These comments are submitted on behalf of the National Association of Blind Merchants (NABM) in an effort to provide feedback on Department of Education regulations which impact the Randolph-Sheppard Program administered by state licensing agencies (SLA's). NABM is a membership organization and a division of the National Federation of the Blind. We advocate for and represent the interests of the almost 2,000 blind entrepreneurs who manage and operate vending facilities in government buildings pursuant to 20 U.S.C. 107d. Most of the comments below address administrative burdens currently being imposed on the states, regulations that have been particularly litigious, and those that negatively impact small businesses.

Issue #1 – Need for prior approval under 2 CFR §200.407 for expenditures in support of vending facilities operated by blind entrepreneurs.

Regulations at 34 CFR §361.4(d) makes applicable the requirements under 2 CFR Part 200 (Uniform Administrative Regulations) to the State Vocational Rehabilitation Program. The Rehabilitation Services Administration (RSA) has apparently taken the position that the prior approval requirements under 2 CFR §200.407 now apply to equipment and other purchases exceeding $5,000 made by the SLA in support of Randolph-Sheppard vending facilities.

The prior approval requirement will pose a serious burden to SLA;'s who are charged with the responsibility of administering the Randolph-Sheppard Programs on the state level. Income of blind vendors and the quality of service provided to customers will be drastically impacted. The Randolph-Sheppard Program is effectively a $750 Million business operating within state governments. Businesses cannot be handicapped with such burdensome procurement requirements and expect to succeed. Many times a piece of equipment breaks and must be replaced the same day. There is not time for the red tape of federal approval that will take weeks to secure. We do not believe that RSA has anticipated the volume of requests it will receive. Virtually every vending machine an SLA buys will require RSA approval. This will result in literally thousands of requests coming to RSA which it is not equipped to handle. OSERS is reportedly losing FTE's in the new budget year but it will clearly have to devote one or two FTE's just to granting these approvals.

NABM recommends that the Department of Education seek an exemption to 2 CFR §200.407 for the Randolph-Sheppard Program as a matter of reducing administrative burdens on the states.

Issue #2 – RSA has apparently determined that federal dollars cannot be used for renovation of vending facilities.

It has been well established that SLA's can use set aside dollars and federal funds to renovate a vending facility. One of the data elements (Section IV, Line 4) on the RSA-15 requires states to report he amounts spent for these purposes.

In 1998, RSA issued PD 99-15, which gave further clarification that funds could be utilized for this purpose. That PD states:

> "Unless prohibited by law, the cost of necessary maintenance, normal repairs and alterations, and the like are allowable to the extent that they: (1). Keep property (including federal property unless otherwise provided for) in an efficient operating condition), (2) Do not add to the permanent value of the property or appreciably prolong its intended life, and (3) are not otherwise included in rental or other charges for space."

Only expenditures that appreciably prolong the life of a property or add value to the property are to be treated as capital expenditures. It is abundantly clear from PD 99-15 that that RSA intended to allow SLA's to use federal dollars to refurbish vending facilities. It is also clear that vending facility renovations meet the three criteria outlined above. These expenditures for renovations keep the buildings efficient in terms of providing an efficient food service to federal employees. Painting a wall or replacing a tile floor in a vending facility will not appreciably add value to the building. Since federal agencies are not permitted to charge for rent or otherwise charge for space, the costs cannot be considered to be included as part of the rent payment. However, RSA has apparently made the determination to revoke PD 99-15 without any sound reasoning behind the decision.

The current practice is for the General Services Administration to provide a "white box" and the SLA convert that space into a vending facility. This may include putting down the type of flooring required for the vending facility which is not found in the rest of the building. It may require painting the walls or running electrical wiring to location of the equipment. These are necessary expenditures for the efficient operation of the building. If RSA's position remains unchanged, SLA's will no longer be allowed to renovate such space for a vending facility.

This action will result in serious burdens being placed on SLA's and blind vendors. States, most of whom are already strapped to fund their business enterprises programs, will have no means to renovate vending facilities. The options will be to leave the facilities in disrepair resulting in inferior service to the federal employees or close the facilities which will in many cases will mean no service to the customers. This change in interpretation effectively takes the Randolph-Sheppard Program out of the snack bar / cafeteria service and renders it as a vending machine only provider as SLA's will not be able to alter space to accommodate or upgrade a vending facility that includes anything except vending. By taking such action, RSA is effectively limiting the income of blind vendors which is expressly prohibited by the Randolph-Sheppard Act.

