



VIA ELECTRONIC SUBMISSION

January 20, 2016

Adele Gagliardi, Administrator  
Office of Policy Development & Research  
USDOL ETA  
Room N5641  
200 Constitution Ave., N.W.  
Washington, D.C. 20210

**Re: RIN 1205-AB59, Comments on ETA’s Notice of Proposed Rulemaking  
Apprenticeship Programs; Equal Employment Opportunity**

Dear Ms. Gagliardi:

Associated Builders and Contractors, Inc. (ABC) submits the following comments to the U.S. Department of Labor’s (the “Department”) Employment and Training Administration in response to the above-referenced Notice of Proposed Rulemaking (“NPRM” or “Proposed Rule”), published in the *Federal Register* on November 6, 2015, at 80 Fed. Reg. 68908.

The Proposed Rule seeks to update the equal opportunity regulations that implement the National Apprenticeship Act of 1937 by amending 29 CFR Part 30. ABC supports the equal employment and affirmative action goals of the existing rules and the proposed updates to those rules. ABC’s primary concerns with the Proposed Rule, expressed below, are focused on the need for further clarification of some of the requirements imposed by the NPRM, which are confusing in their present revised form. At the same time, ABC is concerned about the potential burdens imposed on program sponsors by some of the Proposed Rule changes, including the newly required data collection and utilization analysis of disabled apprentices based upon inadequate data. Notwithstanding these concerns, ABC supports the Department’s recognition of the need for flexibility in the methods of selecting apprentices and in meeting affirmative action goals for protected categories of workers. Additional guidance from the Department is needed to avoid the potential for apprentice agencies to otherwise violate sponsors’ due process rights and thereby undermine volunteer efforts to improve apprenticeship training for all qualified applicants.

**About Associated Builders and Contractors, Inc.**

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work.

ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC and its chapters have long sponsored high quality non-joint apprenticeship programs throughout the country since the first ABC-sponsored apprenticeship program was approved in 1962. ABC's national apprenticeship footprint has grown to nearly 300 individual programs in 56 ABC chapters across the nation, training thousands of apprentices each year, including significant numbers of minorities, women, and disabled workers. ABC's programs have long engaged in the affirmative action steps outlined in the 29 CFR Part 30, including outreach and recruitment among minority and female community organizations, sponsorships of pre-apprenticeship training in high schools and vocational schools, and playing a leading role in the establishment of standardized construction training curricula through the National Center for Construction Education and Research (NCCER), among many other workforce development activities.

ABC also represents and assists many member companies that choose to sponsor their own Registered Apprenticeship programs. A recent study indicates that ABC contractor members annually train approximately 280,000 craft professionals, many of which are enrolled through registered apprenticeship. Many ABC member contractors are government contractors who engage in affirmative action towards all of the groups covered by federal and/or state procurement laws, including but not limited to the requirements administered by the Office of Federal Contract Compliance Programs (OFCCP).<sup>1</sup>

While ABC has a national footprint, the individual, separately incorporated, ABC chapters and member companies that actually sponsor registered apprenticeship programs are often quite small. The average ABC chapter has only five staff employees, most of whom perform tasks unrelated to apprenticeship administration. ABC's member contractors are also predominantly small businesses that also have limited resources available for apprenticeship training. Further, it must be recalled that apprenticeship programs sponsored under the National Apprenticeship Act are entirely voluntary, non-profit programs funded almost entirely by employer donations and tuition payments. Excessive paperwork burdens that use up limited program resources may undermine the very goals of increasing apprenticeship opportunities for minorities and women that the Proposed Rule is seeking to achieve.

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<sup>1</sup> See 41 CFR Part 60-4.

## **ABC's Specific Comments on the Proposed Rule**

### **1. The Department's Overview**

In the NPRM's "Overview," the Department describes the revisions to Part 30 as falling within four general categories: (1) Changes required to make part 30 consistent with the labor Standards for Registration of Apprenticeship Programs set forth in part 29; (2) changes updating the scope of a sponsor's Equal Employment Opportunity (EEO) obligations; (3) changes to enhance sponsors' affirmative action obligations and enforcement efforts by Registration Agencies; and (4) changes to improve the overall readability of part 30.<sup>2</sup> ABC has no quarrel with any of these general objectives.

