agency found discrimination among in only 0.01 percent of firms it audited each year as part of its routine compliance review process.

Thus, the rule would impose new burdens on more than 285,000 federal contractors to address possible discrimination that has been identified among only 0.02% of them. As with the BLS data on unemployment rates, there is no credible evidence of discrimination that warrants adoption of this rule.

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[19] U.S. Department of Labor, Bureau of Labor Statistics, Current Economic Statistics, www.bls.gov/ces/#data
[20] U.S. Department of Labor, Bureau of Labor Statistics, Job Openings and Labor Turnover Survey, www.bls.gov/jlt/#data
[21] http://www.cceq.org/PDFs/cce-vevraa.pdf

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- Our mission is to create workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and promoting affirmative action and equal employment regulatory compliance.

A Review of OFCCP Enforcement Statistics Related to
Section 503 of the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act

David Cohen, M.S., Sr. Vice President
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July 2012

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Executive Summary

In 2011, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) proposed to revise the regulations implementing the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act (Section 503). In light of these proposed changes, the Center for Corporate Equality (CCE) conducted an evidence-based analysis of enforcement data related to charges of discrimination against protected veterans and individuals with disabilities. If the proposed regulations are implemented they would redefine affirmative action and significantly increase the emphasis on anti-discrimination policies for these protected groups. This study seeks to answer the question of whether there is evidence available to support the implementation of the proposed changes. That is, do the data indicate that systemic discrimination against protected military veterans and the disabled is occurring at a rate high enough to justify major changes in the regulations that govern VEVRAA and Section 503?

Three publicly available data resources were used to summarize and interpret OFCCP's enforcement of VEVRAA and Section 503 since fiscal year 2004. These three sources include two Department of Labor databases of OFCCP compliance evaluations and complaint investigations, as well as CCE's database of OFCCP compliance reviews that resulted in a conciliation agreement alleging discrimination against a protected group. The data cover almost a nine-year period and presumably include a universe of approximately 285,390 federal contractor establishments. These data sources were analyzed using descriptive statistics to summarize historical enforcement patterns from September 2004 to June of 2012. Results are organized into two different types of OFCCP enforcement; proactive compliance evaluations and reactive complaint investigations. We found several interesting findings.

With regard to Complaint Investigations:

- Of the approximately 285,390 federal contractor and subcontractor establishments:
    - OFCCP fielded 871 veteran and/or disability complaints between 2004 and June of 2012. Of these 871 complaints, 60 (6.89%) resulted in a violation, an average of 6.67 violations per year.
    - Approximately 95% of all complaints closed without a finding of discrimination involving protected veterans and/or individuals with disabilities.
    - Importantly, the vast majority of these 60 settlements were technical violations (e.g., record-keeping), rather than violations indicating systemic discrimination.

- Based on analyses of complaint data from 2004 to June 2012, it is estimated that less than 0.021% of the 285, 390 federal contractor establishments are likely to have a finding of discrimination with regard to protected veterans or individuals with disabilities.

With regard to Compliance Evaluations:

- From 2007 through 2011, OFCCP conducted 22,104 compliance reviews of federal contractor establishments. Of those, OFCCP alleged discrimination against protected veterans and individuals with disabilities in three (less than 1 tenth of a percent) instances.
- Two of the cases alleged discrimination against protected veterans, while one alleged discrimination against disabled veterans.

After considering the number of violations that result from routine compliance evaluations as well as complaint investigations, it is estimated that less than one percent of federal contractor establishments are likely to have a finding of discrimination against protected veterans or individuals with disabilities. While the data in this report do not prove, nor disprove, the existence of discrimination against protected veterans and individuals with disabilities, the above results fail to provide the evidence needed to make an evidence-based policy decision such as those proposed in the regulations. These results suggest that discrimination against protected veterans and individuals with disabilities, especially with regard to hiring, is not a frequent finding by OFCCP and may not support the major shift in policy that the proposed regulations would necessitate. It is important to note that this report is not a criticism of the agency or the quality of its work. Instead, it is an attempt to neutrally summarize the findings of OFCCP's audit and enforcement efforts.

Introduction

The Center for Corporate Equality (CCE) is a national, non-profit research organization focused on Equal Employment Opportunity. Our mission is to help leaders from various human resource functions harness their natural synergies, understand a breadth of EEO topics, and work together to promote affirmative action and equal employment compliance in their workplaces. Toward this end, CCE conducts research and publishes reports on EEO enforcement, emerging legal topics, and methodological issues.

In response to the return of our military service members, the federal government has proposed various initiatives intended to increase veterans' employment opportunities in the civilian workforce. Relatedly, employment opportunity for individuals with disabilities is an important topic for the current administration and is also the focus of current initiatives.

As a result, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced two Notices of Proposed Rulemaking (NPRM) to amend and revise regulations related to individuals with disabilities and protected veterans. Specifically, on April 26, 2011, OFCCP proposed to revise the federal regulations implementing the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and on December 9, 2011, OFCCP proposed to make similar revisions to the federal regulations implementing Section 503 of the Rehabilitation Act (Section 503). VEVRAA prohibits discrimination against, and requires affirmative action to employ, the veterans that fall into one or more of four categories.[1] Section 503 prohibits discrimination against, and requires affirmative action to employ, individuals with disabilities.

The current requirements of Section 503 and VEVRAA have an anti-discrimination component but primarily focus on affirmative action efforts to engage in positive outreach and recruitment to employ and advance members of these protected groups. Thus, many of the current requirements focus on effective outreach, recruitment and good faith efforts; activities which serve to increase the qualified applicant pool for contractors. If the proposed regulations are implemented a major shift would occur, redefining affirmative action, while placing significant emphasis on anti-discrimination. While the proposals would increase the current requirements to engage in affirmative action and eliminate discrimination, they would clearly increase the latter as much if not more than the former. The proposed rules would, for example, require employers to track in detail the disability and veteran status of all job applicants and employees, provide a written justification for why each disabled or veteran applicant was not hired, and annually conduct statistical analyses of both employment and hiring data. Above and beyond the proposed

[1] VEVRAA covers disabled veterans, recently separated veterans, armed forces service medal veterans and other protected veterans.

regulations' requirement to develop relationships with local groups, few, if any of the new requirements, would have any direct impact on the applicant flow and subsequent hiring for either veterans or individuals with disabilities[2].

A recent article in the *New York Times* succinctly addressed the issue of government policies and the utilization of the behavioral sciences[3]. In the article, economist Richard H. Thaler proposed two mantras when it comes to forming new policies:

- If you want to encourage some activity, make it easy
- You can't make evidence-based policy decisions without evidence

Given this major shift in policy and focus to anti-discrimination efforts, one would expect that past enforcement of Section 503 and VEVRAA shows evidence of significant, if not widespread, discrimination against protected veterans and individuals with disabilities.

OFCCP's proposed rulemakings for both VEVRAA and Section 503 do not provide past enforcement data (i.e., evidence) as part of the impetus for the changes to the regulations[4]. Thus, in an effort to address the question of whether there is evidence to support either an increase or shift in discrimination patterns against protected veterans or individuals with disabilities, this report summarizes several OFCCP sources of enforcement data related to protected veterans and persons with disabilities. These sources include data regarding OFCCP compliance evaluations and complaint investigations of federal contractors and subcontractors. The data cover almost a nine year period and include a universe of approximately 285,390 federal contractor establishments[5] (see Appendix A). Presumably, the data from these two methods would reflect a need for increased anti-discrimination requirements for contractors and are behind the shift in policy that the proposed regulations reflect.

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[2] Proposed changes, in addition to the detailed tracking of applicants (and employees for training opportunities), include: local job posting requirements (national posting does not fulfill requirement), statistical analysis of efforts (referral ratios, applicant ratio, job fill ratio, and hiring ratio), increased record-keeping requirements (5 years), and solicitation of status pre and post-offer for applicants and annually for employees.

[3] Thaler, R. H., (2012, July 8). Watching behavior before writing the rules. *The New York Times*, p. BU4. (http://www.nytimes.com/2012/07/08/business/behavioral-science-can-help-guide-policy-economic-view.html?pagewanted=all)

[4] Rather, the agency cited the unemployment rates for the members of these groups in the NPRM preambles. According to the Bureau of Labor Statistics (BLS), the 2009 unemployment rate for veterans 18 to 24 years old was 21.1% (in comparison to 16.6% for non-veterans in the same age group). It should be noted that this refers to all veterans and not just those covered under VEVRAA. Additionally, the Section 503 NPRM preamble reported BLS data that captured the 2010 unemployment rate for working age individuals with disabilities in the workforce as 14.8% compared to 9.4% for working age individuals without disabilities (note, BLS reports that only 21.8% of working age people with certain functional disabilities are included in the labor force).

[5] Federal contractor establishments were used, rather than total companies, because affirmative action plans (and thus audits) are establishment based.

In the current study, we seek to answer the question of whether there is evidence to support the implementation of the currently proposed changes to the regulations governing Section 503 and VEVRAA. The goal of this study is not to prove (or disprove) that discrimination is occurring, but rather to investigate whether the current, available data support the acceptance of rules that require such a major shift in policy. It is important to note that this report is in no way a criticism of the agency or the quality of its work; CCE reports and interprets the available data without making assumptions or unreasonable inferences.

Method

Data Overview

This report predominately utilizes three sources of information to summarize and interpret enforcement of VEVRAA and Section 503 since fiscal year 2004. Each of these sources provides a different piece of information for the enforcement of these two important regulations over the last nine years. Although there may be other data to consider, CCE exhausted the relevant (and available) data to address whether evidence exists to support the proposed regulations. The following sections summarize each of the data sources, including the method of collection and any possible ambiguity or error that may have existed within the source. Interpretation of these sources occurs in the following section. The data sources utilized were:

- OFCCP enforcement database: *Complaint Investigations* (2004-2012)
- OFCCP enforcement database: *Compliance Evaluations* (2004-2012)
- *CCE database* of OFCCP compliance reviews that resulted in a conciliation agreement alleging discrimination against a protected group (2007-2011)

To add some context to the databases, there are approximately 285,390 federal contractor and subcontractor establishments that are subject to routine compliance evaluations (i.e. audits) and possible complaints.

Complaint Investigations

The first data source utilized was an OFCCP enforcement database for complaint investigations[6] made publically available by the Department of Labor (DOL). A complaint investigation occurs when a protected individual, or group of individuals, files a complaint with the OFCCP against a federal contractor establishment. This source provides useful information with regard to the question of whether

[6] http://ogesdw.dol.gov/raw_data_catalog.php

or not discrimination has previously occurred, as all 285,390 contractor establishments are susceptible to have complaints filed each year. The available database includes records from fiscal year 2004 through "present." It is assumed that "present" refers to June 5, 2012 as that is the last reported "update date" on the website. However, the website does not define what "update" means, so it is unclear if the data reflect activity as of June 5, 2012 or if the cutoff date is an earlier point of time. Based on data in the compliance evaluation database discussed below, we believe the "present" data reflect September 1, 2011 to June 1, 2012. The website reports that it is updated monthly.

The database includes information regarding the basis of the complaint (e.g., gender, race, veteran status) as well as the investigative authority. OFCCP enforces Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), thus each complaint investigation is covered by one of these three investigative authorities. As Table 1 shows, there were 1,124 complaints investigated and closed from 2004 through present. The majority of complaints were under the investigative authority of VEVRAA or Section 503 (40.21% and 35.05% respectively), with the remaining 25 percent under EO 11246 or "other". The database did not define what "other" refers to for the investigative authority.

Table 1. Summary of OFCCP Complaint Investigations: Investigative Authorities (2004-2012)[1]

Investigative Authority	# of Complaints	% of Total Complaint Investigations
VEVRAA	452	40.21%
503	394	35.05%
Executive Order 11246	260	23.13%
Other[2]	18	1.60%
Total	**1124**	**100.00%**

[1]2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

[2]Not defined in OFCCP database

Those complaints that involved protected veterans and/or individuals with disabilities were the main focus of this study. To determine if the complaint involved a veteran claim or an individual with a disability claim, the investigative authorities as well as the basis for the complaint were considered. As Table 2 shows, complaints could be filed with a basis of discrimination for veteran or disability. If the complaint did not include a "yes" under at least one of the two categories of interest, it was not included as a "disability-related" or "veteran-related" complaint. Overlap exists between the basis of the complaint, and the investigative authority for the complaint, within and across the two groups (i.e., protected veterans and individuals with disabilities), so the basis columns cannot be summed to reach the total number of "related" complaints for the year. It should be noted that there is not a complete overlap

between related columns. That is, all complaints covered under Section 503 do not necessarily have a basis of disabled and all complaints involving disability were not necessarily filed under Section 503 (see Appendix B for a detailed breakdown of investigative authority and basis for veteran and/or disability-related complaints). Only complaints related to disability or veteran status are included in Tables 1 and 2.

Table 2. Summary of OFCCP Complaint Investigations: Basis of Veteran or Disability (2004-2012)[1]

Fiscal Year	Alleged Discrimination on the Basis of Veteran Status	Alleged Discrimination on the Basis of Disability	Total Veteran- and Disability-Related Complaints[2]
2004	73	65	**124**
2005	66	50	**114**
2006	53	50	**93**
2007	54	40	**85**
2008	79	70	**134**
2009	39	48	**69**
2010	41	50	**80**
2011	62	63	**110**
2012 [1]	22	43	**62**
Total	**489**	**479**	**871**

[1]2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

[2]Overlap exists between the basis of the complaint, and investigative authority for the complaint, within and across the two groups (i.e., protected veterans and individuals with disabilities), so the investigative authority counts (from table 1) and basis counts cannot be summed to reach the total of complaints for the year

Tables 3 and 4 show, by fiscal year, the number of filed complaints that are considered veteran or disability-related. From 2004 to present, there were 141 veteran- and disability-related complaints that overlapped; thus, there are 871 unique complaints that involve veterans and/or individuals with disabilities over the almost nine year period (Table 5). In addition to the investigative authority and basis of alleged discrimination for the complaint, the enforcement database also reports whether the complaint resulted in a finding of a violation (Tables 3-5). It should be noted that the database does not specify whether or not the violation is a technical violation (i.e., no monetary remedies, typically just reporting requirements) or a finding of discrimination (e.g., payment of back pay, payment of benefits). However, the database does specify the categorical type of violation (e.g., hiring, termination, failure to accommodate). Table 6 provides a count of the violations found in veteran and/or disability-related complaint investigations. Tables 3-6 are discussed in further detail in the analysis section.

Database Integrity Issues

It should be noted that there are some data inconsistencies within the database. For example, there were 17 complaints where the basis is "disabled" yet the complaint is not labeled under Section 503 or

VEVRAA as the investigative authority. Instead, the investigative authority is listed as Executive Order 11246 or "other". Additionally, there are 8 complaints where the basis of the complaint is veteran status, yet EO 11246 or "other" was listed as the investigative authority rather than VEVRAA or Section 503. Similarly, there are 13 complaints where Section 503 is listed as the investigative authority, yet the basis of the complaint is not related to disabled or veteran status. Additionally, some of the violations are not intuitive given the basis of the complaint. For example, in one case the basis of the complaint was veteran status yet the violation was for pregnancy leave. There are two possibilities for this inconsistency; either there is an error in the database or the violations were found during an investigation although they were not the basis of the initial complaint.

Further, there may be duplicate records in the database (i.e., same company, location, fiscal year, and basis). At a minimum, 79 records within the complete database appear to be a duplicate, yet due to abbreviated names or address, not all duplicate records are easily identifiable. That being said, CCE is unable to determine if these 79 are true duplicates or whether more than one complaint of the same nature was filed at a facility during the same fiscal year. Due to the inability to differentiate between a duplicate record and an instance in which two complaints were filed at the same location within a year, these duplicate records were included in the analyses.

Compliance Evaluations

In addition to complaint investigations, OFCCP also conducts routine compliance evaluations based on an administratively neutral selection system of federal contractor establishments. The DOL also makes an enforcement database of compliance evaluations[7] publicly available that is housed separate from the complaint investigation database. As with the complaint investigation database, the compliance evaluation database covers fiscal years 2004 to present and it is assumed that "present" refers to June 2012. Unlike the complaint database, the compliance evaluation database includes a closure date, of which the latest closure date is June 1, 2012; so it is assumed that June 1, 2012 is the cutoff date for the current data[8]. Similar to the complaint file, the compliance evaluation file also includes company information and the types of found violations. However, the compliance evaluation file does not include information regarding the protected class for audits that close with a violation. Thus it is impossible to

[7] http://ogesdw.dol.gov/raw_data_catalog.php

[8] Another issue to note is that the public enforcement database has appeared to fluctuate depending on when the records were pulled. CCE has pulled the database previously, but when comparing a year of data to an old pull, the records do not match up exactly (note, this occurs for all years and not just the current fiscal year at the time of the data pull). For example, in 2011 CCE pulled the OFCCP database to use for another purpose. At that time, the reported number of compliance evaluations for fiscal year 2010 was 4,960; however, the most recent pull of the database reports 4,942 compliance evaluations for 2010. As with the data issues noted above, it is unknown whether this reflects an error. Without evidence to remove data reflecting these issues, CCE believes the data to be the best that are available and appropriate for analysis.

identify specific cases related to protected veterans or individuals with disabilities. To inform on this issue, CCE has performed other data collection methods to build a database that will be discussed in the next section.

Unlike the complaint investigation database, the compliance evaluation database includes the type of closure for each audit, identified as one of the following: closure letter, conciliation agreement, consent decree, or financial remedy. A closure letter is issued when an audit closes in full compliance with no violations. If the audit did not end with a closure letter, a notice of violation (NOV) was issued that resulted in a voluntary conciliation agreement, court-ordered consent decree, or financial remedy. Each of these NOVs results in the federal contractor being required to engage in follow-up reporting activities. For those violations that involve alleged discrimination, financial remedies are included. Appendix C provides the counts for the total number of compliance evaluations closed during each fiscal year from 2004 to present, as well as the manner in which they closed (i.e., closure letter or notice of violation).

CCE Database: OFCCP Settlements Alleging Discrimination

In addition to reviews of the public enforcement database, CCE annually submits a Freedom of Information Act (FOIA) request to OFCCP, requesting a copy of all conciliation agreements or consent decrees that included violations that alleged discrimination against a protected group. Conciliation agreements that result in technical violations only (e.g., record-keeping, failure to post with the state) are not reviewed as a part of CCE's annual analysis. Instead, the focus is on those violations where there is a finding of discrimination and some sort of financial settlement is paid to victims for alleged discrimination in hiring, compensation, promotions, or terminations. CCE has annually requested these data since fiscal year 2007 in order to inform the public about the types of audits and OFCCP strategies that end with a conciliation agreement or consent decree.[9] The actual conciliation agreements and consent decrees provide detailed information about each violation and remedy, and thus the CCE database will be used to provide context to the publically available OFCCP databases discussed above.

For the current study, those conciliation agreements from 2007 through 2011 that involved systemic discrimination against protected veterans and/or individuals with disabilities were reviewed (Table 7). Conciliation agreements can be the result of an administratively neutral scheduled compliance evaluation or complaint investigation. These data provide a piece of information that was lacking from the compliance evaluation database (i.e., protected class members) and thus allows those veteran- and

[9] CCE submitted an additional FOIA request on May 24, 2012 requesting all conciliation agreements and consent decrees alleging discrimination against protected veterans and individuals with disabilities from 2004 through present. To date, CCE has not received the requested information. Once this information is received, the report will be updated to reflect the additional data.

disability-related settlements to be identified. It also provides information to identify whether the complaint investigations with violations included systemic discrimination violations or only technical violations.

In reviewing the annual enforcement database and those records obtained through FOIA requests, CCE noticed that not all conciliation agreements that are listed in the public enforcement database as having a financial agreement (see Appendix C) were sent to CCE, specifically for fiscal year 2011. Specifically, there were 17 financial remedies identified in the database that were not received. After further inquiry with OFCCP, CCE received these missing conciliation agreements and noted that a label of "financial remedy" in the OFCCP database does not necessarily mean that discrimination was identified where remedies for protected class members was present. Instead, OFCCP included estimated financial remedies that a contractor anticipated using to implement the remedy for a technical violation as part of the settlement dollars that OFCCP obtains each year. Thus, in some cases, OFCCP reports settlements that do not go to victims of discrimination. For example, in one of the conciliation agreements obtained through the follow-up request, the violation states that the contractor failed to "provide access for mobility-impaired applicants and potential employees seeking employment". The remedy was to modify the entrance to its Human Resources office to provide access for individuals with mobility disabilities; the estimated modification cost was $385. OFCCP has coded this cost as a financial remedy even though the amount was not paid to an individual or class of victims. In another example, the contractor received a violation where the remedy included building modifications such as doorbells and restroom modifications to provide access for individuals with mobility disabilities. These changes were estimated to cost $20,512.08. Again, this conciliation agreement did not include monetary retribution for victims of discriminations, but rather building modifications and technical violations. This classification of estimated building modification costs as a financial remedy should be considered when interpreting results from Appendix C, especially for 2011, as the number of contractors with a financial settlement is likely less than what is reported in the enforcement database. These data issues reinforce the importance of using the CCE database when interpreting enforcement statistics from the complaint investigation and compliance evaluation databases.

Analyses

Complaint Investigations

Tables 3 and 4 provide detailed information about the number of complaints investigated and closed each year for protected veterans and individuals with disabilities, as well as the number of violations resulting from those investigations. In reviewing the annual breakdown of veteran- and disability-related

complaints, the number of complaints filed per year remains fairly consistent. Note that, based on Table 3, veteran complaints are declining and approaching an all-time low with only 22% of complaints in 2012 related to veteran status[10]. This is interesting given the number of veterans returning from combat, the high-profile nature of the issue, and the fact that OFCCP is the only agency to enforce VEVRAA.

The percentage of veteran-related complaint investigations that resulted in a violation each year ranged from 1.30% to 15.63%, with an overall percentage of 7.18%. Considering all 1,124 complaints that were filed over the almost nine year period, only 3.29% were veteran-related and closed with a violation. To put this into context, approximately 97% of all complaints filed over the last eight plus years closed without a finding of discrimination in regard to discrimination against protected veterans.

Table 3. Veterans-Related Complaint Investigations by Year (2004 - 2012)[1]

Fiscal Year	# of Veteran-Related Complaint Investigations	Veteran Complaints Resulting in a Violation	% of Veteran Complaints		% of Total Complaints		Total Complaint Investigations[2]
2004	77	1	1.30%	(1/77)	0.61%	(1/165)	**165**
2005	71	3	4.23%	(3/71)	2.27%	(3/132)	**132**
2006	57	2	3.51%	(2/57)	1.87%	(2/107)	**107**
2007	55	2	3.64%	(2/55)	1.83%	(2/109)	**109**
2008	83	6	7.23%	(6/83)	3.51%	(6/171)	**171**
2009	39	6	15.38%	(6/39)	7.06%	(6/85)	**85**
2010	46	5	10.87%	(5/46)	4.67%	(5/107)	**107**
2011	64	10	15.63%	(10/64)	6.94%	(10/144)	**144**
2012 [1]	*23*	*2*	*8.70%*	*(2/23)*	*1.92%*	*(2/104)*	***104***
Total	**515**	**37**	**7.18%**	(37/515)	**3.29%**	**(37/1124)**	**1124**

[1]2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.
[2]Total complaints in the database include non-veteran or disability-related complaints (e.g., race, gender, etc.). Note, there is overlap between the veteran- and disability-related complaints

The percentage of disability-related complaint investigations that resulted in violations each year ranged from zero percent to 17.31%, with an overall percentage of 7.44%. Considering all 1,124 complaints there were filed over the almost nine year period, only 3.29% were disability-related and closed with a violation. As noted in the veteran-related complaints, we see that approximately 97% of complaints closed without merit with regard to discrimination against individuals with disabilities.

[10] It is important to keep in mind that 2012 only represents approximately nine months of data (i.e., September 1, 2011 to June 1, 2012) and thus the totals may look different once the fiscal year ends.

