



February 21, 2012

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

*Re: Comments on Proposed Regulations Implementing Section 503 of the
Rehabilitation Act, RIN 1250-AA02*

Dear Director Carr:

The undersigned disability and civil rights organizations, together representing thousands of individuals with disabilities, submit these comments in response to the Notice of Proposed Rulemaking issued on December 9, 2011 by the Office of Federal Contract Compliance Programs to implement Section 503 of the Rehabilitation Act.

General Comments:

We Strongly Support the Proposed Regulations

We strongly support OFCCP's proposal to strengthen its regulations implementing Section 503 of the Rehabilitation Act. For too long, affirmative action efforts under Section 503 have been largely meaningless, as the current regulations lack baseline goals for hiring people with disabilities, do not require the data collection needed to evaluate the effectiveness of affirmative action efforts, and rely almost exclusively on voluntary action. Bringing the Section 503 regulations in line with regulations concerning federal contractors' obligations with respect to employment of women and minorities is long overdue.

To that end, we support OFCCP's proposal to require covered contractors to collect data and keep records that would enable them -- as well as OFCCP -- to determine the effectiveness of their affirmative action efforts; to enter linkage agreements with organizations that serve individuals with disabilities and take other steps to improve recruitment efforts; and to invite applicants and employees to self-identify anonymously as individuals with disabilities. These are important measures to ensure that affirmative action efforts are effective.

Two Areas for Improvement

There are two primary areas where we think that the proposed regulations must be improved in order to ensure that affirmative action efforts are meaningful.

(a) Require Additional Utilization Goal for Underrepresented Groups

First, it is critical for the regulations to recognize the disproportionate barriers to employment faced by people with certain types of disabilities and to set a separate goal to ensure that contractors are employing people with these types of disabilities. The ADA Amendments Act restored Congress's original intent to ensure that a very broad range of people with disabilities are protected from discrimination under the ADA and Sections 501, 503 and 504 of the Rehabilitation Act. In light of the breadth of this definition, it is important to take steps to ensure that contractors are employing those people with disabilities who have historically been excluded from employment in disproportionate numbers. Failure to take such steps would make affirmative action an empty promise for those who most need it.

(b) Clarify that Contractors who Subcontract with Sheltered Workshops May Not Count Individuals in the Sheltered Workshops Toward the Contractors' Utilization Goals

Second, OFCCP should clarify its regulation concerning subcontracts with sheltered workshops in light of OFCCP's introduction of an affirmative action utilization goal. As current and proposed regulations recognize, "[c]ontracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified individuals with disabilities." The regulations also say, however, that such contracts "may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation when such trainees become 'qualified individuals with disabilities.'" While contractors may claim affirmative action credit for hiring individuals from sheltered workshops into competitive employment at regular wages, OFCCP should clarify that a contractor is permitted to count toward its *utilization goal* only those sheltered workshop employees who are actually hired by the contractor at full compensation in integrated employment, and not the employees who remain in the sheltered workshop. Indeed, it would make little sense to count individuals who are employees of a *subcontractor*, rather than the contractor, toward the utilization goal for the *contractor's* workforce.

Specific Comments:

(1) Statement of Purpose (Section 60-741.40):

We think the proposed addition, in Section 60-741.40, of the Statement of Purpose articulating OFCCP's general expectations for affirmative action programs is helpful. The proposed statement is appropriate, except that it should make clear that affirmative action tools such as measurable objectives, quantitative analyses, and internal auditing and reporting systems

are important not only for *measuring the contractor's progress* in achieving equal employment opportunity, but also for *effectuating* that goal.

Accordingly, we propose modifying the Statement of Purpose to add the italicized text:

"An affirmative action program must be 'more than a paperwork exercise.' Rather, an affirmative action program is a management tool that includes measurable objectives, quantitative analyses, and internal auditing and reporting systems designed to *effectuate and* measure the contractor's progress toward achieving equal employment opportunity for individuals with disabilities."

In the interests of harmonizing the various affirmative active regulations, a similar statement of purpose should be included in the final rule implementing the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. § 4212.

