SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

cupa-hr
College and University Professional Association for Human Resources

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VIA U.S. Mail and Electronic Submittal: www.regulations.gov

Ms. Debra Carr
Director, Planning and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Ave., NW, Room C-3325
Washington D.C. 20210

Re: Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans
RIN # 1250-AA00

Dear Ms. Carr:

The Society for Human Resource Management ("SHRM") and the College and University Professional Association for Human Resources ("CUPA-HR"), with their counsel Fortney & Scott, LLC, is pleased to submit these comments in response to the U.S. Department of Labor's ("DOL's") Office of Federal Contracts Compliance Programs ("OFCCP") Notice of Proposed Rulemaking ("NPRM") with respect to the regulations implementing the affirmative action provisions of the Vietnam Era Veterans Readjustment Assistance Act of 1974 ("VEVRAA"), published in the Federal Register on April 26, 2011,[1] with respect to amending the current regulations at 41 CFR Parts 60-250 and 60-300.

SHRM and CUPA-HR strongly support the general goals of the proposed rules—improving outreach to veterans, strengthening existing affirmative action provisions, expanding required training of contractors' workforces that is targeted and effective, expanding contractors' access to data that are reliable and effective for assisting in evaluating affirmative action efforts, and requiring the establishment of hiring goals for covered veterans for the purpose of improving veterans' employment. SHRM and CUPA-HR strongly support these goals and other efforts to improve employment opportunities for our nation's veterans. Additionally, SHRM and CUPA-HR support amending the VEVRRA regulations in a manner that focuses on the improved employment opportunities for protected veterans.

[1] 76 Fed. Reg. 23358 *et seq.* (2011).

Following our careful review of the regulations, we have concluded that, although well intended, unfortunately, the regulations as proposed focus primarily on expanded processes and steps for federal contractors that will significantly increase the burdens and costs on federal contractors without improving employment opportunities for veterans. In addition, and just as importantly, SHRM and CUPA-HR are extremely concerned that by creating a completely separate and distinct series of affirmative action procedures and processes that are unique to veterans, which materially differ from federal contractors' obligations for other protected groups, the proposed regulations will have the unacceptable result of undermining the goal of ***equal*** employment opportunity for protected veterans and other protected groups.

At the outset, we would note that we were disappointed that OFCCP denied our reasonable request, along with similar requests by others, for a 60-day extension of time in which to prepare more detailed responses. This rulemaking effort is an important and significant one, and all stakeholder groups involved should have had the requisite time needed to provide thorough responses. While we are pleased that OFCCP extended the comment period, limiting this extension to 14 days that included the July 4th holiday prevented SHRM and CUPA-HR from completely surveying its respective memberships to provide more detailed comments and information to address the range of issues raised by the proposed rule.

We do however look forward to continuing to work with the OFCCP to improve the rule to achieve the shared goal of increasing the employment opportunities of our nation's veterans.

BACKGROUND ON SHRM AND CUPA-HR

These comments are provided by two significantly experienced human resources organization, both of which are recognized leaders in the human resources field. Additionally, in developing these comments, both SHRM and CUPA-HR had invaluable input and feedback from some of the leading Veterans Service Organizations ("VSOs"), including The American Legion, Paralyzed Veterans of America and Disabled American Veterans. SHRM and CUPA-HR look forward to continuing to work closely with these and other VSOs to address expanded employment opportunities for protected veterans in the future.

The Society for Human Resource Management is the world's largest association devoted to human resource ("HR") management. Representing more than 250,000 members in over 140 countries, SHRM serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

In addition to its traditional member services, SHRM has made extensive efforts on behalf of our nation's veterans. SHRM's webpage dedicated to the employment of veterans (http://www.shrm.org/hrdisciplines/staffingmanagement/Articles/Pages/Military.aspx) highlights that the transition of veterans into the workplace

is a key concern for SHRM and for the HR profession. As evidenced by SHRM's many studies of its members, HR professionals embrace a responsibility to help our nation's military reclaim their civilian lives and return to meaningful and productive work. For example, to assist employers in recruiting and retaining current and former members of the military, SHRM has collaborated with key federal agencies, including partnering with the Department of Defense ("DoD") Employer Support of the Guard and Reserve ("ESGR") and serving on the Secretary of Defense Employer Support Freedom Award National Selection Board. The Freedom Award is the DoD's highest recognition given to employers for exceptional support of their employees serving in the Guard and Reserve.

SHRM also has developed a special training workshop on military employment developed as part of its Annual Conference. The first event in 2010 called, "Military Veterans: Transitioning Skills to the New Economy," brought together HR professionals, business leaders, federal agencies and hundreds of members of the military to highlight how both employers and veterans benefit each other, focusing on the skills each need to succeed as partners. Among the speakers was Ray Jefferson, DOL Assistant Secretary for Veterans' Employment and Training Service ("VETS"). The 2011 Annual Conference Workshop was offered at no charge to more than 12,000 HR professionals and focused on how to recruit and accommodate veterans, wounded warriors and spouses, and how to support and retain veterans in the workplace.

SHRM has developed a deeper relationship with DOL-VETS, working together to inform employers across the nation about the resources that are available to them in finding, recruiting and retaining military veterans. In a related effort, the White House invited SHRM to participate in "Joining Forces," an initiative focused on the needs of military. SHRM also is entering a similar collaboration with the Department of Veterans Affairs ("VA"). In addition, Congress has recognized SHRM's expertise/involvement by inviting SHRM to provide testimony on this topic. Finally, numerous SHRM-affiliated chapters and state councils have held successful job fairs and hiring programs directly aimed at the local veterans in their communities.

The *College and University Professional Association for Human Resources* provides dynamic leadership to the higher education human resources profession and the higher education community by delivering essential knowledge, resources and connections that enhance individual and institutional capacity and effectiveness. Its membership is institution-based and includes close to 90 percent of all U.S. doctoral institutions, around 70 percent of all master's institutions, over 50 percent of all bachelor's institutions, and almost 500 two-year and specialized institutions. CUPA-HR also serves other organizations that are affiliated with higher education. It provides vital resources to more than 12,000 higher education HR professionals at over 1,700 institutions—every day.

CUPA-HR regularly engages its members through various sources on veteran-related issues in an effort to educate members on the importance of veteran recruitment and the resources available. As part of that effort, CUPA-HR has created a dedicated website for members, which serves as a toolkit with detailed information about recruiting

veterans and complying with the various federal laws that pertain to hiring and employment of veterans and veterans with service related disabilities.

INTRODUCTION

As noted above, SHRM and CUPA-HR stand squarely in favor of the goal of improved employment opportunities for veterans. For years, both SHRM and CUPA-HR have undertaken numerous efforts to assist veterans, particularly disabled veterans, in their re-integration into the society they bravely served. The members of both SHRM and CUPA-HR have been materially involved in the recruitment and hiring process addressed by the proposed regulations. Indeed, the common concern of both organizations' members for veterans' employment and the common activities to reach that goal brought SHRM and CUPA-HR together for the purpose of commenting on the proposed regulations.

The following comments, given the short timeframe, necessarily are limited to those regulations we believe are most critical to achieving the goal of increased veterans' employment.

First, we commend OFCCP for the goal of the proposed rule and for establishing a common definition of "protected veteran." We also agree with the NPRM proposal to eliminate Part 60-250 regulations governing contracts entered into prior to December 1, 2003 (and not modified after that date). To assist OFCCP in the rulemaking, SHRM and CUPA-HR also are supplying certain information as requested in the NPRM with regard to outreach resources. We also, as we will point out in our comments, believe there are other areas where OFCCP has proposed a change to the VEVRAA regulations that, with some modifications, would be effective in increasing the hiring of veterans.

SHRM and CUPA-HR have concerns however about the primary focus of the proposed regulations on the required processes and steps, without any significant analysis of whether the proposed new and, in some cases, significantly burdensome processes will result in greater employment opportunities for the protected veterans. Based on the experiences of our members, both SHRM and CUPA-HR believe that many of the proposed required steps and processes included in the proposed regulations will not result in more effective or greater employment opportunities for protected veterans. Additionally, the detailed proposed processes generally follow a "one-size-fits-all" approach, and fail to take into account the vastly different resources and circumstances of the federal contractor community, which includes very large employers with significant resources, to small employers with much more limited resources for performing the human resources functions, including recruiting and hiring. It should be noted that while the citizenry and the federal government as a whole tend to think of most employers as large Fortune 100 and Fortune 500-sized organizations, the bulk of the employment opportunities are with organizations with less than 500 employees.

Our concerns about the process-focused regulations include the lack of research or data cited by OFCCP to support the assertions that the proposals are effective (and a

countervailing silence on research that disagrees with OFCCP's assertions), the dismissal of legal conflicts and impediments to several of the proposals, the shifting to contractors of traditional government roles of collecting reliable data, and, in sum, the enormous administrative burdens the proposals impose. In addition, the regulations as written do not appear to strike a balance between enforcement and a best practices approach that demonstrate that they will lead to the effective hiring of veterans.

Our concerns with respect to the proposed regulations, and, in particular, the additional processes that would be unique to veterans, can be summarized in the common theme that will be sounded throughout our response: ***veterans should be treated like all other protected groups***. Our particular focus on the concerns of veterans takes on special significance only in terms of equal treatment, **not** by creating unique and separate affirmative action processes and procedures for veterans. Not only do we question the effectiveness of these special proposals, but we are also deeply concerned that such proposed regulations could further stigmatize the very individuals they are designed to help and would pit individuals of one protected class against another in the employment selection process.

SHRM and CUPA-HR find it problematic that, from among the protected groups, OFCCP is requiring, for veterans only, a different EEO clause; a separate self-identification process; a singular outreach process and linkage arrangement to employment agencies; unparalleled, detailed communication and training requirements; unique data collection procedures; atypical record keeping obligations; and the establishment of a new and unfamiliar concept of "benchmarks" rather than goals. SHRM and CUPA-HR strongly believe that *using the existing affirmative action process rather than creating new processes to cover the needs of veterans only, is the most effective means to integrate veterans into society generally* and to enhance their employment opportunities. For example, the establishment by OFCCP of "benchmarks" applicable to veterans does not clarify what is needed from the contractor; instead, the OFCCP's insertion of this new term and concept, intended to supplant the long-established term of "goal," creates significant confusion. What exactly does "benchmarks" mean and how does it differ from the "goals" established for other protected groups? The application of "goals" by federal contractors in meeting their affirmative action obligations is well established, and the term "goals" is supported and informed by over 25 years of legal guidance and precedent. Introducing the different standard of "benchmarks" will, at a minimum, result in unnecessary confusion and, most likely, years of extensive litigation. The regulations should avoid such a result and instead should require contractors to meet the same criteria with respect to veterans as other protected classes, *i.e.*, "goals." SHRM and CUPA-HR support the use of measurements, but what is being measured should comport with realistic and easily identified and accessible data, and be consistent with what is being measured for other protected groups.

Further, SHRM and CUPA-HR are concerned that the OFCCP has not identified any studies, surveys or research of any kind to supports its assertions that these proposed regulations will actually improve employment opportunities for veterans. As detailed

below, under the proposed regulations, there is a significant and unjustified amount of new requirements imposed on contractors, but there is little evidence that the proposed new requirements will result in increased employment opportunities for protected veterans. Employers understand existing procedures and requirements, which have been demonstrated, historically, to be successful and effective. It is, therefore, not appropriate to create a new panoply of requirements without identifying a sound justification for doing so.

OUTREACH

Section 60-250.44(f)[2] External dissemination of policy, outreach and positive recruitment

As will be explained more fully below, because of (i) the limited effectiveness of many of the identified programs; and (ii) the variety and breadth of other data sources, OFCCP should exercise a coordinating function, bringing together the best and most useful aspects of the many different vehicles currently available, into a unified system for use by veterans, federal contractors and the employer community in general. It is essential that employers understand their obligations to recruit and hire protected veterans. This is made more difficult by the proposed rule's scattershot approach to identifying mandatory and potential resources or linkage agreements that may not lead to the increased hiring of veterans. Moreover, while larger employers may have resources to understand and follow the available processes, smaller contractors, and particularly subcontractors, are likely to be overwhelmed. Therefore, the government, which is in the best position to aggregate the available data, information and resources, should develop an easily accessible "one-stop" website or portal for contractors and employers to use rather than burden every employer with investigating the myriad resources to identify what may be most useful.

