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EXAMINING THE REGULATORY AND ENFORCEMENT ACTIONS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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EXAMINING THE REGULATORY AND ENFORCEMENT ACTIONS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Wednesday, May 22, 2013
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:03 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Bucshon, Courtney, Sablan, and Bonamici.

Also present: Representative Brooks.

Staff present: Katherine Bathgate, Deputy Press Secretary; Owen Caine, Legislative Assistant; Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; Donald McIntosh, Professional Staff Member; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Mandy Schaumburg, Education and Human Services Oversight Counsel; Nicole Sizemore, Deputy Press Secretary; Alissa Strawcutter, Deputy Clerk; Juliane Sullivan, Staff Director; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; John D'Elia, Minority Labor Policy Associate; Daniel Foster, Minority Fellow, Labor; Eunice Ikene, Minority Staff Assistant; Leticia Mederos, Minority Senior Policy Advisor; Megan O'Reilly, Minority General Counsel; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; and Michael Zola, Minority Deputy Staff Director.

Chairman WALBERG. A quorum being present, the committee will come to order. Good morning to everyone.

This certainly is a great opportunity for a hearing today that has not taken place for an awful long time, and so I am glad that we are involved with it this morning.

Chair Berrien, we are pleased to see you here today. It has been a long time since the committee convened a hearing to examine the policies and priorities of Equal Employment Opportunity Commission and we are grateful you have joined us and thank you for your service to our country.

Ms. BERRIEN. Thank you.

Chairman WALBERG. Republicans and Democrats share the same goal. I think I can say this without a doubt.

We want to ensure the American people work in an environment free of discrimination. Whether or not an individual succeeds in a workplace should be determined by merit and hard work, not the unlawful prejudice of their boss.

For most employers, a person's skills and drive to succeed are what matter most. However, as always, bad actors will put personal bigotries before the talent and dedication of American workers. This is wrong.

A recent case out of Davenport, Iowa, provides a stunning example of this difficult reality. According to reports, 32 men with intellectual disabilities were subjected to abuse and discrimination. The deplorable treatment these men faced included verbal and physical harassment, substandard living conditions, and inadequate medical care.

EEOC is to be applauded for helping to bring those who committed these heinous acts to justice.

Federal laws prohibiting employment discrimination should be vigorously and fairly enforced. That is why we are here today.

There has been a significant shift in both the enforcement and regulatory priorities in the EEOC in recent years. It is our responsibility to ask tough questions to ensure agency policies are in the best interests of workers and employers.

For example, does it serve the best interests of workers and employers when EEOC investigates businesses without evidence of wrongdoing?

The agency has set a goal that up to 24 percent of all litigated cases be systemic in nature. At times these investigations are launched without any employee alleging discrimination. Meanwhile, a backlog of more than 70,000 discrimination claims by workers continues to plague the commission.

At a time of high unemployment and record federal debt, every job and every dollar counts. We should not be diverting scarce resources away from workers who believe they have been harmed in order to follow a hunch. And we should not be dragging our nation's job creators through unnecessary and costly investigations without a factual basis of wrongdoing.

Does it also serve the best interests of workers and employers when the full weight of the agency's litigation power is ceded to one individual?

Congress created a commission of 5 members to ensure accountability within the agency. Yet for almost 20 years the commission has delegated the authority to the Office of General Counsel. Under only limited circumstances can the commission vote on the general counsel's decision to intervene in litigation and these narrow exceptions are not always clear.

As a result, the general counsel has almost complete control over EEOC's enforcement agenda. This cannot be what Congress intended and it is having a real impact on the lives of workers.

One case initiated by the general counsel was later rejected by a federal district judge. The judge described the commission's actions as a, and I quote—"sue first, ask questions later litigation strategy," and noted that, and I quote again—"dozens of potentially

meritorious sexual harassment claims may now never see the inside of a courtroom."

Finally, is it in the best interests of workers and employers when the commission pursues regulatory policies that may make workplaces less safe?

In April 2012, EEOC revised its longstanding guidance on the use of criminal background checks. Should the background check reveal a criminal offense, employers will have to conduct an, and I quote—"individual assessment" and identify a "business necessity" that merits denying individual employment.

However, this proposal has already been criticized by one federal court. As one federal judge noted almost 25 years ago, quote—"Obviously a rule refusing honest employment to convicted applicants is going to have a disparate impact upon thieves."

This policy also puts many employers at risk of running afoul of state or local laws that require background checks for certain positions of public trust, such as child care providers. Employers will bear the burden of any unintended consequences stemming from this regulatory change, not EEOC. Yet they and the public were denied an opportunity to comment on the proposal before it became final.

Public meetings on broader topics isn't the level of openness and transparency the American people deserve. Shouldn't workers and employers have an opportunity to comment on public policy changes that affect their workplaces?

Chair Berrien, these are serious questions that I hope we can discuss with you today. I know that it is a lot to address in one hearing. However, we hope this hearing starts a new, more open dialogue between the committee and the EEOC, and that is our responsibility as well as yours.

As I noted earlier, we all share the same goal and only when we work together can we move closer toward that goal.

Thank you again for being with us today.

I will now recognize my distinguished colleague, Joe Courtney, the senior Democratic member of the subcommittee, for his opening remarks.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning everyone. Chair Berrien we are pleased to see you today. It has been a long time since the committee convened a hearing to examine the policies and priorities of the Equal Employment Opportunity Commission. We are grateful you've joined us and thank you for your service to our country.

Republicans and Democrats share the same goal: We want to ensure the American people work in an environment free of discrimination. Whether or not an individual succeeds in a workplace should be determined by merit and hard work, not the unlawful prejudice of their boss. For most employers, a person's skills and drive to succeed are what matter most. However, bad actors will put personal bigotries before the talent and dedication of America's workers.

A recent case out of Davenport, Iowa provides a stunning example of this difficult reality. According to reports, 32 men with intellectual disabilities were subjected to abuse and discrimination. The deplorable treatment these men faced included verbal and physical harassment, substandard living conditions, and inadequate medical care. EEOC is to be applauded for helping to bring those who committed these heinous acts to justice.

Federal laws prohibiting employment discrimination should be vigorously and fairly enforced. That's why we are here today. There has been a significant shift in

both the enforcement and regulatory priorities at EEOC in recent years. It is our responsibility to ask tough questions to ensure agency policies are in the best interests of workers and employers.

For example, does it serve the best interests of workers and employers when EEOC investigates businesses without evidence of wrongdoing? The agency has set a goal that up to 24 percent of all litigated cases be systemic in nature. At times, these investigations are launched without any employee alleging discrimination. Meanwhile, a backlog of more than 70,000 discrimination claims by workers continues to plague the commission.

At a time of high unemployment and record federal debt, every job and dollar counts. We should not be diverting scarce resources away from workers who believe they've been harmed in order to follow a hunch. And we should not be dragging our nation's job creators through unnecessary and costly investigations without a factual basis of wrongdoing.

Does it also serve the best interest of workers and employers when the full weight of the agency's litigation power is ceded to one individual? Congress created a commission of five members to ensure accountability within the agency. Yet for almost 20 years the commission has delegated that authority to the Office of General Counsel. Under only limited circumstances can the commission vote on the general counsel's decision to intervene in litigation and these narrow exceptions are not always clear.

As a result, the general counsel has almost complete control over EEOC's enforcement agenda. This cannot be what Congress intended and it's having a real impact on the lives of workers. One case initiated by the general counsel was later rejected by a federal district judge. The judge described the commission's actions as a "sue first, ask questions later litigation strategy" and noted that "dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom."

Finally, is it in the best interests of workers and employers when the commission pursues regulatory policies that may make workplaces less safe? In April 2012, EEOC revised its long-standing guidance on the use of criminal background checks. Should the background check reveal a criminal offense, employers will have to conduct an "individual assessment" and identify a "business necessity" that merits denying the individual employment.

However, this proposal has already been criticized by one federal court. As one federal judge noted almost 25 years ago, "Obviously a rule refusing honest employment to convicted applicants is going to have an disparate impact upon thieves."

This policy also puts many employers at risk of running afoul of state or local laws that require background checks for certain positions of public trust, such as child care providers. Employers will bear the burden of any unintended consequences stemming from this regulatory change, not EEOC.

Yet they and the public were denied an opportunity to comment on the proposal before it became final. Public meetings on broader topics isn't the level of openness and transparency the American people deserve. Shouldn't workers and employers have an opportunity to comment on policy changes that affect their workplaces?

Chair Berrien, these are serious questions that I hope we can discuss with you today. I know that is a lot to address in one hearing. However, we hope this hearing starts a new, more open dialogue between the committee and EEOC. As I noted earlier, we all share the same goal and only when we work together can we move closer toward that goal. Thank you again for being with us today.

I will now recognize my distinguished colleague Joe Courtney, the senior Democratic member of the subcommittee, for his opening remarks.

Mr. COURTNEY. Well, good morning, Mr. Chairman. I want to thank you for calling today's hearing to put the spotlight on the important work of the Equal Employment Opportunity Commission, and particularly under the leadership of Chairman Jacqueline Berrien, who is here today.

This is the first time we have actually invited the chairwoman to the House in the last 3 years, so again, I want to applaud the—you know, this action today to, again, start a dialogue with our subcommittee on the important work that the Equal Employment Opportunity Commission engages in every single day. The work of

the EEOC is critical, particularly when we look at the challenges facing the unemployed in our nation.

Even as the economy has improved, with 7.5 percent unemployment rate last month, the unemployment gap has remained high for minorities. For African Americans it was 13.2 percent and for Latinos, 9 percent in April. And we know, as labor economists and experts point to, that discrimination remains one of the factors for that disparity.

Every worker in this country, whether a job applicant or an employee, deserves the right to be treated fairly in the workplace and judged based upon the ability to do the job. The foundation of our civil rights laws is to ensure that all Americans have the opportunity to participate in society, to provide for themselves and their families, and to contribute to the economy.

Unfortunately, far too often workers are not hired or are paid less or fired from their jobs because they are a woman, or a pregnant woman, or an African American, or have a disability. The EEOC plays an essential role in ensuring fairness and equal opportunity in the workplace through its enforcement of our federal laws that make it illegal to discriminate against an employee or job applicant because of that person's race, color, religion, sex, national origin, age, disability, or genetic information.

Despite these protections, nearly 100,000 new charges of discrimination were filed with the EEOC last year, and despite the commission's efforts to achieve resolutions in these cases, they continue to have a backlog, which stands to grow as a result of budget cuts and sequester, and that sequester chainsaw has hit the EEOC just like it has so many other agencies of our government.

Congress has a responsibility to the nation's workers to ensure that should they become a victim of workplace discrimination, that they have a place to seek justice. I am proud that during the Democratic-led 110th and 111th Congress, under the leadership of Speaker Pelosi, we made critical improvements to our nation's civil rights laws through the enactment of the Americans with Disabilities Act amendments and the Genetic Information Nondiscrimination Act, and also passage of the Lilly Ledbetter Fair Pay Act, which restored the law to what it was prior to the misguided Supreme Court decision in Ledbetter v. Goodyear. And in almost every single instance, those three laws were enacted with large bipartisan majorities, so it does show that there really is, I think, concern on both sides of the aisle to make sure that we do better to make a more perfect union, as Lincoln said, in terms of a fair workplace.

But despite the progress that we have made there is still much left to be done, and I believe there are many issues where Democrats and Republicans can join together again to strengthen our civil rights laws. The Employment Nondiscrimination Act, which I am proud to cosponsor, would prohibit discrimination in the workplace because of someone's sexual orientation or gender identity. Again, that was recently introduced in both the House and the Senate with both Democratic and Republican cosponsors.

And I urge both chairmen—and I see Mr. Kline here today—to work with Representatives Polis and Ros-Lehtinen to build bipar-

tisan sponsors in the House to bring this long overdue legislation back before the committee for its immediate consideration.

I would also urge both chairmen to work with us on the Protecting Older Americans Against Discrimination Act. This legislation has been modified since it was originally brought before the committee under the prior chairman, Chairman Miller's, time as leader and is now a bipartisan bill, sponsored by Senators Grassley and Harkin in the Senate. I believe we, too, could find common ground on this bill to protect our nation's older workers.

And finally, the Paycheck Fairness Act, which has been passed twice by this House, again on a strong bipartisan basis, should be brought up for immediate consideration so that gender-based pay discrimination is finally put on an equal footing with our other civil rights laws.

Mr. Chairman, again, I want to thank you for holding this hearing. I am confident that we can find opportunities to work together to strengthen our nation's civil rights laws and have this subcommittee lead the way.

I also want to thank, again, Chair Berrien for being with us today and thank her for her dedication, her hard work on behalf of our nation's workers.

And I yield back.

[The statement of Mr. Courtney follows:]

Prepared Statement of Hon. Joe Courtney, Ranking Member, Subcommittee on Workforce Protections

Good morning. I want to thank Chairman Walberg for calling today's hearing to examine the important work the Equal Employment Opportunity Commission is undertaking through the leadership of the Commission's chair Jacqueline Berrien. Chair Berrien, I want to thank you for being with us today to update the subcommittee on the work of the EEOC.

The work of the EEOC is critical, particularly when we look to the challenges facing the unemployed in our nation. Even as the economy has improved, with 7.5 unemployment rate last month, the unemployment gap has remained high for minorities—for African Americans, it was 13.2 percent and for Latinos, 9.0 in April. And we know, as labor economists and experts point to, that discrimination remains one of factors for the disparity.

Every worker in this country—whether a job applicant or employee—deserves the right to be treated fairly in the workplace and judged based upon ability to do the job. The foundation of our civil rights laws is to ensure that all Americans have the opportunity to participate in society, to provide for themselves and their families, and to contribute to the economy.

Unfortunately, far too often workers are not hired, paid less or fired from their jobs because they are a woman, or a pregnant woman, or an African American or have a disability.

The EEOC plays an essential role in ensuring fairness and equal opportunity in the workplace through its enforcement of our federal laws that make it illegal to discriminate against an employee or job applicant because of that person's race, color, religion, sex, national origin, age, disability or genetic information.

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Despite the progress we have made, there is still much left to be done. And I believe there are many issues where Democrats and Republicans can join together to strengthen our civil rights laws.

The Employment Nondiscrimination Act, which I am proud to cosponsor, would prohibit discrimination in the workplace because of someone's sexual orientation or gender identity was recently introduced in both the House and Senate with both Democratic and Republican co-sponsors.

I urge Chairman Walberg and Chairman Kline to work with Representatives Polis and Ros-Lehtinen, the bill's bipartisan sponsors, to bring this long overdue legislation back before the Committee for its immediate consideration.

I would also urge Chairmen Walberg and Kline to work with us on the Protecting Older Workers Against Discrimination Act. This legislation has been modified since it was originally brought before the Committee under Chairman Miller's leadership and is now a bipartisan bill sponsored by Senators Grassley and Harkin in the Senate. I believe we too could find common ground on this bill to protect this nation's older workers.

In addition, the Paycheck Fairness Act, which has been passed twice by this House on a bipartisan basis should be brought up for immediate consideration so that gender-based pay discrimination is finally put on equal footing with our other civil rights laws.

Mr. Chairman, I want to thank you again for holding this hearing. I am confident we can find opportunities to work together to strengthen this nation's civil rights laws. I also want to once again thank Chair Berrien for being before us today and thank her for her dedication and hard work on behalf of this nation's workers.

Chairman WALBERG. I thank the gentleman.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous materials referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce our distinguished witness.

The Honorable Jacqueline Berrien is the chair of the Equal Employment Opportunity Commission in Washington, D.C. Chair Berrien has a distinguished career, including over 15 years of practicing civil rights law. She has served as a program officer for the Ford Foundation's Peace and Social Justice program and the associate director counsel at the NAACP Legal Defense and Educational Fund.

Chair Berrien received her B.A. in government from Oberlin College and her J.D. from the Harvard Law School.

Welcome.