Table 4. Disability-Related Complaint Investigations by Year (2004 - 2012)[1]

Fiscal Year	# of Disability-Related Complaint Investigations	Disability Complaints Resulting in a Violation	% of Disability Complaints		% of Total Complaint		Total Complaint Investigations[2]
2004	66	0	0.00%	(0/66)	0.00%	(0/165)	**165**
2005	53	1	1.89%	(1/53)	0.76%	(1/132)	**132**
2006	53	2	3.77%	(2/53)	1.87%	(2/107)	**107**
2007	41	1	2.44%	(1/41)	0.92%	(1/109)	**109**
2008	73	7	9.59%	(7/73)	4.09%	(7/171)	**171**
2009	48	4	8.33%	(4/48)	4.71%	(4/85)	**85**
2010	52	9	17.31%	(9/52)	8.41%	(9/107)	**107**
2011	65	6	9.23%	(6/65)	4.17%	(6/144)	**144**
2012 [1]	*46*	*7*	*15.22%*	*(7/46)*	*6.73%*	*(7/104)*	***104***
Total	**497**	**37**	**7.44%**	**(37/497)**	**3.29%**	**(37/1124)**	**1124**

[1]2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

[2]Total complaints in the database include non-veteran- or disability-related complaints (e.g., race, gender, etc.). Note, there is overlap between the veteran- and disability-related complaints for each year

As discussed in the methods section, there is an overlap between 141 of the veteran and disability-related complaints, thus there are 871 complaints total that are veteran and/or disability-related (Table 5). Of these 871 complaints, 60 resulted in a violation, with an average of 6.67 violations per year. As noted in the following section, the vast majority of these complaints involve technical violations rather than an allegation of discrimination. Based upon these data, from 2004 to present, only 6.89% of disability and veteran-related complaints that were investigated and closed were found to have merit. Further, these findings represent only 5.34% of all complaints filed from 2004 to present. Thus, approximately 95% of all complaints closed without a finding of discrimination involving protected veterans and/or individuals with disabilities. Notably in 2012, 8 of 62 veteran and disability-related complaints (12.9%) have settled with a notice of violation.

Table 6 summarizes the type of violations found as a result of veteran and disability-related complaints. For both groups, the most common violation was "other", which was not defined by the OFCCP enforcement database. After that, terminations, accommodations, and hiring were the most common violations. As noted in Table 6, 14 of the complaints that result in a violation were both veteran- and disability-related, thus the veteran and disability columns do not necessarily sum to the total number of violations found for the unique complaints filed. Additionally, one complaint may result in more than one type of violation. For example, in one of the disability-related complaints, there was a violation for

Table 5. Overview of Veteran- and Disability-Related Complaint Investigations and Violations (2004 - 2012)[1]

Type of Complaint	Complaints			Violations				
	# of Complaints	Avg. # Complaints Per Year	Median # Complaints Per Year	# of Complaints Resulting in a Violation	Avg. # Violations Per Year	Median # Violations Per Year	% Resulting in a Violation	**% Resulting in a Violation**
Veterans and/or Disability Complaint Investigations[2]	871	96.77	93	60	6.67	7	6.89% (60/871)	**5.34% (60/1124)**
Non-Veteran or Disability Related Complaints (i.e., race, gender)[3]	253	28.11	27	31	3.44	3	12.25% (31/253)	**2.76% (31/1124)**
Total Complaints	**1124**	**124.89**	**109**	**91**	**10.11**	**9**	**8.10% (91/1124)**	**8.10% (91/1124)**

[1]2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

[2]There are 141 complaints that overlap for veteran- and disability-related, so there are 871 total complaints that are veteran, disabled or both

[3]Non-Veteran or Disability complaints represent the remaining filed complaints under other bases of discrimination (e.g. race) or investigative authority (e.g., EO 11246)

termination, layoff, harassment, job benefits, retaliation, accommodation, and "other". Interestingly, Table 6 shows that over almost nine years, there were only 10 veteran and/or disability –related complaints that resulted in a hiring violation, with six hiring violations per related complaint. Further, when looking at unique veteran-only related complaints (i.e., those with no overlap with disability status), there are only 4 violations for hiring since 2004. This is surprising given the current administration's focus on discrimination in hiring against veterans.

Table 6. Type of Found Violations as a Result of Complaint Investigations for Veteran- and Disability-Related Complaints (2004-2012)[1]

	Protected Veterans	Individuals with Disabilities	Total[2]
Terminations	6	11	13
Accommodations	6	9	11
Hiring	6	6	10
Promotions	4	3	7
Job Benefits	--	4	4
Wages	3	2	4
Retaliation	1	2	3
Layoffs	--	2	2
Demotions	2	--	2
Harassment	1	2	2
Recall	1	--	1
Seniority	1	--	1
Pregnancy Leave	1	--	1
Religious Observance	1	1	1
Other[3]	14	11	21

[1]2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

[2]There is overlap between 14 veteran and disability-related complaints that result in a violation, thus the veteran and disability columns may not add to the total number of violations for these two groups. Additionally, a complaint can close with more than one violation, so the individual columns cannot be totaled to the total number of complaints with violation(s).

[3]Not defined in OFCCP database

Compliance Evaluations

As noted in the methods section, Appendix C summarizes the enforcement database for the compliance evaluations opened and closed from 2004 to present. The compliance evaluation database does not provide information regarding protected classes (e.g., veterans, individuals with disabilities, females, etc.), thus veteran- and disability-related compliance evaluations cannot be specifically identified through the database, as is possible with the complaint investigation database. As Appendix C shows, 84.18% of compliance evaluations ended with a closure letter between 2004 and present. The remaining

15.82% of compliance evaluations resulted in a notice of violation, which OFCCP coded in the database as a conciliation agreement (13.88%), consent decree (0.08%), or financial remedy (1.86%).

Importantly, there are a declining percentage of compliance evaluations closing with a letter of compliance in later years as compared with earlier in the time period. Thus, the number of conciliation agreements has increased, with the most drastic increases occurring in 2011 and 2012. The number of audits that close with financial agreements also appears to have increased over time which is likely the result of the current administration's practice of citing a building modification cost as a financial remedy in the database (as discussed in the data methods section above) versus a finding of discrimination.

CCE Database: OFCCP Settlements Alleging Discrimination

As noted previously in the data methods section, CCE annually requests the conciliation agreements and consent decrees from OFCCP that allege systemic discrimination against a protected group. As Table 7 shows, from 2007 to 2011 there were four instances in which a protected veteran or individual with a disability received financial remedies as a result of alleged discrimination. There were no conciliation agreements or consent decrees in 2007 or 2009 that resulted in monetary relief for protected veterans or individuals with disabilities. The four conciliation agreements in Table 7 represent 1.12% of the total systemic settlements from 2007 to 2011. Table 7 outlines the type of violation, protected class, and type of review for each case to provide context for the settlements.

The conciliation agreement from 2008 collected monetary relief for protected veterans. The company received a violation for a failure to "hire any protected veteran applicants … although there were qualified candidates" for the job title in question. Back pay and interest were paid to affected class members. As Table 7 reflects, there were no findings of systemic discrimination in 2009. However, it should be noted there was a conciliation agreement included in the FOIA request for 2009 that CCE deemed inappropriate to include in our annual report. In reviewing the violation, it appears that the company failed to "provide directions for entrance into its facility to individuals with known physical limitations and modifications to its restrooms". Thus, the "remedy" is the estimated costs of those building and restrooms modifications. Remedies were not paid to individuals with disabilities, thus this conciliation was not included in Table 7.

Table 7. Findings of Discrimination by OFCCP as a Result of all Audits (Compliance Evaluations and Complaint Investigations)[1] (2007-2011)

Fiscal Year	Type of Violation	Protected Class	# of Audits with Findings of Discrimination	Type of Review
2007	--	--	0	--
2008	Hiring	Veteran	1	Compliance Evaluation
2009	--	--	0	--
2010	Hiring	Veteran	1	Compliance Evaluation
2011	Hiring	Disabled Veterans	2	Compliance Evaluation
	Termination & Retaliation	Individual with a Disability		Complaint Investigation

[1] Findings were obtained through a FOIA request by CCE for all OFCCP cases that settled and alleged systemic discrimination against a protected group

The conciliation agreement in 2010 was for a failure to employ protected veterans. Included in the description of the failure to hire violation is the company's failure to "immediately list" (i.e., post) with the state employment office. Typically this posting violation is listed as a technical violation, separate from any disparate treatment or impact violations. The violation further explains that data from the state employment office was used to conduct the hiring adverse impact analyses. This is atypical as analyses should include those job seekers who apply to a position and are considered applicants per the Internet Applicant Regulation. Instead, this violation considered the constructed pool of applicants to be the 79 protected veterans enrolled with the state office, even though they never applied to a position at the organization. The conciliation agreement asserted that the failure to post with state prevented qualified veterans from applying to open positions with the organization and thus should be considered in the pool. This selection rate of 0% for veterans was compared to the actual applicant pool of "non-veterans" selection rate in order to determine whether there was impact. The organization was thus required to pay back pay and interest to veterans who registered with the state, but never actually applied to the organization. As noted above, this violation and remedy are atypical.

As Table 7 shows, there were two conciliation agreements in 2011 with violations for alleged systemic discrimination. The first conciliation agreement was for a failure to hire disabled veterans. Specifically, the company did not uniformly apply its selection procedures and criteria for employment of disabled veterans. Note that this company also received a technical violation for obtaining disability status

from applicants prior to making an offer[11], yet this information was used in order to perform the selection rate analysis of veteran applicants.

The second conciliation agreement in 2011 was the result of a filed complaint (not randomly scheduled compliance evaluation). It may not be appropriate to interpret this violation in conjunction with the other three conciliation agreements; however the complaint did result in remedies paid to the complainant for what the OFCCP considers to be retaliation and termination violations (as reported in Table 6 above). The violation states that the company failed to reemploy the complainant after long-term disability when it failed to interview or select for a posted position "in retaliation for engaging in protected activity". Because the violation is unclear and has several redacted sections, it is difficult to interpret. However, this complaint is recorded in the OFCCP enforcement database as having a violation for termination and retaliation. It is also unclear exactly what remedies the complainant received. The remedy states that $24,640 of the $99,000 that the company was required to pay, is for reimbursement for medical insurance premiums and expenses. The remedy does not specify to how the remaining $74,360 was applied (e.g., back pay, interest, benefits, etc.).

OFCCP and CCE Databases

To provide an accurate picture of all available enforcement activity and findings of discrimination, data from the DOL enforcement databases for complaint investigations and compliance evaluations, as well as the data by CCE on systemic discrimination settlements, have been combined in Tables 8 and 9. Table 8 summarizes the total compliance evaluations completed from 2007 to 2011. Analysis is limited to these four years as the CCE database does not provide data for 2004-2006 or 2012. As noted in Table 8, from 2007 to 2011 only three compliance evaluations closed with an alleged finding of discrimination against veterans. These three findings constitute 0.014% of all compliance evaluations. Additionally, only one compliance evaluation closed with an alleged finding of discrimination for individuals with disability, which constitutes 0.005% of all compliance evaluations. Overall, out of 22,104 compliance evaluations conducted from 2007-2011, only three closed with an alleged finding discrimination for protected veterans or individuals with disability[12]. These three findings represent 0.014% of all compliance evaluations conducted from 2007 through 2011.

[11] Both ADA and Section 503 preclude employers from inquiring into disability status prior to an offer of employment.
[12] The conciliation agreement in 2011 was for disabled veterans, thus there is overlap for the findings in 2011 giving only 3 total from 2007 to 2011.

Table 8. Estimated Percentage of Federal Contractor Establishments with findings of Discrimination involving Protected Veterans and/or Individuals with Disabilities based on Compliance Evaluations (2007-2011)[1]

Fiscal Year	Total Evaluations Completed[2]	Veterans		Individuals with a Disability		Total[3]	
		#	%	#	%	#	%
2007	4,923	0	0.000%	0	0.000%	0	0.000%
2008	4,325	1	0.023%	0	0.000%	1	0.023%
2009	3,907	0	0.000%	0	0.000%	0	0.000%
2010	4,942	1	0.020%	0	0.000%	1	0.020%
2011	4,007	1	0.025%	1	0.025%	1	0.025%
Total	**22,104**	**3**	0.014%	**1**	0.005%	**3**	0.014%

[1]Results based on the CCE Database, so time period only include 2007-2011

[2]Based on Enforcement Database: Compliance Evaluations. Numbers are reported in Appendix C.

[3]Based on numbers reported in table 7. Does not include the 2011 conciliation agreement that was the result of a complaint investigation. This is included in the number of findings reported for complaint investigations in 2011.

Table 9 provides an overview of the number of complaint investigations related to veterans or individuals with a disability that result in a violation. Additionally, it estimates the percentage of federal contractor establishments that you would expect to result in findings of discrimination based on the total number of contractor establishments in the country. Because every location is subject to having at least one complaint filed each year, the percentage of findings based on actual complaints was compared to the total number of contractor establishments. The estimated number of federal contractor establishments[13], 285,390, was obtained from the Veterans Employment and Training Services (VETS) and is based on the number of establishments for which contractors completed VETS100A reports in 2010 (see Appendix A). This helps to estimate the percentage of federal contractor establishments that are likely to have a violation if investigated. Based on findings of violations from veteran-related complaints from 2004 to present, approximately 0.013% of federal contractor establishments are likely to have a finding of discrimination. The findings for disability-related complaints are also likely to be found in 0.013% of federal contractor establishments. Considering the unique veteran and disability-related complaints that resulted in a violation (60), only 1 in every 4,756 (0.021%) federal contractor establishments are likely to have a finding of discrimination for protected veterans and/or individuals with a disability.

[13] For a variety of reasons (e.g. incorrect filing, no filing) the number of estimated federal contractor establishments is likely a gross underestimation. For estimation purposes, the total number of reports submitted for the 2010 VETS100A was used as the estimated number of contractor establishments.

Table 9. Estimated Percentage of Federal Contractor Establishments with Violations Involving Protected Veterans and/or Individuals with Disabilities based on Complaint Investigations (2004-2012)

Fiscal Year	Estimated Number of Federal Contractor Establishments[1]	Veterans Complaints Resulting in a Violation[2]		Disability Complaints Resulting in a Violation[2]		Total	
		#	%	#	%	#	%
2004	285,390	1	0.000%	0	0.000%	1	0.000%
2005	285,390	3	0.001%	1	0.000%	4	0.001%
2006	285,390	2	0.001%	2	0.001%	2	0.001%
2007	285,390	2	0.001%	1	0.000%	3	0.001%
2008	285,390	6	0.002%	7	0.002%	11	0.004%
2009	285,390	6	0.002%	4	0.001%	7	0.002%
2010	285,390	5	0.002%	9	0.003%	12	0.004%
2011	285,390	10	0.004%	6	0.002%	12	0.004%
2012	*285,390*	*2*	*0.001%*	*7*	*0.002%*	*8*	*0.003%*
Total	**285,390**	**37**	**0.013%**	**37**	**0.013%**	**60**	**0.021%**

[1]Number of federal contractor establishments is based on 2010 VETS100A output. This is likely an underestimation of the number of federal contract establishments

[2]Based on numbers reported in table 7. Does not include the 2011 conciliation agreement that was the result of a complaint investigation. This is included in the number of findings reported for complaint investigations in 2011.

Based on the findings in Tables 8 and 9, it is estimated that fewer than one percent of federal contractor establishments are likely to have a finding of discrimination for protected veterans or individuals with disabilities in either a routine compliance evaluation or complaint investigation.

It should be noted that the findings of systemic discrimination from the CCE report only provides information from 2007-2011 for Table 8, whereas the enforcement databases provide information from 2004 to present (Table 9). However, based on the low frequency of findings in the CCE database for protected veterans or individuals with disabilities from 2007 to 2011 we suspect there are few, if any, that are missing. Even taking into consideration these limitations, CCE feels that the estimates provided in Tables 8 and 9 give appropriate context to the enforcement over the last nine years.

Conclusion

This report leveraged multiple data sources to assess current levels of OFCCP enforcement related to protected veterans and persons with disabilities. A limitation of this research is the missing information from 2004 to 2006 for the CCE database. However, CCE has recently submitted a FOIA to OFCCP seeking to obtain all settlements with findings of discrimination against protected veterans and/or

individuals with disabilities from 2004 to present. A follow-up report will be produced once the data are received.

Given the available data, there does not appear to be an inference of support for the proposed regulations. While the data in this report do not prove, nor disprove, the existence of discrimination against protected veterans and individuals with disabilities, the above results fail to provide the evidence needed to make an evidence-based policy decision like those proposed in the regulations. These results suggest that discrimination against protected veterans and individuals with disabilities, especially with regard to hiring, is not a frequent finding by OFCCP and may not support the major shift in policy that the proposed regulations would necessitate.

Appendix A.
Annual Federal Contractor Reporting Comparison Table (January 31, 2011)

Category	2010 VETS-100A	2010 VETS-100	2009 VETS-100A	2009 VETS -100	2008 VETS -100
Total Federal Contractors	13,536	8,880	13,011	11,919	22,159
Single Establishments	9,664	6,461	10,618	9,717	18,943
Multiple Establishment Organizations	5,665	3,543	7,340	4,861	8,690
Multiple Establishment Hiring Organizations	208,435	85,998	144,896	76,631	46,903
Multiple State Consolidated Reports	61,626	17,099	26,684	13,964	10,177
Total Reports Submitted	**285,390**	113,101	190,190	105,251	84,713
Regular Vietnam Era Veterans		217,600	n/a	199,055	341,000
Regular Special Disabled Veterans		49,368	n/a	45,800	62,020
Recently Hired Vietnam Era Veterans		15,968	n/a	14,285	32,007
Recently Hired Special Disabled Veterans		8,131	n/a	7,436	15,466
Regular Other Protected Veterans	784,593		669,265	n/a	n/a
Regular Disabled Veterans	155,386		154,002	n/a	n/a
Regular Armed Forces Service Medal	161,759		142,677	n/a	n/a
Regular Recently Separated	124,523		118,263	n/a	n/a
Recently Hired Other Protected Veterans	133,333		116,769	n/a	n/a
Recently Hired Disabled Veterans	54,601		50,053	n/a	n/a
Recently Hired Armed Forces Service Medal	58,056		51,332	n/a	n/a
Recently Hired Recently Separated Veterans	52,118		49,194	n/a	n/a

Appendix B.
Summary of Complaints that Include Protected Veterans or Individuals with a Disability (2004-2012)[1]

Fiscal Year	Disability-Related Complaints		Veteran-Related Complaints		Total Veteran- and Disability-Related Complaints[2]
	Section 503 Authority	Disabled Basis	VEVRAA Authority	Veteran Basis	
2004	52	65	70	73	**124**
2005	43	50	69	66	**114**
2006	44	50	46	53	**93**
2007	31	40	50	54	**85**
2008	58	70	75	79	**134**
2009	38	48	29	39	**69**
2010	34	50	43	41	**80**
2011	53	63	51	62	**110**
2012 [1]	41	43	19	22	**62**
Total	**394**	**479**	**452**	**489**	**871**

[1]2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

[2]Overlap exists between the basis of the complaint, and investigative authority for the complaint, within and across the two groups (i.e., protected veterans and individuals with disabilities), so the basis and investigative authority columns cannot be summed to reach the total of complaints for the year. It should be noted that there is not complete overlap between related columns (i.e., all complaints covered under Section 503 do not necessarily have a basis of disabled and vice versa), so all related columns are represented.

Appendix C.
Summary of All OFCCP Enforcement Outcomes as a Result of Compliance Evaluations[1] (2004-2012)[2]

Fiscal Year	Closure Letter[3]		Notice of Violation						Total Compliance Evaluations
			Conciliation Agreement		Consent Decree		Financial Remedy		
	#	%	#	%	#	%	#	%	#
2004	4938	93.63%	277	5.25%	0	0.00%	59	1.12%	**5274**
2005	1921	90.61%	146	6.89%	0	0.00%	53	2.50%	**2120**
2006	3559	88.64%	383	9.54%	0	0.00%	73	1.82%	**4015**
2007	4390	89.17%	471	9.57%	0	0.00%	62	1.26%	**4923**
2008	3701	85.57%	539	12.46%	5	0.12%	80	1.85%	**4325**
2009	3204	82.01%	618	15.82%	9	0.23%	76	1.95%	**3907**
2010	4019	81.32%	839	16.98%	3	0.06%	81	1.64%	**4942**
2011	2898	72.32%	999	24.93%	9	0.22%	101	2.52%	**4007**
2012 [2]	1497	65.80%	697	30.64%	1	0.04%	80	3.52%	**2275**
Total	**30127**	**84.18%**	**4969**	**13.88%**	**27**	**0.08%**	**665**	**1.86%**	**35788**

[1]Data is from the Enforcement Database for Compliance Evaluations; this does not include complaint investigations

[2]2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

[3]Closure letters are issued when an audit closes in full compliance (i.e., no violations)

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PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS — 2012

In 2012, 17.8 percent of persons with a disability were employed, the U.S. Bureau of Labor Statistics reported today. In contrast, the employment-population ratio for persons without a disability was 63.9 percent. The employment-population ratio for persons with a disability was unchanged from 2011 to 2012, while the ratio for persons without a disability increased. The unemployment rate for persons with a disability was 13.4 percent in 2012, higher than the rate for persons with no disability (7.9 percent). The jobless rates for both groups declined from 2011 to 2012.

The data on persons with a disability are collected as part of the Current Population Survey (CPS), a monthly sample survey of about 60,000 households that provides information on employment and unemployment in the United States. The collection of data on persons with a disability is sponsored by the Department of Labor's Office of Disability Employment Policy. For more information, see the Technical Note.

Highlights from the 2012 data:

- Persons with a disability were over three times as likely as those with no disability to be age 65 and over. (See table 1.)
- For all age groups, the employment-population ratio was much lower for persons with a disability than for those with no disability. (See table 1.)
- The unemployment rate for persons with a disability declined from 2011 to 2012. The rate for persons without a disability also fell over the year. (See table A.)
- In 2012, 33 percent of workers with a disability were employed part time, compared with 19 percent of those with no disability. (See table 2.)
- Employed persons with a disability were more likely to be self-employed than those with no disability. (See table 4.)

Demographic characteristics

Persons with a disability tend to be older than persons with no disability, reflecting the increased incidence of disability with age. In 2012, 46 percent of persons with a disability were age 65 and over, compared with 13 percent of those with no disability. Overall, women were somewhat more likely to

have a disability than men, partly reflecting the greater life expectancy of women. Among the major race and ethnicity groups, the prevalence of a disability was higher for blacks and whites than for Asians and Hispanics. (See table 1.)

Employment

The employment-population ratio for persons with a disability was 17.8 percent in 2012, unchanged from 2011. The ratio for those with no disability increased from 63.6 percent to 63.9 percent. The lower ratio among persons with a disability is due, in part, to the fact that a large share of the population of persons with a disability was age 65 and older, and older persons are less likely to be employed. However, across all age groups, persons with a disability were much less likely to be employed than those with no disability. (See tables A and 1.)

Among persons with a disability age 65 and over, the employment-population ratio rose to 6.9 percent in 2012, while the ratio for persons age 16 to 64 with a disability held at 27.0 percent. For persons without a disability, the ratios for both age groups increased from 2011 to 2012. (See table A.)

In 2012, persons with a disability with higher levels of education were more likely to be employed than those with less education. At all levels of education, persons with a disability were much less likely to be employed than were their counterparts with no disability. (See table 1.)

Workers with a disability were more likely than those with no disability to work part time. Among workers with a disability, 33 percent usually worked part time in 2012, compared with 19 percent of workers without a disability. The proportion of workers who were employed part time for economic reasons was slightly higher among those with a disability than among those without a disability (7 percent versus 6 percent). These individuals were working part time because their hours had been cut back or because they were unable to find a full-time job. (See table 2.)

In 2012, workers with a disability were more likely than those with no disability to work in production, transportation, and materials moving occupations (16 percent compared with 12 percent). Those with a disability were less likely than those with no disability to work in management, professional, and related occupations (32 percent compared with 38 percent). (See table 3.)

The share of workers with a disability employed in federal, state, and local government (15 percent) was about the same as the share for those with no disability (14 percent). Workers with a disability were less likely than those with no disability to be employed in private wage and salary jobs (73 percent versus 79 percent). The incidence of self-employment among workers with a disability was higher than among workers with no disability (11 percent versus 7 percent). (See table 4.)

Unemployment

The unemployment rate for persons with a disability was 13.4 percent in 2012, higher than the rate for persons with no disability (7.9 percent). (Unemployed persons are those who did not have a job, were available for work, and were actively looking for a job in the 4 weeks preceding the survey.) The unemployment rates for both persons with a disability and those without a disability were lower in 2012 than in the prior year. (See table A.)

In 2012, the unemployment rate for men with a disability (13.2 percent) was about the same as the rate for women (13.7 percent). As is the case among those without a disability, the unemployment rates in

2012 for those with a disability were higher among blacks (20.8 percent) and Hispanics (19.0 percent) than among whites (12.3 percent) and Asians (11.8 percent). (See table 1.)

Not in the labor force

Persons who are neither employed nor unemployed are not in the labor force. A large proportion of persons with a disability--about 8 in 10--were not in the labor force in 2012, compared with about 3 in 10 persons with no disability. In part, this reflects the fact that persons with a disability tend to be much older than those without a disability, and older persons are, in general, less likely to be labor force participants. However, for all age groups, persons with a disability were more likely than those with no disability to be out of the labor force. (See table 1.)

Among those not in the labor force, 1 percent of those with a disability were marginally attached to the labor force in 2012, compared with 3 percent of those with no disability. These individuals were not in the labor force, wanted and were available for work, and had looked for a job sometime in the prior 12 months. They were not counted as unemployed because they had not searched for work in the 4 weeks preceding the survey. For persons with and without a disability, the vast majority of those not in the labor force reported that they do not want a job. (See table 5.)