The NPRM requires that federal contractors follow three outreach and recruitment efforts intended to inform protected veterans of prospective employment. Two require contractors to enter into linkage agreements and establish ongoing relationships with named entities, as detailed and discussed below. The third requires the contractor to consult the "Employer Resources" section of the National Resource Directory. There are aspects of this proposal that we support and believe will help increase the hiring of veterans, as described below; but SHRM and CUPA-HR also believe that the outreach program as proposed is unwieldy, duplicative, difficult to understand and comply with, and requires further adjustments to reach its goal. Accordingly, we believe that the outreach program as proposed could be improved so that more veterans are employed, which is what should define "success" for contractors, veterans and OFCCP.

SHRM and CUPA-HR believe that as the situation presents itself today, it is appropriate that a federal contractor enter into a linkage agreement with Local Veterans Employment Representatives ("LVERs") who are located nearest to the contractor's

[2] Following the references as made by OFCCP in the NPRM, these comments reference 41 CFR Part 60-250 rather than Part 60-300, but the comments are applicable to either.

establishment. *See* 60-250.44(f)(1)(i). These positions are funded through DOL's VETS. The VETS website describes the program, which provides funding through State Employment Security Agencies to provide job development, placement and support services directly to qualified veterans.

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In addition, the proposed rule does not mention the Disabled Veterans Outreach Program ("DVOP"), which also is funded through DOL's VETS and charged with developing jobs and job training opportunities for disabled and other veterans. Both LVER and are specifically tasked with promoting employment opportunities for veterans with disabilities. While these programs target *individuals* for employment, rather than veterans as a group, SHRM and CUPA-HR recommend that OFCCP consider these DOL-funded programs as another avenue for federal contractors to use, on a voluntary basis, as part of the contractors' outreach efforts directed to the veteran community.

The proposed rule also requires that the contractor enlist the assistance and support of at least one of the other persons and organizations listed, which include the nearest VA regional office, veterans' representatives on college campuses, national veterans' service organization officers in the contractor's area, local veterans groups and veterans' service centers near the contractor, as are listed in the current paragraph (f)(1), and the Transition Assistance Program ("TAP"). *See* 76 Fed. Reg. at 23365; Section 60-250.44(f)(1). We understand that there are limitations in both TAP and DTAP (Disabled Transition Assistance Program—intended to assist former service members with disabilities) that may result in these programs not being particularly effective for federal contractors' outreach and expanded hiring efforts. The programs do not cover all service members being discharged from the military; only the Marine Corps requires that its separating service members participate in the programs and our understanding is that TAP is not available to members of the Reserve or National Guard, and that TAP is available only at locations near military bases or similar facilities. In addition, we have been advised by veterans' advocates that those veterans that the programs do reach are provided advice of variable quality, often including information that is excessive and confusing rather than helpful. The materials provided do not focus only on employment issues, but also cover benefits available through the VA and other programs. TAP and DTAP also lose contact with the former military members after they leave the service, particularly after they have finally joined the civilian world. For these reasons, OFCCP should consider whether the use of either the TAP or DTAP programs as constituted today are effective for outreach, and likely to result in expanded employment opportunities for protected veterans.

The proposed rule also requires contractors to consult with the "Employer Resources" section of the National Resource Directory ("NRD") (http://m.nationalresourcedirectory.gov/employment/job_services_and_employment_resources) (as identified in the Preamble at 76 Fed. Reg. at 23365). *See* Section 60-250.44(f)(1)(ii).[3] At the outset, it should be noted that there is no "Employer Resources"

[3] A different URL, http://www.nationalresourcedirectory.gov/employment/employer_resources is identified in the proposed regulation itself. It does not exist.

section—only an "employment resources" section—geared toward the searching veteran. This resource, too, suffers from many of the same problems noted above with respect to TAP. The NRD website describes itself as "a collaborative partnership among the Departments of Defense, Labor and Veterans Affairs that contains information from federal, state and local government agencies; Veterans service and benefit organizations; non-profit and community-based organizations; academic institutions and professional associations that provide assistance to Service Members, Veterans and their families." It services "Wounded Warriors, Service Members, Veterans, their families and those who support them." As indicated by the website, it provides access to thousands of services and resources at the national, state and local levels to support recovery, rehabilitation and community reintegration. Visitors can find information on a variety of topics including benefits and compensation, education and training, employment, family and caregiver support, health, homeless assistance, housing, transportation and travel, volunteer opportunities and other services and resources. The Preamble to the NPRM states, "The NPRM gives contractors and subcontractors the flexibility to select any organization on the National Resource Directory for outreach and recruit purposes. Since this website is a great nationwide resource, any contractor would likely find it useful in fulfilling its affirmative action obligations, such as recruiting veterans."

Although the Employment Resources page within the NRD contains a wealth of information, including links specifically for federal contractors, the biggest issue with this resource is that it is not designed as a tool for employers. Information on resources to locate job candidates is mixed in with general information on hiring veterans and various government policy initiatives. Information on where to find job candidates consists of a series of web links that are redundant to many of those already listed in the proposed rule. While it aggregates a massive amount of information, it would take employers an undue amount of effort to find entities to link with, and employers have no way of knowing which resource is the best for their purposes. At most, this website should be listed as a suggested resource, not a mandated one.

Employers, particularly smaller contractors, need concise, reliable information about whom to contact and how, in their efforts to reach protected veterans. To address this shortcoming, we respectfully submit that OFCCP working with VETS, DoD, the VA and stakeholder groups, should spearhead an effort to establish a "one-stop shop" portal for federal contractors and employers to use for contacting protected veterans. Such a portal would significantly benefit veterans by enabling them to know where to focus their job seeking efforts. Similarly, it would benefit contractors and employers by enabling them to more successfully recruit qualified veterans. SHRM and CUPA-HR would welcome the opportunity to work with the federal government to assist in the design of such a portal.

Under Section 60-250.44(f)(2), the NPRM sets out "suggested outreach efforts." We applaud OFCCP for the listing of the optional outreach means identified in this paragraph. These suggestions allow contractors to determine for themselves potentially viable and non-viable local alternatives. They include formal briefing sessions, preferably on company premises, with representatives from recruiting sources; special

efforts to reach student veterans; participation in work study programs of VA rehabilitation facilities; engagement of protected veterans in career days, youth programs and related activities in communities; and other efforts aimed at attracting qualified protected veterans. All of these are useful suggestions and can provide additional ideas for contractors to pursue in their Section 4212 compliance undertakings. Moreover, this proposal should be the model for all the outreach provisions so that they can use the outreach mechanisms that best suit their individual needs. To help ensure that federal contactors understand what OFCCP requires for compliance, SHRM and CUPA-HR recommend that OFCCP specify that contractors engage in a specified number of outreach efforts; *e.g.*, at least one from the list or other efforts that are comparable.

The NPRM requests that stakeholders provide information on recruitment sources not included in the NPRM that might increase employment of protected veterans. SHRM and CUPA-HR are attempting to identify additional means through which employers and contractors currently recruit and hire protected veterans. It is these types of resources, however, that OFCCP should aggregate and use for its "one stop shop" resource. For example, the VA and the federal Rehabilitation Services Administration ("RSA") recently signed a memorandum of understanding under which the VR&E and state vocational rehabilitation agencies will work together to help veterans with significant disabilities who are seeking employment opportunities. We recommend that OFCCP's regulations address these resources to encourage more of these organic partnerships that are developing daily as opposed to a static listing that may become old and out-dated.

In addition, there is an entire set of programs and policies within the VA devoted to promoting veteran-owned small businesses ("VOSB") and service-disabled-veteran-owned small businesses ("SDVOSB"), many of which are federal contractors. They could be valuable resources as potential hiring pools for protected veterans or for subcontractors. In addition, The Center for Veterans Enterprise ("CVE") was created as a subdivision of the VA Office of Small and Disadvantaged Business Utilization ("OSDBU"). The VA OSDBU is intended to serve as an advocate for VOSBs and SDVOSBs, providing information about contracting with the federal government, hosting vendor conferences and offering other support for veteran entrepreneurs. Contact information for the VA OSDBU can be found at http://www.va.gov/osdbu/about/contacts.asp—and the link to the home page for that office is http://www.va.gov/osdbu/about/index.asp. Again, it would be beneficial for the regulations to address these resources and to demonstrate to contractors how they can be accessed to meet their recruitment obligations pertaining to veterans.

Further, in testimony given on June 1, 2011, before the House Veterans Affairs Committee, several witnesses identified the National Labor Exchange ("NLX"), "an automated initiative operating on the Internet," as a comprehensive set of programs and services to assist employers (*e.g.*, federal government contractors) in complying with VEVRAA regulations. Members can have their job openings automatically indexed (scraped) directly from their corporate career sites and made available to veterans through NLX and VetCentral, which assists participating members in complying with Jobs for Veterans Act regulations. Vet Central, which feeds job listings to State Employment

Services offices nationwide, is fully integrated into the NLX. In addition, NLX obtains downloads of postings from USAJOBS—the federal government's job opening portal—and distributes them to state job banks. To date, over 20 states have asked that USAJOBS be included in their state job bank postings. According to other testimony at the same hearing, NLX, which offers Section 4212/VEVRAA compliance assistance through VetCentral, works with state job banks to receive electronic postings from their state workforce agencies. The final regulations would benefit if OFCCP's efforts were informed by a review of the hearing testimony and the NLX as an example to inform and build upon with regard to its own efforts to develop a one stop portal. [4]

These resources demonstrate that with thoughtful government coordination and use of **existing** resources, OFCCP can develop and institute a more successful program that is more likely to achieve the sought-after goal of reaching and hiring protected veterans. SHRM and CUPA-HR recommend that OFCCP coordinate these resources, perhaps by building easy-use websites for national and local jobs, rather than requiring individual contractors' to reach out to all these varied sources in their different locations, in the multiple formats that currently exist. Such a coordinated system would make employers efforts to identify protected veterans seeking employment less burdensome and more successful. With such a system in place, employers and HR professionals will not be faced with the suggested hit-or-miss approach and instead can successfully identify, recruit and hire protected veterans more efficiently and effectively.

Section 60-300.5(a) Equal opportunity clause

Under Section 60-300.5(a), the NPRM sets forth the equal opportunity clause that must be included in each Government contract, subcontract and modifications, renewals, or extensions thereto. Paragraph 2 of the Equal Opportunity for Section 4212 Protected Veterans language mandated by this section provides that a federal contractor list all employment opportunities available at the time of the execution of the contract with the "appropriate employment service delivery system where the opening occurs." In addition, it states, "In order to satisfy the listing requirement described herein, contractors must provide information about the job vacancy in the manner and format required by the appropriate employment service delivery system." What this means is that contractors must provide job posting data to *each individual state **and** local employment office in the format that each individual state and local office requires.* Because most of the multitude of offices use different formats, this will be a logistical nightmare for all contractors, especially national and multi-state employers. It is both unnecessary and unreasonable to burden contractors with this requirement. It serves no rational purpose to mandate that a contractor reformat its notice of an employment opportunity for each

[4] See, *e.g.,* Prepared Statements of Richard A. Hobbie, Executive Director, National Association of State Workforce Agencies and of Jolene Jeffries, Direct Employers Association, June 1, 2011, House Veterans Affairs Committee hearing on "Putting America's Veterans Back to Work." http://veterans.house.gov/prepared-statement/prepared-statement-richard-hobbie-executive-director-national-association-state.

office and, in fact, it may result in deterring rather than encouraging veterans' employment.

SHRM and CUPA-HR believe that OFCCP needs to develop a standardized format that contractors can use to provide the job posting data in a uniform fashion to all government employment offices and require the appropriate employment service delivery system conform to that format. These offices do not operate independently of the Federal government and, accordingly, it is proper and legal for the Federal government to require the service delivery system to adopt a specified format. For example, requiring a listing using a readily available template, based on a Word or Excel format that is compatible with the typical recruitment records and software, that could be transmitted electronically, would be a significant improvement.

