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REVIEWING THE IMPACT OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS' REGULATORY AND ENFORCEMENT ACTIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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REVIEWING THE IMPACT OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS' REGULATORY AND ENFORCEMENT ACTIONS

Wednesday, April 18, 2012
U.S. House of Representatives
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:03 a.m., in room 2175, Rayburn House Office Building, Hon. David P. Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe, Rokita, Kucinich, Kildee, Tierney, Holt, Scott, and Altmire.

Staff present: Jennifer Allen, Press Secretary; Katherine Bathgate, Deputy Press Secretary; Casey Buboltz, Coalitions and Member Services Coordinator; Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Barrett Karr, Staff Director; Ryan Kearney, Legislative Assistant; Donald McIntosh, Professional Staff Member; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Joseph Wheeler, Professional Staff Member; Kate Ahlgren, Minority Investigative Counsel; Aaron Albright, Minority Communications Director for Labor; Tylease Alli, Minority Clerk; Daniel Brown, Minority Policy Associate; Brian Levin, Minority New Media Press Assistant; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Laura Schifter, Minority Senior Education and Disability Advisor; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; and Michael Zola, Minority Senior Counsel.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order. Good morning, everyone.

I would like to thank our witnesses for being with us today. We have a distinguished panel and we look forward to their insightful testimony.

Roughly one out of every five workers is currently employed by a federal contractor, providing services ranging from construction and I.T. management to the acquisition of office supplies. Drawing from the experience and expertise of the private sector workforce

helps ensure federal projects are carried out more efficiently and at the most competitive price for taxpayers.

Like all employers, federal contractors have a responsibility to ensure equal employment opportunities for workers and job applicants. Discrimination of any kind is abhorrent.

An individual's race, gender, religion, disability, or military service should never preempt a qualified worker from employment. In fact, federal policies prohibit employment discrimination and require employers to take affirmative action to recruit, hire, and advance qualified individuals in targeted populations.

The Office of Federal Contract Compliance Programs is responsible for ensuring government contractors meet these responsibilities. Employers are required to maintain a written plan detailing efforts to identify and remove employment barriers. For women and minorities, employers must also complete an extensive analysis of the workplace that includes a description of all job classifications, the number of women and minorities placed in these job classifications, and the steps an employer will take to remedy situations when they are not appropriately represented.

These requirements extend to subcontractors and cover every employee in an employer's workforce, regardless of whether their job is related to the government contract. Recognizing the scope and complexity of these requirements, it is critical our regulatory and enforcement actions promote the rights of workers without adversely affecting an employer's ability to run his or her business.

While extensive, current policies have been largely successful in this endeavor. Individuals are protected and employers are aware of their legal responsibilities.

However, the administration is advancing numerous regulations that significantly alter longstanding nondiscrimination practices and create new waves of uncertainty for workers and business owners. For example, OFCCP now wants federal contractors to document each step of the hiring process for veterans and individuals with disabilities, as well as submit a written statement of reasons documenting why an individual was not extended an offer of employment. This unprecedented regulatory scheme would bury employers in paperwork, diverting resources away from job creation to manage administrative burdens.

Additionally, OFCCP is in the process of implementing for the first time an arbitrary hiring quota for individuals with disabilities. Supporters have characterized this—as merely a hiring goal, but when a goal is enforced by a federal agency make no mistake: it carries the weight of a mandate. This proposed regulation would also force job applicants to disclose whether they are disabled despite existing protections prohibiting an employer from soliciting such personal information.

Finally, the agency is expanding its jurisdiction to those who provide health care services to military personnel and veterans through the federal health care program, TRICARE. The Department of Defense said it would be impossible to offer health care to military families if onerous federal contracting rules were applied to TRICARE providers.

Despite this warning and congressional action, the OFCCP continues to move forward with its bureaucratic overreach. The agency

has also extended its authority to provide dental, vision, hearing, and prescription drug services to seniors under Medicare.

The challenges facing our nation's employers and workers in the wake of the recession are numerous and one of the greatest hazards to our economic recovery is heavy-handed regulation. U.S. Chamber of Commerce reported this week that 52 percent of small business owners believe regulations pose the greatest threat to their success.

This timely survey underscores the toughest challenges facing the American workforce: a persistently weak economy and lack of jobs. African Americans, individuals with disabilities, and women are all experiencing higher levels of unemployment today than they were 3 years ago, and while the job prospects for veterans have modestly improved, roughly one in 10 veterans are still searching for work. The nation's unemployment—unemployed don't need more regulations; they need more jobs.

Now more than ever we need to support smart policies that protect workers and promote private sector job growth. And during this time of record deficits and debt we need employers with skilled workers competing for government contracts so we can best provide values to taxpayers. The question before us today is whether the regulatory and enforcement policies of today's OFCCP are moving our nation in the right direction.

I look forward to our discussion and will now recognize my distinguished colleagues, Mr. Kucinich, the senior Democratic member of our subcommittee, for his opening remarks.

[The statement of Chairman Roe follows:]

Prepared Statement of Hon. David P. Roe, M.D., Chairman, Subcommittee on Health, Employment, Labor and Pensions

Good morning, everyone. I would like to thank our witnesses for being with us today. We have a distinguished panel and we look forward to their insightful testimony.

Roughly one out of every five workers is currently employed by a federal contractor, providing services ranging from construction and IT management to the acquisition of office supplies. Drawing from the experience and expertise of the private-sector workforce helps ensure federal projects are carried out more efficiently and at the most competitive price for taxpayers. Like all employers, federal contractors have a responsibility to ensure equal employment opportunities for workers and job applicants.

Discrimination of any kind is abhorrent. An individual's race, gender, religion, disability, or military service should never preempt a qualified worker from employment. In fact, federal policies prohibit employment discrimination and require employers to take affirmative action to recruit, hire, and advance qualified individuals in targeted populations.

The Office of Federal Contract Compliance Programs is responsible for ensuring government contractors meet these responsibilities. Employers are required to maintain a written plan detailing efforts to identify and remove employment barriers. For women and minorities, employers must also complete an extensive analysis of the workplace that includes a description of all job classifications, the number of women and minorities placed in these job classifications, and the steps an employer will take to remedy situations when they are not appropriately represented.

These requirements extend to subcontractors and cover every employee in an employer's workforce, regardless of whether their job is related to the government contract. Recognizing the scope and complexity of these requirements, its critical regulatory and enforcement actions promote the rights of workers without adversely affecting an employer's ability to run his or her business. While extensive, current policies have been largely successful in this endeavor. Individuals are protected and employers are aware of their legal responsibilities.

However, the Obama administration is advancing numerous regulations that significantly alter long-standing nondiscrimination practices and create new waves of uncertainty for workers and business owners. For example, OFCCP now wants federal contractors to document each step of the hiring process for veterans and individuals with disabilities, as well as submit a written "statement of reasons" documenting why an individual was not extended an offer of employment. This unprecedented regulatory scheme would bury employers in paperwork, diverting resources away from job creation to manage administrative burdens.

Additionally, OFCCP is in the process of implementing for the first time an arbitrary hiring quota for individuals with disabilities. Supporters have characterized this as merely a hiring "goal," but when a goal is enforced by a federal agency, make no mistake, it carries the weight of a mandate. This proposed regulation would also force job applicants to disclose whether they are disabled, despite existing protections prohibiting an employer from soliciting such personal information.

Finally, the agency is expanding its jurisdiction to those who provide health care services to military personnel and veterans through the federal health care program, TRICARE. The Department of Defense said it would it would be impossible to offer affordable health care to military families if onerous federal contracting rules were applied to TRICARE providers. Despite this warning and congressional action, OFCCP continues to move forward with its bureaucratic overreach. The agency has also extended its authority to providers of dental, vision, hearing, and prescription drug services to seniors under Medicare.

The challenges facing our nation's employers and workers in the wake of the recession are numerous, and one of the greatest hazards to our economic recovery is heavy-handed regulation. The U.S. Chamber of Commerce reported this week that 52 percent of small business owners believe regulations pose the greatest threat to their success.

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Now more than ever we need to support smart policies that protect workers and promote private-sector job growth. And during this time of record deficits and debt, we need employers with skilled workers competing for government contracts so we can provide the best value to taxpayers. The question before us today is whether the regulatory and enforcement policies of today's OFCCP are moving our nation in the right direction.

I look forward to our discussion, and will now recognize my distinguished colleague Rob Andrews, the senior Democratic member of the subcommittee, for his opening remarks.

Mr. KUCINICH. Thank you very much, Chairman Roe. It is a privilege to be with you this morning, my friend, and I look forward to this hearing. I am grateful for the chance to sit next to you here. And I want to thank you for calling the hearing and thank the witnesses for being here so that we can examine the Office of Federal Contract Compliance Programs.

The federal government spends about $537 billion a year on contractors. With that kind of money at stake taxpayers have a right to expect that those contractors will perform to high standards. One of those standards is a simple one: Obey the law. Respect the civil rights of American workers.

That is where the Office of Federal Contract Compliance Programs comes in. The agency's mission is to ensure that contractors receiving federal tax dollars comply with employment nondiscrimination and equal opportunity requirements.

Taxpayer dollars should never be used to violate civil rights or to perpetuate discrimination. OFCCP monitors contractors for systemic civil rights violations, including everything from equal pay

for women to failures to hire or promote veterans or individuals with disabilities.

Today that work is more important than ever. Each year more than 2 million Americans are affected by workplace discrimination.

The Equal Employment Opportunity Commission reports that private sector bias charges are at an all-time high. These unlawful employment practices cost our country $64 billion annually. Nearly 50 years after passage of Title VII of the Civil Rights Act it is unacceptable that workplace discrimination continues to be so prevalent.

Yesterday we marked a milestone that illustrates how much work we and the OFCCP have to do. Yesterday was Equal Pay Day. Equal Pay Day marked the day on which women's compensation finally caught up with their male counterparts from last year. To earn what men earned in 2011 women must work all of 2011 and then keep on working right up until April 17th of this year.

Now, that really bears some thought here because we are not really talking about people who are differently able; we are talking about people who are different genders and are being denied an opportunity for fair pay. The U.S. Census pointed out women working full time continue to earn just 77 cents for every dollar a man earns. This pay gap cost women $10,784 in lost wages last year. Lower lifetime earnings mean women have smaller pensions and an average annual Social Security benefit that is 25 percent less than their male counterparts.

And it is not just women who suffer from pay discrimination. Paying people less than what they are owed is a drag on the entire economy. Closing the wage gap will help families stay in their homes, decrease reliance on government programs, and allow working women the opportunity to spend more of their hard-earned money in their communities.

The OFCCP is the only agency—the only agency that systematically reviews federal contractors' employment practices for pay discrimination. The agency makes sure that when taxpayer dollars are spent women receive equal pay for equal work.

The OFCCP's mission extends well beyond women's pay. The agency is also hard at work protecting our returning veterans, protecting individuals with disabilities, as well as racial and ethnic minorities, all of whom have been particularly hard hit by the great recession.

Fortunately, this agency has not been content to maintain the status quo. In a recently released regulation the OFCCP recognized that our nation's veterans face unique challenges in transitioning to civilian employment. It is working to improve monitoring and enforcement in this area.

Our veterans have every right to expect that they will receive fair consideration for employment on projects supported by federal tax dollars. OFCCP's job is to make sure these men and women get a fair shake when they return to the civilian workforce.

The agency has also proposed a regulation updating the obligations of federal contractors with respect to individuals with disabilities. According to the Bureau of Labor Statistics, individuals with disabilities face nearly double the unemployment rate of individuals without disabilities. It is astounding, especially at a time

when technological advances make it possible for individuals with disabilities to succeed in many more jobs than would otherwise be the case.

The fight against discrimination is smart economics. Taxpayer dollars are limited. Taxpayers should expect that their dollars are spent wisely, employing, promoting, and compensating workers based on their merit, not on gender, race, disability, or veteran status.

This is morally right and a good thing for business. Nondiscrimination ensures higher quality work.

The OFCCP has gargantuan job monitoring responsibilities, monitoring the hundreds of billions of taxpayer dollars spent on contractors every year. While the agency develops ways to make its enforcement efforts more thorough, more agile, and more effective, let's not lose sight of the edict it is attempting to enforce.

It is a simple edict. It is grounded in common sense. If you want to do business with the federal government you will treat our citizens fairly.

I look forward, Mr. Chairman, to hearing from our distinguished panel and thank you, again, for holding this hearing.

[The statement of Mr. Kucinich follows:]

Prepared Statement of Hon. Dennis J. Kucinich, a Representative in Congress From the State of Ohio

Good morning, Mr. Chairman.

I want to thank you for calling this hearing to examine the Office of Federal Contract Compliance Programs (OFCCP).

The federal government spends $537 billion a year on contractors. With that kind of money at stake, taxpayers have every right to expect that those contractors will perform to the highest standards.

One of those standards is a simple one. Obey the law. Respect the civil rights of American workers.

That's where OFCCP comes in. The agency's mission is to ensure that contractors receiving federal taxpayer dollars comply with employment nondiscrimination and equal opportunity requirements. Taxpayer dollars should never be used to violate civil rights or to perpetuate discrimination.

OFCCP monitors contractors for systemic civil rights violations, including everything from equal pay for women, to failures to hire or promote veterans or individuals with disabilities.

Today that work is more important than ever.

Each year, more than 2 million Americans are affected by workplace discrimination. The Equal Employment Opportunity Commission reports that private sector bias charges are at an all-time high. These unlawful employment practices cost our country $64 billion annually. Nearly 50 years after the passage of Title VII of the Civil Rights Act, it is unacceptable that workplace discrimination continues to be so prevalent.

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That's because, as the U.S. Census Bureau has pointed out, women working full-time continue to earn just 77 cents for every dollar a man earns.

This pay gap costs women $10,784 in lost wages each year. Lower lifetime earnings mean women have smaller pensions and an average annual Social Security benefit that is 25 percent less than their male counterparts.

And it's not just women who suffer from pay discrimination. Paying people less than what they are owed is a drag on the entire economy.

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It's a simple edict. It's one grounded in common sense. If you want to do business with the government of the United States, you will treat our citizens fairly.

I look forward to hearing from our distinguished panel of witnesses and yield back. Thank you.

Chairman ROE. Thank you.

I thank the distinguished ranking member.

And pursuant to rule—committee 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 such statements and other extraneous material referenced during the hearing to be submitted for the official hearing record.

Now it is my pleasure to introduce our distinguished panel. First, Mr. Jeffrey Norris is the president of the Equal Employment Advisory Council in Washington, D.C.

And thank you for being here.

Secondly, Ms. Dana Bottenfield is the director of human resources information system at St. Jude's Children's Research Hospital in Memphis, Tennessee.

And before we go on I want to thank you all for what you do at St. Jude's Children's Hospital. We have a branch of St. Jude's Children's Hospital in my community in Johnson City, as you know, Tennessee. Not long after St. Jude's Children's Hospital opened, which was 1962, through the sight and the thought and benevolence of Danny Thomas, with 125 employees, that hospital—I was a medical student there in 1969 and I recall many cases I saw then, and I remember just reminiscing back a little bit that during that time that an acute lymphocytic leukemia, which will—there are people out there today whose children have that—had a 4 percent survival rate.

Today it is 80 percent survival rate thanks to the incredible people who got up every single day of their lives knowing that 96 percent of children would not survive and went to work. And these are the people cleaning the floors, the people cooking the food, the entire staff. And what a remarkable place it is.

And just one more personal response to that: I practiced in Johnson City for 31 years and one of my partners' children was there and had a less than 3 percent survival rate. He was 3 years old; he is now a senior in high school and doing well.

So thank you for what you all do every day to help children not only in Memphis, Tennessee and in the South, but around the world.

Mr. KUCINICH. Mr. Chairman, I would like to associate myself, if I may, with your remarks and thank you for your own humanitarian instincts, which led you to make those observations.

Chairman ROE. Thank you.

Next is Ms. Fatima Graves is the vice president for education and employment at the National Women's Law Center in Washington, D.C.

Welcome.

And Ms. Alissa Horvitz is a shareholder with the law firm Littler Mendelson in Washington, D.C.

And before we start we have got to give you the rules of the game here. Before I recognize you to provide your testimony let me briefly explain our lighting system.

You have 5 minutes to present your testimony. When you begin the light in front of you will turn green; with 1 minute left the light will turn yellow; and when your time is expired the light will turn red, at which point I will ask you to wrap up your remarks as best you are able. We are not going to cut you off in the middle of a sentence, but try to wrap it up.

And as everyone has testified, members will then have 5 minutes to ask the questions of the panel.

And now we will start by recognizing Mr. Norris. We will start with your testimony.

STATEMENT OF JEFFREY A. NORRIS, PRESIDENT, EQUAL EMPLOYMENT ADVISORY COUNCIL

Mr. NORRIS. Thank you very much, Mr. Chairman. I appreciate the opportunity to speak with you and the other subcommittee members this morning about the significant changes being proposed to the regulations by the OFCCP.

I appear here today as president of the Equal Employment Advisory Council, an association of 300 major federal contractors. As has already been noted, OFCCP enforces the nondiscrimination and affirmative action obligations of federal contractors.

In this context affirmative action refers to the additional proactive steps federal contractors must take to ensure that applicants and employees are afforded equal opportunities in all aspects of their employment. OFCCP monitors contractors' obligations by conducting approximately 4,000 agency-initiated compliance evaluations each year—excuse me.

If finalized, OFCCP's proposals will impose extensive new affirmative action obligations on federal contractors and will expand ex-

ponentially the scope and detail of workforce data that contractors must submit to OFCCP for review. OFCCP's five proposals fall into three broad categories: those pertaining to individuals with disabilities and veterans, those pertaining to how OFCCP will conduct compliance evaluations, and those pertaining to compensation analyses.

The veterans and disability proposals would transform what are today qualitative programs based upon situation-specific, good faith efforts and equal opportunity into quantitative programs based on federally mandated numeric targets, preferential treatment, and extraordinarily burdensome paperwork requirements. Among other things, these proposals would for the first time require contractors to establish numeric placement rate goals for veterans and individuals with disabilities in the absence of any reliable information regarding their true availability in the labor market.

They would promote outdated recruitment efforts, relying upon onerous state job posting requirements and contractor linkage agreements with OFCCP-prescribed referral agencies, ignoring completely the advantages of national Internet-based recruitment technologies and programs. And they would convert what today are recommended affirmative action measures in the current regulations into prescriptive mandates with extensive new record-keeping requirements, including requirements to extend multiple invitations to self-identify to individuals with disability and veterans and an obligation to build special employment files on individuals who do so.

With respect to compliance evaluations, OFCCP has proposed expanding dramatically the information contractors must submit to the agency at the beginning of an audit, including competitively sensitive, employee-specific compensation data. Abandoning a tiered or phased approach to compliance evaluations in which the agency initially seeks high-level workforce data to conduct preliminary analyses, OFCCP now seeks to gather at the outset of each compliance evaluation, before there has been an indication of any compliance issue, all employment information that might become relevant in case a potential compliance issue should resolve during the—as the review unfolds.

And third, with respect to compensation, there are two proposals that relate to compensation analyses. The first eliminates previously published guidance through agency investigators on the legal and statistical standards to be used when evaluating compensation practices—guidance that contractors found extremely valuable to do their own self-audits.

The second proposal calls for the development of new compensation data collection tool that will require federal contractors to collect and report extensive information about their compensation and benefits practices. OFCCP has not yet demonstrated a need for another burdensome compensation reporting instrument and the proposal duplicates an effort already underway by the Equal Employment Opportunity Commission.

As described in my written statement, OFCCP has consistently underestimated the actual burdens and costs its regulatory initiatives will impose. As just one example, our members advise that the compliance cost of the proposed disability regulations alone will

be $2 billion in the initial year and $1.5 billion in succeeding years; that is more than 30 times OFCCP's estimate of $80.1 million.

In fact, each one of the agency's five proposals carries with it significant burdens and costs for federal contractors. In combination, those burdens and costs and economic impact are staggering.

Just last month, Cass Sunstein, administrator of OMB's Office of Information and Regulatory Affairs, advised the heads of all executive departments and agencies to, quote—"take active steps to take effect—account of the cumulative effects of new and existing rules and to identify opportunities to harmonize and streamline multiple rules." We believe that is appropriate advice for OFCCP as it proceeds with its five pending rulemakings.

Thank you very much.

[The statement of Mr. Norris follows:]

Prepared Statement of Jeffrey A. Norris, President, Equal Employment Advisory Council

Chairman Roe, Ranking Member Andrews, and Members of the Subcommittee, thank you for inviting me to testify today about the major changes that the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has proposed making to the way it enforces the employment nondiscrimination and affirmative action obligations of federal contractors. I appear here today as President of the Equal Employment Advisory Council (EEAC), a nonprofit association of nearly 300 major federal contractors that, since its creation in 1976, has dedicated itself exclusively to the development and advancement of practical and effective programs to eliminate employment discrimination.

EEAC member companies are—and always have been—fully supportive of OFCCP's mission to eliminate discrimination in the workplace and establish policies that serve to promote equal employment opportunities for all employees—including women, minorities, individuals with disabilities, and veterans. To that end, EEAC has filed written comments with OFCCP on virtually every regulatory and sub regulatory initiative the agency has undertaken over the past 36 years, including those that are the focus of today's hearing.

Simply stated, the pending regulatory proposals are unprecedented in terms of their scope, detail, and potential cost impact. If finalized in their current form they would fundamentally transform, in a negative way, the traditional working relationship of mutual trust and respect between OFCCP and federal contractors. They are also very technical and complex. Given this complexity, I will devote a few moments at the outset of my remarks to provide some background and context for today's discussion.

Background: EEOC versus OFCCP

There are two federal agencies primarily responsible for prohibiting employment discrimination in the private sector—the Equal Employment Opportunity Commission (EEOC), and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

Both agencies enforce federal laws that prohibit employment discrimination on the basis of race, color, religion, sex, national origin, and disability. The EEOC—but not the OFCCP—also enforces laws that prohibit discrimination on the basis of age and genetic composition. The OFCCP—but not the EEOC—also enforces laws that prohibit discrimination against veterans. EEOC's jurisdiction encompasses any private employer with 15 or more employees. OFCCP's jurisdiction extends only to employers that are federal contractors and subcontractors, entities which collectively employ roughly one-quarter of the private sector U.S. workforce.

While both agencies are responsible for enforcing nondiscrimination requirements, OFCCP—and only OFCCP—is also responsible for enforcing the obligations imposed on federal contractors to engage in affirmative action. This often misunderstood term simply means in practice that in addition to refraining from discrimination, federal contractors also have an obligation to undertake affirmative, proactive steps to ensure that applicants and employees are afforded equal opportunities in all aspects of their employment.

The dual mandate imposed on federal contractors (nondiscrimination and affirmative action) has given rise to very different enforcement procedures for the EEOC and OFCCP. Under the EEOC's procedures discrimination claims generally are

raised through the filing of administrative charges by aggrieved individuals or by someone on their behalf. The nature and scope of EEOC's investigation is defined largely by the claims made in these individual charges.

The vast majority of OFCCP enforcement actions, in contrast, take the form of agency-initiated "compliance evaluations" conducted at selected federal contractor establishments. In the recent past OFCCP has conducted approximately 4,000 compliance evaluations each year. Unlike EEOC charge investigations that generally focus on the specific allegations raised in a charge, OFCCP compliance evaluations are open-ended and can encompass virtually any aspect of the contractor's employment practices or policies that OFCCP chooses to evaluate.

If finalized as currently proposed, OFCCP's recent regulatory initiatives will have two major consequences: (1) impose extensive new and highly burdensome obligations on federal contractors to satisfy their affirmative action obligations, and (2) expand exponentially the scope and detail of workforce data that contractors would be required to collect, maintain and make available to OFCCP during routine compliance evaluations.

The crucial question of course is whether these regulatory initiatives are the most effective way to accomplish OFCCP's and federal contractors' shared goal of matching qualified applicants with available jobs. In our view, the answer is no.

OFCCP's Traditional Regulatory Approach

During its 47-year history, OFCCP has adopted a set of regulations and sub-regulatory guidance that both define the standards by which contractor compliance is measured, and establish procedures and protocols for conducting agency compliance evaluations. With respect to identifying unlawful discrimination, OFCCP generally applies the same legal standards followed by the EEOC. With respect to defining and evaluating federal contractor affirmative action commitments, OFCCP has tended to focus on four primary areas:

(1) Development of written affirmative action programs (AAPs) for women and minorities, individuals with disabilities, and protected veterans;

(2) Development of targeted outreach programs seeking diverse qualified applicant pools for all openings;

(3) Statistical monitoring of selection rates (hires, promotions, transfers, terminations, educational opportunities, etc.) to ensure there are no institutional or attitudinal barriers to equal opportunity for any particular group; and

(4) Monitoring of compensation patterns to ensure nondiscrimination in pay for all employees.

Each one of these four affirmative action categories has been the subject of one or more OFCCP-initiated Administrative Procedure Act rulemakings. EEAC and other contractor associations have used these rulemakings to provide input into the practical implications of the agency's proposals, including the need for OFCCP to understand that federal contractors are not monolithic; their businesses are not all structured in the same way; nor do they select, develop or compensate employees in a one-size-fits-all fashion.

Until recently, this process has yielded, if not complete agreement on all issues, at least a respectful mutual understanding of the important role OFCCP and federal contractors each play in promoting equal employment opportunity. Contractors have looked to OFCCP to define and enforce the compliance standards in a clear, consistent and transparent manner, and OFCCP has looked to contractors to undertake good faith efforts to apply those standards in the context of their unique business environments.

The regulatory proposals issued by OFCCP over the past 16 months, if finalized in their current form, threaten to unravel this respectful mutual understanding to the detriment of the very individuals OFCCP and federal contractors are committed to protect. As discussed below, the proposals would convert current regulatory guidance and recommendations into highly prescriptive mandates, rejecting "good faith efforts" as a measure of compliance in favor of extensive recordkeeping and accomplishment of artificially created numerical benchmarks.

Perhaps most troubling, the proposals appear to reflect an unspoken but yet unmistakable underlying OFCCP assumption that virtually all employers subject to the agency's oversight are engaging in unlawful discrimination, and as such must be compelled to adhere to the processes prescribed by OFCCP; must document each and every outreach effort and employment decision; and must make all of this information available to OFCCP during compliance evaluations so that the agency can assure itself that contractors are, in fact, keeping their commitments. Simply stated, the respectful mutual understanding developed between OFCCP and federal contractors over the years is today very much in jeopardy.

OFCCP Has Underestimated the Potential Economic Impact of Its Pending Regulatory Proposals

During calendar year 2011, OFCCP proposed five major changes to its enforcement regulations:

- January 3: Rescind existing guidance on procedures and standards for investigating systemic compensation discrimination
- April 26: Require establishment of numerical targets for veterans' employment and impose sweeping new obligations related to documenting the identification, recruitment and treatment of veterans
- August 10: Impose broad new compensation reporting requirements on contractors
- September 11: Seek permission from OMB to vastly expand the scope and amount of data requested of contractors at the outset of compliance evaluations
- December 9: Impose 7% hiring goal for individuals with disabilities and impose sweeping new obligations related to documenting the identification, recruitment and treatment of individuals with disabilities

In addition to these proposals OFCCP has indicated that major changes to its construction industry regulations and sex discrimination guidelines will be proposed in the near future.

For each proposal OFCCP conducted a cost and burden analysis under the Paperwork Reduction Act. In the course of preparing comment letters on the proposals, EEAC solicited feedback from its member companies regarding OFCCP's cost and burden estimates. Without exception, EEAC members concluded that OFCCP's figures vastly understated the actual burdens and costs of implementing the proposals in their workplaces.

The specific deficiencies in OFCCP's economic impact analyses are discussed in detail in each EEAC comment letter. They include inaccurate counts of the number of covered contractor establishments; complete omission of certain critical compliance requirements; inaccurate assessments of the ease with which certain workforce data can be extracted from contractor computer systems; and wholly unrealistic estimates of the time required for contractors to accomplish prescribed new responsibilities.

The most in-depth analysis of the accuracy of OFCCP's economic impact estimates was conducted with respect to the proposed revisions to the disability regulations. Shortly after the proposal was published, EEAC, the U.S. Chamber of Commerce and the Center for Corporate Equality developed a survey instrument to collect from their federal contractor members fact-based estimates of the proposal's anticipated burdens and utility. A total of 108 major federal contractors submitted complete or substantially complete responses to the survey. Collectively, these respondents employ more than 4.54 million employees in the United States, or roughly 17% of the entire federal contractor workforce, as estimated by OFCCP. During 2011 these companies filled more that 1.1 million job openings, for which they received more than 37 million applications.

OFCCP estimated the cost of implementing its disability proposal to be $80.1 million. The survey results estimated that the actual implementation costs will be at least $2 billion in the initial year (more than 30 times the agency estimate) and at least $1.5 billion annually thereafter. Additional survey results are noted in the more detailed analysis that follows. The consistent pattern of substantial discrepancies between OFCCP's burden and cost estimates and those of major federal contractors raises serious concerns over whether OFCCP has performed an adequate assessment of the likely impact of its proposals as required by Executive Orders 12866 and 13536 and the Paperwork Reduction Act of 1995.

I now offer comments on each of OFCCP's five pending regulatory proposals.

Revision of Regulations Pertaining to Individuals with Disabilities and Covered Veterans

Two of the five pending regulatory proposals pertain to federal contractor nondiscrimination and affirmative action obligations on behalf of veterans covered by the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"), and individuals with disabilities protected under Section 503 of the Rehabilitation Act ("Section 503"). The current VEVRAA and Section 503 regulations are very similar, although not identical. Because OFCCP has always enforced them in parallel fashion, I discuss them together.

In sum, the pending proposals would transform a qualitative program based on situation-specific good faith efforts, equal opportunity, and respect for privacy of a person's disability into a quantitative program based on federally mandated numeric targets, preferential treatment, ineffective and extraordinarily burdensome paper-

work requirements, and invasive inquiries into the disability status of tens of millions of U.S. workers and job seekers each year.

Establishment of Numeric Hiring Goals

OFCCP has long required federal contractors to establish numeric placement rate goals for minorities and women in situations where their current employment levels are below what reasonably would be expected given their representation (i.e., "availability") in the labor market. The goals are calculated using the U.S. Census Bureau's Special EEO File which provides detailed minority and gender labor force participation rates broken out by job category, specific occupation and location.

OFCCP has never before required numeric hiring goals for veterans and individuals with disabilities. Both proposals would require their establishment for the first time. The problem with such a requirement, however, is that there are no reliable "availability" data for veterans and individuals with disabilities comparable to that provided through Census data for women and minorities. The proposals address this inconvenience in two different, and equally ineffective, ways.

The veterans' proposal contemplates that contractors will calculate their own "availability" estimates utilizing two data points provided by OFCCP and three data points unique to each contractor. These five data points are then "weighted" by the contractor according to their relative significance to arrive at a single veteran availability estimate upon which the goals would be based. In contrast, the Section 503 proposal does not require contractors to calculate their own availability estimates for individuals with disabilities, but rather mandates use of a standard 7% utilization goal for each job group in the contractor's affirmative action plan. The primary data source for the 7% disability goal is the Census Bureau's American Community Survey (ACS), an instrument that does not collect disability information in a manner consistent with Section 503 or the Americans with Disabilities Act.

The most fundamental flaw in both proposals is that there is not an exact match between the individuals upon which the benchmarks are based and individuals with disabilities protected by Section 503 or veterans covered under VEVRAA. Without an apples-to-apples comparison as exists with respect to women and minorities, the estimated veterans and disability benchmarks are useless standards by which to evaluate the success of a contractor's outreach efforts. Moreover, numeric hiring goals not based upon true availability encourage one of two unacceptable outcomes—contractors simply "checking the box" that the goals had been accomplished or, more significantly, engaging in unlawful preferences simply to meet the goal and avoid OFCCP scrutiny.

OFCCP estimates that calculating goals for veterans will take each establishment 1 hour per year, while EEAC's estimate is 4 hours per year. The net difference between OFCCP's economic impact estimate for all goal-related aspects of its veterans' proposal and EEAC's estimate is approximately $95 million per year.

Recruitment Requirements—Mandatory State Job Postings and Linkage Agreements

OFCCP traditionally has left it up to contractors to identify the most productive recruitment sources and determine the most effective way to utilize them. While contractors are still free to do so, the disability and veterans' proposals mandate that federal contractors must also list their open positions with certain state and local employment agencies, and establish and monitor "linkage agreements" with referral agencies specified by OFCCP. In addition to being administratively burdensome, the mandated local recruitment efforts ignore the national scope of most contractors' recruitment initiatives and the sophisticated Internet-based technology used in today's employment searches.

Mandatory State Job Listings

Contractors for many years have been required by VEVRAA to list most of their open positions at an appropriate local employment service office. This "mandatory listing" requirement has posed enormous compliance challenges for federal contractors, for OFCCP, and for the hundreds of state agencies that often lack the financial, technical and personnel resources to handle the volume of job postings filed. The advent of Internet recruiting has only exacerbated the challenge.

The mandatory job listing requirement has been handled in several different ways. At one time contractors could satisfy their obligation by simply listing their openings on the America's Job Bank (AJB), a nationwide job board maintained by the U.S. Department of Labor. When AJB was eliminated in 2007, OFCCP required contractors to list their openings directly with the state or local employment agencies, but permitted them to do so in a manner (FAX, e-mail, or other electronic postings) acceptable to the contractor. More recently, OFCCP has flipped this option and now requires that job openings be posted in the "manner and format" required by the local agency. With no consistency in the filing requirements imposed by the local

agencies, this obligation presents enormous burdens and costs for contractors engaged in nationwide recruiting.

There never has been a similar posting obligation for individuals with disabilities. The new disability proposal, however, would require that contractors for the first time post their open positions at the "One-Stop Career Center" nearest to the contractor's facility. Unfortunately, there is no guarantee that the nearest "One-Stop Career Center" will also be the state employment service office that the contractor is using to satisfy its veterans' mandatory job listing requirement. EEAC has recommended to OFCCP that any posting with the state employment service satisfy both the veterans' and disability posting requirements.

OFCCP's economic impact analysis assumes that contractor establishments will have only two open positions per year that require posting. The 108 EEAC survey respondents alone had 1.1 million such openings in 2011.

