

MAJORITY MEMBERS:

JOHN KLINE, MINNESOTA, Chairman

THOMAS E. PETRI, WISCONSIN
HOWARD P. "BUCK" McKEON, CALIFORNIA
JUDY BIGGERT, ILLINOIS
TODD RUSSELL PLATT, PENNSYLVANIA
JOE WILSON, SOUTH CAROLINA
VIRGINIA FOXX, NORTH CAROLINA
BOB GOODLATTE, VIRGINIA
DUNCAN HUNTER, CALIFORNIA
DAVID P. ROE, TENNESSEE
GLENN THOMPSON, PENNSYLVANIA
TIM WALBERG, MICHIGAN
SCOTT DESJARLAIS, TENNESSEE
RICHARD L. HANNA, NEW YORK
TODD ROKITA, INDIANA
LARRY BUCSHON, INDIANA
TREY GOWDY, SOUTH CAROLINA
LOU BARLETTA, PENNSYLVANIA
KRISTI L. NOEM, SOUTH DAKOTA
MARTHA ROBY, ALABAMA
JOSEPH J. HECK, NEVADA
DENNIS A. ROSS, FLORIDA
MIKE KELLY, PENNSYLVANIA



COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

GEORGE MILLER, CALIFORNIA,
Senior Democratic Member

DALE E. KILDEE, MICHIGAN, Vice Chairman
DONALD M. PAYNE, NEW JERSEY
ROBERT E. ANDREWS, NEW JERSEY
ROBERT C. "BOBBY" SCOTT, VIRGINIA
LYNN C. WOOLSEY, CALIFORNIA
RUBÉN HINOJOSA, TEXAS
CAROLYN McCARTHY, NEW YORK
JOHN F. TIERNEY, MASSACHUSETTS
DENNIS J. KUCINICH, OHIO
RUSH D. HOLT, NEW JERSEY
SUSAN A. DAVIS, CALIFORNIA
RAÚL M. GRIJALVA, ARIZONA
TIMOTHY H. BISHOP, NEW YORK
DAVE LOEBSACK, IOWA
MAZIE K. HIRONO, HAWAII
JASON ALTMIRE, PENNSYLVANIA

January 27, 2012

The Honorable Hilda L. Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Solis:

We respectfully request additional information to clarify issues raised in connection with the Office of Federal Contract Compliance Programs' (OFCCP) December 9, 2011, Notice of Proposed Rulemaking (NPRM) regarding individuals with disabilities.¹ We also request a 90-day extension of the public comment period for the review of the additional information. Thorough review of the NPRM and related information is essential to our common goal of ensuring effective administration and enforcement of federal contractors' nondiscrimination and affirmative action requirements.

OFCCP Director Patricia Shiu describes the NPRM as a "sea change" and one of the "most significant" developments to affect federal contractors' nondiscrimination and affirmative action obligations under Section 503 of the Rehabilitation Act of 1973 (Section 503). Current obligations require contractors to engage in good faith efforts to recruit and advance qualified persons with disabilities. The NPRM would, for the first time, require contractors to establish a goal of having 7 percent of their workforce made up of employees with disabilities.²

We question the legal authority under Section 503 permitting OFCCP to establish a numerical hiring standard. We are also concerned that a hiring standard would, in effect, institute a quota, which has been met with great scrutiny from the Supreme Court.³

¹ Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 76 Fed. Reg. 77056 (Dec. 9, 2011).

² OFCCP is also considering a "Sub-Goal Option," requiring contractors to establish a standard of having two percent of their workforces be individuals with certain "severe disabilities." *See id.* at 77071-72.

³ *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (invalidating the U.S. Department of Transportation's 10 percent contract set aside program for minority contractors); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating the City of Richmond's 30 percent contract set aside program for minority-owned businesses); *Regents*

The NPRM also would require federal contractors to ask job applicants to self-identify as disabled. This appears to conflict with the statutory language of the Americans with Disabilities Act (ADA), which prohibits employers from asking disability-related questions before an offer of employment has been made. Moreover, contractors' ability to meet the hiring standard would depend on accurate self-identification and disclosure during the job application process, which has the potential to create more problems than solutions.