Again, it is appropriate here as elsewhere in these comments on this NPRM to ask whether it is justified to require an exercise that calls for a contractor's additional time and expense for veterans only that is not required for other protected groups. We believe that too many of the particularized requirements imposed on contractors for protected veterans are not necessary and will discourage contractors. All protected groups deserve similar treatment and no one protected group should be treated differently for employment opportunities.

CONGRUENCE WITH THE AMERICANS WITH DISABILITIES ACT (AS AMENDED) ("ADA")

Section 60-300.42; Appendix B to Part 60-300

SHRM and CUPA-HR are particularly concerned with how protected veterans with disabilities will be treated under the proposed regulations. Well-meaning provisions have, in the past, had the unintended consequence of further stigmatizing this group of worthy individuals. "Special" requirements, "special" accommodations, and similar mechanisms have served to segregate and separate them from other applicants and employees in the eyes of employers without providing material benefits. We fear that the proposed regulations suffer from this same failing.

Section 60-300.42: Invitation to Self-Identify.

At the outset, we recognize the realities that protected veterans and protected veterans with disabilities face in the job market. Based on extensive experience and the research in the field, we know that *many veterans choose not to self-identify as veterans* for a variety of reasons, including possible employer apprehensiveness about hiring someone who 1) may be called back to active duty; 2) may have difficulty making the transition to civilian life; or 3) may have a hidden limitation, mental or physical, regardless of whether it is a disability, and so on. In sum, the self-identification process is not the mere data-collecting measure it appears to be. Even when, as in the proposed regulations, the self-identification is contemplated as the basis for a hiring incentive or a priority referral (referenced in proposed Section 60-250.5, and elsewhere), it is not necessarily a benign event.

The proposed regulations exacerbate this situation by creating a *second, **mandatory***, post-offer invitation to self-identify for those who have done so as protected veterans. The second self-identification would be for the purpose of permitting the veteran to self-identify as being as a specifically protected veteran, which, for the most part, will affect disabled veterans.

Finally, the proposed regulations state that if a protected veteran self-identifies as being disabled, the contractor is *required* to ask if an accommodation is needed. While well-intended, it is unnecessary; and, more importantly, it violates the Americans with Disabilities Act, as amended ("ADA").

At every point in the recruitment and hiring process, a veteran applicant will be aware of the essential functions of the job and of his or her abilities. Presumably, every contractor will, at the appropriate time in the recruitment process, inquire if the veteran applicant can perform the essential functions of the job, with or without an accommodation, as contemplated by the ADA, and the applicant will respond. Absent a manifest disability giving rise to a reasonable belief that the veteran applicant may not be able to do the job, that is (and should be) the end of it.

Neither the proposed rule nor the template provided in Appendix B make clear that an individual must be able to perform the "essential functions" of the position, which is the keystone of the ADA. The proposed rule, by asking for the employee to self-identify as a disabled veteran, instead suggests that the key factor is whether the individual can work "properly and safely." No mention is made as to whether the individual can perform the essential functions of the job. In today's workplace, with so many desk jobs, such as information specialists, computer programmers, as well as mid-level supervisors, accountants and other traditional office jobs, offering accommodations because the individual is, for example, in a wheelchair, may violate the ADA. Moreover, there is no assurance that the Equal Employment Opportunity Commission (EEOC) will view OFCCP's process as a legal basis for excusing compliance with the ADA. Clearly, federal contractors cannot be required to make the Hobson's choice of deciding whether to comply with the OFCCP's regulations or the ADA, and OFCCP's regulations must conform to the existing ADA obligations in order to avoid such an illogical result.

The ADA, as construed by the EEOC, prohibits pre-employment inquiries regarding disabilities, including the need for an accommodation. *See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act* (May 1994). The assurances of OFCCP notwithstanding, the ADA's prohibition should require the removal of this provision from the proposed regulations. Further, respect for disabled veterans leads to the same conclusion. This different procedure does not advance the nation's disabled veterans' integration into the workforce.

SHRM and CUPA-HR urge that this section of the proposed regulation be withdrawn and that the Invitation to Self-Identify as it currently exists remain in the regulations. The interests of protected veterans will be served as will those of contractors and OFCCP, an impending conflict with the ADA will be resolved, and no new or special processes need be invented for disabled veterans.

Sections 60-300.5; 60-300.42(a); 60-300.44(k); 60-300.45: Data Collection; Contractor established benchmarks for hiring.

In its explanation of the Data Collection provision of the NPRM (Section 60-300.44(k)), OFCCP states:

> . . . no structured data regarding the number of protected veterans who are referred for or apply for jobs with Federal contractors is currently maintained. This absence of data makes it nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of protected veterans in the workforce, or to make any quantitative assessments of how effective contractor outreach and recruitment efforts have been in attracting protected veteran candidates. The proposed regulations provide for the collection of referral data (*see* Sec. 60-300.5, paragraph 5 of the EO clause), as well as applicant data (*see* Sec. 60-300.42(a) at 23377-78).

Although we agree that no specific database for this purpose exists, SHRM and CUPA-HR question the degree to which OFCCP has mined the data available from the various Departments and agencies of the federal government tasked with monitoring protected veterans before imposing this requirement. In any event, we believe that because of the critical role these data will have in assessing the effectiveness of contractors' efforts in recruiting and hiring protected veterans, OFCCP should require contractors to use reliable federally collected data for veterans, as it does for every other protected group. We note, for example, that hiring data is already maintained by contractors in their VETS-100 forms, and the requirement for reporting under VETS is referenced in this proposed rule. Before this rule becomes final, at a minimum, OFCCP

should coordinate with VETS regarding the data being collected and determine how these data may be used.

We also are concerned that these proposed regulations shift to contractors the obligation to create census data regarding protected veterans, in order to establish hiring "benchmarks", based on a mixture of OFCCP-provided data and data gathered by and unique to each contractor. The Data Collection proposal improperly shifts to the private sector—for protected veterans only—the responsibility to do the job the federal government should do: *i.e.*, provide accurate and reliable data concerning the availability of protected veterans. The means, scattered throughout these proposed regulations, are so difficult to understand, so burdensome, so unwieldy, and so costly that they may ultimately deter rather than encourage veterans' employment. Any goals—and not "benchmarks" —should be based on data made readily available by the federal government, while fully addressing employment needs of protected veterans. Further, SHRM and CUPA-HR question the establishment of "benchmarks" for hiring that do not mirror the current goals and timetables that exist for every other affected group under the purview of the OFCCP.

DATA COLLECTION

At the heart of every Affirmative Action Plan is a Utilization Analysis. Based on census data provided by the federal government, every federal contractor can assess the degree to which its recruiting and hiring efforts have succeeded in creating a workforce that reflects the available candidates for each job in its relevant geographical area. The irreplaceable element in this Analysis is reliable, commonly-used, government-provided census data. The proposed regulation discards this carefully wrought procedure and in its place would create a new, different, untested, unproven process with little regard for the burden it places on contractors. Further, OFCCP, having failed to cite any underlying studies supporting this new process, provides no rationale upon which to believe that its maze of requirements will aid veterans in securing employment.

Before implementing such sweeping and burdensome new requirements, OFCCP, at a minimum, should be required to demonstrate why it is unable to acquire the necessary data regarding protected veterans available from the various Departments and agencies of the federal government.

The proposed Data Collection regulations require that the contractor obtain the following data:

(1) The number of priority referrals of veterans protected by this part that the contractor received from applicable employment service delivery system(s);
(2) The number of total referrals that the contractor received from applicable employment service delivery system(s);
(3) The ratio of priority referrals of veterans to total referrals (referral ratio);
(4) The number of applicants who self-identified as protected veterans pursuant to Sec. 60-300.42(a), or who are otherwise known as protected veterans;

(5) The total number of job openings and total number of jobs filled;
(6) The ratio of jobs filled to job openings;
(7) The total number of applicants for all jobs;
(8) The ratio of protected veteran applicants to all applicants (applicant ratio);
(9) The number of protected veteran applicants hired;
(10) The total number of applicants hired; and
(11) The ratio of protected veterans hired to all hires (hiring ratio).

NPRM: Sec. 60-300-44(k).

A certain percentage of veterans are known to be reluctant to identify themselves as veterans. Adding to this difficulty is the fact that many veterans with hidden disabilities have multiple reasons not to self identify. Without virtually 100 percent self-identification, there is no ability to create reliable responses to (1) and (3), above. The same problem pertains with respect to the self-identification of applicants. Self-identification is an inherently random process, particularly for statistical purposes. The ratios that a contractor is required to create under (8) and (11), and even the raw figure of total protected veterans hired (10), above, are all incomplete, inchoate, and unreliable. Furthermore, if the agency's aim in requiring the collection of this data is to create a national database of protected veterans available for employment, then that is a task doomed by the limitations of the process.

The limitations in the proposed rule extend to any efforts to enforce the regulations. Because the data for each contractor will differ, there is no rational basis for comparing the effectiveness of one contractor's recruiting and hiring with another's or with a central, common, reliable data pool. If, as OFCCP states, "The primary indicator of effectiveness is whether qualified veterans have been hired" (NPRM at 23366, explanation of Sec. 60-300.44(f)(3)), contractors must have confidence that any assessments of "effectiveness" do not reflect the random, incomplete, particularized data that is an intrinsic element of the proposed regulations.

Before implementing such a sweeping and burdensome new requirement, OFCCP, at a minimum, should collect the census data regarding protected veterans that is available from the various Departments and agencies of the federal government. Others in government believe the data is there, were OFCCP only to make the effort to discover them. For example, at the June 1, 2011 hearing of the House Committee on Veteran's Affairs, "Putting America's Veterans Back to Work," Ranking Member Bob Filner forthrightly stated that the VA has the data. Rep. Filner went on to specify that the Veterans Benefits Administration has the required data. The proposed regulations, however, fail to address the Veterans Benefits Administration's data and also fail to explain OFCCP's consideration of these data.

SHRM and CUPA-HR can identify numerous other data sources that together would assist in identifying the veteran population in order to reach the ultimate goal of increasing employment of veterans. These include the VA website http://www.va.gov/vetdata/Veteran_Population.asp that breaks down veteran population

by county. It also includes DOL's VETS, which can obtain information from its VETS-100 forms that generally have not been accessed. In addition, we refer OFCCP to the resources identified in response to the NPRM request for resources that can be used for outreach. OFCCP already acknowledges the availability of numerous other databases (*see* NPRM at 23376; explanation of Sec. 60-300.43(f) and Sec. 60-300.45) and of its own access to Bureau of Labor Statistics and VETS data, which it asserts is sufficient to include in the "benchmark" process (NPRM at 23376; explanation of Sec. 60-300.45).

Mere accessibility to these data sources, however, does not mean ease of use. Most of these websites are difficult to master and maneuver and the masses of data must be unearthed and carefully sifted. In sum, using these websites would challenge nearly every human resource professional at every federal contractor, substantially adding to the burdens these regulations impose and materially delaying the recruitment and hiring of protected veterans. Moreover, the information from these sources must be combined with information gleaned from still other sources in order to be meaningful. In our view, mining the census data efficiently and effectively to identify protected veterans is a job for a professional, schooled in using government databases: *i.e.*, the OFCCP. It is the OFCCP—either by itself or in coordination with other federal agencies—that can best gather the available data, some of which is identified above, and in coordination with the VA and its sources for such data, then develop and provide availability data for federal contractors.

The collection of census data for governmental purposes is a quintessential role of government (*see* U.S. Constitution, Article 1). There is no reason why this traditional role should be shifted to over-burdened federal contractors solely for the purposes of the proposed regulations. Rather than having one appropriate governmental agency efficiently collect and collate the data into a commonly available database, the proposed regulations would require thousands of individual contractors to devote time and effort at considerable cost to an effort that will, by its very nature, be a patchwork quilt of individual data sets, of little use to anyone. Obviously, there is a better way: as it does for every other protected group, OFCCP, in concert with other agencies of the federal government, should provide the necessary data, first, to facilitate the identification, recruitment and hiring of protected veterans and, second, to assure fair, sound, uniform enforcement.