(2) Self-identification (Section 60-741.42):

New Requirements for Inviting Self-Identification

We support OFCCP's move to require, rather than simply encourage, contractors to invite job applicants to self-identify as having a disability after receiving a job offer. We also support OFCCP's addition of a requirement that contractors invite all job applicants to self-identify as having a disability *before* receiving a job offer,¹ and invite all employees to self-identify annually. These steps are critical to evaluate how well a contractor's affirmative action plan is working. Without the ability to track how many job applicants have disabilities, how many applicants with disabilities were offered jobs, and how many employees have disabilities, contractors and OFCCP will be unable to conduct the type of analysis of applicant flow data and employee data necessary to determine the effectiveness of affirmative action efforts.

Anonymous Self-Identification

We believe OFCCP's requirement that self-identification be done anonymously is critical. Too often, people with disabilities have experienced discrimination as a result of disclosing a disability. Indeed, it is for that reason that the ADA and the Rehabilitation Act bar employers from soliciting disability-related information from applicants before the applicants have received a conditional job offer. Anonymous self-identification would permit contractors to collect the data necessary to evaluate the effectiveness of their affirmative action efforts while ensuring that applicants and employees with disabilities are protected from discrimination.

No Identification of Type of Disability

Similarly, we believe that the proposed regulations appropriately limit the self-identification so that applicants and employees simply indicate that they have a disability, rather

¹ Of course, to be appropriate under the ADA, disability-related information requested pre-offer would have to be used for affirmative action purposes.

than indicating the type of disability. Permitting individuals to self-identify as having a disability without revealing the details of their particular disability will greatly increase the likelihood that individuals will choose to self-identify. Many applicants and employees are likely to be wary about disclosing needlessly detailed information about their disabilities, even with anonymous self-identification, and will be more likely to self-identify if not asked to identify the nature of their disabilities. Moreover, it is not necessary for purposes of evaluating affirmative action efforts to collect information on the specific type of disability that each person has.

Invitation to Self-Identify As Having a Targeted Disability

In accordance with our comments under Section 60-741.46 below ("Utilization Goals"), OFCCP should also include a second inquiry that permits applicants and employees to self-identify anonymously as having a disability that is among those identified for purposes of a separate utilization goal, ensuring that there is some focus on those most in need of affirmative action. Again, this self-identification can and should be done without identifying the particular disability that an individual has.

Language of Invitation to Self-Identify

We appreciate OFCCP's effort to develop standardized language for contractors to invite applicants to self-identify as having a disability. Having uniform language for all contractors will be helpful to both contractors and applicants and employees.

We have some concern that the proposed language may be too complex and not easily understood. We propose the following simplified version:

This employer is a Government contractor or subcontractor required by law to take affirmative action to employ and advance in employment people with disabilities. Federal regulations require that Government contractors and subcontractors ask job applicants to indicate whether they have a disability. This information is only used for purposes of providing affirmative action for people with disabilities and measuring the effectiveness of affirmative action efforts.

Your submission of this information is voluntary. Choosing not to answer will have no negative effect on your job application or subject you to negative treatment of any kind.

A person has a disability if he or she has either (1) a physical or mental impairment that substantially limits a major life activity, (2) a history of such an impairment. For a list of major life activities, see the back of this page [include the major life activities listed in the NPRM].

If you have a disability, please check the box below:

[] YES, I HAVE A DISABILITY

The law also requires Government contractors to provide people with disabilities with reasonable accommodations needed to ensure equal employment opportunity. If you need an assistive device, sign language interpreter, or other help (including a change in a policy that is applied to you) to participate fully in the application process, please let us know.

At this time you only need to let us know about accommodations in this application process. You do not need to let us know about accommodations you might need on the job.

We recommend that the last two paragraphs be separated from the invitation to self-identify for affirmative action purposes. Otherwise individuals may come away with the impression that they are entitled to reasonable accommodations in the application process only if they have checked the box to self-identify as having a disability.

(3) Required Contents of Affirmative Action Programs (Section 60-741.44):

We support the additions OFCCP proposes to this section. We believe that the requirements setting forth clearer lines of responsibility for implementing affirmative action plans, as well as more clearly defining what steps must be undertaken as part of an affirmative action plan (including linkage agreements and other recruitment strategies, as well as annual reviews of affirmative action programs with specific mandated components), are extremely important to ensure that affirmative action can be done in a meaningful way that brings more people with disabilities into the contractor workforce.