Before I recognize you to provide testimony, I think you know the fire drill with the lights.

Ms. BERRIEN. Yes.

Chairman WALBERG. Yellow light gives you a minute left, and then screech to a halt as quickly as possible at red. But we do want to hear your comments. Our committee will be held to those same 5 minutes.

But without any further information to share, we welcome your comments.

STATEMENT OF HON. JACQUELINE A. BERRIEN, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Ms. BERRIEN. Thank you very much, Chairman.

Mr. Chairman, good morning.

Mr. Chairman Kline, good morning.

Mr. Ranking Member Courtney, good morning, and all members of the subcommittee.

I thank you for inviting me to testify today on behalf of the Equal Employment Opportunity Commission. As I have shared with the staff of our agency many times, including in the visits that I have made to more than half of our 53 offices since my tenure began in 2010, one of my most important responsibilities and greatest privileges is meeting with Members of Congress to share news about agency accomplishments and report on our efforts to serve the public and enforce the nation's laws prohibiting employment discrimination.

I have served as chair of the EEOC since April 2010 together with Commissioners Constance Barker, Chai Feldblum, and Victoria Lipnic. Last week Commissioner Jenny Yang was sworn in as our newest member, so we are now operating again with a full complement of commissioners.

In a few months this nation will pause to reflect on the 50th anniversary of the March for Jobs and Justice, which occurred just a little distance from this building on the Mall. Many years and marches later, that day in August 1963 has such an extraordinary impact on our history and was such an extraordinary moment in this nation that it is still referred to as The March on Washington.

The people who assembled here that day, including my father with me as a toddler in tow, left an indelible imprint on the history of the United States of America—one that I think we are all proud of as a nation.

The EEOC was created less than a year after that march with the passage of the Civil Rights Act of 1964, so I consider it a tremendous blessing and privilege to be responsible for stewardship of the EEOC and its resources today. And I thank you for the opportunity to appear before you today to discuss the plans, challenges, and needs of the EEOC.

Thank you all for your support of the EEOC and its work and I look forward, as I have said in many meetings with individual members of this body over the past few years—I look forward to continuing to work with you and all Members of Congress and all people in this nation who are committed to advancing the mission of the EEOC to end and remedy unlawful employment discrimination.

As I start my testimony, or as I move forward, I would like to just highlight a few things about the EEOC—a few very basic points that I think provide the backdrop for today's discussion.

Despite resource constraints and rising demand for the services of the EEOC, the men and women of our agency have labored mightily and worked diligently to mitigate the impact of the sequester on the people we serve. I greatly appreciate their service and recognize that many workplaces, job seekers, and employers have been positively impacted by the work of the EEOC.

I am pleased to report to you today that over the past 2 fiscal years, despite budgetary constraints and receipt of record numbers of new discrimination charges, the EEOC has been able to resolve more charges than we have received each year.

As a result, the unresolved private sector charge inventory of the EEOC, which some also say—or refer to as a backlog, has been re-

duced. It has been reduced nearly 20 percent since fiscal year 2010. That is a significant accomplishment, and indeed, it is the first time in nearly a decade that the agency has made that progress in resolving charges of discrimination and reducing the number of unresolved charges of discrimination.

As I said to your Senate colleagues during my confirmation hearing, I recognize fully, as one who has been an advocate for and representative of people who have experienced discrimination, that our unresolved charges of discrimination represent potential instances where justice is denied because of delay. So I take very seriously my responsibility and the agency's responsibility to address those unresolved charges, and that is why I made that one of the priorities during my tenure as chair of the EEOC.

But significantly, neither the laws that we enforce nor the priorities—set not only by this commission, but by our colleagues across history of the agency and across parties—have recognized this agency has multiple tools at its disposal to address the continuing problem of unlawful employment discrimination and we have availed ourselves fully of them. And our strategic plan, which was adopted last year, and our strategic enforcement plan, also adopted last year, detail more fully some of the ways that we deploy those resources and those tools that are available to stop and remedy unlawful employment discrimination.

Our strategic plan has three objectives: combating employment discrimination through strategic law enforcement, preventing employment discrimination through education and outreach, and delivering excellent and consistent service through a skilled and diverse workforce and effective systems. We are dedicated and focused, as an agency and as a commission, to ensuring that all of those objectives are met, all with the goal of advancing the very, very important mission of the EEOC.

Our strategic plan communicates to our staff, our stakeholders, and to the general public that we are committed to making the most strategic use of resources, intensifying and enhancing our efforts to prevent unlawful discrimination in the workplace, and ensuring that we serve the public well.

I appreciate this opportunity. I look forward to any questions that you may have—any member of the committee may have about the work of the agency.

And again, thank you for inviting me to testify today.

[The statement of Ms. Berrien follows:]

Prepared Statement of Hon. Jacqueline A. Berrien, Chair, U.S. Equal Employment Opportunity Commission

Good afternoon Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee. Thank you for inviting me to testify today on behalf of the Equal Employment Opportunity Commission (EEOC). The EEOC is a five-member bipartisan commission responsible for the enforcement of federal employment anti-discrimination laws. I have served as Chair of the EEOC since April 2010 with Commissioners Constance Barker, Chai Feldblum, and Victoria Lipnic. I'm pleased to let you know that, just last week, Commissioner Jenny Yang was sworn in as our newest member, so we are now operating with a full complement of Commissioners.

I appreciate the opportunity to appear before you to discuss the plans, challenges, and needs of the EEOC. It has been a privilege to serve as Chair of the EEOC for the past three years, and it is an honor to represent the agency today and in the many meetings with individual members of Congress I have attended over the past few years. Thank you for your past support of the EEOC, and I look forward to con-

tinuing to work with the members of this subcommittee and all members of Congress to advance the mission of the EEOC in the future.

Fiscal realities

Mr. Chairman, before I discuss the agency's plans and accomplishments in greater detail, I would like to provide some context about the current state of the EEOC. I have always considered the careful and thoughtful stewardship of the agency's resources to be one of my chief responsibilities, but that responsibility has become more important given the significant reductions to the EEOC's budget in fiscal years 2012 and 2013.

Our agency, like all federal agencies today, faces many challenges. We are, first and foremost, an enforcement agency with limited resources. We must operate strategically to fulfill our enforcement responsibilities, engage in extensive outreach efforts to promote voluntary compliance, educate the public about the laws that we enforce, and work diligently to serve the public in the most efficient and effective manner possible. I am pleased to report that over the past two fiscal years we have been able to resolve more charges than we have received each year, which has led to a nearly 20 percent reduction in our pending inventory. We have also reduced the average processing time for Federal sector resolutions.

Approximately 80 percent of the EEOC's budget consists of fixed expenses of primarily payroll and rent. An additional 9-10 percent is dedicated to our partners and your constituents in state and local Fair Employment Practices Agencies, also known as FEPAs. Therefore, our fixed costs of approximately 90 percent of the agency's budget leaves us with little discretion to shift additional resources to meet the increasing demands presented by the historically high number of private sector charges and federal sector complaints of discrimination.

Like the rest of the Federal Government, the EEOC is also dealing with the across-the-board cuts required under sequestration. To meet the demands of sequestration, total programs and projects were reduced by 5 percent from the FY 2013 appropriated level, which have required reductions in our programs, as well as employee furloughs of up to eight days. In an effort to reduce the impact on agency operations and staff, we plan to evaluate our budget situation after the first five days of furloughs to determine if the remaining three days are necessary.

Throughout this process we are closely monitoring our operating plan for additional cost savings. There can be no doubt, however, that sequestration has made it more difficult to deliver the services Congress requires and the American people expect of the EEOC. The men and women of our agency have risen to the occasion, but there is no doubt that morale has been impacted. To this end, I have instructed all agency leaders to keep their staff well informed of the sequestration process and do what they can to mitigate the impact of the sequester on our employees and the people we serve. I also want to say here, publically, thank you to all of my colleagues at the agency, especially those on the front-lines in the field, for their great service to this nation.

Strategic vision

A little more than a year ago, the EEOC adopted a new Strategic Plan, which outlines three strategies to advance our mission of stopping and remedying unlawful employment discrimination. Our strategic objectives are:

1. Combating employment discrimination through strategic law enforcement;
2. Preventing employment discrimination through education and outreach; and
3. Delivering excellent and consistent service through a skilled and diverse workforce and effective systems.

EEOC's Strategic Plan communicates to our staff, our stakeholders and to the general public that we are committed to making the most strategic use of our resources, intensifying and enhancing our efforts to prevent unlawful discrimination in the workplace, and ensuring that we serve the public well. It is through a strategic approach that we are striving to build "ONE EEOC"—an agency that operates in a coordinated and seamless manner so that we are responsive to those who need our services and that our efforts have a tangible impact on the workplace.

A strategic approach will also help the agency manage our charge and complaint inventory in the private, public and Federal sectors. Like my predecessor, Chair Gilbert Casellas, who led the Commission in adopting the Priority Charge Handling Procedures in 1995, and Chair Cari Dominguez, who led the Commission in adopting the recommendations of the Systemic Task Force, I have worked together with my Commission colleagues, the General Counsel and agency staff to ensure that we make the best use of available resources. The Strategic Plan furthers those efforts.

The plan was developed with unprecedented opportunities for a wide range of stakeholders, EEOC staff, and interested members of the public to provide input.

We have continued to engage the public as we have entered strategic plan implementation, including during last year's development of the Strategic Enforcement Plan and currently the Quality Control Plan for Investigations and Conciliations.

Although the EEOC is in the early stages of implementing the new Strategic Plan, as detailed in our Fiscal Year 2012 Performance and Accountability Report, we have already begun to make meaningful progress toward more strategic and focused use of our resources.

Strategic enforcement

A key example of our progress is the Commission's adoption of the Strategic Enforcement Plan. Informed by staff and public input and in keeping with our belief that we will execute our mission more efficiently and effectively by targeting specific issues of discrimination where federal enforcement is needed most and will have the greatest impact, the Commission identified six enforcement priorities:

1. Eliminating barriers in recruitment and hiring;
2. Protecting immigrant, migrant and other vulnerable workers;
3. Addressing emerging and developing issues;
4. Enforcing equal pay laws;
5. Preserving access to the legal system; and
6. Preventing harassment through systemic enforcement and targeted outreach.

These priorities were reflected most recently in the EEOC's successful litigation against Henry's Turkey Service. Our agency secured a historic $240 million jury award for a group of 32 men with intellectual disabilities who were subjected to severe abuse, segregated housing, and other forms of harassment and discrimination over the course of more than two decades. This is the largest award in the EEOC's history and is the second largest award ever in an employment discrimination case. It took years for our staff to investigate and successfully litigate this case, but because of that tenacity, we were able to restore the dignity of the workers in this case and send a strong message to all that the unlawful conduct in this case will not be tolerated in the United States. We were able to vindicate the right to work free from unlawful discrimination for all.

The EEOC is also working collaboratively with other Federal agencies, including the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and the Department of Justice's Civil Rights Division. EEOC has strengthened its longstanding Memorandum of Understanding with OFCCP to promote greater efficiency and coordination in support of the agencies' shared mission of ensuring equal employment opportunity under Title VII of the Civil Rights Act of 1964 and Executive Order 11246. EEOC is also partnering with DOJ to more effectively investigate violations of federal equal employment laws by state and local employers.

Maximizing impact

At many points in the EEOC's history, the agency has prioritized directing agency resources to prevent and remedy practices that adversely impact many workers and job seekers. With the adoption of the Systemic Task Force's recommendations in 2006, the EEOC renewed its emphasis on systemic enforcement—those cases that involve policies or practices that affect multiple employees, an entire industry, an occupation, a profession, or an entire geographic area. While systemic cases are highly complex and resource-intensive, they typically affect a large number of employees or job-seekers directly. By increasing public awareness and changing company policies and industry standards, these cases also have indirect effects on untold numbers of others.

To this end, both the Strategic Plan and Strategic Enforcement Plan reiterate the importance of systemic enforcement of priority issues. In FY 2012, the EEOC resolved 240 systemic investigations, securing monetary benefits of $36.2 million for 3,813 individuals.

Examples of systemic resolutions achieved through the conciliation process include a $5.4 million settlement for a class of women in Texas, Louisiana, Mississippi, Alabama, and Florida who sought, but were denied employment as temporary workers for the oil spill response in the Gulf during 2010. Another successful conciliation involved Pepsi Beverages (Pepsi), in which the company agreed to pay $3.13 million and provide job offers and training to resolve a charge of race discrimination. Based on the investigation, the EEOC found reasonable cause to believe that the criminal background check policy formerly used by Pepsi discriminated against African-Americans in violation of Title VII. Pepsi agreed to modify its background check policy and to report to the EEOC concerning implementation of its new policy.

The agency has also seen continued success in its systemic litigation program. In the last fiscal year, the EEOC resolved 21 systemic cases, four of which included

at least 50 victims of discrimination. Just last month, the EEOC settled a systemic hiring discrimination case against Presrite Corporation for $700,000 and job offers for over 40 women. The lawsuit alleged that Presrite, a Federal contractor, consistently passed-over female applicants in favor of less-qualified males for entry-level positions at three Ohio plants.

The largest litigation monetary recovery of FY 2012 was in EEOC v. Yellow Freight, where the EEOC secured an $11 million settlement for 300 victims of a racially hostile work environment at the Chicago trucking firm. Numerous employees complained to the company about hangmen's nooses being displayed, racially offensive graffiti in the workplace, and other forms of race-based discrimination. Nevertheless, the company failed to correct these problems. In addition to obtaining monetary recovery, the settlement requires the company to retain consultants to examine its discipline and work assignment procedures and recommend changes to prevent unlawful discrimination in the future.

In addition to prioritizing systemic enforcement, the Strategic Plan also sets forth a measure to ensure that more of our conciliations, consent decrees, and legal resolutions benefit not only the charging party but also current and future employees and job applicants by including equitable relief designed to end and prevent the recurrence of discrimination.

Prevention through education and outreach

In addition to traditional forms of administrative and legal enforcement, strategic law enforcement also requires consistent and innovative education and outreach efforts aimed at raising awareness amongst employers, employees, and job seekers about their rights and responsibilities under the laws the EEOC enforces. These efforts encourage voluntary compliance and are another cost-effective way to have the greatest impact on the workplace.

To this end, prevention of unlawful discrimination through education and outreach is now clearly identified as a top priority for the agency in the Strategic Plan and Strategic Enforcement Plan.

The agency is currently targeting outreach to vulnerable workers and underserved communities and to small and new businesses. The agency is also working quickly to update our guidance and other documents on the requirements of employment antidiscrimination law and make those materials more accessible and user-friendly to non-legal audiences and the general public.

Again, though we are in the early stages of Strategic Plan implementation, we have already made significant progress in enhancing our outreach efforts. For example, even before the new plan took effect, I asked Commissioner Constance Barker to lead a Small Business Task Force. Already, the task force has identified mechanisms to improve our outreach to small businesses.

Moreover, in the Federal sector, the EEOC issued two significant reports on the barriers facing African Americans and Asian American and Pacific Islanders in Federal employment to educate employees and managers about particular issues for these communities.

Finally, the members of the Commission, the General Counsel, and many employees of the EEOC participate in events across the country in a continuing effort to inform the public about the laws that we enforce. In Fiscal Year 2012 alone, agency staff reached more than 350,000 people in thousands of no-cost and fee-based events held across the country; Commissioners Chai Feldblum and Vitoria Lipnic made joint presentations on the Americans with Disabilities Act to audiences in Seattle, Miami, Boston and Los Angeles; and all Commissioners and the General Counsel addressed bar associations, continuing legal education programs, and other events throughout the nation. Agency leadership also presented at EEOC-sponsored training programs.

Serving the public more efficiently

The third objective of the Strategic Plan is providing excellent service through a diverse and skilled workforce and effective systems. In this objective, we recognize the importance of ensuring that agency staff are equipped and prepared to deliver excellent service. This objective recognizes that the EEOC should strive for continued improvements in the timeliness and quality of enforcement activities in the private, state and local government, and Federal sectors.