FIVE-YEAR RECORDKEEPING

Section 60-250.80; 250-44(j)

Why do OFCCP's proposed regulations require data relating to protected veterans be retained for five years, rather than two years, as required for all other protected groups? It is obvious that OFCCP hopes to build a veterans database from the information the contractors collect. But unreliable data does not improve with age nor does it grow better as it grows in size. A pool of flimsy data based on self-identification does not become more reliable because it is larger. On the contrary, the omissions multiply, rendering 60 months of data more error-filled than the annual data of which it is comprised.

Further, if OFCCP believes it needs five years of records to establish adequate data concerning availability of protected veterans, what does it propose to do about enforcement of "benchmarks" in the interim? Defer? Veterans deserve better.

As stated above, we maintain that the problems with the processes and procedures proposed in this section of the NPRM are unavoidable and fatal. But the solution is also apparent: treat veterans as others are treated. Provide census and availability data for veterans as OFFCP and other federal agencies do for others. Require contractors to treat protected veterans as they must treat other protected groups—including maintaining the same two-year recordkeeping.

Section 60-300.45: Benchmarks for Hiring

The establishment of "benchmarks" for hiring protected veterans "for the first time" raises many questions. As these "benchmarks" would be inextricably tied to the "priority referral process" (Section 60-250.5) and the Data Collection procedures discussed above, it is difficult to respond to this proposed regulation without reference to other provisions of the NPRM.

The initial response of SHRM and CUPA-HR to this new proposal is in keeping with its general position: why create an entirely new procedure with entirely new standards and mechanisms for veterans? The contractor community is familiar and experienced with the goals and timetables used for affirmative action with respect to all other protected groups. We believe that the existing system of goals and timetables should be used for protected veterans as well. Our initial and continuing theme resounds: forcing contractors to master new, burdensome, time-consuming, and costly procedures solely for the purpose of recruiting and hiring protected veterans will deter and not encourage the hiring of protected veterans

There are additional problems with the proposed regulation. We have already addressed the limitations inherent in any procedure that relies on the unreliable data gleaned from self-identification. That data is critical to the "benchmarking" process and suffers from the same limitations. Creating "benchmarks" from questionable data cannot but yield questionable 'benchmarks". Further exacerbating the situation is the legal insufficiency of a hiring process based on "priority referrals" and encouraged by an assessment mechanism that openly admits that, "The primary indicator of effectiveness is whether qualified veterans have been hired." NPRM at 23366; explanation of Sec. 60-300.44(f). In the absence of a hiring standard derived from uniform, common, reliable data rather than the series of assumptions, conjectures, estimates, and extrapolations that make up the core of the benchmarking process, OFCCP's "indicator of effectiveness" sounds very like a quota: an artificial objective based on artificial components.

There is also a significant legal impediment to the benchmarking and assessment processes OFCCP proposes. Our research has failed to identify any law, including VEVRAA, which creates a hiring preference for veterans in the private sector. As a result, the hiring of veterans by any contractor would be voluntary and, thus, exposed to scrutiny and challenge under Title VII and all other equal employment laws by other applicants, including applicants protected by the Executive Order. *See, e.g.,* EEOC Policy Guidance on Veterans' Preference Under Title VII, August 10, 1990, and cases cited therein, explaining, *inter alia,* why Section 712 of Title VII provides no safe harbor in this situation. Because protected veterans are still overwhelmingly men, hiring imbalances arising from the priority referral and benchmarking processes are a pressing reality. Thus, legal challenges to those imbalances are a fact that every contactor must consider.

SHRM and CUPA-HR believe that the regulatory imperatives in the proposed regulations—from priority referrals, to applicant ratios, to "benchmarks", culminating with hiring being the "primary indicator" of compliance—are legally perilous. The legal pitfalls of those processes are more than sufficient reasons to re-examine and improve by re-writing the proposed regulations. Without a safe haven for prioritizing the hire of veterans over that of any other protected group, an employer may be charged with failing to comply with the law for prioritizing the veteran or, conversely, for hiring a woman or African American when also obligated to hire a veteran. It is essential, therefore, that OFCCP develop a better approach to harmonize the obligations of contractors.

We urge that all references to "priority referrals" and hiring "indicators" in 60-250.5, 60-300.44, 60-300.45, and elsewhere, be excised because of the legal consequences of such use and the overall principle of treating veterans equal to other protected classes. SHRM and CUPA-HR recognize that such an excision will require a re-drafting of the data collection procedures of 60-300.44 and the benchmark process of 60-300.45, but we regard those as positive achievements, removing burdensome, stigmatizing, and legally questionable provisions from the proposed regulations. We respectfully recommend that OFCCP reconsider the way in which the proposed regulations seek to incentivize self-identification by means of a thinly veiled promise of preferred hiring in a manner that violates basic tenets of equal treatment, as expressed in

Tile VII and the legal requirements of the ADA. Finally, we urge OFCCP to reconsider the way in which the proposed regulations compel contractors to collect inherently flawed data that will be then used as the basis for an inevitably flawed, legally suspect benchmarking, hiring, and enforcement process.

SHRM and CUPA-HR believe that the appropriate solution to these regulatory shortcomings is apparent: treat protected veterans as other protected individuals are treated. First, OFCCP or other appropriate agencies should collect the census and availability data and make the data available to contractors. Then, the rest of the existing affirmative action process, as outlined in Executive Order 11246, follows as a matter of course, based on well established legal principles. With reliable availability data, meaningful goals and timetables could be established. Needless additional special provisions in the proposed regulations can be eliminated and contractors will be able to integrate the recruitment and hiring of protected veterans into a system with which they are familiar, a system that works.

TIME AND RESOURCES IMPACT ON HUMAN RESOURCE PROFESSIONALS AND CONTRACTORS

OFCCP candidly notes that "the overall population of protected veterans is already relatively small." NPRM at 23363; explanation of Sec. 60-300.42. In light of that, OFCCP should be sensitive to the unique, additional burdens the proposed regulations impose and the resistance the proposals are likely to meet. Instead, OFCCP heaps one new, special requirement upon another; apparently blind to the difficulties they will impose and the deterrents to hiring they will create. This burden is particularly onerous for smaller employers, including many which are veteran-owned or service-disabled veteran owned small businesses. Considering that on average, most small employers incur regulatory costs of at least 30 percent higher than larger counterparts—36 percent in 2010—these regulations may even drive small businesses from federal contracting—if even they could fully understand and comply with the mandates. *See* Small Business Advocate, Vol. 30, No. 4 at p. 3 (May 2011) (published by the SBA Office of Advocacy)(www.sba.gov/advocacy).

OFCCP estimates of the burden are too low, and not realistic. Given the short time provided during this comment period, however, it was not possible to develop and conduct a survey of stakeholders who would provide OFCCP with a truer estimate of the time and expenses the proposed regulations would entail. It is clear that the estimates are very low and simply inaccurate.

Given the multiplicity of tasks asked of contractors—from the mandatory, specified multi-faceted outreach program, to the massive collection and maintenance of five years of data, to special training, to special annual accounting updates of **all** job descriptions, OFCCP fails to take into account the cost in time and money these functions will impose. Merely becoming familiar with the resources available will be hugely time-consuming. Efforts to use those resources and collect data that is intended to create the benchmarks for enforcement also will entail more time than identified.

In particular, the detailed training requirements, that mandate training for persons not involved in hiring and recruiting are a significant burden that, based on our extensive experience in successful training, are unlikely to improve the efforts to hire protected veterans. To be effective, any training requirements must be focused on the persons responsible for recruiting and hiring, and be able to be tailored to the wide range of workplaces that are subject to the requirements—a "one-size-fits-all" approach will not provide effective training. Training is not an exercise; to have value, it must be useful.

SHRM and CUPA-HR again ask why OFCCP has chosen to create and impose new procedures for dealing with veterans that differ from other protected groups. These annual activities are costly, time-consuming and burdensome and may engender resentment for the very group OFCCP seeks to protect, and one most deserving of respect not resentment.

CONCLUSIONS

SHRM and CUPA-HR joined together to comment on the proposed regulations in recognition of their mutual interest in encouraging veterans' employment and concern regarding the impact of the proposal. We fully support OFCCP's goals and do not want to obstruct, impede, or delay those goals.

For over 45 years, the OFCCP has administered affirmative action efforts for minorities and women. Although no one questions that even greater success would be welcome, it is safe to say that that the successful integration of minorities and women into the workforces of federal contractors is one of the proudest achievements of the Executive Branch, DOL and the OFCCP. SHRM and CUPA-HR maintain that the procedures and processes that have been proven to be so successful with minorities and women should be used with veterans. Or, to state the obverse, why do veterans need such completely different mechanisms, across the entire spectrum of activities under the OFCCP's purview? Before OFCCP mandates that contractors learn and implement different recruiting, recordkeeping, training, communication, data collection and hiring mechanisms, at the very least, OFCCP should offer some basis beyond its own belief that all these new, time-consuming and costly procedures will result in increased employment of veterans.

As indicated, SHRM and CUPA-HR have deep concerns over the lack of any significant research or coordination with other offices in the U.S. Government working with veterans, or with the very VSOs established to serve our nation's veterans. Many of the issues described above, and certainly many of the resources that we have identified in response to OFCCP's request for information, could have been identified and utilized prior to publishing these problematic proposals. Moreover, OFCCP's apparent reliance on various contractors' individual collation of data over a five-year period to enforce section 4212 is as unrealistic as it is burdensome. The unreliable data that is the inevitable outcome of the proposed regulation offers no basis for effective hiring or even-handed enforcement.

In addition, SHRM and CUPA-HR share a fundamental concern that OFCCP has not conducted or identified studies to determine whether the administrative burdens being placed on federal contractors and their human resource specialists will have any bearing on attaining the successful outreach to and employment of protected veterans. Moreover, the estimated time that OFCCP indicates will be needed to comply with the regulations is unrealistic, underestimated and, simply, wrong, and if adequate, additional time to comment had been granted, we would have surveyed our members and provided more detailed and accurate burden estimates.

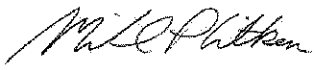
Furthermore, although SHRM and CUPA-HR question the effectiveness of these special proposals, its members also are concerned that this special treatment may cause others to stigmatize the very individuals the proposals are supposed to be helping. Most importantly, these proposed regulations indicate a preferential hiring of veterans over other protected groups whom contractors cannot ignore. As discussed above, this raises insuperable legal hurdles requiring that this proposal be re-worked. Creating a singular and different affirmative action process and procedure for veterans performs a disservice to veterans.

SHRM and CUPA-HR yield to no others in the depth and breadth of their active support for veterans in every sphere of society, including employment, but recognize that only under limited statutory circumstances are veterans provided priority over other protected groups. It is essential that any rules propounded by OFCCP treat veterans as all other protected groups are treated.

In sum, it is the core belief of SHRM and CUPA-HR that the most effective process for veterans is a process that provides veterans with what they most desire: to be treated the same as others. Accordingly, we maintain that OFCCP should focus on integrating veterans into the existing affirmative action process. Harmonizing the overall process, to cover veterans, minorities and women, will be more effective and benefit all on many levels. In this way, OFCCP can help veterans become fully-employed civilians. To provide equal treatment for veterans supports this country's legal and ethical principles. SHRM and CUPA-HR believe, as do veterans, that on a level playing field, the qualities, character, experience and abilities of veterans will supply all the "priority" they need or want.

