August 1, 2013

The Honorable Howard Shelanski  
Administrator, Office of Information and Regulatory Affairs  
Office of Management and Budget  
New Executive Office Building  
725 17th Street, NW.  
Washington, DC 20503

RE: Meeting Request Concerning DOL/OFCCP Final Rule on Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities (RIN: 1250-AA02)

Dear Dr. Shelanski:

On July 31, the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) sent to OMB a final rule concerning Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities. I am writing to respectfully request a meeting with you and your staff to discuss the Association’s concerns regarding the rule. The Association provided comments to OFCCP during the comment period of the NPRM on the rule and we have also repeatedly expressed our interest in working with the Department (including the current Secretary) to achieve a more reasonable, workable approach that would achieve the same goals of increased employment and effective integration of persons with disabilities into the nation’s workforce. Thus far, the Department has not accepted our offer.

HR Policy Association represents the most senior human resource executives in more than 350 of the largest companies in the United States. Collectively, these companies employ nearly nine percent of the private sector workforce, and their chief human resource officer is responsible for finding, hiring, retaining and developing the talent needed to staff their organizations. Our members are committed to increasing the employment of Americans with disabilities regardless of what is required by the federal government and most have programs going well beyond the requirements of Section 503 that are not motivated merely by compliance with governmental requirements. However, we believe that the approach set forth in the NPRM imposes unachievable standards and burdensome requirements on federal contractors while undermining the aforementioned goal.

Prior to submitting our comments to OFCCP, we held several conference calls with our members, obtaining their input on early drafts of our comments to ensure they accurately reflected their views. However, OFCCP’s short public comment period did not give us sufficient time to learn from our members all of the implications of the proposal so that we could represent their views in an adequately comprehensive manner.

Thus, throughout May and June of 2012 we conducted a series of one-day regional meetings in which over 120 representatives from our member companies participated. The enclosed CHRO Views on OFCCP’s Disability Affirmative Action Proposal represents their input. Most significantly, the enclosed document articulates six broad concerns expressed to us by our members:
The proposal would have a profoundly negative impact on the ability of companies to maintain a culture of inclusion that focuses on their employees’ and applicants’ abilities, seeking to minimize the impact and visibility of their disabilities through “reasonable accommodations” that enable them to perform “the essential functions of the job.”

Companies are concerned that the proposal represents a fundamental change in affirmative action, which they strongly embrace, converting it from a “good faith efforts” approach to one of rigid numerical targets that would effectively operate as illegal quotas, while also setting a precedent for other federal affirmative action programs.

Not a single company that participated in the meetings believed that it could fully comply with numerous elements of the proposal, especially the numerical “goals” and the employee/applicant self-identification requirements. With regard to the latter, they are especially concerned that the proposal would require them to violate the Americans with Disabilities Act. Moreover, the proposal fails to recognize the significant obstacles to the increased employment of those with disabilities created by the work disincentives created by the Social Security Disability Insurance program.

The failure to apply the OFCCP’s 2005 final Internet Applicant rule will impose extraordinary implementation and recordkeeping costs on employers, and effectively rescind the Internet Applicant rule for all E.O. 11246 regulations. The rule was necessitated by the practical difficulties a contractor faced in complying with OFCCP’s requirement to solicit race, gender, and ethnicity data, where possible, from the huge numbers of applicants that flooded contractors via the Internet, including applicants who often lacked the qualifications for the job. If the rule does not apply to the 503 regulations, federal contractors will drown under the flood of paperwork, which would include preparing a written statement for every individual with disability who is not hired stating “you did not meet the basic qualifications.”

The substantial paperwork and other administrative costs imposed by the proposal, with an almost negligible impact on the hiring of individuals with disabilities, is contrary to the administration’s economic recovery goals. Moreover, companies question OFCCP proposing to add such significant costs for federal contractors at a time when they are being pressed by their federal contracting agencies to reduce their costs.

Because of those costs— and the exposure to substantial new potential non-compliance liability— a number of companies are questioning whether they would continue to maintain their federal contracts if the NPRM is implemented, thus reducing the competition that now exists for the federal contracts that helps the federal government obtain the best value for the taxpayers’ dollars.

Thank you for your consideration in this matter and we sincerely hope that we can meet with you and your staff to discuss these concerns further.

Sincerely,

Daniel V. Yager
President & General Counsel

Enclosure
CHRO Views on OFCCP’s Disability Affirmative Action Proposal

Chief Human Resource Officer Concerns With the U.S. Department of Labor’s Office of Federal Contract Compliance Programs Notice of Proposed Rulemaking Implementing the Non-Discrimination and Affirmative Action Regulations of Section 503 of the Rehabilitation Act of 1973

September 5, 2012
12-63
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About the Association

HR Policy Association is the lead organization representing chief human resource officers of major employers. The Association consists of more than 335 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce, and 20 million employees worldwide. They have a combined market capitalization of more than $7.5 trillion. These senior corporate officers participate in the Association because of their passionate interest in the direction of human resource policy. Their objective is to use the combined power of the membership to act as a positive influence to improve public policy, the HR marketplace, and the human resource profession. For more information visit www.hrpolicy.org.
I. Broad CHRO Concerns About the Proposal

On December 7, 2011, the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) published a notice of proposed rulemaking (NPRM) that would substantially revise the affirmative action and non-discrimination requirements regarding individuals with disabilities for federal contractors under Section 503 of the Rehabilitation Act. [For a brief overview of the proposal, see the “General Elements” on this page.] The immediate reaction of our members—the chief human resource officers of over 335 major companies, most of which are federal contractors—was one of the highest levels of concern about a proposed policy we have ever heard in the 45 year history of the association. It was clear that our members believed that the proposal would fundamentally transform affirmative action from a focus on federal contractors’ good faith efforts to a rigid system of numerical “goals” that would operate very much like quotas.