ABC does wish to express concerns, however, about the Department's preamble, which contains little if any recognition of the significant affirmative action efforts of construction industry apprenticeship programs that have occurred under the current Part 30 rules over the past four decades. Significant progress has been made in increasing outreach and recruitment of minorities and women throughout the industry, and specifically in non-joint apprenticeship training programs.

That such efforts have not, in the Department's view, resulted in "full" employment of every protected segment of the workforce to the extent "expected" based on raw statistics of workforce availability<sup>3</sup> does not mean that apprenticeship program sponsors have failed to meet their obligations. ABC is concerned that the NPRM does not fully acknowledge the many complex factors contributing to the apparent unwillingness of some minority groups and women to apply to enter the construction industry or to seek apprenticeship training, despite the best efforts of ABC and other program sponsors to make such training available to all qualified applicants.

Among the contributing factors to the alleged underutilization of workers in certain protected groups are stereotypes about the industry in the minds of many potential applicants, as well as the physical and challenging work that is indeed part of the reality of the construction workplace. These non-discriminatory factors, among others, appear to disproportionately discourage applicants in some protected groups from entering construction apprenticeship programs, through no fault of the programs themselves. ABC is concerned that the NPRM places too much reliance on raw statistics of underutilization and dated studies citing anecdotal evidence of discrimination in construction as the sole bases for claiming that continuing discrimination is the primary cause of such underutilization.

It must also be observed that placing excessive responsibility for any underutilization that exists on the apprenticeship programs themselves may lead to unrealistic expectations and burdens being placed on apprenticeship program sponsors. Such inflated expectations in turn may lead to the establishment of goals and timetables that cannot be met, no matter how great a proportion of the sponsors' limited resources are expended in the effort. Put another way, if increased

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<sup>2</sup> 80 Fed. Reg., at 68909.

<sup>3</sup> 80 Fed. Reg., at 68911-915.

apprenticeship training is expected to help solve the alleged continuing underutilization of some protected categories of workers in the construction industry, then it does no good to so increase the burdens on voluntary program sponsors as to discourage or drive them out of the market.

ABC surveyed its chapter apprenticeship program sponsors (ABC chapter survey) to assess their EEO and affirmative action efforts under the current Part 30 rules, and to help measure the burdens being imposed on program sponsors under the Proposed Rule. In general, the responses to ABC's chapter survey indicate that ABC program sponsors are already making appropriate good faith efforts to avoid discrimination against protected groups of apprentices and to engage in affirmative action on their behalf. The responses express concern, however, about the new burdens that will be imposed on voluntary training programs under the Proposed Rule, which appear likely to substantially exceed the adverse impact estimated in the NPRM. Specific data from the ABC chapter survey will be referred to in ABC's comments on the individual provisions of the Proposed Rule set forth below.

### **1. Proposed Changes to the Nondiscrimination and Equal Opportunity Standards of Section 30.3.**

The Proposed Rule seeks to incorporate newly recognized categories of protected apprentices into the nondiscrimination provisions of Section 30.3. ABC recognizes and agrees with these updates to Part 30. Responses to ABC's chapter survey likewise accept the need to include the newly protected workers in updated EEO policies. However, 67 percent of the respondents felt that "moderate expense" (up to \$5000 per program) would be entailed to rewrite existing apprenticeship standards and EEO policy statements. This burden in and of itself is not an excuse for failing to proceed with this aspect of the Proposed Rule, but the accumulation of burdens referenced in each of the sections below, which cumulatively exceed the Department's estimates, should be taken into account in assessing the need for other aspects of the Proposed Rule.

The Proposed Rule further clarifies the steps that all sponsors would be required to take to satisfy the equal employment opportunity standards of Section 30.3. Whereas currently sponsors have a general duty to engage in affirmative steps to ensure equal opportunity, the Proposed Rule sets forth specifically required actions including assignment of one responsible person to oversee affirmative action responsibilities; internal dissemination of EEO policies through orientation and information sessions with apprentices and others; outreach and recruitment from diverse recruitment sources; and development of anti-harassment training and complaint procedures.

Again, ABC does not take issue with any of the Proposed Rule's action step requirements. ABC's chapter survey of its chapter program sponsors, however, indicates that very high percentages of chapters (ranging from 79 percent to 92 percent depending on which action step is mentioned) foresee the rigid requirement of these particular action steps as imposing moderate additional expense upon voluntary apprenticeship programs.

