January 20, 2016

Ms. Adele Gagliardi, Administrator
Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
Room N-5641
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Notice of Proposed Rulemaking
Apprenticeship Programs; Equal Employment Opportunity
29 C.F.R. Part 30

Dear Administrator Gagliardi:

The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("UA") and the Mechanical Contractors Association of America's ("MCAA") twenty-eight hundred (2,800) employers as well as approximately one hundred (100) local employer associations signatory to collective bargaining agreements with the UA or one of its over two hundred forty-five (245) constituent local unions in the United States sponsor over two hundred forty (240) registered apprenticeship programs throughout the country. Over twenty-eight thousand (28,000) individuals participate in these apprenticeship programs. On an annual basis, the UA, MCAA, other employer associations, and local unions and affiliates sponsoring joint apprenticeship programs spend in excess of $250 million providing training and education to apprentices and journeypersons alike. Given this substantial investment, the UA the MCAA and other sponsoring employer groups ("UA/MCAA") are one of the largest stakeholders in registered apprenticeship in the United States. As such, we are most eager to take this opportunity to provide these joint comments on the changes proposed by the United States Department of Labor ("Department") to 29 C.F.R. § 30.

The UA and the MCAA share the Department's commitment to ensuring that apprenticeship and training programs and job sites where UA apprentices and journeypersons work are free from discrimination. The UA/MCAA further believe that all applicants for admission to UA/MCAA apprenticeship programs should be treated fairly and evaluated on their ability, skill, and potential to successfully complete an apprenticeship program, and not on their race, ethnicity, age, gender, gender identity, or disability. The UA and MCAA do not agree, however, with the Department's apparent conclusion that apprenticeship programs in the construction industry are riddled with invidious and intentional discrimination. The UA and MCAA are very concerned that on the basis of this false premise, the Department has proposed regulations that are incompatible with other laws that govern the operation of apprenticeship programs, and in all likelihood will inappropriately ensure that apprentice selection decisions will be based on race, ethnicity and/or gender and undermine successful direct entry programs.

In addition, while the UA and MCAA appreciate the Department's desire not to overly burden small apprenticeship programs, the UA and MCAA suggest that the determination of what constitutes a small apprenticeship program should focus not on the number of apprentices participating in the program, but rather on the number of full time employees the program employs. Program staffing resources are the material factor in having the ability to comply with all of the requirements of the Proposed Regulations. For these reasons as further explained below, the UA and MCAA strongly recommend that the Department withdraw the Proposed Regulations and conduct formal hearings so that all stakeholders have the opportunity to comment before any new regulations are adopted.

I. The Significant Cost Increases Created By The Proposed Regulations, Coupled With ERISA Considerations, Will Lead To Withdrawals From The Department's Registered Apprenticeship System

UA/MCAA local joint apprenticeship programs vary in size, from entities with several full time employees to many with three or less such employees. Regardless of size, funding for these programs comes from negotiated employer contributions which are part of the overall wage package included in various collective bargaining agreements. This funding is placed in trust, which is subject both to the structural requirements of the Taft-Hartley Act and the requirements of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). As such, the assets of these trusts may only be used by the trustees for the sole and exclusive benefit of the ERISA trust's participants and beneficiaries. Furthermore, while the Department's Employee Benefit Services Administration ("EBSA") has issued guidance indicating that expenditures related to recruitment into apprenticeship programs do not violate ERISA's exclusive benefit rule, critically, that same guidance makes it very clear that all such expenditures are subject to a fiduciary's duty of prudence.[1] EBSA has also released guidance stating unequivocally that "[u]nder ERISA, the plan trustee or other investing fiduciary may not use plan assets to promote social, environmental, or other public policy causes at the expense of the financial interests of the plan's participants and beneficiaries." 80 Fed. Reg. 65,135 (October 26, 2015). Department guidance further states"[w]hen fiduciaries expend plan assets without reasonably determining that the expenditures are likely to promote legitimate plan objectives, they breach their core fiduciary obligations under ERISA and are personally liable for the resulting loss of plan assets." EBSA Field Assistance Bulletin 2012-01.