Despite the sweeping changes being proposed by the 50-page proposal, federal contractors were initially only given 60 days to submit comments—a period which was later extended by 14 days, despite requests from the business community and key Members of Congress for a more meaningful extension.

During that 74 day period HR Policy had extensive contacts with its members, including several conference calls with their affirmative action compliance experts, and we eventually filed two sets of extensive comments before the deadline. However, it was clear that we had only touched the surface of our members’ concerns.

Thus, throughout May and June of 2012, we conducted a series of day-long regional meetings (in Atlanta, Boston, Chicago, Minneapolis-St. Paul, and Washington, DC) in which over 120 representatives from our member companies participated, providing us substantial input on the potential impact of the proposed regulations. This position paper represents that input, as well as the results of our annual CHRO survey conducted in February 2012. [The survey covered a number of topics but the results concerning the OFCCP proposal are highlighted herein.]

Negative Impact on Corporate Culture of Inclusion. The NPRM raises a number of both broad and specific objections but the one over-arching concern is its impact on the ability of companies to maintain a culture of inclusion. In their policies regarding individuals with disabilities, companies put the focus on their abilities, seeking to minimize the impact and visibility of their disabilities through “reasonable accommodations” that enable them to perform “the essential functions of the job.” This is not only to ensure compliance with the requirements of the Americans with Disabilities Act (ADA)—from which these phrases are drawn—but because it is simply good human resource policy.

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General Elements

The Proposed Rule Would Require Federal Contractors To:

- Attain a 7% “goal” for individuals with disabilities in each job group. DOL is also considering a 2% “goal” for those with undefined “severe disabilities.”
- Invite job applicants to “self-identify” pre-offer as having a disability and those who self-identify must be considered for other available positions.
- Conduct an annual survey of existing employees to “self-identify.”
- Adopt rigorous new procedures for providing a “reasonable accommodation” for employees with disabilities.
- Maintain written records of all employment decisions involving individuals with disabilities, including rationales.
This culture of inclusion not only draws individuals with disabilities into the workforce but it enables the companies to benefit from the unique skills and talents of the individual that their disability may otherwise preclude. As one company observed, “We have spent years trying to get the workforce to think about abilities not disabilities. This will run counter to that and we will be bringing attention to issues that are not relevant to performance of the job.” Interestingly, the virtual workplace has further diminished the visibility of disabilities and thus the likelihood of discrimination. One company noted that its hiring managers often hire individuals without even having a face-to-face meeting with them. One can assume that such instances will only increase in coming years.

The requirement in the NPRM that companies initiate procedures for encouraging both applicants and current employees to self-identify and therefore highlight their disabilities runs completely counter to this approach. Indeed, that is one of the fundamental reasons why asking applicants to “self-identify” is unlawful under the ADA. As one company observed, "self-identification surveys will create a culture of distrust," noting that “the workforce already distrusts what we do with the medical information that is collected.”

Moreover, by also requiring companies to meet specific utilization “goals”—which likely will operate as *de facto* quotas—within each job group, the companies themselves are incentivized to encourage applicants and employees to proclaim their disabilities simply so that the company can ensure compliance with the rigid artificial thresholds dictated by OFCCP. Furthermore, as will be discussed further below, the requirement that the confidentiality of the self-identification by applicants be maintained is a doomed aspiration. The rigorous procedural requirements that come into play once an applicant self-identifies, requiring a consideration that is distinctive from other applications, will often make it widely known throughout the company that the applicant has a disability.

The requirement that federal contractors adopt meticulous, formalized procedures for handling requests for “reasonable accommodations” of disabilities will have a similar impact on the culture of inclusion. The ADA already contains strict standards that companies ignore at their legal peril. But the reality is that most companies are already engaged in very proactive approaches to providing accommodation, often without distinguishing those driven by “disabilities” that meet the legal ADA definition. While there are wide variations in company practices in this area, a consistent guideline is to maintain the balance between meeting employee needs and minimizing the differences among employees. In contrast, the rigid requirements of the NPRM would highlight those differences while turning what is currently a process of reaching mutual
accommodation of personal and business needs into a potentially confrontational approach that focuses on whether all aspects of the formal procedures are being followed.

Consistently throughout our meetings we heard a concern that most workplace situations involving accommodations for disabilities are handled through traditional HR procedures, ensuring consistency with the corporate culture which is invariably heavily influenced by HR practices and procedures. As one company observed, “This would shift all responsibilities to the compliance side which will take it away from the personal interfaces that define HR. We are currently using good business/HR practices, but will migrate to a total compliance program that is focused on hitting the numbers. Thus, the compliance function will become more important than the HR function.”

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

Thus, companies have successfully developed and embraced affirmative action in a manner that meets its goals of including those historically excluded without crossing into the “reverse discrimination” that quotas inevitably entail. This is a very delicate balance. That balance would be destroyed by the NPRM, which would establish a precedent potentially affecting all areas of affirmative action.