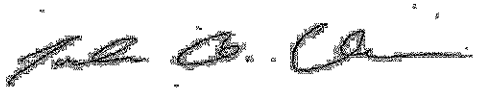
Respectfully submitted by:

Society for Human Resource Management



Michael P. Aitken
Director, Government Affairs
Society for Human Resource Management
1800 Duke Street
Alexandria, VA 22314-3499

College and University Professional Association for Human Resources



Joshua A. Ulman
Chief Government Relations Officer
College and University Professional
Association for Human Resources
Center Point Commons
1811 Common Points Drive
Knoxville, TN 37932

Of Counsel:

Fortney & Scott, LLC

David S. Fortney
Burton J. Fishman
Susan M. Webman

Attorneys for the Society for Human Resource Management and
the College and University Professional Association for Human Resources

College and University Professional
Association for Human Resources

February 20, 2012

VIA ELECTRONIC SUBMISSION: http://www.regulations.gov

Debra A. Carr
Director
Division of Policy, Planning & Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue, N.W., Room C-3325
Washington, D.C. 20210

Re: Notice of Proposed Rulemaking: Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities (RIN 1250-AA02)

Dear Ms. Carr:

The Society for Human Resource Management (SHRM) and the College and University Professional Association for Human Resources (CUPA-HR) appreciate this opportunity to comment on the Department of Labor Office of Federal Contract Compliance Programs' (OFCCP) Notice of Proposed Rulemaking (NPRM) with respect to the agency's regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 (Section 503 or Rehabilitation Act), as announced in the *Federal Register* on December 9, 2011. (76 Fed. Reg. 77056). These comments were prepared on behalf of SHRM and CUPA-HR by Jackson Lewis LLP.[1]

SHRM and CUPA-HR strongly support the underlying goals of the proposed rules – to enhance outreach to qualified individuals with disabilities, strengthen the knowledge of federal contractors' workforces to ensure that individuals with disabilities have an equal opportunity to succeed, and support overall employment opportunities for individuals with disabilities. Following a careful review of the regulations and an informal survey of our members regarding the benefits

[1] For more than 50 years, Jackson Lewis has placed a high premium on preventive strategies and positive solutions in the practice of workplace law. With over 650 employment law practitioners in 46 offices nationwide, the firm partners with employers to devise policies and procedures promoting constructive employee relations and limiting disputes. Jackson Lewis has a robust affirmative action compliance practice. The Firm prepares more than 1700 affirmative action plans every year and regularly represents Federal contractors during OFCCP compliance audits.

and burdens of the proposed rules, we have concluded that, although well-intended, the regulations as proposed focus primarily on creating a set of "one size fits all" requirements that fail to appreciate the complexity involved in compliance and that will significantly increase the burdens and costs on federal contractors without evidence that these substantial new burdens will significantly expand opportunities for individuals with disabilities. While we appreciate OFCCP's belief that "what gets measured gets done", we respectfully submit that measuring progress through onerous paperwork requirements and inherently unreliable data does not advance the OFCCP's stated goals and, indeed, only detracts from federal contractors' current efforts to provide meaningful employment opportunities and supportive environments for individuals with disabilities and other protected groups.

We look forward to continuing to work with the OFCCP to achieve the shared goal of improving employment opportunities for individuals with disabilities. To that end, we offer some recommendations below that we believe will allow the OFCCP to achieve its stated goals without unduly burdening federal contractors, intruding on the privacy of individuals with disabilities, or compromising the important principle of equal employment opportunity for individuals with disabilities and other protected groups. Both SHRM and CUPA-HR would be willing to convene a group of our members to provide expertise from the human resource profession and identify alternative approaches to better reach the stated goals of the rule.

STATEMENT OF INTEREST

These comments are submitted on behalf of two of the nation's leading organizations representing human resource professionals – the individuals responsible for implementing and overseeing recruitment, hiring, training, affirmative action and nondiscrimination processes in most organizations. The comments are informed by years of practical experience regarding the implementation and design of affirmative action plans, policies and procedures that can serve as useful management tools. Our members approach affirmative action plan development and implementation as far more than a paperwork exercise and are committed to ensuring equal employment opportunity.

SHRM is the world's largest association devoted to human resource management. Representing more than 260,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

CUPA-HR serves as the voice of human resources in higher education, representing more than 11,000 HR professionals at over 1,700 colleges and universities across the country, including ninety percent (90%) of all U.S. doctoral institutions, seventy percent (70%) of all master's institutions, more than half of all bachelor's institutions and nearly 500 two-year and specialized institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all fifty (50) states.

As organizations, SHRM and CUPA-HR regularly seek to promote effective practices for advancing equal employment opportunity for all, including individuals with disabilities. For

example, in 2006, SHRM signed an Alliance Agreement with the Department's Office of Disability Employment Policy (ODEP) in order to further advance employment opportunities for individuals with disabilities. As part of that initiative, which was renewed for the third time in January 2012, SHRM created a Disability Employment Resource Page on its website, offering its members a wealth of resources, articles and links to help source, recruit, retain and develop people with disabilities. SHRM also provides training to its members through conference programming and webcasts on disability law and affirmative action requirements. SHRM's member organizations regularly engage in outreach efforts to civil rights and disability organizations, both as part of their current affirmative action obligations and as a sound business practice. CUPA-HR also has created significant online resources promoting equal opportunity, including an Americans with Disabilities Act toolkit with resources, articles and links to help HR professionals advance opportunities for individuals with disabilities. CUPA-HR annual, regional and chapter conferences also frequently include sessions related to disability law and affirmative action requirements.

COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING

As OFCCP itself has described, the NPRM proposes "several major changes" to the current affirmative action requirements for individuals with disabilities. (76 Fed. Reg. at 77058). OFCCP Director Patricia Shiu has described the proposal as a "sea change" and one of the "most significant developments" in the context of Section 503. Given that Executive Order 13563 provides that the comment period for proposed regulations "should generally be *at least* 60 days" and that OFCCP itself appears to recognize the proposal's significance and possible impact, we were surprised and disappointed that the agency did not timely grant our request and that of others for a sixty-day extension of the comment period. The agency's last-minute decision to provide an additional two weeks by which to submit comments was insufficient and thus has not allowed us to prepare more detailed responses to the agency's proposal.[2] Accordingly, we request that the agency reconsider extending the comment period an additional 60 days and allow those who have already filed comments to file amended versions. This rulemaking effort is an important and significant one, and all stakeholder groups involved should have the requisite time needed to provide thorough responses.

Because of the limited comment period, SHRM and CUPA-HR were unable to comprehensively survey our respective memberships to provide more detailed comments and information to address the range of issues raised by the proposed rule. We did, however, conduct an informal survey of a variety of our members. The survey sought to gather anecdotal data regarding federal contractors' current practices in providing affirmative action to individuals with disabilities, as well as feedback regarding the potential benefits and burdens of the OFCCP's proposal. Results of the survey are discussed in greater detail below with respect to specific aspects of the proposed rules.

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[2] While we appreciate that the OFCCP engaged in efforts to collect information from interested stakeholders prior to the release of this NPRM through various means, including an advance notice of proposed rulemaking, those efforts in no way alleviate the agency from its responsibility to provide stakeholders sufficient time to provide meaningful comments on actual proposed text for a rule.

Generally speaking, our members appreciate the agency's efforts to bring consistency to the definitions used in Section 503 and those found in the Americans with Disabilities Act, as amended (ADA). The federal contractor community and individuals with disabilities are well-served by a consistent and uniform approach to defining those who are covered by these laws. We urge the OFCCP to work collaboratively with the Equal Employment Opportunity Commission (EEOC) to ensure that the agencies' enforcement efforts with respect to individuals with disabilities are consistent. This type of collaborative approach to enforcement matters benefits everyone, reduces the costs of compliance, and increases the likelihood that organizations will be able to understand and comply with the panoply of employment laws applicable to their workforces. Indeed, we cannot underscore enough the importance of collaboration between the OFCCP and the EEOC in this area, which is already complicated by the maze of different laws that may apply, particularly in the disability leave health management area.

Our members expressed significant concern, however, that the proposed rules unwisely focus on expanded processes and "one size fits all" requirements for federal contractors, without data to support that the proposed changes will be effective in increasing the employment of individuals with disabilities. In addition, the rules appear to deemphasize the individualized assessment of an individual's unique limitations and a contractor's ability to accommodate those limitations without undue hardship required by law. Before the OFCCP mandates that contractors learn and implement special and extensive recruiting, recordkeeping, training, communication, data collection and hiring mechanisms, at the very least, the agency should offer some basis beyond its own belief that all these new, time-consuming and costly procedures will result in increased employment of individuals with disabilities. Our members also are concerned that their obligations are heavily tied to a factor outside of their control and which the agency has not adequately studied – that being whether individuals with disabilities will voluntarily and reliably self-identify as having a disability to their employer in a manner and fashion that makes qualitative analyses useful for measuring progress in this area.

Feedback from our members also suggests that the OFCCP has grossly underestimated the amount of time and money that will be required to implement many of the proposed changes, and to maintain appropriate records. The OFCCP estimates of the burden are too low by several orders of magnitude, and not realistic. Given the current economic climate, and calls for organizational efficiency and effectiveness, the OFCCP should more fully recognize the unique and extraordinary additional administrative compliance burdens that the proposed regulations will impose and the resistance the proposals are likely to meet from all sides. With respect to the multiplicity of tasks asked of federal contractors in the agency's proposal - from the frequent requests to collect disability status information from applicants and employees, to the mandatory, specified multi-faceted outreach program, to the massive collection and maintenance of five years of referral and hiring data, to special, and very prescriptive, reasonable accommodation procedures, to detailed, individualized personnel logs that document every employment-related opportunity for which an individual with a disability may have been considered, to special annual updates of all job descriptions, the OFCCP fails to take into account the extensive cost in time and money that these activities will impose on federal contractors and individuals alike.

In light of the potential burdens of the agency's proposal, we strongly urge the OFCCP to give much more thought and consideration to any proposed changes, and after due diligence to ensure valid measures, then and only then, consider a phased implementation of any proposed changes, similar to the approach adopted when the Joint Reporting Committee (comprised of the OFCCP and the EEOC) revised the EEO-1 Report, which is the government reporting form used to collect race, ethnicity and gender data about an employer's workforce. 70 FR 71300 (Nov. 28, 2005). A tiered implementation schedule makes particular sense given the breadth of the proposed changes, the need for federal contractors to first develop systems to gather any required disability status data, then to collect the data, and finally to analyze the data once collected. Accordingly, we recommend that the OFCCP allow federal contractors a minimum of one year from the effective date of any final rule to redesign their systems to begin collecting any required disability status data and furthermore, that the agency not require any analyses of that data until the first affirmative action plan year following a full year of data collection.

I. Collection of Disability Status Information, Sections 60-741.42

Under the OFCCP's proposal, federal contractors would be required to allow individuals an opportunity to self-identify their disability status twice during the hiring process and on an annual basis thereafter. Our members have three primary concerns with the agency's proposal: (1) the suggested frequency for data collection is unduly burdensome to federal contractors and significantly increases the chance that an individual with disability will find such questioning by their employer intrusive; (2) the collection of disability status data, no matter how frequent, is inherently fraught with unreliability, given the complex legal definitions of covered medical impairments, the likelihood that many individuals with qualifying disabilities will not wish to provide such information to their employers, and the likelihood that other individuals may identify themselves as having a disability when in fact their status would not meet existing definitions; and (3) the requirement that such data be collected anonymously, while laudable from certain perspectives, makes it impossible for a contractor to conduct the data analyses required by the proposed rules.

We are particularly concerned that the OFCCP's proposal requires the collection of disability status information in a manner and frequency that is different than the way in which other demographic data (e.g. race, ethnicity, and gender) is currently collected by federal contractors. Resurveying is not required under Executive Order 11246, or in order to complete the EEO-1 Report each year. As a result, only a very small handful of our members who responded to our informal survey currently have mechanisms in place to regularly resurvey employees for race, gender or ethnicity information on an annual basis. To require that federal contractors begin collecting disability status information on such a frequent basis will unnecessarily raise questions for employees, particularly given the well-established understanding of employees that such data generally need not be disclosed to one's employer unless a reasonable accommodation is required or for other reasons that are job-related and consistent with business necessity.

Furthermore, the proposed survey frequency is overly burdensome and imposes significant costs on federal contractors. The agency's estimate that it would only take five minutes per contractor to incorporate a pre-offer invitation to self-identify into its hiring process and an additional five minutes per contractor to conduct an annual resurvey of employees is grossly

underestimated. Most federal contractors use an on-line application system to accept applications for employment. Those systems are generally created and programmed by third-party vendors, not by federal contractors themselves. It will take federal contractors weeks, or months, not minutes, to work with vendors or to re-engineer such systems themselves in order to be able to incorporate a separate pre-offer invitation to self-identify disability status. Almost sixty percent (60%) of the members who responded to our informal survey estimated that it would take more than fifty (50) hours to develop a system for collecting pre-offer disability status information, with many estimating more than 100 hours.