Table A. Employment status of the civilian noninstitutional population by disability status and age, 2011 and 2012 annual averages

[Numbers in thousands]

Characteristic	2011			2012		
	Total, 16 years and over	16 to 64 years	65 years and over	Total, 16 years and over	16 to 64 years	65 years and over
PERSONS WITH A DISABILITY						
Civilian noninstitutional population	27,382	15,047	12,335	28,251	15,339	12,912
Civilian labor force	5,722	4,854	868	5,816	4,854	961
Participation rate	20.9	32.3	7.0	20.6	31.6	7.4
Employed	4,861	4,067	794	5,037	4,146	890
Employment-population ratio	17.8	27.0	6.4	17.8	27.0	6.9
Unemployed	861	787	74	779	708	71
Unemployment rate	15.0	16.2	8.5	13.4	14.6	7.4
Not in labor force	21,659	10,192	11,467	22,435	10,484	11,951
PERSONS WITH NO DISABILITY						
Civilian noninstitutional population	212,236	184,842	27,394	215,034	186,077	28,957
Civilian labor force	147,894	141,650	6,244	149,159	142,393	6,766
Participation rate	69.7	76.6	22.8	69.4	76.5	23.4
Employed	135,008	129,155	5,853	137,433	131,078	6,355
Employment-population ratio	63.6	69.9	21.4	63.9	70.4	21.9
Unemployed	12,886	12,495	391	11,727	11,315	411
Unemployment rate	8.7	8.8	6.3	7.9	7.9	6.1
Not in labor force	64,342	43,192	21,150	65,875	43,683	22,191

NOTE: Updated population controls are introduced annually with the release of January data.

Technical Note

The estimates in this release are based on annual average data obtained from the Current Population Survey (CPS). The CPS, which is conducted by the U.S. Census Bureau for the Bureau of Labor Statistics (BLS), is a monthly survey of about 60,000 eligible households that provides information on the labor force status, demographics, and other characteristics of the nation's civilian noninstitutional population age 16 and over.

Questions were added to the CPS in June 2008 to identify persons with a disability in the civilian noninstitutional population age 16 and older. The addition of these questions allowed the BLS to begin releasing monthly labor force data from the CPS for persons with a disability. The collection of these data is sponsored by the Department of Labor's Office of Disability Employment Policy.

Information in this release will be made available to sensory-impaired individuals upon request. Voice phone: (202) 691-5200; Federal Relay Service: (800) 877-8339.

Reliability of the estimates

Statistics based on the CPS are subject to both sampling and nonsampling error. When a sample, rather than the entire population, is surveyed, there is a chance that the sample estimates may differ from the true population values they represent. The component of this difference that occurs because samples differ by chance is known as *sampling error*, and its variability is measured by the standard error of the estimate. There is about a 90-percent chance, or level of confidence, that an estimate based on a sample will differ by no more than 1.6 standard errors from the true population value because of sampling error. BLS analyses are generally conducted at the 90-percent level of confidence.

The CPS data also are affected by *nonsampling error*. Nonsampling error can occur for many reasons, including the failure to sample a segment of the population, inability to obtain information for all respondents in the sample, inability or unwillingness of respondents to provide correct information, and errors made in the collection or processing of the data.

Additional information about the reliability of data from the CPS and estimating standard errors is available on the BLS website at www.bls.gov/cps/documentation.htm#reliability.

CPS estimates are controlled to population totals that are available by age, sex, race, and Hispanic ethnicity. These controls are developed by the Census Bureau and are based on complete population counts obtained in the decennial census. In the years between decennial censuses, they incorporate the latest information about population change (births, deaths, and net international migration). As part of its annual update of population estimates, the Census Bureau introduces adjustments to the total population controls. The updated controls typically have a negligible impact on unemployment rates and other ratios. The estimates of the population of persons with a disability are not controlled to independent population totals of persons with a disability because such data are not available. Without independent population totals, sample-based estimates are more apt to vary from one time period to the next. Information about population controls is available at www.bls.gov/cps/documentation.htm#pop.

Disability questions and concepts

The CPS uses a set of six questions to identify persons with disabilities. In the CPS, persons are classified as having a disability if there is a response of "yes" to any of these questions. The disability questions appear in the CPS in the following format:

This month we want to learn about people who have physical, mental, or emotional conditions that cause serious difficulty with their daily activities. Please answer for household members who are 15 years and older.

- Is anyone deaf or does anyone have serious difficulty hearing?
- Is anyone blind or does anyone have serious difficulty seeing even when wearing glasses?
- Because of a physical, mental, or emotional condition, does anyone have serious difficulty concentrating, remembering, or making decisions?
- Does anyone have serious difficulty walking or climbing stairs?
- Does anyone have difficulty dressing or bathing?

- Because of a physical, mental, or emotional condition, does anyone have difficulty doing errands alone such as visiting a doctor's office or shopping?

The CPS questions for identifying individuals with disabilities are only asked of household members who are age 15 and older. Each of the questions ask the respondent whether anyone in the household has the condition described, and if the respondent replies "yes," they are then asked to identify everyone in the household who has the condition. Labor force measures from the CPS are tabulated for persons age 16 and older. More information on the disability questions and the limitations of the CPS disability data is available on the BLS website at www.bls.gov/cps/cpsdisability_faq.htm.

Other definitions

Other definitions used in this release are described briefly below. Additional information on the concepts and methodology of the CPS is available at www.bls.gov/cps/documentation.htm.

Employed. Employed persons are all those who, during the survey reference week, (a) did any work at all as paid employees; (b) worked in their own business, profession, or on their own farm; (c) worked 15 hours or more as unpaid workers in a family member's business. Persons who were temporarily absent from their jobs because of illness, bad weather, vacation, labor dispute, or another reason also are counted as employed.

Unemployed. Unemployed persons are those who had no employment during the reference week, were available for work at that time, and had made specific efforts to find employment sometime during the 4-week period ending with the reference week. Persons who were waiting to be recalled to a job from which they had been laid off need not have been looking for work to be classified as unemployed.

Civilian labor force. The civilian labor force comprises all persons classified as employed or unemployed.

Unemployment rate. The unemployment rate represents the number of unemployed persons as a percent of the civilian labor force.

Not in the labor force. Persons not in the labor force include all those who are not classified as employed or unemployed. Information is collected on their desire for and availability to take a job at the time of the CPS interview, job search activity in the prior year, and reason for not looking in the 4-week period ending with the reference week. This group includes individuals *marginally attached to the labor force*, defined as persons not in the labor force who want and are available for a job and who have looked for work sometime in the past 12 months (or since the end of their last job if they held one within the past 12 months). They are not counted as unemployed because they had not actively searched for work in the prior 4 weeks. Within the marginally attached group are *discouraged workers*—persons who are not currently looking for work because they believe there are no jobs available or there are none for which they would qualify. The *other persons marginally attached to the labor force* group includes persons who want a job but had not looked for work in the past 4 weeks for reasons such as family responsibilities or transportation problems.

Part time for economic reasons. Persons classified as at work part time for economic reasons, a measure sometimes referred to as involuntary part time, are those who gave an economic reason for working 1 to 34 hours during the reference week. Economic reasons include slack work or unfavorable business conditions, inability to find full-time work, and seasonal declines in demand. Those who usually work part time must also indicate that they want and are available for full-time work.

Occupation, industry, and class of worker. The occupation, industry, and class of worker classifications for the employed relate to the job held in the survey reference week. Persons with two or more jobs are classified in the job at which they worked the greatest number of hours. Persons are classified using the 2010 Census occupational and 2007 Census industry classification systems. The class-of-worker breakdown assigns workers to the following categories: Private and government wage and salary workers, self-employed workers, and unpaid family workers. Wage and salary workers receive wages, salary, commissions, tips, or pay in kind from a private employer or from a government unit. Self-employed persons are those who work for profit or fees in their own business, profession, trade, or farm. Only the unincorporated self-employed are included in the self-employed category. Self-employed persons who respond that their businesses are incorporated are included among wage and salary workers. Unpaid family workers are persons working without pay for 15 hours a week or more on a farm or in a business operated by a family member in their household.

Table 1. Employment status of the civilian noninstitutional population by disability status and selected characteristics, 2012 annual averages

[Numbers in thousands]

Characteristic	Civilian noninstitutional population	Civilian labor force						Not in labor force
		Total	Participation rate	Employed		Unemployed		
				Total	Percent of population	Total	Rate	
TOTAL								
Total, 16 years and over	243,284	154,975	63.7	142,469	58.6	12,506	8.1	88,310
Men	117,343	82,327	70.2	75,555	64.4	6,771	8.2	35,017
Women	125,941	72,648	57.7	66,914	53.1	5,734	7.9	53,293
PERSONS WITH A DISABILITY								
Total, 16 years and over	28,251	5,816	20.6	5,037	17.8	779	13.4	22,435
Men	12,929	3,190	24.7	2,770	21.4	420	13.2	9,739
Women	15,322	2,626	17.1	2,267	14.8	359	13.7	12,696
Age								
16 to 64 years	15,339	4,854	31.6	4,146	27.0	708	14.6	10,484
16 to 19 years	626	139	22.3	85	13.6	54	38.7	486
20 to 24 years	777	309	39.8	223	28.8	86	27.7	468
25 to 34 years	1,652	699	42.3	574	34.7	126	18.0	953
35 to 44 years	2,183	810	37.1	682	31.2	128	15.8	1,373
45 to 54 years	4,182	1,309	31.3	1,144	27.3	165	12.6	2,873
55 to 64 years	5,919	1,588	26.8	1,438	24.3	150	9.4	4,332
65 years and over	12,912	961	7.4	890	6.9	71	7.4	11,951
Race and Hispanic or Latino ethnicity								
White	22,854	4,820	21.1	4,228	18.5	592	12.3	18,035
Black or African American	3,732	635	17.0	503	13.5	132	20.8	3,097
Asian	709	125	17.7	111	15.6	15	11.8	583
Hispanic or Latino ethnicity	2,813	563	20.0	456	16.2	107	19.0	2,250
Educational attainment								
Total, 25 years and over	26,848	5,367	20.0	4,728	17.6	640	11.9	21,481
Less than a high school diploma	6,109	599	9.8	500	8.2	99	16.5	5,509
High school graduates, no college[1]	9,851	1,726	17.5	1,518	15.4	208	12.1	8,126
Some college or associate degree	6,649	1,726	26.0	1,507	22.7	219	12.7	4,922
Bachelor's degree and higher[2]	4,239	1,316	31.0	1,203	28.4	113	8.6	2,923
PERSONS WITH NO DISABILITY								
Total, 16 years and over	215,034	149,159	69.4	137,433	63.9	11,727	7.9	65,875
Men	104,415	79,137	75.8	72,785	69.7	6,352	8.0	25,278
Women	110,619	70,022	63.3	64,647	58.4	5,375	7.7	40,597
Age								
16 to 64 years	186,077	142,393	76.5	131,078	70.4	11,315	7.9	43,683
16 to 19 years	16,359	5,684	34.7	4,341	26.5	1,343	23.6	10,675
20 to 24 years	21,022	15,153	72.1	13,185	62.7	1,968	13.0	5,869
25 to 34 years	39,323	32,766	83.3	30,127	76.6	2,639	8.1	6,557
35 to 44 years	37,459	31,924	85.2	29,894	79.8	2,030	6.4	5,535
45 to 54 years	39,516	33,745	85.4	31,730	80.3	2,015	6.0	5,770
55 to 64 years	32,398	23,122	71.4	21,801	67.3	1,321	5.7	9,276
65 years and over	28,957	6,766	23.4	6,355	21.9	411	6.1	22,191
Race and Hispanic or Latino ethnicity								
White	170,350	118,865	69.8	110,541	64.9	8,324	7.0	51,485
Black or African American	26,176	17,765	67.9	15,353	58.7	2,412	13.6	8,411
Asian	12,107	8,062	66.6	7,594	62.7	468	5.8	4,044
Hispanic or Latino ethnicity	33,945	23,828	70.2	21,421	63.1	2,406	10.1	10,118
Educational attainment								
Total, 25 years and over	177,653	128,323	72.2	119,907	67.5	8,415	6.6	49,330
Less than a high school diploma	18,773	10,729	57.2	9,423	50.2	1,306	12.2	8,044
High school graduates, no college[1]	51,961	35,046	67.4	32,201	62.0	2,845	8.1	16,915
Some college or associate degree	47,645	35,634	74.8	33,198	69.7	2,435	6.8	12,012
Bachelor's degree and higher[2]	59,275	46,914	79.1	45,085	76.1	1,829	3.9	12,360

1 Includes persons with a high school diploma or equivalent.

2 Includes persons with bachelor's, master's, professional, and doctoral degrees.

NOTE: Estimates for the above race groups (white, black or African American, and Asian) do not sum to totals because data are not presented for all races. Persons whose ethnicity is identified as Hispanic or Latino may be of any race.

Table 2. Employed full- and part-time workers by disability status and age, 2012 annual averages
[Numbers in thousands]

Disability status and age	Employed			At work part time for economic reasons[1]
	Total	Usually work full time	Usually work part time	
TOTAL				
16 years and over	142,469	114,809	27,661	8,122
16 to 64 years	135,224	110,589	24,635	7,850
65 years and over	7,245	4,220	3,025	272
Persons with a disability				
16 years and over	5,037	3,366	1,670	362
16 to 64 years	4,146	2,933	1,213	325
65 years and over	890	433	457	37
Persons with no disability				
16 years and over	137,433	111,442	25,990	7,760
16 to 64 years	131,078	107,656	23,422	7,525
65 years and over	6,355	3,787	2,568	235

1 Refers to persons who, whether they usually work full or part time, worked 1 to 34 hours during the reference week for an economic reason such as slack work or unfavorable business conditions, inability to find full-time work, or seasonal declines in demand. Persons who usually work part time for an economic reason, but worked 35 hours or more during the reference week are excluded. Also excludes employed persons who were absent from their jobs for the entire reference week.

NOTE: Full time refers to persons who usually work 35 hours or more per week; part time refers to persons who usually work less than 35 hours per week.

Table 3. Employed persons by disability status, occupation, and sex, 2012 annual averages
[Percent distribution]

Occupation	Persons with a disability			Persons with no disability		
	Total	Men	Women	Total	Men	Women
Total employed (in thousands)	5,037	2,770	2,267	137,433	72,785	64,647
Occupation as a percent of total employed						
Total employed	100.0	100.0	100.0	100.0	100.0	100.0
Management, professional, and related occupations	32.2	30.9	33.8	38.1	34.8	41.9
Management, business, and financial operations occupations	14.3	16.2	11.9	16.0	16.9	14.9
Management occupations	10.8	13.2	7.8	11.3	13.0	9.3
Business and financial operations occupations	3.5	3.0	4.1	4.7	3.9	5.6
Professional and related occupations	17.9	14.7	21.8	22.2	17.9	27.0
Computer and mathematical occupations	2.0	2.4	1.4	2.7	3.8	1.5
Architecture and engineering occupations	1.6	2.8	0.2	2.0	3.3	0.6
Life, physical, and social science occupations	0.8	0.8	0.7	0.9	1.0	0.9
Community and social service occupations	1.9	1.6	2.3	1.6	1.1	2.2
Legal occupations	1.1	1.1	1.2	1.3	1.2	1.4
Education, training, and library occupations	5.0	2.5	8.1	6.0	3.0	9.4
Arts, design, entertainment, sports, and media occupations	1.9	1.8	2.1	2.0	1.9	2.0
Healthcare practitioner and technical occupations	3.6	1.8	5.9	5.7	2.7	9.0
Service occupations	20.0	15.5	25.5	17.8	14.7	21.3
Healthcare support occupations	2.4	0.5	4.8	2.5	0.6	4.6
Protective service occupations	2.2	3.1	1.2	2.2	3.2	1.0
Food preparation and serving related occupations	5.2	3.7	6.9	5.6	4.9	6.5
Building and grounds cleaning and maintenance occupations	6.1	6.9	5.2	3.8	4.5	3.2
Personal care and service occupations	4.1	1.4	7.3	3.7	1.6	6.1
Sales and office occupations	23.5	16.0	32.7	23.3	16.8	30.6
Sales and related occupations	10.4	9.5	11.5	10.9	10.5	11.3
Office and administrative support occupations	13.1	6.5	21.1	12.4	6.3	19.3
Natural resources, construction, and maintenance occupations	8.8	15.4	0.7	9.0	16.3	0.8
Farming, fishing, and forestry occupations	0.6	1.0	0.2	0.7	1.0	0.3
Construction and extraction occupations	4.6	8.2	0.2	4.9	9.1	0.3
Installation, maintenance, and repair occupations	3.5	6.2	0.2	3.4	6.2	0.2
Production, transportation, and material moving occupations	15.5	22.1	7.4	11.8	17.4	5.5
Production occupations	7.7	10.5	4.3	5.9	8.0	3.5
Transportation and material moving occupations	7.8	11.6	3.1	5.9	9.4	2.0

Table 4. Employed persons by disability status, industry, class of worker, and sex, 2012 annual averages
[Percent distribution]

Industry and class of worker	Persons with a disability			Persons with no disability		
	Total	Men	Women	Total	Men	Women
Total employed (in thousands)	5,037	2,770	2,267	137,433	72,785	64,647
Industry as a percent of total employed						
Total employed	100.0	100.0	100.0	100.0	100.0	100.0
Agriculture and related industries	3.1	4.5	1.3	1.5	2.1	0.8
Nonagricultural industries	96.9	95.5	98.7	98.5	97.9	99.2
Mining, quarrying, and oil and gas extraction	0.7	1.2	0.2	0.7	1.1	0.2
Construction	6.2	10.1	1.4	6.3	10.8	1.2
Manufacturing	10.3	13.9	6.0	10.3	13.8	6.4
Wholesale trade	2.1	2.8	1.3	2.6	3.5	1.6
Retail trade	12.7	11.9	13.6	11.3	11.0	11.6
Transportation and utilities	5.3	7.4	2.8	5.1	7.4	2.5
Information	1.9	1.9	1.9	2.1	2.5	1.7
Financial activities	5.7	4.9	6.8	6.8	6.0	7.7
Professional and business services	11.3	12.1	10.3	11.6	12.9	10.2
Education and health services	21.7	12.1	33.4	22.7	10.9	36.1
Leisure and hospitality	8.1	7.1	9.4	9.3	8.6	10.0
Other services	5.9	5.5	6.3	5.0	4.5	5.5
Public administration	5.0	4.7	5.4	4.7	4.9	4.5
Class of worker as a percent of total employed						
Total employed[1]	100.0	100.0	100.0	100.0	100.0	100.0
Wage and salary workers[2]	88.5	86.8	90.5	93.4	92.4	94.5
Private industries	73.0	73.8	72.1	79.1	80.8	77.2
Government	15.4	13.0	18.4	14.3	11.6	17.3
Federal	2.7	2.4	3.0	2.5	2.6	2.3
State	5.4	4.1	7.0	4.4	3.3	5.6
Local	7.3	6.4	8.4	7.4	5.6	9.4
Self-employed workers, unincorporated	11.3	13.0	9.3	6.5	7.5	5.4

1 Includes a small number of unpaid family workers, not shown separately.
2 Includes self-employed workers whose businesses are incorporated.

Table 5. Persons not in the labor force by disability status, age, and sex, 2012 annual averages
[Numbers in thousands]

Category	Total, 16 years and over	16 to 64 years			Total, 65 years and over
		Total	Men	Women	
PERSONS WITH A DISABILITY					
Total not in the labor force	22,435	10,484	4,959	5,525	11,951
Persons who currently want a job	718	521	255	266	197
Marginally attached to the labor force[1]	229	189	101	88	40
Discouraged workers[2]	67	53	31	22	15
Other persons marginally attached to the labor force[3]	162	136	71	66	26
PERSONS WITH NO DISABILITY					
Total not in the labor force	65,875	43,683	15,980	27,703	22,191
Persons who currently want a job	5,840	5,260	2,404	2,856	580
Marginally attached to the labor force[1]	2,287	2,124	1,083	1,041	163
Discouraged workers[2]	842	762	457	305	80
Other persons marginally attached to the labor force[3]	1,445	1,362	626	736	84

1 Data refer to persons who want a job, have searched for work during the prior 12 months, and were available to take a job during the reference week, but had not looked for work in the past 4 weeks.

2 Includes those who did not actively look for work in the prior 4 weeks for reasons such as thinks no work available, could not find work, lacks schooling or training, employer thinks too young or old, and other types of discrimination.

3 Includes those who did not actively look for work in the prior 4 weeks for such reasons as school or family responsibilities, ill health, and transportation problems, as well as a number for whom reason for nonparticipation was not determined.

Chairman WALBERG. Without objection, so ordered.

I now recognize the chairman of Education and Workforce full committee, Mr. Kline, for his 5 minutes of questioning.

Mr. KLINE. Thank you, Mr. Chairman.

Thank you to the witnesses. We are very pleased that Director Shiu could be with us today.

My colleague, the ranking member on the full committee, Mr. Miller, said in a hearing we had the other day that this is a little bit like a tale of two cities, where you—Director Shiu says one thing and Mr. Fortney says another thing and there are two different cities, apparently. But there are regulations that we are trying to get at here that cause some confusion.

So, Director Shiu, I just want to get this clear on the record. Mr. Fortney was expressing some concerns about individual right to sue. As I understand it, both the OFCCP and the Equal Employment Opportunity Commission have asserted that inviting applicants to self-identify as disabled at the pre-offer stage does not violate the Americans with Disabilities Act. I understand that is your position and EEOC's.

But because there is a right to sue under the Americans with Disability Act, Mr. Fortney was proposing that OFCCP join as amici and defend follow contractors who face private suits pursuant to the Americans with Disabilities Act. Will OFCCP join as amici in such a case?

Ms. SHIU. Thank you for your question. I would be happy to discuss that with my solicitors.

We firmly believe that—and as the EEOC has stated—that you can—a contractor, in furtherance of affirmative action—in furtherance of affirmative action, that is the key there—can ask somebody before they are offered a job whether they have a disability. That person doesn't have to answer the question nor does that person have to disclose the disability.

And the reason why we are trying to do that is so that both contractors can begin to get the baseline data that they need in order for them to measure how well they are doing in—

Mr. KLINE. All right. Forgive me for interrupting. I have got a few more questions here.

But the question remains, I mean, they have concerns that it looks like in the language under ADA that you cannot—cannot—in the pre-offer stage, inquire about disability. Even though it is self-identifying, they believe businesses would believe that they can be sued, and certainly they can be sued. And that costs money and time.

And so the question is, because it is your opinion that it is okay to do that, will you join as amici and defend federal contractors who face these suits? Just a—

Ms. SHIU. I would be happy to discuss that with the solicitors and—

Mr. KLINE. Okay. Thank you.

Let me move on here a little bit. Let's talk about veterans.

One of two ways, according to your regulations, which a contractor may fulfill the requirements of the new veterans regulations is to set an across-the-board 8 percent hiring benchmark. OFCCP states this 8 percent number is reflective of the number of

veterans currently in the civilian workforce. Although the benchmark is based on all veterans, the regulation pertains only to covered veterans, a subset of all veterans.

Are you aware of any data on the number of covered veterans in the civilian workforce and did you take that into account?

Ms. SHIU. We looked at all the available data that was—that we could get our hands on, and it is my understanding that VEVRAA covers a majority of veterans. But I cannot give you a specific number with respect to the difference. But yes, it is something that we did look at.

Mr. KLINE. You did look at but you don't actually know what that number is?

Ms. SHIU. Because it doesn't exist, sir, as far as I can—as I understand.

Mr. KLINE. So it is a somewhat arbitrary number, then? Okay. Thank you.

Mr. Shanahan, you are here representing the University of North Carolina. My time is about to run out, so the simple question is, what makes a university system unique, as compared to other government contractors, when undergoing and responding to an OFCCP audit?

Mr. SHANAHAN. I think one of the things that would make the University of North Carolina unique compared to other contractors, Congressman, might be some of the technical differences in our workforce.

So for example, promotions of faculty who are on tenure track when they achieve tenure or they move from assistant professor to an associate professor, that is not the typical promotion you would see; it is not the sort of typical competitive event you would see in another contractor establishment or, say, in the private sector, or even in other government sector employment relationships. Sometimes that has been an issue that has had to be explained in compliance evaluations to OFCCP investigators.

Mr. KLINE. Okay. Thank you.

I see my time is expired. I yield back.

Chairman WALBERG. I thank the gentleman.

And now I recognize the gentlelady from Ohio, Ms. Fudge, for her 5 minutes of questioning.

Ms. FUDGE. Thank you very much, Mr. Chairman.

And thank all of you for being here today.

Just want to make a statement and then I am going to actually, Ms. Shiu, allow you to respond to the questions that were asked of you just a few moments ago.

But it is interesting to me that as we talk on both sides of the aisle about accountability and transparency that we would not want to fill out some forms, that we would not want to assist those who have served this nation. I am concerned about what we are doing here today.

Certainly you have gone through the rule-making process. It has been open, as you talked about all of the hearings and how you listened.