Over the years, EEAC members have found the mandatory listing requirement to be burdensome, costly and only marginally productive in matching veterans with job openings. Since the requirement is statutorily based, the compliance challenges it has created for federal contractors, OFCCP and the state agencies can only be alleviated through a Congressional response. In our view, the current mandatory listing requirement should be eliminated and replaced with a national job board patterned after America's Job Bank that could serve as a centralized job posting system which would serve as the federal government's clearinghouse of job opportunities for which employers are specifically recruiting individuals with disabilities and protected veterans.

Linkage Agreements

In addition to the mandatory postings, the disability and veterans' proposals also both require contractors to execute formal "linkage agreements" with OFCCP-specified referral agencies. Each set of regulations requires a minimum of three linkage agreements per establishment. One of the specified linkage agreements would qualify under both proposals thus resulting in a minimum total of five written linkage agreements per establishment. In addition, the effectiveness of each linkage agreement would need to be evaluated annually. With approximately 285,000 contractor establishments in the U.S., a total of 1,425,000 written linkage agreements would need to be negotiated and/or reviewed each year.

Mandating linkage agreements with government-specified agencies ignores the fact that most contractors already have well-established relationships with various employment services and placement organizations, and have become adept at utilizing Internet-based recruiting techniques. Unlike the centralized job posting system recommended above, the proposed linkage agreements will not facilitate matching veterans and individuals with disabilities with available jobs.

The linkage agreements will instead constrain the already limited resources of both contractors and employment services agencies. Indeed, in comments filed with OFCCP on the proposed disability regulation, the National Association of State Workforce Agencies (NASWA)—an advocacy organization for state workforce programs and policies—warned that "[t]he volume of paperwork and administrative bulk of creating, approving, signing and maintaining such linkage agreements would be overwhelming. Without any administrative funding provided, this becomes an unfunded mandate to an already severely constrained system trying to provide universal services to a growing labor force."

- Time required to initiate each linkage agreement: OFCCP estimate = 5.5 hours; EEAC survey estimate (35% of respondents) = 10 hours
- Time to annually update each linkage agreement: OFCCP estimate = 15 minutes; EEAC survey estimate (54% of respondents) = 3 or more hours

Invitations to Self-Identify

Federal contractors are already required under current regulations to solicit veteran and disability-related information from job applicants after an offer of employment has been extended, but before the individual begins working. Both sets of regulations would expand contractors' self-identification obligations. Individuals with disabilities would be afforded three opportunities to self-identify: (1) whenever they apply for or are considered for employment, (2) after being extended a job offer but before they begin working, and (3) annually as part of a required anonymous survey conducted by their employer. Veterans would be extended two invitations to self-identify: (1) a pre-offer invitation to self-identify as a "protected veteran," and (2) a post-offer, pre-employment invitation to self-identify with respect to each applicable category of protected veteran.

OFCCP's approach to the identification and treatment of individuals with disabilities (including disabled veterans) as reflected in the new proposals is very different

than the approach advocated by the EEOC since enactment of the Americans with Disabilities Act (ADA). The EEOC prohibits employers from making preemployment disability inquiries except when required to undertake affirmative action by federal, state or local law, or when using the information to benefit individuals with disabilities (such as running sheltered workshops). The EEOC also has been very reticent to sanction post-employment invitations to self-identify as mandated in the proposals.

It has always been unclear whether simply being subject to Section 503 is sufficient to justify extending pre-offer invitations to self identify. OFCCP apparently assumes that it is. The EEOC recently issued updated guidance on the ADA that simply reaffirms its traditional policies and fails to answer the question directly. Nevertheless, OFCCP's self-identification proposals, along with the requirement that contractors maintain special employment files on applicants and employees with disabilities (discussed below), stand in stark contrast to the EEOC's approach under the ADA that an individual's disability status generally is relevant only in the context of considering the need for reasonable accommodations.

Contractors thus have concerns about OFCCP's self-identification proposals from the standpoint of (1) invasion of employee privacy, (2) potential exposure to ADA claims, and (3) cost.

• Time required to develop capability to extend pre-offer disability invitations: OFCCP estimate = 5 minutes per establishment; EEAC survey estimate = on average more than 560 hours per contractor

• Time required to develop capability to extend post-offer/pre-employment disability invitations: OFCCP estimate = no additional economic impact; EEAC survey estimate = on average more than 458 hours per contractor

• Time required to develop capability to extend annual anonymous survey of employee disability status: OFCCP estimate = 5 minutes per establishment; EEAC survey estimate = on average more than 722 hours per contractor

Ineffective and Burdensome Paperwork Requirements

The proposed disability and veterans' regulations would impose a wide array of paperwork requirements and costly administrative burdens on contractors while contributing little if anything to matching veterans and disabled individuals with job openings.

Annual Review of Personnel Processes

The existing disability and veterans' regulations require the "periodic" review of personnel processes to ensure that individuals with disabilities and veterans are considered for open positions and training opportunities. The appendix to the current regulations contains suggested methods for carrying out such reviews.

The new proposals turn these suggested methods into mandates by requiring contractors to:

• Identify each known applicant and employee who is disabled or is a protected veteran;

• Keep a record of every vacancy and training opportunity for which protected veterans or disabled applicants and employees are considered;

• Prepare a statement for each instance in which protected veterans or disabled applicants and employees are rejected for a vacancy, promotion, or training opportunity, outlining the reason for the rejection and any accommodations considered;

• Describe the nature and type of accommodations accorded to disabled individuals (including disabled veterans) who were selected for hire, promotion, or training programs; and

• Make these statements available to the applicant or employee upon request.

The net effect of these requirements will be to require contractors to create a unique compliance file on each and every protected veteran and disabled applicant and employee, documenting each and every employment and training opportunity the individual has ever had with the company, along with the reasons in each instance where the person was not successful.

• Time required to construct and maintain files: OFCCP estimate = 30 minutes per establishment; EEAC survey estimate (57% of respondents) = 3 hours or more per individual

• Time required to justify and document each non-selection decision: OFCCP estimate = 30 minutes per establishment; EEAC survey estimate (45% of respondents) = 3 hours or more per individual

• In cases where changes to existing systems, forms or procedures would be necessary to comply with this requirement, more than half of EEAC survey respondents reported that the cost would exceed $100,000

Review of Physical and Mental Job Qualifications

The current disability and veteran regulations require the "periodic" review of all physical and mental job qualifications to ensure that where such qualifications tend to screen out disabled veterans or persons with disabilities, they are job-related and consistent with business necessity. The proposed regulations would mandate that these reviews be performed for all jobs on an annual basis, irrespective of whether there has been a vacancy or the job has changed over the prior year. In addition, such reviews must be documented in such a way that would "list the physical and mental job qualifications for the job openings during a given AAP year * * * and provide an explanation as to why each requirement is related to the job to which it corresponds."

• Time to conduct annual review: OFCCP estimate = 2.5 hours per establishment; EEAC estimate = 2,500 hours per contractor

New Data Collection and Analysis Requirements

The new disability and veterans' proposals require contractors to collect and tabulate ten (disability) or eleven (veterans) new data points annually, to be used in the assessment of the contractor's disability and veterans affirmative action efforts. These data points pertain to such minute details as:

• The number of referrals of protected veterans and individuals with disabilities—separately calculated for referrals from employment service offices, "linkage" agencies, and other sources;

• The number of applicants who are known to be or who self-identified as being a protected veteran or individual with a disability;

• Total number of job openings, total number of jobs filled, and the ratio of jobs filled to openings;

• Total number of applicants for all jobs, the ratio of protected applicants to all applicants ("applicant ratio"), and the number of protected applicants hired; and

• The total number of applicants hired and the ratio of protected applicants hired to all hires ("hiring ratio").

The cost to federal contractors to comply with this one requirement is staggering:

• Time to design and implement the systems, forms and procedures to comply with this mandate: OFCCP estimate = one hour per establishment per year; EEAC survey estimate = on average more than 3,755 hours per contractor

• Time to perform and document the annual evaluation of the effectiveness of each outreach and recruitment effort: OFCCP estimate = 10 minutes per establishment; EEAC survey estimate = on average more than 1,946 hours per contractor

New Required Training

The disability and veterans' proposals both impose new mandatory training obligations on federal contractors. First, the contractor's disability and veterans affirmative action policies must be discussed "thoroughly in any employee orientation and management training programs." Second, training must be provided annually for all personnel involved in "recruitment, screening, selection, promotion, disciplinary, and related processes." The proposals detail the specific topics that must be covered in the training as well as the contemporaneous records that must be maintained regarding which personnel received the training, when they received it, and who facilitated it.

Among the records that must be retained are the written and electronic materials used for the training, which must cover, at minimum, the following topics: (1) the benefits of employing protected veterans and individuals with disabilities; (2) appropriate sensitivity toward veterans and individuals with disabilities; (3) the legal responsibilities of the contractor and its agents regarding protected veterans and individuals with disabilities; and (4) the obligation to provide reasonable accommodation.

OFCCP believes the burden and costs for this training to be minimal—20 minutes to develop and 5 minutes to present the orientation sessions per establishment each year, and 40 minutes to develop and 20 minutes to deliver the personnel selection training per establishment each year. These estimates are totally unrealistic in part because they totally ignore the costs involved in removing employees from their jobs to attend and receive the training. The EEAC survey estimates the actual costs of the orientation training to be $310.3 million and the actual costs of the personnel selection training to be $254.5 million—a combined training cost of approximately $564.8 million.

Proposed Expansion of Contractor Desk Audit Submission Requirements

As noted earlier, OFCCP carries out its enforcement responsibilities primarily through conducting agency-initiated compliance evaluations at selected contractor

establishments. Unlike the scope of EEOC investigations which are defined primarily by the allegations contained in the discrimination charge, OFCCP compliance evaluations are largely open-ended and thus potentially can embrace any and all of a contractor's employment policies, practices and decisions.

Contractor establishments are notified of their selection for review through OFCCP issuance of an OMB-approved Scheduling Letter and attached Itemized Listing. The Itemized Listing enumerates information OFCCP may request at the outset of the compliance evaluation such as copies of Affirmative Action Plans (AAPs); recent EEO-1 Reports; summaries of applicants, hires, promotions and terminations; aggregate compensation information; and copies of collective-bargaining agreements.

The requested information must be submitted by the contractor to OFCCP within 30 days of receipt of the Scheduling Letter, and OFCCP uses the information to conduct its preliminary analysis—referred to as the "desk audit." If OFCCP's desk audit review reveals potential compliance questions, additional information may be requested through focused follow-up data requests or through compliance officers visiting the contractor's premises to conduct an "onsite investigation."

Until recently, OFCCP's practice was to evaluate the desk audit submission to ensure that the AAPs and other written information conformed to all technical requirements of the regulations, and to conduct preliminary statistical analyses of the employment transactions (hires, promotions and terminations) and compensation. In cases where the submission conformed to the regulations and there were no statistical "indicators" of potential discrimination against any group, the audit was closed. Conversely, where there were indicators of noncompliance or statistical adverse impact, a further investigation would be conducted focused on the problematic areas.

This "tiered" or "phased" approach to compliance evaluations offered several advantages to both OFCCP and to contractors. Contractors knew from the Itemized Listing what information they needed to maintain on an ongoing basis for submission to OFCCP, and by authorizing OFCCP to evaluate only that information during the desk audit phase, OMB discouraged OFCCP from venturing off into unfocused "fishing expeditions" during their compliance evaluations. This approach also enabled OFCCP to focus its resources on issues having significant potential for noncompliance.

The key to maintaining this effective balance is the OMB-approved Itemized Listing. Each time the Itemized Listing comes up for periodic OMB renewal under the Paperwork Reduction Act there is a struggle between OFCCP and federal contractors. OFCCP invariably seeks OMB authorization to collect more comprehensive and detailed information for desk audit review, and federal contractors invariably seek OMB protection from being required to disclose highly sensitive and confidential information to OFCCP at the outset of a compliance evaluation before there is any indication of a compliance-related need for it.

The Scheduling Letter and Itemized Listing currently are before OMB for reauthorization, and the struggle continues—but this time the stakes are much higher given the breadth of OFCCP's request for information and the agency's abandonment of a tiered approach to compliance evaluations. There are several new items of information that OFCCP wants to add to the Itemized Listing, but two of them are particularly problematic for federal contractors—employment transactions data and compensation data.

Employment Transactions Data

Currently federal contractors are required to submit to OFCCP summary information on applicants, hires, promotions and terminations (1) by gender and minority/nonminority status, (2) for each AAP job group or each job title. This is the source information that OFCCP traditionally has used to determine whether there are any preliminary "indicators" of statistically significant adverse impact in selections.

OFCCP is now seeking authorization from OMB to collect such information (1) by gender and individual race/ethnicity categories, (2) for each AAP job group and job title. In addition, OFCCP wants contractors to identify by race and gender the "actual pool of candidates" who applied or were considered for promotion, or who were considered for termination. This request is objectionable for two reasons—the data in the preferred format are too granular to be useful for many statistical selection analyses, and most contractors do not utilize "pools" for all of their promotions and terminations.

Compensation Data

Over the years the compensation data requested on the Itemized Listing has served as the greatest source of friction between OFCCP and federal contractors. OFCCP has contended that it needs employee-specific compensation data to conduct

meaningful compensation analyses; contractors have responded that employee-specific compensation data at the higher levels of an organization are among the most sensitive and competitively confidential information they maintain. The result thus far has been a compromise brokered by OMB—OFCCP has been authorized to collect aggregate level (i.e., not-employee specific) compensation data for purposes of desk audit analysis, and then may issue requests for detailed employee-specific information when a need for it has been established. This compromise has generally worked well, although the standards utilized by OFCCP to demonstrate "need" for the follow-up information have eroded significantly in recent years.

As with the transactions data, OFCCP is now petitioning OMB for permission to request in the Itemized Listing far more detailed compensation information. The new request modifies (1) the date the compensation "snapshot" is taken [February 1 each year], (2) the range of employees for whom compensation information must be provided [including contract, per diem, day labor, and temporary employees], and (3) the scope and detail of the compensation data requested [in addition to base salaries and wage rates—such items as bonuses, incentives, commissions, merit increases, locality pay, and overtime].

In addition to being extremely burdensome (discussed below) and technically objectionable, OFCCP's transaction and compensation data requests are also operationally objectionable because they reflect the agency's abandonment of tiered compliance evaluations in favor of thorough "wall-to-wall" compliance evaluations in each and every compliance review. OFCCP apparently assumes that most (or all) federal contractors are out of compliance with their nondiscrimination and affirmative action obligations and it is therefore necessary to gather at the outset of each compliance evaluation—before there is any indication of a compliance issue—all employment information that might be potentially relevant in case a potential violation should develop as the review unfolds. We believe such an assumption is unwarranted, and OFCCP's request to OMB, if approved, will result in contractors maintaining, evaluating and disclosing to OFCCP large amounts of sensitive and confidential business information that will turn out to be unnecessary for a determination of compliance.

OFCCP Burden Estimates

Notwithstanding seeking permission to require audited contractors to provide OFCCP with more data, more records, more manual tabulations, and more information at the outset of the review, OFCCP estimates that its proposed changes will actually reduce the overall burden on each audited federal contractor by approximately 1.34 hours per audit. In addition to defying logic, over two-thirds of the comments submitted to OFCCP in response to its proposed changes questioned the agency's burden estimates as being unrealistically low. EEAC members report that if OMB grants OFCCP's request, their current burden hours will increase three-and in some instances four-fold. OFCCP's burden estimates are simply not credible.

Compensation Analysis

In addition to the proposed Scheduling Letter changes, two other OFCCP proposals will impact the way federal contractors and OFCCP evaluate compensation. The first is OFCCP's proposal, announced in early 2011, to rescind its 2006 Systemic Compensation Discrimination Guidelines and replace them with new—as yet unpublished—guidance. The second is OFCCP's intention to develop a new compensation data collection tool that will require federal contractors to periodically report to the agency extensive information about their compensation systems, practices and patterns.

Rescission of Systemic Compensation Discrimination Guidelines

Prior to 2006, OFCCP did not have a consistent approach to how it audited contractor compensation practices. There was no consistency with respect to such fundamental questions as: (1) how employees should be grouped together for purposes of analysis, (2) what pay variables should be included in the analysis, (3) what statistical methodologies were appropriate for conducting the analysis, (4) how to interpret the statistical results, or (5) whether discrimination allegations could be predicated upon statistics alone or needed to be supplemented with anecdotal evidence of discrimination. In those days the results in any particular audit would depend upon which field offices—or which auditors—were conducting the analysis.

This changed in 2006 when these and other questions were addressed in OFCCP's systemic compensation discrimination guidelines. While admittedly not perfect in all respects, the guidelines nevertheless were predicated upon sound legal and statistical principles accepted by the federal courts in compensation discrimination cases. They thus constituted a valuable blueprint for both OFCCP and federal contractors to follow in conducting compensation analyses. The predictability generated by the

guidelines encouraged federal contractors to conduct voluntary self-critical analyses of their compensation systems.

The compensation guidelines serve as a good illustration of the beneficial consequences that can flow from clearly articulated, consistently applied OFCCP policies. Unfortunately, OFCCP concluded that the guidelines were too rigid and constraining and that it needed greater flexibility to utilize a "variety of investigative and analytical tools." OFCCP has indicated that it will not officially rescind the 2006 guidelines until new guidance is developed to replace it. Thus far there is no indication of what form that guidance will take other than a commitment that it will be based upon principles contained in Title VII of the Civil Rights Act of 1964.

The key point to be learned by the rescission of the compensation guidelines is that preserving investigative flexibility for OFCCP invariably carries with it investigative uncertainty for contractors. In most instances OFCCP's mission will be better served through a clear articulation of policy and standards that both OFCCP and contractors can rely upon—as was the case with the 2006 systemic compensation discrimination guidelines.

Compensation Data Collection Tool

On August 10, 2011, OFCCP requested public comment on a proposed new collection tool that would require federal contractors to collect, calculate, and disclose to OFCCP millions of confidential data points on their pay and benefits policies and decisions. OFCCP posed 15 specific questions regarding the scope, content, and format of the data collection tool—not one of which posed the fundamental question of whether there is actually a need for such a potentially burdensome and intrusive requirement.

EEAC, in conjunction with several other business organizations, have asked OFCCP not to proceed with developing the compensation data collection tool. The agency already has extensive compensation information available to it in the files of recently-completed compliance evaluations, and will have significantly more information from this source should OMB grant the agency's request to expand the Scheduling Letter and Itemized Listing.

In addition, the EEOC currently is sponsoring a project being conducted by the National Academy of Sciences ("NAS") to "review methods for measuring and collecting pay information" from U.S. employers for purposes of administering Title VII. Given the Obama Administration's emphasis on having agencies coordinate their enforcement efforts—and given the EEOC's and OFCCP's commitment to the National Equal Pay Enforcement Task Force to do so—OFCCP should not proceed with the development of a compensation data collection tool independently of the NAS study.

Conclusion

Over the past sixteen months, OFCCP has published five major regulatory proposals. In three instances (disability regulations, veterans' regulations, and revisions to the compliance evaluation Scheduling Letter Itemized Listing), OFCCP is proposing to expand exponentially the recordkeeping, data collection and analysis, and reporting requirements already imposed on federal contractors by the agency's existing regulations. In one instance (rescission of the 2006 compensation guidelines), OFCCP is proposing to withdraw and replace well-founded legal guidance that served as a useful catalyst for voluntary compliance. And in one instance (compensation data collection tool), OFCCP is proposing development of a massive reporting requirement without having established a need for it and apparently without coordination with a parallel study being conducted by the EEOC.

By itself, each proposal carries with it significant burdens and costs for federal contractors. In combination, the burdens and costs are enormous, and the economic analyses conducted by OFCCP suggest a serious underestimation of what those burdens and costs actually will be.

Last month, Cass Sunstein, Administrator of OMB's Office of Information and Regulatory Affairs, reminded the heads of all executive departments and agencies to be aware of the "cumulative effects of regulations." He noted that President Obama's Executive Order 13563 urges agencies to promote "coordination, simplification, and harmonization," and directs them to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs." He further observed that consistent with the Executive Order, agencies should:

"[t]ake active steps to take account of the cumulative effects of new and existing rules and to identify opportunities to harmonize and streamline multiple rules. The goals of this effort should be to simplify requirements on the public and private sectors; to ensure against unjustified, redundant, or excessive requirements; and ultimately to increase the net benefits of regulations."

None of the five proposals discussed in this testimony has been finalized. It is still possible, therefore, to identify and modify their most problematic aspects. As it has throughout its 36-year history, EEAC is ready and willing to engage in a serious and reasoned dialogue with OFCCP to identify and address those aspects of the proposals that we see as roadblocks to our shared goal of matching qualified applicants—including women, minorities, veterans and individuals with disabilities—with available job openings. It is in that spirit that we make the following six recommendations:

1. The outdated, onerous, and only marginally effective mandatory job listing requirements for veterans should be replaced with a national job board patterned after the former America's Job Bank. Such a step would facilitate national recruitment efforts, capitalize on current Internet-based recruiting techniques, and eliminate the need for negotiating and annually updating approximately 1.4 million costly and locally-oriented linkage agreements.
2. OFCCP and EEOC should reconcile their seemingly divergent approaches to identifying and employing individuals with disabilities. OFCCP's insistence upon multiple and ongoing self-identification invitations, in combination with the obligation to build special files on applicants and employees with disabilities, raises the uncomfortable possibility that contractor compliance with OFCCP's regulations can be accomplished only at the risk of violating the Americans with Disabilities Act.
3. OFCCP should not require the establishment of numerical hiring goals for veterans and individuals with disabilities in the absence of reliable labor market availability data.
4. The numerous recommended affirmative action measures for veterans and individuals with disabilities in the current regulations should remain "recommendations" and not be converted into prescriptive, mandatory requirements complete with exhaustive documentation and recordkeeping obligations. Such internally-focused "process" requirements do little to promote actual job creation or placement.
5. Federal contactors should be provided with clear and consistently-applied guidance regarding OFCCP's compliance standards. Such guidance promotes voluntary compliance.
6. The "phased" approach to compliance evaluations should be retained. Contractors should not be required to submit volumes of detailed and highly sensitive employment information to OFCCP at the outset of an audit before there is any indication of a compliance-related need for it.

Thank you again for the opportunity to testify before the Subcommittee today. I will be pleased to answer any questions you may have.

Chairman ROE. Thank you.
Ms. Bottenfield?

STATEMENT OF DANA BOTTENFIELD, DIRECTOR OF HUMAN RESOURCES INFORMATION SYSTEMS, ST. JUDE CHILDREN'S RESEARCH HOSPITAL

Ms. BOTTENFIELD. Chairman Roe, Senior Ranking Member Mr. Kucinich, and other members, I am very honored to speak with you today as a representative at St. Jude Children's Research Hospital and share with you my experiences of the affirmative action planning process. I am the director of H.R. information systems, employment, and immigration at St. Jude.

The mission of St. Jude is to eliminate catastrophic diseases in children through research and treatment. We are a nonprofit run primarily on donor dollars. We have over 3,700 employees who hail from more than 80 countries and every continent but Antarctica.

Annually, we receive over 30,000 applications every year and hire more than 600 individuals. As a government contractor and a standalone organization we are required to complete a single affirmative action plan every year.

Our efforts to comply with the regulations of the OFCCP are multifaceted. Some duties are just embedded in the day-to-day ac-

tivities of our team, which make them difficult to extract or quantify.

The appropriate infrastructure to support our efforts is absolutely required. This includes software, hardware, and storage systems, including onsite physical files, offsite storage, and electronic storage. In addition, in my opinion, an affirmative action vendor and legal attorney are absolutely necessary.

All of these require time and effort. However, the efforts I discuss today will be mostly focused on what I consider to be the tip of the iceberg, not on creating and maintaining the infrastructure to support these efforts.

Every year St. Jude expends resources to collect, audit, and process data collected in our systems to send to our vendor to create our plan. Once the plan is finalized we must review, understand, and implement meaningful actions around the results.

We need to stay current of new and pending regulations and devise strategies to comply with these. And we need to ensure the continued training of new and existing staff around these regulations. Last but not least, we must endeavor to improve data collection processes as opportunities for improvement always exist.

To illuminate our efforts I want to focus on our current affirmative action plan. This document is over 450 pages long. In addition, our background—our affirmative action vendor provides the statistical analysis that the OFCCP would run if were audited. This is an additional 250 pages long. This information has to be read and absorbed and actions taken.

In our current plan we have 21 placement goals, 15 potential areas for adverse impact, and more compensation issues than I can count. For our plan year our estimated time for these activities around these issues is 500 person hours and—at the cost of $58,000.

If our organization is audited our efforts and costs will increase. Our last audit was in 2009 and it lasted 8 months. A conservative estimate put the time and cost to meet the request of the auditor and to defend ourselves against charges of discrimination at a person hour—400 person hours and $37,000. Contractors can be audited every 2 years.

St. Jude takes very seriously our responsibility of guarding against discrimination. When any allegations occur we are committed to dealing with these in a fair, swift, and consistent manner. However, current regulatory framework poses challenges for us to meet the goals and standards set by the OFCCP and the increasing scrutiny of minutia in the audit.

If St. Jude is not employing enough minorities or women in a particular job category then we may—it may appear we are discriminating. If we devise strategies to eliminate this discrepancy and we are too successful in our efforts, meaning we have actually now hired too many men or too many women or minorities, then it may appear that we are engaged in reverse discrimination and actually have adverse impact on another group.

Standards require that we have the perfect mix of gender and racial groups for every job category. It is an impossible standard to meet, not to mention that the data elements used to conduct the analysis are crude and incomplete.

If you only look at race and gender as predictors of hiring, promotions, termination, and pay, then you are actually ensuring that these are the factors that will explain the statistical variance. In reality, there are a plethora of factors that influence these decisions, most of which are not easy to capture in a database or to quantify for over 30,000 applicants and 3,700 employees each year.

Every year our burdens increase. An example would be the 7 percent target representation of persons with disabilities for each job category with an estimated effort of 30 minutes. Based on my experience, this effort is grossly underestimated.

There are good things that come from the affirmative action process. Employer outreach to underemployed groups, attention to eliminating barriers to employment for women, minorities, veterans, and disabled individuals, and encouraging employers to assess their efforts regularly are desirable and of real benefit. The real question, though, is whether the OFCCP's methods and new regulations actually promote these good things in an efficient and effective way or simply create excessive burdens and fodder for litigation.

In conclusions, the effort, resources, and cost to comply with the OFCCP creates significant burdens and barriers far in excess of what is necessary to accomplish effective affirmative action. Our team is not focused on providing a fair and diverse workplace, but instead of surviving our next audit.

Thank you, Mr. Chairman.

[The statement of Ms. Bottenfield follows:]

Prepared Statement of Dana C. Bottenfield, PHR, CCP, CBP, Director of HRIS, Employment and Immigration, St. Jude Children's Research Hospital

Chairman Roe and other members of the Committee, I am honored for the opportunity to speak to you as a representative of St. Jude Children's Research Hospital and share with you my experience with the Affirmative Action Planning process.

Background

St. Jude Children's Research Hospital (St. Jude) was founded in 1962 by the late entertainer Danny Thomas, who believed that no child should die in the dawn of life. Since inception, St. Jude has been not only a hospital, but also an academic research center. In fact, St. Jude has changed the way the world treats childhood cancer and other life-threatening diseases. Supported largely by donations, St. Jude is a non-profit institution where no family pays for medical care, and for every child treated here, thousands more have been saved worldwide through St. Jude discoveries. Our 3,700 employees hail from more than 80 countries and every continent except Antarctica. St. Jude receives more than 30,000 applications annually and hires about 600 employees each year. We are a government contractor and standalone organization; consequently, we only create a single affirmative action plan. More complex organizations, including hospitals with multiple locations and services (e.g., hospitals, hospice care, nursing homes, outpatient surgery) may be required to complete multiple plans.

I have 17 years of experience in Human Resources, with all but two of these years at St. Jude. I have worked in Compensation, Human Resources Information Systems (HRIS), Immigration, Benefits and Employment. I have 15 years of experience in HRIS and seven years of experience in employment. My current title is Director of HRIS, Employment and Immigration. In my 15 years at St. Jude, we have been audited by the Office of Federal Contract Compliance Programs (OFCCP) three times, with the most recent audit starting and concluding in 2009. During these 15 years, my exposure to Affirmative Action Planning (AAP) has increased to the point that I am now responsible for aspects of our plan including, general compliance and communication, and I also serve as the main contact for any audits.

In the paragraphs that follow, you will see what the AAP process looks like when put into practice in the real-world setting of a pediatric research hospital. To say the process takes an insignificant number of hours and dollars would grossly under-

estimate the time, effort, resources and costs required to collect, store and process data, create the actual AAP, construct and implement a meaningful action plan based on the AAP results, conduct outreach efforts, coordinate with linkage sources, stay current as to new and pending regulations, comply with new regulations and ensure ongoing staff training. If I had to estimate the actual hours spent by St Jude's team in preparing St. Jude's AAP, it would vary from a minimum of 300 to 600 person hours over the course of a year. For the current AAP year, based upon our current initiatives, I expect for St. Jude employees to spend 500 hours on affirmative action duties that are in addition to their day-to-day affirmative action duties. The estimated cost of these expenditures, including consulting and the hours of additional effort is approximately $58,000. If our institution is audited, then another 200 to 400 hours can be added to this effort. Our last audit was in 2009. St. Jude employees spent, conservatively estimated, 400 hours working on this audit with an estimated cost of $37,000, including legal fees, consulting fees and cost of employee efforts. However, this does not fully capture the costs or effort. The necessary infrastructure must exist and continue to be maintained. Software systems must be selected, installed, tested, set-up, upgraded and maintained along with the necessary hardware. Document storage systems, including onsite files, offsite files and electronic storage must be also be created and maintained. And day-to-day compliance is built into the jobs and responsibilities that our HR teams carry out daily. There are real hours and dollars included in the cost of building and maintaining this infrastructure and to get to the point where you have a viable program. The time, effort and costs are not included because it is not simple to determine; however, it would easily double or triple the time, effort and costs I have already quoted. In short, creating an AAP is not merely running a few reports and submitting the results to the OFCCP. It's an intensive process that St. Jude must take seriously or else face penalties.

I sincerely hope that you as members of the U.S. Congress will agree that as important a mechanism as the Affirmative Action Plan is, there is indeed an opportunity to improve the process so that it is more streamlined and productive and becomes the meaningful and efficient process it was intended to be.

Creating the Affirmative Action Plan

The first requirement in creating an AAP is to have the systems and staff in place to collect and produce the required applicant and employee data. At St. Jude, we have a team of professionals dedicated to HRIS (8.3 full-time equivalents). This team is responsible for selection, installation, testing, troubleshooting, reporting and daily maintenance of HR systems in conjunction with applicable technical professionals in our Information Sciences Department and our vendors. We have two systems that hold data required for our AAP—an applicant tracking system (ATS) and an HR/Payroll system (HRMS). The ATS handles the collection and storage of applicants, applications, resumes, other documents and demographic elements about applicants for all open positions. Any candidates selected for a position are then fed to our HRMS through an interface, and the employment history of the employee is tracked in this system. These systems require regular interaction and maintenance in order to code, collect, endure date integrity and store the applicable data and documents.

To pull the data required for the AAP, the appropriate table and coding structure must exist in the applicable software systems, and then the reports must be developed to extract the data for the required timeframes. I was personally involved in the creation of all the current reports used by St. Jude, which easily took 400 person hours. The reports in the ATS were developed using report writing software by the HRIS team at St. Jude in conjunction with our ATS vendor. The reports in our HRMS were developed by a programmer at St. Jude due to the complexity of pulling historical information from the applicable data files in this system and the computer programming knowledge needed. Over time, these reports continue to be refined and tweaked annually. Depending upon the change, this effort can take from a matter of minutes to about 10 hours. An example of a recent "tweak" is adding the address of the applicant at the time the application was submitted. This has allowed us to better understand where, from a geographic perspective, we get our applicants, which then corresponds to a more accurate estimate for factor weights used to create our availability statistics. This relatively small tweak took more than 5 hours to complete. The time and effort to set up computer systems, create useful reports and continue to update systems and reporting as needed will vary widely dependent upon the resources available at an institution and the computer systems being used.

In total, our team generates and audits 10 reports each year that contain the raw data used to create our AAP. Because of the volume of data, it is inevitable that coding errors and other discrepancies will exist. Attempts are made to find and cor-

rect any deficiencies in the data. Because we use two systems, certain data from these systems must be compared and validated against each other. For example, every selected candidate in our ATS must match a corresponding record for a hire, rehire, promotion, demotion or transfer record in our HRMS. Each year there are a handful that do not match. A common reason for this discrepancy is the person's name has changed from the time she or he applied for the position and the date of hire. However, failure to correct this prior to sending our data to our affirmative action vendor will create an error when creating our plan. Consequently, we try to find and correct this on the front end. These sorts of data errors are unavoidable, whether due to human error or a process or computer system issue.

We start our initial report/auditing process in late September each year. This is to start identifying any potential errors or issues that will need to be addressed and corrected. Our plan year runs from October 1 to September 30. By the end of October all data regarding filled positions, hires, promotions, separations and applicable pay increases for the AAP plan year are complete and closed in both of our computer systems, and the reports have been validated and are ready to be sent to our affirmative action vendor. Annually, the auditing, production and validation of our reports for our AAP take about 25 to 40 hours.

Our next step is to forward our raw data to our affirmative action vendors. St. Jude has elected to enlist an outside vendor because the skills, knowledge and expertise necessary to compile and run the applicable statistical analyses are not something we have on our current team. Without our outside vendor I can say with certainty the task of completing an AAP each year would be beyond the ability of the St. Jude team. Literally we could not do it ourselves.

Once our affirmative action vendor receives our data, the vendor runs a series of validation processes. They compare our current year data to previous year data and then ask us to validate any changes or discrepancies. Both are inevitable and must be researched, potentially corrected or explained. Over the years, as we learn of potential weaknesses in our data collection and/or processes, we make adjustments to correct for future years. This process of back-and-forth between St. Jude and our affirmative action vendor lasts two to three months each year with an effort of 10 to 20 hours per month by St. Jude employees.