The OFCCP has sought to downplay this concern, providing assurances that the NPRM would not establish “quotas” but instead “aspirational but enforceable goals.” Our member companies are not convinced by this rhetoric and, whether it is intended by OFCCP as such or not, all indications are that the “goals” would effectively become quotas. (Thus, hereinafter we will use the word “goals” in quotes.) In the annual CHRO survey, conducted two months after the proposal was issued, giving our members sufficient time to analyze its potential impact, 32 percent said they believe it is in fact a quota and an additional 50 percent said they would treat it as one. Only 6 percent answered that it is neither a quota nor would they treat it as one. [See Question 1.] When asked this question in our regional
meetings, the percentages were even higher, with total unanimity in some meetings.

The reality is that OFCCP is a very powerful enforcement agency, with numerous enforcement tools and remedies at its disposal, including the ultimate “death penalty” of debarment from federal contracts. Based on its historical track record under administrations of either party, our members’ experience with the agency leaves them with a firmly held belief that, if the agency finds they have not met their “goals”—however “aspirational” they may be—the agency will then leave no stone unturned in rooting out what it believes is the cause of the company’s failure, effectively requiring the company to prove its innocence. The only way to avoid this prosecutorial attention would be to meet or exceed the “goals.”

As one company noted, “The concern is from a conciliation perspective. Maybe they don’t get you on this but ultimately some other misstep will cause you to enter into a conciliation agreement and we are concerned about having any markers on our record. OFCCP calls it an aspirational goal, but failure to meet the goal will lead to enforcement actions.”

Proposed Rule Is Impossible to Comply With. Even in the face of the aggressive enforcement of the NPRM’s new requirements they anticipate from OFCCP, no company that participated in our meetings believes that successful compliance would be possible. Not a single company believed it would be able to meet the utilization “goals” in every single job category in every single establishment. [This was even stronger than the results of the CHRO survey. See Questions 2 and 3.] They reach this conclusion through a combination of: 1) disbelief that there is a sufficiently available qualified workforce in each job group and 2) a recognition that, in many job groups involving significant physical or intellectual capacity, many individuals with certain disabilities will be categorically excluded, thus shrinking the pool even further.

Moreover, they question why the administration is not putting a greater focus on the removal of existing disincentives in the Social Security Disability Insurance program that effectively precludes 8.8 million individuals who receive disability payments from participating in the workforce because their benefits are conditioned on their abstaining from employment if they make more than $12,120 per year. This effectively imposes a cap on the number of individuals with disabilities who are available to work more than 30 hours per week year-round.
Even in job groups where they may in fact reach the goals, the companies are convinced they not will be able to prove it to OFCCP. The self-identification requirement relies totally on the willingness and ability of applicants and employees to self-identify their disabilities. There are numerous impediments to this reliance, starting with the murky legal definition of “disability” that even the legal community struggles with, and ending with a strong reluctance by many with disabilities to disclose them, for a variety of reasons.

In addition to asking applicants, the NPRM requires employers to demonstrate compliance with the utilization “goals” through an annual survey of existing employees, asking them to indicate anonymously whether or not they have a disability. Employee surveys are notorious for having low levels of participation and, in this case, the employer would have no way of knowing who did and did not participate, let alone whether they answered the question truthfully. Thus, even if the goals could be achieved, there is no certainty or even reasonable expectation that it could be demonstrated to OFCCP investigators. (The concerns regarding the self-identification requirements are discussed more thoroughly in section III below.)

This has led many companies to question the value of pouring significant resources into a compliance effort that is doomed to failure. Some believe that their best course may be to continue with their current good faith efforts under Section 503 along with strict compliance with the Americans with Disabilities Act and hope to avoid an OFCCP audit.

**Impact of Substantial New Compliance Costs on Economic Recovery.** Companies are of a unanimous view that the imposition of significant new compliance costs at a time of a fragile economic recovery makes no economic sense and creates yet another disincentive to creating jobs in the United States. The proposal would impose immense new paperwork and data collection burdens on the contractor community for what our members believe is likely to be an almost negligible result in hiring individuals with disabilities. The time and costs involved would inevitably draw away from resources devoted to “growing the business” which in turn could increase employment. Because no company has yet implemented the NPRM’s requirements, estimates of the potential costs varied significantly, though all agreed that the $473 per establishment estimated by OFCCP was ludicrously low. [See CHRO survey question 4.] Many also questioned how OFCCP could be adding such significant costs for federal contractors at a time when they are being pressed by their federal contracting agencies to reduce their costs.

**Questioning the Value of Federal Contracts.** Because of these costs—and the exposure to substantial new potential non-compliance liability—a number of companies questioned whether they would continue to maintain their federal contracts if the NPRM is
implemented. For some companies, this would not be an issue because of the enormous volume of business they do with the federal government. However, for others, particularly those in certain industries such as retail and hospitality, that volume is a small portion of their overall revenues. As one company noted, “You don’t want to turn away business but at some point you cross the line where the cost of the business exceeds the benefits.” We heard repeatedly from those companies that their continued participation in those contracts is now an open question because of the NPRM. Because only a small percentage of their workforce is engaged in federal contract activity, their entire workforce is subjected to the regulatory rigors of the OFCCP, which are already substantial. Their questioning of those contracts should thus come as no surprise. Yet, if they were to back away, it would significantly reduce the healthy competition that now exists for the federal contracts for which they compete.