We hope that contractors, as well as OFCCP, will use the annual reviews to carefully scrutinize physical and mental job qualification standards. We continue to see standards framed in a way that is overbroad and needlessly screens out many people with disabilities. In addition to physical and mental job qualifications, the annual reviews should also scrutinize any qualification that may unnecessarily screen out individuals with disabilities (such as driver's license requirements).

We recommend eliminating the requirement in Section 60-741.44(f)(i) that contractors supply their job listings in formats and in a manner required by the appropriate Employment One-Stop Career Center (One-Stop). Rather than insisting that companies abide by a multiplicity of formats, OFCCP should make it as easy as possible for companies to post their job listings with any One-Stop.²

² OFCCP should note, however, that contractors and One-Stops must make these postings available in a format that is accessible to people with disabilities.

Linkage Agreements

Linkage agreements with vocational rehabilitation agencies, employment networks, EARN, Veterans Affairs regional offices, as well as centers for independent living and other disability organizations are an important component of effective affirmative action. We applaud OFCCP for requiring linkage agreements with these organizations. We believe it is appropriate to include educational institutions' career offices among the entities with whom contractors may choose to enter linkage agreements, but the regulations should specify that if the contractor chooses that option, the linkage agreement with the educational institution must focus specifically on recruiting individuals with disabilities.

The final rule should include Disabled Veterans Outreach Programs as one of the entities with which a contractor may choose to enter a linkage agreement under Section 60-741.44(f)(ii). These programs are funded through the Department of Labor's Veterans' Employment and Training Service and are specifically tasked with promoting employment opportunities for veterans with disabilities.

We understand that some contractors are concerned that the organizations with which contractors must enter linkage agreements lack the financial resources and staff to work with contractors to implement recruiting efforts. We strongly disagree. The types of organizations with which the proposed regulation requires contractors to enter linkage agreements -- including state vocational rehabilitation agencies, Ticket to Work Employment Network organizations, Employment One-Stop Career Centers, Department of Veterans Affairs Regional Offices, disability organizations such as independent living centers, entities receiving Department of Labor funding to provide recruitment or training services for people with disabilities, and similar organizations -- are focused precisely on the work of helping individuals with disabilities find jobs. Given that this is what these organizations are set up to do, we believe that they are capable of working with contractors to link people with disabilities seeking employment with contractors seeking to fill jobs. In fact, these organizations are particularly well-suited to this mission, and would contribute tremendous experience and skill in connecting contractors to qualified people with disabilities.

Training

Technical assistance and training should be readily available from OFCCP and OFCCP-approved sources – through online teaching tools, webinars and other mechanisms. Moreover, it would be helpful if technical assistance and training for all affirmative action obligations under Section 4212, Section 503, and Executive Order 11246 were provided on one comprehensive government website.³

³ Such a website would, of course, have to be compliant with the requirements of Section 508 of the Rehabilitation Act of 1973.

Accommodations for Individuals with Visual Disabilities

We support OFCCP's requirement that contractors provide accommodations such as large print, Braille or other means that enable individuals with visual impairments to read notices of employee rights and contractor obligations rather than having such notices read to the individual. This change brings the regulations in line with current practice and with reasonable accommodation law under the ADA and the Rehabilitation Act. We note that electronic format should also be listed along with Braille and large print.

"Direct Threat"

We appreciate OFCCP's effort to limit the ability of contractors to raise "direct threat" concerns after the fact as a pretext for discrimination. We have some concern, however, about the proposed requirement that contractors create a contemporaneous written statement of reasons supporting their belief that a direct threat exists. An unintended consequence of such a rule may be to encourage contractors to become overzealous documenters of any incidents involving employees with disabilities that could possibly be characterized as a safety threat, no matter how remote, out of concern that such documentation might prove necessary in the future. The better approach would be for OFCCP simply to state that when and whether an alleged direct threat was documented are factors that will be considered in determining whether a contractor's asserted direct threat defense is viable.