Once all additional data issues are resolved, our affirmative action vendor begins to compile the basic numbers and statistics for the AAP. St. Jude then moves its focus to update other areas of the AAP that must be reviewed each year. This includes the narrative, feeder groups and factor weights. All of these are forwarded to our affirmative action vendor for inclusion into the final AAP. This takes about 5 to 10 hours to update each year and has remained constant over the last three years. These duties are handled by the manager of employment or me.

St. Jude's most recent AAP, for the dates of October 1, 2010, to September 30, 2011, was more than 450 pages. We also have our affirmative action vendor run the various statistical analyses that would be generated by the OFCCP if we were audited. This report for the most recent plan year is more than 250 pages. These final reports were sent to us in February. Multiple employees spend significant time reviewing the results and compiling questions and concerns. Typically, about a month after we have received the AAP, we have a one to two hour conference call with our affirmative action vendor to review our concerns and for our affirmative action vendor to point out issues and areas for improvement based upon the audit experiences of their other clients. The time and effort to review and absorb the affirmative action plans and statistical analysis varies upon the number of initial issues found. For our most recent AAP, I have easily spent 30 hours reviewing our plan and conducting trend analyses. Other St. Jude employees also have spent a great deal of time on this process, and I am not able to assess their efforts at this time.

Continual Improvement

After the conference call has concluded, the St. Jude team has a final AAP, and we have identified areas of concern that warrant further analysis. In our current plan, we have 21 placement goals, more than 15 potential issues around adverse impact and numerous potential compensation issues. Placement goals are always reviewed with our entire recruitment team. The placement goals are reviewed over time along with sourcing data to determine if we are headed in the right direction with our efforts or if we need to devise new strategies.

Any statistical indication of potential adverse impact with selection, promotion and termination decisions are reviewed by the employment team. Any statistical indication of potential compensation issues are reviewed by the compensation team. Each group will devise strategies, research the issues, and conduct additional analysis. All of this effort and time varies widely each year dependent upon what findings we have in our plan.

In addition, every year we focus on any new and proposed regulations that may become effective in the future and potential areas of weakness in which our processes and systems can be improved or may need to be modified. Each step can be expensive and time-consuming even for small improvements. For example, in the past two years, we have created new recruitment and retention initiatives relating to U.S. veterans returning from the Iraq and Afghanistan wars. We also had a team research and implement a solution that allows for applicants with disabilities to have new alternative methods (other than using our Career Center website) to apply for open positions. Unfortunately, sometimes the investment does not produce results desired, and we bear the cost of wasted time and expense. For example, we also have attempted to improve our system for collecting data elements relating to the selection process in order to be able to respond fully to OFCCP data requests and to analyze the data. Our current ATS is not designed to provide the data elements we need. Consequently, we paid for and implemented customizations to our ATS about 18 months ago, which we thought would solve this problem. Unfortunately we were off target and are still struggling to find a way to address those issues. The result is that we must now reconsider the steps and expend additional time and expense to make an incremental modification in order to be able to respond to OFCCP data requests. All of these efforts require resources, effort and dollars and vary widely from year to year.

Carrying out the processes and producing the affirmative action plan required by OFCCP regulations is an extremely involved undertaking and can be overwhelming. This is my third year of having full responsibility for the AAP. The first year, given the volume of work required to meet regulatory requirements, all I could manage to do was just to absorb some of the data. The second year, the information and how to address the issues started to solidify. In my third year, I finally gained enough understanding of the data elements and statistics to truly begin to manage many aspects of the AAP processes and to be more active and able to interact effectively with our vendor.

Training

Every year, we expect our teams to participate in training relating to OFCCP regulations. Our compensation and employment teams participate in local conferences, seminars, webinars, list serves and other activities to ensure that we are up-to-date in our current knowledge. Many of our current compensation professionals and recruiters were not at St. Jude for our last audit in 2009. Consequently, we are in the process of scheduling our affirmative action vendor to conduct two to three days of training for our team onsite. This will cost $4,000/day plus travel expenses. The need to train new employees on the entire process and keep other employees current in their knowledge is a constant requirement. This will be in addition to an onsite session with our vendor to revise our data collection, analysis and reporting around factor weights, feeder groups and availability percents.

Audits

All of these efforts I have described are solely in preparation for an audit and passing the audit. Over the course of my employment at St. Jude, we have been audited three times. The last two audits happened in quick succession, in 2007 and 2009. The audit in 2009 started and concluded in that year and lasted about eight months. The length is similar to previous audits. The time and effort expended in 2009 was significant. Each month, our auditor had a number of questions and concerns, which had to be researched and addressed. Before sending any response, St. Jude discussed the questions and our response with our affirmative action vendor and our legal counsel. This back-and-forth process consumed about 20 to 40 hours of effort each month, depending on the number of individuals required to research and compose the response.

In June, we were notified that an onsite visit was required. We were told that there were three job titles that had potential discrimination with respect to compensation and that this was the reason for our audit being elevated from what is referred to as a "desk audit" to a full audit with an onsite visit. Four St. Jude employees spent weeks pulling applications, personnel files, resumes and curriculum vitas to compile additional data that we felt would explain the difference in the pay in these three job titles. Examples of the type of information we collected and entered into a spreadsheet for each employee in these job titles were years of directly related job experience obtained before hire, level of degree, number of degrees, area of specialty, years in job title (not necessarily the same as tenure) and past performance reviews. This information was sent to our affirmative action vendor who reran the applicable statistical analyses. In all instances the statistical indication of potential discrimination was eliminated by these relevant factors. Two other team mem-

bers focused their time on creating a presentation for the auditors to explain the nature of work done at St. Jude and how we were different than the typical sort of institution being audited by the OFCCP.

General Concerns and Conclusion

St. Jude takes seriously our responsibility of guarding against discrimination and when such allegations occur, we are committed to dealing with these in a fair, swift and consistent manner. But the current regulatory framework poses challenges for us to meet the goals and standards set by the OFCCP. If St. Jude is not employing enough minorities and women in a job category, it may appear that we are discriminating; if we devise a strategy to eliminate this discrepancy, but we are too successful in our efforts—essentially meaning now we have hired too many women and minorities—then we may appear to be engaged in reverse discrimination. The standards require that we have the perfect mix of gender and racial groups for every job category. It is an impossible standard to meet, not to mention that the data elements used to conduct the analysis are crude and incomplete. If you only look at race and gender as predictors of hiring, promotions, terminations and pay, then you are actually ensuring that these are the factors that create a statistical variance. The focus of audits, in my professional opinion, become on smaller and smaller bits of data.

The OFCCP's focus on statistical analysis and forcing federal contractors to collect more and more detailed data encourages contractors to focus on data collection data storage, paperwork and legal defense, not on the outreach and employee development that are the essence of affirmative action. The statistical numbers generated in an AAP do not paint a full and accurate picture. The factors that go into making hiring, pay, promotion and termination decisions are numerous and cannot always be quantified, much less collected in a database. Two individuals may have bachelor's degrees—one from a prestigious educational institution and the other from an institution where the only requirement for entrance is to pay the fee and has minimal standards for the individuals teaching the courses. I can potentially capture in a database that both applicants have a degree, but how do I quantify the value or worth of the educational experience represented by each degree? The educational institutions are very different form one another. Yet the OFCCP's analysis treats them equally valuable and may accuse us of discrimination for hiring a graduate of one educational institution over another. The entire list of intangible factors that matter for my institution are many; including number of publications, quality of publications, number of citations, impact on field of study, number of grants, phone interviews, face-to-face interviews, references, quality of references, awards, etc. It is not possible to pull all of this into our analysis for more than 30,000 applicants every year and more than 3,700 employees, as much of this information doesn't even exist in a database. The burden of collecting, maintaining and analyzing this information in the manner that is expected in an OFCCP audit is immense and essentially requires the expense of outside experts. The appropriate focus, and the only one that actually produces the type of results that are supposed to be the OFCCP's goal, is on good faith efforts to improve diversity in the applicant and promotion pools, and creating fair selection processes

And every year the burdens continue to increase as new regulatory requirements must be met. The new proposed regulation relating to affirmative action for persons with disabilities is likely to increase burdens significantly. The proposed target for disability hiring for each job group is 7%. This will require a whole host of additional responsibilities for employers. The OFCCP has estimated that an employer can accomplish all of these new obligations in only 30 minutes each year, but this is grossly underestimated in my opinion.

There are good things that come from the affirmative action process. Employer outreach to under-employed groups, attention to eliminating barriers to the employment of women, minorities, veterans and disabled individuals and encouraging employers to assess their efforts regularly are desirable and can be of real benefit. The real question, though, is whether the OFCCP's methods and new regulations actually promote those good things in an efficient and effective way or simply create excessive burdens and fodder for litigation. As an individual who has worked on OFCCP compliance diligently for a number of years, the process is all "stick" and no "carrot." It does not feel as though St. Jude is rewarded for its good behavior or for making the good faith efforts to combat problems that are larger than the institution.

In conclusion, the efforts, resources and costs to collect the data, create an AAP, do something with the information from the AAP, stay current of new and pending regulations, ensure education for our team and meet other compliance obligations and OFCCP requests create significant burdens and barriers to efficiency and im-

pose a level of expense of time and money that is far in excess of what is necessary to accomplish effective affirmative action. In other words, our team is not focused on providing a fair and diverse workplace, but instead surviving our next audit. Thank you.

Chairman ROE. Thank you for your testimony.

Ms. Graves?

STATEMENT OF FATIMA GOSS GRAVES, VICE PRESIDENT FOR EDUCATION AND EMPLOYMENT, NATIONAL WOMEN'S LAW CENTER

Ms. GRAVES. Mr. Chairman, Ranking Member Kucinich, and members of this subcommittee, thank you for this opportunity to testify today on behalf of the National Women's Law Center. I am pleased to speak today about the Office of Federal Contract Compliance Programs because it is an office of great importance to workers and to women in particular.

OFCCP's authority is not limited to merely responding to complaints. It proactively addresses discrimination by bringing systemic investigations, conducting compliance reviews, and providing real guidance to contractors on affirmatively promoting equal opportunity in the workplace.

The key role that OFCCP has played in improving economic security for workers and their families cannot be overstated, so though my testimony today is focused primarily on OFCCP's important work on sex discrimination and employment, OFCCP's historic and current role in addressing discrimination based on race, national origin, religion, veteran status, and disability has improved opportunities for a wide range of workers and it would be impossible in a short statement to detail it all.

Through the years OFCCP has integrated workforces and taken on large systemic problems. And as this nation recovers from the deep recession that began in 2007 and women finally begin to gain jobs that were lost even in the economic recovery, OFCCP's current role could not be more important.

In fact, as was already noted, yesterday was Equal Pay Day, the day in which women's wages finally catch up to the wages of men from the prior year. According to the most recent data available from the U.S. Census Bureau, the typical woman working full time made only 77 percent of male full-time workers' earnings. The wage gap is even larger for many women of color, with African American women making only 62 cents and Hispanic women only 54 cents for every dollar earned by white, non-Hispanic men.

OFCCP has a tremendous responsibility and opportunity to help address these and other barriers to workplace equality for women, and its regulatory agenda, along with the reinvigorated enforcement of Executive Order 11246, demonstrates that it understands the urgency of equal employment opportunities for women and their families.

To begin with, OFCCP has prioritized pay discrimination enforcement, and I saw in a document released just yesterday by the Equal Pay Enforcement Task Force that 20 percent of its financial settlements are now in the area of pay discrimination. This empha-

sis is especially important given the difficulties workers face even in identifying pay discrimination.

A recent settlement with AstraZeneca, a company with $2 billion in federal contracts, illustrates this point. After OFCCP found gender-based pay disparities it agreed to pay $250,000 to 124 current and former female employees who were paid an average of $1,700 less than their male counterparts. That is $1,700 lost for those women and their families.

Second, OFCCP has identified key areas for regulatory improvement in the area of pay discrimination, proposing measures that would allow its enforcement capabilities to be enhanced and allowing it to conduct more accurate and strategic reviews of contractor compensation practices. For example, it has proposed the rescission of two guidance documents that undermined OFCCP's ability to address pay discrimination. In addition, last fall OFCCP took the initial steps towards implementing an instrument specific to compensation data.

Since 2006, private employers have not been required to systematically report gender-or race-identified wage data to the federal government. OFCCP sought the input of stakeholders on approaches for collecting this wage data and on ways to limit the burden of data collection for employers.

And although women are typically paid less than men in the same occupation, unequal access to high-paying jobs exacerbates the persistent pay disparities between male and female workers, which leads me to my third point. The recent settlement with Tyson Fresh Meats for over $2 million in back pay wages, interest, and benefits to more than 1,600 women who, despite being qualified applicants, were rejected for positions at Tyson's plants is therefore worth highlighting.

In addition to its work on issues for women, OFCCP has importantly exercised the full range of its authority, focusing not just on Executive Order 11246 but also its authority under Section 503 of the Rehabilitation Act and VEVRAA. If anything, updates to these laws are long overdue and are really crucial in light of the extraordinary rates of unemployment experienced by both veterans and individuals with disabilities.

I will just end by saying that there is no doubt that enforcement priorities and policy proposals put forth by OFCCP stand to improve worker protections, and in these times there is no worker and really no family who can afford to have their employment opportunities limited or their wages arbitrarily lowered by discrimination. OFCCP's role is really essential.

Thank you.

[The statement of Ms. Graves follows:]

Testimony of Fatima Goss Graves
Vice President for Education & Employment
National Women's Law Center

House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions

"Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory Enforcement Actions"

April 18, 2012

Chairman Roe, Ranking Member Andrews, thank you for this opportunity to testify on behalf of the National Women's Law Center. For the last forty years, the Center has been involved in virtually every major effort to secure and defend women's legal rights, including their critical rights to equal opportunity in the workplace. And I am pleased to continue that work by speaking today about the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), an office of great importance to workers and to women in particular.

OFCCP administers and enforces the civil rights of all those employed by federal contractors and subcontractors, covering approximately one-fourth of the civilian workforce. Its authority includes Executive Order 11246, which prohibits discrimination and also requires federal contractors and subcontractors to take affirmative action to ensure that individuals, without regard to race, national origin, gender, and religion, have an equal opportunity for 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, or 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. Although my testimony today will focus primarily on OFCCP's important work in administering and enforcing the Executive Order 11246 ban on sex discrimination, and I will touch briefly on its recent regulatory work on Section 503 and VEVRAA, I must note that OFCCP's historic and current role in addressing discrimination based on race, national origin, and religion has improved opportunities for a wide range of workers and it would be impossible for one witness in a short statement to detail it all.

The key role that OFCCP has played in improving economic security for workers and their families cannot be overstated. OFCCP 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. And 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] 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.

I. Civil Rights Enforcement Is Especially Important During Difficult Economic Times.

The deep recession that began in December 2007 cost workers nearly 7.5 million jobs before it officially ended in June 2009.[2] Although between June 2009 and March 2012 the economy added over 2.3 million net jobs,[3] many groups of workers are just beginning to experience the recovery. Women overall have been slow to benefit from the official economic recovery and in fact continued to lose jobs throughout much of it. Indeed, March 2012 marked the first month that women's unemployment rate finally dropped below the 7.6 percent unemployment rate they held at the start of the recovery in June 2009, and women have regained only 13.4 percent of the jobs they lost during the recession.[4] By contrast, men have regained 38.0 percent of the jobs they lost during the recession.[5] Moreover, the unemployment rate for some groups of women has worsened – for example, between June 2009 and March 2012, unemployment rates *increased* for adult black women, from 11.6 percent to 12.3 percent.[6]

These statistics highlight what's at stake for workers seeking to obtain employment in this lopsided recovery. Although women are typically paid less than men in the same occupation, occupational segregation – the fact that the work women do is undervalued because it is women's work – also contributes to women's economic insecurity. Fields like construction and manufacturing that are nontraditional for women and minorities typically offer higher pay, higher benefits, and more opportunities for advancement than do traditionally female fields. Indeed, in the

construction workforce, earnings can be 30 percent higher than in occupations traditionally held by women,[7] yet women make up only 2.6 percent of construction workers They also are only 3.2 percent of those employed in maintenance and repair jobs and 13.6 percent of architecture and engineer workers.[8] And women of color hold only a tiny percentage of the jobs in these fields, comprising less than one percent of each workforce. Detecting and eliminating discriminatory barriers to employment – especially in high-wage fields – is therefore essential for women and their families.

Moreover, unequal access to high-paying jobs is compounded by broader pay disparities between male and female workers. Although the wage gap has narrowed since 1964, when women working full-time earned approximately 59 cents for every dollar earned by men,[9] the gap persists and has remained largely stagnant over the last decade. In fact, it is worth noting that yesterday was Equal Pay Day, the day in which women's wages finally catch up to the wages of men from the prior year. According to the most recent data available from the U.S. Census Bureau, the typical woman working full-time made only 77 percent of male full-time workers' earnings.[10] The wage gap is even larger for many women of color, with African-American women making only 62 cents, and Hispanic women only 54 cents, for every dollar earned by white, non-Hispanic men.[11] These gaps translate into a loss of $19,575 for African-American women and $23,873 for Hispanic women every year. Moreover, unequal pay harms women and their families even after women leave the jobs that pay them less, as the persistence of the wage gap results in women's loss of retirement income and lower savings.

These significant pay disparities cannot simply be attributed to the effect of choices made by women in work or family or legitimate factors that influence an individual's pay.[12] In fact, authoritative studies show that even when all relevant career and family attributes are taken into account, there is still a significant, unexplained gap in men's and women's earnings. Thus, even when women make the same career choices as men and work the same hours, they still earn less. For example, a study of college graduates one year after graduation determined that women earned only 95 percent of what men earned, even after accounting for variables such as "job and workplace, employment experience and continuity, education and training, and demographic and personal characteristics."[13] And a study by the U.S. General Accounting Office found that, even after accounting for all relevant career and family attributes for which measures were available, there was still a significant unexplained gap in men's and women's earnings that can be attributed to discrimination.[14]

II. OFCCP Has Prioritized Areas for Enforcement that Will Enhance Women's Economic Security.

The recession and ongoing recovery underscore the need for robust protections against unlawful employment practices, and OFCCP has a tremendous responsibility and opportunity to help address these barriers to workplace equality for women. Its regulatory agenda along with reinvigorated enforcement of Executive Order 11246 demonstrate that it understands the urgency of equal employment opportunities for women and their families. *To begin with*, OFCCP has prioritized enforcement against pay discrimination, which as I detailed above has a serious impact on the economic security of millions of women and their families. OFCCP's emphasis on pay discrimination is especially important given the difficulties workers face in identifying wage disparities. Nearly half of all workers nationally are either contractually forbidden or strongly discouraged from discussing their pay with their colleagues.[15] And workers can be paid unfair wages for years prior to discovering pay disparities, if they discover them at all. Even if they do discover disparities, workers may feel powerless to address them because they fear retaliation from their employers.

OFCCP is well-positioned to detect and combat pay discrimination in its enforcement of the Executive Order, and the agency's enforcement efforts and regulatory agenda are designed to make meaningful improvements in the wage gap. A recent victory by OFCCP, for example, illustrates this point. After a scheduled compliance review with Astra Zeneca, a pharmaceutical company with a $2 billion contract with the U.S. Department of Veteran's Affairs, OFCCP found gender-based pay disparities. Astra Zeneca agreed to pay $250,000 to 124 current and former female employees who were paid an average of $1,700 less than their male counterparts. In addition to the immediate payments, Astra Zeneca agreed to work with OFCCP to analyze the salaries of 415 additional employees in several states. It will also develop and annually update its affirmative action policies.

Second, OFCCP has identified key areas for regulatory improvement in the area of pay discrimination, identifying measures that would enhance its enforcement capabilities, allowing it to conduct more accurate and strategic reviews of contractor compensation practices. For example, it has proposed a rescission of two guidance documents developed in 2006 that undermined OFCCP's ability to address pay discrimination: the Interpretive Standards for Systemic Compensation Discrimination[16] and the Voluntary Guidelines for Self-Evaluation of Compensation Practices under Executive Order 11246.[17] The guidance documents limited the ability of OFCCP to use the full range of investigatory tools that may be appropriate in compensation cases, hampering the ability of OFCCP to identify cases of compensation discrimination consistent with Title VII and Executive Order 11246. They further encouraged government contractors to avoid OFCCP scrutiny of their self-evaluation procedures by using the same potentially-flawed statistical methods for compensation cases. These policy changes worked together to significantly limit

OFCCP's ability to gather wage data and detect and address wage discrimination. A change in the standards would both significantly aid OFCCP in identifying compensation discrimination among federal contractors and subcontractors and assist federal contractors in their self-audits.

In addition, last fall OFCCP took the initial steps towards implementing an instrument specific to compensation data. Since 2006, private employers have not been required to systematically report gender-identified wage data to the federal government. In an Advance Notice of Proposed Rulemaking, OFCCP sought the input of stakeholders on approaches for collecting wage data and ways to limit the burden of data collection for employers.

This policy stands to improve worker protections while taking the interests of businesses into account. In fact, a compensation tool could ultimately both reduce the existing administrative burden on law-abiding employers and OFCCP by providing a stronger predictive method to highlight within the agency's evaluation system those employers most likely engaged in compensation discrimination. Law-abiding employers would be less likely to be subjected to in-depth review of their compensation and other hiring practices because analyses made possible by the data collection tool would suggest that such employers have a low probability of non-compliance with the nondiscrimination mandate of Executive Order 11246. The process of responding to the data collection tool may raise important issues for employers, spurring them to analyze their pay and related practices. We look forward to the completion of the rulemaking process – a tool for collecting compensation data would enable OFCCP to more effectively identify pay disparities among federal contractors and identify those whose compensation practices warrant closer inspection.

Third, we are pleased that OFCCP enforcement has included prohibiting hiring discrimination by federal contractors and subcontractors in nontraditional jobs for women. The recent settlement with Tyson Fresh Meats, a Tyson Foods, Inc. subsidiary, to remedy discrimination against female applicants is a noteworthy example. Tyson Foods has significant contracts with the U.S. military and other government entities totaling more than $200 million in each of the last three years. It agreed to pay $2.25 million in back wages, interest and benefits to more than 1,650 women who, despite being qualified applicants, were rejected for positions at Tyson plants. The terms of the settlement also required that Tyson hire 220 of the affected women as positions become available. Finally, Tyson was required to review and correct employment policies to prevent the same practices from occurring in the future.

Fourth, while OFCPP's compensation-related regulatory agenda could make a real impact on the wage gap and is therefore a priority for the National Women's Law

Center, we also look forward to OFCCP's work to update the construction contractor affirmative action requirements identified in its regulatory agenda. In 1978, Executive Order 11246 was amended to set a goal for women to work 6.9 percent of federal construction contractors' work hours. After over 30 years, we believe strongly that it is time for OFCCP to revisit these requirements as they do not take into account that women's participation in the civil labor force as a whole and in many formerly male-dominated occupations specifically has increased.

III. OFCCP Section 503 and VEVRAA Regulatory Agenda

Veterans and individuals with disabilities have experienced extraordinary rates of unemployment during both the recession and economic recovery. The unemployment rate for Gulf War II-era veterans was 10.3% in March 2012 while the unemployment rate for the general population at the same time was 8.2%.[18] And the unemployment rate for individuals with disabilities is almost twice that of those who are not disabled – in March 2012, the unemployment rate for individuals without disabilities was 15.2%, while the unemployment rate for individuals without disabilities was 8.1% in March 2012.[19]

In the face of these incredibly high rates of unemployment for veterans and individuals with disabilities, OFCCP has proposed requirements that would change the way that contractors recruit and hire veterans and individuals with disabilities:

Section 503. Contractors' Section 503 requirements have been unchanged since the 1970s, and yet the unemployment rate of working-age individuals with disabilities and the percentage of working age individuals with disabilities who are not in the workforce remain much higher than for individuals without disabilities.[20] Like in the area of pay discrimination, OFCCP has taken steps to strengthen the Section 503 regulations to help ensure equal opportunity for those with disabilities in federal contractor workplaces. On December 9, 2011, OFCCP issued a notice of proposed rulemaking to inform the public about proposed changes to its regulations under Section 503. The changes included revising the nondiscrimination provisions to incorporate the legal changes made by the ADA Amendments Act of 2008 and strengthening the affirmative action provisions by detailing actions contractors must take in recruiting, training, recordkeeping, and disseminating their affirmative action policies. Contractors also would be required to measure the effectiveness of their affirmative action efforts through a national utilization goal of 7% for the employment of individuals with disabilities in each job group of the contractor's workforce.[21]

VEVRAA. Veterans returning from service face significant obstacles in obtaining employment, including explaining their military experience to civilian employers[22] and the stigma associated with psychological injuries and mental health treatment.[23] Yet the framework of contractor obligations regarding VEVRAA has not

been revised since the initial regulations were published in 1976[24] and thus do not reflect the employment situation that returning veterans now face. Among other things, the regulations would prompt 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.

These OFCCP proposals shine a light on the obstacles that veterans and individuals with disabilities face in securing employment and continue in the long OFCCP tradition of ensuring that workers have equal access to employment and that workplaces that are equitable.

* * *

For nearly fifty years, the federal government has operated from 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. But OFCCP's role in administering and enforcing the ban on discrimination in federal contracting is especially important in these times when no worker – indeed no family – can afford to have their employment opportunities limited or their wages arbitrarily lowered by discrimination.

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[1] *WEAL v. Weinberger*, Civ. No. 74-1720 (D.D.C., filed Nov. 26, 1974), subsequently *WEAL v. Califano*.

[2] NWLC calculations from U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Employment Statistics Survey, Table B-5: Employment of women on nonfarm payrolls by industry sector, seasonally adjusted, available at http://bls.gov/ces/cesbtabs.htm (last visited Apr. 6, 2012).

[3] NWLC calculations from U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Employment Statistics Survey, Table B-5: Employment of women on nonfarm payrolls by industry sector, seasonally adjusted, *available at* http://bls.gov/ces/cesbtabs.htm (last visited Apr. 6, 2012).

[4] NWLC calculations from U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey (hereinafter "BLS Current Population Survey"), Table A-1: Employment status of the civilian population by sex and age, seasonally adjusted, *available at* http://www.bls.gov/news.release/empsit.nr0.htm (last visited Apr. 6, 2012). All adult unemployment rates are for individuals 20 and older.

[5] NWLC calculations from U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Employment Statistics Survey, Table B-5: Employment of women on nonfarm payrolls by industry sector, seasonally adjusted, available at http://bls.gov/ces/cesbtabs.htm (last visited Apr. 6, 2012).

[6] NWLC calculations from BLS Current Population Survey, Table A-2: Employment status of the civilian population by race, sex and age, seasonally adjusted, available at http://www.bls.gov/news.release/empsit.nr0.htm (last visited Apr. 6, 2012).

[7] NWLC calculations from Bureau of Labor Statistics, Current Population Survey, 2011 Annual Averages, Table 39. Median weekly earnings of full-time wage and salary workers by detailed occupation and sex, available at http://www.bls.gov/cps/cpsaat39.pdf.

[8] Bureau of Labor Statistics, Current Population Survey, 2011 Annual Averages, Table 11. Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, available at http://www.bls.gov/cps/cpsaat11.pdf

[9] NWLC calculations from U.S. Census Bureau, Census Bureau CPS Data (ASEC), Historical Tbl. P-38: Full-Time, Year-Round Workers by Median Earnings and Sex in 1964, *available at* http://www.census.gov/hhes/www/income/data/historical/people/index.html (last visited Oct. 4. 2011).

[10] NATIONAL WOMEN'S LAW CENTER, POVERTY AMONG WOMEN AND FAMILIES, 2000-2010: EXTREME POVERTY REACHES RECORD LEVELS AS CONGRESS FACES DIFFICULT CHOICES 10 (September 2011), *available at* http://www.nwlc.org/sites/default/files/povertyamongwomenandfamilies2010final.pdf.

[11] NWLC calculations from U.S. Census Bureau, Current Population Survey, 2011 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2010 – People 15 Years Old and Over by Total Money Earnings in 2010, Age, Race, Hispanic Origin, and Sex, *available at* http://www.census.gov/hhes/www/cpstables/032011/perinc/toc.htm (last visited Sept. 27, 2011).

[12] *See, e.g.*, Cheryl Travis, et al., *Tracking the Gender Pay Gap: A Case Study*, 33 PSYCHOL. WOMEN Q. 410, 410-11 (2009) (citing studies).

[13] *See* AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, BEHIND THE PAY GAP 17, 18 (2007), *available at* http://www.aauw.org/learn/research/behindPayGap.cfm.

[14] *See* U.S. GENERAL ACCOUNTING OFFICE, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS (2003), *available at* http://www.gao.gov/new.items/ d0435.pdf.

[15] Institute for Women's Policy Research (IWPR), Fact Sheet: Pay Secrecy and Wage Discrimination (June 2011), *available at* http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination.

[16] Office of Federal Contract Compliance Programs; Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination; Notice, 71 Fed.Reg. 35,124 (June 16, 2006) (hereinafter "Standards").

[17] Office of Federal Contract Compliance Program; Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination; Notice, 71 Fed. Reg. 35,114 (June 16, 2006) (hereinafter "Voluntary Guidelines").

[18] Bureau of Labor Statistics, Table A-5. Employment status of the civilian population 18 years and over by veteran status, period of service, and sex, not seasonally adjusted (Apr. 2012), *available at* http://www.bls.gov/news.release/empsit.t05.htm

[19] Bureau of Labor Statistics, Table A-6. Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted (Apr. 2012), *available at* http://www.bls.gov/news.release/empsit.t06.htm.

[20] Office For Federal Contract Compliance Programs, Section 503 of the Rehabilitation Act

Notice of Proposed Rulemaking (NPRM), *available at* http://www.dol.gov/ofccp/regs/compliance/faqs/Section503_NPRM_faq.htm (last visited Apr. 13, 2012).

[21] *See* Office of Federal Contract Compliance Programs, Frequently Asked Questions, Section 503 of the Rehabilitation Act Notice of Proposed Rulemaking (NPRM), *at*

http://www.dol.gov/ofccp/regs/compliance/faqs/Section503_NPRM_faq.htm#Q9. Other proposed measures include requiring contractors to invite individuals with a disability to voluntarily self-identify at the pre-offer and post-offer stages, requiring that contractors conduct regular anonymous surveys of their employees to provide employees another opportunity to self-identify, and providing for electronic posting of employee rights and contractor obligations. *See id.*

[22] 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").

[23] *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).

[24] Office for Federal 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#Q3 (last visited Apr. 13, 2012).

Chairman ROE. Thank you.
Ms. Horvitz?

STATEMENT OF ALISSA HORVITZ, SHAREHOLDER, LITTLER MENDELSON, P.C.

Ms. HORVITZ. Mr. Chairman, Ranking Member Kucinich, and members of the subcommittee, thank you for the opportunity to speak with you today regarding the Department of Labor's Office of Federal Contract Compliance Programs. The OFCCP is the Department of Labor agency charged with ensuring that companies receiving federal dollars in the form of contracts—not grants or fed-

eral financial assistance—are practicing the two-fold obligation: to engage in affirmative action by using good faith efforts to increase the representation of qualified females, minorities, individuals with disabilities, and veterans, in candidate or applicant pools when opportunities become available; and two, to ensure that when the company's decision-makers have an opportunity to make a decision to hire, to promote, to terminate, to set compensation, that they are doing so fairly and in accordance with the principles of equal employment opportunity.

OFCCP's mission is an important one and one that I would not want to see eliminated.

I know that being a federal government contractor has repeatedly been heralded as a privilege and not a right. However, I also understand that many in the business community—and especially the small business community—are incredibly frustrated because being a government contractor under the current OFCCP administration has become so overwhelmingly burdensome under the existing regulatory framework, and it is anticipated to become significantly and substantially more burdensome if OFCCP's proposed regulations are adopted without change.

Several of my clients have terminated their relationship with the federal government when their contracts ended and others are making the decision not to get into the relationship with the government because of the immense startup costs, burdens, hurdles, and compliance barriers that OFCCP has placed in their path. I am thoroughly convinced that more companies would be willing to contract with the government if at lower contract dollar values they could be exempted from some of these onerous provisions. It would drive up competition and it would drive down taxpayer costs.

In my opinion, the dollar threshold to impose affirmative action plan obligations on supply and service contractors should be raised from the current threshold of a mere $50,000 to a tiered approach based on contract values starting at $250,000. And the implementation time before OFCCP can select the company for an audit should be extended from its current 120 days to 12 months, if not longer. I am advocating for audit exemptions for companies that don't have contracts worth $1 million in the first year working with the government.

In addition, despite the administration's repeated statement that it was going to be more transparent, the current OFCCP administration has been decidedly nontransparent in very critical respects. For example, in December 2010 OFCCP issued Directive 293, which purported to set forth the circumstances under which OFCCP would assert jurisdiction over various health care providers and pharmaceutical suppliers. As of April 16, 2012, when these remarks were written, that directive was nowhere to be found on OFCCP's Web site.

It also issued a directive in June of 2010 which sets forth how the compliance officers are supposed to be evaluating pay during routine compliance review, but that directive is not available to contractors. How are companies who want to do the right thing and be in compliance proactively supposed to do that when OFCCP does not publish the directives it later enforces and without advising government contractors how to self-evaluate their own data?

In my experience, when some companies have gone to OFCCP's district offices to attend compliance assistance seminars and meetings and have asked, how is OFCCP evaluating compensation, its district offices have not provided any answers. It seems fundamentally contrary to notions of due process that companies should be accused of violating OFCCP's regulations when the agency doing the enforcing has failed to identify the benchmarks and standards that companies should follow.

In my experience, OFCCP's conduct during compliance reviews is one of the principal reasons why more companies do not want to contract with the government. There is no current compliance manual that defines how audits ought to be conducted, which has led to OFCCP's compliance officers conducting these audits very differently across its six regions. The most onerous aspect of OFCCP's reviews is the scrutiny it gives to non-hired applicants.

I have found that OFCCP will develop its own database, make its own judgment about whether an applicant was qualified or not, and then refuse to discuss its database. There is no room for negotiation with the agency in these situations.

In short, OFCCP's approach to compensation is not transparent, not consistent, not well-defined, and arbitrary. The notion that OFCCP can develop a Web-based, uploadable tool in a one-size-fits-all approach to compensation, in my opinion.