The UA and MCAA are concerned that the proposed changes to 29 C.F.R. § 30 could cause the trustees of the ERISA plans that conduct apprenticeship programs to run afoul of ERISA's prohibitions. Initially, the Department's own analysis reflects that over a ten year period, compliance with the proposed regulations will cost on the high end $134.98 million and the benefit, in terms of cost savings, would be again on the high end, $5.28 million. *See* Proposed Regulations, Preamble at 68,934. Thus, the proposed regulations anticipate that ERISA fiduciaries will spend $25.56 to obtain one dollar in savings. Furthermore, the UA/MCAA believes that the Department's ratio of cost to savings is inaccurate, because the Department has significantly underestimated the cost of complying with the new regulations in several areas.

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[1] *See* EBSA Field Assistance Bulletin 2012-01 ("FASB 2012-01") ("Similarly, we believe that certain outreach expenses related to the program can be paid for by the apprenticeship and training plans consistent with ERISA's fiduciary requirements. Here again, the expenses must be for marketing or promotion of the apprenticeship or training program itself... and *the amount of the expense must be consistent with the fiduciaries' obligation to be prudent and economical in the use of plan assets*") (emphasis added).

a. EEO Coordinator - Proposed Regulations § 30.3(b)(1)

The Proposed Regulations would require each apprenticeship program to designate an individual with appropriate authority and resources to be responsible and accountable for "overseeing the sponsor's commitment to equal opportunity in registered apprenticeship, including the development of the sponsor's affirmative action program;" "monitoring all registered apprenticeship activity to ensure compliance with required nondiscrimination and affirmative action obligations....maintaining the records required... and generating and submitting reports." 80 Fed. Reg. at 68,918; 68,958. The Proposed Regulations presume that existing apprenticeship coordinators will have the expertise to discharge those obligations and will willingly, voluntarily and at no cost accept those responsibilities. This is a false assumption. Current apprenticeship coordinators already have full time jobs, and to the extent they are accountable to anyone, it is the trustees of the apprenticeship program and/or the members of the joint apprenticeship training committee. Under the Proposed Regulations, they would now be accountable to the Department.[2]

In addition, the Proposed Regulations repeatedly indicate that the tasks required for compliance would be performed by a Human Resources Manager, who the Department seems to believe is already on staff with every apprenticeship program. This is not the case with the overwhelming majority of UA/MCAA apprenticeship programs; therefore, those programs are going to have to obtain this professional resource from the open market. In its estimates, the Department assumes that such a person earns $68.55 an hour, including benefits, for an annual average additional possible projected cost to UA apprenticeship programs of $142,584.

b. Required Training - Proposed Regulations § 30.3(b)(2)(iii)

The Proposed Regulations also would require UA/MCAA apprenticeship programs to conduct periodic EEO training and information sessions for all apprentices and journey workers who supervise apprentices, as well as other individuals connected with the administration or operation of the apprenticeship program, to inform and remind these individuals of the apprenticeship program's equal opportunity policy with regard to apprenticeship. *See* Proposed Regulations § 30.3(b)(2)(iii). The apprenticeship program would also be required to provide anti-harassment training for all personnel. *See* Proposed Regulations § 30.3(b)(4)(ii). In the plumbing and pipefitting industry, apprentices work with different journeyworkers at different times. Thus, each time that an apprentice is assigned to work with a different journeyworker, the apprenticeship program would have to provide training and education to that particular journeyworker. This would seem to require an ongoing training program necessitating monthly, if not weekly, training sessions. For each such training session, the apprenticeship program would have to pay the full scale hourly rates of the journeyworkers in attendance, as well as possibly the apprentices themselves. In addition, the training would have to be conducted by someone with sufficient expertise.[3] The Proposed Regulations do not adequately account for these costs.

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[2] It is entirely unclear in the Proposed Regulations what this accountability could lead to.

[3] Take as an example a large industrial project employing six hundred pipefitters of which four hundred are journeyworkers and two hundred are apprentices. Using an average hourly cost of $50.00 for journeyworkers, including benefits, and a similar cost of $25.00 for apprentices, the apprenticeship program could anticipate a cost of $75,000.00 for one three hour training session, not including any costs associated with the instructor or the facility used for training.

c. Utilization Analysis and the Establishment of Goals - Proposed Regulations § 30.5

The Proposed Regulations draw a clear line of demarcation between apprenticeship plans that underutilize designated groups of individuals (racial and ethnic minorities, workers with disabilities, or women) and those that do not. The cost of complying with the Proposed Regulations will be significantly higher for apprenticeship programs that reflect underutilization as compared to those that have shown approved market utilization rates. As such, one of the most important determinations an apprenticeship program must make is whether there is underutilization of any particular racial or ethnic group, as well as of women and individuals with disabilities. This analysis requires a comparison between an apprenticeship program's current apprenticeship population and an availability estimate "that reflects current employment in an on-site construction occupation and current employment in non-construction occupations *that employ workers who have similar abilities and interests to workers in the corresponding on site construction occupation.*" Proposed Regulations, Preamble at 68,922 (emphasis added).