(4) Reasonable Accommodation Procedures (Section 60-741.45):

We believe OFCCP's effort to set forth specific requirements for reasonable accommodation procedures is useful. We believe that these requirements should be part of the non-discrimination portion of the Section 503 regulations, however, rather than part of the affirmative action requirements. While non-discrimination is essential in order for affirmative action efforts to be effective in expanding the number of individuals with disabilities in the workforce, placing reasonable accommodation mandates in the affirmative action section suggests (incorrectly) that these requirements go beyond non-discrimination requirements.

(5) Utilization Goals (Section 60-741.46):

Setting a Utilization Goal

We strongly support OFCCP's proposal to impose a utilization goal for employees with disabilities.⁴ In contrast to the baseline goals that have long been imposed on contractors under

⁴ As OFCCP correctly notes, the proposed goal is not a quota. Unlike the types of affirmative action requirements struck down by the Supreme Court in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the proposed goal simply constitutes a baseline by which to consider the effectiveness of contractors' affirmative action efforts, rather than a standard that contractors must meet at all costs. Indeed, as OFCCP has emphasized, failure to meet the utilization goal would not, by itself, violate Section 503. This type of goal fits easily within the types of affirmative action approved by the Supreme

OFCCP's regulations concerning affirmative action programs for women and minorities, the absence of any such goals for affirmative action programs for people with disabilities is striking. There is a clear need to have meaningful and measurable goals for employment of people with disabilities. As OFCCP has noted, people with disabilities had staggeringly low employment rates at the time that the ADA was passed and, more than 20 years later, continue to be employed at a fraction of the rate of employment of people without disabilities -- with a 2010 labor force participation rate of 21.8%, compared with 70.1% for people without disabilities.⁵ This stagnation has occurred despite the protections of the ADA and the existing Section 503 regulations.

Moreover, people with disabilities have been disproportionately affected by the recession of the last several years. The employment rate of working age people with disabilities declined by 12.3% between October, 2008 and June 2010, compared with a 3.4% decline for working age adults without disabilities.⁶

The Appropriate Goal

In response to OFCCP's request for comment on whether 7% is an appropriate utilization goal and on the possible range of values between 4% and 10%, we believe that the 7% goal is too low, and that a 10% goal would be more appropriate. As OFCCP recognizes, the calculation of the 7% goal was based on a data set (the American Community Survey) that captures a considerably narrower set of people with disabilities than is covered by Section 503. Among other things:

- While the individuals who would be the subject of the proposed 7% goal include anyone with a physical or mental impairment that substantially limits a major life activity *or* a record of such a limitation, the ACS data captures only people who are deaf or have serious difficulty hearing, people who are blind or have serious difficulty seeing even when wearing glasses, people who have serious difficulty concentrating, remembering, or making decisions due to a physical, mental or emotional condition, people who have serious difficulty walking or climbing stairs, people who have serious difficulty dressing or bathing, and people who

Court, and has been used for many years in enforcing federal affirmative action requirements with respect to race and gender, and with respect to disability under Section 501 of the Rehabilitation Act.

⁵ OFCCP cites Bureau of Labor Statistics data that is based on the Current Population Survey, which captures a narrower group of individuals with disabilities than the ADA and Section 503. As OFCCP also notes, 2009 American Community Survey data shows similar results, with 23% of people with disabilities participating in the labor force compared to 65.8% of people without disabilities.

⁶ H. Stephen Kaye, *The Impact of the 2007-09 Recession on Workers with Disabilities*, Monthly Labor Review, at 2 (Oct. 2010), <http://www.bls.gov/opub/mlr/2010/10/art2full.pdf> (using Current Population Survey data).

have difficulty doing errands alone - such as visiting a doctor's office or shopping - due to a physical, mental or emotional condition.

- The individuals who would be the subject of the proposed 7% goal include people whose impairments substantially limit major bodily functions (such as kidney, liver, endocrine, or immune function) even if they do not substantially limit activities such as hearing, seeing, walking, bathing, climbing stairs or other activities captured by the ACS data.
- The individuals who would be the subject of the proposed 7% goal include people whose limitations are partially or completely controlled by mitigating measures (such as medication, therapies, and other interventions) while the ACS does not ask people whether they would meet the definition of disability absent mitigating measures.