I don't know why we are even having this hearing today since we can't change it. It is nothing, to me, more than just politics. We

are doing what is necessary as a government to ensure that those who we provide a contract to follow certain rules.

You know, I heard the chairman talk about the job creators. We are the job creators. The federal government is creating the jobs. The contractors are not.

And so I think that it is incumbent upon us all to understand why we are here, and that is to ensure that taxpayers' dollars do go to assist those persons who we believe are important.

And so with that, I am going to ask Ms. Shiu if you want to answer the questions that were asked of you of the chairman earlier?

Ms. SHIU. Yes. First of all, let me say that there would be huge benefits that would inure to the economy, to people with disabilities, and veterans, just by having these rules.

The creation of jobs means the creation of a new taxpayer base. It means that we would diminish government entitlements to people who otherwise would not be able to work. It means that there is going to be a whole new treasure trove, if you will, of people who are available for contractors to hire.

I do want to address one thing, if you would, which is these are aspirational goals, and the reason why they are not quotas is because nobody is going to be found in violation of the law if they do not hit the goal or the benchmark. But you have to try. You have to put into place systems.

You have to measure what you are doing to determine whether you are doing enough outreach, doing enough recruitment, hiring people, retaining them. You are going to have to look and measure every step of the way. You are going to have to look at policies.

The idea is to create a culture where individuals with disabilities and vets are welcome, okay? That is really what this is about, where people are unafraid to self-disclose, to disclose they have a disability and they are not going to fear retaliation.

I do want to make one comment, if I might, Congresswoman, in response what Mr. Fortney has said. In discussing this G&K case, which I understand is subject to discussion with my solicitors, I don't want you to get the impression that this is somehow typical—although I have not been totally briefed on it—of what the OFCCP does.

It is important for people to know that in discrimination cases we are not proceeding based on whether the contractor has or has not met a utilization goal. Instead, we are looking at a substantial, usually statistically significant pattern of one protected group getting treated much worse in the hiring process than the favored group, as well as other evidence from our investigations and interviews to draw that conclusion.

So I don't want you to draw the assumption that somehow failing to meet the goal, one leads to violation and something that we would sue for.

Also, if I might answer one other question. Chairman Walberg, with all due respect, I think that the numbers with respect to the previous administration versus this administration are not accurate in so far as the previous administration included in its numbers the value of every job that they negotiated for, regardless of whether anybody actually got that job. In fact, we have decided not to use that approach and I would be happy to brief you.

We have done 6 percent more audits; we have a higher findings of discrimination—triple—with respect to vets, much higher with respect to Section 503. But we have done it in a more quality way and we have recovered more per year on behalf of victims of discrimination.

Ms. FUDGE. Thank you very much.

I just want to say that it is—there are many, many people who want to do business with the federal government. There are many people who would be willing to provide the information that we are requesting today.

Thank you, and I yield back.

Chairman WALBERG. I thank the gentlelady.

And I thank Director Shiu for offering to discuss those numbers. We would be delighted to discuss those. It is our intention to be accurate and to work off of accuracy in issues. At present we don't agree, but willing to discuss further.

I am delighted now to recognize my colleague from Indiana, Mr. Rokita, for your 5 minutes of questioning.

Mr. ROKITA. I thank the chairman.

Ms. Shiu, thank you for being here. Picking up on the discussion that you referenced that—with Mr. Fortney, or his testimony, rather, does a conciliation agreement, in your opinion, have the force and effect of law or not? Right? If there is a conciliation agreement, according to Mr. Fortney's testimony, that has a quota, that has a number in it, and that is violated, quote-unquote, or that is not followed through, are there not consequences? Would you not enforce that somehow?

Ms. SHIU. It depends on the other provisions of the agreement. I am not—

Mr. ROKITA. You wouldn't enforce a conciliation agreement?

Ms. SHIU. It depends on whether there are provisions to enforce it, yes. It depends on what is in it. Sometimes conciliation agreements—

Mr. ROKITA. Mr. Fortney, with your experience with conciliation agreements what have you found with regard to my question?

Mr. FORTNEY. Rigorous and demanding insistence by the agency that all the terms be met as scheduled.

Mr. ROKITA. Right.

It is a contract. It has the force and effect of law. I certainly disagree with your earlier statement and I am concerned, as a person who used to run five agencies in a previous life, that the head of an agency would be that misinformed about the force and effect of an agreement that their agency enters into on almost probably a daily or weekly basis, and your ability to enforce and your intention to enforce such agreements.

Would you say, speaking of your agency, that it is more efficient or less efficient than it was during the previous administration?

Ms. SHIU. Definitely more efficient.

Mr. ROKITA. By what metric would you say that it is more efficient?

Ms. SHIU. By looking at the number of audits that we do, by looking at the quality of the audits, by looking at the breadth—

Mr. ROKITA. How do you measure quality of the audit?

Ms. SHIU. We measure quality in a number of different ways depending on things that we call deficiencies—technical deficiencies or other deficiencies, timeliness. We have worked very hard to reduce the timeliness—the time it takes for us to investigate cases, the amount of recoveries we get, the amount of jobs that we have recovered, whether we have been able to save money in litigation—

Mr. ROKITA. Let me stop you there. Let me stop you there at timeliness. It seems like an investigation, if it is an honest one, at least when I used to be responsible for hundreds of investigations, you weren't put on a time schedule because that could lead to short circuiting, that could lead to cutting corners.

An investigation takes as long as it needs to find the truth. That is what an honest investigation does, so I would question—and I appreciate what you are saying, and in fact, I agree with it, and apparently other witnesses share the same feeling. What measured is what gets done, and you only have to ask my previous employees and current employees about what we do in terms of strategic planning. But you have to have honest metrics, in my opinion.

One way to do that, I think, is to measure budgets, and we are going to pick up this discussion, perhaps, where the chairman left it and your response to it. It is true that the President's fiscal year 2014 budget request was around $27 million more than in the final year of the previous administration. Is that accurate? You questioned some accuracy, and I am not sure if that is what you were talking about or not.

Ms. SHIU. I don't know that to be the case, but if you say so I—we can work off of that premise.

Mr. ROKITA. Well, I have figures of—for the record—$81 million in 2008 to $108.5 million in 2014. So assuming that is true, you are saying that you have gotten $41 million in financial remedies on behalf of 80,000 workers—$512 per worker.

Ms. SHIU. I believe I said $57 million—

Mr. ROKITA. Okay.

Ms. SHIU.—on behalf of—

Mr. ROKITA. But the previous administration got $171 million for 62,000 workers—$2,630 per worker. But you are saying there is a difference in how you measure that?

Ms. SHIU. There is a difference, sir, because we do not count the amount of the value of a job if we negotiate extra jobs as part of the conciliation agreement, which, by the way, is a contract. I think I was reading too much into your question, sir. We don't count the value of that job—

Mr. ROKITA. Okay. It is a contract, meaning that you enforce it? My question was do you not enforce the contracts, because you said this would not be a quota, that these would be aspirational, and my question was, if you get into a conciliation agreement—

Ms. SHIU. Yes.

Mr. ROKITA.—and it doesn't meet the number that is in the agreement—we have testimony where you said there was an actual number—will you not then enforce that agreement?

Ms. SHIU. Well, it depends on what the agreement says. What we anticipate the agreements will say—

Mr. ROKITA. It says that there is a number that you have to hire so many people with disabilities and/or veterans.

Ms. SHIU. What we will enforce, sir, is whatever deficiencies have not been worked on with respect to hiring, retention—

Mr. ROKITA. Like if you didn't meet the number that is in the conciliation agreement, would you enforce on that?

Ms. SHIU. We will not enforce on the goal or the benchmark alone, no.

Mr. ROKITA. Chairman, I yield back. I see that I am out of time.

Chairman WALBERG. Thank the gentleman.

I now recognize the ranking member for his 5 minutes of questioning.

Mr. COURTNEY. Thank you, Mr. Chairman.

Mr. Kirschner, I just wanted to cover one point. Again, your focus was on the impact of hospitals participating in fee-for-service managed care programs that are financed through TRICARE and FEHB.

If a hospital was contracting with the federal government directly for an NIH grant or any other type of department funding, you know, again, for research, clinical trials, whatever, again, as a, you know, direct contract between a hospital and the federal government, that is a sort of different sort of kettle of fish, right? I mean, that is not really what your concern is today. I just want to clarify that—

Mr. KIRSCHNER. That is completely correct. If a hospital enters into a contract, whether it is a research grant that would qualify as a federal contract or if some other relationship with the federal contract where it is clear that is—the parties are entering into that knowing that is a federal contract, then they are knowingly entering into an arrangement with the federal government and should be subject to the obligations of being a federal contractor.

Now, they may have concerns similar to those expressed by other employers with respect to the burdens imposed there, but that is not what our concern is today.

Mr. COURTNEY. Right.

Mr. KIRSCHNER. Our concern is where hospitals enter into a contract where on its face it says that this does not make you a federal contractor, where the regulations of the entity that is operating—

Mr. COURTNEY. I appreciate that clarification. And again, I just, in terms of the legislation which was mentioned earlier, I mean, it is your understanding of that bill that it does not, again, change that situation at all, right? I mean, that is—

Mr. KIRSCHNER. It does not change that. In fact, the—

Mr. COURTNEY. Just wanted to clarify that point.

Mr. Fitzgerald, as the witness here today who is on the ground dealing with people affected by these regulations, you know, again, I think for some people listening to this they might find it kind of incredible that employers resist hiring veterans or people with disabilities who obviously, you know, have the education and training and even job experience and the background. I mean, tell us how these regulations will help, since they, in some respect they are being sort of presented as, again, not mandates or quotas, but how will they dovetail with the efforts that Easter Seals is doing on the street?

Mr. FITZGERALD. I think by the aspirational goals will create opportunities for veterans and people with disabilities. I think that

employers, if they are working towards achieving a goal, create more opportunity, so that I think that qualified veterans will have more opportunity to go before an employer, sell their skills, show what they can do, and increase the opportunity to hire.

Given the rate of unemployment for people with disabilities and for veterans, the current approach is not working as well. So I think, once again, you know, it is a cliche but it is proven to be true, what measured gets done.

And I would like to just mention a cost of not providing employment. I have eight Vietnam veterans in my residential program and we spend on annually $60,000 per year for these eight veterans. That comes out to about $480,000 for veterans whose aspirations were never met.

I am a success story. They weren't successful. They didn't find the job. They lost hope. And then as the lost hope they ran into trouble.

And today we serve them and support them but there is a cost to not creating that opportunity. Employment is kind of the foundation and the success mark particularly for veterans in transition, and once they have that—so there is a cost in not moving towards this.

And industry today, you know, the new trend is analytics, and everything is about developing analytics for smart business decisions. Why not have analytics for smart business decisions to employ veterans who have served their country proudly? And I think we owe them. We owe them opportunity.

Mr. COURTNEY. Right.

So when you described in your initial testimony, you know, resistance by some H.R. folks who weren't sure whether somebody who comes out of a military experience, you know, would fit into the culture of the company that is there, is there other examples that you can cite in terms of resistance by companies when a veteran shows up at their doorstep in terms of whether or not they really should be hired?

Mr. FITZGERALD. I don't have any other specific examples. I think it is the unfamiliarity.

At an earlier age many more people served in the military so they understood military training and could relate it to civilian work experience. There are less people that have that experience today, so I feel for veterans today, particularly if you are in—were in the combat arms, it is harder to translate that military experience into civilian occupation.

Mr. COURTNEY. Right.

Mr. FITZGERALD. So I think that is the—it is more difficult today.

Mr. COURTNEY. Right. Thank you.

Chairman WALBERG. I thank the gentleman.

I turn to the good doctor from Indiana, Mr. Bucshon, for your 5 minutes.

Mr. BUCSHON. Thank you, Mr. Chairman.

First of all, I would like to completely disagree that anyone here today is being resistant to hiring veterans. I find that everyone I talk to out there of course has great respect for what veterans have done for their country and wants every one of them to be employed,

and I disagree with the previous statements that are to the contrary.

Ms. Shiu, the question I have—and I am concerned about the Americans with Disabilities Act—do you think an employer should ask a woman when she comes to be employed whether or not she plans to have a family or not?

Ms. SHIU. No.

Mr. BUCSHON. Okay. Do you think that there are some people out there who are employers that may consider that a potential—having a potential impact on their future employment of that individual?

Ms. SHIU. Perhaps.

Mr. BUCSHON. Okay. Then why do you think that it is okay for businesses now to ask people if they have a disability or not?

Ms. SHIU. Because the ADA says so.

Mr. BUCSHON. They can ask, you can ask people—I ran a medical practice that had 100 employees and 15 physicians and I can tell you that we never—those type of questions in the initial pre-offer stage were not the type of things that we would ask. Why? Because it violates the law.

Ms. SHIU. If it is in furtherance of affirmative action, sir, then they are permissible questions.

Mr. BUCSHON. You know, I think you are talking out of both sides of your mouth on this issue—I will be frankly honest with you—because I have serious concerns about, on one hand, saying that employers—people are allowed to have people voluntarily say whether they have a disability, but on the other hand, saying that, well, it depends on the circumstance, that could be a violation of the law. I do think it leaves employers wide open to individual lawsuits.

As a previous employer—and I can tell you that my wife—I have four children. My wife is a working mother. She is an anesthesiologist. I have direct experience with this, and I don't think that employers should be able to ask women whether they plan to have a family or not. I think it should be a violation of the law because it is discriminatory, potentially.

So I have serious concerns about what you said today about accepting the fact that now, because you want to set a quota, the only way to do a quota is to have people self-determine whether or not they have a disability so that you can use that to establish a quota. That is the issue I have, because I think personally it leaves people open to violation of the law, and I just think that is a serious problem.

And I think your intent is—I am not talking about your intent or your motivation; I am just thinking, particularly based on the law, that you are changing precedent where now people—so say what happens, an employer comes in and they asked someone that has a disability and the person says, "I refuse to answer that question."

Ms. SHIU. That is a perfectly appropriate answer.

Mr. BUCSHON. Right. And so say that person is someone who—is someone who was told to go in to a particular employer because they knew they were going to get asked that question and when they walked out of the room their attorney filed a lawsuit saying

that they were discriminated against because the employer didn't—say they didn't get the job.

The employer says, "You didn't get the job because you are not—you don't have the requirements." They say it is because they refused to answer whether they have a disability or not. Would that be a violation of—would that be a lawsuit that would be something you would agree with that they could do that?

Ms. SHIU. It is certainly not a lawsuit I would have taken as a plaintiff's lawyer.

Mr. BUCSHON. Why not?

Ms. SHIU. Because you have to have proof that there was an intent to discriminate against someone solely because of their disability.

Mr. BUCSHON. Well if somebody comes in—

Ms. SHIU. There is no nexus—

Mr. BUCSHON.—and you ask them the question and they—as it turns out, they say—say they do have a disability but they refuse to answer the question—

Ms. SHIU. Just because a pregnant woman applies for a job doesn't mean that if she doesn't get the job it is because she was pregnant. I mean, there is an analysis that has to go and I would—I find that to be very thin on the facts and the law, sir.

Mr. BUCSHON. Yes, well I find your testimony to be very thin on the facts, also.

Mr. Kirschner, I want to ask you a question. Your testimony states that over 3,300 hospitals and clinics provide coverage to almost 10 million TRICARE beneficiaries that an expansion of OFCCP's jurisdiction to classify these hospitals as a federal subcontractor will cover almost 60 percent of the registered hospitals in the United States.

If OFCCP is successful in its assertion of jurisdiction over hospitals, how do you expect this potentially will affect the care for our nation's servicemembers and veterans?

Mr. KIRSCHNER. Well, each hospital would need to make its own decision, but what the DOD has already found in a published report is that hospitals are becoming more resistant to signing up to participate in TRICARE programs out of a concern that they could, after the fact, be found to be federal contractors.

Mr. BUCSHON. So what you are saying is it is going to limit access to health care? Because I was a heart surgeon before. I know about health care. What you are going to say is maybe a lot of community hospitals in smaller communities just aren't going to mess with it.

Mr. KIRSCHNER. Correct. If they are not otherwise federal contractors and therefore, just participating in TRICARE or FEHBP would cause them to, by that—by performing that medical care, become federal contractors, hospitals could make a decision to say, "I don't want that burden—that administrative burden, and so therefore we are not going to provide care for either servicemembers or for federal employees and their families."

Mr. BUCSHON. Thank you.

Mr. Chairman, I yield back.

Chairman WALBERG. I thank the gentleman.

I recognize myself for my 5 minutes of questioning.

And, Director Shiu, I appreciate the opportunity to sit down, hopefully soon, with the issues of the results and the data that is there. We simply took—

Ms. SHIU. Of course.

Chairman WALBERG.—data as communicated by your office on the results for the past as well as the present, so without understanding any changes that might be there, it is difficult to determine.

I noted earlier our frustration with the administration's lack of cooperation with our oversight specifically on this important issue. On September 19th we sent the Department of Labor an oversight request. Unfortunately, we did not receive a response until last Wednesday, right before the holiday.

I am confused as to why the department was so late in delivering a wholly inadequate response, and I state that way because the department failed to answer all of our questions or provide the internal documents we requested. Based on what we did receive, am I to understand the department did not communicate with OMB regarding the rule-making and no one was denied a meeting with the administration regarding this rule-making?

Ms. SHIU. Chairman Walberg, the DOL's Office of Congressional and Intergovernmental Affairs guides the process for responding to congressional oversight matters. I have not been specifically involved in that but I do understand that hundreds of pages of documents have been turned over and questions were, in fact, answered.

I also understand that there are ongoing discussions between your staff and their staff and I certainly hope we can get this resolved and get you the information that you want.

Chairman WALBERG. Well, that is not my understanding.

Ms. SHIU. Oh, okay.

Chairman WALBERG. In February we held a hearing on guidance issued by the department concerning the WARN Act and sequestration. In response to similar frustrations with a lack of oversight cooperation, Assistant Secretary Oates stated that the OCIA handles the oversight requests and her agency was not involved in the process.

I would hate to think that the department is obstructing our oversight. Will you assure us that by December 13 we will receive a complete and adequate response to our oversight request, including all requested materials, documents, and communications?

Ms. SHIU. I will confer with OCIA and our solicitors. On our staff we have had people who have been working with OCIA on the oversight request, just to allay that one particular fear.

Chairman WALBERG. Well, in our deliberative process we need those issues resolved. And so I would continue to push for that to be made. And I know there are a lot of pushes that go on, but it is my responsibility and this subcommittee's responsibility to get the answers that we need to make accurate decisions.

The Department of Defense stated in 2010 that it was impossible to achieve the TRICARE mission of providing affordable health care for our nation's active duty and retired military members and their families if onerous federal contracting rules were applied to more than 500,000 TRICARE providers in the United States. Are

you at all concerned, Ms. Shiu, about the lack of access to care the Department of Defense believes our nation's servicemembers and veterans will face if OFCCP continues to assert jurisdiction over health care providers, along with testimony we received from Mr. Kirschner today about the practical ramifications to the hospital industry?

Ms. SHIU. Of course I am concerned that everybody has appropriate health care, but I don't believe that it is—OFCCP has not expanded our jurisdiction. Whatever people may think, we just not—we have not expanded our jurisdiction over TRICARE-covered subcontractors nor do we believe that all health care providers that participate in TRICARE are subcontractors.

In fact, our subcontractor coverage is determined on a case-by-case basis. The necessary to performance prong of the definition at issue in the TRICARE case has been in the regulations since 1978.

Chairman WALBERG. Well, let me jump in there and ask again, then, Mr. Kirschner, why would you disagree with that?

Mr. KIRSCHNER. On several points, Chairman.

First of all, the OFCCP has expanded its jurisdiction. The OFCCP had previously issued directives—internal directives—stating that, for example, that coverage under the FEHBP would not make you a federal contractor. The OFCCP has rescinded that.

The OFCCP has also taken the position that participation in TRICARE in a managed care component of TRICARE would make hospitals a government contractor. That is a new position. Previously, TRICARE participation like FEHBP, like Medicare, was treated as a federal financial assistance that did not result in the hospital being a federal contractor.

The OFCCP's current position, which is, as stated by Director Shiu, a case-by-case basis, is completely unworkable from a hospital's perspective. When the hospital enters into a—

Chairman WALBERG. I am going to have to cut it off here. I wish we could go on, and we will, on this issue and others related to it in the future.

But I think what I did want to get at was that while there is a statement from the department's position, yet the practical ramifications and impressions out in the field are so much different, and we need to deal with that.

But my time is expired, so I will try to hold myself to that, as well.

I thank the panel for your participation today.

And now I turn to my ranking member for final comments.

Mr. COURTNEY. Thank you, Mr. Chairman. Again, before making my remarks I just want to introduce a joint letter which was signed by the Bazelon Center for Mental Health Law, National Disability Rights Network, Epilepsy Foundation, VetsFirst, Paralyzed Veterans of America, the National Down Syndrome Congress, Easter Seals, the National Council on Independent Living, and Source of America—again, a joint letter in support of the two rules that we have been discussing here today.

Also, a separate letter from the Women's Legal Defense and Education Fund, the National Women's Law Center, and the Leadership Conference on Civil and Human Rights. So if I can submit those?

[Additional Submissions by Mr. Courtney follow:]

LEGAL momentum
The Women's Legal Defense and Education Fund

Elizabeth L. Grayer, President
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The Hon Tim Walberg, Chair, Subcommittee on Workforce Protections
The Hon. Joe Courtney, Ranking Member, Subcommittee on Workforce Protections
2181 Rayburn House Office Building
Washington, DC 20515

Re: Hearing on "Examining Recent Actions by the Office of Federal Contract Compliance Programs."

December 3, 2013

Dear Chairman Kline, Ranking Member Miller, Subcomm. Ch. Walberg & Subcomm. Chair Courtney:

I write to provide Legal Momentum's views for the record and in conjunction with the hearing, "Examining Recent Actions by the Office of Federal Contract Compliance Programs." Legal Momentum is the oldest women's legal organization in the country. We devote significant resources to improving access to nontraditional employment and apprenticeship and training opportunities for women, and with Wider Opportunities for Women, we co-chair the National Task Force on Tradeswomen's Issues, which unites local, regional and national expertise and action to support tradeswomen and women who want access to these occupations.

One of our primary areas of concern is enforcement of Executive Order 11246, which bans employment discrimination by government contractors on federal and federally assisted construction sites. The Order was revised in 1978 because of the "almost total exclusion of women from [construction] employment." The same year, the regulations governing registered apprenticeship programs were also revised to establish specific affirmative standards for women, who numbered between 1% and 3% of apprentices in the skilled construction trades.[1] We applaud Director Shiu for the work that she and her staff have done to ensure that federal contractors comply with the requirements of E.O. 11246. Women's access

[1] 43 Fed. Reg. 20769 (May 12, 1978)

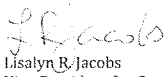
to these high-wage career opportunities face on-going barriers that include gender stereotyping and other forms of discrimination including barriers to training and hiring and unfair job assignments. Women need the OFCCP to help federal contractors address these issues and change the traditional operating procedures to offer all who want these jobs real equal opportunity.

Additionally, we are fully in support of the recently revised rules re: Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). We applaud the new Section 503 rules, which set out a hiring goal that 7% of federal contractors and subcontractors of each job group in their workforce be qualified individuals with disabilities. We also support the aspects of the rule that specify actions contractors must take with respect to training and recruitment, record keeping, and policy dissemination. These provisions are similar to those that promote workplace equality for women and minorities, and have long been in place. The new VEVRAA rule makes clear job listing and subcontract requirements, and strengthens accountability and record-keeping requirements, thereby enabling contractors to assess the effectiveness of their recruitment efforts. These revised rules ensure that federal contractors offer our veterans and people with disabilities access to meaningful opportunities for work.

Taken together, the continued enforcement of E.O. 11246, along with implementation and enforcement of the new rules regarding Section 503 and VEVRAA will ensure that federal contractors can enhance their ability to attract, train, and hire veterans, women, people of color and people with disabilities. It will also buttress the access of these groups to positions that provide economic security and help strengthen our economy. We feel that these standards are fair and encourage employers to both deepen and broaden the talent pool of those eligible for, and capable of filling these contractor and subcontractor positions. The use of affirmative action and efforts to ensure equal employment opportunities, particularly for underrepresented groups, is of paramount importance and we fully support the efforts of OFFCP and the Department of Labor in this regard.

Thank you for the opportunity to provide this testimony. We look forward to continuing to work with you on these and other matters.