**Failure to Seek Consensus.** Finally, our members find OFCCP’s approach both frustrating and insulting to what they consider their good faith efforts to employ and integrate individuals with disabilities into their workforce—efforts that even OFCCP is not questioning other than to say they are “not enough.” Thus, when OFCCP suggests that they go beyond good faith efforts, they question what is meant by that. They are concerned that, rather than working with them to find out ways to achieve better results, OFCCP believes it can increase the employment of individuals with disabilities by administrative fiat. Yet, in the past, when our member companies have been called upon to help improve federal employment disability policies—as in the case of the Americans with Disabilities Act Amendments Act of 2008—they have responded by sitting down with disability advocates to fashion a workable approach. They believe that the failure of the OFCCP to adopt such a collaborative approach to improving the 503 regulations is the principal cause for the set of unworkable proposed rules for which compliance is impossible.
II. Utilization “Goal”/ Quota

The NPRM would establish a federally mandated “utilization goal” of seven percent for individuals with disabilities for each job group in each establishment in the contractor’s workplace. The NPRM also indicates that a sub-goal of two percent for persons with severe disabilities, as yet undefined, is under consideration. According to OFCCP, the seven percent goal “is neither a hiring quota nor a restrictive hiring ceiling” and “should be attainable by complying with all aspects of the [proposed] affirmative action requirements.” Yet, in announcing the proposal, OFCCP Director Patricia Shiu indicated that good faith efforts “clearly are not working,” even though “good faith efforts” are viewed by federal contractors as the touchstone for compliance with affirmative action requirements.

In fact, a number of our member companies believe that if the utilization goal were to be applied across the company’s workforce (as opposed to each job group), they may already exceed the seven percent goal in view of the broad definition of “disability” contained in the Americans with Disabilities Act Amendments Act of 2008. For example, one company official with an aging workforce estimated that about 30 percent of its employees would qualify as obese which often feeds into a qualified disability, particularly if you factor in their age. Even in such instances, however, companies have no confidence they would be able to demonstrate they meet the goal because few employees will voluntarily identify that they have a disability, especially if they do not need an accommodation, and the NPRM does not allow alternative ways, such as visual observation, to collect the data.

Lack of Reliable Data. At the core of our members’ view that compliance with the utilization goals would be impossible is the fact that the OFCCP’s seven and two percent “goals,” respectively, have no statistical credibility, and are generally viewed as a “straw man” set by the agency with no connection to the availability that actually exists in local labor markets. Unlike other affirmative action goals, the seven percent “goal” and the separate two percent sub-goal for the “severely disabled” are not derived from reliable census data with respect to the availability of qualified workers in each locality. Rather, as is discussed more extensively in our comments on the NPRM, they are extrapolated from national-level American Community Survey data. The OFCCP asserts this is the best available data but the agency did not factor in important differences with regard to the availability of individuals in each geographic area (regional, state, or local labor markets) with the skills needed for each job group for which a contractor will be required to meet its goals.
Applying the “Goal” to Each Job Group. Companies believe that, no matter how extensive their efforts may be in seeking to employ individuals with disabilities, they simply will not be able to meet the goals for every single job group in every single establishment even if their overall numbers far exceed the 7 percent or 2 percent “goal.” First, as noted above, there is no data to indicate that there will be a sufficient pool of workers in each geographical area with the skills needed to fill each position. Absent such specific data, there is simply no way of knowing what a realistic goal would be, whether it is 1 percent or 99 percent.

Moreover, the NPRM fails to recognize wide differences in the demands of various positions. Some positions, particularly those involving physical work will automatically exclude those individuals with those disabilities for which no “reasonable accommodation” is available through which they could otherwise perform the essential functions of the job. This is not to say that the job cannot be filled by someone with a different disability but it limits the available pool from which the employer can draw in order to meet its “goals.”

Finally, even though our membership is composed of the largest companies, many if not most of them have small establishments with only 15 to 20 people or less and are not only concerned as to how they could meet the “goal” on an establishment-by-establishment basis, but also how they could meet it in job groups with only one or two employees at that establishment. In those situations, to meet the seven percent “goal,” they would actually have to exceed it by a much higher percentage.

Impact on the Existing Workforce. The NPRM does not specify whether the “goal” applies to data regarding the existing workforce or the hiring data for each year, or both. The distinction is a critical one. If it applies only to new hires, then even if an employer’s workforce in a job group already exceeds the “goal,” then it would still be held in violation for any year where it failed to reach the hiring “goal.” Thus, a company with 40 percent of a job group composed of individuals with a disability would be in violation if less than 7 percent of its new hires had disabilities. Yet a company with a job group with 3 percent with disabilities would be in compliance as long as every year it met the 7 percent hiring “goal.”

If on the other hand, the “goal” only applies to the existing workforce, then, depending on the size of a job group, an employer may have to hire far in excess of 7 percent to meet the target. For example, if there are 100 individuals in the group, but only 3 have disabilities, the company will only comply if it replaces four others with those with disabilities. If it only hires four in a given year, that would constitute 100 percent, not 7 percent, of its hiring. More
importantly, suppose there is no turnover in that job group. If no action is taken by the employer, it remains locked at 3 percent and the only way it can comply is by terminating four individuals and replacing them with individuals with disabilities.

Failure to Recognize Other Constraints on Employer’s Hiring Options. In establishing a one size fits all utilization goal, the NPRM ignores the restrictions that exist on many employers in their hiring decisions. Our member companies who operate in highly regulated environments, such as transportation and utilities, are concerned that their ability to hire individuals with disabilities for certain positions is constrained by other public health and safety regulatory requirements.