In its Final Regulatory Impact Analysis for regulations implementing the ADA Amendments Act, the EEOC estimated that somewhere between 20% and 64% of individuals covered by the ADA as amended participate in the labor force.⁷ The EEOC's estimate applies as well to Section 503, which has the identical definition of disability as that in the ADA. This estimate confirms that OFCCP should aim higher than a 7% utilization goal.

Within OFCCP's suggested range of between 4% and 10%, we believe that 10% is the most appropriate goal in light of the breadth of the targeted group.

We recognize that some applicants and employees may choose not to self-identify. Because the identification would not only be anonymous, but also would not specify what type of disability the person has, we believe the number of people who will decline to self-identify will be small. In our experience, most people with disabilities are interested in participating in voluntary affirmative action programs where the nature of their disability and its existence will remain unknown to the employer. Moreover, in the unlikely event that very few individuals with disabilities did self-identify, OFCCP would be able to take that into account in its enforcement efforts -- and as OFCCP has emphasized, a contractor will not be found in violation of Section 503 simply by virtue of not meeting the utilization goal. In addition, if a 10% goal were to prove

⁷ 76 Fed. Reg. 16991 (March 25, 2011). The EEOC began with data from the Current Population Survey, which uses the same definition of disability as the ACS, and adjusted to account for the much greater scope of individuals covered under the ADA. The baseline percentage of people with disabilities participating in the labor force using the CPS data was 20%. This figure is significantly higher than the 5.7% derived by OFCCP by averaging ACS disability data averaged by EEO-1 job category and then averaging across EEO-1 job categories. We note that averaging across job categories will significantly depress the percentage of individuals with disabilities in the labor force by giving equal weight to the low percentage of individuals with disabilities in high level job categories (due in part to a history of discrimination and unwarranted assumptions about the capabilities of people with disabilities), even though those categories represent comparatively small numbers of individuals.

unworkable, OFCCP would be able to change it pursuant to Section 60-741.46(c), which requires the Director to periodically review and update the utilization goal as appropriate.

Counting Discouraged Workers

OFCCP requested comment concerning its decision to include a portion of "discouraged workers" with disabilities in calculating the utilization goal. We believe this is appropriate for several reasons. First, discouraged workers are individuals who have not looked for work in four weeks, not because they lack the *desire* to work, but rather because they believe that *no work is available* for them. As OFCCP correctly describes, historical discrimination against people with disabilities has had the effect of suppressing the representation of people with disabilities in the workforce, and discouraged workers might seek employment in the absence of discrimination or other employment barriers. The utilization goal that OFCCP sets should not reflect an expectation that such discrimination and exclusion will continue.

Second, one of the primary purposes of revising the Section 503 regulations is to ensure that there are far more aggressive outreach and recruiting efforts on the part of contractors and correct the perception that there are no jobs available for people with disabilities. The utilization goal should reflect the assumption that new outreach and recruiting efforts will have some effect in correcting this notion among discouraged workers.

Third, the percentage of discouraged workers counted by OFCCP is minimal and any possible overcount is more than offset by the dramatic undercount that results from using the vastly underinclusive ACS data to calculate the utilization goal. The agency included a mere 1.7% of discouraged workers to the goal, and further reduced that number to 1.3% when it rounded down the goal from 7.4% to 7%. Even if some portion of the 1.3% would not seek employment, this number pales in comparison to the undercount occasioned by using the ACS definition of disability rather than the definition in the ADA and Section 503.

Subgoal for a Targeted Group of Individuals with Disabilities

We urge OFCCP to set a separate goal for a more targeted group of people with disabilities, in addition to the utilization goal for *all* people with disabilities covered by the ADA and Section 503. As a result of Congress's 2008 amendments to the ADA and Sections 501, 503 and 504 of the Rehabilitation Act, this latter group is extremely broad and diverse. While having a broad definition of disability makes sense for purposes of non-discrimination rules, any serious effort to measure the effectiveness of affirmative action efforts must look not only at the overall group of people with disabilities but *also* at those within that group who have had the greatest barriers to employment and are most in need of affirmative action.