Finally, we are concerned about the potential burdens associated with the NPRM's myriad new paperwork and recordkeeping requirements. In January of last year, President Obama aptly noted, "[s]ometimes, [rules and regulations] have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs."⁴ In our view, a number of the NPRM's new paperwork and recordkeeping requirements could create a burden for employers with questionable benefits for individuals with disabilities. We urge OFCCP to weigh closely the related concerns of affected stakeholders, who are best able to quantify proposed burdens and anticipate unintended consequences.

In light of the above concerns, we ask OFCCP to respond to the following inquiries **no later than February 10, 2012**.⁵ Further, we ask OFCCP to provide all documents and communications⁶—from OFCCP, the Office of the Solicitor, or any other agency—related to the inquiries below.

1. Identify and explain OFCCP's statutory authority under Section 503 to establish a numerical hiring standard.
2. Identify and explain the basis for OFCCP's decision that federal contractors' good faith efforts are insufficient affirmative action under Section 503.
3. Identify and explain OFCCP's statutory authority to require contractors to ask job applicants to self-identify as a qualified individual with a disability, given that the ADA prohibits disability-related questions before an offer of employment has been made.
4. Identify and explain the basis for OFCCP's assumption that job applicants and contractors' current employees would understand the legal definition of "disability," as defined in the NPRM's prescribed self-identification notice.⁷

of the University of California v. Bakke, 438 U.S. 265 (1978) (invalidating the University of California at Davis's minority admissions set aside plan for minorities).

⁴ Barack Obama, *Toward a 21st-Century Regulatory System*, Wall St. J., Jan. 18, 2011, available at <http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html>. See also Exec. Order No. 13,563 (Jan. 21, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

⁵ Please direct OFCCP to order responses and materials to correspond to the requests below. Further, if OFCCP is unable to provide the requested information by said date, please inform the committee in writing why the deadline cannot be met and the date by which OFCCP will provide the requested information.

⁶ The terms "document" and "communication" are further defined in the attached "Definitions."

⁷ See 76 Fed. Reg. 77056, 77063 (Dec. 9, 2011).

5. Under proposed section 60-741.44(b), OFCCP assumes contractors would spend 30 minutes per year to draft and provide written “statement[s] of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs.”⁸ Simple math would suggest the amount of time required would far exceed this estimate. Explain how OFCCP determined the 30 minutes per year estimate.
6. Under proposed section 60-741.44(d), OFCCP failed to consider the costs federal contractors would incur to make their “electronic or online job application systems [] compatible with assistive technology commonly used by individuals with disabilities, such as screen reading and speech recognition software.”⁹ Likewise, under proposed section 60-741.44(g), OFCCP failed to consider the economic burdens associated with discussing the NPRM’s new affirmative action requirements with all employees during, for example, orientation and training events.¹⁰ Explain why OFCCP failed to consider the costs of contractors’ compliance with these provisions of proposed sections 60-741.44(d) and (g).

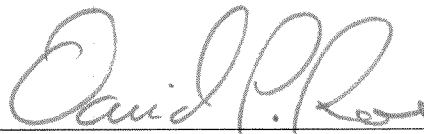
Again, to provide for a sufficient amount of time to review OFCCP’s responses to the above, we request that OFCCP extend the NPRM’s comment period by 90 days from the current closing date of February 7, 2012.

Thank you for your time and attention to this matter. If you have questions or comments, please contact Donald McIntosh or Joe Wheeler of the committee staff at (202) 225-7101.

Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



PHIL ROE
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions

Enclosure

CC: The Honorable George Miller, Senior Democratic Member, House Committee on Education and the Workforce
The Honorable Robert Andrews, Senior Democratic Member, House Subcommittee on Health, Employment, Labor, and Pensions

⁸ *Id.* at 77079, 77082.

⁹ *Id.* at 77082.

¹⁰ *See id.*

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i. e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one *CD*, hard drive, memory stick, thumb drive, box or folder is produced, each *CD*, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents should be delivered, one set to the Majority Staff in Room 2181 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.