One of the agency's greatest challenges has been, and continues to be, resolving discrimination charges filed by private and Federal sector employees and job seekers promptly, while at the same time ensuring that the rights of the charging parties and respondents receive appropriate attention and respect. Moreover, one of the overriding concerns among stakeholders has been improving the quality and efficiency of EEOC investigations. To address this concern, the EEOC's Strategic Plan

calls for the creation of a Quality Control Plan for investigations and conciliations. The agency is currently developing this plan, and we have again solicited public input concerning improvements in the quality of service provided by the agency and engaged a diverse group of employees in advising the Commission. We expect a plan to be approved by the Commission this year.

Effectively managing and ultimately reducing the inventory of unresolved charges remains an important goal for the EEOC. As noted earlier, since 2010, with the benefit of renewed investment in the staffing, training and technological needs of the EEOC, we have achieved a nearly 20 percent reduction in our inventory of unresolved charges. Moreover, the agency is no longer addressing this issue as a short term or episodic problem and is, instead, working to enhance and reinvigorate existing systems to address this challenge on a sustained basis. The adoption of our Strategic Enforcement Plan will also assist agency leaders and staff in the expeditious management and resolution of private sector discrimination charges by streamlining the number of priorities. While furloughs necessitated by sequestration will impact the Commission's continued ability to slow the growth of our charge inventory in the short-term, setting clear priorities provides guidance to staff, helping them focus and expedite investigations, which will more effectively manage our charge inventory over the long-term.

Finally, with respect to improving customer service, the EEOC's Strategic Plan requires the Commission to make use of technology to improve communication by allowing the public to submit and receive more information electronically. As we have heard from employees and employers, streamlining the private sector charge filing system and making information about the status of pending charges accessible electronically will serve the interests of workers, employers, and the EEOC as we seek to make the best possible use of scarce resources.

The EEOC continued its focus on expanding the use of technology to make the Federal hearings and appeals process faster and more effective. We have implemented an electronic file system, which is designed to allow Federal agencies the ability to securely submit electronic reports of investigation, complaint files, and other documents to the EEOC in support of the Federal hearings and appellate processes. This system is now available to all Federal agencies for their use in transmitting documents electronically to the EEOC. Currently, there are 21 parent agencies and 47 sub-agencies utilizing this technology for electronic document submission and receipt.

Moving forward

Despite these accomplishments, our rebuilding efforts are incomplete and the progress is fragile. Given the agency's varied enforcement responsibilities, we are constantly challenged to meet the growing public demand for the services we provide. We are mindful of the need to identify ways to reduce spending and have worked diligently to cut costs that will not compromise or undermine our ability to fulfill our mission. EEOC employees have worked to improve operations, provide better service to the public and more effectively and efficiently enforce the Federal laws prohibiting employment discrimination.

The EEOC requested a budget of $372.9 million for FY 2014, an increase of $12.9 million from the FY 2012 appropriations. These resources are vital to maintaining the progress made in rebuilding the EEOC's enforcement capacity. Our FY 2014 request will allow us to make continued progress on the charge inventory and in carrying out the agency's critical work and priorities, including serving the public more efficiently and effectively and seeking to prevent discrimination through enhanced education and outreach.

The EEOC is moving forward despite the fiscal challenges and demands we face. The agency is on track in implementing the goals of its Strategic Plan and making meaningful progress towards becoming "One EEOC."

Thank you for this opportunity to highlight some of our recent accomplishments, all of which are helping us to achieve our mission to stop and remedy unlawful employment discrimination. I look forward to working with you in the future and will be happy to answer any questions that you may have.

Chairman WALBERG. Thank you, Ms. Berrien.

And now will open for questions from the committee, and I recognize myself for 5 minutes of questions.

As I mentioned in my opening comments, I am particularly concerned about the delegation of litigation authority to the general counsel of the EEOC. The December 2012 Strategic Enforcement

Plan delineated a list of situations in which a decisive—or—which a decision to commence or intervene in litigation must be brought to the commission for a vote.

Specifically, I am concerned commissioners cannot force an opportunity to vote and there is no checks and balances system to ensure the full commission votes on important cases, especially considering EEOC's recent high-profile litigation losses. Do you share these concerns? And if not, how can we be comfortable that the commission is not just a commission in name only?

Ms. BERRIEN. Chairman Walberg, I believe you were quoting from our Strategic Enforcement Plan adopted in December of 2012, and I want to reinforce that—and underscore that that was adopted by a bipartisan majority of the commission—members of the commission, so what is reflected there is not only my view but it is the view of a majority of members of the commission.

With that background, I would say several things. First of all, as you have noted, the Strategic Enforcement Plan does refer to the 1995 delegation of authority to the general counsel of the agency and does continue that basic delegation, which was adopted together with the priority charge handling procedures and other systems intended to streamline the work of the agency and make sure that we were more effective in using the resources that we had.

Certainly at this time, as the commission considered the input from more than 100 members of the public, institutions, representatives of employers, a wide range of agency stakeholders, we heard from them about a range of subjects including the issue of delegation and considered some of the recommendations that were made concerning the delegation of authority, and as a result, some changes were made but the basic delegation of authority remains.

The general counsel of the agency has, as I was and as all of our colleagues of the commission were, was nominated by President Obama and confirmed by the Senate. He conducts litigation on behalf of the commission. And as the Strategic Enforcement Plan provides, he reports regularly on the conduct of that litigation.

It should be noted that our litigation program in this fiscal year has an over 90 percent success rate in its litigation. I believe we have done 8 of 9 trials this year and we have succeeded.

And so I do believe it is important to look at the instances where we have lost a case in light of the overwhelming success of our——

Chairman WALBERG. Some of those losses were significant financial losses and were brought to the attention that they were really beyond what we should be expecting. And I guess that, again, goes to my question about what hands-on direction the commission is actually giving if, indeed, the counsel is making so many decisions and we have a 70,000 case backlog, why we are going after some of these that end up very clearly with huge, huge losses to the taxpayer.

Ms. BERRIEN. I don't in any way mean to understate the significance of any loss because, of course, ultimately in a case where we have pursued litigation and lose, there are people who are affected by that decision. So I don't take that lightly at all, as well as the resources of the agency at stake.

Chairman WALBERG. Let's jump to one of those. It was Washington State against—a case in Washington State against Evans

Fruit Company. The first case resulted in unanimous jury verdict for the employer—unanimous. The second case was dismissed before it even got to trial.

What internal steps does the EEOC plan to take to assess the reasons for these types of high-profile failures? And second, do you agree that an employer who successfully defends EEOC claims through a jury trial should have its attorney fees reimbursed by the EEOC?

Ms. BERRIEN. Well, I believe the existing law is clear about when and how an employer can recover fees, and employers that believe they are entitled to fees have sought them. In some instances they have obtained awards of fees; in many instances they have not. So we respect and adhere to whatever the existing law is on that point.

In the specific case of Evans Fruit, there is also one aspect of the case that we are currently seeking reconsideration by the judge, and that is a retaliation claim. And the jury verdicts that you have noted, we will ultimately examine whether there is any basis for taking an appeal, but that decision has not been made yet. It would be premature.

In terms of the commission and the commission's input, there are several things that are in the Strategic Enforcement Plan that specifically go to your question of, does the commission have appropriate involvement and engagement in how the resources of the agency are used in litigation? As I have indicated, the general counsel does report regulatory to the commission. That is reaffirmed in the Strategic Enforcement Plan.

In addition, one of the provisions of the Strategic Enforcement Plan is that at least one case from each of our districts will come to the commission for consideration, and some of the major cases of the commission, of course, already come to the commission, given that there are a number of criteria set out in our National Enforcement Plan previously and now Strategic Enforcement Plan that indicate that matters of significant financial consequence or that will demand significant resources of the agency or they could generate significant public attention or publicity among others should come to the agency, as well as those that involve novel applications of law or new and potentially new statutes, as well.

Chairman WALBERG. Well, thank you. My time has expired.

I now recognize my ranking member, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman. You know, listening to the exchange a moment ago I was reminded of my father, who was a trial lawyer for almost 50 years—lifelong Republican—and used to say when I was starting out as a young lawyer that any lawyer who tells you they have won every case is a lawyer that has never tried a case. And, you know, it is kind of nature of the business is that, you know, no one—there is—you know, no one bats 1,000 in the system.

Obviously, if there is, you know, losses it is something that we all need to be concerned about and learn from those results, and I am sure, you know, the commission takes that responsibility seriously.

Again, in your opening comments you talked about the backlog reduction, which is, in my opinion, quite impressive—20 percent

since 2010. And again, the inflow of cases, though, which is happening at the same time that you are trying to address older cases—again, according to the statistics staff has given me it is about 100,000 cases a year. Is that correct?

Ms. BERRIEN. That is correct.

Mr. COURTNEY. And really, logistically, you know, it would be impossible for the commission to sort of scrutinize every single one of those cases. I mean, the fact is that you have to have systems in place where your professional staff is out there investigating and making decisions about this disposition. Isn't that pretty much how it runs every day?

Ms. BERRIEN. Absolutely. As dedicated as the members of the commission are, there is no way that we can consider or review 100,000 charges of discrimination.

We are very fortunate to have a very dedicated professional staff that conducts investigations, that mediates charges of discrimination, that conciliates, and that litigates where necessary, as well as engaging in extensive outreach and public education.

Mr. COURTNEY. And you mentioned 9 cases that went all the way to verdict just a moment ago, in terms of, you know, some of the success rate——

Ms. BERRIEN. Yes, in this fiscal year.

Mr. COURTNEY. The cases that go that far, again, are almost an infinitesimal fraction of the 100,000 cases that come in. I mean, you are out there trying to negotiate and resolve cases, otherwise you would drown.

Ms. BERRIEN. Absolutely. And in fact, in our latest discussion of conciliations, for example, we saw that 40 percent of the matters that reach the point of conciliation are successfully conciliated. So those matters never reach litigation, for example.

Our mediation program, which is very well received and highly regarded, I think, across the spectrum of the bar resolves successfully thousands of cases or charges of discrimination every year and recovered a significant amount of relief for people who were victims of discrimination in the past year.

So we certainly use mediation, conciliation, and in the course of our investigation, when and if we determine that there is no merit to a charge of discrimination, the last thing that anyone in this agency, particularly given our limited resources, wants to do is to waste any of those resources by continuing a meritless investigation.

Mr. COURTNEY. Right. And you issue reports to sort of break down on a regular basis in terms of what the, you know, the results are?

Ms. BERRIEN. Yes, we do. And we also provide an annual report, the Performance Accountability Report, to this Congress every year.

Mr. COURTNEY. Thank you.

Well, so in terms of trying to grapple with, again, the backlog, the inflow of new cases, you know, the hard work to go out and resolve in as many cases as you can, I mean, obviously that is—relies a lot on your staffing and the individuals. Sequester is now in full swing since March 1st. Congress can turn it off if we can come together with an agreement, just like prior Congresses did when

Gramm-Rudman sequester went into effect in the 1980s and 1990s, but nonetheless, we are not there, apparently, at this point.

Can you talk a little bit about how you are handling sequester, particularly in terms of your staffing, furlough days, layoffs?

Ms. BERRIEN. Yes. Well first of all, to put context to this, in 1980 the staffing of this agency was nearly 1,000 people more than it is today. In 1990 the staffing of the agency was approximately 500 people more than it is today.

Nevertheless, since 1990 the agency has jurisdiction now to enforce two additional statutes—the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act—in addition to the prior authorizations to enforce Title VII of the Civil Rights Act, the Equal Pay Act, and the Age Discrimination in Employment Act.

So our jurisdiction has grown; the number of charges of discrimination have, for the past several years, been at an historic level of approximately 100,000. During that same period our funding has decreased significantly; our staffing has decreased significantly. Today we have approximately 2,300 staff. Last year we instituted a hiring freeze in order to achieve the cost savings that were necessary to meet our budget last year.

And in this year, despite efforts to cut other areas of our budget, we were unable to make the savings that were required by the sequestration so we are furloughing our employees. At this point we have called for 5 days of furlough; if necessary, an additional 3 days are provided in our notice to furlough. So it has had a real impact on our workforce and we fear it will have a real impact on our ability to make further progress towards fulfilling our mission.

Mr. COURTNEY. I think my time is expired so I will yield back, but thank you for that important perspective.

Chairman WALBERG. Thank you.

And I now recognize the chairman of the full committee, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman.

Thank you, Madam Chair, for being here. It is nice to see you.

Ms. BERRIEN. Thank you.

Mr. KLINE. I very much appreciated that you made the trip up. We had an opportunity to chat just a couple weeks ago——

Ms. BERRIEN. Yes.

Mr. KLINE [continuing]. So thank you very much for that.

I am very sensitive to the 5-minute clock, and so I want to pursue a line of questioning sort of quickly here. Picking up, we discussed this a little bit in the office, and that is the issue of partnership agreements and the definition of "employee" under federal nondiscrimination law that—over which you have jurisdiction.

Many partnerships in the legal and accounting professions have voluntarily adopted mutually agreed upon policies for their retirement, for example. Now, there is no question that in one of these firms that there are employees that are clearly covered by nondiscrimination laws, including the Age Discrimination in Employment Act—the ADEA—but I am not entirely convinced that when Congress created the ADEA they had in mind—we had in mind applying this law to prevent law firm and accounting partners, who are highly educated—or so they tell me—and well compensated

from voluntarily organizing as they see fit, including adopting retirement policies that they view to be in their best interest.

So the questions that I have are these, and I will just give them all to you and then you can sort of respond to them in—in a group: Can you tell us whether or not the commission intends to make these mutually agreed upon retirement policies in the legal and accounting professions a focus of its enforcement efforts? Two, in light of the Supreme Court precedent governing the legal treatment of partnerships, wouldn't you think it best for the commission to come to Congress for any changes in the law that you might think should be required?

And then, as we have already started discussing in this hearing this morning, given the commission's resource constraints, doesn't it make more sense to focus on truly vulnerable workers and leave challenges to partnership retirement policies to individuals? I mean, we have already talked about the backlog and how much work you have got to do, and yet, I understand that the commission is looking at some of these arrangements. It just strikes me that in a period of scarce resources that might not be the best use of your resources.

Those are the questions.

Ms. BERRIEN. Okay. Thank you.

Well, first of all, I would like to note that there are six enforcement priorities identified in our Strategic Enforcement Plan, which was adopted in December, and it includes exactly the areas—some of the areas that you have mentioned, including protecting immigrant, migrant, and other vulnerable workers, eliminating barriers in recruitment and hiring, addressing emerging and developing issues, enforcing equal pay laws, preserving access to the legal system, and preventing harassment through systemic enforcement and targeted outreach.

I believe the case you are referring to is the Clackamas Gastroenterology Associates case, and what that case provides——

Mr. KLINE. Let me interrupt. I don't want to tie it to a specific case. There are a number of instances here, so we can leave the specifics of a case out. It is in general——

Ms. BERRIEN. I am sorry. I meant the Supreme Court decision you were referring to.

Mr. KLINE. Go ahead.

Ms. BERRIEN. I am sorry. If I misunderstood you please let me know.

But the Supreme Court's decision in Clackamas Gastroenterology requires that basically the way that a partnership is viewed for purposes of application of the antidiscrimination laws may vary from case to case. So in the course of an investigation concerning a possible claim of discrimination against a person who is a partner in a firm, we are bound, in part by that Supreme Court decision, to examine the circumstances and determine whether and how the antidiscrimination——

Mr. KLINE. Excuse me again. The time is about to expire.

In some of these cases there has been no complaint and you are looking into that arrangement, and it just strikes me again that that was not the intent of Congress when talking about employees and protection and nondiscrimination. We weren't talking about

lawyers making huge piles of money, and accountants and so forth, who are in a different position than their employees. And yet, I understand that the commission is proactively looking in some of these cases and I am just wondering why that would be.