The group of people with disabilities covered by the ADA and Section 503 already constitutes well over 10% of the population,⁸ and well over 10% of individuals participating in the labor force.⁹ Thus, most contractors would almost certainly meet a 7% or 10% utilization goal already. Even if they did not, having only an overall goal for this extremely broad group would permit contractors to employ individuals with the least stigmatized disabilities, and would do little to ensure that those individuals with the greatest history of exclusion from the workforce would benefit from affirmative action. OFCCP would not even know whether affirmative action efforts were reaching the latter group.

As a result of pernicious stereotypes and unwarranted assumptions about their capabilities or the cost of accommodating their needs, some categories of people with disabilities have long experienced particularly dismal rates of employment. For example, individuals with intellectual disabilities, individuals with serious mental illnesses, individuals with autism spectrum disorders, individuals who are blind, and individuals who are deaf have historically had employment rates that are a fraction of the employment rate for people with disabilities generally.

In March, 2011, the EEOC heard testimony about the staggeringly low employment rates among individuals with psychiatric disabilities and intellectual disabilities. For example, Dr. Gary Bond, Professor of Psychiatry at Dartmouth Psychiatric Research Center, testified that:

Surveys have found that only 10% - 15% of people with serious mental illness receiving community treatment are competitively employed (Henry, 1990; Lindamer et al., 2003; Pandiani & Leno, 2011; Rosenheck et al., 2006; Salkever et al., 2007). Rates are even lower, typically less than 5%, in follow-up surveys of people discharged from psychiatric hospitals (Farkas, Rogers, & Thurer, 1987; Honkonen, Stengård, Virtanen, & Salokangas, 2007). National and international surveys of community samples, which include respondents with less serious disorders, have reported employment rates of 20% - 25% for people with schizophrenia and related disorders (Marwaha et al., 2007; Mechanic, Bilder, & McAlpine, 2002).

The employment rate for people with serious mental illness is less than half the 33% rate for other disability groups (Anthony, Cohen, Farkas, & Gagne, 2002). Both rates are of course much lower than for the general population. Even during the height of the current recession,

⁸ In 2011, the EEOC estimated that a *subset* of the individuals whose impairments will virtually always be disabilities covered by the ADA accounts for approximately 60 million people -- approximately 20% of the population. That estimate excluded, among others, individuals whose coverage under the ADA was generally clear before the ADA Amendments Act, such as individuals with mobility impairments requiring the use of a wheelchair, and individuals with blindness, deafness and intellectual disabilities. 76 Fed. Reg. 16990-91.

⁹ See *supra* note 7 and accompanying text.

the national employment rate for adults in the general population was 72%, according to U.S. Bureau of Labor statistics (Fogg, Harrington, & McMahon, 2010).¹⁰

Dr. William Kiernan, Director of the Institute for Community Inclusion University Center on Developmental Disabilities, University of Massachusetts Boston and Children's Hospital Boston, testified similarly about employment rates for individuals with intellectual disabilities:

There are populations where the labor force participation rate is and has been quite low as in the case of persons with intellectual and developmental disabilities, where eight out of ten are not in the labor market. Persons with mental illness have a somewhat lower labor force participation rate (15%). Coupling the apparent declining labor supply with the low labor force participation rate for persons with disabilities (nationally 34.9% of working age adults with any disability and 23.9% with a cognitive disability were employed in 2009 compared to 71.9% for working age adults without a disability as reported by the American Community Survey), there is clear underutilization of persons with intellectual disabilities and mental illness in the current labor force nationally.¹¹

Individuals with autism spectrum disorders similarly have employment rates that are far below those of people with disabilities generally. According to the National Longitudinal Transition Study (NLTS-2) funded by the U.S. Department of Education, the proportion of autistic young adults who had a job was nearly half that of all young adults with disabilities (33% vs. 59%). The proportion of autistic young adults who had a job was comparable to that for young adults with deaf-blindness and multiple disabilities and far below the proportion of those with a number of other disabilities associated with significant employment barriers.¹²

According to December 2011 data from the Department of Labor's Bureau of Labor Statistics concerning the civilian non-institutionalized population age 16 and over, only 23% of people reporting blindness or serious difficulty seeing participated in the labor force, and of those, 13.4% were unemployed. In total, approximately 18.5% of all individuals reporting blindness or serious difficulty seeing were employed.¹³

¹⁰ Written Testimony of Dr. Gary Bond, U.S. Equal Employment Opportunity Commission Public Meeting on Employment of People with Mental Disabilities (March 15, 2011), <http://www.eeoc.gov/eeoc/meetings/3-15-11/bond.cfm>.