While the first element of the equation may be relatively easy for an apprenticeship program to determine, the second part – availability analysis – is much more complex and requires a review of the "most current and discrete statistical information available." *Id.* The Proposed Regulations anticipate that this information will come from various government publications, such as census figures and data published by the Department itself. The UA and MCAA are not aware, however, of any such publication that is reflective of the "interests" of individuals. This would seem particularly crucial, as clearly a career in the plumbing and pipe fitting industry is not for everyone, even in the limited universe of workers who have similar abilities employed in non-construction occupations.

Work in the plumbing and pipefitting industry requires physical labor, exposure to toxic substance and human waste, as well as year-round exposure to the weather. It also requires more than a fundamental understanding of mathematics and physics, and entry to UA apprenticeship programs is limited to those who have a high school diploma or equivalent. Indeed, many UA apprentices have formal education beyond high school. UA apprentices frequently work for more than one employer throughout their course of training, a trend that will continue once they complete the apprenticeship program. Moreover, like every other construction occupation, employment in the plumbing and pipe fitting industry is cyclical. In addition, the geographic areas covered by many UA apprenticeship programs are vast, in some cases encompassing more than one state, an entire state, or multiple counties within a single state. Thus, apprentices and journeyworkers alike routinely travel significant distances to work, and when work is unavailable in their local union area, they then travel into the territory of other local unions to continue their work and training.

Even though the Proposed Regulations indicate that the availability analysis is to focus on individuals with similar interests, their underlying premise makes no allowance for such differing interests, and instead proceeds under the assumption that unless a utilization analysis shows no underutilization, there must be discriminatory barriers to entry into the apprenticeship program. *See* Proposed Regulations § 30.4(a)(2) ("a central premise underlying affirmative action is that, absent discrimination, over time a sponsor's apprenticeship program, generally, will reflect the sex, race, ethnicity and disability profile of the labor pool from which the sponsor recruits and selects.") It is quite possible, however, that the impact of any one of the above referenced non-discriminatory characteristics of a UA apprenticeship program could contribute to the choice of an individual to seek – or not seek – entry into a UA apprenticeship program.

We submit that the UA and MCAA experience with its highly successful and regarded Veterans in Piping Program ("VIP") is most instructive on the point of applicant "interests."

Under the VIP program, active duty military personnel who are leaving the military are introduced to the program and given the opportunity to seek admission to it. While accomplished in various methods depending on the branch of service, potential VIPs are informed of the program as part of the required transition classes that they attend before leaving the military. In these classes, individuals are informed of the various options for training and education available, and with respect to the VIP program, learn that it is the only program that **guarantees a job upon completion**. This should serve as a strong incentive to any person eligible for the VIP program. Under these circumstances, it is hard to argue that there are any discriminatory barriers to entry and furthermore, it would seem that women who have served in the military would be individuals who would be attracted to the construction trades. Thus, if the Department's theory is correct, it would be assumed that the number of women participating in the VIP program would generally be reflective of the percentage of women in the military.

From its inception in 2009, 1,099 individuals have graduated from the VIP program, of which 36 are women. This yields an overall percentage of 3.2%. Drilling down further, 355 Marines have completed the VIP program, of which 6 are women— for a percentage of 1.6% — at a time when women made up over 5% of the Marine Corps.[4] Thus, at least within certain segments of the military, women, when presented with options, including the option of entering the VIP program which provides for a guaranteed job, have not selected a career in the plumbing and pipe fitting trades at anywhere near their percentage of the military. The only explanations the Proposed Regulations acknowledge for a lack of women in the construction trades are "negative stereotypes about a women's ability to perform construction work" and/or "pervasive sexual harassment" and, unless dubious assumptions are made that the military is influenced by negative stereotypes about womens' ability to perform construction work and/or that military veterans fear pervasive sexual harassment, the demographic data of the VIP program would seem to undercut the assumptions underlying the Proposed Regulations. It further points to the need that any utilization analysis distinguish between the impact of choice and truly discriminatory barriers to entry.