It is similarly unrealistic to assume that most federal contractors will use a paper process to resurvey their workforce on an annual basis. Accordingly, conducting an annual resurvey for disability status information will require that many contractors design, build, test and implement systems to gather and store this additional data. More than fifty percent (50%) of the members who responded to our informal survey estimated that this piece of the agency's proposal alone would require more than fifty (50) hours. Only about ten percent (10%) thought it would take less than ten (10) hours. Consistent with these estimates by human resource professionals, when the Joint Reporting Committee revised the EEO-1 Report, the Committee specifically rejected any mandate that employers resurvey their workforce in order to "minimize the burden for employers." 70 FR 71300 (Nov. 28, 2005).

Even with less frequent collection, our members are concerned that individuals will not reliably or accurately be able to provide disability status information, given the complex legal definition of a disability, and the individualized, case-by-case analysis required to determine whether someone has a covered disability. For a variety of reasons, many individuals with impairments may chose not to self-identify as disabled to their employer, even if they understand the parameters of the questions being asked. For example, some individuals may not wish to disclose their disability status because they do not require accommodation. Other individuals may mistakenly believe that they are not disabled, while still others erroneously will believe that they are. Further, there are significant groups that will not want to reveal their condition to their employer for fear of stereotyping and prejudice – regardless of medical privacy rules – such as those with a mental illness or with HIV. Requesting this data multiple times does not make the data more reliable – it simply increases the costs of collecting it. Furthermore, the inherent unreliability of the data being collected severely limits the usefulness of the data for any qualitative analyses.

Our members also are concerned about the "catch 22" situation imposed by the proposed rules. Indeed, many of our members summarized the proposed rules as the epitome of being "set up to fail." This is because the proposed rules require federal contractors to ask for, and analyze, data about the disability status of all applicants and employees. As a result of these inquiries, federal contractors will have knowledge of an individual's disabled status where they otherwise would not. This runs contrary to the notion embodied in the ADA that information regarding one's medical conditions is only relevant to employers to the extent that it pertains to the individual's ability to perform the essential functions of the job. Not only does this well-established principle protect employee privacy, it helps prevent employers from impermissibly acting on such information and greatly limits the circumstances where an employee may believe his or her employer has acted impermissibly on such information, when that is not the case. The OFCCP's proposal turns this privacy expectation on its head, and places the burden squarely on

federal contractors to show that they only used the information for affirmative action purposes and not for some other unlawful reason.[3]

We also question the requirement in proposed section 60-741.42(e) that contractors maintain self-identification information in a separate data analysis file. Federal contractors should be allowed to maintain this information in any system, or any way, they find most efficient and effective; provided it is maintained in a confidential manner. While our members certainly appreciate the advantages to having disability status data reported anonymously, we are perplexed as to how the agency expects federal contractors to then use such data to conduct the referral and hiring analyses in the proposed rule. Unless a federal contractor knows the name and other identifying information of all individuals who have self-identified as disabled, it cannot determine its progress towards meeting utilization goals by job group because there will be no way to determine in which job groups individuals with disabilities should be placed. Nor will federal contractors be able to conduct a compliant annual review of their personnel processes. Similarly, without identifying information regarding each individual with a disability, federal contractors will not be able to create the personnel log for each individual with a disability proposed in the NPRM.

In our view, when balancing the need to collect reliable data versus the desire to conduct artificially-created qualitative analyses, collecting information on a confidential, voluntary, and anonymous basis is preferable. This approach reduces the risk to federal contractors that an individual will claim he or she was not selected for an employment opportunity because of a known disability and makes it more likely that individuals with disabilities will provide accurate information. Accordingly, if the agency maintains the self-identification requirements, we recommend that the OFCCP revise the data collection requirements of the proposed rule to account for anonymous collection of disability status information. While we acknowledge that this may require significant revisions to the text of the proposed rule, and may even require that the agency abandon certain of its proposed qualitative analyses of hiring, referral, training and promotion activity, we believe that the balance must be struck in favor of collecting more reliable data about disability status.

If the agency decides that such data should not be collected on an anonymous basis, the agency must address how federal contractors should handle individuals with a known disability

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[3] Indeed, the OFCCP's proposal exposes federal contractors to a wide variety of potential claims under the ADA and Section 503. Perhaps rather obviously, an individual might assert that a federal contractor acted negatively to the disclosure of an actual medical condition, thus giving rise to a potential claim of discrimination based on an actual disability. Alternatively, an individual with a disclosed disability also may claim that an employer failed to provide a reasonable accommodation, despite having knowledge of the individual's disability through the self-identification process. It is just as likely that voluntary self-identification of disability status by individuals will lead to a federal contractor having erroneous information about an individual's disability status, thereby creating an opportunity for regarded as claims based on the individual's own assertion about his or her disability status. That the OFCCP, or a court, may ultimately find that a federal contractor acted permissibly is beside the point. The cost of defending a claim, whether meritorious or not, is substantial.

who decline to self-identify as disabled.[4] This issue is of particular concern to our members, particularly when coupled with the data analyses required by the proposed rules. On the one hand, federal contractors will want to include as many individuals as possible when analyzing whether they have satisfied any utilization goal or whether their referral and outreach efforts are sufficiently effective. On the other hand, an employer's decision to identify an employee as disabled when the employee has not so self-identified could potentially result in an admission of covered status under the ADA or a claim that the federal contractor unlawfully "regarded" the individual as disabled.

Three additional points deserve attention with respect to this section of the proposed rules. HR professionals and employers take their obligations under the Rehabilitation Act and the ADA very seriously and have invested in training to ensure that they respect an employee's right not to disclose a disability. Although the OFCCP's position is that voluntary self-identification pre-offer is allowed for purposes of affirmative action, we note that our members have significant concerns that the EEOC or a federal court could find otherwise. Indeed, we seriously doubt that the narrow "affirmative action" exception under the ADA for otherwise impermissible inquiries was intended to permit the collection of disability status information from hundreds of thousands of job seekers, as required by the agency's proposal. Accordingly, if the agency decides to move forward with this piece of its proposal, we urge the OFCCP to create an explicit safe harbor in its regulations to provide complete assurance that a federal contractor's compliance with any requirement to survey applicants about disability status prior to an offer of employment being made does not violate any requirements of the Rehabilitation Act, the ADA, the EEOC's implementing regulations and guidance, or any applicable state or local laws.

We also urge the agency to incorporate the definition of an applicant, including the definition of an Internet Applicant, found in the Executive Order 11246 regulations at 41 CFR 60-1.3, when defining the pool of candidates from whom disability status information would be collected. To do otherwise would only further highlight the different treatment of individuals with disabilities and other protected groups and increase the likelihood that individuals with disabilities would find the requests confusing and intrusive. Furthermore, having different standards for data collection based on particular protected traits imposes significant additional costs to federal contractors, who would be required to redesign their current applicant tracking systems at substantial costs. We believe the simplest way to address this issue is to add a definition of an "applicant" in proposed section 60-741.2 which incorporates the definition of an applicant, including an Internet applicant, found in the Executive Order 11246 regulations.

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[4] Under Executive Order 11246, a federal contractor is permitted to use visual identification or other employment records in order to identify an individual's race, ethnicity and gender. *See, e.g.,* OFCCP ADM Notice 283 (August 14, 2008) (noting that "contractors may use post-employment records or visual observation when an individual declines to self-identify his or her race or ethnicity"); OFCCP ADM Notice 265 (April 21, 2004) ("while self-identification is the preferred method, visual observation also can be an acceptable method for identifying the gender, race and ethnicity of applicants, although it may not be reliable in every instance. Visual observation may be used when the applicant appears in person and declines to self-identify his or her gender, race or ethnicity."). However, it is unlikely that federal contractors will be able to – or even legally should – follow the same process when an individual declines to provide disability status information. First, many disabilities are hidden and not subject to visual observation. Second, information regarding the medical condition or history of any applicant or employee is cloaked in confidentiality by law. 41 C.F.R. § 60-741.23.

Finally, any self-identification form designed by the agency should be optional so that federal contractors have the flexibility to prepare a self-identification form that is tailored to their specific organizational needs. While some of our members appreciate the agency's development of a standard form, others would prefer to create a form that is more consistent with their organizational culture and other communications regarding the collection of demographic data. We see no reason to require that federal contractors use a specific form to collect this data, provided the data is collected in accordance with applicable legal requirements. We also request that the OFCCP modify its proposed invitation to self-identify disability status form to allow an individual to respond in one of the following three manners: (1) Yes, I have a disability. (2) No, I do not have a disability; or (3) I do not wish to provide this information. This proposed change is consistent with the manner in which the Federal government currently collects disability status information for its own employment purposes.

II. Utilization Goal – Section 60-741.46

The OFCCP's proposed rule also would establish a seven percent (7%) utilization goal for individuals with disabilities in each affirmative action program job group. While we appreciate the OFCCP's desire to use more tangible measurements to judge federal contractors' affirmative action efforts, we believe that what is being measured should be based on reliable and accessible data that is relevant to a particular contractor and/or industry, given the significant burdens imposed on federal contractors by any required data analyses.

As an initial matter, we still have serious concerns about the agency's decision to require any type of utilization goal for individuals with disabilities. Quite simply, disability status is not an immutable characteristic like race or gender. The very definition of a covered disability under the ADA and Section 503 makes clear that determining one's "disability status" requires an individualized, fact-intensive, determination that makes statistical analyses wholly inappropriate. Given that disabilities are individual in nature, gross statistical comparisons based on self-identification of disability status will be of limited value to federal contractors in measuring the effectiveness of their affirmative action efforts towards individuals with disabilities. For example, diagnostic analyses of the type required under Executive Order 11246 will not help a federal contractor determine if it is satisfying its obligation to provide reasonable accommodations to individuals entitled to them under the law. Accordingly, we urge the OFCCP to rethink any requirement that federal contractors judge their affirmative action progress through the lens of a utilization goal based on a voluntary self-reporting mechanism that cannot adequately account for an individual's actual ability to perform a particular job.

Even assuming gross statistical comparisons are to be pursued in the disability context, there is a complete lack of data to support the agency's proposed national utilization goal. As the OFCCP itself recognizes, the agency's national utilization goal is based on figures from various sources, none of which sought to gather disability status information that comports with the definition of disability under Section 503 or the ADA. In essence, the OFCCP's proposal asks federal contractors to compare apples and oranges, and holds contractors accountable if that comparison is not favorable. Most troubling is that the agency cites no data whatsoever to support its conclusion that its proposed national utilization goal is a reasonable one, or that it even comes close to approximating the availability of individuals with disabilities, as that term is defined under the ADA and Section 503, who are actively seeking employment. Given the significant costs

associated with soliciting disability status information from applicants and employees and conducting the proposed statistical analyses, we respectfully request that the OFCCP consider less burdensome methods of ensuring that federal contractors effectively recruit and consider individuals with disabilities until the Federal government is able to provide the necessary data to facilitate realistic and valid identification, recruitment and hiring measures for individuals with disabilities covered by the provisions of Section 503.

If the agency decides to move forward with a utilization goal, we urge the agency to adopt a contractor- or establishment-wide goal that is based solely on the number of individuals with disabilities actually looking for work (versus including individuals with disabilities who have been discouraged from looking for work). As the OFCCP recognizes in its proposal, the placement goal framework used for other protected groups does not include consideration of discouraged workers when computing overall availability figures. We do not agree with the OFCCP's conclusion that placement goals for individuals with disabilities deserve "special" treatment. If individuals are discouraged from seeking employment because of discriminatory behavior by federal contractors, that will be true whether the discrimination is due to disability, race, ethnicity, gender, military status, or other protected status. Furthermore, the OFCCP's consideration of discouraged workers when determining an initial utilization goal only compounds the agency's use of unreliable data, by layering one unreliable calculation upon another.