For example one utility company noted that many employees in the industry have to be “respirator qualified,” which could bar employees with certain disabilities, such as asthma and other lung disease, heart conditions, and psychological conditions like claustrophobia, from being qualified for positions in some job groups. It was also noted that in the utility industry, essential job functions are and must be designed around safety and the response requirements during emergency situations, e.g., storms, fires, etc, in addition to normal so-called “steady state” conditions. Indeed, the real value of an effective electric utility is the ability to employ “all hands on deck” in weather-related or man-made crises, where everyone can drive, climb, carry, and stand for extended periods of time, etc. For this and other reasons, the “fitness for duty requirements” for safety purposes in non-nuclear operations and “trustworthiness and reliability standards” in nuclear operations could mean that many disabilities are not amenable to reasonable accommodations. Conflicting regulatory standards such as these will make it difficult for contractors in some industries to comply with the proposed utilization goals.

Dilution of Efforts to Hire Those Most Difficult to Employ. Employers are concerned that the seven percent utilization goal will very likely dilute the efforts to hire the severely disabled, who present the greatest hiring challenges for employers. Putting the focus on numbers will instead incentivize employers to hire those easiest to employ. Yet, employers do not believe a two percent sub-goal for severe disabilities would resolve this unintended consequence because: 1) they do not believe the sub-goal is obtainable for all of the reasons listed herein, and 2) the disincentives contained in the Social Security disability insurance program described below significantly discourage individuals with severe disabilities from even seeking work. Instead of imposing unachievable numerical “goals” that will inevitably operate as quotas and incentivize employers to play a “numbers game,” our members believe that OFCCP should focus on encouraging employers to continue and enhance their outreach efforts to employ those facing the most significant hurdles to entering the workforce.
**Social Security Disincentives.** Several employers mentioned that they have been frustrated in efforts to hire the most severely disabled by the disincentives created by other federal disability policies—most notably the Social Security disability insurance (SSDI) program—which have a substantial negative impact on the employment rate of persons with disabilities. Lawmakers and policy experts alike have long recognized the systemic barriers to employment and work disincentives built into the Social Security programs, including the loss of the monthly cash benefit and health care for a beneficiary who works and earns too much. In the words of one company executive, “people get disabled by disability.”

Because SSDI covers 8.8 million Americans with previous work histories, this substantially limits the potential pool of available workers from which employers would need to draw in order to satisfy the “goals.” Moreover, this suggests that if policymakers were to address these disincentives, it would accomplish far more by encouraging more individuals with disabilities to participate in the workforce than any fiat from OFCCP.
III. Self-Identification and Consideration of Applicants for Other Positions

To determine statistically whether an employer has complied with the utilization “goals,” the NPRM requires that all applicants and existing employees be provided a “self-identification” form prescribed by the OFCCP. Furthermore, a positive response from an applicant who is not hired for the position applied for triggers an additional requirement that the federal contractor consider her/him for all other openings for which she/he “may” be qualified. These dual requirements generated at least as much concern as the utilization “goals” in terms of impossibility of compliance and impact on workplace culture.

**Compelled Violation of Americans with Disabilities Act.** The Americans with Disabilities Act (ADA) clearly states: “Pre-employment – [employers] shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.” Thus, our members are very concerned that compliance with the NPRM would compel them to violate the ADA, at least insofar as it pertains to pre-offer requests for self-identification. Moreover, this complaint taps their more fundamental concern—well-aligned with the goals of the ADA—about ensuring that hiring decisions are made based on an employee’s abilities, consistent with a culture of inclusion, while leaving it to the applicants’ discretion in deciding whether a disability needs to be disclosed in order to consider a reasonable accommodation to enable her/him to perform the essential functions of the job.

**Lack of Reliability Undercuts Ability to Prove Required “Goals” are Achieved.** Clearly, the self-identification requirement is viewed by the OFCCP as the essential mechanism for determining whether companies are meeting their “goals.” The unanimous reaction to this approach in our meetings was that it would not work. For the various reasons described below, the information provided by the self-identification forms simply could not be relied upon as an indicator of the number of a contractor’s employees with disabilities, and companies are very concerned that they will be judged by a standard that they cannot in any way provide reliable evidence they are meeting. Thus, quite apart from their concerns about the achievability and wisdom of the utilization “goals,” they are convinced that even companies that may meet them will never be able to satisfactorily demonstrate that they are.
Getting Employees and Applicants to Respond Accurately. As noted, companies are concerned that, especially since there is no separate verification of a self-identification form completed by an applicant or employee, those forms will be totally unreliable as an indicator of meeting the “goals.” (In the case of employees, the forms are confidential anyway so verification would be impossible.) Based on our members’ experience, there are any number of reasons why a form may be inaccurate:

- The applicant/employee may not be aware that he/she has a disability, based either on a misunderstanding of the law and the form itself—quite understandable given the complexity, as well as requiring at least a 10th grade level of reading ability—or the fact that they have not yet been diagnosed with a disability that is not readily apparent;
- The applicant/employee may have a personal preference for not revealing a particular disability to anyone other than a physician, therapist or other professional for privacy reasons;
- The applicant/employee may strongly believe that a key part of overcoming a disability is to refuse to acknowledge it, even to her/himself;
- An applicant/employee may believe, however irrationally, that an employer’s awareness of a disability could negatively impact his/her ability to be hired or promoted; and
- An applicant/employee without a disability may believe, however irrationally, that an employer believing she/he has a disability could positively impact his/her ability to be hired or promoted either to comply with OFCCP requirements or to avoid a discrimination claim.

