



February 7, 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 N4322  
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 National Association of Wholesaler-Distributors (NAW) takes 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 (Rehabilitation Act), as announced in the Federal Register on December 9, 2011 (76 Fed. Reg. 77056).

NAW is comprised of direct member companies and a federation of national, regional, state, and local associations and their member firms which collectively total approximately 40,000 companies with locations in every state in the United States. NAW members are a constituency at the core of our economy—the link in the marketing chain between manufacturers and retailers as well as commercial, institutional and governmental end users. As suppliers of goods and services to governmental end users, many wholesaler-distributors are federal contractors who would be affected by this proposed rule. Industry firms vary widely in size, employ millions of American workers, and account for over \$4.0 trillion in annual economic activity.

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**NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS**

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This NPRM would, for the first time, require all federal contractors (and subcontractors) with contracts in excess of \$10,000 to establish a goal of having at least 7 percent of each job group in their workforce comprised of employees with disabilities—replacing current provisions requiring contractors to act in good faith to recruit and advance qualified individuals with disabilities. Also under consideration is a 2 percent sub-goal within the 7 percent goal for individuals with severe disabilities (total deafness, blindness, missing extremities, paralysis, epilepsy, severe intellectual disability, psychiatric disability and dwarfism). The legal authority of a federal agency to set a specific numerical hiring standard or goal under Section 503 of the Rehabilitation Act of 1973 is doubtful. Further, contractors would have to ask job applicants to self-identify as being disabled (twice during the hiring process and on an annual basis thereafter), which potentially places the employer in jeopardy of violating the Americans with Disabilities Act (ADA). The proposed rule then piles additional regulatory burdens on the already overburdened contractor without any appreciation for the adverse economic impact on employers and the “job-killing” aspects of this proposal. New “red tape” includes mandatory outreach programs, frequent collection of disability status information from applicants and employees, the onerous collection and retention of five years’ worth of referral and hiring data, special annual updates of all job descriptions and implementation of new reasonable accommodation procedures.

The sixty day comment period that OFCCP proposed in the NPRM is totally inadequate to allow organizations such as NAW to survey their membership, explain the scope of the proposed rulemaking, receive member feedback and formulate detailed commentary and input on the proposed rule that, we believe, OFCCP is interested in receiving. This rulemaking effort is undoubtedly a major one, accurately described as a “sea change” by OFCCP Director Patricia Shiu. All interested parties must be afforded procedural due process and given a reasonable period of time to analyze this rulemaking proposal, assess its impact on their organizations and provide the OFCCP with a thorough response.

**Therefore, NAW requests the agency to extend the period within which public comments to the NPRM may be filed for at least an additional ninety days.**

Extending the public comment period for 90 days will have another benefit accruing to OFCCP as it conducts this rulemaking. The OFCCP has been asked by the House Committee on Education and the Workforce, in a letter dated January 27, 2012 from Chairman John Kline, to provide documentation and communications relevant to this proposed rule, including information that identifies and explains:

- OFCCP’s statutory authority to establish a numerical hiring standard;
- OFCCP’s statutory authority to require federal contractors to ask job applicants to self-identify as a qualified individual with a disability, in light of the ADA prohibitions against disability-related questions at the pre-employment stage;

- The basis for OFCCP's apparent decision that federal contractors' good faith efforts to employ and advance in employment qualified individuals with disabilities are insufficient;
- The basis for OFCCP's assumption that a contractor will only spend 30 minutes *per year* to draft and provide statements of reasons explaining the rejection of individuals with disabilities for vacancies and training; and
- Why OFCCP failed to consider all costs that federal contractors will incur in complying with the proposed rule.

Once the OFCCP has responded fully to the Committee's request for information and that information is made available to the public, all affected stakeholders in this rulemaking proposal—including NAW—will be in a better position to provide public commentary to OFCCP and assist the agency in deciding what, if any, changes are needed to the programs now in place to promote the employment of qualified individuals with disabilities.

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NAW looks forward to OFCCP granting at least a 90 day extension of time for public comment on this rulemaking proposal. In the event that this request is denied, NAW registers its general opposition to proposed rule based upon: (1) the agency's questionable statutory authority to promulgate it; (2) the fact that allowing job applicants to self-identify as disabled will place federal contractors at severe risk of violating the ADA ban on pre-employment disability-related inquiries; (3) the establishment of an arbitrary across-the-board 7 percent utilization goal and possible 2 percent sub-goal for disabled workers in each job group that is legally suspect and in potential conflict with the need for individualized assessment of an individual's unique limitations and a contractor's ability to accommodate those limitations without undue hardship; and (4) the onerous regulatory costs and burdens imposed on federal contractors without any substantiated need for, or benefits produced by, these compliance measures.

Respectfully submitted,



Jade West  
Senior Vice President – Government Relations