Given the significant limitations to the data currently available, a contractor- or establishment-wide utilization analysis strikes a more appropriate balance between the agency's goals and the burdens imposed on federal contractors by its proposal. Unlike race or sex, a person's disability may be relevant to their ability to perform a particular job. Traditional affirmative action principles under Executive Order 11246 presume that individuals of different races or sexes have, at least statistically, relative equal qualifications for employment. That is not necessarily the case for individuals with disabilities, even those with the identical impairment. For example, two individuals with the same learning disability may have vastly different abilities and limitations, depending on the severity of each individual's impairment. A statistical comparison by job group would not account for these differences in qualifications, even though the law requires a federal contractor to conduct an individualized assessment to determine whether an individual with a disability is qualified to perform, with or without a reasonable accommodation, the essential functions of the position he holds or desires, when making employment decisions. Likewise, diagnostic analyses of disability status by job group would not take into consideration the very real possibility that the legitimate physical requirements of some jobs will make it impossible to achieve a seven percent (7%) utilization goal.

Moreover, the burden imposed by the requirement to analyze utilization by job group is substantial. The OFCCP's estimate of sixty (60) minutes the first year and thirty (30) minutes in subsequent years per federal contractor is woefully inadequate. Large federal contractors in particular may have hundreds of job groups. To think that it will take such federal contractors only thirty (30) minutes to thoughtfully analyze whether individuals with disabilities are being utilized in each job group at a level that meets the OFCCP's pre-established goal is unrealistic. Indeed, even with only 100 job groups, that would mean the federal contractor is conducting the required analyses for each job group in about three (3) minutes.

Given the lack of currently reliable data with which to establish any type of goal and the burden to federal contractors of conducting utilization analyses by job group, we believe that the OFCCP should focus on a federal contractor's outreach and other good faith efforts until reliable availability data can be developed. To the extent that additional data, once collected, supports the establishment of a utilization goal in the future, it should be applied contractor- or establishment-wide. For the same reasons, we do not believe that it is appropriate for the OFCCP to establish a sub-goal for individuals with targeted disabilities.

III. Voluntary Priority Consideration Programs – Section 60-741.47

Some of our members have expressed concern regarding the OFCCP's proposal to allow federal contractors to provide voluntary priority consideration for employment opportunities to individuals with disabilities. Our organizations strongly believe in the principle of equal employment opportunity for all. Implementation of priority consideration for any protected group, when not required by statute, runs afoul of the basic principles of nondiscrimination and only serves to expose the federal contractor to claims of disparate treatment on other bases. It also needlessly highlights the differences among various protected groups and encourages individuals to perceive a particular employment decision as being "unfair", even when it is not.

Because the hiring of individuals with disabilities by any federal contractor is voluntary, any decision to provide priority consideration is exposed to scrutiny and challenge under Title VII and all other equal employment laws by other applicants, including applicants protected by the Executive Order. For these reasons, a voluntary priority consideration program is legally perilous for any federal contractor to undertake and should not be encouraged by an agency that is charged with enforcing nondiscrimination principles. It is our opinion that the agency's overall mission is best served when the most qualified candidate is selected for a position, without regard to any protected status. For these reasons, we urge the agency to delete Section 60-741.47 of the proposed rules.

IV. Annual Review of Personnel Processes and Job Descriptions – Section 60-741.44(b) and (c)

Section 60-741.44 of the proposed rules would require federal contractors to conduct comprehensive annual reviews of their personnel processes and job descriptions, once again using a set of very prescriptive, "one size fits all" requirements applicable to all federal contractors, regardless of size, available resources, or industry. The proposed requirements include:

- Identifying the vacancies and training programs for which applicants and employees with disabilities are considered;
- Providing a statement of reasons explaining circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations;
- Describing the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs;

- Annually reviewing all physical and mental job qualification standards and providing a written explanation as to why each requirement is related to the job; and
- Ensuring that the use of information and communication technology is accessible to applicants and employees with disabilities.

In essence, the proposed rule requires federal contractors to develop a "personnel log" for individuals with disabilities – something federal contractors are not required to do for any other protected group. Again, SHRM and CUPA-HR question the wisdom, no matter how well-intended, of creating "special" procedures and processes for individuals with disabilities. We also believe it is beyond the agency's authority to create such formalized procedures. While Section 503 and the ADA require employers to provide reasonable accommodation and apply qualification standards in a manner that is job-related and consistent with business necessity, neither law contains specific mandates for accomplishing these tasks nor contemplates the extensive recordkeeping proposed by the OFCCP.

Furthermore, our members are concerned about their ability to actually comply with this requirement, no matter the amount of good faith efforts expended. To fulfill this obligation, a federal contractor must know whether an individual is disabled; whether that individual is being contemplated for any type of vacancy or training program, no matter how informally; whether that individual requested an accommodation; and whether an individual manager considered an accommodation of some sort in selecting that individual for hire, promotion or a training opportunity. Quite simply, many of the decisions that the OFCCP wishes to have federal contractors document are not made on such a formalized basis. Nor do we think that it advances the employment of individuals with disabilities to require that these decisions be made in a more formalized manner. With good reason, the EEOC always has encouraged employers to view the interactive process required to process a reasonable accommodation request as an informal process. To formalize this process only means that managers will be required to complete more paperwork and jump through more hoops to provide reasonable accommodations and opportunities for individuals with disabilities. Given this onerous compliance burden, we are concerned that the OFCCP's proposal will actually discourage, rather than encourage, the employment of individuals with disabilities.

Our members also are concerned about the requirement that federal contractors make these personnel logs available to applicants or employees upon request. Again, this requirement is not imposed with respect to a federal contractor's decisions regarding other protected groups, thus calling into question the OFCCP's stated goal of providing greater transparency for a federal contractor's employment decisions. Why is greater transparency needed with respect to decisions relating to individuals with disabilities versus those relating to women, minorities, or other protected groups? Furthermore, how is a contractor to explain that it only is required to provide this information to individuals with disabilities and that it need not provide such information to a female non-disabled candidate who is not selected? We respectfully submit that this practice will only serve to increase the number of complaints filed against federal contractors, not decrease them as the OFCCP suggests.

Our members also think it is unnecessary, and unduly burdensome, to require federal contractors to review all physical and mental job qualification standards on an annual basis. In many organizations, this would require human resources and/or hiring managers to review every job description for hundreds, and in some cases thousands, of positions on an annual basis. Very few, if any, federal contractors have the resources to complete this type of review on an annual basis. Practically speaking, our members also question the utility of an annual review since most jobs change incrementally over time, and are not significantly changed from year to year. Given this, we encourage the OFCCP to only require federal contractors to review physical and mental job qualification standards when significant changes are made to the essential functions of a position. Alternatively, the OFCCP might consider requiring such a review before any position is posted for hiring. We believe these suggestions strike a more reasonable balance between the agency's reasons for requiring a review of job qualifications and the burden on federal contractors of complying with such a requirement.

We also request clarification of the agency's proposed requirement that federal contractors make all information and technology accessible to individuals with disabilities. To the extent that the OFCCP intends to require that federal contractors make all information and technology fully accessible, we respectfully suggest that the agency has far exceeded its authority under Section 503. As the agency itself has recognized in its own guidance on this subject, federal contractors have an obligation to provide an effective reasonable accommodation to individuals with disabilities, including with respect to any information technology that is required to enjoy equal access to employment opportunities. However, the law does not require that a federal contractor provide a particular accommodation, such as full accessibility, when another accommodation, such as assistance with utilizing any non-accessible technology, might be equally effective at addressing the conflict between the individual's medical impairment and the term or condition of employment to which he or she seeks access.

The agency should revise this section of its proposal to make clear that federal contractors must provide reasonable accommodations to individuals with disabilities, including with respect to information technology, unless doing so would impose an undue hardship. The OFCCP also should make clear that full accessibility is not required under any circumstances. The agency also should remove any reference to the requirements imposed on federal agencies under Section 508 of the Rehabilitation Act, as it suggests that federal contractors also must comply with those requirements, which simply is not the case.

Taken together, the burden imposed on federal contractors by these proposed requirements is substantial. The agency's estimate that it will take a federal contractor thirty minutes to complete all personnel logs per year, thirty minutes to record each accommodation request, and no additional time to review and document the job-relatedness of all physical and mental qualification standards is far too low and entirely unrealistic. Of the members who responded to our informal survey, most estimated that it would require between 100-500 hours to create and maintain the required personnel logs on an annual basis, and another 100-500 hours to conduct an annual review of all physical and mental job qualifications. In fact, many of our members indicated that they would need to hire additional personnel in order to create the personnel logs and conduct the annual review of all job descriptions contemplated by this piece of the agency's proposal. Given these significant burdens, and the lack of data to support that these requirements will have real and

significant benefits for individuals with disabilities, we urge the OFCCP to reconsider its proposal that these procedures be mandatory, rather than permissive as they are currently.

Similarly, any requirement that federal contractors provide fully accessible information technology systems would impose substantial burdens that are unaccounted for in the agency's burden analysis. The vast majority of members who responded to our survey do not currently maintain their systems to be fully compatible with assistive technology nor are they in compliance with the Section 508 requirements federal agencies must follow. Our members' burden estimates varied widely, often based on the size or industry of the covered entity. What is most troubling to our members, however, is that the agency appears to be imposing these significant burdens on federal contractors without explaining why the agency's on-line accessibility initiative, undertaken in 2008, is ineffective at addressing this potential barrier to equal employment opportunity for individuals. Rather than imposing a "one size fits all" solution without any analysis of the proposed burdens, the agency should first conduct a study of the effectiveness of its 2008 initiative in addressing this issue.

V. Required Job Listings and Linkage Agreements – Section 60-741.44(f)

The OFCCP's proposal also sets forth prescriptive requirements regarding federal contractors' required recruitment efforts, including that federal contractors must enter into a minimum of three different linkage agreements with specified recruitment sources and that federal contractors must list job openings with the nearest local employment delivery system. While we believe that partnerships with disability organizations and referral sources are key ways to identify qualified candidates with disabilities for available employment opportunities, we are concerned by the very narrow and specific steps federal contractors would have to follow in order to be in compliance with the proposed rules. This is yet another example of how the OFCCP's proposal under Section 503 has strayed far from the notion embodied in Executive Order 11246 that an affirmative action plan should be a "management tool" and not a mere paperwork exercise.

In particular, we do not believe it is wise to enshrine the job listing requirements of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) into the OFCCP's Section 503 regulatory scheme, particularly in light of the fact that the Department of Labor eliminated its centralized and free America's Jobs Bank service several years ago. Since then, state and local employment offices have developed a multitude of different formats for posting job listings. Many federal contractors have had to engage for-profit companies to help them list jobs with the appropriate state and local employment offices, and even companies that provide this service as their business are unable to always comply with every office's particular requirements.

Given this reality, the requirement that federal contractors satisfy this listing requirement in the "manner and format required by the appropriate employment service delivery system" is unwieldy under the current system. Ideally, the Department of Labor would work with state and local employment offices to redevelop a free, centralized listing service before it expands the current decentralized model used to satisfy the VEVRAA job listing requirements to Section 503. At a minimum, it would be helpful for the OFCCP to develop a standardized format that federal contractors can use to provide the job posting data in a uniform fashion to all government employment offices and require the appropriate employment service delivery system conform to that format. These

offices do not operate independently of the Federal government and, accordingly, it is proper and legal for the Federal government to require the service delivery system to adopt a specified format. For example, requiring a listing using a readily available template, based on a Word or Excel format that is compatible with the typical recruitment records and software, that could be transmitted electronically, would be a significant improvement. SHRM and CUPA-HR would be interested in working with the OFCCP to identify, through the expertise of our members, the best way to create such a template.