NABM recommends that RSA not change its interpretation and continue to allow SLA's to use set aside dollars and federal funds to do such renovations to Randolph-Sheppard vending facilities.

Issue #3 – Misinterpretation of 34 C.F.R. 395.31(d) related to satisfactory sites for Randolph-Sheppard vending facilities in buildings with fewer than 100 federal employees and/or 15,000 square feet of space.

34 C.F.R. 395.31(d) states in part, "The provisions of paragraphs (a) and (b) of this section shall also not apply when fewer than 100 Federal Government employees are or will be located during normal working hours in the building to be acquired or otherwise occupied or when such building contains less than 15,000 square feet of interior space to be utilized for Federal Government purposes in the case of buildings in which services are to be provided to the public." This provision is frequently misconstrued by federal agencies who believe that the Randolph-Sheppard priority does not apply to such facilities with respect to vending on these premises altogether. Consequently, there have been multiple federal arbitrations on this issue and in every one to date the panels have ruled the priority applies. This is consistent with RSA's own interpretation of the Act. However, RSA has not provided any sub-regulatory guidance on this issue and some federal agencies refuse to comply. Literally hundreds of thousands of federal dollars are being allocated to arbitration cases dealing with this single issue. This is a waste of government resources and a burden on the SLA's who must pursue litigation to enforce the priority. It is also a detriment to the establishment of small businesses owned and operated by blind entrepreneurs participating in the Randolph-Sheppard Program.

NABM recommends that RSA clarify this regulation to ensure that in instances in which such facilities have fewer than 100 federal employees and/or less than 15,000 square feet that the priority still applies if the federal entity wants vending or if the SLA determines that the site will support a blind vendor. In the meantime, sub-regulatory guidance on this issue would be most helpful.

Issue #4 – The need for clarification as to when the Randolph-Sheppard priority applies to cafeterias, particularly troop dining contracts.

34 C.F.R. 395.33 grants a priority to blind vendors to manage and operate cafeterias on federal properties. In recent years, there have been at least nine federal arbitration cases dealing with the issue of what constitutes a cafeteria. The cost to the federal government for convening these panels exceeds $1 Million. Most of these cases have involved the Department of Defense which argues the priority only applies if the blind vendor is managing the overall contract and provides all services pertaining to the operation of the cafeteria. For the priority to apply, the blind vendor must be responsible for contract management, prepping the food, cooking the food, serving the food, washing dishes, bussing tales, mopping floors, and running the register. However, it is DOD's position that if the blind vendor is only prepping the food, serving the food, washing dishes, bussing tables, mopping floors, and running the register, it is not a cafeteria and therefore there is no priority. DOD ignores 34 C.F.R. 395.33(c) which states the priority applies to all contracts "pertaining to the operation of a

cafeteria." It also ignores the definition found at 34 C.F.R. 39511(x) of a "vending facility" which includes "other services".

It must also be noted that as currently being interpreted by DOD, this regulation is anti small business as small businesses owned by blind vendors are being denied opportunities as are those who qualify under Section 8(a) and Hub Zone.

In 2006, the Department of Education, Department of Defense, and the Committee for Purchase from the Blind and Physically Handicapped (now known as AbilityOne) developed what was called the Joint Policy Statement. The intent of the Joint Policy Statement was to determine when the Randolph-Sheppard priority applied and when AbilityOne was entitled to the contract. The Department of Education was supposed to promulgate the Joint Policy Statement into regulations but did not once it realized it violated the Randolph-Sheppard Act. Nonetheless, DOD still relies on it and attempts to disregard the blind vendor priority. DOD even attempted to promulgate its own regulations in 2016 even though Congress only gave the Department of Education the authority to promulgate Randolph-Sheppard regulations.

In an effort to reduce the cost of litigation and ensure that he rules are pro small business, NABM urges the Department to disavow itself of the Joint Policy Statement. It should then promulgate regulations that clearly state the priority applies to all cafeteria related services. In the meantime, sub-regulatory guidance on this issue would be helpful.