Ms. BERRIEN. Well, certainly, Congressman, the need for us to consider all of the relevant factors in making a decision about whether to litigate a case or even to pursue a directed investigation might include whether or not the law will be adequately enforced by private attorneys general, which is certainly part of what all of the statutes that we enforce envision or contemplate, that the private bar or private attorneys general may be well suited to pursue certain claims. And in our Strategic Enforcement Plan we have recognized that.

That said, without reference to a specific set of facts or a specific investigation, I would have to say that even under existing law an examination of the facts that apply to the business arrangements or the partnership agreements is necessary under the Clackamas Gastroenterology Associates case. I can't say that there are no cases involving partners where there might be a instance of discrimination that would warrant or be appropriate for the exercise of the commission's jurisdiction.

As I think you have recognized, without addressing any specific facts, I think the answer is broadly we would have to look in an investigation at whether or not, under Clackamas, that particular partnership would qualify as an employer for purposes of the statute.

Mr. KLINE. That is the reason why I am not a lawyer. I can't even pronounce the Supreme Court case name.

But I am concerned. I don't think that got to the issue I was trying to get to. Perhaps we will be able to pursue it later.

My time is more than expired, and I yield back.

Chairman WALBERG. I thank the gentleman.

There are plenty of lawyers. We are glad for colonels.

I now recognize for 5 minutes of questioning, Ms. Bonamici?

Ms. BONAMICI. Thank you very much, Mr. Chairman.

And thank you for being here, Chairwoman Berrien.

Guilty—I am one of the lawyers. And I wanted to align myself with the comments Mr. Courtney made about the legal system and the need to analyze cases, and sometimes you win, sometimes you lose. I think maybe Perry Mason didn't lose a case. But for the most part there are risks involved, and I know that the EEOC takes steps to analyze cases before you bring them forward.

I wanted to talk a little bit about one of the priorities that you have identified in your Strategic Enforcement Plan, which is eliminating barriers in recruitment and hiring, and I know that one of the things that the EEOC has discussed is discrimination against the unemployed. There are a lot of people out there still who have lost jobs through no fault of their own, and getting them back to work is something that we all talk about here in Congress.

But several states, including my state of Oregon, have passed legislation limiting the use of credit reports in employment. It is especially timely because so many people who did lose jobs, through no fault of their own, faced some financial difficulties, and when employees are not hiring prospective employees because ei-

ther because they are unemployed or because something on their credit score, it only exacerbates the difficulties faced by people who are trying to get back to work.

And in the states—I believe there are about eight states now who have passed legislation limiting the use of credit in employment—of course, there are exceptions made for industries where that is relevant—and I wonder, Chairwoman, if you have looked into whether that practice tends to disproportionately impact minorities and women and what steps, if any, is the EEOC taking to prevent employment discrimination based on the unemployed status or on credit history?

Ms. BERRIEN. Thank you.

Actually, we have looked at both of those practices as a commission in public meetings of the commission. In the first year or so of my tenure at the commission, we conducted approximately a half a dozen commission meetings on barriers to hiring and recruitment, and we were particularly sensitive to several things: one, the fact that a large number of people would be seeking or—seeking to return or enter to the workforce in the first place, and we tried to look at practices that might affect that group. So we looked, for example, at the impact of the economy on older workers and some practices that affect older workers.

We also conducted a public meeting on employers' consideration of credit information and history as a potential barrier to employment and recruitment. And in fact, I believe that some of the local laws that have been introduced or passed in the months since then have actually drawn on the record of the meeting that we conducted and the testimony that witnesses presented.

We also conducted a meeting on unemployment or unemployed status as a potential barrier to employment for job seekers. And in every instance we were interested in determining whether and to what extent there was a disparate impact on any particular group.

In some instances I think we broadened our look so that we were not only addressing those who might be the obvious potential groups impacted, but also those who may not. For example, when we conducted our meeting on credit we did have someone testify on the impact of this practice for women. When we conducted a meeting on the unemployed status we looked at the practice's impact not only on African Americans but also on other groups that could be impacted, including older workers.

So I think through our meetings we have brought information into the public sphere that is helpful in those instances where states and localities have tried to pursue, as well as looking at our own charges of discrimination and, where appropriate, investigating if we believe there is a disparate impact or disparate treatment.

Ms. BONAMICI. Thank you. And in just the remaining time, I know the EEOC enforces the Equal Pay Act, which has been the law since the 1960s. I support the Paycheck Fairness Act. I hope we can pass that.

But why is it since equal pay for equal work has been the law since the 1960s is it the case that women only make about 77 cents to the dollar that men make?

Ms. BERRIEN. I don't know if I am the best person to answer the why, but I can say that that is a real priority for us to close that gap once and for all, and I think we have made some significant progress in doing that. We have litigated a number of cases successfully challenging pay disparities—not only pay disparities affecting women, but in some cases pay disparities affecting other groups. And we will continue, along with our enforcement partners in the federal government who are part of the Equal Pay Enforcement Task Force, to work to close that gap.

Ms. BONAMICI. Thank you. My time is expired.

I yield back. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentlelady.

And I recognize a doctor on the committee, Dr. Bucshon.

Mr. BUCSHON. Good morning.

A couple of things. First of all, I strongly believe all workers deserve strong protections against employment discrimination, and I thank you for your work in that area.

A couple things that I am intrigued by, though, is, does it require a criminal background check or drug testing to be employed by the EEOC?

Ms. BERRIEN. We are subject to the same standards that are set out by the Office of Personnel Management——

Mr. BUCSHON. So it is yes or no.

Ms. BERRIEN. We have at times—I am not sure that we have required drug tests, but criminal background checks, depending on the nature of the position, may be required.

Mr. BUCSHON. Okay. And can I ask, did you have to have a criminal background check on yourself or a random drug test before you were appointed to get appointed to your job?

Ms. BERRIEN. I certainly did not have a random drug test, although—and as far as a criminal background check, I was subject to the FBI clearance and check that I believe all Presidential appointees are.

Mr. BUCSHON. Yes. And do you think—do—in that vein, do you think that it was important for you to have a criminal background check before you were appointed to you current position? Why would that be applicable to you?

Ms. BERRIEN. Well, I would say this: I want to make clear that the guidance that the EEOC adopted does not prohibit any employer—federal government, state or local government, or private employer—from conducting a criminal background check. What is relevant under existing law—and this has been determined by federal courts—is how those results are used and whether or not the check—whether or not the results are related to the job in question. And in that case, I believe I was subject to the same practice that is provided for in the guidance that we have adopted.

Mr. BUCSHON. Thank you. Because we hear all the time, "Well, Congress passes laws that don't apply to them," but it seems to me that, you know, not being overly critical, that if you required a criminal background check to get your appointment or Presidential appointees require criminal background checks, I don't really see the applicability in those other than political implications, I will be frankly honest with you, and I think that is where I have some difficulty with the guidance where an employer, based on what they

determine is appropriate, can conduct a criminal background check regardless of what type of employment—and I see it as an overreach. That is just one of my things.

Now, do you know—do you consider drug use or alcohol abuse to be a disability?

Ms. BERRIEN. There have been cases that have determined—federal cases that have determined that under certain circumstances not drug abuse or alcohol use but a history of alcoholism, for example, has been determined in some cases to be a disability.

Mr. BUCSHON. Yes. And I can't totally disagree with that. I have personal family reasons to agree with you. And as a medical doctor I realize that these can be classified as diseases and can be considered a disability in some instances.

And the reason I ask that is the U.S. Steel case, which you lost so far—do you know how much U.S. Steel pays in workman's comp payments per year by chance, or what their liability insurance is for their employees? Just a——

Ms. BERRIEN. I can't give you a figure, but I am sure it is substantial.

Mr. BUCSHON. So why would the EEOC continue to litigate a case when it seems to me U.S. Steel is protecting not only the employee and surrounding employees around them—litigate a case that clearly, if that employee, for example, made a mistake and killed another employee or that they would be open to litigation from the employee's family, they would be open to litigation from all kinds of sources, plus—or they injured another person and the company ended up paying workman's comp payments for years or the federal government had to pay disability payments forever.

Why would the EEOC pursue a case when it is pretty clear that, you know, if you are working in a dangerous environment, in my personal view, it is not inappropriate for people to know the status of the employee not only for their own protection but for the protection of their surrounding employees and the company as it relates to liability, and that would be my question. Why would you disagree with that?

Ms. BERRIEN. Well, Congressman, I am not sure that I would disagree with your premise. We certainly recognize that health and safety rules and regulations are a part of the backdrop for some of the laws that we enforce. And similarly, with our arresting and conviction guidance, we certainly and expressly recognize that concerns about employee health and safety or customer safety, among other factors, could be relevant to an employment decision. So I don't think we disagree about that.

Mr. BUCSHON. Okay. Do you think that if a person comes to be employed—an unemployed person, and a company has—I see my time is expired.

I will yield back. Thank you.

Chairman WALBERG. I thank the gentleman.

I would ask unanimous consent that Representative Susan Brooks of Indiana, and a member of our full committee, be allowed to participate in today's hearing.

Without objection, Representative Brooks, you are recognized for 5 minutes. Welcome.

Mrs. BROOKS. Thank you, Chairman.

Hello, Chair Berrien. Nice to——

Ms. BERRIEN. Good morning.

Mrs. BROOKS [continuing]. Be with you today.

I am going to follow up a little bit on a line of questioning from Congressman Bucshon, because I am a former United States attorney, but similarly—or I have also been involved in the criminal justice system as a criminal defense attorney my entire career, so I have been in the criminal justice system until most—until the last half a dozen years, and criminal background check issues have always been an issue not only for those, you know, coming out of the criminal justice system but particularly for employers who are looking to hire and making those important hiring decisions.

And I know that the EEOC did finalize its criminal background check guidance with—but it was, from my understanding, without a regard for the directive proposed by the Senate Appropriates Committee that the guidance was supposed to have been circulated for public comment at least 6 months before adoption. And it is my understanding that the report language accompanying the enacted fiscal year 2013 C.R. directed the EEOC to report to the Appropriations Committee the steps taken by the EEOC to alleviate that confusion caused by the criminal background check guidance.

Can you please provide for this committee an update on how the EEOC's—what is the progress in complying with this directive? And if you could please expand and share with me—and I am sorry I didn't get here on time—more information about the criminal background guidance and what the response was to the Senate Appropriations directive.

Ms. BERRIEN. Of course. So we will obviously comply with the Senate Appropriations Committee directive; the date for doing so has not arrived yet.

Mrs. BROOKS. And I am sorry, what is that date?

Ms. BERRIEN. I believe the committee—that report language came out approximately a month-and-a-half ago; I believe we have another month, more-or-less, to provide that information. We certainly will do that in a timely manner and we certainly are going to be prepared to do that.

But I can certainly share with you broadly several things. First of all, the guidance that we adopted in April of 2012 was an update of guidance that had actually been in effect since the 1980s. It was initially adopted when Chair Thomas was at the agency; it was reaffirmed when Chair Kemp was at the agency.

We believe, though, that for several reasons, because a court had indicated that additional support for the guidance would be useful, because of the burgeoning number of instances where background checks are conducted not only by screening or other firms but now increasingly it is possible for one to use online or other services to conduct background checks, because of the larger number of people—and I do want to make a distinction here.

Our guidance concerns employer consideration of arrests and convictions, and from the passage of the first guidance in the 1980s the agency has always distinguished between arrests and convictions, given that arrest and the information underlying an arrest is not subject to the same standards nor is it the same quantum of proof as a conviction, so I do want——

Mrs. BROOKS. Excuse me, Madam Chair, but is—in the guidance are arrests subject to an employer being entitled to see arrests?

Ms. BERRIEN. An employer can request arrest or conviction records, but the guidance, as it has since the 1980s, indicates that a record of arrest is not entitled to the same weight or should not lead to the same consequences as a conviction record.

Mrs. BROOKS. Because there is a very different standard for a conviction versus an arrest.

Ms. BERRIEN. Exactly.

Mrs. BROOKS. But an employer is still entitled to receive a list or request from a employee what you have been arrested for——

Ms. BERRIEN. An employer can correct—can request that.

Mrs. BROOKS [continuing]. And then what they have been convicted of. And so what is the new—what is the change that was made and what was the commission's—what happened in the 6-month public comment period?

Ms. BERRIEN. Well——

Mrs. BROOKS. Was there a 6-month public comment period?

Ms. BERRIEN. Actually, there were several opportunities for the public to weigh in on this subject. The commission conducted public meetings before I arrived, actually, under the leadership of Chair Earp, on arrest and conviction as a barrier to employment——

Mrs. BROOKS. And I know—I certainly am aware that there is, but was there a 6-month public comment period?

Ms. BERRIEN. It was not treated like notice and comment rulemaking, absolutely—so it was not published for comment in the Federal Register, nor do we believe it needed to be.

Mrs. BROOKS. And so we will, then, in a month or a month-and-a-half, when you said we will be able to receive what the EEOC's response is to that directive at that time?

Ms. BERRIEN. We will absolutely make that submission to the committee that is required.

Mrs. BROOKS. Thank you. Can you let me know—so many state and local laws require employers to conduct criminal background checks, so state and local laws may be in conflict with what the directive is. Is that a possibility?

Ms. BERRIEN. Well, we recognized that in the guidance and we did discuss that. But in fact, it is not the guidance that creates that conflict; it is actually the law itself, which indicates that as federal law is, Title VII recognizes the supremacy of federal law.

However, the commission is aware that there may be instances where in order to comply with federal law a background check may be required and that that may warrant an exclusion or a decision in a particular case to exclude an employee. I think there certainly is the opportunity in the course of an investigation to present that if that ever occurred. But we have addressed that in the guidance.

Mrs. BROOKS. And I have one last question, if I might, Mr. Chair.

Chairman WALBERG. Without objection.

Mrs. BROOKS. Thank you.

So can you please provide for us how EEOC can assure employers that are either faced with the EEOC guidance or with the state and local law that they are not going to be subject to litigation? I mean, if the state and local law is in—is, you know, in conflict with

your guidance, which law is, in your view and in the commission's view, should the employers be following?

Ms. BERRIEN. Well, there would never be a case where our guidance prohibits an employer from conducting a background investigation, so if—and that is often the case with state and local laws. If the state or local law says, "In order to work in this setting you must be subject to a background investigation," there is nothing in this guidance that would prohibit that.

The issue that the guidance addresses in great detail is what the standards are when an employer, if based on information they obtain in the guidance, makes a particular employment decision. And if the defense or the justification is that a state law requires exclusion of all people with a particular conviction, I think that would obviously be relevant to a determination that the commission would make about what steps would need to be taken next.

Mrs. BROOKS. But the commission is allowing employers to determine certain categories of crimes and convictions that would preclude employment. Is that correct?

Ms. BERRIEN. Absolutely. And that is provided for in the guidance.

Mrs. BROOKS. Okay.

Ms. BERRIEN. Then that, though, would assure that a person could not bring a suit or would not bring a charge of discrimination, so we can't provide for that.

Mrs. BROOKS. Certainly.

Ms. BERRIEN. We would have to make the determination based on all the facts at the time.

Mrs. BROOKS. Thank you very much.

Ms. BERRIEN. Thank you.

Mrs. BROOKS. I yield back. Thank you for the additional time.

Chairman WALBERG. I thank the gentlelady, and appreciate the questions and the responses.

Definitely one committee hearing is not sufficient to get to the issues to understand, and I think that assures us that there will be opportunities for the future.

I now recognize the ranking member for any closing comments he would like to make.

Mr. COURTNEY. Thank you, Chairman Walberg. And again, I want to thank you for holding this hearing—again, the first time EEOC has been invited over here in this Congress or the prior Congress, and obviously the lively exchange shows that, again, there is a lot of interest on both sides of the microphone here in terms of the great work that your commission conducts to protect, again, the civil rights of all Americans.