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

To underscore their skepticism, some companies indicated they even have difficulty getting veterans to disclose their status, for inexplicable reasons. They believe this is because the employees do not see a benefit from disclosure or simply do not think it is any of the employer’s business. Either way, companies are concerned that it would be even more difficult to get individuals to disclose they have a disability.

Annual Surveying of Employees. Because surveys are a key tool in the HR function, our members have had extensive experience in conducting them and, often, one of the biggest challenges is to get employees to respond at all. This becomes even more difficult when
personal information is involved. An example that is comparable to the OFCCP requirement is a wellness survey, which is confidential and anonymous. Despite assurances to this effect, employees invariably are resistant to providing private, personal information, and often respond angrily to the request, refusing to believe the information will be kept confidential.

Meanwhile, a recurring question that was invariably raised at each of our meetings was “what is the value proposition to an employee to respond to the self-identification form?” Since it is anonymous, no employee could derive any perceived benefit from responding to the survey. Our members also believe that employees are unlikely to self-identify unless they need an accommodation. Thus, employee surveys are likely to be even more unreliable than applicant self-identification invitations. Within a given job group, the annual percentages are likely to fluctuate widely, even where there has been little if any change in the composition of the workforce.

Our members also noted that for some job groups in small establishments it may be impossible to maintain the anonymity of the survey. This problem is well known by federal statistical agencies, including the Bureau of Labor Statistics (BLS). For many surveys, although individual information is not released, identity disclosure cannot be entirely avoided. That is why the BLS and others have specific publication disclosure standards to protect the confidentiality of individuals and establishments who are in small groups or categories.

In addition, compliance would be particularly difficult in some industries in the service and manufacturing sectors where a company may have thousands of employees without computer access at work. In these settings, the hurdles imposed on conducting such a survey, keeping it anonymous, and tallying the results in any sort of meaningful way are daunting.

**Consideration of Applicants for Other Positions.** The NPRM requires that, if a job applicant identifies him/herself as having a disability, he/she must be considered for all available positions for which he/she may be qualified if the position(s) applied for is unavailable. However, contractors must keep all self-identification information confidential and in a data analysis file that cannot be shared with those considering the applicant for the other available positions. Contractors would also be required to document the reasons for rejecting individuals with disabilities for any vacancies for which they were considered, while also describing whatever reasonable accommodations were considered. The NPRM does not state a time limit during which the applications must be considered for any new openings that arise after the application is filed.

As will be covered further in the discussion on new administrative and paperwork requirements, companies receiving thousands of
applications with operations at numerous locations throughout the
country view this requirement as among the most burdensome and
unworkable of all those in the NPRM. One retail company indicated
that it receives 1.5 million applications a year, most of which are
online. The company has over 2000 stores throughout the country,
each of which would have to consider applicants with disabilities for
any open positions for which they may be qualified, notwithstanding
the applicant’s location requirements. Meanwhile, as is often the case
in retail and certain other industries, many of the positions are
relatively unskilled, which means almost any application received is
likely from someone who may be qualified.

The requirement will be particularly difficult for companies that do
not have centralized processes for considering applications. It will
pose similarly daunting challenges for companies that have numerous
lines of business. For example, some member companies are
composed of a large number of manufacturing plants all acquired
separately, each manufacturing a completely different product. The
regulation would appear to require that any applicant indicating that
she/he has a disability would have to be considered at each of these
plants if she/he “may” be qualified.

Confidentiality Concerns. From a practical perspective, most
companies believe it would be extremely difficult, if not impossible, to
maintain the confidentiality of an applicant’s disability status if she/he
is required to ensure that the numerous individuals making hiring
decisions throughout the company are required to provide special
attention to those applications. This includes considering the applicant
for positions she/he did not apply for and the recording of the reasons
for not hiring her/him. The general consensus is that, if the proposed
process is in place it will become obvious to many employees and
hiring officials which applicants have a disability. Particularly in
small operations, it will be extremely difficult to keep this information
from being widely known. This is particularly sensitive in the area of
intellectual and psychological disabilities, which are not as likely to be
obvious to co-workers and which often have a social stigma attached
to them.

Moreover, requiring managers and supervisors who make the
hiring decisions to document the reasons for rejecting individuals with
disabilities who applied for a job effectively defeats any confidentially
pledge or requirement. Simply performing the documentation task
signals to whomever is doing the documenting that this particular
individual has a disability. By effectively removing the veil of
confidentially, this requirement will further discourage individuals
from self-identifying. The only way to get around this would be to
require this documentation for all applicants who were not hired—a
requirement that would exponentially increase the cost of compliance.
Even if one accepts the premise of confidentiality, companies question how they are supposed to engage in affirmative action if those making the hiring decisions are unaware that an applicant has a disability. As one company noted, "Simply tracking people who self-ID won't by itself help individuals with disabilities get jobs."
IV. New Administrative and Paperwork Burdens

Costs. Generally speaking, the contractors viewed the cumulative costs of these requirements as oppressive and, when combined with the potential liability for failure to ensure 100 percent compliance, would be a significant factor for those contemplating whether to discontinue performing federal contract work. With estimated costs per establishment varying from $10,000 to $20,000 for some companies, and, in the case of one contractor, $100,000 per establishment, companies wonder how this can be managed when they are currently operating in a “leaner cost environment.”