Though ABC chapters currently engage in outreach to minority and women's referral organizations, as well as local high schools and vocational schools, the suggestion has been made that the Department should provide and regularly update the necessary lists of such recruitment

sources for each geographic area of the country where affirmative action efforts are to be undertaken. At the same time, ABC seeks further clarification that association program sponsors who obtain most if not all of their apprentices from employer contractor members are entitled to rely on such contractors' representations that they have themselves engaged in affirmative action efforts to attract and hire minority, female, and now disabled apprentice applicants.

## **2. Written Affirmative Action Programs Under Section 30.4**

The current rule requires that all program sponsors with five or more apprentices establish written affirmative action plans. The Proposed Rule would preserve the small program exemption, which ABC supports and believes should be expanded to include larger programs. (Most if not all ABC chapter programs are too large to qualify for the current small program exemption). The Proposed Rule also exempts program sponsors that are already in compliance with other equal opportunity programs, such as federal contractors that have written Affirmative Action Programs (AAPs) developed in accordance with Executive Order 11246 and Section 503 of the Rehabilitation Act.

ABC agrees and supports this exemption and would also seek clarification that association program sponsors that obtain their apprentices primarily from participating employer members that are already in compliance with the foregoing written AAP requirements should likewise be exempt from the redundant obligation to prepare written plans themselves. Finally, ABC supports the Proposed Rule's flexible treatment of the AAP requirement for those whose AAP's are in full compliance with the new rule.

## **3. Analysis of Apprenticeship Programs' Composition by Race, Ethnicity, and Sex Under Section 30.5.**

The proposed new Section 30.5 describes and purports to simplify the utilization analysis that each apprenticeship program sponsor will be required to engage in under the Proposed Rule. ABC supports the Department's overall attempt to simplify the utilization analysis by reducing the number of factors to be considered by program sponsors. However, the two factors chosen by the Department may actually increase the burdens imposed on such programs, as they may not be used by many program sponsors who may have previously favored other permitted factors. For example, the first factor proposed – the percentage of individuals available in the sponsor's relevant recruitment area with the present or potential capacity for apprenticeship – is not a factor that has been widely used in the construction industry, and it is unclear what data is available from which such percentages can be accurately estimated.

In addition, Section 30.5(c) directs all program sponsors to analyze the numbers of their "current employees who are not in an apprenticeship program, but who have the capacity to be in the apprenticeship program..."<sup>4</sup> This provision does not make sense for most ABC chapter program sponsors that do not "employ" any apprentices.

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<sup>4</sup> 80 Fed. Reg., at 68922.

By way of comparison, the current Proposed Rule’s description of utilization analysis, in section 30.4(e), directs employers to analyze the numbers of minorities and women “participating” as apprentices. Perhaps this is what the new Proposed Rule intends as well, but the reference to “sponsors’ employees” is confusing for those program sponsors that do not enroll any employees of their own in their apprenticeship programs.

The utilization analysis described in the preamble to Section 30.5 of the Proposed Rule is also confusing because it describes a variety of data sources that are to be used by apprenticeship programs, but that are not specific to the construction industry.<sup>5</sup> At the same time, the preamble description for this section of the Proposed Rule concludes with the statement that construction apprenticeship programs should use data that includes “but is not limited to” the workforce data specified by the OFCCP in 41 CFR Part 60-4 and/or state agencies. As it stands, most construction industry apprenticeship programs are already subject to utilization goals for minorities and women that have been specified in each geographic area of the country by federal and/or state approval agencies.<sup>6</sup>

It is unclear from the above referenced listing of the additional data resources in the Proposed Rule whether the Department is telling construction industry programs that they should no longer comply with the longstanding goals previously designated for the industry by state and/or federal apprenticeship agencies, or whether the other data resources are intended only for use by non-construction industry apprenticeship programs, or whether the new data points are intended to allow greater flexibility for construction industry programs. Further clarification with specific reference to the construction industry is hereby requested to avoid confusion regarding the new utilization analysis requirements.