And again, I want to compliment you on how open and responsive and precise your answers were to all the members' questions. And again, hopefully this is the beginning of a dialogue between our subcommittee and your commission to, again, find ways to get better information out about the work that your commission does, and also look at ways that we can improve civil rights laws to protect, again, groups and individuals that are still subject to discrimination.

Again, we have bipartisan legislation, which has been introduced by Congresswoman Ros-Lehtinen and—and Representative Polis,

the Employment Nondiscrimination Act, which again, I am hoping our committee will take up sometime during this Congress. And also the Protecting Older Workers Against Discrimination Act, which again, has bipartisan introduction in the Senate with Senator Grassley and Senator Harkin to, again, address a recent Supreme Court decision which I think unfairly hinders older Americans from, again, having their rights protected in the workplace.

And with that in mind, I wanted to introduce two letters for the record, one from AARP and the other from the Leadership Conference on Civil Rights and Human Rights, which again, underscores the work that your commission is doing to protect older Americans and, again, the need for Congress to, again, help support the commissions and their efforts. So hopefully without objection?

[The information follows:]

AARP,
May 21, 2013.

Hon. TIM WALBERG, *Chair;* Hon. JOE COURTNEY, *Ranking Member,*
Subcommittee on Workforce Protections, House Education & Workforce Committee, 2101 Rayburn House Office Building, Washington, DC 20515.

DEAR CHAIRMAN WALBERG AND REP. COURTNEY: AARP is a nonpartisan, nonprofit membership organization of people age 50 or older that fights for the issues that matter most to older Americans, including equal employment opportunity. On behalf of our more than 37 million members and all Americans age 50 and older, AARP appreciates the sustained attention the EEOC has been giving to issues that affect older workers and workers with disabilities, and we are pleased that you are holding a hearing to highlight the regulatory and enforcement actions of the Equal Employment Opportunity Commission (EEOC).

The aging of Boomers, combined with a 25-year trend of Americans working longer and retiring later, means that our nation's workforce is getting older. By 2020, all Boomers will be age 55 and older, and the 55+ age group will constitute one-fourth of the workforce. As more older workers decide to delay retirement because they want to continue working or, increasingly, because they cannot afford to retire, having the option to work beyond traditional retirement age is of increasing importance to older workers, including the one-third of AARP members who are in the workforce.

Despite the need for older workers to remain in the workforce longer, significant barriers to their hiring and retention exist. Among them is the persistence of age discrimination, both blatant and subtle. In a nationwide survey by AARP in 2012, about two-thirds (64%) said they believe that people over age 50 face age discrimination in the workplace. Moreover, about one-third (34%) reported that either they personally faced age discrimination in the last four years, or know someone who has. Once older workers lose their jobs, they face much longer periods of unemployment than younger workers—lasting on average more than one year. Employment discrimination on grounds of disability is also particularly challenging for older workers, as a disproportionate number of workers discriminated against on the basis of disability are older.

The EEOC must continue to play a vital role in confronting practices and policies that impair full and equal employment opportunity for older workers. These include practices such as mandatory retirement, age limitations on employee benefits by state and local governments, discrimination against the long-term unemployed, and inquiries for medical information about employees.

In the regulatory arena, AARP is particularly grateful for and strongly supportive of the EEOC's work to clarify the law on employment practices that have a disparate impact on the basis of age. The Supreme Court previously affirmed the validity of such actions under the Age Discrimination in Employment Act, and specified the application of the "reasonable factor other than age" defense, but the high court provided no guidance on the parameters of these concepts. The EEOC has applied its expertise in interpreting the law and issuing regulations to guide employers and employees. The EEOC's "reasonable factor other than age" regulations were squarely in line with case law, and it is important that this type of systemic policy guidance be available to employers as they review the impact that their decisions can have on older workers.

In the enforcement arena, AARP agrees with the Commission's targeting of barriers in recruitment and hiring, including hiring discrimination based on age, as a national priority in its Strategic Enforcement Plan. Hiring discrimination, which has been exacerbated during this Great Recession, is a huge problem for older workers, but is very difficult for job applicants to detect and take action against. AARP has urged the Commission to use its greater ability to detect and bring systemic cases in targeted industries in which age stereotyping is prevalent. The Commission's inclusion of enforcement strategies aimed at discriminatory screening tools such as date-of-birth screens on job applications is also key.

Over the last four years, the Commission has given broad attention to a wide variety of issues of great concern to older workers. These include public hearings on:

• Age Discrimination—In the depths of the recession, the EEOC held public hearings on "Age Discrimination in the 21st Century—Barriers to the Employment of Older Workers," and on the "Impact of the Economy on Older Workers."

• Hiring Discrimination—Once jobless, older workers are far more likely than younger workers to experience long-term unemployment. Organizations and media reports uncovered a disturbing trend in which employers would refuse to consider the applications of jobseekers who were currently unemployed. The EEOC has held hearings on: "Disparate Treatment in 21st Century Hiring Decisions," and "Out of Work? Out of Luck: Treatment of Unemployed Job Seekers."

• Caregiver Discrimination—People are living longer, and the vast majority of older adults with chronic, disabling conditions are being cared for by family members. Midlife and older workers juggling family eldercare responsibilities will be increasingly common, prompting the EEOC to issue best practices and hold a hearing, "Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities," on the equal employment issues attendant to the treatment of family caregivers.

• Credit Report Screens—Since older workers experience longer spells of unemployment (increased risk of struggling to pay bills and debts), and are more likely to experience medical problems and medical debt, the indiscriminate use of credit reports in the screening of job applicants raises many issues for older workers. AARP was pleased that the EEOC held a hearing on "Employer Use of Credit History as a Screening Tool."

• Employer Wellness Programs—Employer-sponsored wellness programs were expanded under the Affordable Care Act. The EEOC recently held a hearing on "Wellness Programs Under Federal Equal Employment Opportunity Laws,"

The EEOC has appropriately and effectively used these hearings to gather diverse views, and to inform updates of enforcement guidance and help focus its enforcement actions.

AARP strongly supports the actions of the Commission to address the needs of older workers for fairness and equal opportunity, and looks forward to working with both the EEOC and this Committee on these important issues. If you have any questions, please feel free to contact Debbie Chalfie of the Government Affairs, Financial Security and Consumer Affairs staff at (202) 434-3723.

Sincerely,

JOYCE A. ROGERS, *Senior Vice President, Government Affairs.*

May 21, 2013.

Hon. TIM WALBERG, *Chair;* Hon. JOE COURTNEY, *Ranking Member,*
Subcommittee on Workforce Protections, House Education & Workforce Committee, 2101 Rayburn House Office Building, Washington, DC 20515.

DEAR MEMBERS OF THE EDUCATION AND THE WORKFORCE COMMITTEE: On behalf of the Employment Task Force of The Leadership Conference on Civil and Human Rights ("The Leadership Conference"), a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, we write to applaud Chair Jacqueline Berrien for the successful and critical work of the Equal Employment Opportunity Commission ("the Commission") under her guidance.

The Commission serves a vital function in ensuring workplaces free from unlawful discrimination based on race, color, religion, sex, national origin, age, and disability. The Commission's critical mission helps to promote economic security for all workers and their families. During Chair Berrien's term, the Commission has strengthened efforts to prevent discrimination through outreach, education, and technical assistance and has pursued fair and vigorous enforcement of the law when evidence of

discrimination is uncovered. We write to highlight some of the Commission's recent accomplishments under Chair Berrien's leadership.

Since Chair Berrien assumed her role in April 2010, the Commission has received approximately 300,000 charges of employment discrimination. In the last three years, the Commission has recovered over $1.2 billion in lost wages and other relief for workers who faced unlawful discrimination. Under Chair Berrien's leadership, the Commission has represented some of the most vulnerable workers in this country.

We applaud the Commission's enforcement efforts to investigate and challenge not only individual cases of discrimination, but also systemic violations of the law, pursuant to its clear legal authority. Systemic enforcement is crucial to the Commission's ability to effectively combat pattern-or-practice discrimination. Victims of discrimination may not be aware that they have been subject to discrimination and they may be less inclined to bring an individual complaint due to a lack of resources or fear of retaliation. Moreover, the Commission may be better positioned to pursue systemic cases that the private bar is less likely to take on, for example, in cases where the monetary relief might be limited, the focus is on injunctive relief, or the victims are in underserved communities.

An important milestone in the Commission's recent work was the issuance in April, 2012, of an updated "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964." This Guidance serves to inform employers of the agency's interpretation of the relevant law and provides information about appropriate methods for employers to use criminal history records in compliance with the requirements of the statute. The Enforcement Guidance is a thoughtful, flexible, and workable roadmap for employers to follow. The Guidance explains to employers how to conduct and use any appropriate background checks they reasonably require, without violating the rights that job applicants have under Title VII. As reflected in testimony presented at a briefing on December 7, 2012, before the United States Commission on Civil Rights, for example, from the Society for Human Resource Management, the Enforcement Guidance has been generally well received by employers. We are attaching a copy of extended comments that some members of the Task Force submitted to the Commission on Civil Rights, based on the record of the Briefing.

Beyond legal and administrative enforcement, the Commission serves as a crucial resource to employers by providing training, technical assistance, and guidance concerning compliance with relevant civil rights laws. The Commission conducts thousands of outreach events each year for the public, with a special emphasis on underserved communities, small businesses and workers who would otherwise have limited access to information about their rights under equal employment laws. In the last three fiscal years, over 1.1 million people participated in one of the Commission's no-cost educational, training and outreach events.

Thank you for your attention to the Commission's important work to ensure equal employment opportunity in the nation's workplaces and to promote economic security for all workers and their families. If you have questions or if we can be of assistance, please contact Lisa Bornstein, Senior Counsel at the Leadership Conference on Civil and Human Rights at Bornstein@civilrights.org or (202) 466-3311, or Sarah Crawford, Co-Chair of the Employment Task Force and Director of Workplace Fairness at the National Partnership for Women & Families at scrawford@nationalpartnership.org or (202) 986-2600.

Sincerely,

LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES.

Cc:

Rep. John Kline
Rep. Tom Price
Rep. Duncan Hunter
Rep. Scott DesJarlais
Rep. Todd Rokita
Rep. Larry Bucshon
Rep. Richard Hudson
Rep. Robert Andrews
Rep. Tim Bishop
Rep. Marcia Fudge
Rep. Gregorio Sablan
Rep. Suzanne Bonamici

Chairman WALBERG. Without objection, hearing none, they will be entered into the record.

Mr. COURTNEY. Great.

And so lastly, I just want to say that, you know, you got some homework from some of the members in terms of the report that the Senate required, and I am sure you are going to share that with us.

I would also ask that you keep us up-to-date regarding the damage that sequestration is doing to your hard work to eliminate the backlog of cases, which again, I think—to me, that is the fundamental challenge which your commission is confronted with and doing great work to reduce, and—but we don't want to go backwards here. And with a smaller staff, as you pointed out, than you had 10 years ago and 20 years ago, you are still making that progress, but to have furlough days imposed clearly is going to hinder that effort.

And it is important for us to know because we can still turn off sequester. I mean, that is still in our power as Congress—something which, again, historically, looking at Gramm-Rudman sequestration over the 1980s and 1990s was done repeatedly by our predecessors, and we are failing the American people by not getting our arms around that and turning it off.

So again, hopefully you will share that with our subcommittee in terms of your efforts to comply with the Budget Control Act.

And again, I want to thank you for your outstanding testimony today.

And with that I would yield back.

Chairman WALBERG. I thank the gentleman, and I would concur with a good number of those statements.

And appreciate the opportunity to hear direct responses on questions. I think there is still, of course, some uncertainty about the why and wherefore of certain cases, and, you know, I would make it very clear, I don't expect you to win every case. I am not a lawyer; I am a pastor and I didn't expect to save every person in my congregation either, or even get their tithe.

But I do expect that we have agencies that serve the good of the people and do the will of Congress, that continue to look to the priorities that need to be set in sequestration time. I agree, there, that that adds a challenge, I think an unnecessary challenge, and we wish that there could be a decision that would enable us to set the priorities of government and do the appropriate things without being caught in this design.

But it is what it is, and so in recognition of that, any efforts that the 5-member commission can make to make sure that employees of the EEOC as well as the general counsel keep any—keep to the minimum any perceived—and I say perceived because perception is a big sense when we deal with a department this important and this impacting in our society—that we make sure that any so-called fishing or agenda-producing efforts are controlled for the best benefit of those claims that have been made, those concerns that have been expressed by employees that we have in the backlog and will be having further are addressed first.

I think it is our concern that there has been a perceived, increasingly-aggressive approach by the EEOC to enforcing federal non-

discrimination laws with questionable benefits for employees and little consideration of the larger consequences of job creation, which is important that we keep that balance, that future guidance in a greater way be given the opportunity for public comment and review, and so that reality prevails in how we deal with best practices and actual situations, whether it be with a case like U.S. Steel or Evans Fruits, or a number of cases in relation to not simply employment contractual relationships, but employer contractual relationships of partners that have been made with all good efforts to make sure that there are continuing opportunities for new partners to come in and that there is opportunity for a change in the diversity makeup that would not take place if we hold hard and fast to saying that these unique settings that are not employee settings but are employer—actual employer settings, partner settings, are dealt with their unique situation kept in mind.

And so with no efforts to diminish the good work that is being done by the EEOC and the commission and your leadership on that commission, Ms. Berrien, I would say that it is good for us to be reminded that that fine line, in an age of great necessity at producing more jobs, more opportunities, making sure that best practices are carried out at the workplace, that sometimes the actual workplace knows the best practice better than the bureaucracy or Congress, are considered, and the results being that we have a safer, larger workforce with as little discrimination as we possibly can have

It will never be perfect; I understand that, but making sure that we give our greatest efforts to finding those specific cases first and eradicating that from our workforce and our employer base.

Having said that, with no further responsibilities or information to come before this committee, I will call it adjourned.

[Additional submission of Chairman Walberg follows:]

Washington, DC, June 6, 2013.

Hon. TIM WALBERG, *Chairman,*
Subcommittee on Workforce Protections, Committee on Education and the Workforce, Washington, DC 20515.

DEAR CHAIRMAN WALBERG: The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates this opportunity to provide a statement for the record as part of the Subcommittee's May 22, 2013 hearing entitled "Examining the Regulatory and Enforcement Actions of the Equal Employment Opportunity Commission." The purpose of this letter is to provide you with a summary of our members concerns regarding the Equal Employment Opportunity Commission's ("EEOC" or "Commission") enforcement and sub-regulatory and agendas.

At the outset, we wish to thank you for holding a hearing on this important subject. The laws and regulations that the EEOC implements and enforces are very important, but they are also very detailed and technical, requiring an investment of significant time and resources to fully understand. We wish to express our appreciation for the Subcommittee making EEOC oversight a priority. We look forward to working with you and other members of the Subcommittee on these issues in the coming months.

In this letter, we present the concerns of our Members with EEOC enforcement and sub-regulatory initiatives. We wish to emphasize that it is not our intent in this letter to debate the merits of any law or regulation that the EEOC is charged with implementing and enforcing. Instead, these comments focus on the manner in which the EEOC is carrying out its responsibilities under these laws and regulations.

EEOC's Abusive Investigatory Tactics

It should be emphasized that enforcement tactics can be difficult to summarize in a letter such as this. Many concerns seem outrageous on their face. Others might

not seem egregious standing alone, but repeated time and again or combined with other abuses, become more serious. With this in mind, set forth below are several examples of recent EEOC enforcement abuses that we have heard from our Members:

• After the investigation, but before issuing a determination, EEOC investigators send the employer a letter, urging a mid-five figure settlement and outlining a variety of bad facts which show discrimination. Within days of rejecting these offers, the EEOC then dismisses the allegations entirely, making the whole basis of the original letter intellectually dishonest and making a supposedly neutral investigation appear to be nothing more than a "shakedown."