With respect to the linkage agreement requirement, we urge the agency to rethink its current prescriptive approach and allow federal contractors the flexibility to identify the appropriate number and type of referral sources that will be effective at identifying suitable candidates for particular organizational needs. We also do not think it is wise to codify a list of referral sources that likely will need to be updated and revised on a regular basis. Indeed, the link to the Employer Resources section of the National Resource Director provided in the proposal (https://www.nationalresourcedirectory.gov/employment/employer_resources) is already not functioning, despite repeated attempts to access it. Our members also are concerned that the identified sources will be overwhelmed by the sheer number of requests for linkage agreements that they are likely to receive under the OFCCP's proposal. The rule provides no assurances that these organizations will be able to accept job postings or provide quality referrals. In fact, in our experience, some of the sources identified by the OFFCP are simply not helpful to employers seeking to identify qualified referrals. Furthermore, federal contractors are not confined to a prescriptive list or number of referral sources when recruiting minority or female candidates, and there is no data to suggest that the more flexible approach adopted under Executive Order 11246 would not be workable here. Given this, we urge the OFCCP to abandon the requirement that federal contractors recruit from a minimum number of mandated sources and allow federal contractors to identify appropriate referral and recruitment sources that prove effective for their particular organizations, as is currently the case under Executive Order 11246.

VI. Data Analysis of Referral and Hiring Activities – Section 60-741.44(k)

The OFCCP's proposed rule also would require federal contractors to collect, calculate, and maintain data regarding the number of disabled referrals, applicants, and hires, as well as data regarding the ratio of disabled versus non-disabled applicants and hires, for a five year period. Specifically, Section 60-741.44(k) requires that federal contractors collect, analyze and potentially report the following data items:

- The number of referrals of individuals with disabilities that a federal contractor receives from the applicable employment delivery system and other referral sources;
- The number of applicants who self-identify as individuals with disabilities, or who are otherwise known to be individuals with disabilities;
- The total number of job openings and total number of jobs filled;
- The ratio of jobs filled to job openings;
- The total number of applicants for all jobs;
- The ratio of applicants with disabilities to all applicants ("applicant ratio")
- The number of applicants with disabilities hired;

- The total number of applicants hired; and
- The ratio of individuals with disabilities hired to all hires ("hiring ratio").

As discussed above, SHRM and CUPA-HR have significant concerns about the reliability of the self-identification data that will be used to conduct these required analyses. Quite simply, our members are struggling with the notion that they may be required to undertake significant qualitative analyses, at a substantial cost to their organizations, using data that simply is not reliable. We urge the OFCCP to postpone any required qualitative analyses of disability status information until further study is undertaken regarding the reliability of the data being analyzed. Otherwise, federal contractors will simply be analyzing data for the sake of analyzing data, without any real measurable means of determining whether actual progress has been made with respect to the employment of individuals with disabilities.

The proposed regulations further indicate that the effectiveness of a federal contractor's outreach efforts will be evaluated by the OFCCP for reasonableness, based primarily on whether qualified individuals with a disability have been hired. SHRM and CUPA-HR believe that the regulatory focus on hiring as the "primary indicator" of compliance is legally perilous. It creates incentives to use utilization goals as quotas, since what will be judged is the ultimate result, not a federal contractor's good faith efforts to achieve that result. Quite simply, the OFCCP should not engage in any regulatory initiative that blurs the well-established line between lawful goals and impermissible quotas.

As discussed above, we also implore the OFCCP to abandon any requirement that federal contractors collect and analyze disability status data on all job seekers, not just those that meet the definition of applicant, as defined by the Executive Order 11246 regulations. Federal contractors have taken significant and costly steps to understand and comply with the agency's internet applicant definition. Indeed, many of our members have redesigned their entire application process to comply with the requirements of that rule. We fail to understand the agency's reasoning for creating a separate definition of an "applicant" for collecting and analyzing disability status information versus other demographic data. Furthermore, we are concerned that this "special" treatment will only serve to confuse applicants, many of whom already find employer requests to collect demographic data intrusive.

The OFCCP estimates that all these analyses will take one hour per contractor. Our members who responded to our informal survey consistently indicated that the OFCCP's estimate is woefully too low. More than sixty percent (60%) of the members who responded to our informal survey stated that it would take between 100-500 hours to complete the analyses required by this section of the proposal; yet another twenty-six percent (26%) estimated that it would take between 50-100 hours. Given the limitations of the data being analyzed, and the concomitant questionable utility of the analyses, we believe that the burden to federal contractors is not justified by the minimal benefits that might accrue as a result of conducting these analyses.

VII. Development of and Training on Reasonable Accommodation Procedures – Section 60-741.45

Section 60-741.5 of the proposed rules requires that federal contractors develop specific procedures for processing requests for reasonable accommodation, and that federal contractors provide training to their employees regarding these procedures.

SHRM and CUPA-HR support the development of reasonable accommodation procedures as a means of ensuring that individuals with disabilities have equal opportunity to succeed in the workplace. However, we are concerned that the agency's proposal sets forth a number of specific requirements that may not make sense for every workplace, particularly smaller employers. Indeed, the agency's proposal has turned what is supposed to be an informal, interactive process into a formal paper exchange. We urge the agency to make clear that federal contractors are free to design reasonable accommodation procedures that are appropriate and effective for their organization, provided that those procedures comply with the requirements of Section 503 and the ADA.

In particular, our members expressed concern about the requirement that all requests for accommodation be confirmed in writing. We question whether a requirement of this nature makes sense for many accommodation requests. For example, does a request for a more ergonomic chair need to be documented in writing if the chair can be provided immediately? Documenting the request will take longer than providing the actual accommodation and serves no useful purpose.

Our members also believe that the OFCCP should not set specific, minimum time periods by which to respond to reasonable accommodation requests. Federal contractors already have a duty to provide reasonable accommodations as promptly as possible; otherwise, they risk exposure to a claim that they failed to timely accommodate an individual with a disability. Inclusion of very specific time periods as "minimum" standards adds little to ensuring that individuals with disabilities receive the accommodations they deserve, particularly when the delay in providing accommodation may be due to a need for medical documentation from the employee's health care provider – a factor outside of the federal contractor's control. The OFCCP's rigid, formulaic approach to the reasonable accommodation process also fails to account for the dynamic nature of many accommodation requests and the ongoing, interactive dialogue that may need to occur between an employee, health care providers, and the employer as an employee's needs change.

We also do not believe it makes sense to require that all denials of accommodation requests be in writing. Further, we strongly oppose the requirement that federal contractors include a statement of an individual's right to file a discrimination claim with the OFCCP with every denial. Federal contractors already are required to provide numerous notices to applicants and employees of this right. Demanding that it also be included in any denial of accommodation notice needlessly suggests that the federal contractor's decision, while perhaps perfectly legitimate, was unlawful.

We support regular training of managers and employees regarding the reasonable accommodation process and other disability-related issues. Training is an effective means of dismantling barriers to employment for all individuals, including those with disabilities, because it raises awareness of the issues that may arise, highlights available resources and existing

Organization policies and procedures, and provides positive, proactive solutions for managers and employees who may need to address such issues in the future. However, we question the utility of conducting training of the scope contemplated by the agency's proposed rules. Training for the sake of training does not result in the creation of additional employment opportunities for individuals with disabilities. Perhaps what is most telling is that OFCCP itself does not require that its own managers undergo such intensive training regarding the agency's own reasonable accommodation procedures, presumably because the agency has determined that its training schedule should be more flexible and based on actual need, rather than an annual requirement that must be checked off. Accordingly, while we support the use of training to raise awareness of a federal contractor's affirmative action and nondiscrimination obligations, we do not believe that the agency should prescribe the manner or frequency of such training.

VIII. Notice Requirements – Section 60-741.5

Section 60-741.5 proposes numerous new and burdensome notice requirements for federal contractors, without any data to support that the proposed changes would effectuate the OFCCP's stated goals. We oppose creating new notice requirements for the sake of more paperwork and ask the OFCCP to reconsider whether notice requirements that are different than and more burdensome than those required by Executive Order 11246 are justified.

In particular, we question the usefulness of requiring that federal contractors include the EO Clause in subcontracts and purchase orders verbatim. While the OFCCP may view this requirement as a relatively simple one, the agency's proposal fails to account for current federal contractor procurement practices. Many purchase orders are limited in length to a single page. Indeed, the EO clause itself is longer than many purchase orders used by our members. Requiring federal contractors to incorporate the EO Clause verbatim requires federal contractors to revise their existing agreements, at significant costs, with the result being a more cumbersome and less-user friendly document.

Furthermore, the agency has not explained why the current practice of allowing federal contractors to incorporate the EO Clause by reference is unsatisfactory. Allowing the EO Clause to be included by reference is consistent with the manner by which federal contractors are required to incorporate other Federal laws and requirements into subcontracts and purchase orders, including requirements imposed by the Department of Labor under Executive Order 11246 and wage and hour laws. We can think of no reason why Section 503 should be accorded "special" treatment in this area and urge the agency to reconsider this proposed requirement.

IX. Five-year Recordkeeping Requirement - Section 60-741.80

Generally speaking, unless a complaint has been filed, all affirmative action records required by Section 503 must be maintained for a minimum period of one year for small federal contractors and a minimum period of two years for large federal contractors. This recordkeeping protocol is consistent with the current requirements under Executive Order 11246 and VEVRAA. Proposed section 60-741.80, however, would require that federal contractors maintain data regarding the outreach efforts required by proposed section 60-741.44(f)(4) and the qualitative referral and hiring ratio data required by proposed section 60-741.44(k) for a five-year period.

The agency's reason for requiring that certain records be maintained for more than double the current retention period is that a longer retention period "will enable the contractor and OFCCP to more effectively review recruitment and outreach efforts." Yet the agency cites no research to support its conclusion that five years of data is better than two, and we are aware of none, particularly since the extended recordkeeping requirement is not being imposed for all aspects of a federal contractor's Section 503 affirmative action obligations. Furthermore, a federal contractor should be able to determine whether a particular referral source has referred qualified candidates by looking at just one year of data. Five years of data, or even two years of data, will not make the referrals from a particular organization any better. Instead, it will simply mean that a federal contractor has relied on an unreliable recruiting source for too long, to the detriment of individuals with disabilities. Accordingly, with no good reason to impose a longer recordkeeping requirement for certain aspects of a Section 503 affirmative action plan, the OFCCP should apply the current one-year and two-year recordkeeping requirements uniformly.

CONCLUSION

SHRM and CUPA-HR wholeheartedly support the OFCCP's primary objective – to increase employment opportunities of individuals with disabilities in the federal contractor sector. However, we strongly believe that it would be misguided for the agency to focus on achieving this result though the use of utilization analyses and the establishment of placement goals – particularly where the data used for these comparisons is likely to be unreliable given the currently available Federal data sources, the inherent individualized and changing nature of any particular individual's disability status, and the significant difficulties involved in obtaining full and accurate self-identification of disability status. In essence, the agency's proposed requirements for collection and analysis of disability status information puts the proverbial "cart before the horse." Federal contractors should not be required to engage in qualitative analyses of their progress towards employing individuals with disabilities until the Federal government develops reliable data upon which to base those analyses.

We are particularly concerned by the onerous administrative and recordkeeping burdens and "one size fits all" approach taken by the agency with respect to affirmative action obligations for individuals with disabilities. This is a departure from the agency's traditional view that affirmative action plans should be a useful management tool. Replacing that flexibility with a checklist of very specific "gotcha" items is not likely to encourage employment of individuals with disabilities and instead only will serve to undermine the underlying premise of Section 503 – which is that the capabilities of any individual with a disability be examined on a case-by-case basis and not be based on stereotypes or common misperceptions about a condition or impairment. We also question the wisdom of creating a multitude of "special" requirements that are only applicable to federal contractors' affirmative action obligations to individuals with disabilities, without any empirical basis for creating such legally dubious distinctions among protected groups.

We appreciate the opportunity to submit these comments and look forward to working with the OFCCP to develop a compliance system that better balances the agency's laudable goals of improving employment opportunities for individuals with disabilities with the burdens of imposing onerous paperwork requirements on federal contractors. If we can be of further assistance on this matter, please do not hesitate to contact us.

Respectfully submitted,

Michael P. Aitken
Vice-President, Government Affairs
Society for Human Resource Management
1800 Duke Street
Alexandria, VA 22314
703.548.3440

Joshua A. Ulman
Chief Government Relations Officer
The College and University Professional
Association for Human Resources
Center Point Commons
1811 Common Points Drive
Knoxville, TN 37932
703.435.7119

Of Counsel:
Lynn A. Clements
JACKSON LEWIS LLP
2800 Quarry Lake Drive
Suite 200
Baltimore, MD 21209