Sincerely,



Lisalyn R. Jacobs
Vice-President for Government Relations

STATEMENT OF
FATIMA GOSS GRAVES
VICE PRESIDENT FOR EDUCATION & EMPLOYMENT
NATIONAL WOMEN'S LAW CENTER

BEFORE THE COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

FOR A HEARING TITLED: "NEW HIRING POLICIES FOR FEDERAL CONTRACTORS"

December 4, 2013

OFCCP's Final Rules Providing Meaningful Economic Opportunity to Veterans and People with Disabilities are Critical in These Challenging Economic Times

Chairman Walberg, Ranking Member Courtney, and members of the Subcommittee:

Thank you for the opportunity to submit this testimony. The National Women's Law Center has been involved in virtually every major effort to secure and defend women's legal rights over the last 40 years, including their critical rights to equal opportunity in the workplace. We write today to draw your attention to the important work of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

OFCCP administers and enforces the civil rights of all those employed by federal contractors and subcontractors, covering approximately one-fourth of the civilian workforce, and more than 200,000 businesses with contracts totaling almost $700 billion. Its authority includes Executive Order 11246, which prohibits government contractors from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin, and also requires contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of employment. In addition to the Executive Order, OFCCP's jurisdiction extends to enforcement of Section 503 of the Rehabilitation Act, which requires nondiscrimination and affirmative action for qualified individuals with disabilities, and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), which requires nondiscrimination and affirmative action for special and disabled veterans of any war, campaign, or expedition in which a campaign badge has been authorized.

Unfortunately, over the last four decades the equal opportunity programs for qualified veterans and people with disabilities required under VEVRAA and Section 503 have failed to translate into meaningful employment opportunities. The new regulations issued by OFCCP clarify the requirements of the law under those two statutes, give clear guidance, require data collection, and set out baseline benchmarks for hiring. We are pleased that OFCCP has issued these rules, as they will be crucial to promoting economic opportunity for veterans and the disabled, and are of special importance in light of the high rates of unemployment in both communities.

I. OFCCP Is Working Effectively to Eradicate Barriers to Employment

The key role that OFCCP has played in improving economic security for workers and their families cannot be overstated. OFFCP is not limited to merely responding to complaints—it proactively addresses discrimination by bringing systemic investigations, conducting compliance reviews of selected contractors, and providing guidance to contractors on affirmatively promoting equal opportunity in the workplace and complying with the laws under its jurisdiction. By focusing on large, systemic problems, OFCCP has ensured that workers receive fair treatment in hiring and promotions and that the employment decisions made by contractors reflect our society's nondiscrimination norms. This mission also ensures that the many federal contractors that play by the rules do not have to compete at a disadvantage with those that discriminate.

Throughout the years, OFCCP has implemented a number of initiatives that have aided in the integration of the workforce in industries such as construction, higher education, and mining, ensuring equal opportunity for women in sectors with a long history of unfair treatment in hiring, promotions, and compensation. For example, in 1975, pursuant to a legal settlement reached with the National Women's Law Center, OFCCP targeted hiring and employment practices for women in colleges and universities around the country, improving opportunities for women in higher education.[1]

Today, OFCCP continues to be well-positioned to open the doors of opportunity to those groups who have experienced a history of discrimination. In the past seven months, OFCCP has collected over 4 million dollars ($4,260,315) in back wages and interest for workers:

- Nearly 400 African-American, Hispanic, and Asian American workers will receive almost 1 million in back wages from a federal contractor who discriminated against them in hiring.

- Nearly 60 women workers who were steered into lower paying jobs will receive $265,983 in back pay.

- OFCCP won $2,181,593 in back wages and interest for 1,147 African American job applicants who were rejected for teller and entry-level clerical and administrative positions over the course of two decades.

- A medical equipment manufacturer that paid Hispanic workers less than their white counterparts will pay $290,000 in back wages and interest to 78 affected production associates.

- OFCCP settled with ResCare HomeCare Spokane on allegations that the company was responsible for sex discrimination against 77 qualified men who applied for in-home care positions. The rejected applicants will receive $92,000 in back wages and interest, and ResCare agreed to make eight job offers to the class members as well as reform its hiring practices.

- A Maryland construction firm will pay fourteen Hispanic employees $113,000 after they alleged sexual harassment, retaliation and interference. The company also pledged to rehire the affected workers as job opportunities become available.

- OFCCP negotiated a settlement with Bertucci, a construction company that holds large contracts with the U.S. Army. Bertucci will pay $70,000 in back wages and interest to 14 employees who were rejected for positions. The company has also agreed to extend job offers, with retroactive seniority, to at least six of the original class members.

In addition to recovering back wages, interest and benefits for affected workers, OFCCP also educates workers about their rights, inspects workplaces to make sure they are free from discrimination, secures good job opportunities for victims of discrimination, and prompts positive changes in employment policies and practices.

II. The Newly Issued Regulations Will Increase Economic Opportunity for Veterans and People with Disabilities

OFCCP's mission is especially important in these challenging economic times. The most recent data on poverty and income revealed that even as the economy continues to recover, poverty rates have remained at or near record levels.[2] Fifteen percent of Americans, or 46.5 million people, live in poverty.[3] More than one in seven women, nearly 17.8 million, lived in poverty in 2012. About 44 percent of these women (nearly 7.8 million) lived in extreme poverty, defined as income at or below 50 percent of the federal poverty level. The poverty rates for people of color were especially high: 23.1 percent of black people, 21.6 percent of Hispanics, and 29.5 percent of Native Americans are in poverty.[4] Rates were even higher for women of color. About one in four black (25.1 percent) and Hispanic women (24.8 percent) are in poverty, as well as about one in three Native American women (34.4 percent).[5] The overall wage gap between fulltime working men and women remained flat at 23 cents, with the gap widening when the wages of fulltime working women of color are compared to their white male counterparts.[6]

Veterans and people with disabilities are disproportionately represented among the unemployed and those out of the workforce entirely. As of October 2013, the unemployment rate of people with disabilities remained almost twice that of those without disabilities (12.8 percent vs. 6.7 percent), and the labor participation rate remains extremely low, at 20.0 percent – less than one third the participation rate of those without disabilities.[7] Recent veterans (Gulf War-era II) had an unemployment rate of 10.1 percent, 9.6 percent for men and 11.6 percent for women in October 2013.[8] As these numbers demonstrate, veterans and people with disabilities are not seeing improvements as the economy advances.

In the face of these incredibly high rates of unemployment for veterans and individuals with disabilities, OFCCP updated its regulations. Section 503 and VEVRA are likely to prompt important changes in the way that contractors recruit and hire veterans and individuals with disabilities.

Section 503. Contractors' Section 503 requirements have been unchanged since the 1970s. OFCCP's final rule will strengthen the Section 503 regulations to help ensure equal opportunity

for those with disabilities in federal contractor workplaces, by aiding contractors in their efforts to recruit, hire, and improve job opportunities for people with disabilities. The final rule also makes changes to the nondiscrimination provisions of the regulations to bring them into compliance with the ADA Amendments Act of 2008.

VEVRAA. Veterans returning from service face significant obstacles in obtaining employment, including explaining their military experience to civilian employers[9] and the stigma associated with psychological injuries and mental health treatment.[10] Yet the framework of contractor obligations regarding VEVRAA had not been revised since the initial regulations were published in 1976[11] and thus do not reflect the employment situation that returning veterans now face. Among other things, the final rule prompts contractors to evaluate annually the effectiveness of their efforts to ensure that protected veterans have access to employment opportunities, including by setting measurable benchmarks for hiring veterans.

In the process of developing both of these final rules, OFCCP conducted a thorough and transparent stakeholder engagement strategy. In 2010, OFCCP began meeting with advocates, policymakers, employer groups, workers and job seekers. On December 9, 2011, OFCCP issued a notice of proposed rulemaking to inform the public about proposed changes to its regulations under Section 503 and VEVRAA. After a full and extensive comment period, OFCCP issued its final rule on September 24, 2013.

For nearly fifty years, the federal government has operated with the longstanding principle that companies that have the privilege of profiting from doing business with the federal government should not be permitted to discriminate in employment. For good reason – the taxpayer dollars used to buy goods and services from companies simply should not support discrimination. For too long veterans and people with disabilities have experienced widespread workplace discrimination, and the tools to combat this discrimination, even discrimination by those contracting with the federal government, were inadequate. Strengthening the nondiscrimination rules for veterans and people with disabilities will yield results for workers and employers alike. These new rules will set the stage for employers to tap into a diverse pool of talent that will only leave them and the broader economy stronger.

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[1] *WEAL v. Weinberger*, Civ. No. 74-1720 (D.D.C., filed Nov. 26, 1974), subsequently *WEAL v. Califano*.

[2] Joan Entmacher, et. al. *Insecure & Unequal: Poverty and Income Among Women and Families 2000-2012* 6, Nat'l Women's Law Ctr (Sept. 2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/final_2013_nwlc_povertyreport.pdf [hereinafter *Insecure & Unequal*].

[3] U.S. Census Bureau, News Release: Income, Poverty and Health Insurance Coverage in the United States: 2012 (Sept. 17, 2013) http://www.census.gov/newsroom/releases/archives/income_wealth/cb13-165.html.

[4] U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2012 – Report and Detailed Tables (Sept. 2013), http://www.census.gov/hhes/www/poverty/data/incpovhlth/2012/index.html (last visited Dec. 2, 2013); Current Population Survey Table Creator, http://www.census.gov/cps/data/cpstablecreator.html (last visited Dec. 2, 2013).

[5] *Insecure and Unequal* at 3.

[6] Nat'l Women's Law Ctr., *The Wage Gap is Stagnant in the Last Decade* (Sept. 2013) *available at* http://www.nwlc.org/sites/default/files/pdfs/wage_gap_is_stagnant_2013.pdf.

[7] U.S. Dep't of Labor, Office of Disability Employment Policy, http://www.dol.gov/odep (last visited Nov. 27, 2013).

[8] U.S. Dep't of Labor, Bureau of Labor Statistics, Economic News Release, Table A-5. Employment status of the civilian population 18 years and over by veteran status, period of service, and sex, not seasonally adjusted, *available at* http://www.bls.gov/news.release/empsit.t05.htm (last visited Nov. 27, 2013).

[9] Vanessa Williamson & Erin Mulhall, Iraq and Afghanistan Veterans of America, *Careers After Combat: Employment and Education Challenges for Iraq and Afghanistan Veterans* 2 (Jan. 2009), *available at* http://iava.org/files/iava_careers_after_combat_2009.pdf (noting one recent survey found that 61% of employers did not believe they had "a complete understanding of the qualifications ex-service members offer" and more than 75% of veterans entering the workforce reported "an inability to effectively translate their military skills to civilian terms").

[10] *See id.* (noting nearly one-third of veterans who tested positive for mental health problems worried about the effect it will have on their career).

[11] Office for Fed'l Contract Compliance Programs, Vietnam Era Veterans' Readjustment Assistance Act (Section 4212) Notice of Proposed Rulemaking (NPRM), *available at* http://www.dol.gov/ofccp/regs/compliance/faqs/VEVRAA_NPRM_faq.htm (last visited Nov. 6, 2013).

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STATEMENT OF
WADE HENDERSON, PRESIDENT & CEO
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"EXAMINING RECENT ACTIONS BY THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS"

HOUSE EDUCATION AND THE WORKFORCE COMMITTEE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

DECEMBER 4, 2013

Chairman Kline, Ranking Member Miller, Subcommittee Chairman Walberg, Ranking Member Courtney, and Members of the Subcommittee: I am Wade Henderson, president & CEO of The Leadership Conference on Civil and Human Rights. Thank you for the opportunity to submit testimony for the record regarding hiring policies for federal contractors and recent actions by the Office of Federal Contract Compliance Programs (OFCCP).

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's more than 200 national organizations represent persons of color, women, children, organized labor, persons with disabilities, the elderly, the LGBT community, and faith-based organizations.

The Leadership Conference is committed to building an America that is as good as its ideals – an America that affords everyone access to quality education, housing, health care, collective bargaining rights in the workplace, economic opportunity, and financial security. Today, many workers are unable to secure equal access to employment and to be protected against workplace discrimination.

Equal opportunity initiatives in the employment context are designed to ensure that all individuals have a fair chance to access opportunities in the workplace. Equal opportunity programs have opened up job opportunities for qualified women and minorities to achieve high wages, advance in the workplace, and pursue nontraditional careers. Continued use of equal opportunity programs in employment and contracting is necessary to help break down barriers to opportunity and ensure that all Americans have a fair chance to demonstrate their talents and abilities. The Leadership Conference strongly supports the Department of Labor's (DOL) OFCCP efforts to strengthen the affirmative action and nondiscrimination obligations of government contractors regarding individuals with disabilities and veterans, and encourages efforts to ensure equal access to job and apprenticeship opportunities for women and minorities.

According to DOL, nearly one in four American workers are currently employed by a business that receives federal funds for contracted work. That's more than 200,000 businesses with contracts totaling

almost $700 billion. Therefore, it is critical to ensure adequate protections for workers employed by federal contractors or those seeking employment with such a substantial sector of our workforce. The purpose of OFCCP is "to enforce, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity required of those who do business with the Federal government."[1] OFCCP's authority to enforce nondiscrimination and affirmative action hiring policies for federal contractors is clear. OFCCP enforces Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). Collectively, they require contractors and subcontractors that do business with the federal government not to discriminate in employment on the basis of sex, race, color, religion, national origin, disability, or status as a protected veteran.

Receipt of a federal contract comes with a number of responsibilities beyond compliance with federal nondiscrimination and anti-retaliation laws. It also requires developing meaningful and effective efforts to recruit and employ underrepresented individuals, creating and enforcing personnel policies that support the contractor's affirmative action efforts, maintaining accurate records on its affirmative action efforts, and providing OFCCP access to these records upon request. Failure to abide by these responsibilities may result in various sanctions, including withholding of progress payments, termination of contracts, and debarment from receiving future contracts.

The VEVRAA rule provides contractors with a quantifiable metric to measure their success in recruiting and employing veterans, by requiring contractors to annually adopt a benchmark either based on the national percentage of veterans in the workforce (currently 8 percent), or their own benchmark based on the best available data. The rule strengthens accountability and record-keeping requirements, enabling contractors to assess the effectiveness of their recruitment efforts. It also clarifies job listing and subcontract requirements to facilitate compliance.

Section 503 of the Rehabilitation Act requires government contractors to take "affirmative action to employ and advance in employment qualified individuals with disabilities."[2] However, until now, these programs have been largely ineffective. Implementing new rules that give clear guidance, require data collection, and set out baseline goals for hiring is crucial to ensure equal access to employment for people with disabilities as well as to promote economic opportunities. The Section 503 rule introduces a hiring goal for federal contractors and subcontractors that 7 percent of each job group in their workforce be qualified individuals with disabilities. The rule also details specific actions contractors must take in the areas of recruitment, training, record keeping, and policy dissemination – similar to those that have long been required to promote workplace equality for women and minorities.

The Leadership Conference supports OFCCP's work to help contractors recruit, retain, and hire people with disabilities and veterans. Many unemployed veterans and individuals with disabilities are ready, able, and willing to work. Employment opportunity increases access to economic security and independence. Furthermore, we strongly support additional efforts to encourage recruitment and training of women and minorities employed by federal contractors and efforts to prevent and enforce nondiscrimination based on sex or race.

The Leadership Conference believes that the federal government should continue to hold its contractors to a standard of taking affirmative steps in recruiting, retaining, and advancing qualified employees including women, minorities, veterans, and people with disabilities. Affirmative action or equal

opportunity is not a "quota," nor the substitution of numerical dictates for merit-based decisions. Some affirmative action plans include the management tools of numerical goals or targets for representation of women or minorities, and timetables for meeting those objectives. OFCCP's final rules set fair and reasonable standards and guidelines for federal contractors, which employ approximately a quarter of the civilian labor force. Affirmative action programs expand the talent pool for businesses to draw on, and many companies report that a diverse workforce has led to enhanced performance and productivity.[3]

Conclusion

The Leadership Conference and its members look forward to continuing its work with the Committee and the Department of Labor to find solutions to securing fair employment opportunities for our most vulnerable workers. Thank you for your leadership on this critical issue.

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[1] Office of Federal Contract Compliance Mission Statement at http://www.dol.gov/ofccp/aboutof.html.
[2] Section 503 of the Rehabilitation Act of 1973, as amended, 29 USC Sec. 793(a)(1993).
[3] Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital at 5 (1995). (a study of the Standard and Poor's 500 found average annualized returns of 18.3% for companies committed to affirmative action, compared to 7.9% for businesses where glass ceilings were firmly in place).

Commemorating 40 Years
Of Disability Advocacy
1973-2013

December 3, 2013

Hon. Tim Walberg
Chair, Subcommittee on Workforce Protections
2436 Rayburn House Office Building
Washington DC 20515

Hon. Joe Courtney
Ranking Member, Subcommittee on
Workforce Protections
2348 Rayburn House Office Bldg.
Washington DC 20515

Hon. John Kline
Chair, Committee on Education and the Workforce
2439 Rayburn House Office Building
Washington DC 20515

Hon. George Miller
Senior Democratic Member,
Committee on Education and the
Workforce
2205 Rayburn House Office Bldg.
Washington DC 20515

Representatives Walberg, Courtney, Kline and Miller:

The Consortium of Disabilities (CCD) Task Forces on Rights, Veterans and Military Families, and Employment and Training submit this written testimony for the December 4, 2013 subcommittee hearing, "Examining Recent Actions by the Office of Federal Contract Compliance Programs." CCD is a coalition of national disability organizations working for national public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We applaud the Department of Labor's efforts to ensure that the affirmative action requirements of Section 503 and VEVRAA include a utilization goal for employment of people with disabilities and a hiring benchmark for protected veterans by contractors receiving large federal contracts. Goals or benchmarks have long been needed to make implementation of Section 503's and VEVRAA's affirmative action requirements meaningful and to more closely align these requirements with federal contractors' affirmative action obligations relating to race, ethnicity and gender. It is also critical that the new Section 503 and VEVRAA regulations require the collection of data that will help contractors and the Labor Department determine whether contractors' affirmative action efforts to recruit, hire and retain employees with disabilities and protected veterans are effective. Affirmative action efforts are of limited value if they do not include any analysis of data to determine whether these efforts are actually having success.

These updates to the Section 503 and VEVRAA regulations are extraordinarily important to ensure that people with disabilities and protected veterans are afforded meaningful opportunities to work. The employment rates for people with disabilities remain far below those of any other group tracked by the Bureau of Labor Statistics, and working-age people with significant disabilities participate in the workforce at less than one-third of the rate of the general population. The workforce participation rate of veterans with disabilities is also well below that of the general population. The Labor Department's new rules make clear that the failure to meet the utilization goals in Section 503 and the hiring benchmarks in VEVRAA is not sufficient to prompt an enforcement action and that contractors that take the steps required by the regulations do not violate the law, even if they do not meet these goals or benchmarks. Having a goal or benchmark, however, is an important mechanism to create some accountability and help ensure that progress is actually achieved.

The Committee and Subcommittee leadership have questioned whether the Department of Labor has the authority to impose a utilization goal for employment of individuals with disabilities and a benchmark for protected veterans, and to require contractors to invite job applicants to self-identify as having a disability for purposes of affirmative action. Litigation recently instituted against the Department by a construction firm trade association also challenges the Department's authority to set a utilization goal and to require the collection of data concerning the hiring and employment of people with disabilities.

We strongly disagree with the assertion that the Department lacks the authority to (1) impose a utilization goal or a benchmark, (2) require the collection of information related to the hiring and employment of people with disabilities, and (3) invite applicants to self-identify as having disabilities. Having a goal or benchmark and requiring the collection of data to determine whether a contractor's efforts to employ people with disabilities and protected veterans are *actually working* are well within the scope of the agency's authority in enforcing laws that direct contractors receiving large federal contracts to maintain and implement affirmative action programs to improve employment of people with disabilities and protected veterans. Indeed, the agency imposed these requirements only after concluding that little improvement in the employment of these groups had occurred during the several decades during which the prior regulations were in effect. As the agency noted, it "determined that affirmative action process requirements, without a quantifiable means of assessing whether progress toward equal employment opportunity is occurring, are insufficient."[1]

Moreover, the Department's requirement that contractors invite applicants to voluntarily self-identify as an individual with a disability is perfectly consistent with the Americans with

[1] U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities; Final Rule, 78 Fed. Reg. 58682, 58703 (Sept. 24, 2013), http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21228.pdf.

Disabilities Act (ADA). The U.S. Equal Employment Opportunity Commission (EEOC), charged with enforcing and interpreting the ADA's requirements with respect to employment discrimination, has *always* maintained that disability-related inquiries are permitted of applicants as part of a voluntary affirmative action program. *See, e.g.*, 29 C.F.R. Part 1630 App. § 1630.14(a), *Medical Examinations and Inquiries Specifically Permitted* ("As previously noted, collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted by [the ADA's provisions concerning pre-employment inquiries]"). In fact, the EEOC issued a letter specifically clarifying that the Labor Department's regulations inviting individuals to voluntarily self-identify as having a disability are consistent with the ADA.[2]

We think that the Department of Labor was not only well within its authority in issuing the regulations implementing Section 503 and VEVRAA, but could have gone further. In response to the concerns expressed by contractors, the Department made numerous concessions to contractors in its final regulations. For example, the Department:

- declined to impose a separate subgoal to ensure that individuals with significant disabilities are being employed
- eliminated its proposed requirements that contractors maintain linkage agreements with specified entities to assist with recruitment of individuals with disabilities and protected veterans
- eliminated its proposed requirement that contractors ensure that their online applications are accessible to individuals with disabilities
- eliminated its requirement that contractors have written procedures outlining how individuals with disabilities may request reasonable accommodations and how such requests will be processed
- eliminated its proposed requirement that contractors review annually the physical and mental qualification requirements for their jobs to ensure that they do not needlessly screen out individuals with disabilities (the final rule simply requires that the contractor follow a "schedule" for doing such a review)
- eliminated its proposed requirement that training of relevant personnel concerning Section 503's and VEVRAA's requirements include specific topics and its proposed requirement that contractors make and maintain specific records

[2] Letter from Peggy R. Mastroianni, Legal Counsel, EEOC, to Patricia A. Shiu, Director, Office of Federal Contract Compliance Programs (Aug. 8, 2013), http://www.dol.gov/ofccp/regs/compliance/sec503/OLC_letter_to_OFCCP_8-8-2013_508c.pdf

- eliminated its proposed requirement that contractors document and update data including the "applicant ratio" of applicants with known disabilities to total applicants, the "hiring ratio" of individuals with known disabilities to the total number of individuals hired, and the "job fill ratio" of job openings to job openings filled (the final rule only requires contractors to collect raw data)

- exempted contractors with fewer than 100 employees from the Section 503 requirement that the 7% goal be at the job group level (the final rule requires that, for these employers, the 7% goal applies only at the level of the entire workforce)

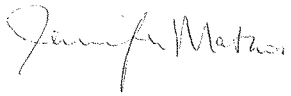
- changed the requirement that contractors annually invite employees to self-identify as individuals with disabilities to a requirement to invite employees to do this once every five years

- included language allowing the Department of Labor to waive compliance with the equal opportunity provisions for any federal contract or group of contracts when it deems this "in the national interest"

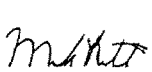
Many of these concessions disappointed individuals with disabilities and protected veterans who believed that the agency should have required more of contractors who benefit from significant federal contracts. Nonetheless, we support the final regulations implementing Section 503 and VEVRAA and believe that they provide a necessary foundation for increasing employment opportunities for individuals with disabilities and protected veterans.

Thank you for considering our comments.

Sincerely,

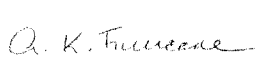


Jennifer Mathis
Bazelon Center for Mental Health Law
Co-chair, Rights Task Force



Mark Richert
American Foundation for the Blind
Co-chair, Rights Task Force

Curt Decker
National Disability Rights Network
Co-chair, Rights Task Force



Sandy Finucane
Epilepsy Foundation of America
Co-chair, Rights Task Force

Heather Ansley
VetsFirst
Co-chair, Veterans and Military Families
Task Force

Maynard Friesz
Easter Seals
Co-chair, Veterans and Military Families
Task Force

Susan Prokop
Paralyzed Veterans of America
Co-chair, Veterans and Military Families
Task Force

Kelly Buckland
National Council on Independent Living
Co-chair, Employment and Training
Task Force

Susan Goodman
National Down Syndrome Congress
Co-chair, Employment and Training
Task Force

Alicia Epstein
SourceAmerica
Co-chair, Employment and Training
Task Force

Chairman WALBERG. Without objection, and hearing none, they will be added to the record.

Mr. COURTNEY. Great. Thank you.

Again, I want to thank the witnesses. This has been a very, I think, healthy, somewhat adversarial or—at times, but that is the way our system is set up, and again, I think there has been some good information that we have elicited from today's hearing, and I am sure there will be more follow up with the agency, particularly in terms of the question of just enforcement, which I think is a legitimate concern that people really should, again, get some more guidance from you in terms of how these rules would be enforced.

But I also think it is important that we recognize, you know, that chart over there, as well, which is that there are hundreds of thousands of Americans who I think are prepared to contribute to this country, and we, again, and particularly in the area of federal contracts, need to really ensure that we are—in a way that is not intrusive or excessive mandates, trying to advance a goal which I think most Americans would support.