In conclusion, much has changed at OFCCP in the last several years. I appreciate the agency's commitment to achieving its mission. However, I have seen that the contractor community is increasingly frustrated by the negative tenor of these audits, the perception that compliance officers approach audits with an eye towards finding violations, and citing employers for noncompliance, and the increased willingness to take contractors into enforcement if they are unwilling to agree to the very harsh negotiation tactic that OFCCP employs at the conclusion of these reviews.

We hope that there is a great willingness to be more objective, less biased, and more conciliatory, especially when dealing with employers that truly are trying to do the right thing and be in compliance with the laws and regulations that OFCCP enforces. I contend that an open and clear communication of contractors' compliance obligations is a better use of OFCCP's resources and will go further in achieving the agency's mission.

Thank you very much.

[The statement of Ms. Horvitz follows:]

Prepared Statement of Alissa A. Horvitz, Esq., Shareholder, Littler Mendelson, P.C.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: Thank you for the opportunity to speak with you today regarding the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

I am a shareholder in the Washington D.C. office of Littler Mendelson, P.C. and one of the two co-chairs of our OFCCP Practice Group. My practice is devoted to working with companies that choose to do business with the federal government and to helping them to comply with the equal opportunity laws that OFCCP enforces.

My testimony today is based on my own personal views and does not reflect the views of Littler, its attorneys, or of any other organization or client.

The OFCCP is the Department of Labor agency charged with ensuring that companies receiving federal dollars in the form of contracts—not grants or federal financial assistance—are practicing their two-fold obligation:

(1) to engage in affirmative action by using good faith efforts to increase the representation of qualified females, minorities, individuals with disabilities and veterans in candidate or applicant pools when opportunities become available; and

(2) to ensure that when the company's decision makers have an opportunity to make a decision—to hire, to promote, to terminate, to set compensation—that they are doing so fairly and in accordance with the principles of equal employment opportunity.

OFCCP's mission is an important one, and one that I would not want to see eliminated. It performs this mission by engaging in compliance assistance and by conducting random audits known as compliance reviews. OFCCP conducts roughly 4,000 compliance reviews per year.

The Dollar Threshold Should Be Raised

Different compliance obligations are triggered depending on the value of the federal contract, but in my opinion, the dollar threshold to impose these obligations is far too low for the burden placed on companies.

When the aggregated value of all the company's federal contracts in a 12-month period exceeds a mere $10,000, onerous record keeping and subcontractor flow down obligations are triggered.

At a mere $50,000 from one single contract (not an aggregate), the company must prepare two written affirmative action plans—one for women and minorities, which plan includes extensive annual data analyses, and a second plan for individuals with disabilities. Because $50,000 is the dollar threshold that triggers written affirmative action plans, contracts above this dollar threshold are subject to audit.

With a single contract worth $100,000, the obligation to prepare an affirmative action plan for veterans is triggered, and contractors must also undertake the separate obligation to ensure that throughout the organization, including establishments and facilities at which no government contract work is performed, every job vacancy is listed with requisite state and local job banks, unless the job is a temporary job lasting 3 days or less, unless it is a senior management or high-level executive position, or it will be filled with an internal candidate. It does not matter whether the state and local workforce agencies are amply funded, or not, or are able to refer the employer any qualified candidates, or not.

I know that being a federal government contractor has repeatedly been heralded as a privilege and not a right. However, I also understand that many in the business community (and especially the small business community) are incredibly frustrated because being a government contractor under the current OFCCP administration has become so overwhelmingly burdensome under the existing regulatory framework, and is anticipated to become significantly and substantially more burdensome if OFCCP's proposed regulations are adopted without change. Several of my clients have terminated their relationship with the federal government when their contracts ended and others are making the decision not to get into the relationship with the government because of the immense start-up costs, burdens, hurdles and compliance barriers that OFCCP has placed in their path. I am thoroughly convinced that more companies would be willing to contract with the government if, at lower contract dollar values, they could be exempted from these onerous provisions. It would drive up competition and drive down taxpayer costs. In my opinion, the dollar threshold to impose affirmative action plan obligations should be raised from the current threshold of $50,000 to a tiered approach based on contract value starting at $250,000, and the implementation time before OFCCP can select the company for an audit should be extended from its current 120 days to 12 months, if not longer.

I do not believe that raising the dollar threshold, which triggers the heavy administrative burdens, will cause otherwise law-abiding companies, already subject to other federal and state nondiscrimination laws, to begin engaging in intentional discrimination if their contracts are below that value.

I am advocating for audit exemptions for companies that do not have contracts worth at least $1,000,000 in the first year working with the government. If the contract is worth $500,000, the company could be audited after two years. If the contract is worth $250,000, it could be audited after completing its third year. Congress needs to give smaller and medium businesses that are new to these obligations adequate time to evaluate the profit margin from these contracts and to take steps to comply with OFCCP's obligations.

In addition, despite the Administration's repeated statements that it was going to be more transparent, the current OFCCP administration has been decidedly nontransparent in critical aspects. For example, on December 16, 2010, OFCCP issued Directive 293, which purported to set forth the circumstances under which OFCCP would assert jurisdiction over various health care providers and pharmaceutical

suppliers. As of April 16, 2012, when these remarks were written, that directive still was nowhere to be found on OFCCP's website. OFCCP's recent enforcement settlement with Federal Express was posted on OFCCP's media page the same day as the settlement was announced, but significant and desperately-needed guidance to the health care industry is available only if you obtain a copy of the directive through other means.

OFCCP also issued Directive 289 on June 4, 2010, which sets forth how compliance officers are supposed to be evaluating pay during routine compliance reviews, but this directive is not available to contractors, either. Contractors are expected to evaluate employees' pay annually to ensure that there are no gender, race, or ethnicity-based disparities, but OFCCP has not published any information or guidance that sets forth how it is going to evaluate compensation during audits, and yet from June 2010 through at least the beginning of this year, OFCCP was using this new protocol in audits.

How are companies who want to do the right thing and be in compliance, proactively, supposed to do that when OFCCP does not publish the directives it later enforces and without advising government contractors how to self-evaluate their own data? In my experience, when some companies have gone to OFCCP's district offices to attend compliance assistance seminars and meetings, and have asked how OFCCP is evaluating compensation, OFCCP's district offices have not provided an answer. It seems fundamentally contrary to notions of due process that companies could be accused of violating OFCCP's regulations when the Agency doing the enforcing has failed to identify the benchmarks and standards that companies should follow.

Compliance Burdens

Once the value of all the company's contracts over the course of 12 months exceeds $10,000, there are two compliance burdens that begin:

(1) the obligation to notify all subcontractors and vendors that they, too, may have affirmative action obligations if the work they perform is necessary to the performance of a government contract (41 CFR Section 60-1.4(a)(7)); and

(2) the extraordinary record keeping obligations set forth in section 60-1.12.

For example, if one small research lab in a large hospital enters into a research contract with an agency of the federal government, then the entire hospital is required to ensure that for each and every position it seeks to fill—both internally and externally—it must implement a way to track every single expression of interest in employment that it receives.

- If a recruiter does not look at the expression of interest, the company must develop a way to default that application to "not considered."
- If the recruiter looks at the resume or electronic application, the recruiter must evaluate the candidate's credentials to determine if the candidate is qualified or not.
- If the candidate is not qualified, the company must still maintain a record of that application for two years from the making of the record or the hiring decision, whichever is later.
- If the company is a small business, and the value of its contract is more than $10,000 but less than $150,000, it is obligated to keep those records for only one year.
- For each qualified candidate, the company must be able to identify every stage of the hiring process that the candidate made it through, and for every qualified candidate who is not hired, the burden is on the employer to have documentation that explains why the qualified candidate was not hired.
- For each qualified candidate, the employer must solicit the applicant's race and gender. If, over time, a sufficient percentage of candidates voluntarily elects not to disclose that information, OFCCP might substitute labor market availability for actual data in an effort to find that the contractor is engaging in discrimination against females or a racial subgroup.
- The contractor must develop a mechanism to solicit race and gender, then ensure that the actual decision makers do not have access to that information, but cross reference the hidden information back to the candidate's application every year for purposes of evaluating whether managers—who did not have access to race and gender information—nonetheless rejected a disproportionate percentage of applicants based on race or gender, even though they did not have access to that information unless and until the candidate was interviewed.
- If the contractor does have records of who applied, OFCCP might go to the state workforce agency and locate expressions of interest that the agency collected and deem them to be potential victims of hiring discrimination, even though there is no proof that the employer actually considered those individuals for employment.

At the $50,000 level, and as part of the written affirmative action plan for women and minorities, employers are expected to perform three sets of data analyses:

(1) a comparison of employment against availability,

(2) analyses of hiring rates, promotion rates and termination rates to ensure that those rates do not differ significantly for men compared to women, or any one racial sub group against all other racial subgroups, and

(3) a compensation analysis.

Under the goal-setting compliance obligation, for any grouping of titles in the workforce (which grouping the employer has discretion in developing), if the contractor's employment of females and minorities is less than reasonably expected, the employer is obligated to set a hiring goal. There are no fines or penalties for not meeting the goal, but there is an obligation on the part of the employer to identify the goal in its written affirmative action plan under the "Identification of Problem Areas" section of the plan, and there is an obligation for the employer to develop an "action oriented program" for each group with a goal, designed to improve the representation of qualified females or minorities when opportunities arise in the future. If the employer hires externally for such vacant positions, initiatives might include the use of new recruiting sources, outreach to organizations that help to place qualified females and minorities, and the like. If the employer tends to promote from within, then ensuring that women and minorities are trained and mentored could be examples of action-oriented programs for those job groups.

Still at the $50,000 level, government contractors also have obligations under the regulations that implement Section 503 of the Rehabilitation Act of 1973, which deals with individuals with disabilities. Employers are required to include the EO Clause in each of their covered contracts or subcontracts. Employers must make available the entire written affirmative action program to any employee or applicant for employment upon request.

Employers must also include the following sections and legal commitments in a written affirmative action program under Section 503:

1. Prepare an equal opportunity policy statement that indicates the Chief Executive Officer's commitment and that it is updated annually.
2. Review personnel processes to ensure they provide for careful and systematic consideration of the job qualifications of applicants and employees with disabilities.
3. Establish a schedule for the periodic review of all physical and mental job qualification standards to ensure that qualification standards are job related and do not screen out otherwise qualified disabled applicants and employees.
4. Make reasonable accommodation to the physical and mental limitations of otherwise qualified individuals with disabilities unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.
5. Develop and implement procedures to ensure that its employees are not harassed because of any disability.
6. Undertake appropriate outreach and positive recruitment activities to recruit qualified individuals with disabilities.
7. Ensure adequate internal support from supervisory and management personnel to encourage them to take the actions necessary to meet the contractor's affirmative action obligations, and disseminate its policy internally.
8. Design and implement an audit and reporting system that measures the effectiveness of the contractor's affirmative action program.
9. Designate an official to be assigned responsibility for implementing the contractor's affirmative action program.
10. Train all personnel involved in the recruitment, screening, selection, promotion, evaluation, and discipline systems to ensure that the contractor's commitments are implemented.

At $100,000, the Veterans obligations begin. They largely overlap with the Section 503 regulations, but the additional obligation to list every nonexecutive, non-temporary, and non-internal position with the employment service delivery systems is a tremendous burden for small businesses who, after subtracting expenses from revenue, often cannot afford a third-party vendor costing tens of thousands of dollars annually, who can scrape the employer's website for new vacancies and ensure that they are posted properly. It is also an unreasonable burden for employers seeking highly skilled professionals, to be forced to use these one-stop employment service delivery systems because the candidates being referred are not likely to be qualified. A university looking for a Ph.D. assistant professor candidate in physics still has to list that assistant professor job with the unemployment office or it is a violation of the Veterans' regulations that OFCCP enforces. A hospital looking for a Neurosurgeon has to list that vacancy with the one-stop employment service delivery system.

In sum, these burdens are currently imposed on all companies doing business with the government at very low thresholds. Profits from low-dollar contracts do not begin to cover the costs of ensuring that each one of these obligations is met within 120 days of signing the contract, or the in case of the mandatory job listings, on the date that the contract is signed.

Compliance Reviews

In my experience OFCCP's conduct during compliance reviews is one of the principal reasons why more companies do not want to contract with the government. There is no current compliance manual that defines how audits ought to be conducted, which has led to OFCCP's compliance officers conducting these audits very differently across OFCCP's six regions. For almost two years now, OFCCP has made representations to the contractor community that it is revising and republishing the manual.

The most onerous aspect of OFCCP's compliance reviews is the scrutiny it gives to non-hired applicants.

Using twelve (12) months of data from the employer's HRIS or payroll system, the employer is expected to know for each vacancy it filled, who was the qualified applicant pool. The employer is required to evaluate hiring rates of women against men, and every racial group against all other racial groups that comprise 2% of the labor force or 2% of the employer's workforce. If any of these applicant and hire equations reveals statistically significant differences in hiring rates, the OFCCP compliance officers are trained to follow up with the employer and obtain a substantial amount of underlying data, including all resumes, applications, interview notes, and the like to evaluate whether the employer's decisions were based on legitimate, nondiscriminatory reasons. The burden is on the employer to have all this documentation going back two years (unless it is a small business with fewer than 150 employees) because if it does not, OFCCP will presume that the information would have been unfavorable to the employer. It will launch burdensome information requests for every application that the employer included on its applicant flow log, and it will come onsite to the employer's premises to interview HR managers, recruiters, hiring managers, and hired employees. In my experience, in its search for anecdotal evidence, it will also interview rejected applicants.

Many employers have had to invest in expensive electronic applicant tracking systems in order to maintain this information. To make it easier for recruiters to fill positions and record the reasons why an applicant might not be the most qualified person for the job, many of these applicant tracking systems use disposition codes—a code to indicate why the applicant was rejected.

OFCCP affords employer applicant flow log disposition codes little to no deference in audits. If the employer's human resource managers coded applications as "not qualified," "unstable work history," "lacks relevant experience," OFCCP compliance officers will likely attempt to substitute their judgment for the employer's judgment and include those rejected candidates in OFCCP's remedies if the employer hired only one person whose resume or application appeared to include "unstable work history" or lacking in relevant experience. Again, in my experience, a number of OFCCP compliance officers equate even the littlest inconsistency in an employer's hiring process with intentional discrimination.

When the hiring rates for women are greater than the hiring rates for men, or the hiring rates for minorities are greater than the hiring rate for nonminorities, OFCCP will still pursue information requests if those hiring rates are statistically significantly different. It apparently does not matter whether the employer had a goal for women or minorities, and tried to increase the percentage of qualified females or minorities in the candidate pools. If the employer's hiring rates are not proportional based on the applicant population, OFCCP will follow up in audits. I have found that there is most definitely a perception among the equal employment opportunity and diversity professionals charged with compliance that there is a no-win situation with many of OFCCP's compliance officers. These auditors are apparently approaching audits as if the employer is presumed to have discriminated and presumed to have lost records.

If the employer fails to maintain complete and accurate records that will explain the nonselection of all qualified candidates, OFCCP will seek back pay remedies on behalf of the non-hired applicants who appear on paper to be just as qualified as the hired employees. When OFCCP is pursuing an adverse impact in hiring case, the applicant flow data base is very important. It forms the basis for the OFCCP's argument as to who applied, who was qualified, who wasn't interviewed, who wasn't hired. In too many recent cases, I have found that OFCCP will develop its own database, make its own judgment about whether an applicant was qualified or not, and refuse to discuss the database. The applicant flow database—which forms the basis

for the OFCCP's assertion of monetary relief—is "off the table." There is no room for negotiation with the Agency in these situations. If the employer "accepts" the database, it is responsible for locating all non-hired applicants and affording them monetary back pay relief. Every non-hired applicant has to get added to the employer's payroll for purposes of paying back pay and withholding taxes, and then once the checks are cut, the alleged victims of discrimination are removed from the payroll so that they are not inadvertently counted in future affirmative action plan reports.

When an employer with incomplete records is accused of violating the Executive Order and OFCCP's regulations, and OFCCP seeks to negotiate a conciliation agreement, I have found the employer is facing an Agency that will not negotiate a reasonable settlement offer. In my experience, OFCCP begins settlement negotiations under the presumption that the non-hired candidates could never have found other, alternative employment, even at the minimum wage, until much later in the negotiating process. Opening offers seem artificially inflated. Indeed, OFCCP in the current administration frequently asks the employer to begin negotiations by coming up with the amount it is willing to pay; OFCCP does not open negotiations by valuing the non-hired applicants' alleged loss and adjusting for median tenure or wage mitigation.

OFCCP audits can proceed quickly, some closing in less than 30 days. The more common scenario, however, is that an OFCCP audit can last more than a year. Our law firm has at least four audits that are approximately five years old. OFCCP currently is seeking regulatory authority to expand the temporal scope of a compliance review. Right now, OFCCP can review two years' of data looking back from the date that the employer receives its audit letter. OFCCP is proposing to increase the scope of the audit so that the audits can stay open indefinitely. I understand that many in the contractor community have strongly opposed that provision in the proposed veterans and 503 regulations, and Congress ought to step in and ensure that audits cannot cover a data period more than the current two-year period going back from the date the audit letter is received.

Compensation

The other issue that has frustrated government contractors in my experience is OFCCP's position on compensation. Although OFCCP has no standards or guidance to employers about how it will evaluate compensation in audits, OFCCP compliance officers have been focusing on every job title where there is a 2% or $2000 difference and requiring the contractor to justify the difference. If the employer wants to justify the difference based on prior relevant experience, it needs to produce a resume or application supporting that difference. If the employer wants to justify the difference based on performance, it needs to have performance evaluations.

Because of how OFCCP enforces its unpublished, stealth directive on compensation, labor market demands and economic factors are not taken into consideration by compliance officers pursuing information requests.

Most employers present their compensation data in an audit by job title because in most workplaces, individuals who are placed into the same title often (but not always) are doing similar work. At the first phase of the audit, when an employer is required to provide summary compensation, the OFCCP compliance officer looks to see if there are any job titles with 2% or $2000 differences. If just one title has this 2% or $2000 difference, OFCCP has sent out a form letter seeking additional information from the government contractor for every job title in the establishment being audited. It does not matter whether the job has one single incumbent, or all incumbents in the job title are all the same race or the same gender. OFCCP demands that the employer produce the additional information on everyone, and if the employer does not have the information stored in an easily retrievable human resource information system or payroll system, the OFCCP will come on site, demand the production of employee personnel files, and it will build this data base itself.

This focus on whether there are current differences in average pay, however, has no basis in Title VII compensation law. Under Title VII, as amended by the Lilly Ledbetter Fair Pay Act of 2009, a plaintiff in litigation must be able to point to a decision that the employer made that was discriminatory. OFCCP, despite its stated intention to follow Title VII principles when it investigates compensation, is not doing that. OFCCP is focused on whether there are disparities or differences in current pay. If there are differences in pay, then I have found that OFCCP immediately shifts the burden of producing a nondiscriminatory reason back onto the employer—for every job in the workplace with a 2% or $2000 difference. Employers with tens of thousands of employees in one AAP are spending months trying to justify current compensation, pulling thousands of paper and electronic files, looking at resumes and applications, refreshing their recollections as to why pay was initially set as it

was decades ago. Employers that have acquired new companies with very different salary structures are not given recognition for how long legacy differences in pay are allowed to exist.

What OFCCP compliance officers ought to be focusing on are employer decisions made during the audit time frame, typically a 12-month period preceding the audit letter's receipt. When the government contractor had an opportunity to hire someone, or promote someone, or make salary increases, did it do so fairly and in accordance with equal employment principles?

In addition, during an onsite visit, OFCCP interviews managers responsible for setting compensation and employees to build a record of everything that the employees do that are the same. OFCCP compliance officers typically do not focus on parts of the job that are different, and the employer may not have an attorney or management representative in employee interviews to ensure that the compliance officer's questions are fair, objective and balanced. In short, OFCCP's approach to compensation is not transparent, not consistent, not well-defined, and arbitrary in audits. The notion that OFCCP can develop some type of web-based, data uploadable tool in a one-size-fits-all approach is the wrong approach, in my opinion. It is not going to enable OFCCP to hone in on compensation decisions that were made unlawfully based on race, ethnicity, or gender, and it is going to place unreasonable documentation and record keeping burdens on already-thinned human resource and equal opportunity staff, who are trying to comply with these laws and regulations.

Reinstate the Ombudsman

During prior OFCCP administrations, there was an Ombudsman—someone at OFCCP whose job it was to field concerns about inconsistent positions among the OFCCP's compliance officers and district officers and enable these types of concerns to be dealt with efficiently. In my view, it would be a positive development if the Ombudsman position could be reinstated.

Separate Facility Exemptions

Finally, I question why it takes approximately two years for OFCCP to evaluate an employer petition for a separate facility exemption. In 2002, OFCCP developed a process for companies (particularly retail companies) to apply for an exemption for those facilities not connected with a government contract. The idea behind the exemption was that if a clothing retailer, which had hundreds if not thousands, of stores in malls and shopping centers all across the nation, was also selling clothes to the military, for example, but only out of its corporate office or its distribution center, OFCCP could be petitioned to require the corporate office and the distribution center to have to comply with all these rules and regulations, but OFCCP would grant the employer an exemption for all the small retail stores in the malls and shopping centers. It seemed to be a fair and reasonable approach to all these compliance burdens. I do not know how many pending separate facility exemption petitions are currently pending at OFCCP, but I do not understand why it should take upwards of 19 months, which is very burdensome for employers waiting for a response.

Functional Affirmative Action Plans (FAAPs)

OFCCP's regulations explain that an employer is expected to have a separate affirmative action plan for each facility with 50 or more employees. In some larger workplaces, the notion of having an AAP tied to a physical building is artificial. Workforces are spread out among several different physical buildings, but they report to the same executive. Splitting up the workforce into separate physical establishments makes it harder for that executive to appreciate whether his or her workforce has any employment goals for women and minorities, or whether when that executive's managers and directors made hiring, promotion, and termination decisions, those decisions were made fairly.

Rather, I believe it makes more sense for the employer to be able to prepare an affirmative action plan based on a functional organizational unit, like a division or department. OFCCP developed a process known as the Functional Affirmative Action Plan (FAAP) directive that allows an employer to petition OFCCP for permission to prepare its plans on a functional basis. In 2011, however, OFCCP revised the 2002 FAAP directive and required that all employers that previously had been granted permission to prepare plans on a functional basis had to re-apply for permission to prepare plans that way. A term or condition of the 2011 re-approval process is that the contractor agrees when audited to provide all applicant flow, hires, promotions, terminations, and compensation data in Microsoft Excel or Access, not pdf. There is no such obligation under other current regulations.

In addition, if the contractor wants to renew the FAAP agreement, at least two FAAP facilities will have to undergo a compliance evaluation during the three-year

term of the FAAP approval. Thus, under OFCCP's new FAAP approval process, companies that wish to continue preparing AAPs on a functional basis are guaranteed to undergo at least two audits. If the company has only four functional agreements, it is 100% guaranteed to have 50% of its plans audited every three years, if it wants to continue doing business with the federal government and prepare its plans in a manner that makes more sense. The new directive comes across as harsh and punitive. It is clearly a game-changer for many companies that thought preparing plans on a functional basis was a better way to track and report employment data.

In conclusion, much has changed at OFCCP in the last several years. I appreciate the Agency's commitment to achieving its mission. However, I have seen that the contractor community is increasingly frustrated by the negative tenor of compliance reviews, the perception that compliance officers approach audits with an eye towards finding a violation and citing the employer for noncompliance, and the increased willingness to take contractors into enforcement if they are unwilling to agree to the often harsh negotiation tactics that OFCCP may employ at the conclusion of these reviews. We hope there is a greater willingness to be more objective, less biased, and more conciliatory, especially when dealing with employers that truly are trying to do the right thing and be in compliance with the laws and regulations that OFCCP enforces. I contend that an open and clear communication of contractors' compliance obligations is a better use of OFCCP's resources and will go further in achieving the Agency's mission.

Chairman ROE. Thank all the witnesses.

Mr. Kucinich?

Mr. KUCINICH. Thank you very much, Mr. Chairman.

As I am listening to the testimony one of the things that strikes me is that we have got men and women out in the field right now with their lives on the line—veterans that will be returning home. They put their lives on the line, they want—and there is a very high rate of unemployment among returning veterans—but can't find jobs.

The best shot they have is when you have requirements that if somebody has a federal contract, if anyone wants to go to work with them that the veteran is going to have some protection in making sure that the law is going to be enforced with respect—with respect to returning veterans, and if the regulations that are being proposed right now are not put in force we are looking at veterans having really less opportunities. I want to point out that in April 2011 the OFCCP issued a proposal to strengthen the nondiscrimination and affirmative action protections for veterans, and it proposed its regulations in response to the employment obstacles that veterans are facing when they return from Iraq and Afghanistan.

We have a national unemployment rate of about 8.2 or 8.3 percent; the unemployment rate for veterans serving on active duty at any time after September 2001 was 12.1 percent in 2011, and 26 percent of recently returning veterans reported having a service-connected disability in August 2011.

Excuse me, but federal contractors wouldn't even have the ability to participate in these programs if you didn't have veterans who are protecting the rights of all of us. And it doesn't seem like it would be asking much when these men and women come home to just say, "Well, you have got to jump through a few extra hoops to make sure that somebody is giving a fair them opportunity." Now, this is one of the reasons why the Paralyzed Veterans of America are supporting not just annual hiring bench, but that you have them supporting the proposal of the OFCCP.

But you have opponents like the Chamber of Commerce. I mean, what a bunch of phonies at the Chamber of Commerce. You know, they are the first to wave the flag when our men and women are over there, but when they come back they are the ones that are fighting the efforts to try to make sure that reporting requirements are there to insist that these men and women get hired. So please——

Now, Mr. Norris—how much time we got left—in your testimony you say that this proposed legislation would be detrimental to business. However, you have companies, including Bayer, Highmark, Amerigroup, American Airlines, and Walgreens—they have recognized the benefits of hiring individuals with disabilities and they have written in support of this regulation.

And, Mr. Chairman, without objection I would like to submit these letters for the record from these corporations.

[The information follows:]

American Airlines

Will Ris
Senior Vice President
Government Affairs

Debra A. Carr
Director, Division of Policy, Planning, and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN Number 1250-AA02

Dear Director Carr:

On behalf of American Airlines, I write in support of the Department's proposed rule on "Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities," implementing Section 503 of the Rehabilitation Act of 1973.

At American we approach this issue in two ways. First, as a transportation company we are well aware that for most people mobility is a critical component in leading a fulfilling life and achieving professional success. Hence at American we not only provide accommodations for people with disabilities, but we actively welcome them as passengers. Second, we strive to have a workforce that reflects the breadth and diversity of our customers. That means as we think about diversity of our employees, we include representation of people with disabilities as one of the groups for which we take affirmative action.

Accordingly, it is our policy to recruit and welcome people with disabilities to fill critical positions in our company when they arise. Indeed, we support a very active employee organization called our Abilities Resource Group. We utilize this organization of employees to organize recruiting and mentoring events designed to raise awareness of opportunities in our company for individuals with disabilities. These activities take place in numerous communities throughout our network. American's Legal Department, through our General Counsel, Gary Kennedy, was the very first corporate legal department in the country to sign the ABA Commission on Disability Rights "Pledge for Change" to promote diversity, and especially disability diversity, in the legal profession.

1101 17th Street NW, Washington, DC 20036
(202) 496-5650, Fax: (202) 496-5968

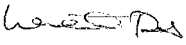
On the national level for more than a decade we have been the only major airline supporter of the American Association of People with Disabilities (AAPD) which has as part of its mission reducing the massive unemployment of people with disabilities and educating the business world on the advantages of both hiring and serving this population.

We also provide a substantial amount of transportation and support to members of the military wounded in action during the conflicts in Iraq and Afghanistan. We want to be as helpful as possible in assisting them as they seek to enter the civilian workforce after sacrificing for their country.

Regrettably, our ability to do more in this arena is severely limited by our current economic circumstances. As you may know, American is undergoing restructuring under Chapter 11 of the Bankruptcy Code. Hence, in the short run we will be reducing our workforce by 13,000. After emerging from this process, we hope to begin growing again. As we do, those who have been furloughed and retain recall rights will have the first right to return. To the extent we are able to hire employees who are new to American for the first time, we will again have the opportunity to recruit people with disabilities and enhance an already diversified and highly skilled workforce.

While it is rare for us to support additional federal regulations, the need for a greater public commitment to a valued sector of our population which has close to 70 percent unemployment should be a national high priority. Hence we support the spirit and purpose of the proposed rule and look forward to the development of a final rule that will fully respect and advance employment rights and opportunities for persons with disabilities.

Sincerely,



Will Ris
Senior Vice President Government Affairs
American Airlines

February 21, 2012

Ms. Debra A. Carr
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
US Department of Labor, Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

Re: Office of Federal Contract Compliance Programs: Notice of Proposed Rulemaking: Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities under § 503 of the Rehabilitation Act of 1973: RIN 1250-AA02

Dear Ms. Carr:

I am writing on behalf of Amerigroup Corporation regarding the above-referenced Notice of Proposed Rulemaking. I appreciate the opportunity to comment on the proposed revisions to the regulations implementing Section 503 of the Rehabilitation Act of 1973.

Amerigroup is a company that fully supports people with disabilities and the right to live independently. A significant component of living independently includes the opportunity to work and participate in the economic mainstream. We believe strongly in recruiting, retaining, and promoting qualified employees with disabilities, as evidenced by our growing and diverse workforce.

Amerigroup's National Advisory Board on Improving Healthcare Services for Seniors and People with Disabilities developed a white paper, the "Declaration for Independence: A Call to Transform Health and Long Term Services for Seniors and People with Disabilities," which is a Call To Action based upon six foundational principles:

- Enhance Self-Care through Improved Coordination;
- Encourage Community Integration and Involvement;
- Expand Service and Supports Accessibility;
- Uphold Personal Preference;
- Empower Economic Participation; and
- Improved Technology to promote Independence

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Virginia Beach, Virginia 23462
757.490.6900
www.amerigroupcorp.com

The fifth principle above is designed to encourage the removal of disincentives for people with disabilities to work and to ensure education and training to enhance the labor pool with talented candidates. As the Chief Executive Officer at Amerigroup, I can tell you from experience that hiring, promoting and retaining workers with disabilities is not only good for our company but also good for the people and communities we serve.

Although the proposed regulation will require Amerigroup and other companies to be more pro-active in collecting data that can track the incidence of disability within our workforce and within our applicant pool, the reality is that this data will help us to set goals and monitor performance internally in a more systematic way than we currently are able.

I am fully aware that the employment rate for Americans with disabilities continues to drop and that without implementation of these proposed revisions to the existing regulations the rate of employment can only continue to fall. Federal contractors can and should play a large role in helping to boost the rate of American employment of individuals with disabilities. It is the right thing to do.

I appreciate OFCCP's leadership and look forward to working with you, our partners in the disability and business communities, and our own employees to meet and exceed the goals articulated in the proposed rule.

If you should have any questions or would like additional information, please feel free to contact me at (757) 473-2715.

Sincerely,

James G. Carlson
Chairman and CEO

Bayer

Greg Babe
President and
Chief Executive Officer

February 2, 2012

Ms. Debra A Carr
Director, Division of Policy, Planning, and Program Development
Office of Federal Contract Compliance Programs
US Department of Labor
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN number 1250-AA02, "Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities"

Bayer Corporation and
Bayer Manufacturing LLC
100 Bayer Road
Pittsburgh, PA 15205-9741

Phone: 412 777 2000
Fax: 412 776-4820
greg.babe@bayer.com
www.bayerus.com

Dear Ms. Carr,

I write on behalf of Bayer Corporation regarding the above-referenced Notice of Proposed Rulemaking. I appreciate the opportunity to comment on the proposed revisions to the regulations implementing Section 503 of the Rehabilitation Act of 1973.

As the Chief Executive Officer of a company with a long history of being proactive in our efforts to recruit, retain and promote qualified employees with disabilities, I commend the Office of Federal Contract Compliance Programs (OFCCP) for strengthening the requirements and clarifying the expectations for federal contractors under the affirmative action and nondiscrimination provisions of Section 503.

I can tell you from experience that hiring, promoting and retaining workers with disabilities is good for our business, good for our shareholders, and good for the communities in which we do business. By partnering with companies like Bender Consulting Services, we have been able to identify talent that might otherwise have been overlooked.

Our commitment to the business value and societal value of opening doors to employment for workers with disabilities has led us to create a co-op program that enables young people with disabilities to gain work experience that can lead to a successful career at Bayer or another employer. In 2011 alone, we have successfully employed several individuals from Bayer's co-op program with Bender Consulting Services.

Although it will be an adjustment for Bayer and other companies to be more proactive around collecting data that can track the incidence of disability within our workforce and within our applicant pool, the reality is that this data will help us set goals and monitor performance internally in a more systematic way than we are currently able to do.

I am aware that the employment rates for Americans with disabilities continue to fall well below 30 percent and that the economic downturn has had a disproportionate negative impact on workers with disabilities. If we are going to turn a corner in the area of disability employment, it is critical for large and small employers to step up, get serious, and get proactive about finding talented employees with disabilities and retaining talented employees after the onset of a disability. Federal contractors can and should play a large role in helping to boost America's disability employment rates.

I see your proposed rule as a call to action and I welcome the challenge. Working together, I'm convinced we can dramatically improve the labor force participation of Americans with disabilities. I appreciate OFCCP's leadership and look forward to working with you, our partners in the disability and business communities, as well as our own employees to meet and exceed the goals articulated in your proposed rule.

Sincerely yours,

Greg Babe
President and CEO
Bayer Corporation

HIGHMARK

Kenneth R. Melani, M.D.
President and
Chief Executive Officer

February 7, 2012

Ms. Debra A. Carr
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
US Department of Labor, Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

Dear Ms. Carr,

I am writing on behalf of Highmark Inc regarding the above referenced Notice of Proposed Rulemaking. I appreciate the opportunity to comment on the proposed revisions to the regulations implementing Section 503 of the Rehabilitation Act of 1973.

Highmark is a company with a long standing history of recruiting, retaining, and promoting qualified employees with disabilities. This commitment began in 1995 when Highmark partnered with Joyce Bender to support her when she founded Bender Consulting Services. Since that time, the partnership has been supported by three Highmark CEO's and it has resulted in significant employment of individuals with disabilities and a strong cultural support of diversity in the workforce.