A recent cost analysis from Applied Economic Strategies, funded by the Association, estimates that the first year cost of the proposed rule will be at least $5.9 billion. This is significantly higher than the $81.1 million estimated by OFCCP, and well in excess of the $100 million threshold that triggers a more detailed review of the regulatory burdens and potential alternatives required under the Unfunded Mandates Reform Act.

Internet Applicant Rule. Companies are particularly concerned that the rule eviscerates the so-called “Internet Applicant Rule” that has helped large companies who receive hundreds of thousands, if not millions, of job applications annually over the Internet manage their OFCCP compliance. Under the rule, contractors need only solicit race, gender and ethnicity information from applicants who meet the basic qualifications of the position they are applying for. However, under the proposal, contractors will be required to send self-identification invitations to all applicants, regardless of their qualifications for the position. It is not uncommon for some large companies to receive over one million Internet applications a year so there is considerable concern over the abandonment of this useful rule by the agency.

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<th>General Elements</th>
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<tr>
<td>The Proposed Rule Would Require Federal Contractors To:</td>
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<tr>
<td>• Prepare written explanations of why individuals with disabilities were not hired and whatever reasonable accommodations were considered.</td>
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<tr>
<td>• Annually review all physical and mental job qualifications and document the review.</td>
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<tr>
<td>• Document each vacancy and training program each applicant with a disability was considered for.</td>
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<tr>
<td>• Document each vacancy and training program each employee with a disability was considered for.</td>
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<tr>
<td>• Send out pre-offer self-identification invitations to all persons who express an interest in working for them every year over the Internet.</td>
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<tr>
<td>• Send out “receipt of the request” letters or emails to applicants who self-identify as having a disability and also request an accommodation.</td>
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<tr>
<td>• Annually survey employees.</td>
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<tr>
<td>• Track, analyze and record ten disability-related affirmative action data items pertaining to applicants and hires on an annual basis.</td>
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V. Formal Reasonable Accommodation Procedures Beyond the Requirements of the ADA

The proposed regulation requires federal contractors to take several new steps beyond what is required of all other employers under the ADA. Specifically, the NPRM creates a new regulatory section that requires contractors to develop and implement written procedures for processing reasonable accommodation requests, including the process by which the contractor renders a final determination.

**Rigid Timeframes for Processing Requests.** All companies are concerned about the rigid timeframes that the NPRM would create for considering and resolving accommodation requests. Much of the concern is that the prescriptive timeframes don't allow for a bilateral give and take, putting the employer at a disadvantage by trying to “to hurry up and do something” rather than seeking a solution that works for both sides. The companies noted how highly dependent requests are on the situation, including the logistics of the request itself, which may be as simple as a single leave request or as complicated as the installation of new technology in the workplace. These can often take well beyond the 10 and 30 day timeframes required by the NPRM. The assessment of the disability alone can frequently involve considerable periods of time.

**Mixed Responses to Formalized Processes.** This was one of the few areas where there were divergent views among the membership. All companies were in agreement that the current “reasonable accommodation” requirements of the ADA are already very rigorous and are being actively enforced by the Equal Employment Opportunity Commission and the courts. Thus, they questioned the benefits of an additional layer of requirements, particularly in an area that involves ADA compliance rather than the affirmative action mission of the OFCCP.

Although the majority of companies attending our meetings did not appear to have formal accommodation procedures, some have recently put such procedures in place or are considering doing so. Others believe that formal procedures are unnecessary because accommodating employees’ individual needs “is already built into our cultural DNA,” and formalizing the process would only increase the visibility of disabilities and diminish their "culture of inclusion." Among those who have not formalized their procedures, there was strong concern expressed about the impact on the current flexibility and ease with which they are able to provide accommodations to all employees. Right now, it is a “conversation” which typically results in a solution that addresses both the employee’s and the employer’s needs. There is a concern that more formalized procedures with reporting requirements could lead to a more cautious, potentially confrontational process that focuses on whether or not the procedures

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**General Elements**

The Proposed Rule Would Require Federal Contractors To:

- Take no longer than 10 business days to process reasonable accommodation requests when supporting medical documentation is not needed, and no longer than 30 days when supporting medical documentation or special equipment is needed.
- Provide written notices to requesters when the processing of their accommodation requests will not be completed on time including the reason(s) for any delay and a projected completion date.
- Provide written confirmation of receipt of a request to the person who requested accommodation, either by letter or email; any denial or refusal must be provided in writing and include the reason for the denial, a statement of the requester’s right to file a discrimination complaint with OFCCP, and information about any internal appeals process the contractor may have.

Continued on next page.
were followed instead of focusing on reaching a mutually agreeable solution.

Nevertheless, many companies have begun formalizing their reasonable accommodation processes. The impetus has often been to ensure compliance with the ADA but some companies indicated that it has also had a positive impact on employee morale. Having said that, there were very few companies that had mature processes and they were in various stages of implementation, making it very difficult to draw generalities from their experiences. Among those companies who have a formalized process, some expressly limited the procedures to those with disabilities, some had procedures for all accommodations but attached more rigor to those involving disabilities, and some made the procedures available to all without requiring the existence of a disability.

Those falling in the latter group often do so because they actively seek to create an atmosphere where employee differences are downplayed. In addition, they are concerned that if their procedures are viewed as being driven by accommodating “disabilities” as opposed to what all employees need to do their jobs, the procedures could result in the accommodated employees being legally “regarded as” having a disability, which triggers potential ADA liability where a disability may not even exist.