¹¹ Written Testimony of Dr. William E. Kiernan, U.S. Equal Employment Opportunity Commission Public Meeting on Employment of People with Mental Disabilities (March 15, 2011), <http://www.eeoc.gov/eeoc/meetings/3-15-11/kiernan.cfm>.

¹² Dr. Scott Standifer, Disability Policy & Studies, University of Missouri, *Fact Sheet on Autism Employment* (Sept. 2011), <http://dps.missouri.edu/Autism/AutismFactSheet2011.pdf>.

¹³ American Foundation for the Blind, *Interpreting BLS Employment Data* (updated Jan. 2012), <http://www.afb.org/Section.asp?SectionID=15&SubTopicID=177>.

Authority to Set a Subgoal

While Section 503 applies to all individuals who meet the ADA's definition of disability, nothing in Section 503 precludes OFCCP from including among the tools to implement Section 503's affirmative action mandate a means of looking at individuals *within* the broader group of covered individuals who may merit particular attention because of the particular barriers that they face in obtaining employment. Indeed, it is hard to imagine that OFCCP would choose to ignore entirely the barriers faced by these individuals in its implementation efforts. Having a subgoal for individuals with disabilities that have the greatest employment barriers would not give these individuals preference over others in securing employment, but would simply provide a means of measuring the impact of affirmative action efforts on the employment of these individuals.

In fact, Section 501 of the Rehabilitation Act applies to the same group of individuals as Section 503, and the federal government has implemented the affirmative action mandate of Section 501 for decades by having a goal for a targeted group of people with disabilities because of the particular need to give attention to that group. In addition, OFCCP's own regulations implementing Executive Order 11246 permit similar efforts to focus on a subgroup where appropriate. These regulations provide that contractors may be required to set separate goals where there are substantial disparities in the utilization of a particular minority group, or men or women of a particular minority group. *See* 41 C.F.R. § 60-2.16(d).¹⁴

Individuals Covered by a Subgoal

It is critical for OFCCP to fashion a subgoal that captures individuals with the lowest employment rates and the greatest barriers to employment. There are a number of ways in which OFCCP could do this. However it is done, it must be driven by data analysis. OFCCP should work with experts in this field, such as Dr. Stephen Kaye at the Department of Social and Behavioral Sciences and Institute for Health and Aging, University of California, San Francisco, and Dr. Peter Blanck at Syracuse University College of Law and Chairman of the Burton Blatt Institute, to design an appropriate methodology to define such a subgoal.

One possible approach would be to have a list that includes those categories of disabilities that have caused people to face the greatest employment barriers. As OFCCP notes, the federal government has taken this approach, setting a utilization goal for individuals with "targeted disabilities," including blindness, deafness, missing extremities, paralysis, epilepsy,

¹⁴ OFCCP has also limited its proposed Section 503 utilization goal to a subset of the individuals covered under Section 503 -- those covered under the first and second prongs of the definition of disability. Individuals covered under the third prong (those "regarded as" having a disability) are presumably excluded because it would be difficult to implement the goal for these individuals, particularly in light of the current interpretation of the "regarded as" prong.

severe intellectual disabilities, psychiatric disabilities, and dwarfism. We think that the federal government's list of targeted disabilities omits some categories of individuals who have had dramatic employment barriers -- for example, individuals with autism spectrum disorders.