As the current Chief Executive Officer at Highmark, I can tell you from experience that hiring, promoting and retaining workers with disabilities in not only good for our company but it is also good for the communities in which we do business. Our company is focused on keeping people in our community healthy and well and there is no better way to improve health outcomes then to give someone an opportunity to work.

Although it would require Highmark and other companies to be more proactive around collecting data that can track the incidence of disability within our workforce and within our applicant pool, the reality is that this data will help us set goals and monitor performance internally in a more systematic way than we are currently able to do.

Employment rates for Americans with disabilities continue to fall and without implementation of the proposed revisions to the regulations things will only get worse. Federal contractors can and should play a large role in helping to boost America's disability employment rates. It is the right thing to do.

I appreciate OFCCP's leadership and look forward to working with you, our partners in the disability and business communities, as well as our own employees to meet and exceed the goals articulated in your proposed rule.

Sincerely yours,

Kenneth Melani, M.D.

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Chairman ROE. Without objection, so ordered.

Mr. KUCINICH. I appreciate that, Mr. Chairman.

And, you know, some, in fact, have set hiring goals for people with disabilities that exceed the 7 percent established in the regulations. Now, where you point to concerns these companies see benefits. In one letter of support Bayer says, quote—"Although it will be an adjustment for Bayer and other companies to be more proactive around collecting data that can track the incidence of disability within our workforce and within our applicant pool, the reality is that this data will help us set goals and monitor perform-

ance internally in a more systemic way than we are currently able to do." So businesses are saying this benefits.

Now, Ms. Graves, can you implement this—can implementing this regulation help address the employment gap for people with disabilities?

Ms. GRAVES. I think there is no doubt that it would make a real difference. As you point out, the employment gap is almost two times for—between people with disabilities and without disabilities.

And what history has shown is that this won't happen on its own, that contractors and other employers, that some will not engage in the steps that are required to improve access to high-quality jobs for people with disabilities that are so needed. And so much has changed since Section 503 was passed in the 1970s that it is really time that Congress' mission really be fulfilled on this point.

Mr. KUCINICH. Thank you very much, Mr. Chairman. Yield back.

Chairman ROE. I thank the gentleman for yielding.

Mr. Rokita?

Mr. ROKITA. Thank you, Mr. Chairman.

I would like to also thank the witnesses for their participation today. My first question deals with the recently issued proposal to require contractors to ask job applicants to self-identify as an individual with a disability.

And I missed—admittedly missed some of your testimony, Mr. Norris, and if you talked about this I apologize, and I will go to you with this question first. Do you believe this proposal is consistent with the requirements of the ADA or not, and where do you see litigation, if any, going?

Mr. NORRIS. This proposal is very inconsistent with the underlying philosophy of the Americans with Disabilities Act, which is to minimize one's disability, to keep it a private matter except in instances where it is necessary to be discussed in the context of a—of affording a reasonable accommodation. What this proposal will do will be to feature one's disability, will be to ask people to identify their disabilities and their veteran status not once, not twice, but sometimes three times on an annual basis for purposes of establishing numerical targets that are not based upon labor market data.

So this proposal is inconsistent in the sense that it is featuring someone's disability and it raises the uncomfortable prospect that companies will be able to satisfy OFCCP's regulations only at the expense of violating the Americans with Disabilities Act.

Mr. ROKITA. Yes, it seems to me, and coming from a guy who used to run a couple of agencies back in the state of Indiana, it is a classic example of the right hand not knowing or not—more offensively, not caring what the other hand is doing, and asking business, the engine of our economy, to try to interpret all that.

Mr. NORRIS. That is exactly right.

Mr. ROKITA. Very unfair.

Ms. Bottenfield, thank you for your testimony, as well. I was amazed to hear some of your figures—450 pages for your manual and another 250 pages for what?

Ms. BOTTENFIELD. For the analysis that the OFCCP would run if we were audited, so we do that proactively every year.

Mr. ROKITA. And then without the audit you are running about $60,000 a year in costs?

Ms. BOTTENFIELD. It will vary depending each year, but that is what we plan to spend this year.

Mr. ROKITA. And then your last audit, which was part of the roving audit scheme that is going on, you didn't—it wasn't a complaint-based audit that caused this, right?

Ms. BOTTENFIELD. No.

Mr. ROKITA. Right. That was $40,000, and you had—that took 8 months?

Ms. BOTTENFIELD. Yes.

Mr. ROKITA. Now, they sat in your office for 8 months, or how did all this work?

Ms. BOTTENFIELD. Lot of phone calls, e-mailing back and forth for a number of months, so we would get requests for data or requests to justify something we had been doing, so a lot of back and forth——

Mr. ROKITA. Was the data readily available or did it cause you to have to redo I.T. programs, or go off on searches, or how easy was that to compile, in all honesty?

Ms. BOTTENFIELD. Well, when they decided to come on-site, and we had three job titles where they said we had discrimination with respect to pay, we had to pull a number of personnel files to collect data that wasn't originally in the analysis that we felt were the drivers and the explanation for that pay. So, for example, that would be years of experience prior to coming to St. Jude, so we would have to get that from the application; the degree that the candidate or the employee had, and is it meeting the job requirement or in excess of that job requirement.

Mr. ROKITA. And all this was part of the 400 man hours——

Ms. BOTTENFIELD. Yes.

Mr. ROKITA [continuing]. Person hours, excuse me.

We are all aware from your testimony and just general knowledge about the mission of St. Jude's. Given that St. Jude is a non-for-profit and funding is largely from donations—majority is still from donations, is that right?

Ms. BOTTENFIELD. Yes.

Mr. ROKITA. Okay. Do you believe these OFCCP compliance resources spent largely on paperwork and recordkeeping could be used elsewhere within the hospital—400 person hours?

Ms. BOTTENFIELD. As a nonprofit, any dollar not spent on administration is always going to be made available for research or patient care. But I could also argue that we could spend these dollars more effectively to truly reach the goals of affirmative action. Instead of focusing on pieces of paper and documenting that our team could do real community outreach, as other business partners in the city of Memphis have done, to, for example, reach out to our city schools and get children interested in science, technology, engineering, and math, so that they are eligible to get the college educations that are going to make them——

Mr. ROKITA. What an excellent, positive idea. If you do that or if you were to do that would you get any credit, so to speak, or any kind of recognition in your audit from OFCCP?

Ms. BOTTENFIELD. I have got to have the documentation of that——

Mr. ROKITA. Mr. Norris, do you—oh, so—but they would give you——

Ms. BOTTENFIELD. They would give me some credit, but then it is going to go back to that they are going to come back and say, "Well, it looks like you have got discrimination issues with respect to this compensation. That is all really great but deal with this bit of minutia," and that is what we would have to defend. There are so many potential areas that you have to defend, you might have these great efforts, and they are great, and they say, "We applaud you but now we are focused on this small bit of information and we want you to defend that."

Mr. ROKITA. Understood. Thanks. I am out of time.

Yield——

Chairman ROE. Gentleman's time is expired.

Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman.

Mr. Norris, you spoke of the costs which OFCCP imposes on business. Fire prevention costs money but prevents negative consequences. How do we determine whether the costs of enforcing OFCCCP are reasonable or unreasonable?

OFCCP may cost business, but women waiting until April 17th to catch up with men in their compensation certainly cost women money. How do we justify that? Everything costs some money.

But we do know that women—and this is—the data has been sifted through many, many times—really have to wait till April 17 to catch up with men, and they are being cost money. How do you justify that and how do you get your figures for the cost to business?

Mr. NORRIS. Well, there is no question that there is costs attendant to compliance with these regulations. The question is whether or not the resources that are required to comply with the regulations are being used in the most effective manner.

And I will use your example of pay as a good example. One of the most beneficial things that OFCCP did back in 2006 was to eliminate prior confusion as to how companies should monitor their compensation practices for pay equity, and they came up with some legal and statistical standards that their auditors would use in their compliance evaluations. With that clear guidance companies were able to take that guidance and apply it to their own practices to ensure that their pay systems were equitable and that women, minorities, everybody was being paid equitably.

That is an effective use of resources. Requiring some of the burdensome paperwork requirements of this new regulation is not an effective use of resources.

Mr. KILDEE. Why do you say it is not an effective—what waste is taking place there?

Mr. NORRIS. Well, for the very reason that Ms. Bottenfield just said, that their resources that could be used for outreach, that could be used to try and match veterans, individuals with disabilities with jobs, instead are being directed internally to comply with all of the paperwork requirements so that in the event that there is a compliance evaluation the company can document that they

went through each and every step that OFCCP prescribes must be done. Companies should be left to develop their own resources in light of their own business needs and be evaluated on the bottom line, not on the very prescriptive steps to get there.

Mr. KILDEE. But knowledge is power, and you have to have knowledge of what—how a business is operating, and it is extremely important to try to get information to empower the agency to carry out the effect of the laws and regulations which the federal government puts in place. You know, my dad worked at the auto plant in Flint, Michigan from 1916 to 1960, and unless federal government had moved in there the number of people who were physically injured would have escalated.

So there has to be some cost to protect people, whether it be their wages, their health. Has to be some cost, and knowledge is helpful in determining how we can protect those people.

Mr. NORRIS. Well, and I think knowledge is a two-way street. I think it is helpful for OFCCP to clearly articulate what its requirements are going to be for contractors, and contractors then have to take that information and translate it into programs that are in compliance.

Mr. KILDEE. I thank you, Mr. Norris.

Thank you. I yield back. I yield back, Mr. Chairman.

Chairman ROE. Mr. Tierney?

Mr. TIERNEY. Thank you, Mr. Chairman.

So, Ms. Horvitz, when you say your clients choose to do business with the federal government who do they choose not to do business with in making that choice?

Ms. HORVITZ. I guess I am unclear about your question. Who do they not choose to do business——

Mr. TIERNEY. I mean, so who do they pass up in order to do business with the federal government if they choose to do business with the federal government?

Ms. HORVITZ. They are going to do business with other private companies that don't impose these onerous obligations.

Mr. TIERNEY. Okay. And nobody is stopping them from doing that, right?

Ms. HORVITZ. No. No one is stopping them, but the problem really is that many companies get pulled into this arena without their knowledge of it. You could have a company——

Mr. TIERNEY. Seriously?

Ms. HORVITZ. Absolutely. You could have a company that has a major customer. They are supplying $50,000 of their product to another company. It is a great customer relationship.

And that other company could decide that it wants to get into the business of doing business with the federal government. That other company is a direct federal contractor, and now my client who was simply producing widgets for a customer all of a sudden is a federal government subcontractor, and all of OFCCP's obligations have been pulled down at the subcontractor level and it never signed onto that. OFCCP has jurisdiction when what my client is producing is necessary to the performance of that prime contract.

Mr. TIERNEY. Because now they are providing matters—or materials to a company that is doing direct contracting with the government and because——

Ms. HORVITZ. And they did so for a specific cost, and now all of a sudden the costs of preparing the affirmative action plan, and engaging the vendors, and hiring the statisticians, and doing all the outreach, and complying with the mandatory listings is all put on them. It is a very expensive proposition——

Mr. TIERNEY. Which they will reflect in their cost, I assume, right, when——

Ms. HORVITZ. Excuse me?

Mr. TIERNEY. Which they will reflect in the amount that they charge?

Ms. HORVITZ. To the American taxpayer, that is right, because the company doing business with the government is going to have to pay more because the subcontractor is going to have to spend more costs.

Mr. TIERNEY. Do you think it is important to have a law that requires that people not be able to discriminate on race?

Ms. HORVITZ. Absolutely.

Mr. TIERNEY. On color?

Ms. HORVITZ. Absolutely.

Mr. TIERNEY. On religion?

Ms. HORVITZ. Yes.

Mr. TIERNEY. On national origin?

Ms. HORVITZ. Yes.

Mr. TIERNEY. On gender?

Ms. HORVITZ. Yes.

Mr. TIERNEY. On disability?

Ms. HORVITZ. Yes.

Mr. TIERNEY. On veteran status?

Ms. HORVITZ. Yes. I am for the mission of OFCCP and I would not want to see it eliminated.

Mr. TIERNEY. So basically your argument is on matter of degree.

Ms. HORVITZ. It is a matter of what has happened in this administration to businesses.

Mr. TIERNEY. Well, what has primarily happened is they have proposed some matters and they put out an advanced notice of rulemaking, right?

Ms. HORVITZ. Well, yes, in part, and our——

Mr. TIERNEY. Well, that is primarily what the beef is here, right? There has been advanced notice of proposed rulemaking on a couple of issues—on compensation and on disability. And on those matters when they put out advanced notice of rulemaking you get to give your complaints to them.

Ms. HORVITZ. Correct.

Mr. TIERNEY. Which you have done, I presume?

Ms. HORVITZ. Yes.

Mr. TIERNEY. As forcefully as you have done it here today?

Ms. HORVITZ. Hopefully.

Mr. TIERNEY. And you are awaiting some decision?

Ms. HORVITZ. Yes.

Mr. TIERNEY. Then I think we are a little early for this hearing, Mr. Chairman.

So what is the beef? You have a process. You have been given an opportunity to make your cases. I have had no indication from you that they are ignoring you and that they won't consider them.

That is what we have the advanced notice of rulemaking for; that is what we have the rulemaking process for. We all agree with you. We don't want discrimination against any of these matters, particularly women, who I think Ms. Graves made a particular case of. They have been discriminated in pay compensation.

Lilly Ledbetter apparently is forgotten by some of our colleagues here. That was not too long ago that we had to take action on that matter.

Nobody wants to see people with disabilities discriminated against. We have an affirmative obligation to the agency that is responsible for making sure that that doesn't happen. They are doing the best that they can to make sure that they do that fairly. They have asked for your advice and counsel.

In fact, they put out that notice because they wanted you to give them ideas of how it would affect your business, how it might be done better, how it might be less intrusive, and how you could both agree with the goal of making sure there is no discrimination in the way that is most efficient for you. And you have submitted your suggestions for that.

Ms. HORVITZ. I have. I really hope they take our suggestions into account if they finalize the rule.

Mr. TIERNEY. Well, let's wait and see.

But, Mr. Chairman, until they do that maybe we could have fewer preemptive hearings and let the agency do its job and the companies make their case, and then if something goes awry we can come in and take the committee's time. I yield back. Thank you.

Chairman ROE. Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. Graves, can you explain how you can guarantee nondiscrimination in employment if you don't have regulations?

Ms. GRAVES. I think you have hit the nail on the head. It is one thing to have a ban on discrimination or a promise for equal opportunity, but you need enforcement.

And I just want to give one example where it really matters around pay discrimination. You know, there is a huge veil of secrecy around pay discrimination, and many employers have either firm policies or unwritten policies that you can't even talk about your own wages.

So you mentioned—Congressman Tierney mentioned Lilly Ledbetter. She worked for almost 20 years without knowing that she was experiencing pay discrimination.

So without the OFCCP's ability to do a systemic evaluation of pay practices wage disparities and wage discrimination could go on for many, many years without individuals in the workplace being able to do anything about it.

Mr. SCOTT. And what about if discrimination is going on in employment—say racial discrimination—how would anybody know it if you don't keep the records that are being requested?

Ms. GRAVES. That is precisely right. I mean, the complaints that have been heard today have essentially been about the requirement for record-keeping and the requirement to do outreach. And if a company is taking really great steps to do the sort of outreach and they are ensuring that they aren't discriminating, you know, I am

not sure what OFCCP is supposed to do to evaluate the sort of disparities if they don't have records, and I am not sure how a company is supposed to take the sort of equal opportunity steps if it doesn't do outreach.

Mr. SCOTT. Well, the numbers alone are not sufficient to prove discrimination. Is that right?

Ms. GRAVES. That is right.

Mr. SCOTT. And so if there is discrimination going on and you have got obviously disparate numbers, how would you show—Well,if they are not discriminating and have disparate numbers they would have to show that they at least tried—good faith effort. Is that right?

Ms. GRAVES. You know, there is no hard quota or anything like that, to be sure, but I mean, I just want to say, in terms of the record-keeping that is required, it gives a company the opportunity to show, "This is what we have been doing. These are the steps that we have taken and here is our response to your concerns."

So, you know, an audit may take an additional piece of time, but if an employer is undertaking the type of self-evaluation that it is required to take in some areas and it is tracking its steps it will be able to demonstrate, "Well, you know what, you know, here is why there are significant disparities and here is what we do." And OFCCP could give some additional advice there about some additional things they could do to increase their talent pool.

Mr. SCOTT. You have indicated that a lot of times people don't know they are being discriminated against. If we had to wait for people to bring individual cases of discrimination what would be wrong with that?

Ms. GRAVES. We would never get at the problem. I mean, that, you know—the EOC's charges have increased, particularly during this economic downturn, but I will tell you that that is just a drop in the bucket in terms of the type of discrimination that is out there because when you are having to wait for an individual to undertake the burden of filing a discrimination charge, risking retaliation, standing alone in that type of instance, that takes a particular type of person. Most discrimination is going to go unchecked and unaddressed without the sort of systemic enforcement that OFCCP can do.

Mr. SCOTT. And if we don't do this in government contracts what chance would there be that the culture would change?

Ms. GRAVES. It just wouldn't happen. And I think in government contracts in particular, the privilege of being a government contractor, the role of the government contractor really needs to reflect the society's nondiscriminational norms, and it is a process and OFCCP's proposals, I believe, are a way to move forward with that process.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman ROE. Thank the gentleman for yielding.

Dr. Holt?

Mr. HOLT. Thank you. Thank you, Mr. Chairman.

I thank the witnesses.

Ms. Horvitz, do you agree that there are instances of those things that you want to prevent—instances of employment dis-

crimination based on sex, based on disability, based on returning veteran status, and so forth?

Ms. HORVITZ. I suppose there probably are some instances out there.

Mr. HOLT. Okay.

Mr. Norris, you said at one point—kind of my paraphrase—what you are really asking is to let companies do their work, or leave them to their own devices to solve these problems. How would you rephrase what I just——

Mr. NORRIS. That is partially correct.

Mr. HOLT. Okay.

Mr. NORRIS. What I am saying is the enforcement agency has responsibilities to enforce the laws that it administers. It has to provide standards by which it is going to do that—legally, statistically defensible standards. And once those standards are issued then contractors have an obligation to try to exercise good faith efforts to try and accomplish those obligations.

We are not saying that there should not be any oversight of a company's affirmative action and nondiscrimination requirements. What we are saying is that those are actually shared goals that federal contractors and OFCCP have and the contractor community and the OFCCP should be working together to devise methods by which they can accomplish that objective of matching people with jobs.

Mr. HOLT. So, Ms. Bottenfield, I think I heard you say—not a—I won't go back to read the record—have the record read—but it was essentially, if we do a good job in outreach, if you have some sort of outreach program for science—STEM education, or whatever, OFCCP would then say, "But what about this instance of discrimination?"

Ms. BOTTENFIELD. Yes.

Mr. HOLT. I have——

Ms. BOTTENFIELD. Yes. That is the analysis that is considered—it is called adverse——

Mr. HOLT. Now, I am sure St. Jude's Hospital is very well intentioned, but don't you think there are institutions where there are, indeed, instances of discrimination?

Ms. BOTTENFIELD. I am sure there are.

Mr. HOLT. Well, you know, I am trying to get a sense of just how widespread this is. I mean, we hear, for example, that women are earning 77 cents on the dollar compared to men. We have some state breakdowns of median earnings for full-time, year-round workers by sex and state, and, you know, it is—I see the lowest here appears to be Wyoming at 63.8 percent; the highest is the District of Columbia at 91.4 percent.

It would be really good if we had good—really good data about how much discrimination there is.

Ms. Goss Graves, is there anything different about the District of Columbia, why that number might be higher?

Ms. GRAVES. You know, it is hard to say. Part of it could be the role of the federal government as an employer in the——

Mr. HOLT. Yes. Let me offer that as a suggestion. The contractors here and the employers here in—are more the federal government

than they are in North Dakota, Wyoming, the other states, where women evidently are not doing quite so well.

So, you know, I understand my colleague, Mr. Tierney's, frustration with holding this hearing prematurely. I would argue a little differently, that I think it is not that the hearing is premature, but the witnesses' testimony is directed toward the wrong thing.

It shouldn't be, how can we get the government out of our hair? But it should be directed toward, what do we need to understand? How will we get the data that we need? What record-keeping must be done so that we have the data so that we can deal with what are very real problems and actually solve those problems?

There is very real discrimination out there, and relying on the good faith of good employers evidently, looking over decades of data, is not good enough. It requires record-keeping. Otherwise we won't know what is going on. We won't know how bad the problem is or how we are going to solve it.

That is the role that we have given to the OFCCP and I hope that that will be the focus of this and any future hearings. Thank you.

Chairman ROE. I thank the gentleman for yielding.

I will now ask some questions and submit for the record—and I don't for 1 minute think the Obama White House is doing this on purpose, it is just what it is. But the 2011 annual report of White House staff, female employees earned a median salary of $60,000, which is about 18 percent less than the median salary for male employees.

Now, I don't think they intentionally did that but that is a fact, and so I would like to submit that to the record and also submit to the record for the pay discrimination, and obviously discrimination of any kind is wrong. I want to bring up something from my 30-something years as an employer and just ask your advice about this. We had a decision on the Florida hospital case where the OFCCP's issuance of the Directive 293 and the National Defense Authorization Act that was passed this year contained a provision clarifying that health care providers operating as a part of TRICARE network may not be considered a federal contractor or subcontractor, and they did that.

So that means if I take—in my medical practice, if I take a TRICARE patient maybe I now have to comply with all these directives that OFCCP did. Here is the problem I have: I am an OB/GYN doctor. I have never had anybody in my office as an employee in 35 years but a female. We have half of our medical practice now are female; my office manager has always been a female. Am I, in that office, doing reverse discrimination?

And because of this, now, if I am—if this applies to me the simplest thing for me to do as a practitioner is to get out of TRICARE, quit seeing people who have served this nation, as I have—I am the—I think I am the only Vietnam veteran sitting here—and what should I do?

And the second question I have—and I would like Ms. Horvitz, let me give you a chance to answer that. Am I involved in reverse discrimination?

Ms. HORVITZ. No, Mr. Chairman. I don't think you are involved in reverse discrimination when you have hired qualified physicians

who happen to be female if they are the most qualified people who applied for that opportunity.

The problem that contractors have, however, is that when they offer opportunities they are going to place an advertisement. Chances are you are going to field a pool of candidates and the most important thing that you have to keep in mind is you have to hire the most qualified person for the job.

But a federal government contractor has to do something different. We are supposed to collect information on race and gender and then hide it from the decision-makers, go ahead and make our decision, and then marry all the data to make sure that the information we collected but didn't use as part of our decision-making reveals at the end of the day that we didn't discriminate in employment. That is a very difficult burden to impose on even small businesses—small medical practices who may be part of larger institutions.

Chairman ROE. And, Ms. Bottenfield, one of the concerns I have also is that the 450 pages and however much money you—and then 250 pages of your auditor, and then—and what was the result of your 2009 audit? What happened after all that year, almost, that went by?

Ms. BOTTENFIELD. We had a full-day on-site visit from our auditors. It was expected that that would continue forth over a number of weeks but when we presented our data and actually did a tour of our facilities and explained how St. Jude was really different than the sorts of organizations they typically audit, which are logistics firms and construction firms in the Memphis City area, they ultimately took our data and said, "Thank you, goodbye."

Chairman ROE. Well, thank goodness, because all of that effort you put in did not go to taking care of childhood cancers and research and the people down there that have done it. It took away from that, and that bothers me.

The other thing that bothered me was I think you put in your testimony you were paying $4,000-plus per day for training, plus expenses for people to come in, because you do have turnover in your——

Ms. BOTTENFIELD. Yes.

Chairman ROE [continuing]. In your shop. Is that correct?

Ms. BOTTENFIELD. Yes. We feel it is imperative that they are trained and understand the regulations they need to comply with.

Chairman ROE. There needs to be. And just one other entry into the record, and I am sure Mr. Kucinich did not realize this about the Chamber, but in March of 2011 the Chamber launched a program called Hiring our Heroes, which is a nationwide effort to hire veterans like myself and military spouses for employment, and they had 100—in the last 12 months 140 hiring fairs in 47 states and the District and have placed over 10,000 veterans in jobs. So that was a good thing.

I think what we are trying to do is no one here is saying, "Do you want discrimination?" That is like saying, "Do you still beat your wife?" Nobody wants that. And that is a loaded question.

What you want is you want a situation where employers can meet these criteria and not be buried in paperwork or not, like me, just get out of TRICARE—create a situation where you just fold

your hands up and say, "We are done." Is that reasonable, what I have just said?

Mr. Norris?

Mr. NORRIS. Yes it is. It is absolutely reasonable.

Ms. GRAVES. And, Chairman Roe, may I respond to the TRICARE question, too?

Chairman ROE. Yes. Ms. Graves?

Ms. GRAVES. I just wanted to point out in the example you gave that the OFCCP affirmative action obligations and many of the record-keeping pieces that we have discussed here today don't apply to all contractors, it is contractors with employee—50 or more employees and contracts of $50,000 or more——

Chairman ROE. I have 50 employees in my office; I have 350. And also, I don't know whether we have that—I know we do that in Medicare and they are trying—this OFCCP is trying to get into Medicare Part D, Medicare Part C, and so it is a slippery slope for me to be on to know if I am compliant.

Ms. GRAVES. And if I could just raise one more point, it is my understanding that the Florida hospital litigation is on—is continuing as there will be an assessment about what this new law means.

Chairman ROE. Thank you.

I see no other witnesses—I mean no other congressmen here, so I will ask Mr. Kucinich if he has any closing—and I want to thank the panel, too—and if you have any closing remarks?

Mr. KUCINICH. I do, Mr. Chairman, and I want to thank you very much for calling this hearing. I note your remarks about the Chamber of Commerce. That is good. They are encouraging veterans to be hired, and all they have to do is go a step further and say, let's make sure that it is done in a way the veterans' rights are never going to be compromised, that there are a lot of veterans out there that need jobs. Let's follow equal employment opportunity laws, and in addition to that to look at the proposals that are under review by this subcommittee today.

One of the things that, as I am hearing this discussion, that concerns me is there seems to be an undercurrent on the part of some of the people who are testifying that promotes this type of thinking: How can we get the federal government out of federal contracting requirements? You can't. It is a privilege, as Ms. Graves said, to have a federal contract.

No business is owed a federal contract. We are not talking about private businesses dealing with each other here; we are talking about private businesses dealing with the federal government. Federal government has every right to put these requirements on here for the protection of minorities, women, veterans, protecting against any gender-based discrimination.

So thank you, Ms. Graves, for pointing out that it is a privilege to have a federal contract, and I think that if we are going to—those businesses who are having difficulty dealing with the federal government should keep in mind that it is a privilege to have a federal contract.

Thank you, Mr. Chairman.

Chairman ROE. I thank Mr. Kucinich.

And I want to thank the panel. I read all of your testimony end to end—a little tedious for some of it for a doctor to be reading it, but I did read it all. It was very informative, and what I believe, obviously, the goal should be is to reduce and eliminate discrimination as—if it is possible in this country to do that without the onerous obligations of the federal government to stymie business. I think that is what—it is a delicate balance, and it is hard to do.

And I look at my 30-plus years in my business that I have run and trying to jump through all these hoops. One of the things that you may not be doing, as Ms. Horvitz pointed out is that you may be a subcontractor and may not be involved at all but be involved by not—through no action of your own. I think we need to clarify those things for subcontractors so that they are not there.

And certainly when you look at a—and I cannot say enough good things about St. Jude's Hospital because you have changed so many lives of people that I have seen—babies I have delivered that have these terrible childhood cancers, and anything that gets in the way of your mission should be—and fortunately, the OFCCP saw that when they go down there, that is 3,700 employees, that you are making a good faith effort in providing a nondiscriminatory environment and the highest quality of care in the world for our citizens and for people around the world.

So I think that is what we are trying to do here and that is what the mission of this would be. I thank you all for being here and I thank both sides for this, and I think we will continue this discussion.

Meeting adjourned.

[Additional submissions of Chairman Roe follow:]

April 17, 2012.

Hon. PHIL ROE, *Chairman;* Hon. ROBERT ANDREWS, *Ranking Member, Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, 2181 Rayburn House Office Building, U.S. House of Representatives, Washington, DC 20515*

DEAR CHAIRMAN ROE AND RANKING MEMBER ANDREWS: On behalf of Associated Builders and Contractors (ABC), a national association with 74 chapters representing 22,000 merit shop construction and construction-related firms, I am writing in regard to the subcommittee hearing, "Reviewing the Impact of the Office of Federal Contract Compliance Programs' (OFCCP) Regulatory and Enforcement Actions."

ABC supports OFCCP's mission to address employment discrimination against individuals with disabilities. However, ABC has serious concerns regarding a recent proposed rulemaking designed to update existing requirements for federal contractors and subcontractors under Section 503 of the Rehabilitation Act of 1973. OFCCP itself has referred to the proposal as a "sea change."

The December 2011 notice of proposed rulemaking (NPRM), drafted under questionable statutory authority, mandates arbitrary quotas (referred to by the agency as "goals") for the hiring of disabled workers by all contractors with a government contract or subcontract of $50,000 or more and 50 or more employees. To date, OFCCP has failed to compile any meaningful evidence to indicate federal contractors are currently failing to meet their affirmative action and nondiscrimination obligations toward the disabled community. In addition, OFCCP minimized, and in some instances ignored, the regulatory burdens the NRPM would impose on contractors, particularly small businesses—more than 20,000 of which currently contract with the federal government.

ABC is deeply concerned about each of the failures identified above.However, our greatest concern is that OFCCP failed to analyze or justify the draconian impact of its proposal on the construction industry, and has not acknowledged or explained the inconsistencies between the NPRM and OFCCP's longstanding differentiation of the construction industry from other industries with regard to affirmative action requirements. Our industry has long been exempted from being forced to engage in

job group utilization analyses, data collection and reporting—all of which will be required if the proposal is finalized.

ABC has requested OFCCP withdraw its proposal immediately so the agency can address the many concerns outlined in this letter (and described in greater detail in our formal comments, which are attached). It is our hope that this hearing will also highlight these concerns.

We commend the subcommittee for its attention to this issue, and look forward to its continued oversight of this important rulemaking.

GEOFFREY BURR,
Vice President, Federal Affairs.

VIA ELECTRONIC SUBMISSION

February 21, 2012.

PATRICIA A. SHIU, *Director,*
Office of Federal Contract Compliance Programs, U.S. Department of Labor, 200 Constitution Avenue, NW, Room C-3325 Washington, DC 20210.

DEBRA A. CARR, *Director,*
Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs, U.S. Department of Labor, 200 Constitution Avenue, NW, Room C-3325 Washington, DC 20210.

RE: *Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities (RIN 1250—AA02)*

DEAR DIRECTORS SHIU AND CARR: Associated Builders and Contractors, Inc. (ABC) submits the following comments in response to the above-referenced notice of proposed rulemaking (NPRM), published in the Federal Register by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP, or Department) on Dec. 9, 2011, at 76 Fed. Reg. 77056.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing 22,000 contractors, subcontractors, materials suppliers and construction-related firms within a network of 74 chapters throughout the United States. ABC member contractors employ workers whose training and experience span all of the more than 20 skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. ABC's membership is bound by a shared commitment to the merit shop philosophy. This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures taxpayers and consumers will receive the most for their construction dollar.

ABC is submitting these comments to make the Department aware of the adverse impact the NPRM will have on the construction industry and to request immediate withdrawal or modification of the proposal to maintain consistency with the Department's historic recognition of the unique employment features of the construction industry. Also, ABC seconds the comments of other organizations that represent government contractors generally, and small business contractors in particular, whose burdens the Department has failed to acknowledge or properly analyze.

ABC's Comments in Response to OFCCP's NPRM

ABC strongly supports OFCCP's longstanding regulatory goal of affirmative action and nondiscrimination regarding individuals with disabilities under Section 503 of the Rehabilitation Act. Of equal importance, however, is the longstanding recognition by the Department that the construction industry is different in many ways from other industries that contract with the government. ABC is concerned the NPRM fails to recognize the uniquely burdensome impact of the proposed data collection and reporting requirements on the construction industry and fails to acknowledge or explain the inconsistency between the proposed rule and OFCCP's longstanding differentiation of the construction industry from other industries with regard to affirmative action requirements.

As stated in OFCCP's own guide with regard to Executive Order 11246, "in order to take into account the fluid and temporary nature of the construction workforce, OFCCP does not require construction contractors to develop written affirmative action programs."[1] In particular, unlike the requirements of job group utilization analyses the Department has required of other industries under Executive Order 11246 for minorities and women, OFCCP has long recognized the collection and reporting of utilization data in such detail would be a wasteful and futile exercise for construction contractors, whose workforces ebb and flow much more frequently than

other types of government contractors. Therefore, in lieu of extensive data analysis and reporting, OFCCP for decades has maintained a special set of regulations for the construction industry enumerating more practical good faith steps that covered construction contractors must take in order to increase their employment of minorities and women in the skilled trades.[2]

Unlike Executive Order 11246, construction contractors have not been specifically exempted from the provisions of Section 503 of the Rehabilitation Act of 1973, as implemented in 41 C.F.R. Part 60-741. Until now, this did not place an onerous burden on construction contractors because the provisions of Section 503 and OFCCP's implementing regulations did not mirror the job group utilization analyses and related data collection efforts required under Executive Order 11246 for non-construction contractors. Instead, prior to the NPRM, OFCCP regulations under Section 503 focused exclusively on good faith affirmative action efforts similar in scope to those already applicable to the construction industry under Executive Order 11246. Thus, no requirement exists under the current Section 503 regulations for any contractor to undertake burdensome job group utilization analyses of disabled workers, to document or report the reasonable accommodations offered to such workers, or to meet any arbitrarily selected target goal for the number of disabled workers hired into the workplace.

All of that is about to change under the Department's NPRM. Notwithstanding the absence of any statutory authority under Section 503 itself, OFCCP is proposing to mandate arbitrary target quotas for the hiring of disabled workers by all contractors with a government contract or subcontract of $50,000 or more and 50 or more employees—a threshold that will impact more than 20,000 small businesses in all industries that currently contract with the federal government. In the Department's own words, this is a "sea change" in the Department's affirmative action regulations.[3]

Not only has OFCCP failed to identify any statutory authorization for its radical new approach, but the Department has failed to compile any statistical or other evidence that federal contractors are failing to meet their affirmative action obligations towards the disabled community.[4] Instead, the preamble to the NPRM relies exclusively on statistics purporting to show higher unemployment of workers with disabilities in the workforce as a whole, without any assessment of the employment rate of disabled vs. nondisabled workers employed by government contractors.[5] In short, OFCCP has collected no data on which to support the premise that government contractors' affirmative action efforts are failing to meet their objectives. Under such circumstances, no justification exists for the Department's drastic changes to the affirmative action requirements of federal contractors generally.