Reflecting the foregoing concerns, ABC’s chapter survey reveals considerable confusion among program sponsors around the country regarding the new terminology employed by the Department to describe the utilization analysis that is being proposed, and how if at all the process will differ from what construction industry apprenticeship programs have previously been required to do.<sup>7</sup> It is unclear what will be achieved under the Proposed Rule that is not already being accomplished by program sponsors’ simply measuring their minority and female apprentice numbers against the geographic goals for each category that have already been

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<sup>5</sup> 80 Fed. Reg., at 68922. The data resources referred to in the NPRM include the BLS Occupational Handbook, the American Census Bureau, and the data provided by state apprenticeship agencies, among others in a nonexclusive list.

<sup>6</sup> *Id.*

<sup>7</sup> In response to the Department’s specific request for comments regarding what data and/or tools exist that would enable program sponsors to determine, within their relevant recruitment area, the availability of individuals with the present or potential capacity for apprenticeship broken down by race, sex, and ethnicity, ABC is not aware of any such data that is meaningful for the construction industry. ABC’s chapter survey responses indicate the belief that collection of such data would be onerously expensive, and that the expenditure of limited program funds on such data collection is not helpful to the affirmative action process.

specified by OFCCP and/or state apprenticeship agencies. Again, further clarification is hereby requested with specific reference to construction industry program sponsors.

It must also be noted that the majority of respondents to ABC's chapter survey expressed the view that compliance with the new utilization analysis requirements contained in the Proposed Rule would be "very expensive" (up to \$25,000) or "onerous" (over \$25,000). Eighty-seven percent of respondents described the analysis component as "onerous," "very expensive" or "moderately expensive."

Finally, ABC agrees with the Department's statements in the Proposed Rule that the utilization goals are not "quotas" and cannot be the basis for hiring "preferences."<sup>8</sup> If that is so, however, then the Department should make clearer that mere failure to meet (often) unrealistic utilization goals or timetables is not in and of itself an indication of any failure on the part of a program sponsor. Too often in the experience of ABC chapters or member sponsors of apprenticeship programs, their alleged failure to meet unrealistic utilization goals are improperly cited by unions and/or state apprenticeship agencies as "proof" that unilateral programs are somehow not meeting their obligations under the Part 30 standards. The Department should clarify that the failure of any program to meet a utilization goal is not in and of itself a violation of Part 30, nor is it evidence of any such violation.

#### **4. Expansion to Individuals With Disabilities Under Section 30.7**

ABC supports the inclusion of qualified individuals with disabilities in apprenticeship programs. However, ABC is concerned about the newly proposed requirement that apprenticeship program sponsors expand their affirmative action program utilization analysis and data collection requirements to individuals with disabilities. These requirements include a new national goal of 7 percent apprentices with disabilities and would require program sponsors to "invite" individuals with disabilities to voluntarily self-identify as such. The Department's preamble in support of the new goal and data collection requirements pertaining to disabilities is largely lifted from the OFCCP's previously issued rule imposing similar requirements on federal government contractors.<sup>9</sup>

Though the U.S. Court of Appeals for the District of Columbia Circuit upheld the OFCCP's rule change in the case of *Associated Builders and Contractors, Inc. v. Shiu*, 773\_ F.3d 257 (D.C. Cir. 2014), that holding does not justify extension of the identical data collection and utilization analysis in the apprenticeship context.

As noted above, apprenticeship programs are voluntary in nature and are not funded by taxpayers, unlike government contractors. Association program sponsors such as ABC chapters are non-profit organizations with limited budgets and program resources. As a practical matter, association program sponsors in particular have no way to tell whether their apprentices are

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<sup>8</sup> 80 Fed. Reg., at 68923.

<sup>9</sup> See 40 CFR 60-541, 78 Fed. Reg., at 58682 (Sept. 24, 2013). See also ABC's comments and lawsuit in opposition to the OFCCP rule, which are hereby incorporated by reference.

disabled or not, in the absence of data beyond the voluntary self-identification by the apprentices themselves. The self-identification by apprentices is inherently unreliable as an indicator of actual disability and cannot be verified without further inquiry that is largely prohibited by the Americans With Disabilities Act. As currently defined in the Proposed Rule, the only correct answer that a program sponsor can give to the question of whether the arbitrary 7 percent goal is being met is “unknown.” Yet the Department requires program sponsors to repeatedly call upon apprentices to identify themselves as disabled and to compare the random number of individuals who so identify themselves against the 7 percent goal, in order to be able to state whether that goal is being met.