You know, I would say, you know, Mr. Fitzgerald's comments regarding the obstacles that veterans face, which again, were challenged, the fact of the matter is the unemployment rate for veterans, particularly Iraq and Afghanistan War veterans, exceed both their own age group and the country as a whole. That is unacceptable.

And, you know, when Admiral Mullen, who was chairman of the Joint Chiefs, left military service, he gave his farewell address, which was a remarkable speech, in my opinion, but he really warned about the fact that our military, as Mr. Fitzgerald said, has become the 1 percent. We talk a lot about the 1 percent, the 99 percenters, but there is no question—you know, numbers don't lie—that the fact of the matter is that the—particularly with an all volunteer force, which is so valuable in so many ways—but the fact of the matter is that the interaction between the vast, vast majority of our country, including employers and some who, again, benefit from federal contracts, and their exposure to people who serve in the military—as Admiral Mullen—you can't get more credible than Mike Mullen, is very limited just because of just the way things have developed over time in terms of how we raise our forces for our country.

So the unemployment rate, which again, is unacceptably high for people leaving the military despite the best efforts for tax incentives for employers, and I am sure a lot of members, including all who are on the committee who do the best to promote, at job fairs and what not, hiring these folks, we are falling short here. And to say that we can't set up some system where federal contractors can sort of be part of that solution, again, I think is something that we really should do better.

I mean, we really need to use our best, balanced, reasonable approach to try and, again, help these folks who have done so much over the last 12 years—longest military conflict in American history with an all volunteer force. Unemployment rate that, again, far exceeds the norm. You know, that just is not something that I think any American would find to be satisfactory or acceptable.

So again, hopefully this dialogue which we started here today will answer some of the questions that have been brought forth. Again, Mr. Kirschner has raised, I think, some important issues about impact on programs that have—that help our TRICARE military retirees and active duty folks, in terms of making sure that we maintain access for hospital services.

And again, I want to compliment the chairman for holding this hearing and look forward to working with you in the future to try and, again, work out some of the kinks that have come forward here today. And with that, I yield back.

Chairman WALBERG. I appreciate those comments and I respect them because I know they are true. And I look forward to working together on it.

This is an important issue, and I appreciate the attention to this hearing today—each of you in the room as well as those of you in the panel. There is no one in this room at this dais or who has left this room that does not want to create more jobs, more opportunity for everyone in our great nation.

And that includes those that would be considered disabled for whatever reason, and certainly those who have served our country in settings that many of us can only assume about the extent of what that means but appreciate it nonetheless.

We want to encourage growth. We want to encourage opportunity.

We want to encourage hope in our society that indeed, in this country, of any country on the face of the earth, there is still that wonderful dream called the American dream that can still be achieved and that there are entities in our governmental system that will do their best to assure that unnecessary roadblocks are kept out of the way, not allowed to be there, but also that same government and its system will recognize the reality of what human frailty and options and challenges that are out there in the real world put in the way of well-meaning people that still must have certainty reign in order to produce jobs and hope and economy for all people.

Our nation has been successful in doing that better than any other nation, and that is why a hearing like this is put in place for oversight to make sure that we don't vault ourselves backwards.

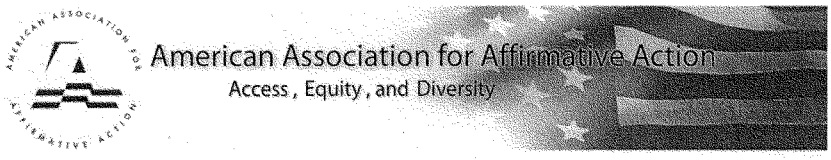
And so I would say thank you, certainly, to a panel that is made up of people who live in that real world, whether it be in health care, which is, frankly, frustrated right now with all sorts of uncertainty in how to go forward in dealing with a health care plan that isn't just a Web site but is a product that has produced a lot of uncertainty right now; with entities that deal with veterans and their specific needs and realizes the outcomes and the breakdown when we don't meet those needs and find now secondary solutions that have to be undertaken for their lives; educational systems that are challenged with costs to both students and the institutions to get back on track still as a world leader but, nonetheless, in a global challenge now that we have not had before—to meet those needs and still deal with bureaucratic challenges to your handling of that; and then ultimately, to human resource people who have to have Solomon's sword in hand at times to try to split through questions that come because of competing catch-22 situations put in law by

well-meaning entities that need the touch of reality that comes from the real world.

And then, Ms. Shiu, your response with doing the job you have been asked to do, and that is why we are here to help you do that and I hope that will continue to be the process that we can work together on.

Having said all of that, we look forward to additional response, potentially additional hearings, roundtables, whatever it might take to make the system work for our people for which we at this dais have been elected to represent. There being no further business, the committee stands adjourned.

[Additional Submissions by Mr. Miller follow:]



STATEMENT OF

GREGORY T. CHAMBERS, PRESIDENT

THE AMERICAN ASSOCIATION FOR AFFIRMATIVE ACTION

"EXAMINING RECENT ACTIONS BY THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS"

HOUSE EDUCATION AND WORKFORCE COMMITTEE

WORKFORCE PROTECTIONS SUBCOMMITTEE

Chairman Kline, Ranking Member Miller, Subcommittee Chairman Walberg, Ranking Member Courtney, and Members of the Subcommittee: I am Gregory T. Chambers, president of The American Association for Affirmative Action (AAAA). Thank you for the opportunity to submit testimony for the record regarding hiring policies for federal contractors and recent actions by the Office of Federal Contract Compliance Programs (OFCCP).

Founded in 1974, the American Association for Affirmative Action (AAAA) is a national not-for-profit association of professionals working in the areas of affirmative action, equal opportunity, and diversity. AAAA assists its members to be more successful and productive in their careers. It also promotes understanding and advocacy of affirmative action to enhance access and equality in employment, economic and educational opportunities. The Association is composed of individuals and organizations from the public and private sectors, business, social service, legal, government, and education. While we were founded by affirmative action officers working for colleges and universities our members are now in the private sector; federal, state and local government as well as in higher education.

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American Association for Affirmative Action
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AAAA was founded as a result of the promulgation of the regulations of Executive Order 11246, as well as the Civil Rights Act of 1964. The mission of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is therefore a major program of interest for our membership and we have maintained a dialogue with its leadership over many years.

As is apparent by our name, AAAA is dedicated to the promotion of affirmative action as an instrument to fulfill the nation's promise of equal opportunity. Its mission is to nurture understanding of and offer advice on affirmative action to enhance access and equity in employment, economic and educational opportunities. Civil rights laws were enacted to redress both systemic and individual discrimination based on race, color, religion, sex, national origin, age or disability. The Association is committed to eradicating all forms of invidious discrimination.

The subject of this hearing, primarily the regulations recently promulgated by the OFCCP, is of major interest to our members because they are the ones who are responsible for compliance in their institutions and organizations. Our members, as EEO, affirmative action and diversity professionals are tasked with developing and implementing affirmative action programs as well as other EEO-related activities including complaint investigations. Protected groups within our purview include individuals with disabilities and veterans as well as minorities and women.

Our members are preparing to comply with the regulations finalized in August of 2013 and while we are in the preparatory stages of this activity we will not comment on the relative complexity or difficulty of compliance. It is our hope that the regulations will enable us to cast a wider net to recruit and hire more individuals with disabilities and veterans who deserve an equal opportunity akin to that of their minority and female counterparts. We would like to commend the Department of Labor for making the effort to provide greater employment opportunities to veterans and individuals with disabilities a high priority. The unemployment rates of these populations are unacceptably high and in our efforts to promote equal employment opportunities for both groups we see the need to do much more.

We would also like to commend the OFCCP for its substantial outreach activities in the development of these regulations. The public was given extensive notice and opportunities to comment when the regulations were announced and after they were finalized. Thus, the rulemaking process was above reproach. For example, Director Patricia Shiu attended AAAA's 39th National Conference and Annual Meeting in San Antonio, Texas last year and her staff met with our board of directors in September of 2013 to hear our concerns and questions about the implementation and compliance process post promulgation. The Department has also met with other groups, both employer-focused and members of the civil rights community, in the effort to communicate the importance and substance of these regulations. For her efforts to dialogue with members of the community, Director Shiu and her staff deserve our thanks.

We would also like to commend the Department of Labor and the OFCCP for embracing the spirit of affirmative action in these regulations. Outreach and recruitment, as well as nondiscrimination are the essence of affirmative *action,* which is a tool to promote equal employment opportunity. While the term has been often vilified, AAAA believes that affirmative action -- including identifying and eliminating barriers, setting goals where there is underutilization, making reasonable accommodations where necessary, and internal monitoring -- remains an essential component of any successful equal opportunity or diversity program.

Conclusion

The American Association for Affirmative Action and its members look forward to continuing its work with the Committee and the Department of Labor to find solutions to securing equal employment opportunities for all workers who seek the chance to serve without regard to their race, ethnicity, national origin, gender, religion, veteran's status or disability. Thank you for your leadership on this critical issue.

Statement of Eileen Kirlin
International Executive Vice President, Service Employees International Union

United States House of Representatives
Committee on Education and the Workforce
"The Effects of the Patient Protection and Affordable Care Act on Schools, Colleges and Universities"
Thursday November 14, 2013

Thank you Chairman Klein, Ranking Member Miller, and members of the Committee for the opportunity to submit a statement on the important issue of access to affordable health insurance for the teachers, faculty and education support personnel in our k-12 schools and higher education institutions.

The Service Employees International Union (SEIU) represents 2.1 million workers. We are the largest union of healthcare workers. And we represent more than one million public service workers, including 75,000 faculty and staff at institutions of higher education and 150,000 k-12 workers. The issues of access to affordable health care and the quality of standards for the teachers, faculty and staff in our schools are vitally important to all of our members and the communities in which they live.

Many of the workers that we represent in educational institutions are part-time workers. These were part-time jobs long before the enactment of the Affordable Care Act. The people who fill these vital jobs often earn low wages, work multiple jobs, and presently do not have access to affordable healthcare. For these workers, and millions more like them, the Affordable Care Act provides a new opportunity to gain health insurance coverage for themselves and their families.

In 2012, there were approximately 1.5 million people teaching in postsecondary education in the United States. Many of us think of these jobs as being filled by full-time, salaried professors who spend their days on campus educating their students, developing cutting edge research and increasing the depth of our academic knowledge. We think of these jobs as being well-paid, middle class jobs with access to generous benefit packages such as pensions, healthcare and paid leave. The reality is something entirely different.

Part-time faculty make up half of all teaching faculty at degree-granting institutions. This trend toward part-time faculty and away from full-time, tenured faculty has been in place for decades. It is not a result of the Affordable Care Act.

Among these part-time faculty, 4 out of 5 report that they do not get health insurance. Further, the median pay per course for these part-time faculty is $3,000. Unlike the image that most of us have of the life of a college professor, a part-time faculty member teaching three classes each semester, or six for a school year, has an annual income of $18,000.

The Affordable Care Act creates a new opportunity for these professors to gain access to affordable health insurance coverage. Some with very low-wages will qualified for Medicaid. Others may get subsidies to purchase private health insurance. And many will have access to lower-cost coverage through the health care exchanges.

Similarly, much of the k-12 workforce is part-time and without current health insurance coverage. Virtually all full-time teachers are covered by health insurance. However, more than 40 percent of the elementary and secondary workforce are school support personnel other than certified teachers. These workers—paraprofessionals, food service workers, bus drivers, building and grounds maintenance workers, security personnel and substitute teachers—are frequently low-wage, part-time workers who do not have access to affordable health insurance. When the work is contracted out to a private company rather than provided directly from the school district the pay generally is lower and benefits even more rare.

For example, there are more than 300,000 food service workers in elementary and secondary education. Typically they work less than half-time, earn about $10 an hour—less if the work is contracted out--and rarely are they provided with health insurance coverage.

There are at least 260,000 bus drivers, most of whom work less than 30 hours a week. These are another group of low-wage school employees who often do not receive benefits from the company or school district for which they work.

The Affordable Care Act provides a new opportunity for these and other lower-income, part-time school employees to gain health insurance—through the Medicaid expansion, subsidies, or exchange.

We are aware that some employers are cutting hours to avoid the requirement to provide health insurance to those who work 30 hours a week or more. It is troubling that there would be public and nonprofit educational institutions that would join the ranks of low-wage employers like Wal-Mart and manipulate workers hours so they don't have to provide affordable health insurance. Our educational institutions need to remain focused on their mission of helping students of all ages achieve their highest potential. This cannot be done

when cutting corners and providing the lowest possible wages and benefits to the people responsible for achieving that mission.

Fortunately, we know that these cases of education employers cutting hours and courseloads to avoid the 30-hours rule are exceptions and not the rule. Analysis of employment figures provides no discernible evidence of the Affordable Care Act leading to increases in part-time employment.

As a nation, we cannot achieve the highest standards of our potential when the professionals we employ to lead and educate our children and adults receive meager pay and no benefits. The Affordable Care Act makes important steps to provide affordable access to health insurance to the more than one million education workers who will benefit from the law.

Written Statement of

Lisa Maatz
Vice President of Government Relations
American Association of University Women (AAUW)

"Examining Recent Actions by the Office of Federal Contract Compliance Programs."

United States House of Representatives
Education and the Workforce Committee
Workforce Protections Subcommittee

December 4, 2013

Chairman Walberg, Ranking Member Courtney, and members of the committee, thank you for the opportunity to submit input about important work of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

On behalf of the approximately 170,000 bipartisan members and supporters of the American Association of University Women (AAUW), I am pleased to share AAUW's perspective. Since its founding in 1881, AAUW has been breaking through barriers for women and girls. AAUW "supports affirmative action to improve racial, ethnic and gender diversity" and has long advocated for fairness in compensation, equitable access and advancement in employment, and vigorous enforcement of employment antidiscrimination statutes.[1]

Workplace discrimination persists.
Job creation and economic opportunity are critical issues for women, many of whom continue to struggle with economic insecurity and wage discrimination. Yet despite civil rights laws and advancements in women's economic status, workplace discrimination still persists. Women and minority workers continue to face significant pay disparities in the United States. The average woman working full time, year round is still paid only 77 cents for every dollar paid to the average man.[2] African-American and Latina women are at a particular disadvantage: as full-time workers, they earn only 68 percent and 59 percent, respectively, of what white men earn.[3] Women in every age group,[4] at every level of educational achievement,[5] and in every industry,[6] are underpaid relative to their male counterparts. In the construction industry, women's average earnings lag behind men's by 8 percent.[7]

As our economy slowly recovers from the recent recession, many workers will need to access training to upgrade their skills to fit new demands. Presently, women encounter barriers to entering certain nontraditional fields, such as construction, experiencing sexual harassment and differential treatment that drive them away from these fields. Women account for 10 percent of

students in the construction and repair industry, but many of these women are deterred from entering this field upon graduating from these programs. These troubling statistics underscore the need for additional government scrutiny of discriminatory practices by federal contractors.

The OFCCP plays a pivotal role in combating discrimination.
The OFCCP is charged with ensuring that federal contractors and subcontractors provide equal employment opportunity through affirmative action and nondiscrimination based on race, color, national origin, religion, or sex. This is tremendously important work that protects the rights of millions of people. Nearly one in four American workers is employed by a federal contractor, at over 200,000 businesses with contracts worth almost $700 billion.[8]

Identifying and remedying compensation discrimination is a key part of the OFCCP's work. In January 2011, the OFCCP proposed[9] recalling and replacing the two guidelines that shape how it conducts these compensation discrimination investigations. The current guidelines obligate the OFCCP to follow an identical procedure for all compensation discrimination investigations "regardless of the facts of a particular case."

AAUW also strongly supported[10] the OFCCP's announcement that it will develop a new tool to collect information on salaries, wages, and other benefits for employees of federal contractors.[11] AAUW has long supported OFCCP conducting a survey of contractor employment data to target enforcement efforts and better understand why women and people of color continue to be paid less relative to their counterparts. OFCCP should ensure that the data collected can be used to conduct in-depth analyses of pay practices in various industries to identify the most problematic fields and provide industry-wide guidance where there are systemic problems. If done correctly, this tool will be essential for giving workers and employers the information they need to end pay discrimination, and it will give the Department of Labor the information it needs to make sure companies that are receiving our tax dollars are following the law.

AAUW is committed to promoting workplace equity and opportunity for all women, and to reducing discrimination and other barriers that deter women from pursuing career goals and economic security. We have worked closely with the OFCCP on these issues, and we look forward to working with the office in the future.

Thank you for this opportunity. We are pleased to be working with you on this critical issue.

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STATEMENT OF
SHAWN MCMAHON, ACTING PRESIDENT/CEO
WIDER OPPORTUNITIES FOR WOMEN

"Recent Actions by the Office of Federal Contract Compliance Programs"

HOUSE EDUCATION AND WORKFORCE COMMITTEE
WORKFORCE PROTECTIONS SUBCOMMITTEE

December 4, 2013

Chairman Kline, Subcommittee Chairman Walberg, and Members of the Subcommittee, my name is Shawn McMahon, acting CEO of Wider Opportunities for Women (WOW). Thank you for the opportunity to submit testimony regarding federal hiring policies for federal contractors.

Wider Opportunities for Women works with policymakers at all levels of government to promote programs and regulations that help individuals obtain quality jobs and move toward economic security. WOW is committed to ensuring equal access to quality education, job training, economic opportunity and economic security. Many women continue to struggle to secure equal employment opportunity.

Equal employment opportunity initiatives are designed to ensure that qualified individuals have equal access to jobs and job training. Equal opportunity programs have enabled qualified women to obtain better paying jobs and to access training, promotion and other benefits so that they advance in the workplace and successfully pursue nontraditional careers. Continued use of equal opportunity in federal contracting is necessary to overcome continuing barriers to employment for women and ensure that all Americans have a fair chance to demonstrate their talents and abilities. For these reasons, WOW strongly supports the work of the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) to strengthen the affirmative action and nondiscrimination obligations of government contractors regarding individuals with disabilities and veterans, and we also encourage their efforts to expand greater equal opportunity for women and minorities.

Close to one-in-four American workers is currently employed by a business that receives federal funds for contracted work. That is more than 200,000 businesses with contracts totaling almost $700 billion. Our work to realize the goal of equal employment opportunities for all workers in this substantial share of the economy produces significant ripple effects across the workforce.

The privilege of being awarded a federal contract comes with a number of responsibilities, including compliance with federal nondiscrimination and anti-retaliation law, implementing meaningful and effective efforts to recruit and employ all workers, creation and enforcement of personnel policies that support the contractor's affirmative action efforts, maintenance of accurate records on its affirmative action efforts, and OFCCP access to these records upon request.

OFCCP's legal authority to enforce nondiscrimination and affirmative action hiring policies for federal contractors is clear. OFCCP enforces Executive Order 11246, Section 503 of the

Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 VEVRAA). These provisions prohibit businesses that contract with the federal government from discriminating in employment on the basis of sex, race, color, religion, national origin, disability or status as a protected veteran.

The Vietnam Era Veterans' Readjustment Assistance (VEVRA) Act rule provides contractors with a clear, quantifiable metric to measure their success in recruiting and employing veterans. The rule strengthens accountability and record-keeping requirements, enabling contractors to assess the effectiveness of their recruitment efforts. It also clarifies job listing and subcontract requirements to facilitate compliance. Adopting an annual benchmark, either based on the national percentage of veterans in the workforce or their own benchmark based on the best available data, will help contractors set clear hiring goal, clarify the role of the OFCCP's oversight, and most importantly, help to ensure that veterans have an equal chance at securing good, quality jobs.

Section 503 of the Rehabilitation Act requires government contractors to take affirmative action to hire people with disabilities. The continuing gap in average incomes and employment rates between people with and without disabilities illustrates that affirmative action programs for people with disabilities have been largely ineffective. Implementing new rules that give clear guidance, require data collection, and set out baseline goals for hiring is crucial to ensure equal access to employment and promote economic opportunity for people with disabilities. The Section 503 rule introduces a hiring goal for federal contractors and subcontractors that 7% of each job group in their workforce be qualified individuals with disabilities. The rule also details specific actions contractors must take in the areas of recruitment, training, recordkeeping and policy dissemination–similar to those that have long been required to promote workplace equality for women and minorities.

WOW supports OFCCP's ongoing efforts to help contractors recruit, retain and hire veterans and people with disabilities. Many unemployed veterans and individuals with disabilities are ready, able and willing to work, and yet still face obstacles and discriminating in gaining employment. Equal employment opportunity increases these workers access to quality jobs and prospect of building economic security for themselves and their families. Our economy is strongest when all workers and families have an equal shot of getting by and getting ahead, not when we choose to leave millions of people behind. Promoting greater economic opportunities for veterans and people with disabilities will benefit all of us. For the same reasons, WOW also strongly supports additional efforts by OFCCP to encourage recruitment and training of women employed by federal contractors and efforts to prevent and enforce nondiscrimination based on sex and gender.

The federal government spends hundreds of billions of dollars annually on contractors. It has the authority and responsibility to require these contractors to take affirmative steps in building a strong economy by recruiting, retaining and advancing qualified employees including women, minorities, veterans and people with disabilities. Affirmative action or equal opportunity is not a "quota," nor the substitution of numerical dictates for merit-based decisions. The rules set fair and reasonable standards and guidelines. Affirmative action programs expand the talent pool for

businesses from which to draw. Indeed, many companies report that a diverse workforce has led to enhanced performance and productivity.

WOW looks forward to continuing its work with this Committee and the Department of Labor to secure fair employment opportunities that enable workers to achieve economic security. Thank you for your leadership on this critical issue.

Testimony regarding "Examining Recent Actions by the Office of Federal Contract Compliance Programs"
House Committee on Education and the Workforce, Subcommittee on Workforce Protections
Wednesday, December 4, 2013, 10:00 am

As the nonprofit membership organization for the fifty-seven (57) federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for people with disabilities, the National Disability Rights Network (NDRN) would like to thank Chairman Walberg, Ranking Member Courtney and the Subcommittee on Workforce Protections for holding today's hearing, "Examining Recent Actions by the Office of Federal Contract Compliance Programs." NDRN and the P&A and CAP network advocate for people with disabilities to receive appropriate services and supports to obtain competitive, integrated employment, as an important part of integration into the community. NDRN would like to express its support for efforts by the Office of Federal Contract Compliance Programs (OFCCP) to promote employment of people with disabilities by federal contractors.

Unemployment among people with disabilities is a severe and endemic problem. The unemployment rate among people with disabilities is nearly twice that of the general population, and the labor force participation rate for people with disabilities is approximately 20%, about one-fourth of the labor force participation rate in the general population. Although the economic recovery has added jobs to the economy over the past three years, the effects of the recovery have been much slower for people with disabilities, and the participation rate for people with disabilities has actually decreased while the unemployment rate for people with disabilities has increased since 2010. This is despite significant advances in educational achievement in recent history for people with disabilities.

Often, people with disabilities become frustrated and give up on trying to find employment because they find that employers are unwilling to give them the opportunities they seek. Section 503 provides one opportunity to fix this problem, and NDRN supports the regulations as a guideline for federal contractors to provide employment opportunities for people with disabilities. The OFCCP's decision to establish utilization goals for the hiring of people with disabilities among federal contractors is an important step toward increasing employment for people with disabilities. NDRN recognizes the importance of federal contractors setting the tone for the workforce at large by providing an example of hiring people with disabilities, but also recognizes the importance of doing so without a significant compliance burden. Section 503 sets an appropriate balance by setting non-mandatory goals for hiring of people with disabilities, encouraging partnerships with community-based resources to help enable them to meet those goals, and allowing voluntary disclosure of disability status

by employees. The OFCCP's regulations will complement the goals of the Americans with Disabilities Act by encouraging employers to take active steps to recruit and employ people with disabilities. Finally, OFCCP has established sample language and surveys that contractors may use to implement the utilization goals and report their progress to the agency.

Historically, employers who have taken steps to encourage employment for people with disabilities have been successful not just for the people who they have hired, but for the employers as well. For example, Walgreens' far-reaching efforts to include people with disabilities in their workplace have allowed them to establish extremely successful distribution centers with rates of employment of people with disabilities as high as forty percent. Walgreens integrates people with disabilities in every level of employment, from the assembly line to upper management. These centers have seen increased employee morale and have helped Walgreens to improve its bottom line. Although Section 503 does not require that federal contractors go as far as Walgreens has, contractors will realize a similar benefit by breaking down the barriers that prevent people with disabilities from coming into the workforce now.

Employers can often reach goals to hire veterans and other people with disabilities through a few simple accommodations at minimal cost. The Protection and Advocacy (P&A) network has often worked with people with disabilities and their employers to find appropriate accommodations. For example, this last year, one P&A agency assisted a toll booth operator in obtaining the accommodation he needed to work despite back problems that prevented him from standing for long periods of time – a chair. Another P&A agency assisted a person with significant hip impairments to receive an accommodation of obtaining a parking place close to the door because she could not walk long distances or take an employee shuttle. These and similar accommodations can help federal contractors achieve the Section 503 hiring goals at minimal cost.