Even worse, OFCCP has ignored or unfairly minimized the regulatory burdens that the NRPM will impose on government contractors, particularly small business contractors. The Department has thereby acted in a manner inconsistent with the congressional mandate that federal agencies should encourage and give preference to small and disadvantaged businesses in procurement of government contracts, as set forth in the Small Business Act.[6]

ABC is deeply concerned about each of the failures identified above as they appear in the NPRM. But ABC's greatest concern is that OFCCP has apparently failed to notice, and has certainly failed to analyze or justify, the draconian impact of its proposal on the construction industry. In particular, as further discussed below, the NPRM gives no attention at all to the historical reasons why the construction industry has been exempted from being forced to engage in the sort of wasteful and fruitless job group utilization analysis and other data collection and reporting that will now be required if the proposal is finalized.

1. The NPRM Ignores the Unique Aspects of Construction Industry Employment, Contradicting Decades of Regulation by OFCCP

As noted above, OFCCP has for many decades recognized the unique employment challenges facing construction contractors, resulting in a separate set of regulations governing construction contractors' affirmative action requirements.[7] While these unique regulations have traditionally applied only in the context of minorities and women, as opposed to disabled workers, the reasons underlying the longstanding differentiation between construction contractors and other industries apply with even greater force to the proposal. Specifically, the fluid and temporary nature of employment in the construction industry renders most forms of job category utilization analysis futile and wasteful. Given that OFCCP has repeatedly recognized this fact with regard to the employment of minorities and women, it makes no sense for the Department to suddenly require construction contractors to engage in the much more difficult analysis of the utilization of disabled workers. It is obvious the analysis called for in the NPRM will be much more difficult for employment of disabled

workers than minorities and women because of the need to make numerous difficult judgments regarding reasonable accommodations, undue hardships and direct threats to safety, none of which are necessary in analyzing the employment of minorities and women. The Department gives no attention to these proposed new burdens on the construction industry in the proposal.

The Department should also be aware that the construction industry is one of the most physically demanding and hazardous industries, which renders many of the assumptions underlying the NPRM irrelevant and incorrect. For example, in support of the need for strengthening the affirmative action rules, the Department cites the fact that employment rate disparities continue to persist in the entire workforce "despite years of technological advancements that have made it possible to apply for and perform many jobs from remote locations, and to read, write, and communicate in an abundance of ways."[8] Yet the overwhelming majority of construction work cannot be performed anywhere except the jobsite, so the ability to perform other types of jobs from remote locations is of little or no value to the construction industry. Even the ability to read, write and communicate through technological advances, while somewhat more helpful to construction workers, is often not the primary consideration in determining whether a disabled individual is able to perform the essential elements of a construction job requiring physical and hazardous labor, with or without reasonable accommodation.

The point is not that construction contractors should be entitled to shirk their duty to take affirmative steps to recruit and accommodate disabled workers when such accommodations do not create undue hardships or direct threats to health and safety on construction sites. Rather, the point is that a "one size fits all industries" rule, such as the one being proposed by the Department, is arbitrary and capricious because it fails to take into account the very real differences between industries and the unique challenges confronting construction contractors in particular. Again, there has been no showing by the Department that construction contractors have significantly failed to meet the affirmative action requirements of Section 503 on government projects that would call for imposition of the additional burdens by the NPRM.

Chief among the additional burdens, as noted above, is the requirement that all government contractors above a minimal size (contracts of $50,000 or more and 50 or more employees) must perform a job group utilization analysis for disabled workers comparable to, and even more extensive than, the analysis required for non-construction industries regarding minorities and women. What is most striking about the NPRM in this regard is the assumption that all industries already routinely engage in such analysis.[9,10] In other words, the drafters of the proposal appear to have forgotten that construction contractors have never been required to perform such analyses as to minorities and women under Executive Order 11246, so the newly proposed analysis will be a drastic and burdensome change.

The 7 percent target goal arbitrarily adopted for all industries by the Department is flawed on many levels; but limiting our focus to construction, OFCCP erroneously assumes contractors will use their "existing job groups" for analysis, a shortcut not available to construction contractors who have not previously been required to conduct such analyses under Executive Order 11246. Even worse is the 2 percent subgoal that the Department is considering. OFCCP offers no consideration as to how construction contractors can safely target workers, except in rare circumstances, who suffer from total deafness, blindness, paralysis, epilepsy and severe intellectual disability, to name only a few of the severe disabilities referenced in the NPRM. Again, a one-size-fits-all approach makes no sense for the construction industry and must be withdrawn as arbitrary and capricious.

2. OFCCP's Initial Analysis Under the Regulatory Flexibility Act (RFA) is Deeply Flawed

The RFA requires all agencies conducting rulemakings to "prepare and make available for public comment an initial regulatory flexibility analysis," which "shall describe the impact of the proposed rule on small entities."[11] As part of its analysis, the agency is required to consider other significant alternatives to the rule that could affect the impact on small entities, and explain any rejection of such alternatives in its final regulatory flexibility analysis.[12] The sole relevant exception to this requirement arises if "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[13]

The agency must provide a factual basis for its certification, the determination of which is subject to judicial review for correctness under a non-deferential standard.[14]

Reports from ABC members and our knowledge of the construction industry lead ABC to respectfully submit that OFCCP has significantly understated the costs of compliance with its proposal. The time for compliance with the paperwork burdens (repeatedly cited by the Department as taking anywhere from five minutes to 30 minutes) has been understated by several decimal points. In other words, ABC is reliably informed by its members that the time spent on training managers; interacting with applicants about the self-identification process; analyzing, documenting, and reporting on the number of disabled individuals recruited, hired and laid off; and the time spent analyzing, documenting, and reporting the reasonable accommodations, undue hardships and direct threats to safety are more likely to take hundreds, if not thousands, of hours. Most small contractors will be unable to perform the analysis required at all, and will no doubt instead be compelled to turn to outside consultants at significant additional costs in order to comply. OFCCP's erroneous cost estimates must be entirely reconsidered and the NPRM withdrawn for further study in order to determine the unique impact it will have on the construction industry and on small federal contractors generally.

For each of the reasons set forth above and in the comments of other organizations representing construction contractors and small businesses generally, the NPRM should be withdrawn, or significantly modified and republished for public comment.

Thank you for the opportunity to submit comments on this matter.

ENDNOTES

[1] OFCCP, Technical Assistance Guide for Federal Construction Contractors, May 2009.

[2] See 41 C.F.R. 60-4.

[3] Bureau of National Affairs (BNA), OFCCP Proposal Includes 'Utilization' Goal for Contractors Employing Disabled Workers, Dec. 8, 2011.

[4] 76 Fed. Reg. at 77074: "DOL is not aware of any existing data that show the number or percentage of federal contractor employees with disabilities. * * *"

[5] 76 Fed. Reg. at 77069.

[6] 15 U.S.C. 637(d).

[7] 41 C.F.R. Part 60-4.

[8] 76 Fed. Reg. at 77056.

[9] 76 Fed. Reg. at 77067: "Although measurements specific to disability are new requirements of this proposed regulation, the non-disability-specific data, such as the total number of applicants, the total number of job openings, and the number of jobs filled is information that contractors are already required to maintain pursuant to Executive Order 11246. * * *"

[10] See also 76 Fed. Reg. at 77075: "OFCCP expects that contractors will conduct this assessment in conjunction with the correlating assessments required under [Executive Order] 11246. * * *"

[11] 5 U.S.C. § 603(a).

[12] Id. at § 604. A "significant regulatory alternative" is defined as one that: 1) reduces the burden on small entities; 2) is feasible; and 3) meets the agency's underlying objectives. See A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act, SBA Office of Advocacy, June 2010, p. 73-75 (available at *http://www.sba.gov/advo/laws/rfaguide.pdf).*

[13] Id. at § 605(b).

[14] North Carolina Fisheries Association v. Daley, 27 F. Supp. 2d 650 (E.D. Va. 1988); Aeronautical Repair Station Assn, Inc. v. FAA, 449 F. 3d 161, 175-177 (D.C. Cir. 2007), reversing agency certification of lack of impact on small entities.

April 18, 2012.

Hon. DAVID P. ROE, *Chairman,*
Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and the Workforce, U.S. House of Representatives Washington, DC 20515.

DEAR CHAIRMAN ROE: We are writing on behalf of the U.S. Chamber of Commerce (Chamber), the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, in advance of the Subcommittee's hearing scheduled for April 18, 2012, entitled Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions. The purpose of this letter is to provide you with a summary of our members concerns regarding the agency's regulatory and enforcement agenda.

At the outset, we wish to thank you for holding a hearing on this important subject. The laws and Executive Orders that the Office of Federal Contract Compliance Programs (OFCCP) implements and enforces are very important. They and the regulations implementing them are also very detailed and technical, requiring an investment of significant time and resources to fully understand. We wish to express our appreciation for the Subcommittee making OFCCP oversight a priority. We look

forward to working with you and other members of the Subcommittee on these issues in the coming months.

In this letter, we present the concerns of our members first with OFCCP enforcement. We then turn to a summary of our concerns with the OFCCP's very active regulatory and sub-regulatory agenda. We wish to emphasize that it is not our intent in this letter to debate the merits of any Executive Order or law that the OFCCP is charged with implementing and enforcing. Instead, these comments focus on the manner in which the OFCCP is carrying out its responsibilities under these laws and Executive Orders.

OFCCP Enforcement

No discussion of OFCCP enforcement can begin without first understanding the tremendous leverage that OFCCP has over federal contractors stemming from the OFCCP's authority to cancel or terminate a particular government contract and the OFCCP's authority to debar a contractor from future opportunities.[1] The threat of such a penalty is so severe that it creates a powerful incentive for contractors to settle any dispute with OFCCP no matter how frivolous an allegation may be or how egregiously agency staff has acted. While sophisticated contractors may push back against OFCCP allegations, few are willing to go through all of the Administrative reviews and seek protection of their rights in court because even a small risk of debarment is unacceptable no matter how good the contractor's case.

Given the tremendous leverage that debarment and these other severe sanctions give the OFCCP, it is all the more important that enforcement be reasonable and undertaken only after careful and thoughtful analysis has been conducted. Unfortunately, it appears that all too often the OFCCP is failing to acquit itself in such a manner.

It should also be emphasized that enforcement tactics can be difficult to summarize in a letter such as this. Many concerns seem outrageous on their face. Others might not seem egregious standing alone, but repeated time and again or combined with other abuses, become more serious. The following summarizes a handful of examples of enforcement abuses that we have heard from our members over the last year:

- OFCCP staff telling a contractor that it was welcome to bring a matter before an administrative law judge, "but the judge works for us."
- Agency staff using strong arm tactics in employee interviews to get the answers they want to hear.
- Employers passing an audit and then investigators returning and re-opening the investigation until they can find a violation.
- OFCCP might have an issue with a handful of job groups or titles, but will demand information on all job groups or titles.
- OFCCP is not interested in discussing narrowing the scope of its information requests. Rather than data on problem areas, OFCCP wants data on everyone.
- Agency staff telling employers "we can ask for anything we want."
- Sitting on data for years without closing cases.
- Using substandard interpreters while interviewing employees who do not speak English.
- OFCCP looks at large data sets and cherry picks to allege violations, such as using arbitrary timelines or combinations of protected classes.
- Blind adherence to statistics, such as assuming any numerical disparity more than two standard deviations must be attributable to discrimination and ignoring the fact that any large data set will produce some number of statistical disparities.
- Not understanding other laws or regulations that constrain employers may be responsible for disparities, such as the relation of payments to physicians to schedules set by the Center for Medicare and Medicaid Services.

These examples are just a few reported to us by our membership recently. Some of these examples come from contractors who by any measure would be considered among the most progressive and compliant employers in the nation. As you may understand, most contractors and subcontractors are not willing to discuss these concerns publicly for fear of retaliation. Consequently, we urge you to continue the Committee's oversight of OFCCP enforcement with this in mind, perhaps by utilizing the General Accounting Office, or another route that provides strong confidentiality for contractors and subcontractors who may be interviewed.

OFCCP Regulatory and Sub-Regulatory Agenda

The OFCCP has an incredibly aggressive regulatory and sub-regulatory agenda. While a comprehensive review of these matters is beyond the scope of these comments, the following identifies several of the OFCCP's most controversial policy initiatives, a summary, and, where available, links for further information.

OFCCP Jurisdiction

OFCCP has continued to push its interpretation of its jurisdiction to the limits of credibility, earning it a sharp rebuke from Congress. Nevertheless, rather than recognize its overreach, the agency has pledged to fight for greater jurisdiction.

The OFCCP has jurisdiction over virtually all federal contractors and subcontractors. However, the issue of whether an employer is a contractor or subcontractor is not as straightforward as it otherwise might seem. While OFCCP has always maintained a broad view of its jurisdiction, we have seen the agency take an even broader view in recent years with perhaps the highest profile example being treatment of certain hospitals.

For example, OFCCP Directive No. 262 limited jurisdiction over hospitals that had contracted with an insurer who, it turn, contracted with the federal government under the Federal Employees Health Benefits Plan (FEHBP).[2] Now, the OFCCP has rescinded Directive 262[3] and is litigating a high profile case to try to establish jurisdiction over a hospital as a FEHBP subcontractor.[4] Compounding challenges for the hospital is the fact that its contracts with the insurer were established before the insurer ever contracted with the federal government.[5]

In a similarly high profile case, OFCCP has sought jurisdiction over hospitals that have contracted with insurers under TRICARE.[6] This case is particularly egregious because the Department of Defense specifically stated that the payments to hospitals were federal financial assistance (and thus not a subcontract). Nevertheless, OFCCP argued that its determination was controlling, not that of the Department of Defense.[7]

Responding to this case, Congress stepped in and adopted language as part of the National Defense Authorization Act stating that such arrangements to provide care under TRICARE do not confer jurisdiction as covered subcontractors.[8] Rather than accept this rebuke, OFCCP condemned the legislation, which was signed into law by the president, and vowed that "this isn't over yet."[9] It is disturbing that even in light of a Congressional rebuke the OFCCP would continue to assert such broad jurisdiction.

Compensation, Data Collection, and Analysis

Through three separate but related initiatives, the OFCCP has proposed doing away with what little transparency exists in how the agency will assess whether systemic compensation has occurred. It is also embarking on an effort to collect massive amounts of individually identifiable pay and benefits data without adequate privacy protections and without even a scintilla of evidence of wrongdoing.

The OFCCP has at least three separate initiatives that raise significant concerns among contractors related to the agency's approach toward data collection and analysis, specifically compensation data.

1. Rescinding Guidelines for Determining Systemic Compensation Discrimination.[10]

On January 3, 2011, the OFCCP published a notice proposing to rescind guidance issued during the last administration related to systemic compensation discrimination. The existing guidance makes it clear that the OFCCP will not use the debunked pay-banding method (or the so-called DuBray method) of determining whether discrimination may have occurred, but will instead use more robust and accurate methodologies such as multivariable regression. It also issued voluntary guidelines for self-evaluation.

OFCCP now plans to abandon these guidelines without replacing them, which could mean that the OFCCP will return to using debunked statistical analysis as it pursues compensation discrimination claims. The Chamber filed comments on this proposal on March 4, 2011:

http://www.uschamber.com/issues/comments/2011/comments-ofccp-rescissioncompensation-guidance

2. New Compensation Data Collection Tool.[11]

On August 10, 2011, the OFCCP published an advanced notice of proposed rulemaking to develop a replacement for the EO survey to implement Executive Order 11246. This is highly controversial since the EO survey required extensive time for contractors to complete and produced no useful data for enforcement, as verified by a third party review of the program. The ANPRM solicits comments from the public on 15 separate questions. Perhaps most alarming, the agency in one of their questions has raised the possibility that businesses bidding on future Federal contracts will need to submit compensation data as part of the Request for Proposal process. OFCCP has also stated their intentions to use this type of compensation data for research, such as analyzing industry trends. On October 11, 2011, the Chamber submitted comments seeking withdrawal of the regulation.

Chamber comments filed Oct. 11, 2011:

http://www.uschamber.com/issues/comments/2011/comments-non-discriminationcompensation-compensation-data-collection-tool-adva

3. Modification of the "scheduling letter and itemized listing." [12]

On May 12, 2011, the OFCCP published a notice, which seeks to make significant changes to the "scheduling letter" and "itemized listing" that it uses at an initial stages of a compliance evaluation. On July 11, 2011, the Chamber submitted comments sharply critical of some of the proposed changes, in particular, the creation of a new government database of private compensation information, the burdens that would be imposed by the new recordkeeping and reporting obligations, and the invasion of privacy and threat to proprietary and confidential information. On September 28, 2011, the OFCCP sent a final version of the letter and itemized listing to OMB. The Chamber submitted comments on October 28, 2011.

Chamber comments filed July 11, 2012:

http://www.uschamber.com/issues/comments/2011/comments-proposed-extensionapproval-information-collection-requirements

Chamber comments filed Oct. 28, 2011:

http://www.uschamber.com/issues/comments/2011/comments-proposed-extensionapproval-information-collection-requirements%E2%80%94non-co

New Tremendously Burdensome Affirmative Action Regulations

The proposed revisions to affirmative action regulations that OFCCP has made are heavy on paperwork and recordkeeping requirements and have grossly underestimated the costs of compliance. In addition, there are many new proposals that seem impracticable at best. It is within the OFCCP's power to strengthen these regulations through an approach that would increase employment for protected veterans and individuals with disabilities by consensus without imposing such dramatic costs for programs of questionable utility.

Among the two most burdensome initiatives proposed by the OFCCP so far are revisions of affirmative action and non-discrimination regulations that apply with respect to protected veterans and individuals with disabilities. We wish to emphasize that these requirements were enacted pursuant to laws that the Chamber supports. Our criticism of revisions to the regulations should not be interpreted as criticisms of these laws. While we appreciate that the OFCCP may believe that the existing regulations may not have operated effectively, the approach taken by the OFCCP in its proposals would be tremendously burdensome. We strongly believe that a consensus approach could be found to both sets of regulations and we renew our call for OFCCP to engage stakeholders to sit down and work through the many difficult issues to arrive at a shared goal.

1. Federal Contractor Affirmative Action Obligations under the Vietnam Era Veterans Readjustment and Assistance Act

On April 26, 2011, OFCCP issued a proposed rule that seeks to strengthen affirmative action requirements by requiring federal contractors to conduct more substantive analyses of recruitment and placement actions under the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA, as amended) and the use of numerical targets to measure effectiveness. The proposal also imposes vast new recordkeeping and other burdens on contractors and subcontractors. The Chamber filed comments, in conjunction with other employer associations, on July 11, 2011, emphasizing the significant new burdens that would be imposed on contractors should the rule be implemented, and offered alternative and less burdensome mechanisms to achieve the shared goal of increasing employment opportunities for our nation's veterans.

The coalition comments may be accessed here:

http://www.uschamber.com/issues/comments/2011/coalition-full-comments-affirmative-actionand-nondiscrimination-obligations-co

2. Federal Contractor Affirmative Action Obligations under the Rehabilitation Act

On December 9, 2011, OFCCP published a notice of proposed rulemaking significantly altering the regulations implementing Section 503 of the Rehabilitation Act. If implemented, the proposal would establish a utilization goal for hiring individuals with disabilities for every job group. The proposal also would require contractors to ask every applicant for employment to self-identify as an individual with a disability upon application as well as later in the hiring process. It would also require contractors to survey their entire workforce each year to ascertain disability status. The proposal further would establish numerous new paperwork burdens, such as track-

ing every reasonable accommodation request, no matter how informal. The Chamber, in conjunction with other associations, conducted a survey of about 100 federal contractors and estimated that the costs of the regulation are, at a minimum, $2 billion per year. The Chamber submitted comments on February 21, 2012.

The comments may be accessed here:

http://www.uschamber.com/sites/default/files/comments/120221—503Comments.pdf

Conclusion

We wish to thank you for taking the time to hold this important hearing on OFCCP oversight. These comments only begin to summarize the very great concern that we have with the OFCCP's enforcement and policy agenda. We look forward to working with you as you continue to examine these important issues. Please do not hesitate to contact us if we may be of assistance in this matter.

Sincerely,

MICHAEL J. EASTMAN, *Senior Vice President,*
Executive Director, Labor, Immigration & Employee Benefits Labor Law Policy.

ENDNOTES

[1] See, e.g., Exec. Order No. 11246, §209(a)(6).
[2] Mar 17, 2003.
[3] OFCCP Directive No. 293 (Dec. 16, 2010).
[4] OFCCP v. UPMC Braddock, ARB Case No. 08-048 (May 29, 2009).
[5] Ralph Lindeman, Hospitals Wage Legal Battle with OFCCP: Hospitals Claim High-Stakes Controversy, DAILY LABOR REPORT (BNA)(Feb. 17, 2011).
[6] OFCCP v. Florida Hospital of Orlando, ALJ Case No. 2009-OFC-00002 (Oct. 18, 2010).
[7] See Ralph Lindeman, Hospitals Wage Legal Battle with OFCCP: Hospitals Claim High-Stakes Controversy, DAILY LABOR REPORT (BNA)(Feb. 17, 2011).
[8] Pub.L. 112-81, §715.
[9] Jay-Anne B. Casuga, Shiu Says OFCCP Will Assess Its Policies In Light of Subcontractor Provision in NDAA, DAILY LABOR REPORT (BNA)(Dec. 21, 2011).
[10] Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246; Notice of Proposed Rescission, 76 Fed. Reg. 62 (Jan. 3, 2011).
[11] Non-Discrimination in Compensation; Compensation Data Collection Tool, Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. 49,398 (Aug. 10, 2011).
[12] Agency Information Collection Activities; Submission for OMB Review; Comment Request; Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements—Supply and Service, Notice, 76 Fed. Reg. 60,083 (Sept. 28, 2011).

April 17, 2012.

Hon. DAVID P. ROE, *Chairman,*
Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and the Workforce, U.S. House of Representatives Washington, DC 20515.

DEAR CHAIRMAN ROE: HR Policy Association is writing to commend you for holding the hearing, "Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions," to examine the Department of Labor's (DOL's or Department's) Office of Federal Contracts Compliance Programs (OFCCP). Though the OFCCP is not widely known, its operations have wide-reaching effects as their policies have been estimated to cover 25 percent of the workforce.

While HR Policy is concerned in general with reports from our members about the OFCCP's aggressive enforcement of its rules, our members are most concerned specifically with OFCCP's December 9, 2011 Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the non-discrimination and affirmative action regulations of section 503 of the Rehabilitation Act of 1973. We strongly believe that this proposal, on its own, merits a close examination by your Subcommittee with an additional hearing.

As you know, our 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 final bill was largely a result of negotiations between the business community and the disability and civil rights groups, in which HR Policy played a critical role. We believe this process formed a valuable template for formulating federal workplace disability policy—an approach that is being abandoned with the NPRM.

The Section 503 NPRM would, for the first time, set a goal that seven percent of every job group in a contractors' workforce be filled with individuals with disabilities. The proposed rules would apply to a contractor's entire workforce regardless

of the percentage of the company that is devoted to the federal contract. The difficulty in achieving this goal is underscored by the fact that the federal government as well as most agencies (including the Department of Labor) fall short of the proposed goal on a workforce-wide basis, not to mention in each job group. In addition, the Department is, like most federal agencies, unable to meet the federal government's goal of filling two percent of its workforce with individuals with "targeted" disabilities.

Given the OFCCP's own description of the aggressive enforcement it would apply to the new rules, most federal contractors, to avoid the threat of debarment, would have to treat the goals as, in effect, a quota system, even though the federal courts have ruled that quotas are illegal. The NPRM also fails to explain how employers can achieve these goals if they are not hiring new employees. Would current employees have to be displaced in order to hire individuals with disabilities?

Further, the proposal requires employers to ask each job applicant if he or she has a disability, even though employers are prohibited under federal law. In addition to violating a specific prohibition in the Americans with Disabilities Act, this requirement raises substantial privacy issues and contravenes sound human resource practices by shifting the focus of a job applicant's abilities that would match the employer's needs to a focus on the disabilities of employees and applicants.

Finally, the NPRM deliberately kept the cost estimates below the $100 million threshold to avoid triggering additional procedural hurdles for regulations that are considered "economically significant." The estimate was kept lower by ignoring major new requirements that would be imposed on contractors. Factoring these in, we estimate that compliance will cost $1.8 billion annually.

Given that OFCCP has put this proposal on a fast track to be finalized this year, we believe it is critical that your Subcommittee review this proposal carefully. Thus, HR Policy urges you to consider holding a hearing specifically to examine this NPRM. Thank you for your consideration and we respectfully request that this letter be included in the record of the hearing.

Sincerely,

DANIEL V. YAGER, *President and General Counsel,*
HR Policy Association.

April 17, 2012.

Hon. PHIL ROE, M.D., *Chairman,*
Subcommittee on Health, Employment, Labor and Pensions, U.S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN ROE: Thank you for holding the April 18, 2012 hearing reviewing the impact of recent regulatory and enforcement actions taken by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). On behalf of the Society for Human Resource Management (SHRM) and the College and University Professional Association for Human Resources (CUPA-HR), we write to express concern with OFCCP's recent flurry of activity.

As you know, OFCCP is responsible for enforcing affirmative action and equal employment opportunity laws for employers that do business with the Federal government. Both SHRM and CUPA-HR are supportive of the affirmative action goals articulated by the executive orders and laws administered by OFCCP and the underlying goals of recent OFCCP rulemakings.

However, we are very concerned that the recent regulatory and enforcement initiatives will not achieve our shared objective of increased employment opportunities for protected classes as the agency has not provided accurate and reliable methods for compiling the data necessary to implement its proposed requirements. At the same time, the recent regulatory actions impose requirements for federal contractors that conflict with other statutes, intrude on employee privacy, and set unrealistic objectives and impose unnecessary and burdensome paperwork requirements.

In the past 18 months, OFCCP has issued the following regulations:

- January 3, 2011—notice of proposed rescission of its systemic compensation discrimination standards and self-audit guidelines for evaluating pay practices for federal contractors and subcontractors under Executive Order 11246 (See CUPA-SHRM comments: *http://www.shrm.org / Advocacy / PublicPolicyStatusReports / Courts-Regulations / Documents / 3 % 204 % 2011 % 20OFCCP % 20comments % 20on % 20rescission % 20of % 20comp % 20guidance % 20stds % 20 % 20FINAL.pdf*)
- April 26, 2011—notice of proposed rulemaking under the Veterans' Readjustment Assistance Act overhauling the federal contractor affirmative action program requirements for covered veterans (See CUPA-SHRM comments: *http://www.shrm.org / Advocacy / PublicPolicyStatusReports / Courts-Regulations / Doc-*

uments / 7 % 2011 % 2011 % 20Protected % 20Veterans % 20Comments % 20FINAL.pdf)

• August 10, 2011—advanced notice of proposed rulemaking soliciting comments on development of a compensation data collection tool (See CUPA-SHRM comments: *http://www.shrm.org / Advocacy / PublicPolicyStatusReports / Courts-Regulations / Documents / 20111011155702497.pdf*)

• September 29, 2011—formal request to the Office of Management and Budget to review and approve a significant revision of the information they routinely request on Scheduling Letters and Itemized Listings from federal contractors (See CUPA-SHRM comments: *http://www.shrm.org / Advocacy / PublicPolicyStatusReports / Courts-Regulations / Documents / Oct % 2028 % 20CUPA-HR % 20and % 20SHRM % 20Scheduling % 20Letter % 20comment.pdf*)

• December 9, 2011—notice of proposed rulemaking amending the regulations implementing Section 503 of the Rehabilitation Act of 1973 revising nondiscrimination and affirmative action employment requirements for individual with disabilities for all federal contractors (See CUPA-SHRM comments: *http://www.shrm.org / Advocacy / PublicPolicyStatusReports / Courts-Regulations / Documents / SHRM % 20comments % 20to % 20OFCCP % 20on % 20Changes % 20to % 20Affirmative % 20Action % 20Requirements % 20forIndividuals % 20with % 20Disabilities % 20- % 202.21.2012.pdf*)

We have filed detailed comments on all of these regulatory actions reflecting our concerns (links listed above). These comments are attached and we respectfully request they be included in the official hearing record. In addition to the above actions, we understand OFCCP is currently developing five regulatory proposals that may lead to even greater administrative burdens on employers.

Mr. Chairman, thank you for your consideration of our concerns with OFCCP's significant changes to its regulatory and enforcement policies. We look forward to working with you on these issues.

Sincerely,

MICHAEL P. AITKEN, *Vice President, Government Affairs, Society for Human Resource Management;*

JOSHUA ULMAN, *Chief Government Relations Officer, College and University Professional Association for Human Resources.*

April 19, 2012

The Honorable Phil Roe
Chairman
Subcommittee on Health, Employment, Labor, and Pensions
U.S. House Committee on Education and the Workforce
Washington, D.C. 20515

Mr. Chairman:

Thank you for holding this important hearing and for allowing us the opportunity to provide a written statement to include for the record.

Food Marketing Institute (FMI) members are grocery retailers and wholesalers. They are in the business of selling groceries and other retail products mostly to the general public. Sometimes FMI members are asked to sell groceries to the federal government, either by supplying commissaries with products that they in turn sell or by supplying other government facilities with supplies they utilize. This part of their sales - sales to the federal government - is a very small part of our members' overall sales, but as soon as they hit the $50,000 threshold, they become covered by the jurisdiction of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). This has resulted in an inordinate recordkeeping burden that applies to our members' entire operations, not just the one or two facilities that might be performing work under the contract. Members who have had compliance reviews report that these reviews are lengthy and oppressive, too often resulting in bullying tactics by district and regional managers who do not appear impartial.

There is perhaps no industry more focused on ensuring, not only that their products reflect the diversity of their communities, but also their workforce. Our members take this responsibility very seriously, especially given the significant business impact for them. If they are not successful on this front, they will not have the diverse products or the diverse customers that our members' businesses require to be successful.

We recognize at times that OFCCP compliance reviews may identify areas where improvement may be possible, and we welcome the constructive feedback that these reviews may provide. However, we feel strongly that the results of a compliance review should be the start of a productive discussion in which the contractor can learn about the basis for the OFCCP's conclusions, and the Agency in turn can learn more about the challenges of the business more broadly, including the specific job positions, and together the auditor and business can consider unique methods to try to continue to make progress with goals and improve compliance overall. Unfortunately, there is currently inconsistency with some of the regional offices of

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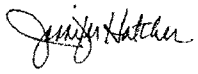
OFCCP as they have gone in the complete opposite direction and used preliminary, unverified compliance review results as a basis to intimidate and threaten contractors with huge penalties without offering these contractors a chance to even understand the data on which the Agency claims it is relying. These tactics are unlike any ever experienced before by FMI members.

We applaud your oversight of OFCCP and look forward to the Committee identifying ways to ensure greater consistency in the review process across each of the offices and among all employees of the agency.

Sincerely,



Jennifer Hatcher
Senior Vice President
Government & Public Affairs
Food Marketing Institute

[Additional submission of Mr. Miller follows:]

Prepared Statement of Patricia A. Shiu, Director, Office of Federal Contract Compliance Programs, U.S. Department of Labor

Chairman Roe, Ranking Member Andrews, and Members of the Subcommittee, thank you for holding this important hearing. As the Director of the Office of Federal Contract Compliance Programs ("OFCCP") at the Department of Labor ("Department"), I am pleased to provide this Statement for the Record on the impact of OFCCP's regulatory and enforcement actions. OFCCP is a worker protection agency, responsible for enforcing the civil rights of nearly one-quarter of American workers. The mission of OFCCP's more than 700 dedicated staff is to protect workers, promote diversity, and enforce the nation's equal employment opportunity laws in federal contractors' and subcontractors' workforces. OFCCP has jurisdiction over

170,000-plus establishments that profit from over $700 billion in government contracts annually. 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.

The thoughtful testimony given by the witnesses and insightful questions posed by the Members of the Subcommittee at its hearing on April 18, 2012, revealed the positive effect that OFCCP's work has on the lives of thousands of women, minorities, individuals with disabilities, and protected veterans. Much of what was said is also reflected in the thousands of comments we received on OFCCP's recent regulatory proposals. OFCCP remains committed to reviewing and considering any and all feedback that will help achieve the shared goal that was repeated by several participants in the hearing: to combat discrimination and ensure equal employment opportunity in a manner that is efficient, effective, measurable, consistent with the law, and fair.

Background on OFCCP

OFCCP has long been a pillar of the federal government's civil rights enforcement and 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. OFCCP administers and enforces three legal authorities that require equal employment opportunity: 1) Executive Order 11246, as amended ("the Order" or "EO 11246"); 2) Section 503 of the Rehabilitation Act of 1973, as amended, 29 USC Sec. 793 ("Section 503"); and 3) the Vietnam Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 ("VEVRAA").

The Executive Order prohibits federal contractors and federally-assisted construction contractors and subcontractors (hereafter, "contractors") who have contracts of at least $10,000 with the federal government from discriminating in employment on the basis of race, color, religion, sex, or national origin. Among other things, this includes discrimination in rates of pay or other forms of compensation. For contractors with 50 or more employees and a contract of at least $50,000, the Executive Order also requires contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment.

Section 503 protects the employment rights of individuals with disabilities. It covers persons with a wide range of mental and physical impairments that substantially limit or restrict a major life activity such as hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning, or working. Like the Executive Order, Section 503 requires federal contractors with Government contracts of at least $50,000 and 50 employees to take affirmative action to employ and advance in employment these individuals.

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 take affirmative action to employ and advance in employment protected veterans.

Taken together, these laws ban discrimination and require federal contractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a protected veteran. Under all three laws, contractors must develop written programs detailing the actions that they are taking for this purpose and make the plans available when requested in a compliance evaluation or complaint investigation.

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

- strengthening enforcement activities,
- broadening outreach to agency stakeholders, and
- implementing an ambitious agenda of regulatory reform.