To be clear, ABC agrees with the inclusion of qualified individuals with disabilities in program sponsors’ affirmative action plans and EEO policy statements, and ABC further supports outreach and recruitment efforts by apprenticeship programs towards qualified individuals with disabilities. ABC remains concerned, however, about the Department’s imposition of the arbitrary 7 percent goal and its new requirement that apprenticeship programs waste valuable resources collecting meaningless data from apprentices who choose voluntarily to identify themselves as such, with no means available to verify that the responses to such invitations are accurate or represent a meaningful set of data reflecting the actual number of disabled apprentices.

Eighty-six percent of respondents to ABC’s chapter survey asserted that the new disability requirements of the Proposed Rule will range from moderately expensive to very expensive or onerously expensive.

## **5. Specification of Four Types of Required Outreach and Recruitment Under Section 30.8.**

ABC does not oppose the Department’s narrowing of the previous listing of ten types of outreach and recruitment activities down to a required list of four such activities. As previously noted, however, those association-sponsored programs that rely primarily on their employer members to supply apprentices to chapter programs should be entitled to rely on the outreach and recruitment efforts of the actual employers of the apprentices in question. In such circumstances, association program sponsors should be exempted from the redundant outreach and recruitment requirements of the proposed Section 30.8, and/or should be permitted to rely on the affirmative action efforts that their participating employer members have engaged in to establish the necessary outreach and recruitment efforts.

## **6. Selection of Apprentices Under Section 30.10**

Whereas the current Part 30 rule sets forth four restrictive mechanisms by which sponsors may select apprentices into their programs, the Proposed Rule properly provides for greater flexibility in the selection process. The Proposed Rule allows program sponsors to use any method to select apprentices so long as that method complies with long-established Uniform Guidelines on Employee Selection Procedures and the Americans With Disabilities Act and is not



discriminatory. Such selection processes expressly may include so-called Direct Entry as a form of apprentice selection -- a method favored by many ABC chapters.

ABC supports the more flexible approval of selection procedures in the Proposed Rule, which will encourage more open apprenticeship selection procedures generally and will ultimately benefit minorities, women and individuals with disabilities. Additional clarification is requested, however, as to the application of the Uniform Guidelines to apprenticeship selection procedures. It should certainly be made clear that apprenticeship qualifications that are derived from Part 29 of the Department's rules on apprenticeship standards are consistent with the Uniform Guidelines.

## **7. Enforcement Actions Under Section 30.15.**

The current Part 30 rule includes sanctions for noncompliance that include cancellation or deregistration of an apprenticeship program. Such drastic penalties are not permitted, however, nor should they be, until after corrective measures are identified and not complied with over time, and even then only so long as the due process rights of program sponsors are protected. The Proposed Rule largely maintains the current enforcement procedure with one important exception: the Proposed Rule would for the first time allow an enforcement agency to place a temporary moratorium on a sponsor's registration of new apprentices until the program sponsor has addressed alleged violations or has met the steps identified in its compliance action plan.<sup>10</sup>

While the Proposed Rule is not entirely clear on this point, the moratorium proposal appears to raise significant due process concerns. No hearing procedure is described in advance of the proposed moratorium, and it is again unclear whether the sponsor will even be allowed the opportunity to take corrective action prior to the moratorium being imposed. Nor is any time limit on the moratorium specified in the Proposed Rule.

The proposed moratorium would have potentially drastic consequences for any apprenticeship program, since it would effectively shut the program down or at a minimum deprive it of adequate program funds for an indefinite period of time. The most severe adverse impact would fall on the apprentices themselves, including minorities, women and disabled individuals, because they would be effectively deprived of access to apprenticeship training during the moratorium.

Finally, a non-hearing based moratorium will be ripe for abuse by apprenticeship agencies and/or councils that are controlled by labor organizations, which often seek to use that control to attack competing training programs operated by ABC chapters and member contractors, as well as other non-joint organizations. This aspect of the Proposed Rule should certainly be withdrawn in its present form, and due process guarantees and cure periods should be restored and strengthened.

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<sup>10</sup> 80 Fed. Reg., at 68931.

## **Conclusion**

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Greg Sizemore". The signature is fluid and cursive, with the first name "Greg" being more prominent than the last name "Sizemore".

Greg Sizemore  
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