Although the Section 503 regulations could be stronger, the new regulations are appropriate and in line with other regulations that have been in place for decades relating to women and people of color. These are not quotas, but merely aspirational goals that allow the OFCCP to measure progress toward full integration of people with disabilities in the Federal contractor workforce. The definitions of a "person with a disability" are clear and has been established for numerous decades based on both the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The regulation is a simple and long overdue step forward in combating the high rate of unemployment and low labor force participation rate for people with disabilities.

NDRN and the P&A / CAP network are happy to work with the House Committee on Education and the Workforce and the Subcommittee on Workforce Protections to improve and support employment and transition services for people with disabilities to competitive, integrated employment, with the eventual goal of reducing unemployment of people with disabilities and increasing the participation of people with disabilities in the workforce.

We appreciate the opportunity to submit testimony on this important topic, and for more information please be in touch with Patrick Wojahn at (202) 408-9514, x102.

[Additional Submissions by Mr. Walberg follow:]

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December 6, 2013

The Honorable Tim Walberg
Chairman
Committee on Education and the Workforce Subcommittee on Workforce Protections
United States House of Representatives
2181 Rayburn House Office Building
Washington, DC 20510

Dear Chairman Walberg:

On behalf of the American Hospital Association's (AHA) nearly 5,000 member hospitals, health care systems and other health care organizations, and our 43,000 individual members, I am writing to express our support for your legislation, the *Protecting Health Care Providers from Increased Administrative Burdens Act* (H.R. 3633). This bill will help ensure the continuing availability of a robust network of hospital care for TRICARE and Federal Employees Health Benefit Program (FEHBP) participants by clarifying the Office of Federal Contract Compliance's (OFCCP) role and its oversight and enforcement activities over hospitals that provide services to military families, federal employees and other recipients of care under federal health reimbursement programs.

For many years, the OFCCP's policy has been that hospitals providing health care services to participants in federally funded health benefit programs, including TRICARE, FEHBP and Medicare, are not considered federal contractors. TRICARE is the health care program for military service members and their families; the FEHBP is the health care program for civilian employees and their families. Medicare is the health care program for individuals 65 years or older. The OFCCP's previous position was consistent with the position taken by the agencies specifically charged with administering these programs. Its current position is unprecedented and, if accepted, would convert a majority of our nation's hospitals into "federal contractors" overnight, without advance notice to or agreement by those hospitals.

Recently, however, the OFCCP has undertaken an aggressive attempt to expand the agency's jurisdiction over hospitals by asserting that hospitals' participation in managed care networks offered through TRICARE, FEHBP and even Medicare Parts C and D effectively makes them "federal subcontractors" and, thus, subject to OFCCP's burdensome regulatory scheme. OFCCP has continued to pursue this policy despite Congress' previous passage of language in the *National Defense Authorization Act for Fiscal Year 2012* (NDAA) [P.L. 112-81] that specifically exempted TRICARE network providers from federal contractor status. These continued actions by OFCCP make passage of this bill critically important for the nation's hospitals.

Hospitals are subject to myriad anti-discrimination laws and regulations, including anti-discrimination regulations that are appropriately enforced by many federal, state and local agencies. Subjecting hospitals to additional paperwork burdens and the costs associated with OFCCP regulations makes little sense at a time when hospitals are being asked to do more with less reimbursement. It effectively would divert financial resources from patient care in order to satisfy the OFCCP's administrative requirements, forcing hospitals to make difficult choices about their ongoing participation in various federal health care reimbursement programs that OFCCP argues is the basis for the agency's oversight and enforcement.

The OFCCP's attempt to expand its jurisdiction and its real lack of clear guidance for providers has forced hospitals to engage in ongoing lengthy and costly litigation to remove the uncertainty surrounding scope of OFCCP's jurisdiction.

H.R. 3633 will provide clear direction for OFCCP policy and ensure that the burdens of complying with OFCCP's unnecessary and costly regulatory scheme does not come at the cost of reducing hospitals' robust participation in networks of care for TRICARE, FEHBP and Medicare patients and threaten access for our nation's military families, federal employees and other federal health care program beneficiaries.

Thank you for introducing this legislation. The AHA looks forward to working with you to ensure its enactment.

Sincerely,

Rick Pollack
Executive Vice President

[Questions submitted for the record and their responses follow:]

Questions for the Record
"Examining Recent Actions by the Office of Federal Contract Compliance Programs"
Subcommittee on Workforce Protections

Questions from Chairman John Kline (MN-02)

1. As a follow-up to my question at the hearing, OFCCP and the Equal Employment Opportunity Commission have asserted that inviting applicants to self-identify as disabled at the pre-offer stage does not violate the *Americans with Disabilities Act* (ADA). However, on OFCCP's website, under the compliance assistance webpage for frequently asked questions for employers, it states that under Section 503 of the *Rehabilitation Act of 1973* (Section 503) and *Vietnam Era Veterans' Readjustment Assistance Act* (VEVRAA), employers should not ask job applicants "disability-related questions (i.e., questions that are likely to elicit information about a disability) . . . until after a conditional job offer is made." As you are aware, the ADA includes an individual right to sue. Will OFCCP join as *amici* and defend federal contractors who face private suits pursuant to the ADA?

Questions from Subcommittee Chairman Tim Walberg (MI-07)

1. According to OFCCP, if a contractor asks an applicant to self-identify their disability status, the inquiry will not violate the *Americans with Disabilities Act* (ADA) provided the request is made in order to comply with the new rule pertaining to individuals with disabilities. How does this safe harbor apply to employers that are sometimes a contractor and other times not? Can an employer continue to rely on this safe harbor, even if its contractor status ends for a short period of time, or must the employer immediately stop making the pre-offer inquiry?

2. The August 8, 2013 letter from the Equal Employment Opportunity Commission's (EEOC) Office of Legal Counsel referred to in the final rule pertaining to individuals with disabilities conflicts with a 1996 letter from that same individual in the EEOC's Office of Legal Counsel, which says "a contractor cannot cite Section 503 as justification for making pre-offer inquiries regarding self-identification." The 1996 letter further states a federal contractor may only make this request at the pre-offer stage if due to "another" law (other than the ADA). Please explain the conflicting letters from the EEOC Office of Legal Counsel. Does the 2013 letter supersede the 1996 letter?

3. The new rule pertaining to individuals with disabilities establishes a seven percent utilization goal for individuals with disabilities in each job group of a contractor's workforce. Specifically, how will OFCCP determine whether failure to meet this goal is a result of discrimination or a lack of qualified individuals within that community? If all applicants do not voluntarily disclose their disability, will contractors be accountable for the seven percent goal?

4. According to the new rule pertaining to individuals with disabilities, the Director of OFCCP has sole discretion to alter the seven percent utilization goal. What factors will be considered by

OFCCP to determine the goal level? Will OFCCP solicit input from Congressional leaders and the contractor community prior to the finalization of these changes?

5. Previously, affirmative action hiring policies were based on a "good faith" effort. Given the changes in the new rule, what exactly will federal contractors be required to do to meet the seven percent utilization goal? Will OFCCP apply the standards in a flexible manner, and, if so, how?

6. Will failure of a contractor to meet the seven percent utilization goal trigger costly compliance requirements and/or debarment? Specifically, which violations of the new rule pertaining to individuals with disabilities would prompt debarment for a contractor?

7. If a federal contractor has a manufacturing facility with 1,000 people and 68, or 6.8 percent, self-identify as individuals with a disability, what would OFCCP expect the contractor to do, if anything, to meet the seven percent goal? What would a compliance officer look for if that contractor were audited? Does the answer change if 70 people self-identify?

8. What does OFCCP believe are the barriers to employment facing individuals with disabilities? Is OFCCP concerned that work disincentives in the Social Security Disability Insurance program may pose an obstacle for employers trying to meet the new utilization benchmark? If so, what are those disincentives?

9. Current estimates suggest as many as 92 percent of all veterans are male. How does OFCCP expect contractors to prioritize their efforts for hiring women and veterans when they have both a "benchmark" for hiring veterans and affirmative action requirements for hiring females?

10. Are there any contractual arrangements created pursuant to the *Patient Protection and Affordable Care Act* that will subject companies to OFCCP jurisdiction?

11. Companies are expected to know they are subject to OFCCP's jurisdiction even if it is not included in the contract. OFCCP's jurisdiction emanates from the existence of a contract and this has created much uncertainty and concern for the contractor community. How is a company expected to know if it is a covered subcontractor?

12. It does not seem practical for a major health care institution with thousands of contracts to have the procurement department determine on a contract-by-contract basis if the goods or services are necessary to the performance of a federal contract, thereby making them a federal subcontractor. What is OFCCP's rationale for asserting jurisdiction over a health care provider based on its acceptance of patients covered by TRICARE or the Federal Employee Health Benefits Program?

13. In the proposed rule pertaining to covered veterans (April 2011), OFCCP estimated 108,288 contractor establishments would be covered by the new rule. In the proposed rule pertaining to individuals with disabilities (December 2011), OFCCP estimated there were 171,275 covered contractor establishments. However, estimates show that 285,390 contractors are covered based

on the number of establishments reported in most recent VETS-100A filings. The final rules do not state how many federal contractor establishments might be covered, but instead include a range, with a low estimate of 171,275 establishments and a high estimate of 251,300 establishments. How many federal contractor and subcontractor establishments are covered by these rules? How confident is OFCCP in the final estimates, and why did the original estimates vary so widely? What types of contractors were excluded from the initial analysis to come up with final estimates?

14. How did OFCCP calculate the cost to implement the new regulations for covered veterans and individuals with disabilities? Please explain the significant differences between the costs calculated by OFCCP and those calculated by the contractor community.

15. Many stakeholders viewed the rules pertaining to covered veterans and individuals with disabilities as very contentious, although neither of the laws these regulations address are controversial. In fact, one group has already filed suit to block implementation of the disability rules. Did OFCCP consider any consensus-based approaches to reviewing the veterans and individuals with disabilities regulations, such as negotiated rulemaking, to create regulations that would receive broad support among stakeholders?

16. Both OFCCP regulations state outreach must be "effective." Please define "effective" and explain how an employer will know they have met this measurement.

17. Construction contractors have never been required to conduct a "job group" analysis for their OFCCP affirmative action program. Given the new job group requirements in the regulation pertaining to individuals with disabilities, how does OFCCP expect construction contractors to measure this utilization benchmark—by project or metropolitan area? Please explain how OFCCP envisions a construction company would apply the seven percent utilization goal when it does not utilize job groups?

18. The nature of the construction industry requires certain physical abilities to both ensure successful job performance and support workplace safety. Are there any concerns these new utilization goals of hiring of persons with disabilities in all job groups, regardless of the job's physical requirements, might pose safety issues? How will investigators treat positions where some disabilities may inherently disqualify individuals from the position?

19. What steps has OFCCP taken to address the concerns raised in the National Academy of Sciences report on collection of employer pay data, including the concern about the reliability of data if OFCCP does not coordinate with other federal agencies? Will OFCCP address the concerns raised in the report before proceeding with any rulemaking that will mandate large-scale collection of sensitive compensation data? Will OFCCP work closely with EEOC to ensure employers are not subject to conflicting regulations?

20. In February of 2013, OFCCP withdrew guidelines that articulated how the agency would investigate compensation discrimination. While the agency has replaced these guidelines with a directive, many contractors are concerned the directive does not adequately articulate the nature

of the agency's approach to investigating compensation discrimination. The directive states OFCCP would look into whether there is a disparate impact in workplace policies concerning pay differences, but this does not necessarily indicate discrimination has occurred. Please explain the basis for using a disparate impact analysis for investigating workplace pay differentials and any other alternative methods OFCCP has considered for examining compensation discrimination practices.

21. The legal basis for OFCCP to schedule an onsite visit is "specific evidence of a violation of the Executive Order." OFCCP claims compensation differences provide such evidence, yet OFCCP refuses to share its compensation analysis with the contractor before the onsite visit even though this would streamline the visit and ensure the contractor is not wasting time and resources pulling unnecessary data. Please explain why OFCCP refuses to disclose its compensation analysis to employers.

22. OFCCP is responsible for ensuring federal contractors are compliant with all nondiscrimination laws within the workplace. However, the lack of transparency regarding the auditing processes and procedures is of great concern to employers. Over the past few years there has been a substantial increase in audits for any one business in a single year. Please explain the procedures and processes of OFCCP's audit process. What criteria and formulas does OFCCP use to select the contractors it audits? How does OFCCP explain the increase in audits for a single employer as compared to years past?

23. Contractors are already struggling to meet the tight deadlines associated with audit submissions and have an even tougher time obtaining approval for an extension. It is especially disconcerting for those contractors who have been denied extensions to wait for OFCCP to take any action on the audit, which can take up to 16 months. How does OFCCP determine when submission deadlines may be extended? What are the data requirements for these audits and do the requirements go beyond those required in the existing logs employers maintain? Is it reasonable to ask a contractor to comply with same day data requests or week turn-around periods for substantial paperwork submissions?

24. There have been concerns that OFCCP's regional offices ignore complaints about overly aggressive compliance officers. What is the national OFCCP office's oversight of regional compliance officers, particularly when officers act unreasonably within the scope of their job?

25. OFCCP regulations add enormous compliance costs for contractors, often resulting in higher contracting costs for the federal government. Subcontractors with small profit margins also struggle with these high compliance costs, threatening their sustainability. What steps is OFCCP taking to fully evaluate and reduce the burdens of regulatory actions on contractors?

26. On or about January 12, 2009 the Department of Labor posted on its website a paper entitled "An Analysis of Reasons for the Disparity in Wages Between Men and Women," prepared for the department by CONSAD Research Corporation with a forward by then-Deputy Assistant Secretary for Federal Contract Compliance Charles E. James, Sr. (*See* http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf)

The paper was removed from the department's website shortly thereafter. Please explain why the paper was removed from the department's website and who decided it should be removed. If there were concerns about the content of the paper, please explain what those concerns were, what steps were taken to investigate the validity of those concerns, and whether the concerns were ultimately found to be valid.

Representative Fudge Question for the Record:

Director Shiu, during the hearing on December 4, 2013, before the Subcommittee on Workforce Protections, Members and witnesses discussed a range of important matters including OFCCP's effectiveness, enforcement efforts and regulatory agenda. Is there any additional information you would like to provide to the Subcommittee regarding these issues or any of the other topics raised at the hearing?

Questions for the Record

Office of Federal Contract Compliance Programs

For the Subcommittee on Workforce Protections

Hearing date December 4, 2013

Questions from Chairman John Kline (MN-02)

1. **As a follow-up to my question at the hearing, OFCCP and the Equal Employment Opportunity Commission have asserted that inviting applicants to self-identify as disabled at the pre-offer stage does not violate the *Americans with Disabilities Act* (ADA). However, on OFCCP's website, under the compliance assistance webpage for frequently asked questions for employers, it states that under Section 503 of the *Rehabilitation Act of 1973* (Section 503) and *Vietnam Era Veterans' Readjustment Assistance Act* (VEVRAA), employers should not ask job applicants "disability-related questions (i.e., questions that are likely to elicit information about a disability) . . . until after a conditional job offer is made." As you are aware, the ADA includes an individual right to sue. Will OFCCP join as *amici* and defend federal contractors who face private suits pursuant to the ADA?**

To update its website consistent with the Section 503 and VEVRAA regulations, OFCCP has removed the above referenced frequently asked question from its website. Compliance with a U.S. Department of Labor (DOL) regulation requiring contractors to invite applicants to voluntarily self-identify as individuals with disabilities *pre-offer* for affirmative action purposes does not violate the ADA.

Questions from Subcommittee Chairman Tim Walberg (MI-07)

1. **According to OFCCP, if a contractor asks an applicant to self-identify their disability status, the inquiry will not violate the Americans with Disabilities Act (ADA) provided the request is made in order to comply with the new rule pertaining to individuals with disabilities. How does this safe harbor apply to employers that are sometimes a contractor and other times not? Can an employer continue to rely on this safe harbor, even if its contractor status ends for a short period of time, or must the employer immediately stop making the pre-offer inquiry?**

The EEOC's regulations implementing the ADA specifically provide that no employer is liable for a violation of Title I of the ADA for an action the employer is required to take under another Federal statute or regulation. 29 C.F.R. § 1630.15(e). Affirmative action

that is required by either the Section 503 or VEVRAA regulations will not make an employer liable under the ADA.

If an employer was no longer covered by the requirements of Section 503, then the employer would no longer be able to rely on Section 503 in an action challenging the use of pre-offer inquiries.

2. **The August 8, 2013 letter from the Equal Employment Opportunity Commission's (EEOC) Office of Legal Counsel referred to in the final rule pertaining to individuals with disabilities conflict with a 1996 letter from that same individual in the EEOC's Office of Legal Counsel, which says "a contractor cannot cite Section 503 as justification for making pre-offer inquiries regarding self-identification." The 1996 letter further states a federal contractor may only make this request at the pre-offer stage if due to "another" law (other than the ADA). Please explain the conflicting letters from the EEOC Office of Legal Counsel. Does the 2013 letter supersede the 1996 letter?**

Specific questions regarding EEOC law and policies should be directed to the EEOC. However, it should be noted that the 1996 letter stated: "Since the section 503 regulations do not require that Federal contractors take any affirmative action at the pre-offer stage which would necessitate inviting applicants to self-identify at this stage, a contractor cannot cite section 503 as justification for making pre-offer inquiries regarding self-identification." That sentence's premise is no longer correct, because the new rule – "another" law other than the ADA – now requires contractors to invite applicants to self-identify as individuals with disabilities at the pre-offer stage. Thus, the sentence's conclusion – that a contractor cannot cite Section 503 as justification for making pre-offer inquiries regarding self-identification – no longer follows.

3. **The new rule pertaining to individuals with disabilities establishes a seven percent utilization goal for individuals with disabilities in each job group of a contractor's workforce. Specifically, how will OFCCP determine whether failure to meet this goal is a result of discrimination or a lack of qualified individuals within that community? If all applicants do not voluntarily disclose their disability, will contractors be accountable for the seven percent goal?**

Under both OFCCP's previous and current Section 503 regulations, discrimination occurs when qualified individuals are denied equal employment opportunity on the basis of their disability. To make this determination, OFCCP reviews the contractor's personnel policies and practices to see that they are neither discriminatory, nor applied in a discriminatory manner. This includes reviewing the contractor's mandated assessment of whether it is using qualification standards that unnecessarily screen out qualified individuals with disabilities, and assessing whether needed reasonable accommodations have been properly provided. Although a contractor that discriminates on the basis of disability may, as a result, fail to meet the goal, OFCCP's regulations are clear that the mere failure to meet the goal will not result in a finding of discrimination or other violation of the regulations. Rather, the failure to meet the goal requires only that the contractor determine, based on reviews it is already required to perform as part of its

affirmative action obligations, whether that failure is the result of any impediments to equal employment opportunity in their personnel policies and practices, or whether it could do a better job of recruiting or retaining individuals with disabilities. Only if a problem or barrier to equal employment opportunity is identified must the contractor take corrective action. OFCCP recognizes that not all individuals with disabilities will voluntarily self-identify. All covered contractors must, nevertheless, apply the seven percent aspirational goal to their workforces. If the lack of voluntary self-identification or the lack of qualified individuals in the community is the cause of a failure to meet the goal, a violation will not be found and corrective action will not be required.

4. **According to the new rule pertaining to individuals with disabilities, the Director of OFCCP has sole discretion to alter the seven percent utilization goal. What factors will be considered by OFCCP to determine the goal level? Will OFCCP solicit input from Congressional leaders and the contractor community prior to the finalization of these changes?**

The new regulations provide that the Director of OFCCP will "periodically review and update, as appropriate, the utilization goal." 41 CFR 60-741.45(c). OFCCP will conduct this review by analyzing the relevant data that is available at that time. This will include, but may not be limited to, data regarding the civilian labor force availability, the civilian population, unemployment rates, and labor force participation rates of individuals with disabilities from tabulations from the Census Bureau's American Community Survey (ACS) and the Bureau of Labor Statistics (BLS). OFCCP will conduct notice and comment rulemaking under the Administrative Procedure Act to alter the goal, and thus will notify the public that it is reviewing the goal, and will, as part of that review, solicit and consider input from all of its stakeholders, including Congress and the contractor and disability communities.

5. **Previously, affirmative action hiring policies were based on a "good faith" effort. Given the changes in the new rule, what exactly will federal contractors be required to do to meet the seven percent utilization goal? Will OFCCP apply the standards in a flexible manner, and, if so, how?**

The Executive Order regulations have a good faith consideration; however, the Section 503 and VEVRAA regulations are not now, nor were they previously, based on a "good faith" effort. Previously, the Section 503 regulations required covered contractors to periodically review their personnel practices and qualification standards to ensure that they do not screen out or discriminate against individuals with disabilities; engage in outreach and recruitment activities focused on individuals with disabilities; and audit and assess the effectiveness of their affirmative action programs at ensuring equal employment opportunity for individuals with disabilities. The new Section 503 regulations also require covered contractors to use the 7 percent utilization goal as a management tool to assess the effectiveness of their outreach efforts and of their affirmative action program overall.

OFCCP will work with each contractor, as needed, to support the development of outreach and recruitment strategies, and other actions that are intended to generate a qualified and diverse applicant pool that includes qualified individuals with disabilities.

6. **Will failure of a contractor to meet the seven percent utilization goal trigger costly compliance requirements and/or debarment? Specifically, which violations of the new rule pertaining to individuals with disabilities would prompt debarment for a contractor?**

As noted in the response to Question 3, a contractor will not be found in violation of the regulations simply because it failed to meet the aspirational goal.

In more than 98 percent of OFCCP's cases, the agency's efforts to conciliate are successful and it is not necessary to seek administrative enforcement or the debarment of the contractor. Even in those cases where administrative enforcement is necessary, debarment is rarely imposed.

7. **If a federal contractor has a manufacturing facility with 1,000 people and 68, or 6.8 percent, self-identify as individuals with a disability, what would OFCCP expect the contractor to do, if anything, to meet the seven percent goal? What would a compliance officer look for if that contractor were audited? Does the answer change if 70 people self-identify?**

A contractor that finds that it is not meeting the goal will be expected to review the assessments it has performed as part of its annual affirmative action obligations and determine whether there are any impediments to equal employment opportunity that need to be corrected, and whether its outreach and recruitment efforts are working well or should be adjusted. A contractor will not be found to be in violation of the law during a compliance evaluation simply because it is not meeting the goal. Rather, the compliance officer reviewing this contractor will look to see that it has performed the required assessments and that its conclusions are reasonable. The compliance officer may also provide the contractor with technical assistance to help it strengthen its outreach and recruitment efforts.

A contractor that is meeting the goal is required to continue to engage in the data collection, periodic assessments, and outreach and recruitment efforts required by the regulations. These efforts will help ensure the contractor maintains a pipeline of qualified applicants with disabilities to fill future vacancies as they occur.

8. **What does OFCCP believe are the barriers to employment facing individuals with disabilities? Is OFCCP concerned that work disincentives in the Social Security Disability Insurance program may pose an obstacle for employers trying to meet the new utilization benchmark? If so, what are those disincentives?**

Individuals with disabilities may face numerous barriers to employment, including lack of accessible or appropriately available services and supports such as transportation,

accommodations, and technology, and employment discrimination and discriminatory or stereotypical attitudes toward people with disabilities (*see, e.g.,* Hernandez, B., Keys, C., & Balcazar, F. (2000), "Employer attitudes toward workers with disabilities and their ADA employment rights: A literature review," Journal of Rehabilitation, 66(4), 4–16 (studies identifying low expectations and negative perceptions as key contributing factors limiting the employment of people with disabilities)).

In addition, there are programs that aim to remove disincentives for Social Security beneficiaries with disabilities. The Ticket to Work and Work Incentives Improvement Act of 1999 and the Social Security Administration's (SSA) work incentives, for example, allow people with disabilities who receive SSDI or Supplemental Security Income to keep their benefits while they explore employment, receive vocational rehabilitation, and gain work experience. OFCCP specified Ticket to Work's Employment Networks as a potential recruitment resource in the Final Rule.

9. Current estimates suggest that as many as 92 percent of all veterans are male. How does OFCCP expect contractors to prioritize their efforts for hiring women and veterans when they have both a "benchmark" for hiring veterans and affirmative action requirements for hiring females?

The statutes and regulations enforced by OFCCP require that all groups be given an equal opportunity to apply and compete for available jobs and that the best qualified be hired. The VEVRAA rule does not require contractors to meet the hiring benchmark, nor does it penalize contractors solely for failing to meet it. The benchmark provides a measurement tool that will encourage contractors to be inclusive of protected veterans, rather than to discriminate against non-veterans through preferences or quotas.

10. Are there any contractual arrangements created pursuant to the Patient Protection and Affordable Care Act that will subject companies to OFCCP jurisdiction?

OFCCP determines coverage on a case-by-case basis based on the terms of each contract or subcontract and whether that agreement meets the regulatory definitions of a "government contract" or "subcontract." (See response to Question 12 for definitions.)