• An investigator refused to allow the employer to mediate the charge, claiming that the company does not negotiate in good faith.[1] This position was blatantly inaccurate given that company had successfully mediated a matter with the same investigator only a few months earlier. The employer's request for the case to be reassigned to another investigator was denied.

• Several examples of instances where employees have claimed that they had been terminated unlawfully, when in fact they were either still employed or had resigned voluntarily. The employers were then obligated to respond to such allegations with a position statement in order to simply show that a termination had not occurred. This response requires the employer or its representatives to, among other things, review the complaint, obtain documents, interview managers, and draft the legal response. Some Members estimate that preparing such a response can easily cost $3000 to $4000.

• Pursuing investigations despite clear evidence that any alleged adverse action was not discriminatory—such as an employee caught on videotape leaving pornography around the workplace.

• Investigators refusing to close cases that are several years old by continually making additional requests for information.

• Investigators refusing to close cases, even where the employer, employee and union have all agreed to a private settlement of the matter at hand.

• Failing to engage in good faith conciliation in order to pursue a case which the EEOC eventually lost on summary judgment, costing the employer several hundred thousand dollars in attorneys' fees and costs.

• Continually attempting to communicate directly with employers rather than through employers' counsel.

• Making overly-burdensome requests for information and issuing subpoenas which are sweeping in scope and not sufficiently related to the underlying investigation.

• Demanding that the employer turn over workplace policies that are completely irrelevant to the underlying charge.

• Various issues related to EEOC investigators' "fact-finding conferences," such as:

• Making these conferences mandatory; and holding them prior to any investigation and prior to permitting the employer to submit a statement of position or a statement of facts.

• Conducting these conferences in a confrontational and one-sided manner in which EEOC investigators aggressively question employers, but refuse to permit employers' counsel to speak.

• Making unprofessional and prejudicial statements during conferences, such as exclaiming that, "it is well known that [employer] has a pattern and practice of discriminating and retaliating against its employees."

EEOC's Abusive Litigation Strategy

The anecdotes catalogued above were personally described to Chamber staff by concerned Members. However, there are also myriad public examples of the EEOC's irresponsible enforcement efforts—particularly once they have entered the litigation stage.[2] These instances have most notably been demonstrated in a litany of federal court opinions in which federal judges have awarded attorneys' fees and costs to employers who were subjected to the EEOC's overzealous enforcement tactics.

In one of the most well known examples of the EEOC's reckless enforcement agenda, the U.S. Court of Appeals for the 8th Circuit largely affirmed a district court's dismissal of an EEOC class action lawsuit which alleged sexual discrimination but failed to identify the alleged victims of discrimination.[3] The 8th Circuit agreed with the district court that the EEOC stonewalled the company in explaining who it sought to represent and made no meaningful attempt at conciliation. As a result of the EEOC's outrageous litigation strategy, the District Court ordered the agency to pay the employer almost $4.5 million in attorneys' fees and expenses.[4] The 8th Circuit noted the district court's description of the EEOC's tactics in the case:

There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

Additionally, a federal court in New York dismissed a pregnancy discrimination lawsuit filed by the EEOC, ruling that the Commission did not present sufficient evidence to establish that the employer engaged in a pattern or practice of pregnancy discrimination.[5] The EEOC, which represented 600 women against the employer, based its claim on anecdotal accounts that the company did not provide a sufficient work-life balance for mothers working there. The Court ruled that the law does not mandate work-life balance, and that employers are not required by law to treat pregnant women and mothers better or more leniently than others. The Court criticized the EEOC for using a "sue-first, prove later" approach, noting that, "'J'accuse!' is not enough in court. Evidence is required."

In a race discrimination case, the EEOC alleged that a staffing company's blanket policy of not hiring individuals with a criminal record had a disparate impact on African-Americans.[6] However, the company simply did not have a blanket no-hire policy. Despite becoming aware of this issue, the EEOC proceeded with the litigation anyway. The U.S. District Court for the Western District of Michigan determined that "this is one of those cases where the complaint turned out to be without foundation from the beginning." As a result, the Court ordered the EEOC to pay a total of $751,942.48 for deliberately causing the company to incur attorneys' fees and expert fees when the agency should have known that the company did not have the blanket no-hire policy.

Similarly, in a case alleging discrimination under the Americans with Disabilities Act ("ADA"), the Commission continued to litigate even when it became clear that the case had no merit.[7] Specifically, the EEOC admitted that the alleged victim of discrimination could not perform the essential functions of the job but "continued to litigate the * * * claims after it became clear there were no grounds upon which to proceed." Thus, the EEOC's claims were "frivolous, unreasonable and without foundation." The district court dismissed the claim and awarded the employer over $140,000 in attorneys' fees and costs. The Court of Appeals affirmed.

Wasting Resources in Challenging Uncontroversial Policies

Recently, the EEOC has challenged several employers' workplace policies which have been in effect for years and have been voluntarily agreed to by all interested parties. In challenging these policies, the Commission has likely expended significant time and resources. Yet even if the EEOC is eventually successful in invalidating these policies, any supposed benefits of its efforts will be dubious at best, as it is unclear who the Commission is protecting in these instances.

Targeting Voluntary Partnerships

For example, the Wall Street Journal recently published a story on the EEOC's investigation into PricewaterhouseCoopers ("PwC").[8] The Commission alleges that the firm's partners are actually employees, and that the firm's mandatory retirement policy therefore violates the Age Discrimination in Employment Act ("ADEA").

According to the Wall Street Journal, the Commission has demanded that PwC eliminate the retirement policy.

The EEOC's legal theory conflicts with its own existing guidance on partnerships and misapplies the law on this issue as interpreted by the Supreme Court.[9] Even putting those issues aside, one wonders whether pursuit of such a case is the best use of the Commission's resources. After all, the challenged retirement agreement concerns partners who are retiring from a major U.S. accounting firm—hardly a vulnerable group in need of protection.[10] These individuals became partners knowing about and agreeing to this retirement policy, and have benefitted from the partnership structure while they were partners. Pursuant to the policy's terms, these partners enjoy a significant retirement pension supported by current partners.

If the EEOC chooses to sue PwC, the litigation will not aid or protect vulnerable workers but will simply force the company to abandon a policy that its partners themselves agree is in the business' best interest. EEOC's harassment of PwC—and, potentially, all other partnerships—is not only an abuse of its enforcement authority, but also an incredible waste of resources.

Challenging Workplace Safety Policies

In another case, the EEOC inexplicably challenged a company's common sense efforts to ensure a safe workplace in a potentially hazardous industrial environment.[11] In the EEOC's case against U.S. Steel, the employer performed random drug and alcohol testing on its probationary employees pursuant to the terms set

forth in the collective bargaining agreement it entered into with United Steelworkers of America (USW). The EEOC has challenged this policy as violative of the ADA.

Working conditions at the plant in question require strict adherence to safety rules. Employees work on or near coke batteries, which contain molten coke that can be as hot as 2,100 degrees Fahrenheit. The working areas are very narrow, are sometimes at dangerous heights and are located among large industrial machinery and gasses that are both toxic and combustible. Quite clearly, the drug and alcohol tests are performed in order to ensure a safe workplace. The EEOC might have realized why such tests are so important—and why both the employer and union agreed to them—if investigators and simply asked about the reasons for the policy, or visited a U.S. Steel facility. EEOC investigators did neither.

Instead, the EEOC blew through the conciliation process and filed suit against both U.S. Steel and USW alleging that the random drug and alcohol testing violates the ADA, which prohibits workplace medical exams that are not "job-related and consistent with business necessity."[12] U.S. Steel argued that the testing is appropriate as job-related and as a business necessity because it enables them to detect impairment on the job. The district court agreed and granted summary judgment for the company. The court noted that "safety is a business necessity and the testing policy genuinely serves this safety rationale and is no broader or more intrusive than necessary."

That the EEOC pursued such a claim against a policy so that was so clearly related to workplace safety is bad enough. However, the Commission has "doubled-down" on this strategy and has appealed the decision, thereby wasting even more resources in pursuit of a nonsensical claim.

Issuing Sub-regulatory Guidance on Employers' Use of Criminal Background Information

The EEOC also pushes its enforcement agenda in the sub-regulatory arena. Recently the Commission issued guidance concerning employers' use of criminal background information entitled, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended (the Guidance). Although having a criminal record is not specifically protected by Title VII,[13] the EEOC takes the position that because "incarceration rates are particularly high for African American and Hispanic men,"[14] employers' use of criminal background information when hiring may have a disparate impact on these individuals.

Unfortunately, the EEOC did not publicly release a draft of its Guidance for the public to have an opportunity to provide comment. This is contrary to the strong policy favoring pre-adoption notice and comment on guidance documents.[15] Pre-adoption notice and comment would have helped the EEOC arrive at Guidance that better reflects the law while limiting controversial elements of the proposal.[16] This lack of transparency is even more troubling considering the fact that the Guidance became effective upon publication, giving employers no time to reconsider policies and practices in preparation for its implementation.

The Guidance contains substantive flaws as well, the first being the suggestion that employers should conduct "individualized assessments" of candidates before any final employment decision is made. According to the Guidance, the individualized assessment essentially gives excluded candidates an opportunity to explain why an employer's screening policy should not apply to them (e.g., that the background check yielded incorrect information).

Although the Guidance does not have the force of law, it is not unreasonable to assume that many employers will likely conclude that it does, and that "individualized assessments" are now required under federal law; or, at the very least, that failure to follow the Guidance will be used as evidence of non-compliance. The Guidance is also not sufficiently specific as to under what circumstances an employer should utilize individualized assessments and how they are to be conducted. For instance, must a daycare employer conduct an individualized assessment of a job candidate who has been convicted of a violent crime against a child? Commissioner Barker, in her separate statement opposing the Guidance, recognized how confusing the Guidance could be to employers: "[T]he only real impact the new Guidance will have, will be to scare business owners from ever conducting criminal background checks."

Furthermore, the Guidance notes that state and local laws are preempted by Title VII if they "require or permit the doing of any act which would be an unlawful employment practice under Title VII." In other words, the fact that an employer's criminal screening policy was issued in order to comply with state or local law will not be a defense to an allegation of disparate impact discrimination. Unfortunately,

the Guidance offers no help to those employers in situations in which there is a potential conflict between state and federal law, and employers cannot be expected to perform their own preemption analyses. Although employers should not be subject to undue scrutiny by the EEOC simply because they are complying with state laws, the Guidance indicates that this could be a real possibility.[17]

The Commission's Own Limitation on its Oversight Authority

The underlying problem with the enforcement abuses described above is the fact that the Commission has not implemented the appropriate safeguards to ensure it is not wasting resources by pursuing non-meritorious litigation. This may be because a significant amount of litigation authority placed by statute in the hands of the Commissioners has been delegated to the General Counsel. It may also be partially attributed to subsequent delegation of authority to District Offices. In comments submitted to the Commission during the development of its Strategic Enforcement Plan (SEP), the Chamber questioned whether the Commission was exercising sufficient oversight of that delegation and whether the continued delegation is appropriate in light of the failure to address these problems.

Specifically, the Chamber noted that the officials charged with setting Commission policy must have a direct stake in the implementation of that policy in the context of litigation.

Unfortunately, the Commission reaffirmed this delegation of authority in the final SEP, although it does require "[a] minimum of one litigation recommendation from each District Office [to] be presented for Commission consideration each fiscal year." Many employers believe that this minor change will do little to improve the Commission's oversight function. This is primarily because the Commission files much more than 15 lawsuits each year (the number of EEOC District Offices), and because the District Offices are likely to submit uncontroversial cases simply to satisfy this requirement. In her comments for the record, Commissioner Barker noted that she is "very concerned about the Commission's delegation of most of its litigation authority to the General Counsel."[18] With the reaffirmance of this delegation of authority, the Commission severely restricts its ability to reign in the enforcement abuses described above.

Conclusion

We wish to thank you for taking the time to hold this important hearing on EEOC oversight. These comments only begin to summarize the very great concern that we have with the EEOC's enforcement and policy agenda. We look forward to working with you as you continue to examine these important issues. Please do not hesitate to contact us if we may be of assistance in this matter.

Sincerely,

RANDEL K. JOHNSON, *Senior Vice President, Labor, Immigration and Employee Benefits.*

JAMES PLUNKETT, *Director, Labor Law Policy.*

ENDNOTES

[1] The EEOC has a statutory duty to engage in conciliation before filing a formal complaint. See 42 U.S.C. § 2000e-5(b). The policy rationale behind this requirement is simple: needless litigation should be avoided and if compliance may be obtained through informal means, that is preferable to expending the significant resources litigation requires.

[2] The Chamber has previously notified the EEOC of its concern regarding the Commission's pursuit of meritless charges and suggested potential solutions. See e.g., Johnson, Randel K. STATEMENT OF THE U.S. CHAMBER OF COMMERCE TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. Small Business Realities, Discrimination Laws and the Equal Employment Opportunity Commission, Hearing, December 9, 1998.

[3] EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012).

[4] In the 8th Circuit decision, although the court ruled against the EEOC on almost all counts, it did revive a few claims. Accordingly, the attorneys' fees and expenses award was vacated, without prejudice, since the employer was no longer a "prevailing" party.

[5] EEOC v. Bloomberg L.P., 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011).

[6] EEOC v. Peoplemark, Inc., 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).

[7] EEOC v. Tricore Reference Laboratories, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012).

[8] Discriminating Against Partnerships, WALL STREET JOURNAL, June 3 2013, available at *http://online.wsj.com/article/SB10001424127887323855804578511693604180764.html?mod=WSJ—Opinion—AboveLEFTTop*

[9] See Clackamas Gastroenterology v. Wells, 538 US 440 (2003).

[10] The story notes that these partners are compensated in the "seven-figure range."

[11] EEOC v. U.S. Steel Corp., No. 10-1284 (W.D. Pa. Feb. 20, 2012).

[12] See 42 U.S.C. 12112(d)(4)(A).

[13] The EEOC administers Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a).

[14] See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS (April 25, 2012), Section II.

[15] The Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007) states the following: "Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments."

[16] In October of 2010, the EEOC conducted a hearing on employers' use of credit information. It is expected that some form of guidance will be issued. The Subcommittee should encourage the EEOC to provide an opportunity for the public to comment in writing on any such guidance.

[17] See, e.g., Waldon v. Cincinnati Public Schools, 1:12-CV-00677 (S.D. Ohio, April 24, 2013).

[18] See COMMENTS FOR THE RECORD, February 20, 2013 Public Commission Meeting on the Implementation of the EEOC's Strategic Plan for Fiscal Years 2012-2016.

[Additional submissions of Mr. Courtney follow:]

Prepared Statement of the National Council of EEOC Locals, No. 216, AFGE/AFL–CIO

The National Council of EEOC Locals, No. 216, AFGE/AFL-CIO ("the Council") is the exclusive representative of the bargaining unit employees at the Equal Employment Opportunity Commission (EEOC), including investigators, attorneys, administrative judges, mediators, paralegals, and support staff located in 53 offices around the country. The Council thanks you for the opportunity to share our views on the record regarding the May 22, 2013 hearing before the Subcommittee on Workforce entitled "Examining the Regulatory and Enforcement Actions of the Equal Employment Opportunity Commission."

EEOC has historically worked within a tight and often frozen budgets, even while adding jurisdiction over new laws. However, the budget situation worsened for EEOC, even before the current sequestration. In FY12 a 2% across the board cut in FY12 reduced the budget to $360M from $367 in FY10 and FY11. This was the first budget cut in EEOC's history. The original FY13 continuing resolution (CR) carried over the FY12 cut for the first two quarters of FY13. Now with sequestration, EEOC must cut an additional $18M or 5% in FY13. These cuts come on the heels of five years of record high EEOC charge filings. Prior to sequestration, EEOC had already lost 10% of its staff, leaving the agency with only 2,245 FTEs nationwide. Now, EEOC has furloughed the entire staff, but not contractors, for 5 days, to absorb a shortfall that the agency stated it was unable to find from other expenses. After a reassessment period to take place between July1-12, EEOC will decide whether to furlough staff an additional 3 days.