Contrary to the Proposed Regulations, performing a utilization analysis is not a task that can prudently be delegated to a clerical employee. Rather, it will require the assistance of individuals skilled in and who are familiar with statistical and demographic analysis and know how to read, interpret and manipulate vast amounts of data. Such a process is time consuming and not inexpensive, as reflected in the attached report from Biddle Consulting, a firm that specializes in developing written affirmative action plans under Executive Order 11246 for employment with Federal contractors. (*See* Exhibit A). Biddle Consulting was asked to perform an availability analysis for one UA/MCAA apprenticeship program located in the central part of the country. This analysis, conducted by highly experienced individuals, took nine hours at a cost of $3,465.00. In addition, Biddle has estimated that it would take as much as twenty hours for an inexperienced individual to perform a similar analysis.[5]

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[4] While the VIP program operates on several Army bases, it does not operate on every one. By contrast, there are only two major Marine Corps bases in the United States and the VIP program operates on both. It is also noted that the percentage of women in the Marine Corps does not even approach the percentage of women who would be eligible to join the Marines.

[5] Even with Biddle's extensive experience, its availability analysis does not accurately gauge the impact of interest and choice on entry into apprenticeship programs.

Together, the additional costs described above will further skew the actual ratio of cost to savings and will require ERISA plan fiduciaries to make choices between spending plan assets for the purpose of providing training and education to existing plan participants, as opposed to achieving the desirable social purposes an affirmative action plan may produce. In the same way as taking advantage of one investment opportunity causes a plan to forego another one, the expenditure of one dollar of plan assets for one purpose foregoes expenditure for another purpose.[6] As delineated previously, ERISA precludes plan trustees from using plan assets to promote social, environmental or other public policy causes at the expense of the interests of the plan's participants and beneficiaries.

Being part of the DOL's registered apprenticeship system is voluntary and offers very little economic benefit to apprenticeship programs themselves. While it is true that registered apprentices may work on prevailing wage jobs for less than the prevailing wage, this is a benefit primarily for signatory contractors and public agency construction budgets. Furthermore, even if this is considered a benefit to an apprenticeship program, there are many programs where prevailing wage work is not a significant percentage of the work performed or where the prevailing wage is less than the union scale. In such situations, an apprenticeship program has every incentive to leave the registered apprenticeship system and very little incentive to stay.

Given an ERISA fiduciary's duties, the lack of economic benefit for participation in the Department's registered apprenticeship system, and the increased costs of compliance with the Proposed Regulations, apprenticeship plan trustees are placed in a conflict which could very well result in the decision to voluntarily withdraw from the registered apprenticeship system. The Proposed Regulations do not adequately account for the ERISA issues associated with compliance, as well as the consequences therefrom. The UA and MCAA would urge the Department to re-evaluate the Proposed Regulations in light of the substantial problem posed by this very negative unintended consequence. This issue alone would merit suspension of the proposal and the conduct of more detailed fact-finding.

II. The Proposed Regulations Impermissibly Impose Hiring Quotas And Will Lead To Hiring Preferences On The Basis Of Race, Ethnicity And Gender

The UA and MCAA are also very concerned about the quotas the Proposed Regulations are most likely to encourage and establish. The Proposed Regulations are reflective of the view that the absence or presence of discrimination is linked entirely to the demographic breakdown of an apprenticeship program's participants. Indeed, this numerical driven approach is reinforced when it comes to the burdens placed on apprenticeship programs. Those programs whose demographic analysis meets certain preordained norms are not required to incur the expense of certain affirmative action obligations, while those programs not meeting those norms are saddled with these additional costs. *See* Proposed Regulations, § 30.5(d) ("sponsors are not required or expected to establish goals where no disparity in utilization rates has been found.").

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[6] The Proposed Regulations import many of the requirements of the regime created for federal contractors through the Office of Federal Contractor Compliance ("OFCCP"). Under that regime, certain contractors are required to take all of the steps contemplated by the Proposed Regulations; the difference, however, is that all of the costs of compliance are part of the contractor's overhead and are thus in effect passed back to the government. The same may be said to the extent that the Proposed Regulations impact an apprenticeship program run by a manufacturing company or hospital, where any increase in cost can and most likely will be passed on to the consumer. By contrast, UA apprenticeship programs must absorb the additional costs the Proposed Regulations impose and every dollar spent on compliance with the Proposed Regulations is one less dollar that can be spent on training.