Another approach would be to focus on functional limitations that have created employment barriers for people with disabilities. Congress has identified a set of individuals with high barriers to employment based on a combination of functional limitations and categories of disability. This group of individuals with a "significant disability," designed for purposes of determining order of selection for employment services, includes an individual with a disability:

(i) who has a severe physical or mental impairment which seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills) in terms of an employment outcome;

(ii) whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and

(iii) who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, intellectual disability, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, sickle cell anemia, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs described in subparagraphs (A) and (B) of paragraph (2) [describing assessments] to cause comparable substantial functional limitation.

29 U.S.C. § 705(21)(A).

Additionally, a variety of national data sources can be analyzed to identify individuals with disabilities who experience the greatest employment barriers, including the Survey on Income and Program Participation, the ACS, the Current Population Survey, CDC data, and other data. While some of these data sources include a narrower group of individuals with disabilities than those covered by Section 503, that may be appropriate for designing a subgoal focused on individuals with the greatest employment barriers.

Ideally, OFCCP could create a subgoal that identifies groups of people with disabilities who have the lowest employment rates based on functional limitations. To the extent that good functional measures do not exist for certain types of disabilities, or that such measures cannot form the basis for an easy means of self-identification, it may be necessary to use categories of disability.

The size of the subgoal will depend on how the subgoal is designed. We believe, however, that the group of individuals who would likely be captured by such a subgoal would be greater than 2% of the labor force. For example, taking only two groups of individuals who should likely be targeted by a subgoal, out of many others, these individuals constitute approximately 7.2% of the general population.¹⁵ For this reason, we urge OFCCP to begin with a subgoal that is in the range of 5%.

(7) Sheltered Workshops (Section 60-741.48):

The introduction of an affirmative action utilization goal makes it necessary for OFCCP to clarify its regulation concerning subcontracts with sheltered workshops and how the utilization goal applies to contractors with these subcontracts. As current and proposed regulations recognize, "[c]ontracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified individuals with disabilities." The regulations also say, however, that such contracts "may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation when such trainees become 'qualified individuals with disabilities.'"

While contractors may claim affirmative action credit for hiring individuals from sheltered workshops into competitive employment at regular wages, OFCCP should clarify that a contractor is permitted to count toward its *utilization goal* only those sheltered workshop employees who are actually *hired* by the contractor at full compensation in integrated employment, and not individuals who remain in the sheltered workshop. Indeed, it would make little sense to count individuals who are employees of a *subcontractor*, rather than the contractor, toward the utilization goal for the *contractor's* workforce. This is the most sensible reading of the utilization goal's application to the regulation concerning subcontracts with sheltered workshops.

(8) Sanctions and Penalties (Section 60-741.66):

OFCCP should make clear that it will use the full range of enforcement mechanisms available to effectively prevent violations of Section 503, and that it will use appropriate sanctions and penalties to prevent situations where a contractor calculates that continuing to incur penalties and violate the law is preferable to complying.

¹⁵ Approximately 4.5% of population has a serious mental illness. National Institute of Mental Health, Prevalence of Serious Mental Illness Among U.S. Adults by Age, Sex, and Race (2012), http://www.nimh.nih.gov/statistics/SMI_AASR.shtml. Approximately 2.7% of the population has a severe cognitive impairment. Lewis Kraus et al., National Institute on Disability and Rehabilitation Research, *Chartbook on Disability in the United States* (1996).

Thank you for the opportunity to comment on these proposed regulations.

Sincerely yours,

American Association of People with Disabilities

American Civil Liberties Union

Association on Higher Education And Disability

Bazelon Center for Mental Health Law

Burton Blatt Institute

Carrie Griffin Basas, Visiting Associate Professor of Law, Case Western Reserve University

Disability Rights Education and Defense Fund

Disability Rights Legal Center

The Legal Aid Society -- Employment Law Center

Little People of America

Public Justice Center

National Association of Rights Protection and Advocacy

National Council on Independent Living

National Federation of the Blind

National Women's Law Center

Alabama Disabilities Advocacy Program

Disability Law Center (Massachusetts)

Disability Rights Mississippi

Disability Rights Network of Pennsylvania

Disability Rights New Jersey

Disability Rights North Carolina

Disability Rights Texas

Equip for Equality (Illinois)

Everyone Reading, Inc. (New York)

Indiana Protection and Advocacy Services

Maryland Disability Law Center

Ohio Legal Rights Service