Statement

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

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

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

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

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

Introduction – the 503 Regulations and Broader Concerns

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

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

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

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

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

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

The Association's Commitment to Effective Workplace Disability Policies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Achievement of the Seven Percent "Goal"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No Deference to Guiding Law: The Self-Identification Requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Several Significant Administrative and Paperwork Concerns Addressed in the Final Rule

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

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

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

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

The Companion 4212 Regulations for Protected Veterans

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

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

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

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

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

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

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

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

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

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

The Final Word Has Yet to Be Written

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

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

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

Endnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[16] *Id.*

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

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

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

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

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

[22] 42 U.S.C.A § 12112(d)(2).

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

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

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

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

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

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

[29] 42 U.S.C.A. § 12102 (1).

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

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

[32] 29 C.F.R. § 2520.102-2 (a).

[33] 41 C.F.R. § 60-1.3.

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

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

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

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

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

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

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

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

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