Barring a change to the law, sequestration will remain in effect for 10 years. Therefore, EEOC, like its sister agencies in the Federal government, must determine the best course for absorbing this fiscal year's reduction in funding, which has been prorated this year to 5%. In subsequent years of sequestration EEOC must be prepared to operate within budgets reduced by 8.2%.

Typically the impact of sequestration has focused upon larger cabinet level agencies.

Significantly, this was not only the first hearing that this Subcommittee has had this Congress on EEOC, but the first hearing since the start of sequestration. Therefore, the hearing was an excellent opportunity to seek further information into the effects of sequestration on EEOC and its stakeholders, including workers, employers, and the agency's own employees.

In fact, Chair Berrien was questioned on sequestration by Ranking Member Joe Courtney, who inquired, "Sequester has been in full swing since March 1. Can you talk about how you are handling it in terms of staffing?"

Chair Berrien provided context, explaining that EEOC currently has approximately 2,300 employees.[1] She stated that in 1980 EEOC had 1,000 employees more than today. In 1990, EEOC had more 500 more than today. Since 1990, Congress has added enforcement over the Americans with Disabilities Act and the Genetic Information Nondiscrimination to the EEOC's jurisdiction. Chair Berrien also dis-

[1] The overall staffing number for FY13 is 2,226, according to EEOC's Congressional FY14 Budget Justification.

cussed that charges have been at an historic level, i.e., over 100,000. During this time EEOC has had funding decreases and a hiring freeze, which goes back to 2011.

After Chair Berrien provided this background, she followed with a brief direct response to Ranking Member Courtney's sequestration question.

Chair Berrien: Despite efforts to cut other areas of our budget we were unable to make the savings required by sequestration. We are furloughing staff five days and if necessary the notice adds an additional three days. This will have a real impact on our workforce and ability to make further progress towards our mission.

This statement brings to bear tremendous concerns. Unfortunately, time constraints prevented follow up to Chair Berrien's response. The response raises more questions than answers for this Subcommittee. Chair Berrien's answer regarding the impact of sequestration is worth breaking down into greater detail.

"Despite efforts to cut other areas of our budget we were unable to make the savings required by sequestration"

What efforts were actually made by the EEOC to achieve savings, other than furloughs?

The Office of Management and Budget advised agencies this past January to look for savings including cutting temporary employees and reviewing contracts to "determine where cost savings may be achieved." Did EEOC cut temporary employees? Did EEOC review its contracts? Did it make modifications to contracts based on this review? Does the agency have any contracts with option years? Has the agency reduced or negated any of the option year spending? What savings were achieved? Are contractors working while government employees are on furlough? What savings, if any, are being required from EEOC's fifteen field office budgets? What savings, if any, is EEOC requiring to its travel budget? EEOC's website indicates that the agency is going forward with public training seminars, despite other agencies, such as GSA, cutting such seminars. Are training seminar budgets reduced at all?

EEOC's union, the National Council of EEOC Locals, No. 216, AFGE/AFL-CIO, has created an initiative to identify areas where savings could be captured and efficiencies implemented.[2] The Union advocates reducing furloughs through savings and efficiencies, such as: modifying contracts and reducing option year spending; cutting management travel that could be conducted by video-teleconference; double-sided printing; reducing space through voluntary expanded telework; lowering supervisor to employee ratios, and its cost-saving full service intake plan. Will the agency act on these suggestions? If not, what actions will the agency take?

"We are furloughing staff 5 days"

While many agencies originally announced that furloughs would be necessary as a result of sequestration, several of these agencies were ultimately able to avoid furloughs. Why has EEOC implemented furloughs when other agencies have avoided them?

"If necessary the notice adds an additional 3 [furlough] days."

Will these additional 3 furlough days be necessary? What cost savings could be implemented to avoid these additional days? The uncertainty of future furlough days certainly affects planning, operational needs, and agency goals. The uncertainty must also be a source of concern for the employees, who may or may not be furloughed. The agency intends to conduct a reassessment period between July 1-12, 2013 to determine if the additional 3 days of furloughs will occur, referred to as Phase II. Can EEOC resolve this uncertainty now? What is the earliest that EEOC can determine and notify employees whether they will be required to take an additional three days of furloughs? EEOC should take demonstrable actions to avoid furloughs and announce immediately that additional furloughs are off the table.

*"This will have a real impact on our workforce * * *"*

What is the impact on EEOC's workforce? Five days of furlough spread over five two week pay periods results in a10% pre-tax pay loss to its employees. Does EEOC have information on the financial consequences the pay loss is causing its staff, especially support staff whose pay grade levels range from GS-5-GS-7? What is EEOC doing to provide information about resources that employees may turn to for financial assistance? How are furloughs impacting employee morale, specifically in those areas of human capital development that are addressed in the annual Federal Employee Viewpoint Survey? How many employees will leave between now and the end

[2] Union Seeks Savings to Reduce Furloughs, Daily Labor Report, April 8, 2013.

of the fiscal year? Given the hiring freeze, will those additional losses impact morale? What impact will these staffing losses have on average case workload?

*"This will have a real impact on our * * * ability to make further progress towards our mission."*

What is the nature of the impact that sequestration will have on EEOC's civil rights mission? EEOC ended FY12 with a backlog of more than 70,000 discrimination. At the hearing Chair Berrien noted the modest progress in the last two years, wherein the agency has reduced the backlog by 10% in FY11 and again in FY12. However, EEOC's FY14 budget justification projects that the backlog will rise dramatically to 80,575 by FY14.

The FY14 budget justification makes no reference to sequestration or furloughs. The backlog projection then would appear to be skewed lower than is realistic, considering the loss of productivity caused by the furlough days. What is EEOC's projection for the FY13 backlog when 5 furlough days are incorporated into the analysis? What is EEOC's projection for the FY13 backlog when 8 furlough days are incorporated into the analysis? How many furlough days are anticipated for FY14? How will this impact the agency's backlog projection for FY14?

According to EEOC Performance and Accountability Report for FY12, EEOC's average charge processing time is a lengthy 288 days. How will furloughs impact average charge processing time? What changes is EEOC making to ensure wise use of its limited and scarce resources?

Furloughs are counterproductive to effectively carrying out the EEOC's mission. Therefore, furloughs should only be implemented only as a last resort. The testimony provided by Chair indicated that the EEOC is still considering adding three additional days of furlough to the current 5 days furloughs. The Council urges EEOC to consider alternative means other than furloughs, such as those suggested thus far by the Union, to achieve the budget reductions required by sequestration.

January 18, 2013

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Re: Briefing on EEOC Enforcement Guidance on Use of Criminal Records

Dear Chair Castro and Commissioners:

Thank you for inviting comments to supplement the Commission's Briefing on "The Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's (EEOC) Conviction Records Policy on the Employment of Black and Latino Workers," held on December 7, 2012. This letter is submitted on behalf of the organizations identified below, many of which are participants in the Employment Task Force of The Leadership Conference on Civil and Human Rights. Many other organizations joining in these comments work with people with criminal records to aid in workforce re-entry.

We join many of the witnesses who testified at the Commission briefing in wholeheartedly supporting the EEOC's April 2012 Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions ("Enforcement Guidance" or "Guidance") as an important bipartisan update explaining the legal rights and responsibilities of employers under Title VII of the Civil Rights Act of 1964. The Enforcement Guidance is a thoughtful, flexible,

and workable roadmap for employers to follow. The Guidance explains to employers how to conduct and use any appropriate background checks they reasonably require, without violating the rights that job applicants have under Title VII.

These comments emphasize the following points:

- Successful reentry requires that appropriate jobs be available to people with criminal records, and too many employers use criminal history record background checks to deny employment to qualified applicants
- The Enforcement Guidance encourages sensible use of background checks; it does not restrict or discourages employers from conducting criminal history record checks
- The Society of Human Resource Management and other management trade groups agree that the Guidance sets out flexible, fair, balanced, and workable hiring procedures
- No changes in legal requirements are reflected in the Guidance. It simply explains employers' obligations under Title VII, based on court decisions, adopted by the EEOC in 1987
- The EEOC developed the Guidance with the assistance of broad public input provided in two public hearings and in 300 public comments.[1]

I. In addition to the universal agreement that appropriate job opportunities must be open to people with criminal records, many witnesses at the briefing emphasized the severity of the barriers minority workers – particularly African-American men – face in the job market and that the combined effects of race and having a criminal conviction devastate the job prospects of minority workers, doing great harm to their families and communities.

Each Commissioner and witness at the briefing who addressed the question acknowledged that it is critically important for people with criminal records who are qualified, willing, and effective workers to have fair and equal access to appropriate jobs.[2] But as witness

[1] Commissioners Kirsanow, Heriot, and Gaziano submitted a joint comment opposing adoption of updated Guidance.

[2] *See, e.g.,* Commissioner Gaziano (MTB [Master Transcript of Briefing] at 42, lines 14-17: I "appreciate the importance of re-entry programs that help prisoners reenter and reentry programs afterwards. This has been a great interest to me for a number of years."); Dr. Sedgwick (MTB at 33, lines 6-8: "enhanc[ing] employment prospects for the ex-offender in aiding successful re-entry [is] … a goal that we all share."); Commissioner Kirsanow (MTB at 212, lines 8-12: "I haven't heard anybody say ... that we don't support reintegration of those with criminal records into society."); Mr. Martin (MTB at 91, lines 1-7: "I think back to the 2004 State of the Union Address where it was President Bush who suggested that when the gates of the prison open we need to give people a second chance and that it should be a road to a better life. And how do

after witness testified, there is a deeply entrenched bias against hiring African Americans, particularly African-American men. Studies consistently show that the barriers to jobs are much worse for African Americans with a criminal record. The effect is that many African Americans with a criminal record are locked out of the labor market.

Glenn Martin, now Vice-President of the Fortune Society, a non-profit agency with over 80 years of experience working with people re-entering the workforce after paying their debts to society, described the results of one of the studies that the EEOC relied on in the Enforcement Guidance, a study in which he served as project director on behalf of the National H.I.R.E. Network. Mr. Martin explained the study in his written statement (at page 3):

> To study present-day discrimination, Principle Investigators Devah Pager and Bruce Western collaboratively conducted a field experiment in the low-wage labor market of New York City, recruiting white, black, and Latino job applicants who were matched on demographic characteristics and interpersonal skills. These applicants were given equivalent résumés, carefully manufactured by the research team, and sent to apply in tandem for hundreds of randomly assigned entry-level jobs in NYC.
>
> **The results show that black applicants were half as likely as equally qualified whites to receive a callback or job offer. In fact, black and Latino applicants with clean backgrounds fared no better than white applicants just released from prison. Moreover, the positive outcomes for black applicants, when presenting evidence of a criminal record, were reduced by 57%.** [Bold in original.]

The results of the New York City study[3] are typical of the findings of numerous labor market studies that have demonstrated both that African Americans, particularly men, have higher barriers to employment than do white workers and that having a criminal record does more harm to the job prospects of African-American workers, Hispanic workers and other workers of color than the harm having a criminal record does to the prospects of white job applicants.

These points were made very eloquently by Dr. Harry Holzer, whose research was the starting point for this Commission's briefing. Dr. Holzer made this primary point in his written testimony (page 1): "The prevalence of arrests and convictions among less-educated American men substantially reduces employer willingness to hire them later in life and worsens their employment outcomes more generally, in ways that generate clear "disparate impacts" on minority (especially black) men." In responding to questions from the Commissioners at the briefing, Dr. Holzer summarized his knowledge succinctly (MTB at 63-64):

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you get a better life if you don't have access to the labor market?"); Ms. Miller (for NAPBS) (MTB at pages151-52: "we can all agree that reintegration of ex-offenders into society is important.").

[3] As Mr. Martin testified, the New York study replicated a study conducted earlier in Milwaukee, Wisconsin. MTB at pages 86-87.

> Every study that I'm aware of that's ever looked at this, finds that black men are at the end of the hiring queue of employers. That… of all the demographic groups black men face very substantial discrimination. Every audit study, rigorous studies where they send out matched pairs of applicants, find that employers are reluctant to hire black men.
>
> For many different reasons. Perhaps some legitimate, perhaps not. And we know that the fear of criminal records almost certainly is part of that. And again, the work done by Bruce Western and Devah Pager, our work and others, suggests that's an important part of that fear.

Automatically disqualifying all applicants who disclose a criminal conviction on an initial job application – no matter how old, minor, or unrelated to the position the conviction was – is a widespread practice that has devastating results on communities of color. As Roberta Meyers, co-director of the National H.I.R.E. Project testified (MTB at 81, lines 20-23): "a criminal record is usually the number one automatic disqualifier for employment. And we know that many employers, public and private, will go as far as noting on job postings… such a thing." Prior to the EEOC's issuance of the updated Enforcement Guidance, the use of automatic disqualifiers was extremely widespread, as documented in a study by the National Employment Law Project, "65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment" (2011).[4] To address this problem, the Guidance recommends as Best Practice that employers follow the procedure popularly known as "Ban the Box," i.e., not asking candidates to disclose criminal history in the initial application, because "an employer is more likely to objectively assess the relevance of an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience." (Guidance, Section V-B-3, text at n. 109.)

When people who have criminal records are denied opportunities to work, locking those workers out of the job market has a devastating impact on low-income communities of color. As Dr. Holzer emphasized (written testimony at page 3):

> Children and youth growing up in very low-income neighborhoods, where large fractions of adult men do not work, are likely to have even worse outcomes in life than those from similar families but better neighborhoods [citations omitted]. The absence of role models for work and labor market contacts and connections for young men in these neighborhoods likely further worsens their employment opportunities in the future….

Prof. Holzer also pointed out that noncustodial fathers who cannot find work cannot make child support payments.

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[4] The study is available online at http://nelp.3cdn.net/c1696a4161be2c85dd_t0m62vj76.pdf, last accessed January 10, 2013, at 12:05 p.m.

The EEOC's Guidance was sorely needed. Yet it is only a small first step in what will be a long journey to correcting the discrimination in hiring that so acutely affects people of color with criminal records in their attempts to re-enter society after completing a criminal sentence.

II. The record at the briefing plainly demonstrated that the EEOC designed the Guidance to help employers assess criminal history records sensibly; it does not discourage employers from doing criminal background checks.

The testimony presented at the briefing by Carol Miaskoff, Acting Associate Legal Counsel for the EEOC (written statement at 1-2), could not have been more clear on this point:

> "The updated Guidance does not prohibit employers' use of criminal background checks or criminal history information to make employment decisions. The Guidance does, however, outline how employers can use such background checks and the information they yield in a fact-based and targeted way that is consistent with Title VII."

In other words, the Guidance has neither the purpose nor the effect of reducing the use of criminal history record checks by employers. Instead, the Guidance illustrates appropriate procedures for evaluating candidates' criminal history information for those employers who conduct such checks.

The Guidance suggests that a selection process can be shown to be demonstrably job-related and consistent with business necessity when an employer follows two steps:

(1) uses a targeted screen that, *inter alia*, carefully identifies specific convictions that, if repeated in the position being filled, would present risks to the employer's legitimate interests and the length of time after the offense that the risks persist; and

(2) for any applicant who has a record within the parameters of the above screen, conducts an individualized assessment to determine whether the evidence of rehabilitation that the applicant offers persuades the employer that the applicant should not be considered at risk for committing another crime.

A. Individualized Assessment

With regard to the individualized assessment of an applicant with a criminal record, Dr. Jeffrey Sedgwick's testimony was critical of the EEOC's use of social science research data in the Guidance, but in fact Dr. Sedgwick's own review of social science data strongly supported the EEOC's recommendation for using an individualized assessment.

