

Testimony of

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before the

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Committee on Education and the Workforce
Subcommittee on Workforce Protections**

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Chairman Walberg and Ranking Member Courtney, thank you for the opportunity to offer testimony to the members of this Committee. I have a deep personal sense of the history and importance of Congress. Accordingly, it is a great honor to appear before this Committee today.

I am a shareholder in the Minneapolis office of Littler Mendelson. I am speaking to you today on my own behalf and not on behalf of my firm. I have represented government contractors in connection with OFCCP compliance for over 25 years. Like most of my clients, I believe in the importance of equal employment opportunity. Also, like most of my clients, I believe that diversity in the workplace is essential to the success of our businesses. Accordingly, like most of my clients, I support the basic mission of the OFCCP.

In recent years, there has been significant controversy regarding OFCCP's efforts to assert jurisdiction over healthcare providers. One of the arguments that the OFCCP has asserted in support of jurisdiction over healthcare providers has been providers' participation in TRICARE – the program designed to provide healthcare benefits to members of the military and their families.

Healthcare providers are already highly regulated. The cost of healthcare is a significant issue facing this country. Under these circumstances, whether it is good policy to impose additional regulations on healthcare providers is a question on which reasonable people can disagree. Indeed, it appears there are differences of opinion regarding this issue between executive agencies within the current administration. The Department of Defense and the Office of Personnel Management have expressed a belief in the importance of being able to contract with providers to offer healthcare services for the military and federal employees without having to subject those providers to the OFCCP's regulations. These agencies believe – and I believe they are correct in this regard – that imposing such requirements limits the number of providers that are willing to offer such services.

The OFCCP, on the other hand, believes that it needs to regulate such providers and that it can do so without imposing an unreasonable burden.

Other individuals are testifying today regarding the merits of this debate. I am here because I understood this issue to have been resolved, at least with regard to TRICARE when Congress passed the National Defense Authorization Act for Fiscal Year 2012. This measure included language that was very widely and reasonably understood as putting an end to this debate and providing that the OFCCP could not exercise jurisdiction based on providers participation in TRICARE.

This was a very important outcome because it appeared to provide healthcare providers with certainty and allowed them to decide what to do. I can tell you that during this period of uncertainty regarding OFCCP jurisdiction, my colleagues and I

spend a great deal of time discussing with healthcare clients the costs and burdens that come with OFCCP compliance. We see many healthcare providers making decisions not to participate in certain programs and arrangements because the costs of compliance are simply greater than the benefits of participation. And we are talking not only about the financial costs of compliance, but also how OFCCP regulation impacts the ways in which providers deliver services to their patients.

To outside observers, it was very surprising when the OFCCP continued to pursue TRICARE jurisdiction even after Congress had acted. The OFCCP did this by continuing litigation against a particular healthcare provider, the Florida Hospital of Orlando, which had been disputing OFCCP's assertion of jurisdiction based on TRICARE. The OFCCP continued to pursue this litigation through proceedings before the Department of Labor's Administrative Review Board (ARB) and practitioners were not surprised when the ARB found in favor of the hospital and held that the OFCCP could not assert jurisdiction based on TRICARE in light of the Congressional action.

After that decision, I think it is fair to say that most practitioners in this area were astounded when the OFCCP indicated that it would not accept defeat on this issue and would continue to pursue the matter. As far as I know, the ARB's decision to accept re-hearing of the Florida Hospital case and its subsequent reversal of its original decision are unprecedented. Its decision in this regard, has been widely criticized. The Florida Hospital case is still working its way through administrative proceedings. As already mentioned, obtaining a final decision with regard to this issue is very, very important to providers. Providers need to know what their obligations will be before they decide to

enter into relationships that may subject them to OFCCP jurisdiction. Unfortunately, it appears that a final judicial resolution of this issue may still take several years.

The interests of healthcare providers and their patients, including members of the military, military families, and federal employees – as well as taxpayers – would be best served by a final resolution of the TRICARE issue. I believed that this final resolution came from Congress in December 2011. The ideal resolution would be for the Department of Labor to accept the role of the Congress and stop fighting against the fact that Congress has already spoken. The second best option is for the courts to finally resolve the issue. The proposal offered by the Department of Labor in its letter of March 11, 2014 presents neither a compromise nor a positive step.

To the extent that the Department of Labor's proposal would not end the Florida Hospital litigation and does not represent a commitment by the OFCCP to relinquish its claims of jurisdiction over TRICARE participants in non-audit contexts, such as complaint investigations, nothing is really being resolved.

On the other hand, to the extent that the Department of Labor's proposal would end the Florida Hospital litigation and, therefore, prevent the final resolution of this issue in the courts, I am personally concerned. It has taken more than five years for the Florida Hospital case to get to the point where it is now (the Administrative Complaint was filed on December 18, 2008). A final determination may still be years away. The Department of Labor's proposal means that there will be at least five more years of uncertainty and probably more. It means that many healthcare providers will decline to participate in programs or opportunities that may subject them to OFCCP

jurisdiction. And finally, accepting this proposal would reinforce a very disturbing trend that contractors have seen at the OFCCP in the context of compliance reviews. And that is an indifference by the agency to the letter of the law when, in its judgment, the letter of the law is inconsistent with the agency's goals.

Sitting here, as I already mentioned, with a sense of reverence for this institution, I am very, very disturbed to see an executive agency continuing to pursue a policy that has been explicitly addressed and rejected by the Congress.

Thank you and I look forward to answering any questions you may have.