Enforcement

OFCCP is one of three federal agencies protecting the civil rights of employees, the other two being the Equal Employment Opportunity Commission and the Civil Rights Division of the U.S. Department of Justice. But OFCCP is unique in that it conducts in-depth compliance evaluations of about 4,000 contractor establishments each year, according to a neutral selection and scheduling system. These are scheduled reviews, not triggered by specific complaints. While OFCCP does inves-

tigate complaints, the majority of its work consists of compliance evaluations, during which compliance officers check to make sure that contractors are meeting their legal obligations to provide equal opportunity for all of their workers.

OFCCP's compliance reviews are particularly important because too often, workers are unaware of the discrimination they face. Job seekers who don't get an offer, employees who are being paid less than colleagues doing similar work, workers who are downsized in a bad economy—they may not know if the underlying cause is discrimination, because they do not have the necessary information. But federal contractors have specific obligations when it comes to record-keeping and data collection, including maintaining information about listed job openings; worker recruitment methods; selections of interviewees for openings; and decisions about hiring, terminations, placement, pay, and promotions. Contractors are required to share those records with OFCCP during audits, and OFCCP is able to analyze that data and determine if there are indicators of discrimination. If so, OFCCP does a more in-depth investigation to see if the contractor treats protected groups differently or follows practices that create an unjustified adverse impact on job seekers or workers.

Under this Administration, OFCCP has undertaken a concerted effort to shift toward more thorough, careful and consistent compliance reviews, toward higher quality—not just quantity—of evaluations. In 2010, OFCCP provided the first national training for its compliance officers in more than a decade. Also in 2010, it updated its enforcement and evaluation protocols to improve the way compliance evaluations are conducted—with more thorough desk audits, more frequent on-site investigations, more flexibility in defining classes of victims, and more reviews focused on specific types of discrimination. Now, OFCCP investigates all types of discrimination—not just hiring, but also compensation, placement, promotion, termination, harassment, retaliation, and other conditions of employment; every protected group, including women, minorities, people with disabilities, and protected veterans; and every industry and job group. Notably, these changes have been accomplished while maintaining the overall level of compliance evaluations conducted at approximately 4,000 per year.

One important example of these changes is that OFCCP now reviews compliance with Sections 503 and VEVRAA in every evaluation in which a contractor meets minimum coverage requirements. Previously, the agency audited for Section 503 and VEVRAA compliance in only in a few focused reviews each year, which meant that very few violations of those laws were ever uncovered. Now that OFCCP routinely reviews Section 503 and VEVRAA compliance, the proportions of evaluations in which violations are found have significantly increased: for Section 503, the proportion rose from three percent in FY 2005 to 21 percent in FY 2011; for VEVRAA, from five percent in FY 2005 to 25 percent in FY 2011. The vast majority of these are violations such as failure to have an Affirmative Action Program, failure to post job listings as required, failure to do outreach, and recordkeeping violations.

The increased thoroughness of OFCCP's compliance reviews is revealed by several other performance statistics as well:

- The proportion of compliance evaluations in which some kind of violation—including discrimination as well as violations such as failure to have an Affirmative Action Program (AAP), failure to list job openings as required, failure to do outreach, and recordkeeping violations—rose dramatically, from 13 percent in FY 2007 to 38 percent in FY 2011.
- In FY 2011, the number of cases closed with financial remedies was at its highest point since at least FY 2005.
- The amount of back pay and interest collected in FY 2011—$12.3 million—was at its highest point since at least FY 2005.
- The average back pay and interest per eligible worker in FY 2011—$842—was at its highest point since at least FY 2005.

One statistic that has remained constant is that the vast majority of reviews in which violations were found—99 percent—are resolved by conciliation agreement or consent decree. Extremely few cases go to litigation, and voluntary compliance is always OFCCP's goal. That said, OFCCP will litigate if necessary, and, for the worst offenders, will seek debarment of federal contracts.

Focus On Compensation Discrimination

Despite passage of the Equal Pay Act of 1963, which requires that men and women in the same workplace be given equal pay for equal work, and of the Civil Rights Act of 1964, which prohibits compensation discrimination more generally, the "gender gap" in pay persists. On average, women, who work full-time, still earn only about 77 cents for every dollar a man earns. The gap is even larger for African American women, who earn about 64 cents, and Hispanic women who earn about

56 cents for each dollar that white males earn. Over a woman's lifetime, this wage gap adds up and grows over time. By age 65, the cumulative gap in earnings can be hundreds of thousands of dollars.

Decades of research shows that the "gender gap" in pay remains even after factors like the kind of work people perform and qualifications, such as education and experience, are taken into account. Many studies address how much these factors explain why women earn less than men. They consistently conclude that a pay gap still remains and that discrimination is the best explanation for the difference. Research also shows that progress towards closing the pay gap has stalled. In other words, pay discrimination is a real and persistent problem that continues to short-change American women and their families.

As a member of the President's Equal Pay Task Force, OFCCP has made combating pay discrimination a major priority. On the enforcement side, about 20 percent of OFCCP's financial settlements addressed compensation issues in FY 2011—a significant increase over prior years. In fact, the 28 conciliation agreements with financial remedies in compensation cases in FY 2011 were greater than the number of such conciliation agreements in FYs 2006 through 2009 combined.

OFCCP's equal compensation enforcement efforts have made real differences in the lives of many workers. For example, in June of 2011, OFCCP settled a lawsuit against AstraZeneca, alleging that the pharmaceutical company discriminated in compensation at its Philadelphia Business Center in Wayne, Pennsylvania. OFCCP determined that 124 female sales specialists were paid, on average, $1,700 less than their male counterparts. Under the terms of the settlement agreement, the company agreed to pay $250,000 to the women who were discriminated against, to adjust salaries accordingly going forward, and to work with OFCCP to re-examine its pay practices at facilities across the country. AstraZeneca also agreed to develop and annually update its affirmative action plan and keep all supporting documentation as required by law.

Outreach to Stakeholders

Through its outreach efforts, OFCCP seeks to ensure input from stakeholders as it develops policies that are both practical and effective. 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. OFCCP's leadership has made it a priority to meet with groups that are directly affected by its program, and has had numerous and productive conversations with some of the organizations that testified at the hearing.

In FY 2011, OFCCP hosted more than 1,800 outreach events where more than 61,000 stakeholders were engaged. Of these events, nearly 1,000 compliance assistance events provided contractors with the tools to understand and comply with the laws it enforces. More than a third of those compliance assistance events were directed specifically at small businesses and first-time federal contractors.

Regulatory Proposals

Over the last three years, OFCCP has recovered nearly $35 million in back wages and interest on behalf of over 70,000 workers affected by discrimination. It has audited more than 12,000 businesses which employ almost 7 million workers. While these are major accomplishments, workplace discrimination against women, minorities, people with disabilities, and protected veterans is still a major problem. To increase the effectiveness of its efforts and those of contractors to eliminate such discrimination, OFCCP has recently issued several regulatory proposals, which were discussed at the Subcommittee's hearing.

Notice of Proposed Rulemaking to Strengthen Affirmative Action Obligations With Respect to Employment Opportunities for People with Disabilities under Section 503

On December 9, 2011, OFCCP published a Notice of Proposed Rulemaking (NPRM) to strengthen affirmative action obligations with respect to employment opportunities for people with disabilities under Section 503. The NPRM 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 proposed rule would establish, for the first time, a single, national utilization goal for individuals with disabilities: contractors would be required to set an aspirational goal of having 7 percent of their employees be workers with disabilities in each job group of the contractors' workforce. This aspirational goal is not a quota and failure to meet it would not be evidence of discrimination; rather, it will help contractors evaluate the effectiveness of

their recruitment efforts towards workers with disabilities. The proposed rule also would improve collection of data on the employment of people with disabilities by requiring contractors to invite applicants to voluntarily self-identify as an "individual with a disability" at the pre-offer stage of the hiring process, to invite post-offer voluntary self-identification, and to survey all employees annually to invite their self-identification in an anonymous manner. Under the proposal, contractors would also, for the first time, develop and implement written procedures for processing requests for reasonable accommodation.

At the Subcommittee's hearing on April 18, 2012, a concern was raised that the voluntary self-identification requirements in the Section 503 NPRM could be in conflict with the Americans with Disabilities Act. I would like to take a moment to address that concern. As the Preamble to OFCCP's proposed rule explains:

The requirement to give applicants and employees the opportunity to self-identify is consistent with the ADA's restrictions on pre-employment disability-related inquiries. Although the ADA generally prohibits inquiries about disability prior to an offer of employment, it does not prohibit the collection of this information by a contractor in furtherance of its section 503 affirmative action obligation to employ and advance in employment qualified individuals with disabilities. (Emphasis supplied.)

In fact, in its regulations and guidance implementing the ADA, the EEOC specifically states that "inviting individuals to identify themselves as individuals with disabilities * * * to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted" by the ADA as long as individuals are given clear notice that their response to the invitation is voluntary, that refusal to provide a response will not subject the individual to any adverse treatment, and that the information will be kept confidential and used only for affirmative action purposes.[1] In developing its proposed rule on Section 503, OFCCP worked in close partnership with officials at the EEOC to ensure that any regulatory changes are completely consistent with both the letter and the spirit of the ADA.

Notice of Proposed Rulemaking on Contractors' Obligations With Respect to Employment Opportunities for Protected Veterans under VEVRAA

OFCCP's VEVRAA regulations have remained unchanged, in large measure, since the implementing rules were first published in 1976. Meanwhile, 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. In fact, veterans who served on active duty since September 2001 face a higher rate of unemployment than nonveterans. On April 26, 2011, OFCCP proposed changes to the VEVRAA regulations that would improve the job opportunities for this group and ensure that the men and women who served our country are afforded their full rights and protections under VEVRAA.

Specifically, the VEVRAA proposal would require contractors to record and maintain quantitative data on their recruitment and hiring of veterans and establish annual hiring benchmarks based on relevant information. Contractors would also have to evaluate the effectiveness of their efforts to ensure that protected veterans have access to employment opportunities.

Policies Regarding Compensation Discrimination

With regard to compensation discrimination, OFCCP has several policy initiatives underway.

First, on January 3, 2011, OFCCP proposed to rescind two policy documents that were adopted in 2006—"Interpretive Standards for Systemic Compensation Discrimination" and "Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246"—because the Standards "have limited [its] ability to effectively investigate, analyze and identify compensation discrimination" and the Voluntary Guidelines "have not been an effective enforcement strategy" (76 Fed. Reg. 62 (January 3, 2011)).

Second, on August 10, 2011, OFCCP published an Advanced Notice of Proposed Rulemaking (ANPRM) seeking comments on the possibility of systematically collecting compensation data with respect to gender, race and national origin from federal contractors and subcontractors, to strengthen its ability to identify and remedy compensation discrimination. The ANPRM posed 15 questions for public response on

[1] Appendix to 29 CFR 1630.14(a); Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, Question 23 (July 7, 2000), *http://eeoc.gov/policy/docs/guidance-inquiries.html#10.*

the types of data that should be requested, the scope of information OFCCP should seek, how the data should be collected, how the data should be used, what the tool should look like, which contractors should be required to submit compensation data, and whether the tool might create potential burdens for small businesses. By publishing this ANPRM, OFCCP proactively sought feedback on what a compensation data tool might look like.

Potential Impact on Contractors

Finally, I would like to address some of the issues raised during the recent hearing. In particular, there was concern expressed that in recent years government contractors' obligations have become overly burdensome and would increase if the proposed regulations are finalized.

I would like to assure the Members of the Subcommittee that in moving forward with all of OFCCP's regulatory initiatives and in developing a data compensation tool, OFCCP is diligently analyzing the impact that our proposals may have on contractors and the business community as a whole. By reviewing and considering any and all public comments on these proposals, OFCCP is ensuring that federal contractors and their representatives, as well as workers and their representatives, play a central role in its efforts.

Many, if not all, of the concerns raised regarding OFCCP's regulatory proposals are being examined by OFCCP and were addressed in comments the agency received. For instance, some concerns were raised at the Subcommittee's hearing that the compensation data device was burdensome and costly. Yet there have been no decisions, and no device has been deployed—or even formally proposed. OFCCP is reviewing, considering and analyzing the more than 7,800 comments submitted from a broad range of stakeholders in response to the ANPRM. The issues and concerns raised during the hearing were reflected in these comments, and OFCCP will take them into account in developing any proposal for a compensation data tool.

In addition, the guidance, training, webinars, and other forms of technical assistance that OFCCP provides informs contractors both about their obligations under the law and about the agency's regulatory and other policy proposals. OFCCP is committed to sharing information about our regulatory proposals to the extent it can do so within the law and to considering constructive feedback about the impact of such proposals on stakeholders, and will stay true to this commitment as its regulatory reform efforts go forward.

The overall burden imposed by OFCCP compliance reviews is relatively small. As noted above, OFCCP conducts an average of approximately 4,000 compliance reviews a year—out of more than 170,000 contractor establishments. Accordingly, each establishment has less than a 2.4 percent chance of being reviewed each year.

Moreover, the total number of OFCCP's compliance evaluations has remained quite steady over the last six years. In FY 2011, OFCCP conducted 4,014 compliance evaluations. This total is very close to 4,122, the average number of evaluations conducted per year in FY 2005 through FY 2011, and, in fact, is the median number conducted for those years (the number conducted having been fewer in FYs 2005, 2006, and 2009, and greater in FYs 2007, 2008, and 2010).

The perspective provided at the hearing by the witness from St. Jude's Children's Research Hospital about her experience as an employee of a federal contractor who dealt with an OFCCP compliance evaluation was extremely informative. St. Jude's clearly takes its obligations as a federal contractor very seriously. In OFCCP's 2009 compliance review, St. Jude's successfully documented its compliance: after an exchange of data and a single day of on-site interviews, OFCCP compliance officers concluded the audit fully satisfied and with no finding of discrimination. The witness testified that approximately 400 employee hours were spent to respond to this audit. However, St. Jude's Hospital has 3,700 employees, and thus 400 employee hours is the equivalent of only 20 percent of one full-time employee's time per year.

With regard to record-keeping obligations, the witness testified that about eight full time employees work on St. Jude's employee databases, which are used in OFCCP-related record-keeping. However not only is that is only 0.2 percent of St. Jude's staff, but most of that employee time would have to be expended on similar tasks even absent OFCCP, to manage employee records electronically for payroll, tax and accounting functions and compliance with other employment laws.

The witness estimated the cost of preparing an Affirmative Action Program at $58,000, but that amount is approximately 0.01 percent of the total revenue of $589,885,089 that St. Jude's reported on its FY 2010 tax return and a small proportion of the approximately $82 million that St. Jude's currently receives in federal contracts.

Finally, the witness testified that St. Jude's took additional steps, such as running various statistical analyses on the data, which are not required by OFCCP. For the

largest contractors, it costs approximately $8,000 per year to develop (in the first year) or to review and update (in subsequent years) an Affirmative Action Program. The additional measures that St. Jude's took while preparing its plan may well explain why the stated cost ($58,000) varies from the national estimate. More importantly, St. Jude's willingness to go beyond OFCCP's requirements illustrates how well-run organizations are aware of the value of keeping adequate records on personnel activity, compensation, diversity and affirmative action compliance.

Some concern has been expressed that OFCCP has abandoned its tiered approach to compliance evaluations. That is not true, however. Pursuant to its settled practice, OFCCP continues to conduct desk audits on all scheduled compliance evaluations and generally conducts onsite visits only when the desk audits reveal some evidence of potential discrimination or concerns about data integrity.

In some cases, OFCCP requests additional information during the desk audit phase of a compliance evaluation. This has been a long-standing practice of OFCCP and has been upheld by the courts, which have found that contractors must provide the information requested because, as one United States District Court stated: "submission to such lawful investigations is the price of working as a federal contractor."[2] OFCCP has always verified and followed up on concerns presented in a contractor's Affirmative Action Plan or otherwise revealed in a desk audit, and will continue to do so.

Moreover, recordkeeping is essential to a contractor's success in increasing employment opportunities for minorities, women, protected veterans, and people with disabilities. The law requires employers to maintain and analyze their records not merely in anticipation of an OFCCP review, but also as a tool for self-evaluation, and to help employers proactively address challenges and opportunities when it comes to ensuring diversity in their workforce.

It is a simple rule of business that what gets measured gets done. Any successful company relies on data every day to track its performance and identify where it can do better. OFCCP's recordkeeping requirements ensure that contractors have the data they need to measure their own performance in providing equal employment opportunity and to identify areas where they can do better. Businesses must be able to track their progress in hiring our nation's veterans or closing the pay gap for women just as they track sales, inventory, profits or any other critical measure of success.

While there are limited costs associated with complying with OFCCP's regulations, being a federal contractor remains a privilege. Federal contractors receive millions—in some cases billions—of dollars in federal contracts. As these contractors continue to benefit from taxpayer dollars, so do we strive to ensure that they respect the civil rights and advance the opportunities of the taxpayers who are their employees.

Confidentiality

Concerns were also expressed about the confidentiality of employee-specific compensation data under the proposed regulations. OFCCP has always taken steps to protect the confidentiality of contractor data, and will continue to do so. Specifically, OFCCP treats compensation and other personnel information provided by the contractor during a systemic compensation investigation as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act.

Transparency

Some witnesses expressed concern that OFCCP has not been sufficiently transparent in the standards it uses to evaluate contractors' compliance. OFCCP is committed to transparency, and OFCCP's website reveals the extent to which the agency provides detailed information about its standards and procedures. An important element of these efforts is the Federal Contractor Compliance Manual that OFCCP staff use in compliance evaluations, which is publicly available at *http://www.dol.gov/ofccp/regs/compliance/fccm/fccmanul.htm.* OFCCP is in the process of reviewing and updating the Compliance Manual; in the meantime, the current Manual remains in effect. Any interim changes to procedures in the Manual are made public, as appropriate, via Directives or other agency guidance.

In addition, virtually all of OFCCP's directives are available to the public on the OFCCP website. OFCCP does maintain the confidentiality of a few directives that contain sensitive information involving its law enforcement protocols and internal

[2] United Space Alliance, LLC v. Solis, Civil Action No. 11-746, 2011 WL 5520428 (D.D.C. Nov. 14, 2011).

policies. The use of such internal directives is not unique to OFCCP; nor is it a recently developed OFCCP practice.

Finally, OFCCP spends thousands of hours each year providing free compliance assistance to any federal contractor or subcontractor that seeks clarity on the law. This service is free of charge (and without the possibility of any kind of adverse action toward contractors) and is offered via Webinars and trainings and forums at regional and field offices across the country, as well as in individual consultations.

In sum, OFCCP is committed to providing transparency regarding any changes to existing guidance once that process is complete. And both before and after such changes may be made, the OFCCP staff stands able, willing and ready to provide any information, technical assistance or education that will enable contractors to understand their obligations under the law.

Conclusion

Workers are our nation's greatest resource. The United States has 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 in general, and OFCCP in particular, are so singularly focused on making sure that American workers have the opportunities and working conditions that will allow them and their employers to flourish.

[Additional submission of Mr. Norris follows:]

April 26, 2012.

Hon. PHIL ROE, *Chairman,*
Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, 2181 Rayburn House Office Building, Washington, DC 20515.

Re: *OFCCP Oversight Hearing, April 18, 2012*

DEAR CHAIRMAN ROE: At the April 18, 2012 Subcommittee hearing entitled, "Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions," you extended an invitation to the witnesses to supplement their testimony by inserting additional information into the hearing record.

The testimony I provided on behalf of the Equal Employment Advisory Council (EEAC) questioned the accuracy of the economic impact analyses conducted by OFCCP in support of the five pending regulatory initiatives that were the focus of the hearing. I compared the economic impact estimates calculated by OFCCP with the considerably higher estimates provided by EEAC's member companies.

The magnitude of the differences in these cost estimates could not be captured adequately in my oral or written testimony, but are compared in detail in the comment letters EEAC submitted to OFCCP on each of its pending regulatory proposals. Accordingly, I respectfully request that the following documents be included in the official hearing record:

- March 3, 2011 EEAC comment letter on OFCCP's proposal to rescind existing guidance on procedures and standards for investigating systemic compensation discrimination [76 Fed. Reg. 62 (January 3, 2011)] *http://www.eeac.org/public/11-046a.pdf*
- July 11, 2012 EEAC comment letter on OFCCP's proposal to require numerical targets for veterans' employment and impose sweeping new obligations related to documenting the identification, recruitment and treatment of veterans [76 Fed. Reg. 23358 (April 26, 2011)] *http://www.eeac.org/public/11-133a.pdf*
- October 11, 2011 EEAC comment letter on OFCCP's proposal to impose broad new compensation reporting requirements on contractors [76 Fed. Reg. 49398 (August 10, 2011)] *http://www.eeac.org/public/11-197a.pdf*
- October 28, 2011 EEAC comment letter on OFCCP's proposal to seek permission from OMB to vastly expand the scope and amount of data requested of contractors at the outset of compliance evaluations [76 Fed. Reg. 60083 (September 28, 2011)] *http://www.eeac.org/public/11-206a.pdf*
- February 21, 2012 EEAC comment letter on OFCCP's proposal to impose a 7% hiring goal for individuals with disabilities and impose sweeping new obligations related to documenting the identification, recruitment and treatment of individuals with disabilities [76 Fed. Reg. 77056 (December 9, 2011)]
  http://www.eeac.org/public/12-037a.pdf

Thank you again for the invitation to testify at the April 18 hearing, and please feel free to call upon us if we can be of additional assistance.

Sincerely,

JEFFREY A. NORRIS, *President,*
Equal Employment Advisory Council.

[Questions submitted for the record and their responses follow:]

U.S. CONGRESS,
Washington, DC, May 31, 2012.

DANA BOTTENFIELD, *Director of Human Resources Information Systems,*
St. Jude Children's Research Hospital, 262 Danny Thomas Place, Memphis, TN 38105.

DEAR MS. BOTTENFIELD: Thank you for testifying at the April 18, 2012, Subcommittee on Health, Employment, Labor, and Pensions hearing entitled, "Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions."

Enclosed are additional questions submitted by subcommittee members following the hearing. Please provide written responses no later than June 14, 2012, for inclusion in the official hearing record. Responses should be sent to Benjamin Hoog of the committee staff, who may be contacted at (202) 225-4527.

Thank you again for your contribution to the work of the committee.

Sincerely,

PHIL ROE, *Chairman,*
Subcommittee on Health, Employment, Labor, and Pensions.

QUESTIONS FROM REPRESENTATIVE ROE

1. Based on your experience complying with the Office of Federal Contract Compliance Programs' (OFCCP) regulatory requirements and audits, what suggestions do you have to improve the OFCCP compliance process?

2. Based on your experience responding to OFCCP audits, do you have any concerns about the agency's pending proposal pertaining to individuals with disabilities, which would require contractors to set a "goal" that 7 percent of all job groups be filled with individuals with disabilities, including a "sub-goal" of 2 percent for individuals with severe disabilities? In your experience, how has OFCCP enforced other such "goals"?

3. The Americans with Disabilities Act states that 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" prior to extending a job offer to an applicant. However, OFCCP's proposal pertaining to individuals with disabilities would require St. Jude and all federal contractors to make such inquiries. How would this requirement impact St. Jude's hiring process?

Ms. Bottenfield's Response to Questions Submitted for the Record

Below, please find responses from Dana Bottenfield, on behalf of St. Jude Children's Research Hospital, to additional questions from the House Committee on Education and Workforce's Subcommittee on Health Employment, Labor and Pensions. These questions are related to the subcommittee's April 18, 2012 hearing entitled, "Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions."

Q1: Based on your experience complying with the Office of Federal Contract Compliance Programs' (OFCCP's) regulatory requirements and audits, what suggestions do you have to improve the OFCCP compliance process?

A: We have a number of suggestions to improve the OFCCP compliance process:

- The length of the OFCCP audit should be defined and adhered to. St. Jude is audited regularly by many agencies and accrediting organizations, including, but not limited to the Joint Commission, OSHA, CMS, FDA, PHS, CAP, USCIS and the State of Tennessee. OFCCP audits last months or years, while audits by the other agencies typically last days.
- The OFCCP should reinstate the practice that a full audit is not required unless a desk audit identifies serious issues.
- The OFCCP should focus on "systemic" rather "individual" allegations of discrimination.

• The OFCCP should develop a realistic compensation standard to replace its current unrealistic standard. Currently, the OFCCP considers it an issue if there is a 2 percent average pay difference between men and women in a job title or 2 percent average pay difference between minorities and non-minorities in a job title. There are many drivers for pay, including differences in performance, special skills, years of experience prior to employment, level of education and myriad other pertinent factors. The tight standard does not recognize that pay can vary widely based upon these legitimate factors. The unfortunate result of the unrealistic compensation standard is meritless allegations of compensation issues that nevertheless must be defended.

• For organizations with a history of compliance, positive audit outcomes, and appropriate hiring efforts, the OFCCP should allow a longer period between audits than the 2 years currently permitted.

• The OFCCP should reconsider the pending regulations, including the time, effort and costs associated with these regulations and the feasibility of implementing and adhering to these standards for members of the Federal contractor community, especially the regulations that directly conflict with other existing statues.

Q2: Based on your experience responding to the OFCCP audits, do you have any concern about the agency's pending proposal pertaining to the individuals with disabilities, which would require contractors to set a "goal" that 7 percent of all job groups be filled with individuals with disabilities, including a "sub-goal" of 2 percent for individuals with severe disabilities? In your experience how has the OFCCP enforced other such "goals"?

A: Yes, we have concerns that the 7 percent and 2 percent goals are unrealistic. Placement goals traditionally have been based on readily available information, such as census data, and there are no other predefined, across-the-board placement goals for all job groups. This will be the first "hard" placement goal, rather than targets based upon availability analysis. A review of St. Jude's "faculty member" job category illustrates the difficulty of attaining these goals. All of the job titles in St. Jude's "faculty member" category require an MD, Ph.D. or other similar doctorate level degree. However, St. Jude has no idea if 7 percent of the U.S. population with a MD or Ph.D. has a disability or if 2 percent have a severe disability and whether it would be possible to reach those goals and satisfy all of our other hiring criteria. We are concerned about the repercussions if we are unable to identify and hire the required 7 percent and 2 percent. If the regulation is implemented, then all contractors must expect that this will be a focus for any audit and that hard placement goals must be met. Another major issue is the apparent conflict with the Americans with Disabilities Act (ADA), which places employers between the proverbial "rock and hard place." Federal contractors will have to make very tough decisions that leave them vulnerable for the standards of one regulation or the other.

Q3: The Americans with Disabilities Act states that 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" prior to extending a job offer to an applicant. However, OFCCP's proposal pertaining to individuals with disabilities would require St. Jude and all Federal Contractors to make such inquiries. How would this requirement impact St. Jude's hiring process?

A: Employers would face serious challenges with complying with conflicting regulations. This will mean all contractors are susceptible to consequences with respect to one statute or the other.

Should you have questions or need additional information, please do not hesitate to contact Rob Clark, Director of Government Affairs for St. Jude Children's Research Hospital, at Robert.Clark@STJUDE.ORG.

U.S. CONGRESS,
Washington, DC, May 31, 2012.

ALISSA HORVITZ, *Shareholder,*
Littler Mendelson, P.C., 1150 17th Street, NW, Suite 900, Washington, DC 20036.

DEAR MS. HORVITZ: Thank you for testifying at the April 18, 2012, Subcommittee on Health, Employment, Labor, and Pensions hearing entitled, "Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions."

Enclosed are additional questions submitted by subcommittee members following the hearing. Please provide written responses no later than June 14, 2012, for inclu-

sion in the official hearing record. Responses should be sent to Benjamin Hoog of the committee staff, who may be contacted at (202) 225-4527.

Thank you again for your contribution to the work of the committee.

Sincerely,

PHIL ROE, *Chairman,*
Subcommittee on Health, Employment, Labor, and Pensions.

QUESTIONS FROM REPRESENTATIVE ROE

1. The conference report for the 2012 National Defense Authorization Act exempted TRICARE network providers from the Office of Federal Contract Compliance Programs' (OFCCP) jurisdiction. In light of this development, is it your understanding OFCCP has ceased pursuing health care providers that participate in a TRICARE network? Please explain.

2. How does an entity that contracts with a direct federal contractor know whether it must comply with OFCCP's requirements? Is it possible for OFCCP's requirements to apply to an entity that was not aware of the requirements at the forming of a contract with a direct federal contractor?

3. Please explain how a single transaction with the federal government can unknowingly subject an entity to coverage under OFCCP's requirements. As part of your response, please discuss whether it is likely that a single transaction with the federal government—a $50,000 transaction, for example—would cover the costs of complying with OFCCP's requirements.

4. Your written testimony noted that OFCCP is proposing to increase the scope of its audit process, so that audits can stay open indefinitely. First, how long can audits last currently? Second, what are the potential consequences for contractors of an indefinite temporal scope to OFCCP audits?

5. In your opinion, is OFCCP focusing adequate resources on compliance assistance for contractors? What steps, if any, is OFCCP taking to clarify the rules of the road for contractors?

6. In the context of investigating possible discrimination in compensation, your written testimony notes that during the audit process, OFCCP launches a full investigation of a contractor's compensation practices wherever there is a 2 percent or $2,000 difference between certain workers in a particular job title. How has OFCCP justified these thresholds? Once OFCCP identifies a compensation disparity in a contractor's workforce, what burdens does the agency impose on the contractor to prove that there is no discrimination?

7. Your written testimony highlighted the fact that solely focusing on differences in average pay between workers has no basis in compensation discrimination law under Title VII of the Civil Rights Act of 1964. For the purposes of pursuing a pay discrimination claim under Title VII, what is the appropriate analysis?

Littler
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June 14, 2012

VIA EMAIL

David P. Roe
United States House of Representatives
Chairman, Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington DC 20515-6100

Re: Written Questions for Inclusion in the Hearing Record for "Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions"

Dear Chairman Roe:

Thank you, again, for the opportunity to speak at the April 18, 2012 hearing on the Office of Federal Contract Compliance Programs. I have received many positive comments surrounding my remarks, most expressing gratitude that someone was able to articulate the genuine concerns that have developed over the last two years when doing business with the federal government.

Attached please find my written answers to the questions that the subcommittee sent me on May 31, 2012. If I may be of any further assistance to you, the Subcommittee, or the full Committee, please let me know.

Sincerely,

Alissa A. Horvitz

AAH
Attachment

Ms. Horvitz' Response to Questions Submitted for the Record

1. The conference report for the 2012 National Defense Authorization Act exempted TRICARE network providers from the Office of Federal Contract Compliance Programs' (OFCCP) jurisdiction. In light of this development, is it your understanding OFCCP has ceased pursuing health care providers that participate in a TRICARE network? Please explain.

No, it is not my understanding that OFCCP has ceased pursuing health care providers that participate in a TRICARE network. OFCCP held a web seminar on April 25, 2012 during which time it announced that it was putting those audits on hold during the pendency of the appeal involving Florida Hospital of Orlando. Indeed, its litigation position in the Florida Hospital case is that the National Defense Authorization Act eliminated only the "provision of medical care" as a basis for subcontractor status via TRICARE. OFCCP argues that Florida Hospital of Orlando is still

a subcontractor based on its role in facilitating the creation of the TRICARE health network. This interpretation of the National Defense Authorization Act would have the effect of all but writing out the exemption in the National Defense Authorization Act.Also in the interim, while the appeal of the Florida Hospital of Orlando case is pending, OFCCP has sent letters to hospitals and other medical institutions, whose audits were on hold because of the Tricare jurisdictional issue, if OFCCP believes it has an alternate basis to assert jurisdiction, such as the existence of a direct federal contract. For those companies with an alternate basis for jurisdiction, OFCCP is expecting them to submit affirmative action plans as of the date when the company first received a scheduling letter before the audit hold went into effect. For some companies, in other words, OFCCP is now seeking in 2012 a 2009 affirmative action plan, based on 2008's data.

2. How does an entity that contracts with a direct federal contractor know whether it must comply with OFCCP's requirements? Is it possible for OFCCP's requirements to apply to an entity that was not aware of the requirements at the forming of a contract with a federal contractor?

It is possible for the agency's requirements to apply to a company that was not aware of the obligations at the forming of an arrangement with a federal contractor. There are several ways in which a company doing business with a contractor could learn that it is a covered contractor, including receiving a notice from the direct contractor asking for the subcontractor's certification with the laws and regulations that OFCCP enforces. Other prime or direct contractors include references to OFCCP's regulations or the applicable Federal Acquisition Regulation (FAR) provisions in their standard contract terms and conditions. It may be in the "fine print," but the direct contractor has complied with its obligation to flow down the OFCCP's regulatory compliance obligations to each subsequent level, and it is up to the subcontractor, supplier, or vendor to determine whether it must comply.

The problem is that not every vendor and supplier on a direct federal contract is a covered subcontractor. A covered subcontractor is an entity that either sells a good or renders a service that is "necessary to the performance" of the direct government contract, or who performs any portion of the direct contractor's obligation under the contract. Most of the time, the direct contractor's procurement or contracting officers do not know whether the goods or services they are procuring are "necessary" to the performance of the direct federal contract. It is simpler to have the direct contractor's procurement officials insert the clause in every commercial contract and purchase order they let out along with the words "as applicable." Then, it is up to the vendor or supplier to inquire as to whether the goods and services it is providing meet that "necessary to the performance" threshold.

OFCCP's position in pending litigation, however, is that whether or not the incorporated equal opportunity clauses are actually flowed down, they operate as a matter of law, and their omission from a contract is not evidence that the company need not comply. OFCCP's regulations at 41 CFR Sections 60-1.4(e), 60-300.5(e), and 60-741.5(e) are parallel, and the Executive Order regulation at 1.4(e) states that "By operation of the [Executive] order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written." In other words, even if the contract does not have any OFCCP equal opportunity clause language in it, the company could still be a covered contractor or subcontractor.