In sum, even those with formalized processes are concerned about the government imposing rigid "one-size-fits-all" mandates while companies are still experimenting with the ideal approach. The bottom line is that all companies are committed to complying with the ADA’s “reasonable accommodation” requirements. As to the best approach for doing so, the jury is still out and will likely always vary from one company’s culture to another.

Continued from previous page.

• Provide the circumstances under which medical documentation will be sought for an accommodation.
• Disseminate the reasonable accommodation procedures to all employees.
• Provide annual training for supervisors and managers regarding the implementation of reasonable accommodation procedures.
VI. Linkage Agreements and Other Outreach

One of the most significant changes in the NPRM addresses the scope of the contractor’s recruitment efforts and the dissemination of its affirmative action policies. Currently, the regulations recommend rather than mandate the specific methods for carrying out these obligations.

Concerns Regarding Capacity. Compared to other requirements in the NPRM, companies are generally more receptive to OFCCP’s efforts to expand connections between employers and agencies serving those with disabilities, seeing this as an essential component of any affirmative action efforts. However, their strongest concern is the assumption by OFCCP that these organizations, particularly at the state and local level, will have the capacity to respond to an increase in employer activity in this area. And, in this same light, whether these organizations are or can be effective. The situation varies widely from location to location and among the various agencies serving different disabilities.

Companies with centralized recruitment processes are particularly concerned about the confusion and fragmentation that would occur by forcing them to enter into a maze of state and local agreements. They are also concerned about the wide variety of skills involved and the difficulties in matching those up with the right groups, noting “no single group could help us staff top to bottom.” Many companies have national partnership agreements with so-called “aggregator groups,” which have relationships with numerous other groups at all levels. However, under the NPRM, that would only count as one linkage agreement and not meet the requirement of having three agreements per establishment no matter how effective that one aggregator partnership may be.

Companies are also concerned that not all of the disability organizations are effective at sending referrals and it is difficult to track how effective the organizations are in that regard. Their previous experience with many of these organizations is mixed at best. They are also concerned that the groups often do not fully understand the employer’s needs and thus fail to refer many qualified applicants.

The sheer number of required linkage agreements is also of great concern, especially since OFCCP’s proposed regulations concerning veterans have a similar requirement, raising the possibility of thousands of agreements nationwide with a requirement that each one be analyzed and assessed for its effectiveness. Most companies viewed these combined requirements as impossible to achieve, and questioned the amount of time it would take away from other equally effective outreach efforts.

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<tr>
<td>The Proposed Rule Would Require Federal Contractors To:</td>
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<tr>
<td>• Promptly list all full-time, part-time, and temporary positions, with limited exceptions, with the nearest Employment One-Stop Career Center.</td>
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<tr>
<td>• Establish a “linkage” (i.e., partnership) agreement with either the local State Vocational Rehabilitation Service Agency office or a local Employment Network organization listed in the Social Security Administration’s Ticket to Work Employment Network Directory.</td>
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<tr>
<td>• Establish a linkage agreement with a DOL funded recruitment or training service for individuals with disabilities.</td>
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<tr>
<td>• Establish one other linkage agreement with a veteran organization, local disability group, or private recruitment source.</td>
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<tr>
<td>• Document all linkage agreements and all outreach and recruitment efforts.</td>
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VII. Conclusion

Our member companies strongly embrace the value of constant improvement and affirmative action is no exception. Indeed, they are proud of the progress they have made in reducing the vestiges of all forms of discrimination, but no one would claim that those efforts can never be improved. A far better approach than the NPRM would be for OFCCP to seek to work with federal contractors to see if there are ways to achieve such improvements.

One area whose deficiencies are exposed by the NPRM is the lack of available, reliable data regarding the employment of individuals with disabilities. Unlike other protected groups, disability status is often invisible—even to the individual. This makes it difficult for employers to track their own progress in employing those with disabilities. Yet, the compilation of such data is an inherently sensitive area. Putting employers in the position of engaging in invasive inquiries into applicants’ and their employees’ personal situation is neither desirable nor will it achieve the intended results. Recognizing that perfect data in this area will always be unattainable, employers are willing to consider other mechanisms for improving the statistical assessment of their success in employing those with disabilities.

Similarly, companies strongly believe in the value of close working relationships with outside organizations to help in achieving affirmative action goals. Most companies are already fully engaged in those relationships but are concerned about the capacity and effectiveness of those outside organizations. They believe that focusing on addressing those deficiencies would be far more productive than simply mandating a numerical set of “linkages” that in many cases would be the proverbial “bridge to nowhere.”

Finally, our members believe that the challenge of increasing the participation of individuals with disabilities in the American workforce can never be met as long as the current work disincentives are maintained under the Social Security system. We recognize that there are significant operational, fiscal and political complexities involved in correcting this that are beyond the capability of the OFCCP and the employer community to address by themselves. However, the OFCCP needs to recognize that no amount of additional administrative requirements can achieve the desired goals without addressing this problem.
The challenges in meeting the goals of Section 503 are formidable even without the implementation of the NPRM, but our members are committed to meeting them. In doing so, they simply ask that their good faith efforts be recognized and that they not be required to do that which cannot be done. If the OFCCP were to engage with them in seeking improvements, we believe they could be found as long as the challenges that are beyond employers’ control are recognized.