This is highly suggestive of quotas,[7] and puts the Proposed Regulations on shaky constitutional grounds.

Several years ago, the D.C. Circuit in *Lutheran Church – Missouri Synod v. FCC*, 141 F. 3d 344 (D.C. Cir. 1998) reviewed and struck down as unconstitutional the FCC's affirmative action requirements which were similarly numbers-driven and contained many of the same requirements that the Proposed Regulations impose on apprenticeship plans.[8] Striking down the FCC regulations, the court stated: "we do not think it matters whether a government hiring program imposes hard quotas, soft quotas or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race." 141 F. 3d at 354. The same can certainly be said with respect to the Proposed Regulations as they apply to both minorities and women. The Proposed Regulations are not narrowly tailored to obtain the government's objective, and the UA and MCAA believe that the Department should reconsider and re-draft them so that they will pass constitutional muster.

III. The Proposed Regulations Impermissibly Treat Direct Entry Methods As Selection Procedures

Another concern of the UA and MCAA centers on the Department's treatment of direct entry processes, such as the UA's VIP program, as a selection procedure. This program has been lauded by the United States Congress and the military as being one of the most effective training programs for veterans ever devised. In large part, the military's support comes from the UA and MCAA sponsors' commitment that it will directly place into an apprenticeship program successful VIP graduates. The Proposed Regulations would make compliance with that promise impossible, and if put into effect as proposed, would most likely lead to the demise of the VIP program, or any other successful direct entry programs such as recruiting from commercial welding schools or community colleges. In the regulatory preamble, DOL specifically recognizes the VIP program as one form of direct entry into apprenticeship programs that would be allowed; however, it conditions that on the requirement that it be applied "to all applicants for apprenticeship and apprentices..." Proposed Regulations, Preamble at 68,928. This would mean that if an apprenticeship program accepted a VIP graduate, it could not obtain apprentices from any other source and it would have to so state in its affirmative action plan. The VIP program cannot become the exclusive means of selection and entry into any apprenticeship program. Therefore, it could not be mentioned in an affirmative action plan, which in turn would make it impossible for an apprenticeship program to accept a VIP graduate.

This problem appears to stem from a fundamental misunderstanding of the purpose and design of the VIP program. Like any other method of direct entry, the VIP program is

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[7] With respect to the hiring of individuals with disabilities, the Proposed Regulations make no pretense of not calling for a quota and impose a flat 7% requirement.

[8] Like the Proposed Regulations, the FCC's EEO guidelines required a station to evaluate its employment profile and job turnover against the availability of minorities and women in its recruitment area, determining if there was underrepresentation of either minorities and or women. *See* 141 F. 3d at 352. Furthermore, if a station demonstrated underrepresentation it was subject to more frequent review. *Cf.* Proposed Regulations, Preamble at 68,921, "if [a program] can demonstrate that it not underutilized in any of the protected basis for which measurements are kept...and its review of personnel practices did not require any necessary modifications to meet nondiscrimination objectives, then the sponsor may wait two years to complete its next internal AAP review and update its written plan. *This proposal is intended to provide an incentive to sponsors who have shown success in meeting their AAP and nondiscrimination obligations.*" (emphasis added).

recognition that contractors are seeking individuals with certain established skill sets and are willing to pay higher wages to such individuals. Thus, it was never designed to secure entry level apprentices and certainly was not designed to be a selection procedure as contemplated by either the existing or the Proposed Regulations. Rather, it was designed to be a supplement to existing apprenticeship programs and a veteran recruiting tool for employers (who are meeting Department veteran hiring goals as well). When seen in this light, the VIP program is as contemplated a method of placing individuals into apprenticeship programs, who are transitioning from active military duty to civilian life, who have already undergone 18 weeks of intensive training, and who are then employed by employers who want employees with such skill sets, without having to comply with an apprenticeship program's established selection procedures.