That is what happened to UPMC Braddock Hospital, which is litigating this and other issues before the United States District Court for the District of Columbia. UPMC Braddock Hospital was selected for an audit and contested jurisdiction. UPMC Braddock Hospital had signed participating provider agreements with UPMC's HMO. The HMO in turn had signed a direct federal contract with the Office of Personnel Management, which negotiated medical service contracts for the Federal Employee Health Benefit Program. OPM has its own regulation, duly promulgated based on notice and comment, which regulation specifically carves out the participating hospitals and medical providers from the definition of subcontractor. The contract that UPMC Braddock signed specifically excluded hospitals from subcontractor jurisdiction, but the DOL's Administrative Law Judge and the Administrative Review Board held that OPM's regulation was entitled to no deference. Only the Director of OFCCP or the Secretary of Labor can exempt an employer from OFCCP's regulations, and OPM had no authority to do so, according to the ALJ and ARB. Because the direct contract between the UPMC HMO and the Federal Employee Health Benefit Program was to provide medical services to federal employees, their dependents, and beneficiaries, and UPMC Braddock Hospital provided medical

services in fulfillment of that direct contract, UPMC Braddock Hospital was held to be a covered subcontractor.

Every time a company receives a document from a federal agency, it has no certainty at all whether OFCCP's obligations apply, or not. Suppose the procurement officer forgets to check the box that incorporates OFCCP's regulations. How does the company know whether the unchecked box was intentional or inadvertent? Can it rely on that, or does it have to assume that OFCCP's obligations apply as a matter of law? There is no definitive answer.

Other agencies are very oblique in the agreements they sign, not making it clear whether the agency is expending grant funds (which do not give OFCCP audit jurisdiction) or is contracting with the company (which would give OFCCP jurisdiction). It's a no-man's land, in many respects. Other times, procurement officials have entered mis-information into the federal procurement data system, characterizing arrangements as contracts when they were not. This has happened frequently with respect to medical and scientific research. Some agencies procure medical research through grants and contracts, but their procurement officials have not been accurate in the characterization of such arrangements in the Federal Procurement Data System. Several times, a recipient of grant funds is accused of having a federal contract, when it does not, and it has to engage a lawyer and expend additional funds to try to persuade OFCCP to "administratively close" the audit because OFCCP lacks jurisdiction, and the "agreement" is really a grant, not a contract.

Finally, as I mentioned during my oral testimony, a company (Company A) can have an existing relationship to supply a good or service to another company (Company B) at a fixed, agree-upon price. If company B decides to become a direct federal contractor, and accepts the obligations imposed on it by the OFCCP, it has an obligation to flow-down the compliance clauses to all of its vendors and suppliers, who are supplying goods or services necessary for the performance of its new government contract. If Company A is supplying a good necessary to the performance of the government contract, it is now covered by all of OFCCP's regulations. It is (unwillingly) a government subcontractor. If the value of the goods and services that Company A supplies to Company B (and that are necessary to the performance of the direct contract) exceed $50,000, the subcontractor must prepare written affirmative action plans for women and minorities, and for individuals with disabilities. The women and minorities' plan includes extensive data evaluation regarding the employment of females and minorities against census data, the setting of employment goals, and the evaluation of hiring rates, promotion rates, termination rates, and compensation equity for the entire company (not just the facility that is supplying the good or service to the prime contractor). If the value of the subcontract exceeds $100,000, then on the date that the direct contractor signed the contract, the subcontractor (unknowingly) had an obligation to begin listing all of its non-executive and non-temporary jobs with the unemployment office where the job is located, for all of its jobs, all over the country, even if only one of its facilities is supplying a direct federal subcontractor with $100,000 in supplies.

3. Please explain how a single transaction with the federal government can unknowingly subject an entity to coverage under OFCCP's requirements? As part of your response, please discuss whether it is likely that a single transaction with the federal government—a $50,000 transaction, for example—would cover the costs of complying with OFCCP's requirements?

I think one of the most striking examples of how a transaction would unknowingly subject an institution to coverage is the example of a hospital that agreed to treat a federal prisoner with a severe heart condition. The hospital agreed to treat the prisoner (as if it could ethically say "no"?) and, not surprisingly, the medical bills soon reached $50,000 (if not much higher). In order for the Federal Bureau of Prisons to pay for the medical care that the hospital rendered, it had to create a purchase order in its system (after the fact). The purchase order contained the standard EEO clauses in it. When the hospital was selected for an audit, it asked OFCCP for evidence of the contract, and OFCCP sent it the Federal Bureau of Prisons purchase order. That one hospital was part of a larger network of hospitals, and as a result of the one hospital's decision to treat the federal prisoner, OFCCP asserted that the whole hospital system is a covered contractor with an obligation to prepare AAPs and track applicants, and the like.

To comply with OFCCP's regulations, particularly the excruciating record keeping associated with applicant tracking, most companies spend far more than $50,000 in the first year of the contract:

- Companies need to implement changes to any on-line hiring process to ensure they have a method to solicit the race and gender of qualified applicants, and to solicit the veteran and disability status of new hires;

• The company's website needs to be re-configured to accommodate applicants with disabilities;

• The company needs to change managers' and supervisors' hiring processes and train them in all aspects of the OFCCP's regulations;

• The company must prepare written affirmative action plans for each of its establishments with 50 or more employees if the value of the single contracts exceeds $50,000, which data queries often trigger expensive software development upgrades to payroll or HRIS systems because the systems were not developed with an eye towards preparing affirmative action plans.

• The company is expected to evaluate compensation for race, ethnicity, or gender-based disparities, and it is highly unwise to do that without the protection of attorney client privilege, which means there are legal fees associated with compliance.

• If the contract is for $100,000 or more, the obligation to list every job vacancy with the employment service delivery system in the jurisdiction where the job is located will apply, and that obligation is not limited to the building or facility where the government contract is being performed.

• The job listing obligation applies immediately upon signing a contract, unlike the written AAP obligation which contractors have 120 days to implement.

• And there are other obligations, including engaging in meaningful outreach for qualified veterans and individuals with disabilities, which also takes time and resources because since the federal government eliminated America's Job Bank, multi-establishment employers have no one-stop place to efficiently and cost-effectively comply with that job listing obligation. It also results in individuals with disabilities and veterans having to check multiple sources for these opportunities, instead of affording them one unified place to begin a job search.

OFCCP's proposed new scheduling letter will seek even greater information from employers in audits, if adopted as proposed, and employers will have to re-configure payroll systems to adapt. "For all employees, compensation includes base salary, wage rate, and hours worked." [Proposed New Question 12(a)]. The vast and overwhelming majority of companies are not tracking hours worked for exempt employees. I do not know how my clients are going to do this, at all.

4. Your written testimony noted that OFCCP is proposing to increase the scope of its audit process, so that audits can stay open indefinitely. First, how long can audits last currently? Second, what are the potential consequences for contractors of an indefinite temporal scope to OFCCP audits?

Although, most compliance reviews will end within one year, some can last a lot longer. I am personally aware of four audits that are all more than four years old. Our oldest began in July 2007.

As long as I can remember, it has always been OFCCP's practice to ask for information going back from the date of the scheduling letter. At first, OFCCP receives the current affirmative action plan, which is based on the prior year's data. If OFCCP identifies potential discrimination in that first year's data, it typically asks for one more year going back, so it can evaluate a total of two years' worth of data. If the company was more than six months into its current plan year when it received the scheduling letter, OFCCP also obtained data for the first six months of the current year. At most, therefore, OFCCP would have 2.5 years of data to evaluate. It was efficient for contractors to be able to handle the audits because the data set that was being evaluated was limited and confined to a concrete period.

Now, OFCCP is proposing to alter its veterans and disabilities regulations to remove any date limitations on the scope of those audits, and the Administrative Review Board held in OFCCP v. Frito-Lay that OFCCP can obtain information past the date of the scheduling letter in audits conducted pursuant to the Executive Order. OFCCP compliance officers can stop working on an Executive Order audit (women and minorities) for four years, pick it up again, and ask the company for all of its compliance data in the intervening four years, and contractors will have to gather it. In fact, that is essentially what happened in the Frito-Lay case. OFCCP did almost nothing in that compliance review, and then nearly two and a half years later sought to double the time frame under review based on nothing more than summary data showing a statistically significant difference in hiring rates between females and males in one job group. OFCCP did nothing for two years to understand what was driving the disparity. OFCCP needed more data for no other reason than OFCCP had not pursued the compliance review in a timely manner. The ARB's "objective deficiency" standard of one statistically significant disparity to justify extending the audit out indefinitely is divorced from what statistical significance means—that an outcome would only occur randomly by chance 5% or less of the time. In my opinion, most employers do not make decisions randomly. Without any factual

investigation at all, OFCCP will never know if the nonrandom explanation was discrimination.

Moreover, and more importantly, a 5% or 1 out of 20 result is statistically expected and not particularly unusual, at all. If approved, OFCCP's new scheduling letter will ask for hires and applicant information title by title, and any company with hiring activity in as few as 20 job titles in its AAP can expect that if its plan is "typical", one of those titles will show a statistically significant gender-based hiring disparity and another title will show a statistically significant race-based hiring disparity—that is, of course if hiring decisions were simply random.

The ARB's assertion that one statistically significant disparity without any other evidence linking that disparity to discrimination is an "objective deficiency" that justifies an unlimited extension in the temporal scope of an audit represents either an intentionally broad directive that will justify the temporal extension of a very large percentage of OFCCP's compliance reviews or an embarrassingly gross misunderstanding of the concept of statistical significance.

There are no limitations, at all, as to how long these audits can take. And now, with the ARB's decision in Frito-Lay, there likewise will be no limit to the period of time that gets reviewed by OFCCP in a compliance review when OFCCP fails to process and complete its compliance reviews in a timely manner.

In my opinion, the EEO professionals who work on these audits want very much to be in compliance with OFCCP's regulations. Most companies genuinely want to know if they did something wrong, or are not doing everything they are supposed be doing. They want to do the right thing. Tell them what they did wrong so they won't keep doing it. They will agree to do it right going forward. If the OFCCP finds a violation, cite the employer, negotiate a fair resolution, and then OFCCP can monitor progress going forward. The audit is done. If OFCCP finds statistically significant differences in hiring rates in data it receives in 2012 for the calendar 2011, what is the point of letting the contractor continue to engage in the same discriminatory practice or policy in 2012, 2013, 2014, and into 2015? It makes more sense for the OFCCP to reach its conclusions early and compel the employer to stop doing the wrong thing sooner rather than later. Why is it in the interest of future victims of discrimination to allow the employer to continue doing the same thing that caused the problem in the first place? The longer OFCCP takes to conduct the audit, the more victims there will be in 2012, 2013, 2014, and 2015. The stark reality is that the longer the audit is open, the more back pay remedies OFCCP will seek on behalf of more victims. The bigger the dollars, the larger the media coverage is likely to be.

5. In your opinion, is OFCCP focusing adequate resources on compliance assistance for contractors? What steps, if any, is OFCCP taking to clarify the rules of the road for contractors?

In my opinion, OFCCP is not focusing adequate resources on compliance assistance for contractors. There are some OFCCP district offices where the district director and assistant district director are very well-trained, and thus the compliance officer ranks are well trained. I would recommend that my government contractor clients take advantage of the assistance OFCCP provides in such offices. Hartford and Buffalo come to mind in that respect. However, there are other offices where that is not the case, at all, and companies that have gone to these compliance assistance seminars are being given incorrect advice.

For example, we have had clients attend compliance assistance training, and the compliance officer has told the company that every single person who sends the company a resume is an applicant, must be included on an applicant tracking log, and must be sent an invitation to self-identify. That is incorrect. The OFCCP's Internet Applicant definition has four parts to it, and only when all four parts are met does the company have an obligation to solicit race and gender of applicants. Companies receiving expressions of interest over the Internet, by fax, or by email, for example, have no obligation to solicit race and gender from individuals who are not Internet Applicants. This referenced company received those expressions of interest via email. If the company did not actually consider the candidate for an open position, and never even determined whether the candidate was qualified, there was no legal obligation to solicit race and gender. A company's obligation is to solicit race and gender of qualified candidates it actually considers for a vacant position. But in reliance on the OFCCP compliance officer's incorrect advice, that company included all the unsolicited resumes on its applicant log, and OFCCP used that information to assert that the company was discriminating against those non-hired applicants because of gender when the rate at which it hired women was significantly less than the rate it hired men. When the company tried to argue that it did not actually consider those individuals for an open position, OFCCP rejected the argu-

ment because the company had no evidence in support of its position. It had no evidence that it did not consider the individuals. How are companies expected to prove that they did not do something?

Compliance assistance is hit or miss in the district offices. When OFCCP has rendered assistance by web seminar out of its national office, those compliance assistance broadcasts are well done. However, more compliance assistance could and should be provided.

OFCCP also has the ability to issue Directives and Guidance to the contractor community, but on several occasions during the Shiu administration, these directives were never published or made available to the contractor community so that contractors could be informed about OFCCP's position. For several years, OFCCP has been telling the government contractor community that it will be publishing its revised Compliance Manual, but it has not completed that task, either.

6. In the context of investigating possible discrimination in compensation, your written testimony notes that during the audit process, OFCCP launches a full investigation of a contractor's compensation practices wherever there is a 2 percent or $2,000 difference between certain workers in a particular job title. How has OFCCP justified these thresholds? Once OFCCP identifies a compensation disparity in a contractor's workforce, what burdens does the agency impose on the contractor to prove that there is no discrimination?

I don't think OFCCP has justified the 2% or $2000 threshold. It apparently designed the threshold to be so low that practically every contractor fails it, and then it has some basis to obtain line item, individual compensation data on everyone in the entire workforce, even for employees that are single incumbents in the job, and including job titles where everyone in the title is the same race or the same gender. OFCCP sends the contractor a letter stating that is has identified "unexplained differences in average compensation that require further evaluation of your company's compensation practices." For example, the 18 variables that districts in the southeast region request are:

- Employee ID Number
- Job Title
- Pay Division/Group as identified in the Itemized 11 response
- Job Group (AAP)
- Gender
- Race/Ethnicity
- Annual base salary or base hourly wage (excluding overtime, bonuses, incentives)
- Date of hire (provide the date, not the time in months or years)
- Date of entry into the job title (provide the date, not the time in months or years)
- Part-time/Full-time status (for part-timers, please include a separate column showing the average hours worked in a typical week)
- Other paid allowances, if any, such as commission pay, overtime pay, bonus pay or shift differential. Report each allowance in separate data columns;
- Department
- Work shift (if more than one and as applicable)
- Exempt vs. non-exempt status
- Grade level or salary band classification (if applicable)
- Employee location
- Similarly Situated Employee Groupings (SSEG's), if developed, and
- All other factors relevant to your company's compensation system.

The form letter then says, "If any of the items requested above are not applicable and/or not readily available, please notify us immediately. We will then determine if we are able to continue our evaluation with the readily available items and/or to determine if a need for an onsite visit to gather the items is appropriate." The subtext there is that if the contractor does not invest substantial time, money, and resources into creating its own database with these variables included, OFCCP would be willing to come on site, look at every personnel file, and make its own database. Either the employer can go through the arduous exercise of building such a database, or OFCCP would be happy to do it by coming onsite to inspect personnel records.

Some district offices rationally ask for further information only on job titles with comparators. Other districts rigidly insist on having the contractor populate Excel workbooks for every job title in the workplace, including job titles with no comparators because the form letter says "[f]or the next phase of our evaluation, we are requesting that you provide the following information, for all employees in your work-

force, as of the same date and workforce used in the your data submission to Itemized 11 of the scheduling letter."

That rigid approach makes no sense in smaller workplaces where it is highly unlikely that a lot of jobs will have multiple incumbents of different races and genders. In a workplace with fewer than 300 employees, you would not expect to have three HR Managers, three Marketing Managers, three CEOs. It is plausible for a small employer to have one person doing a job that is unique to him or her. So if it there is only one CEO, and no comparators, why does OFCCP need the CEO's Department Name, Exempt FLSA status, work location, date of hire, date in the job, bonus pay, and the like? Likewise, if the employer has only three Executive Assistants, and all are Black Females, why does the OFCCP need the variables for everyone in that job title? Why does OFCCP insist on having the contractor gather all the additional information on job titles with single race and gender incumbents? None of that information is likely to help OFCCP identify whether there is discrimination based on gender, race or ethnicity.

OFCCP places extensive and extraordinary burdens on employers to prove that any observed difference in compensation triggered by the 2% or $2000 threshold is justified by a nondiscriminatory reason. Soon after the contractor submits its response to Itemized Listing 11, which includes only total compensation and total number of employees in the grouping (whether by title, by grade, by range, by family), as noted above in the response to number 8, OFCCP will send the company a letter stating that it has identified "unexplained differences" in compensation. OFCCP typically provides only 10 business days for the contractor to gather the variables, one of which is time in the position or time in the title. A substantial number of government contractors are not tracking that information in a way that enables them to write a query of a database and extract the information efficiently. They have to go into personnel files and look up each person individually. Even in situations where time with the company fully and satisfactorily explains the differences that OFCCP was observing initially, some district offices insist that the contractor extract all of the requested variables, not just the one that would explain the differences. In other cases, OFCCP's rigid variable list has nothing to do with the differences in pay. Two individuals could have started in the same job on the same day, and they are making $3000 difference. One came to the job with three years of direct relevant experience working for a competitor, and the other came to the job right out of college with no direct relevant experience. There is no column that identifies whether the experience is relevant, and in those situations, where experience indeed explains the difference in compensation, the contractor is expected to produce an application or resume, clearly showing that there were differences in prior relevant experience justifying the difference in pay. If a contractor has evidence that subsequent performance has led to pay differences over time, it will need to demonstrate that fact with evidence of performance reviews. If performance review information is not in the same database as the payroll data, it needs to be "married" or "merged" into the same database so that the employer can evaluate the mathematical effect of the performance information on pay.

If the employer is unable to produce evidence in the form of applications, resumes or performance evaluations, the OFCCP is likely to come onsite to interview managers responsible for the setting of compensation, supervisors who may have knowledge about differences in skills, responsibilities, job performance, attendance, attitude, and other criteria relevant to pay, and the employees themselves in an effort to obtain evidence of the similarity of employee roles. In my opinion, many newer compliance officers who have been hired recently approach these onsites with a bias against the employer, looking to find evidence of discrimination. Questions are not neutral and designed to gather facts. Questions are designed to foster conclusions of similar work for different pay because that is the evidence OFCCP needs to allege discrimination. The employer or its representative is not permitted to sit in on these employee interviews, and the employer is not allowed to ask the employee what he or she told the auditor. During manager interviews, if the employer's representative tries to help the client recall information, the compliance officers will instruct the second compliance officer in the role of "scribe" or "note-taker" to write down that it was the lawyer who gave the answer, not the company. In these cases, it is not about the search for truth; it is about the search for evidence of discrimination.

7. Your written testimony highlighted the fact that solely focusing on differences in average pay between workers has no basis in compensation discrimination law under Title VII of the Civil Rights Act of 1964. For the purposes of pursuing a pay discrimination claim under Title VII, what is the appropriate analysis?

Pursuant to the Lilly Ledbetter Fair Pay Act of 2009, if someone wants to claim pay discrimination, (s)he must identify a specific discriminatory decision affecting

her/his pay. Showing that you are paid less than a peer is not enough. In other words, under Title VII, which applies the standards adopted in Lilly Ledbetter Fair Pay Act of 2009, an employee must point to a discriminatory decision affecting pay, not just differences in pay.

Gender-based (but not race-based) pay difference are relevant under the Equal Pay Act if the employees are in substantially the same job at the same location and if the difference in pay is not based on factors other than sex. OFCCP generally does not pursue its cases under the limited and very narrow Equal Pay Act.

Yet in a compliance review, OFCCP does not analyze pay decisions at all. Instead, OFCCP receives total compensation and total number of employees and calculates an average. It asks the employer to explain the difference with evidence, such as a resume or application to differentiate education, skill set, prior relevant experience, and the like. It may ask for performance evaluations, if the employer contends that performance influences pay. If the employer asks for a data variable that the employer does not maintain in its HRIS or payroll system, the OFCCP will insist on coming onsite to examine personnel files to obtain the data itself and create its own data base.

Even if the employer is able to extract the demanded variables from an HRIS or payroll system, OFCCP may decide to conduct onsite interviews with individuals responsible for setting initial compensation and with employees in the same job to measure how similar or different the roles are.

OFCCP knows that if it identifies a difference in pay between similarly titled individuals, and the amount of the compensation remedy is less than what it would cost the employer to retain counsel and oppose the violation, it is more cost effective for the government contractor to pay the employee the difference in wages than to litigate the matter through years of enforcement proceedings. Thus, even if the employer offers a legitimate, nondiscriminatory reason for the difference, and OFCCP has not identified any discriminatory decision, OFCCP issues the Notice of Violations and obtains back pay remedies. OFCCP alleges that the employer violated Executive Order 11246, and so long as the conciliation agreement contains a non-admissions clause, the employer capitulates without any proof or evidence at all that there was a discriminatory decision that led to the difference in pay. OFCCP is issuing a Notice of Violations in situations when it has not identified a discriminatory decision.

U.S. CONGRESS,
Washington, DC, May 31, 2012.

JEFFREY A. NORRIS, *President,*
Equal Employment Advisory Council, 1501 M Street, NW, Suite 400, Washington, DC 20005.

DEAR MR. NORRIS: Thank you for testifying at the April 18, 2012, Subcommittee on Health, Employment, Labor, and Pensions hearing entitled, "Reviewing the Impact of the Office of Federal Contract Compliance Programs' Regulatory and Enforcement Actions."

Enclosed are additional questions submitted by subcommittee members following the hearing. Please provide written responses no later than June 14, 2012, for inclusion in the official hearing record. Responses should be sent to Benjamin Hoog of the committee staff, who may be contacted at (202) 225-4527.

Thank you again for your contribution to the work of the committee.

Sincerely,

PHIL ROE, *Chairman,*
Subcommittee on Health, Employment, Labor, and Pensions.

QUESTIONS FROM REPRESENTATIVE ROE

1. Your written testimony highlighted that the Office of Federal Contract Compliance Programs (OFCCP) underestimated the potential costs and burdens of each of its pending regulatory proposals. For example, you noted that the burdens associated with the agency's proposal pertaining to individuals with disabilities may have been underestimated by 30 fold. Please explain how, in your opinion, the agency underestimated the burdens of its regulatory proposals. Also, as part of your response, please include a discussion of the extent to which OFCCP consulted federal contractors in preparing the regulatory proposals and appurtenant burden estimates.

2. Your written testimony stated that OFCCP's regulatory proposals would convert the agency's current regulatory scheme of "guidance and recommendations" into one of "highly prescriptive mandates." These new mandates would, in large part, reject contractors' "good faith" efforts as a measure of compliance. Instead, OFCCP

would become more focused on hyper-technical administrative requirements and whether contractors are meeting the agency's predetermined outcomes. Based on your experience, please explain whether OFCCP's mission is best served by such highly-prescriptive requirements and predetermined outcomes.

3. Your written testimony noted that OFCCP is proposing to mandate a number of new requirements relating to contractors' obligations to post jobs with local workforce agencies. This includes forming "linkage agreements" with workforce agencies hand-picked by OFCCP. Please explain the burdens associated with forcing contractors to undertake these requirements. Also, please explain whether you believe the potential benefits of requiring these efforts of contractors would outweigh the costs.

4. Your written testimony noted that OFCCP intends to rescind its guidelines related to systemic compensation discrimination. In conjunction with this rescission, I understand OFCCP has also argued that to prove systemic pay discrimination, it may not need to consider anecdotal evidence of discrimination in the workplace or the nondiscriminatory variables that form contractors' pay decisions. Please explain whether you believe this is consistent with the Supreme Court's rulings on pattern or practice discrimination under Title VII of the Civil Rights Act of 1964.

Mr. Norris' Response to Questions Submitted for the Record

DEAR CHAIRMAN ROE: On May 31, 2012 you requested that I provide written answers to four questions regarding the testimony I presented to the Subcommittee at the hearing referenced above. I am pleased to do so. Your questions and my responses are as follows:

1. Your written testimony highlighted that the Office of Federal Contract Compliance Programs (OFCCP) underestimated the potential costs and burdens of each of its pending regulatory proposals. For example, you noted that the burdens associated with the agency's proposal pertaining to individuals with disabilities may have been underestimated by 30 fold. Please explain how, in your opinion, the agency underestimated the burdens of its regulatory proposals. Also, as part of your response, please include a discussion of the extent to which OFCCP consulted federal contractors in preparing the regulatory proposals and appurtenant burden estimates.

The fundamental flaws in OFCCP's economic impact analyses for both its "Section 503" proposal pertaining to individuals with disabilities and its "Section 4212" proposal pertaining to covered veterans—flaws which we respectfully submit have resulted in a gross understatement of their true cost burden—were the subject of extensive discussion and analysis in our comment letters submitted to OFCCP in response to each proposal's formal Notice of Proposed Rulemaking published in the Federal Register. I have linked copies of both comment letters for your review. Please see pages 2-11 of the Section 503 disability comment letter (*http://www.eeac.org/public/12-037a.pdf*) and pages 4-11 of the Section 4212 veterans' comment letter (*http://www.eeac.org/public/11-133a.pdf*). By way of summary, however, the errors and omissions contained within OFCCP's economic impact analysis for each of its two proposals can be categorized as follows:

- OFCCP has underestimated by a minimum of 100,000, and perhaps as many as 200,000, the actual number of federal contractor establishments subject to the agency's Section 503 and Section 4212 requirements;
- OFCCP has completely omitted from its economic impact analyses certain mandatory compliance requirements—such as mandatory training sessions and employee meetings—that federal contractors will be required to spend considerable time and resources to satisfy;
- OFCCP has grossly understated or ignored the actual amount of time federal contractor personnel will spend complying with many if not most of the agency's proposed requirements; and
- OFCCP has grossly understated or ignored other critical parameters—such as the number of jobs filled by the federal contractor community each year—in its economic impact analyses.

With respect to OFCCP's efforts to consult with federal contractors in preparing its Section 503 and Section 4212 proposals, and specifically to develop accurate and realistic estimates of each proposal's respective burdens, we respectfully submit that no such meaningful consultation ever occurred. Aside from a handful of "town hall listening sessions" and "online chats" held by the agency during its development of these regulatory proposals, we are aware of no other efforts by the agency to engage the contractor community in a dialogue around how the proposed rules' underlying policy objectives might be most effectively and efficiently accomplished. Indeed, even with a history of more than 35 years of close collaboration between EEAC and OFCCP—regardless of the Administration in power—on matters of equal employ-

ment opportunity and affirmative action policy, EEAC was not consulted in any meaningful way on either of these two significant regulatory proposals.

2. Your written testimony stated that OFCCP's regulatory proposals would convert the agency's current regulatory scheme of "guidance and recommendations" into one of "highly prescriptive mandates." These new mandates would, in large part, reject contractors' "good faith" efforts as a measure of compliance. Instead, OFCCP would become more focused on hyper-technical administrative requirements and whether contractors are meeting the agency's predetermined outcomes. Based on your experience, please explain whether OFCCP's mission is best served by such highly-prescriptive requirements and predetermined outcomes.

We believe a "one-size-fits all" approach to regulating the employment practices of federal contractors is doomed to fail given the wide variety of ways that companies structure their businesses and manage their workforces. OFCCP can most efficiently accomplish its mission of promoting affirmative action and equal employment opportunity in the workplace by clearly articulating in general terms its compliance standards and then monitoring how federal contractors adapt to those standards in ways appropriate to their unique business environments.

OFCCP's past evaluation of corporate compensation practices is a case in point. In 2000, OFCCP implemented an Equal Opportunity Survey ("EO Survey")—a reporting form that required federal contractors to report employment and compensation information in a standardized format. The prescribed format did not conform to how most companies ran their businesses. As a result, completing the report was burdensome and of no practical value to contractors and provided little usable enforcement information to OFCCP. The EO Survey was rescinded by OFCCP in 2006 because it "failed to provide value to either OFCCP enforcement or contractor compliance." Unfortunately, the EO Survey seems to have acquired a new lease on life in OFCCP's August 10, 2011 Advance Notice of Proposed Rulemaking to develop and implement a new compensation data collection tool. The proposed tool suffers from all of the same infirmities as the former EO Survey, with the addition of many more prescriptive elements.

In contrast to the EO Survey and proposed new compensation data collection tool, OFCCP's 2006 Systemic Compensation Discrimination Guidelines (which OFCCP is now proposing to rescind) provide clear guidance to both OFCCP compliance officers and federal contractors regarding the statistical and legal standards to be used in evaluating the equity of corporate compensation systems. Rather than being prescriptive, the standards instead offer guidance for how contractors can appropriately evaluate the various components of their compensation systems. With the benefit of this guidance, many federal contractors voluntarily undertook compensation self-evaluations and implemented pay adjustments where warranted.

Such voluntary action under the 2006 compensation guidelines has better served OFCCP's mission than did the failed EO Survey. Unfortunately, by proposing to rescind the compensation guidelines and resurrect the EO Survey in the form of a new compensation data collection tool, OFCCP currently is proceeding in exactly the wrong direction.

3. Your written testimony noted that OFCCP is proposing to mandate a number of new requirements relating to contractors' obligations to post jobs with local workforce agencies. This includes forming "linkage agreements" with workforce agencies hand-picked by OFCCP. Please explain the burdens associated with forcing contractors to undertake these requirements. Also, please explain whether you believe the potential benefits of requiring these efforts of contractors would outweigh the costs.

The "mandatory listing" and "linkage agreement" requirements contained in the Section 503 disability and Section 4212 veteran proposals are other examples of OFCCP's "one-size-fits-all" approach to enforcement. They are discussed on pages 4-11 of the veteran comment letter and pages 2-11 of the disability comment letter. Both requirements prescribe ways federal contractors must recruit veterans and individuals with disabilities.

The mandatory listing obligation requires contractors to post most of their employment openings with an "appropriate" local employment delivery system such as the state employment service or a local veterans' employment representative (for veterans) and the "One-Stop Career Center" nearest the contractor's facility (for individuals with disabilities). These are not necessarily the same offices in all cases. Quite apart from the sheer number of postings required, the most burdensome aspect of the mandatory job listing obligation is the fact that the listings must be made in the "manner and format" required by the particular receiving office. Accordingly, rather than developing and utilizing a standard job posting and transmittal process appropriate for all openings, each listing must be customized to the idiosyncrasies of the local offices where it is posted.

The "linkage agreements" are referral contracts federal contractors must negotiate with veteran and disability referral agencies, many of which are specified by the federal government. Collectively, OFCCP's veterans and disability proposals mandate a minimum of five linkage agreements for each establishment. With approximately 285,000 covered contractor establishments in the U.S., a total of 1,425,000 written linkage agreements would be required each year.

The notion that contractors will successfully generate greater numbers of disabled and veteran job applicants by signing more than one million written linkage agreements and posting their jobs with hundreds of state and local job services offices in the specific manner and format each office requires, ignores the modern-day methods and mechanisms employers use to recruit qualified applicants, as well as the methods and mechanisms used by veterans to find and express interest in those jobs. It also ignores the fact that many contractors already actively utilize numerous resources to recruit disabled persons and veterans, including some currently mandated by the agency's existing regulations.

The recruitment efforts, as proposed by OFCCP, dictate a certain process that largely ignores today's technology and the far reach of the Internet. Today, a great deal of recruiting is conducted online, thus making a global community seem far more local. Imposing restrictions requiring "local" recruitment efforts has the effect of limiting the contractor community to efforts aimed at small pockets of the disabled and veteran communities. EEAC member companies prefer to continue to raise awareness of their commitment to the employment of individuals with disabilities and protected veterans by utilizing resources that allow individuals access to all of their opportunities, not only those in their immediate geographic locale.

4. Your written testimony noted that OFCCP intends to rescind its guidelines related to systemic compensation discrimination. In conjunction with this rescission, I understand OFCCP has also argued that to prove systemic pay discrimination, it may not need to consider anecdotal evidence of discrimination in the workplace or the nondiscriminatory variables that form contractors' pay decisions. Please explain whether you believe this is consistent with the Supreme Court's rulings on pattern or practice discrimination under Title VII of the Civil Rights Act of 1964.

OFCCP's current Systemic Compensation Discrimination Guidelines provide that "[e]xcept in unusual cases, OFCCP will not issue a Notice of Violation (NOV) alleging systemic compensation discrimination without providing anecdotal evidence to support OFCCP's statistical analysis." This position is consistent with Supreme Court precedent as well as with EEOC's enforcement guidance on compensation discrimination, which provides that "[a] cause finding of systemic discrimination rarely should be based on statistics alone." See EEOC Compliance Manual, Section 10, n. 30. OFCCP now finds that traditional position "problematic" in its proposal to rescind the current compensation guidelines because, in the agency's view, anecdotal evidence of pay discrimination "may not exist" in some cases. Yet in Int'l Brotherhood of Teamsters v. United States, the lone Supreme Court precedent that OFCCP relies upon in supporting a statistics-only approach to compensation discrimination, the government's statistical evidence of discrimination was bolstered by individual testimony describing 40 specific instances of discrimination. In the Court's view, it was this individual, anecdotal evidence that "brought the cold numbers convincingly to life." It is this same precedent upon which the EEOC and the courts rely in "rarely" pursuing discrimination cases based upon statistics alone.

While we, like the EEOC, acknowledge that in rare instances statistics alone can form the basis of a discrimination claim, those cases are typically reserved for instances where the disparities are so extreme on their face that additional statistical analyses offer little additional probative value. In Teamsters, for example, the Court was faced with evidence that despite the fact that African Americans represented approximately 50% of Atlanta's population and nearly 20% of Los Angeles' population, not one of the company's more than 400 line drivers in those locations were African American. The Court observed that the company's inability to defend itself came not from statistics, but from the "inexorable zero." Further, as the Court stated in Hazelwood School District v. United States, 433 U.S. 299, 312-13 (1977) only after considering "all of the surrounding facts and circumstances" can a determination be made as to the usefulness of statistics and their ability to serve as the foundation of a "pattern or practice" of discrimination.

It is troubling that OFCCP now elects to marginalize long-standing Title VII principles in this area. OFCCP should not be permitted to convert the rare exception into a general rule by using statistics to infer discrimination in the absence of any other supporting evidence, rather than using statistics to confirm the existence or bolster a theory of discrimination otherwise based upon a foundation of anecdotal evidence.

Once again, thank you very much for the opportunity to testify on April 18, and to provide the supplemental information requested in these additional written responses. I hope the information is helpful to the Subcommittee in its important deliberations, and that you will feel free to call upon me in the future if I can be of additional assistance.

[Whereupon, at 11:19 a.m., the subcommittee was adjourned.]