11. Companies are expected to know they are subject to OFCCP's jurisdiction even if it is not included in the contract. OFCCP's jurisdiction emanates from the existence of a contract and this has created much uncertainty and concern for the contractor community. How is a company expected to know if it is a covered subcontractor?

To ensure that covered subcontractors are aware of their obligations as Federal contractors, OFCCP requires prime contractors to inform their subcontractors of their status as Federal contractors by including in their contract a specific provision, the "Equal Opportunity (EO) Clause," that details their nondiscrimination and affirmative action obligations under Executive Order 11246, Section 503, and VEVRAA. The new Section

503 regulations and VEVRAA rules permit contractors to incorporate by reference into the subcontract the Section 503 and VEVRAA provisions setting out the EO Clause, provided that certain prescribed language is used to alert the subcontractor that it now has specific EEO and affirmative action obligations. This prescribed language is set forth in the new 503 and VEVRAA regulations.

12. It does not seem practical for a major health care institution with thousands of contracts to have the procurement department determine on a contract-by-contract basis if the goods or services are necessary to the performance of a federal contract, thereby making them a federal subcontractor. What is OFCCP's rationale for asserting jurisdiction over a health care provider based on its acceptance of patients covered by TRICARE or the Federal Employee Health Benefits Program?

OFCCP's regulations at 41 CFR 60-1.3 define a covered "subcontract" as follows:

> *Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):
>
> (1) For the purchase, sale or use of personal property or non-personal services which, in whole or in part, is necessary to the performance of any one or more contracts; or
>
> (2) Under which any portion of the contractors' obligation under any one or more contracts is performed, undertaken or assumed.

The "necessary to performance" prong of the definition of subcontractor dates back to 1978. This prong of the definition that OFCCP has asserted continues to be a viable basis for OFCCP's jurisdiction over hospitals that serve as in-network TRICARE and Federal Employee Health Benefits Program providers. It is not a new basis for OFCCP jurisdiction nor has there been any effort by OFCCP under this administration to expand that jurisdiction. In fact, hospitals, in general, made up about two percent of OFCCP's annual audits between 2006 and 2013.

However, to allay concerns regarding notice to TRICARE subcontractors, the Department has decided to exercise its prosecutorial discretion by establishing a five-year non-enforcement policy under Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act for TRICARE subcontractors. Subsequent to the hearing, on May 7, 2014, a written directive was issued and posted on OFCCP's website. During this enforcement moratorium, OFCCP will provide technical assistance to health care providers that may be subcontractors under TRICARE or other Federal health plans, to educate them about their nondiscrimination and affirmative action obligations under the three laws that OFCCP enforces.

13. In the proposed rule pertaining to covered veterans (April 2011), OFCCP estimated 108,288 contractor establishments would be covered by the new rule.

In the proposed rule pertaining to individuals with disabilities (December 2011), OFCCP estimated there were 171,275 covered contractor establishments. However, estimates show that 285,390 contractors are covered based on the number of establishments reported in most recent VETS-100A filings. The final rules do not state how many federal contractor establishments might be covered, but instead include a range, with a low estimate of 171,275 establishments and a high estimate of 251,300 establishments. How many federal contractor and subcontractor establishments are covered by these rules? How confident is OFCCP in the final estimates, and why did the original estimates vary so widely? What types of contractors were excluded from the initial analysis to come up with final estimates?

In light of the comments OFCCP received on the VEVRAA proposed rule concerning the size of the Federal contractor establishment universe, OFCCP reexamined the original number of 108,288 contractor establishments it used in the NPRM. For the Section 503 proposed rule, OFCCP combined Equal Employment Data System (EEDS) data with several other information sources. The agency used FY 2009 EEDS data to determine the number of Federal contractor establishments with 50 or more employees; this resulted in a total of 87,013 Federal contractor establishments. An additional 10,518 establishments were identified through a cross-check of other contractor databases for a total of 97,531 establishments. Covered Federal contractors must develop AAPs for all of their establishments, even those with fewer than 50 employees. Therefore, OFCCP added an additional 73,744 establishments, using EEO-1 and Federal Procurement Data System – Next Generation data, for an adjusted total of 171,275 Federal contractor establishments affected by the final rule. This adjustment to the methodology for calculating the number of contractors and contractor establishments resulted in a 58 percent increase over the earlier estimate used in the VEVRAA NPRM.

We also presented an estimated high end for the range of the cost of the rule based on a contractor establishment number of 251,300. This number was based on 2010 VETS data from their pending Information Collection Request.

14. How did OFCCP calculate the cost to implement the new regulations for covered veterans and individuals with disabilities? Please explain the significant differences between the costs calculated by OFCCP and those calculated by the contractor community.

In response to public comments, the final regulatory impact analysis increased the cost estimates for compliance with the rules' provisions for contractors using some of the cost estimates suggested by commenters and the agency's own research. OFCCP also provided low- and high-range estimates for certain requirements. These ranges were based on estimates provided by contractors, the comparison of contractor establishment numbers, assumptions about the use of automated application and human resources information systems, and/or contractor size.

15. Many stakeholders viewed the rules pertaining to covered veterans and individuals with disabilities as very contentious, although neither of the laws these regulations address are controversial. In fact, one group has already filed suit to block implementation of the disability rules. Did OFCCP consider any consensus-based approaches to reviewing the veterans and individuals with disabilities regulations, such as negotiated rulemaking, to create regulations that would receive broad support among stakeholders?

Former Governor and Secretary of Homeland Security Tom Ridge said in a *Wall Street Journal* op-ed that OFCCP's "rule-making process should be a model for how government can work with stakeholders in crafting regulations that are practical and effective" (October 2, 2013). To inform the development of the VEVRAA and Section 503 final rules, OFCCP employed an open, transparent and inclusive process in order to maximize opportunities for all interested parties to participate, rather than the negotiated rulemaking process, which is typically used by Federal agencies to reach consensus when only a limited number of stakeholders will be impacted. This open process provided OFCCP with the benefit of many different perspectives and experiences to inform the development of the final rules. It included the issuance of an Advance Notice of Proposed Rulemaking, in July 2010, soliciting public comment on specific ways to strengthen the Section 503 affirmative action provisions, which drew more than 125 comments from a broad spectrum of stakeholders, including trade and professional associations, disability and veteran advocacy organizations, contractors, Federal, state and local government agencies, and private citizens. OFCCP also conducted several public forums designed to reach out to as many stakeholders across the nation as possible to obtain valuable input for the development of the regulations. In addition, OFCCP extended the 60-day period for public comment on the Notice of the Proposed Rulemaking (NPRM) for both the Section 503 and VEVRAA rules, and received more than 400 comments on the Section 503 rule and more than 100 comments on the VEVRAA rule from an equally broad spectrum of interested groups and individuals, including disability and veteran organizations, contractors, law firms, state and local government agencies, veterans, and individuals with and without disabilities. These efforts provided us with a wealth of information for improving the regulations, leading to the issuance of streamlined final rules that minimize the burden on contractors, while providing them with improved tools to help achieve the stated purposes of VEVRAA and Section 503 of increasing the employment opportunities for protected veterans and people with disabilities. It should be noted that the district court upheld the Section 503 rule in the lawsuit referred to in the question. Associated Builders and Contractors, Inc., v. Shiu, C.A. No. 13-1806 (D.D.C. March 21, 2014), appeal filed March 28, 2014.

16. Both OFCCP regulations state outreach must be "effective." Please define "effective" and explain how an employer will know they have met this measurement.

The final rule does not define "effective." Instead, the final rule requires contractors to review the outreach and recruitment efforts they took over the previous year to evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities.

The final rule states that among the criteria contractors should use to evaluate their outreach efforts are their applicant and hiring data. The final rule also provides contractors flexibility to consider other factors that are unique to a particular contractor in determining effectiveness, so long as the factors are reasonable. The assessment would involve a comparison of current year applicant and hiring data, and any other factors identified by the contractors at its discretion, compared to the previous year's data.

If a contractor determines that its outreach efforts are not effective and is unsure how to strengthen them, it may contact OFCCP for technical assistance, free of charge.

17. Construction contractors have never been required to conduct a "job group" analysis for their OFCCP affirmative action program. Given the new job group requirements in the regulation pertaining to individuals with disabilities, how does OFCCP expect construction contractors to measure this utilization benchmark – by project or metropolitan area? Please explain how OFCCP envisions a construction company would apply the seven percent utilization goal when it does not utilize job groups?

The Section 503 Final Rule does not require construction contractors to create new "job groups" for purposes of the utilization goal. Construction contractors with more than 100 employees will use the same groupings – the construction trades – that they already use in their affirmative action programs required by OFCCP's regulations implementing Executive Order 11246. Construction contractors with 100 or fewer employees may use either the construction trades or their entire trade workforce for their utilization analyses.

New Section 741.45(d)(2) specifies that the contractor must use the same job groups established for utilization analyses under the Executive Order, "either in accordance with 41 CFR part 60-2 [applicable to non-construction contractors], *or in accordance with 41 CFR part 60-4* [applicable to construction contractors], as appropriate." 78 Fed. Reg. at 58,745 (emphasis added). Under 41 CFR Part 60-4, the job-group construction goals are applied to each construction trade. *See* 41 CFR § 60-4.6 (stating that the utilization goals applicable to construction contractors "shall be applicable to each construction trade in a covered contractor's or subcontractor's entire workforce which is working in the [geographic] area covered by the goals and timetables").

18. The nature of the construction industry requires certain physical abilities to both ensure successful job performance and support workplace safety. Are there any concerns these new utilization goals of hiring of persons with disabilities in all job groups, regardless of the job's physical requirements, might pose safety issues? How will investigators treat positions where some disabilities may inherently disqualify individuals from the position?

Neither Section 503 nor the new regulations require contractors to hire any individual who cannot perform the essential functions of the job, nor to hire any individual who poses a direct threat to the health and safety of that individual or other people. 78 Fed. Reg. at 58,707. However, a contractor may not discriminate against a qualified

individual, who happens to possess a disability but is able to perform the essential functions of the job with or without reasonable accommodation, on the basis of disability.

19. What steps has OFCCP taken to address the concerns raised in the National Academy of Sciences report on collection of employer pay data, including the concern about the reliability of data if OFCCP does not coordinate with other federal agencies? Will OFCCP address the concerns raised in the report before proceeding with any rulemaking that will mandate large scale collection of sensitive compensation data? Will OFCCP work closely with EEOC to ensure employers are not subject to conflicting regulations?

OFCCP continues to coordinate with the EEOC and other relevant Federal agencies on the question of pay data collection.

With respect to the National Academies report, OFCCP provided information to the panel responsible for developing the report for the EEOC, and is aware that the report identifies several options and approaches for the EEOC to consider going forward. As President Obama directed in his Memorandum of April 8, 2014, *Advancing Pay Equality Through Compensation Data Collection*, OFCCP will carefully consider independent studies regarding the collection of compensation data, such as the National Academies study, as it develops a rule requiring Federal contractors to submit summary compensation data.

20. In February of 2013, OFCCP withdrew guidelines that articulated how the agency would investigate compensation discrimination. While the agency has replaced these guidelines with a directive, many contractors are concerned the directive does not adequately articulate the nature of the agency's approach to investigating compensation discrimination. The directive states OFCCP would look into whether there is a disparate impact in workplace policies concerning pay differences, but this does not necessarily indicate discrimination has occurred. Please explain the basis for using a disparate impact analysis for investigating workplace pay differentials and any other alternative methods OFCCP has considered for examining compensation discrimination practices.

Directive 307 (renumbered on 9/16/13 as DIR 2013-04) provides specific investigative guidance applying principles that align OFCCP's analysis of pay discrimination with the principles used to enforce Title VII of the Civil Rights Act of 1964. In applying Title VII principles and case law, the agency uses a case-specific approach and relies on systemic and individual disparate treatment and disparate impact theories of discrimination – just like all other areas where OFCCP reviews contractor compliance under E.O. 11246.

The agency intends to follow the well-established Title VII disparate impact law, which includes both the affirmative defenses of job-relatedness and consistency with business necessity as well as the requirement to consider less discriminatory alternatives. Indeed, Directive 307 requires investigators to consider evidence of validity and/or whether factors at issue are job-related in cases involving potential disparate impact.

21. The legal basis for OFCCP to schedule an onsite visit is "specific evidence of a violation of the Executive Order." OFCCP claims compensation differences provide such evidence, yet OFCCP refuses to share its compensation analysis with the contractor before the onsite visit even though this would streamline the visit and ensure the contractor is not wasting time and resources pulling unnecessary data. Please explain why OFCCP refuses to disclose its compensation analysis to employers.

OFCCP is not required to have specific evidence of a violation of the Executive Order before making an onsite visit. Under the Fourth Amendment, OFCCP may also go onsite if the contractor was selected pursuant to a neutral administrative plan.

As long as the agency's scheduling process satisfies the Fourth Amendment, the agency may proceed onsite in cases where it is still in the process of making an assessment of compliance. Indeed, in cases where the agency is not able to obtain documents or information during the desk audit, or in cases where the information provided raises data integrity concerns, the agency may proceed to an onsite visit in scheduled compliance evaluations simply to obtain the records contractors are obligated to maintain and provide to the agency upon request. *See* 41 CFR § 60-1.20(a)(1) and § 60-1.43; OFCCP Directive 307 ("If at any point during the process of reviewing data and information, the CO determines either that there is evidence of potential compensation discrimination, or that more data or information is needed to make that determination, OFCCP may proceed to an onsite investigation.")

As Directive 307 makes clear, investigators should have substantial engagement with contractors during the life of the compliance evaluation and the process of requesting and analyzing data, to ensure OFCCP has the most accurate picture possible of the contractor's compensation system and practices. OFCCP typically communicates with the contractor prior to the onsite visit to identify specific data, documents and potential witnesses to make the process as efficient as possible. In general, it is OFCCP's practice to share the results of statistical analysis used to support a Notice of Violation.

22. OFCCP is responsible for ensuring federal contractors are compliant with all nondiscrimination laws within the workplace. However, the lack of transparency regarding the auditing processes and procedures is of great concern to employers. Over the past few years there has been a substantial increase in audits for any one business in a single year. Please explain the procedures and processes of OFCCP's audit process. What criteria and formulas does OFCCP use to select the contractors it audits? How does OFCCP explain the increase in audits for a single employer as compared to years past?

OFCCP's Federal Contractor Selection System (FCSS) is a neutral system that identifies Federal contractor establishments for selection for compliance evaluations. The FCSS process uses multiple information sources such as Federal acquisition and procurement databases, EEO-1 employer information reports, Dun & Bradstreet data, and Census data tabulations. The list is further refined and sorted by applying a number of neutral

selection factors such as contractor dollar amount, number of employees, contract expiration date, industry, etc. These factors are administratively "neutral" since they apply to all contractors rather than any one particular contractor. It is important also to note that OFCCP's list is not, nor is it required to be, random, which would require an equal probability of selection from the full population of Federal contractors. Rather, OFCCP focuses its list and its resources according to neutral criteria such as those listed above.

The number of establishments selected for a compliance review in a scheduling cycle for any one company has varied over time. A Federal contractor may have hundreds or even thousands of establishments. The number that would appear on any one scheduling list typically represents a very small percentage of a contractor's total establishments eligible for review.

23. Contractors are already struggling to meet the tight deadlines associated with audit submissions and have an even tougher time obtaining approval for an extension. It is especially disconcerting for those contractors who have been denied extensions to wait for OFCCP to take any action on the audit, which can take up to 16 months. How does OFCCP determine when submission deadlines may be extended? What are the data requirements for these audits and do the requirements go beyond those required in the existing logs employers maintain? Is it reasonable to ask a contractor to comply with same day data requests or week turn-around periods for substantial paperwork submissions?

Under the OFCCP regulations for Executive Order 11246, Section 503, and VEVRAA, contractors are required to have an AAP in place 120 days after receiving a Federal contract. As a courtesy, OFCCP provides contractors with advance notice, through a scheduling announcement letter, that they may be scheduled for a compliance evaluation in the coming calendar year. Once a contractor receives a formal scheduling letter containing the date of the compliance evaluation, the contractor has 30 days to submit its AAP. OFCCP expects that contractors should be ready to meet their contractual obligation to timely submit AAPs after receiving a formal scheduling letter. OFCCP compliance officers work with contractors to seek timely submission of AAPs and follow-up information during a compliance evaluation.

24. There have been concerns that OFCCP's regional offices ignore complaints about overly aggressive compliance officers. What is the national OFCCP office's oversight of regional compliance officers, particularly when officers act unreasonably within the scope of their job?

Our expectation is that all OFCCP inspectors will act with the highest level of integrity and professionalism. However, if contractors have concerns, they may contact OFCCP's Director of Program Operations in the National Office.

25. OFCCP regulations add enormous compliance costs for contractors, often resulting in higher contracting costs for the federal government. Subcontractors

with small profit margins also struggle with these high compliance costs, threatening their sustainability. What steps is OFCCP taking to fully evaluate and reduce the burdens of regulatory actions on contractors?

OFCCP is sensitive to the need to minimize the burden of the regulations on contractors, and particularly small contractors. For this reason, OFCCP made several changes to the final Section 503 rule to reduce the burden on contractors. The final rule under Section 503 requires the aspirational goal be applied to the same job groups that contractors have already established pursuant to EO 11246 and allows small contractors with 100 or fewer employees to apply the goal to their workforce as a whole, rather than to each of their job groups. The final rule permits each contractor the flexibility to engage in whatever type of outreach that meets its needs, while providing examples of outreach sources. To harmonize the pre-offer invitation to self-identify requirement in the Section 503 rule with Executive Order 11246's Internet Applicant recordkeeping provisions (consistent with Executive Order 13563's mandate that agencies harmonize rules), the final rule permits contractors to invite applicants to self-identify after they meet the Internet Applicant requirements, including the basic qualification screen. The final rule also reduced the length of time that contractors must retain data about applicants and hires from five years to three, eliminated the proposed requirement to review the physical and mental qualification standards of all jobs annually, reduced the frequency of the workforce survey, and consolidated the two proposed voluntary self-identification of disability forms into one. Finally, the final rule's affirmative action requirements apply only to contractors with 50 or more employees and a contract worth $50,000 or more.

26. On or about January 12, 2009 the Department of Labor posted on its website a paper entitled "An Analysis of Reasons for the Disparity in Wages Between Men and Women," prepared for the department by CONSAD Research Corporation with a forward by then-Deputy Assistant Secretary for Federal Contract Compliance Charles E. James, Sr. (See http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf) The paper was removed from the department's website shortly thereafter. Please explain why the paper was removed from the department's website and who decided it should be removed. If there were concerns about the content of the paper, please explain what those concerns were, what steps were taken to investigate the validity of those concerns, and whether the concerns were ultimately found to be valid.

In early January of 2009, the agency posted a copy of an unpublished paper with no identified author, entitled "An Analysis of Reasons for the Disparity in Wages Between Men and Women," on the OFCCP public website with a forward by the OFCCP Director at the time, Charles James. The study was removed from the website a few days later based on concerns about whether it had been properly cleared for public release.

Questions from Representative Marcia Fudge (OH-11)

During the hearing on December 4, 2013, before the Subcommittee on Workforce Protections, Members and witnesses discussed a range of important matters including OFCCP's effectiveness, enforcement efforts and regulatory agenda. Is there any additional information you would like to provide to the Subcommittee regarding these issues or any of the other topics raised at the hearing?

OFCCP appreciates the opportunity to address three key topics that were discussed at the hearing.

People with Disabilities in the Federal Workforce

Written testimony submitted to the Committee incorrectly stated that "the employment of individuals with disabilities by the Federal Government itself is below seven percent, both government-wide (5.9 percent) and within various agencies after years of presidential initiatives to increase hiring." [1]

In fact, in FY 2012, people who self-reported as having a disability when they were hired constituted 11.9 percent of the full-time, permanent Federal workforce. For the same time period, people with disabilities constituted 12.5 percent of the Labor Department workforce.[2]

Moreover, the Federal Government's employment of people with disabilities has climbed steadily since 2010 when the President required Federal agencies to use "performance targets and numerical goals" to increase the employment of individuals with disabilities in their workforces. In 2010, the percentage of full-time permanent executive-branch agency employees who had disabilities was 10.2 percent; in 2011, it was 11.0 percent; and in 2012, as noted above, it had risen to 11.9 percent.[3]

The employment of veterans and people with disabilities in the Federal workforce is increasing because the Administration made it a priority. The President required goals for the hiring of such workers in departments and agencies and called on leaders across the Executive Branch to assess their performance in this area of employment and to develop plans to achieve the goals that were set.

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[1] Statement of David Fortney to the House Committee on Education and the Workforce (December 4, 2013), at p. 6, http://edworkforce.house.gov/uploadedfiles/fortney_testimony.pdf. The source cited for the 5.9 percent figure, see *id.* at footnote 11, does not contain information about employment of individuals with disabilities by the Federal Government (though it does contain figures for employment of individuals with *targeted* disabilities by the Federal Government).
[2] OPM, *Employment of People with Disabilities in the Federal Executive Branch FY 2013 Report*, 2012 On Board Table (p. 9).
[3] OPM, *Employment of People with Disabilities in the Federal Executive Branch FY 2013 Report*, 2012 On Board Tables (p. 7).

Employment opportunities for both veterans and for people with disabilities in the Federal Government should continue to improve – because agencies like DOL developed specific, measurable plans for recruitment, outreach, access, and reasonable accommodation. Companies that do business with the Federal Government are being asked to do the same thing – to make employment opportunities for veterans and people with disabilities a priority.

Veterans' Benchmark

In determining the appropriate annual benchmark for the employment of protected groups of veterans, OFCCP reviewed relevant data sources, including the VETS-100/100A reports and BLS data. The national benchmark published in the final rule in September, 2013, reflected the percentage of veterans in the civilian labor force – estimated at eight percent, which was the national percentage of veterans in the civilian labor force as of June 2011 (based on Census Population Survey Table 1, provided by BLS); this figure is updated on OFCCP's website and currently stands at 7.2 percent, the national percentage of veterans in the civilian labor force for 2013. OFCCP recognizes that the data collected by the Census Bureau on veterans could be seen as over-inclusive because it captures all veterans, and not just veterans protected under VEVRRA. To address this and other concerns regarding the limitations of existing data, contractors may establish and use their own benchmark in lieu of the eight percent.

Contractors that set their own benchmark should consider five factors, set forth in the rule, to develop the metric:

> (i) the average percentage of veterans in the civilian labor force in the state(s) where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and published on the OFCCP website;
>
> (ii) the number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the state where the contractor is located, as tabulated by the Veterans' Employment and Training Service and published on the OFCCP website;
>
> (iii) the applicant ratio and hiring ratio for the previous year, based on the data collected by the contractor;
>
> (iv) the contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts; and
>
> (v) any other factors, including but not limited to the nature of the contractor's job openings and/or location, which would tend to affect the availability of qualified protected veterans.

As long as a contractor adequately describes and documents the factors it took into account, the contractor would be in compliance with the requirements related to adopting a hiring benchmark.

Enforcing Conciliation Agreements

OFCCP has for many years enforced regulations governing affirmative action requirements under Executive Order 11246, which require contractors to set goals as part of their affirmative action efforts. OFCCP does not issue "Notices of Violation" because contractors fail to meet the goals. Nor does the agency enter into conciliation agreements that require contractors to have specified numbers of women or minorities in their workforce when their goals are not met. That would, in fact, be a quota system, which is illegal under both the existing rules and the new rules. If OFCCP finds violations, it negotiates conciliation agreements with contractors that wish voluntarily to correct the violations. OFCCP cannot "impose" conciliation agreements on contractors. However, OFCCP has and will continue to cite violations against contractors that fail to undertake required outreach and recruitment that could help them achieve the goals or that fail to comply with other obligations as prescribed by the laws we enforce.

The purpose of a metric is to provide feedback on whether contractor efforts are working, or whether they should be reviewed and improved. Metrics are tools for self-analysis and self-evaluation. Failing to achieve a goal or a benchmark alone is not grounds for citing a violation – under either the prior rules or the new rules.

Discrimination is distinct from affirmative action as it involves denial of equal opportunity to applicants and employees based on an individual's race, color, religion, sex, national origin, covered veteran status or disability. In the case of G-A Masonry (discussed by one of the witnesses at the hearing), OFCCP cited the company for violating the Equal Opportunity Clause in VEVRAA (41 C.F.R. 60-300.5(a)(1)) by discriminating against qualified, protected veterans for jobs on a construction project. Despite the fact that the contractor had access to a highly qualified pool of veteran applicants, and despite the fact that the project was located on a military base, the contractor showed a clear pattern of not hiring qualified veterans.

In this case, OFCCP had both data and anecdotal evidence that supported its conclusion that the company had discriminated against protected veterans. As part of the conciliation agreement – voluntarily entered into by OFCCP and G-A Masonry – the contractor agreed to provide back wages and job offers to the affected veteran job seekers.

[Whereupon, at 11:25 a.m., the subcommittee was adjourned.]

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