When cast in the light of the Proposed Regulations, however, the VIP program becomes an unworkable process that cannot succeed and cannot meet the military's expectations. Furthermore, as already explained, neither the UA, MCAA, nor any apprenticeship program has any control over the demographics of the applicant pools of the programs being conducted on the various military bases. As such, it makes no sense to treat a VIP graduate as a statistic in determining an apprenticeship program's compliance with mandatory goals and timetables. For these reasons, no form of direct entry, including the VIP program, should be considered a selection procedure, and the entry of apprentices into programs from such sources, though permissible, must be beyond the scope of the Proposed Regulations.[9]

IV. Any Exemption From The Requirements Of The Proposed Regulations Should Be Based On The Number Of The Plan Sponsor's Full Time Employees

The Proposed Regulations exempt programs with five or fewer apprentices from any of the affirmative action requirements imposed on every other apprenticeship program. Proposed Regulations, § 30.4(d). The Department posits that given the number of apprentices in these programs, the program sponsors "are quite small with few employees." Proposed Regulations, Preamble at 68,944. The Department further declares that such "sponsors would likely be overly burdened by the targeted outreach, recruitment and retention requirements in proposed § 30.8," fearing "they might not have the staff and resource capacity to adequately handle large numbers of applications." *Id.* The UA and MCAA recognize this as a legitimate concern; however, even UA apprenticeship programs with more than five apprentices frequently employ few full time employees. Thus, to avoid overly burdening those apprenticeship programs as well, the UA and MCAA strongly recommend that the Department rewrite the exemption contained in proposed § 30.4(d) to focus not on the number of apprentices in the sponsor's program, but rather on the number of full time employees employed by the program sponsor. To this end, the UA and MCAA propose that apprenticeship program sponsors that employ five or less full time employees should qualify for the exemption contained in Proposed Regulations § 30.4(d). If this is not acceptable, then the basis for the exemption appears to be unsound. Consequently, there should be no exemption and every apprenticeship program, regardless of size or resources, should be required to adhere to all of the Proposed Regulations' requirements.

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[9] While this is the preferred and appropriate result, another way of addressing this issue would be to establish that direct entry programs are alternative selection procedures that work in conjunction with other selection procedures an apprenticeship program may utilize.

V. Conclusion

ERISA covered construction industry education plans make up the overwhelming majority of the apprenticeship plans that have voluntarily joined the Department's registered apprenticeship system; however, the Proposed Regulations have not been drafted with an eye toward the special considerations and limitations of those programs. We are hopeful that the these comments will cause the Department to seriously reevaluate impact the Proposed Regulations will have on these programs.

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WPH/SD:bdh
Attachment

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Exhibit A

Biddle Consulting Group, Inc. ("Biddle") specializes in Equal Employment Opportunity (EEO) consulting, litigation support, personnel testing software development, and Affirmative Action Plan (AAP) outsourcing and software. Since 1974, when known under the name Biddle & Associates, Biddle has worked with thousands of employers in these areas, as well as providing litigation support as consultants or experts in over 200 state, federal, and circuit court of appeal EEO cases involving statistics and/or job-relatedness (test validity) analyses. This includes conducting sensitive statistical EEO audit analyses for employers prior to a suit to minimize the likelihood of suit.

Biddle was asked to review the Notice of Proposed Rule Making ("NPRM") related to proposed changes to 29 C.F.R. § 30 and to perform an availability analysis as called for by the NPRM for a hypothetical joint labor management plumber pipefitter apprenticeship program that operates throughout the state of Kansas. Biddle's focus was on the issues surrounding external availability, as joint labor management apprenticeship programs do not have employees who would otherwise be available to become apprentices. Thus, with respect to the test apprenticeship program, the utilization analysis called for by the NPRM required a comparison between the demographic breakdown of the apprenticeship program's current cohort of apprentices and a demographic breakdown of an appropriate comparator group representing "the percentage of individuals available with the present or potential capacity for apprenticeship in the sponsor's relevant recruitment area." Proposed Regulations, Preamble at 68,960. With respect to construction-type apprenticeship programs, this comparator group is further defined as "current employment in an on-site construction occupation and current employment in non-construction occupations that employ workers who have similar abilities and interests to the workers in the corresponding on site construction occupation." Proposed Regulations, Preamble at 68,922. Because the test program includes both plumbers and pipefitters, industry specific data had to be considered for both job categories. Furthermore, the analysis had to take into account that only individuals with a high school diploma or equivalent are eligible to enter the apprenticeship program.