Issue #5 – Current regulations do not define "active participation' thus resulting in wide variations in interpretation and much conflict between SLA's and Elected Committees of Blind Vendors.

The regulations at 34 C.F.R. 395.14(b)(1) establish that the "State Committee of Blind Vendors" shall "actively participate with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program," but the regulations fail to define[ii] the term "active participation." In the absence of federal guidance on the definition of this term, states are left to decide for themselves exactly how they will choose to interpret it, leading to mixed results in the participation of the Committee of Blind Vendors. In the most egregious cases, the Committee of Blind Vendors is simply looked upon as being an advisory body, violating Congress's intent for the Committee.

NABM strongly urge the Department to amend the regulations to include a uniform definition for the term "active participation." We propose the following language:

> *Active Participation—the term "active participation" means an ongoing process of negotiations between The State Licensing Agency (SLA), and*

The State Committee of Blind Vendors as described in 34 C.F.R. 395.14 to achieve joint planning and approval of program policies, standards and procedures affecting the overall operation of the vending facilities program, prior to their implementation by the SLA. The implementation of agreed-upon policies, standards and procedures affecting the overall operation of the vending facilities program, shall be subject to review by the Committee. It is understood that the Agency bears final authority and responsibility for the administration and operation of the vending facilities program, including the assurance of continuing, active participation with the Committee.

This is actually the definition endorsed by the National Association of Blind Merchants, the National Council of State Agencies for the Blind, the Randolph-Sheppard Vendors of America, and RSA in approximately 2002 when RSA put together a work group to provide sub-regulatory guidance on the issue. That guidance was never issued and confusion continues today.

In an effort to minimize confusion, conflict, and litigations, NABM urges the adoption of the above definition in its regulations and provide sub-regulatory guidance on how it should work as a practical matter.

Issue #6 – There is a need to clarify terminology related to blind vendors.

There is ongoing confusion over the use of the terms "blind vendors" and "blind licensees." Current regulations include a definition of "blind licensee" but not "blind vendor." At times, the terms are used interchangeably while at others there appear to be a distinction. This is particularly true when considering membership on the Committee of Blind Vendors and determining who gets to participate in income sharing from vending machines on federal property. This confusion needs to be clarified in the rules. "Blind vendor" needs to be defined and then the rules be reviewed to ensure that "blind licensee" and "blind vendor" are used appropriately throughout the regulations. This will eliminate the burden on states to try to interpret on their own the intent of the regulations.

Issue #7 – The exemption to income sharing by military post exchanges and the VA Canteen Service has been misinterpreted to be an exemption to the Randolph-Sheppard priority.

It is clear that Congress intended for the military Post Exchange and VA Canteen Service to be allowed to operate on military bases and VA properties respectively. It exempted both entities from the vending machine income sharing provisions of the Act. However, both the military and VA

have an obligation to provide a satisfactory site in all building under their control when feasible. They are not doing so resulting in multiple arbitrations and lawsuits costing hundreds of thousands of federal dollars. This also poses a burden on the states who have to devote valuable resources that could be utilized in other ways to contribute to the growth and efficient operation of the vending facility program.

NABM urges the Department to include language in the rules making it absolutely clear what obligations DOD and the VA have in light of their unique circumstances. In the absence of such regulations, RSA should provide sub-regulatory guidance.

Issue #8 – Definition of satisfactory site it outdated.

Current regulations only require that a federal entity provide 250 square feet of space for the establishment of a vending facility including storage. This is inadequate in most cases. The result is the blind vendor is denied the opportunity to earn an adequate income. NABM urges the Department to revise this definition to ensure that there is adequate space to establish a vending facility that will support a blind person.

Issue #9 – Competition from private cafeterias is problematic for blind vendors.

Blind vendors many times are required to operate on the same premises with privately run cafeterias. The blind vendor may operate vending machines, a micromarket, or a small C-Store selling all prepackaged items. It is not unusual for the cafeterias to sell competing prepackaged items. Current regulations protect blind vendors form competition from privately run vending machines but not cafeterias. The current definition of "cafeteria' found at 34 C.F.R. 395.1(d) indicates that they are to sell "prepared" foods. This would suggest to the casual reader that cafeterias sell foods prepared on-site. However if one walks into many of these cafeterias, it will be noted that the portion of the cafeteria devoted to prepackaged foods is much larger than the space devoted to selling prepared foods. This again is anti small business as small businesses are unable to compete with large corporate run cafeterias.