Due to time constraints of this project, Biddle assigned a senior tenured consultant with over sixteen years of experience working with data in preparation of thousands of affirmative action plans. Because of her extensive experience, she was able to complete the task in two hours. It is noted that the NPRM estimates that someone without experience could perform the tasks associated with doing an availability analysis in one hour. Proposed Regulations, Preamble at 68,938. Based on Biddle's experience, this is a gross underestimation of the time an inexperienced person would take to appropriately complete this task. Rather, Biddle's experience has shown that it would take an inexperienced person ten to twenty hours to perform this task, including time to

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understand the assignment, review available statistical information to determine the relevant data sets, mine the data sets for the appropriate information, and prepare, edit and revise appropriate reports as well as to explain the results to the relevant individuals.

To identify the appropriate comparator group, the NPRM lists several sources, including Census Bureau's American Community Survey EEO Tabulation 2006 to 2010; the Census Bureau's Census 2000 EEO Data Tool; the Census Bureau's Quick Facts tables; the Census Bureau's American Fact Finder; labor market information data from State workforce agencies; data from vocational education schools, secondary and postsecondary school or other career and employment training institutions; educational attainment data from the Census Bureau; and for sponsors of registered apprenticeship programs in the construction industry, any data provided by OFCCP through their regulations at 41 CFR part 60–4 or otherwise on the potential availability of workers by demographic group for employment in on-site construction occupations. Proposed Regulations, Preamble at 68,922. Thus, the first step of the analysis is to determine which of the listed sources will provide the correct information as well as which source is more readily available, such as those available online as opposed to those that are only available from private sources. Data readily available online can be found through the United States Census Bureau's American Fact Finder.

After reviewing each of the available options, Biddle selected the Census Bureau's American Community Survey (ACS) EEO Tabulation 2006 to 2010 (http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk EEO-ALL04R-Geography-Kansas Estimate: EEO 4r. EEO-1 Job Categories by Sex, and Race/Ethnicity for Residence Geography, Total Population - Universe: Civilian labor force 16 years and over) as the data source. Biddle chose this dataset for three reasons; 1) Accessibility, 2) the ACS data is used to construct availability analyses under similar regulations such as 41 CFR part 60-2, and 3) data available through OFCCP regulation at 41 CFR part 60–4 provides one availability percentage for *All Minorities* whereas the NPRM requires utilization comparisons by ethnicity or particular race.

Using this information, Biddle identified two appropriate EEO categories to include in its comparator group, Craft Workers and Laborers and Helpers.[1] Having created an appropriate comparator Biddle also had to determine the appropriate geographic area from which to construct the comparator group. In this case, this process was relatively simple because the test apprenticeship program operates throughout the state of Kansas. Had that not been the case, Biddle would have to have gathered the availability data for each comparator category (Craft Workers and Laborers and Helpers)

[1] Each of these categories is defined in the EEO-1 Instruction Booklet, http://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm. Those definitions are: (1) craft worker: Most jobs in this category include higher skilled occupations in construction (building trades craft workers and their formal apprentices) and natural resource extraction workers; and (2) laborer and helper: Jobs in this category include workers with more limited skills who require only brief training to perform tasks that require little or no independent judgment. None of these categories specifically screen for the necessity of having a high school diploma; however, for purposes of this exercise, it was assumed that anyone working in any of these categories possessed a high school diploma. Nor do any of the categories gauge individuals' interest.

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from each of the identified recruitment areas and then weight the availability data according to the relevance of each of those areas. This would have increased the time necessary to complete the availability computations by approximately one hour.

After reviewing all of the available information Biddle has reached the following conclusions with respect to the demographic percentages of the available comparators in the area in which the test apprenticeship program operates: Male (91.6%), Female (8.4%), Hispanic (14.7%), White (78%), Black (3.8%), Native American (.8%), Asian (1.3%), NHOPI (.1%) and Two+ (1.3). It took Biddle nine hours to perform this project, including four hours reading and interpreting the NPRM, a little over an hour researching the data options, one hour extracting the data from the ACS and manipulating in Excel, two hours to do the write-up and another one hour to discuss and draft this report. Biddle charged this time at the following hourly rates: Senior Consultant hourly rates of $385 per hour @ 9 hours, for a total cost of $3,465.

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