NABM urges the Department to clarify its regulations to protect blind vendors from competition from cafeterias selling prepackaged food the same as it does from competing vending machines.

Item #10 – What are "other services" as used in 34 C.F.R. 395.1(x)?

The current definition of "vending facility" found at 34 C.F.R. 395.1(x) includes not only food and other articles but also services. There is little discussion of what that actually means and state programs have primarily found their niche in food service. However, opportunities are diminishing as government continues to downsize and limiting opportunities t only food service is no longer a viable model. The Act affords blind vendors a priority to establish vending facilities on federal property. To what kinds of services does that priority extend? For example, does the priority apply to laundry services, lawn care, janitorial, etc.?

NABM urges the Department to elaborate on this issue in its regulations. In the absence of regulations, RSA should provide sub-regulatory guidance.

Issue #11 – There is confusion on the use of funds derived from third party vending at the interstate rest areas.

In 1982, Congress passed the Kennelly Amendments of the Surface Transportation Act which allowed SLA's to establish vending sites at our nation's interstate rest areas. Rest areas are not technically federal property but are controlled by federal property in that it is Congress and the department of Transportation that dictate the activities that can and cannot occur at the rest areas. In most instances, SLA's establish vending facilities to be operated by blind vendors at the rest areas. In other cases, states use third party vending which generates income for the agency. As currently interpreted, SLA's are free to use these funds as they choose and don't even have to use the dollars for the benefit of the vending facility program. In many states, the blind vendors would like to see blind individuals managing the vending at those sites but the SLA's are dependent on that income; thus, opportunities for the blind are denied. This could be remedied if for Randolph-Sheppard purposes rest areas were treated as federal properties.

NABM urges the Department to amend its regulations and clarify that vending machine income from interstate rest areas must be treated the same as income from vending machines on federal property.

Item #12 – Randolph-Sheppard regulations do not reference funding of the program.

Many state vending facility programs struggle because SLA's siphon off dollars from the program for use elsewhere. Current regulations require the SLA to perform certain functions. This includes but is not limited to training, establishment of vending facilities, purchase of new and replacement equipment, repairing and maintaining equipment, and supervision of vending facilities. States readily accept these responsibilities and provide the necessary assurances to RSA; however, in many cases pass the burden of funding these obligations on to the blind vendors. NABM believes this should not be allowable and that the SLA should assume the lion[s share of responsibility for funding these obligations. Current blind vendors should not bear the responsibility of paying for a training program to train new vendors who are VR clients and receiving training as a VR service. Vendors shouldn't be required to foot the bill for creating new employment opportunities for which the SLA is obligated to do. Blind vendors should not be forced to pay the salaries of SLA staff especially if they have no say in how many employees will be hired, what their job duties will be, etc. NABM does not object to SLA's using program generated income (set aside and vending machine income) as match for federal dollars to fund at least some of these obligations. Training being provided as a VR service should NEVER always be the responsibility of the SLA. However, too many states are placing 100% of the responsibility on the blind vendors. It then takes the matching federal dollars that it can draw down for non Randolph-Sheppard purposes. NABM has no objection to the vending facility program contributing to the financial health and well being of the state VR Program as a general rule. However, we believe strongly that states should assume responsibility for funding the portions of the program for which they have provided assurances they will provide.

This is complicated further by the fact that in many states the program is reliant on unassigned income to fund the program. Blind vendors would prefer to see blind people operating these sites now being managed by third party vendors. However, the SLA is addicted to the revenue and refuses to convert third party sites to blind vendor sites. This is in contradiction with the intent of the law. The Randolph-Sheppard Act was not enacted to provide a funding mechanism for state agencies serving the blind. It was

enacted to provide remunerative employment to blind persons. Creating opportunities should always be the first priority

NABM urges the Department to clarify in its regulations that an SLA cannot pass on the cost of meeting assurances made to RSA by the SLA as part of it's application to be designated as the state licensing agency. In the absence of regulation, sub0regulaotry guidance should be provided.