In his written testimony (at page 10), Dr. Sedgwick endorsed the views of Prof. Strahilevitz that, to evaluate the risk of hiring an applicant with a criminal history, "**decision makers [should have] something that approximates complete information about each**

applicant, so that readily discernible facts like race or gender will not be overemphasized and more obscure but relevant facts, like past job performance and social capital, will loom larger." [Emphasis in bold added.] Past job performance is one of the main indicators to be consulted in the individual assessment. (*See* Guidance at Section V-B-9). From the social science literature, Dr. Sedgwick identified several other factors that he found to be particularly relevant for evaluating the potential success of person with a criminal conviction history as an employee, as follows (at pages 4-5):

1) The **number of past offenses** committed by someone is a good predictor of whether he will commit crimes in the future.

2) Lack of education increases the risk of committing another crime and, conversely, **attaining more formal education** makes re-offending less likely.

3) Success in overcoming a **substance abuse problem** is often a positive factor for people who avoid committing crimes after serving a sentence.

4) A person who is in a **stable family relationship** is much less likely to commit crimes in the future.

In the first two factors, Dr. Sedgwick endorses elements that are similar to those the EEOC Guidance recommends employers consider as part of the individual assessment (*i.e.*, the number of prior criminal convictions and whether the applicant has post-offense educational achievement; *see* Guidance at Section V-B-9). As for the third and fourth factors, Dr. Sedgwick apparently takes the view, based on the research literature, that the Guidance would be improved if it also recommended that employers consider both the time a person with a criminal history has been "clean and sober," *i.e.*, in recovery from alcohol or drug dependence, and whether he maintains stable family supportive relationships. The undersigned groups support criminal records policies that give applicants an opportunity to provide evidence of rehabilitation that may include sobriety and/or stable family supportive relationships of all types.

B. Negligent Hiring Liability and the Guidance

The Guidance provides employers with information effectively to avoid negligent hiring liability. An employer that uses the selection process outlined in the Guidance is virtually certain to be protected from liability for negligent hiring. When employers carefully consider the risks present in particular jobs, they will find that, as courts have observed,[5] most jobs do not pose

[5] *See, e.g., Ponticas v. KMS Invs.*, 331 NW.2d 907, 913 (Minn. 1983), discussing requirements when the job requires an employee "to regularly deal with members of the public." Unless there is some particular aspect of the job that requires greater concern (such as access to passkeys to apartments), "If the employer has made adequate inquiry or otherwise has a reasonably sufficient basis to conclude the employee is reliable and fit for the job, no affirmative duty rests on him to investigate the possibility that the applicant has a criminal record." *See also*, *Evans v. Morsell*, 284 Md. 160, 167, 395 A.2d 480, 484 (1978).

risks that require a criminal background check. Most cases imposing negligent hiring liability that involve individuals with conviction histories arise when the employer has completely failed to do either a check of all references or a criminal history records check. Julie Payne, General Counsel for the U.S. operations of G4S Secure Solutions (USA), Inc., a unit of a global private security company, included cases in her written testimony where doing a proper background check before hiring absolved the employer from liability for alleged negligent hiring (page 13, Appendix A, bottom of page).

There was speculation by some witnesses and Commissioners at the briefing that the prospect of the EEOC's either bringing an enforcement action or conducting a probing and expensive investigation of an employer's criminal history records screening practices would cause some employer, somewhere, to stop doing criminal history background checks to avoid the expense of defending an investigation of potential Title VII liability.[6] But this speculation was not supported by specific facts, or even by anecdotes. Garen Dodge, for example, admitted that he had not heard of any case where a company was considering discontinuing background checks because of the EEOC Enforcement Guidance. (Dodge, MTB at 116-17.)

Ms. Payne said in her written testimony (at page 4) that employers perceive "[t]he potential costs of not screening [for criminal records] are enormous," and that in her experience the "average" award in a negligent hiring case is as much as three million dollars. But while employers may fear multi-million dollar verdicts in negligent hiring cases (in part because consultants and counsel fan this particular flame), whether significant numbers of such verdicts actually exist is suspect. In one paragraph, Ms. Payne cites three widely different "average" award figures, all of which are ultimately sourced only to web pages maintained by human resources consultants or liability consultants who use those pages to promote their services.[7]

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[6] While Ms. Payne complained that her company had spent "hundreds of thousands of dollars" in defending an EEOC class-wide investigation where the company had refused to hire a minority candidate for a security guard position when it found he had two misdemeanor theft convictions, (Payne, MTB at 99-100) it is hard to evaluate the merits of her complaint that the EEOC investigation is unreasonably burdensome, since she did not specify the annual revenues and profits of this privately held multi-national company that employs more than 33,000 security guards in the U.S. alone (Payne, written testimony at 2). Nor did she describe the company policy the EEOC is investigating. If the policy being reviewed is an automatic, permanent disqualification of any applicant ever convicted of a misdemeanor, it is hardly surprising that the EEOC has decided to open a systemic investigation of the company – such a policy would very likely have an adverse impact on minority applicants and would violate the fundamental principles of Title VII that the federal courts and the EEOC enunciated over 25 years ago.

[7] *See* Payne written testimony at page 5:

> Despite employers' efforts in this area, they lose more than 70 percent of such lawsuits, and the ***average jury plaintiff award is more than $1.6 million***. Approximately 66 percent of ***negligent hiring trials result in awards averaging $600,000 in damages***. The Workplace Violence

Further, the majority of cases claiming "negligent hiring" involve employees who are alleged to be "unfit" for a wide variety of reasons that have nothing to do with having a criminal record.[8] In sum, while the risk of an employer facing a multi-million dollar verdict or settlement may exist, that risk is remote. If employers follow the procedures recommended in the Guidance, the possibility that the EEOC will launch a class-wide investigation is at least equally remote.

Certain positions that involve access to homes or care of children, the elderly, or people with disabilities, include higher levels of care in hiring decisions. Employers who have such positions in their workforce know full well that they need to conduct criminal background checks when they hire new employees for these positions and are frequently required to do so by state and federal laws. The Enforcement Guidance provides these and other employers with a roadmap to successfully perform such evaluations.

III. As confirmed by the testimony of the representative from the Society for Human Resource Management and other witnesses, the Guidance sets out flexible, fair, balanced, and workable procedures for assessing what prior convictions are relevant to the risks presented in the job and for evaluating applicants who have convictions.

The Society for Human Resource Management (SHRM) is the leading association in the world for human resource professionals. Mr. Segal, representing SHRM, testified (written testimony at pages 5-6) that when the updated Guidance was issued in April, 2012,

> "SHRM members were pleased to see that the guidance did not impose any new bright-line rules explicitly designed to prohibit employer access to and use of certain information. Instead, the Commission, in this guidance, continues to embrace use of the long-standing three-factor test identified by the case *Green v. Missouri Pacific Railroad Company* when evaluating criminal history. [Nature of the offense, nature of the job, and time elapsed since conviction or completion of sentence.] … These factors are familiar to HR professionals. Indeed, *SHRM has not received significant negative feedback from its members about the guidance as a whole.* HR professionals have long taken seriously the need to balance the rights of job applicants against the needs of the employer when criminal history information is considered." [Emphasis added.]

Research Institute reports that ***the average jury award for civil suits*** on behalf of the injured is ***$3 million***. [Bold italics added; citations omitted.]

Mr. Dodge's written testimony cites the same three figures (page 5, text at note 13 and page 6, text at notes 18-19). Neither Ms. Payne nor Mr. Dodge offer any explanation of why they assert three mutually incompatible "average" award figures as true facts about jury awards in negligent hiring cases.

[8] For example, a close reading of the descriptions of negligent hiring cases cited in the written testimony of Ms. Payne and Mr. Dodge reveals that the majority of these cases had nothing to do with hiring an employee who had a prior criminal conviction.

Since the Guidance fundamentally reflects only a restatement, with some clarification and additional detail, of long-standing principles followed by many human resource managers, it is natural that experienced human resource personnel do not see the Guidance as discouraging the use of criminal background checks. As Mr. Segal testified in response to a question from Commissioner Gaziano (MTB at 200, lines 15-21):

> In my experience, as an attorney who advises clients, and in SHRM's experience, this has not resulted generally in employers discontinuing use of the background checks. What we have seen as employers looking to the guidance as just that [*sic, i.e.,* as "guidance"] and in reviewing more carefully the Green factors.

Other human resource professionals and trade association representatives also indicated in their testimony that the Guidance provides guidelines for employers that are flexible, fair, balanced and workable. Mr. Larson, who consults with small businesses ranging from 15 to 300 employees, observed that smaller businesses that had not been previously alert to the issues addressed anew in the EEOC's updated Guidance should not even need to add staff to comply fully with the recommended procedures.[9]

IV. <u>The Guidance did not change any legal requirements, it simply described a practical method for employers to comply with the legal requirements of Title VII,</u>

The updated Guidance issued in 2012 was primarily a restatement and consolidation of prior policy documents issued during the Chairmanship of Clarence Thomas. (EEOC Enforcement Guidance, Section II, text at nn. 15-16 and those notes.) As Ms. Miaskoff also testified at the briefing, those policy statements grew out of a series of decisions by the EEOC in the 1970s and early 1980s that found criminal record disqualifications discriminatory based on an analysis similar to the *Green* factors noted in the preceding section of these comments. (Miaskoff written testimony at 2, notes 4-5.)

As noted in Mr. Segal's testimony, since the Guidance utilizes the *Green* factors, long-established concepts that are familiar and comfortable for human resource managers to apply, professionals in human resources have not reported encountering significant difficulties in

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[9] Mr. Larson testified that the evaluation processes are familiar to employers who comply with other federal statutes such as the Americans with Disabilities Act Amendments Act (ADAAA) and the Family and Medical Leave Act (written statement at page 3):

> The actual time to make an individualized case-by-case evaluation should not be overly burdensome upon the employer. Often this issue presents itself at 5% or less of contingent job offers and once the data is gathered, decisions can be make rather quickly.
>
> Companies already trained to make decisions regarding requests for reasonable accommodation under the ADAAA will quickly grasp the steps in the recommended analysis process. Those familiar with processing FLMA leave requests will have a similar analytical framework.

following the procedures recommended in the Guidance for using targeted screens and individualized assessment to apply the *Green* factors to hiring applicants.

V. The EEOC developed the Guidance over a period of many years, with the assistance of broad public input provided in two public hearings and in 300 public comments.

The EEOC conducted a thoughtful and thorough process in soliciting input on this issue of critical concern to millions of U.S. workers. Beginning in 2006, under then Chair Naomi Earp, the EEOC conveyed its interest in updating the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964. According to Commissioner Victoria Lipnic, this update was necessary "in light of the technological and case law developments of the last two decades" since the Commission first issued the guidance under Chairman Clarence Thomas in 1987.[10]

The EEOC has held several open meetings through which it has solicited and received the views of a diverse set of stakeholder groups, including employer representatives, and participated in numerous forums organized by the key stakeholders.[11] The EEOC invited leaders from the management community to participate on panels at public EEOC meetings in 2008 and 2011. At the 2011 meeting, the Commission received information about employer best practices for hiring individuals with criminal records. The Commission received roughly 300 comments after its July 2011 meeting, many of which were from employer representatives, small business owners, and human resource professionals.[12] Virtually every major industry group with a stake in

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[10] Commissioner Lipnic's statement upon voting to adopt the Guidance, April 25, 2012, page 1.

[11] *See* Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records *at* http://www.eeoc.gov/eeoc/meetings/11-20-08/index.cfm and Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier *at* http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm.

[12] The views of the organizations and constituencies that this Commission invited to testify at the briefing were all presented to the EEOC in public comments. In addition to the comments submitted jointly by Commissioners Kirsanow, Heriot and Gaziano, critical or cautionary comments about updating the Guidance were submitted by Mr. Dodge on behalf of the Council for Employment Law Equity; by Ms. Bone for Sue Weaver CAUSE; by the National Association of Professional Background Screeners; by the National Retail Federation; and by the Society for Human Resource Management, all of whom presented testimony at the briefing on December 7. Though Mr. Fishman's firm did not submit comments, six or eight consumer reporting agencies like his company did, in addition to the comments submitted by their association. The National Small Business Association does not appear to have commented to the EEOC, but the concerns of many of its constituents were undoubtedly reflected in the comments submitted by the National Federation of Independent Business. Mr. Dodge's discussion of negligent hiring, retention and supervision cases also covered most of the substance of the statement of Ms. Payne at the briefing on behalf of GS4 and private security companies.

criminal history record checks made its views known to the EEOC.[13] Notably, the comments were two to one in favor of updating the Guidance.

When drafting the 2012 Enforcement Guidance, Commission staff again met with various employer and employee representatives to obtain focused feedback on discrete issues. This review process culminated in the Commission's April 25, 2012, bipartisan vote to approve the Enforcement Guidance.

VI. The fact that Congress expressly provided in Title VII that the federal statute pre-empts any state or local laws that require an employer to violate Title VII, as stated in the Guidance, creates the theoretical potential for employers to face conflicting legal obligations, but few employers will ever encounter such a conflict in the real world.

Some concern has been raised because the Guidance states that asserted compliance with state or local law is not a defense to a violation of Title VII.[14] Ms. Miaskoff explained this provision very plainly (Miaskoff written testimony at page 10):

> Title VII prohibits disparate impact discrimination and it also includes language that preempts state or local laws when those laws "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under the statute. [Citing 42 U.S.C. § 2000e-7.] Therefore, if an employer's exclusionary policy or practice has a disparate impact and is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law does not shield the employer from Title VII liability.

The cited section of the statute has been in place since 1964. It is not the Enforcement Guidance, but Title VII itself which preempts state or local laws that require an employer to violate Title VII. It would be a disservice to employers if the EEOC were to fail to inform them about Title VII's preemption of state law in this area.

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[13] According to a list of the public comments on file at the EEOC, compiled by the National Employment Law Project, a signatory to this letter, major national business and trade associations that weighed in with public comments included the U.S. Chamber of Commerce, American Bankers Association, American Camp Association, American Insurance Association, Food Marketing Institute, International Association of Amusement Parks and Attractions, International Association of Exhibitions and Events, National Federation of Independent Business, National Multi Housing Council (NMHC) & National Apartment Association (NAA), National Council of Investigative and Security Services (NCISS), Petroleum Marketers Association of America, and Retail Industry Leaders Association.

[14] Footnote 167 of the Guidance states:

> *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991) (noting that "[i]f state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII"); Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 380 (2d Cir. 2006) (affirming the district court's conclusion that "the mandates of state law are no defense to Title VII liability").

None of the witnesses at the briefing could relate a single instance in which one of their members or customers had identified a state statute or local law that might require an employer to violate Title VII. *See, e.g.,* Commissioner Kladney's question to the third panel of witnesses (MTB at 217-18): none of those panelists were aware of a single instance where a state statute that required a disqualification had been identified as a potential conflict between state law and Title VII.

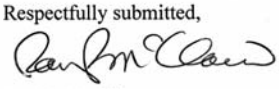
The strict requirements to prove a disparate impact violation circumscribe narrowly the statutes that can present employers with this type of conflict. State statutes are not preempted simply because the statute requires background checks, but only if the statutes impose excessive disqualifications. Not only must a statutory disqualification have disparate impact on minority workers, but the required disqualification must be without relation to the job and not be required by business necessity. It is not surprising that none of the witnesses at the briefing could identify even one employer who has faced a conflict created by such a statute.

Conclusion

The EEOC Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions, as updated by the EEOC in 2012, is a thoughtful, flexible, and workable roadmap for employers to follow. The Guidance explains to employers how to conduct and use any appropriate background checks they reasonably require, without violating the rights that job applicants have under Title VII.

We thank the Commission for the opportunity to present these comments for the Commission's consideration in preparing any report on the briefing. If you have any questions, please contact Ray McClain at The Lawyers' Committee for Civil Rights Under Law at rmcclain@lawyerscommittee.org or Lexer Quamie at The Leadership Conference on Civil and Human Rights at quamie@civilrights.org.

Respectfully submitted,



Ray P. McClain
Director, Employment Project
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, N.W., Suite 400
Washington, DC 20005

Joined by the following organizations:

9to5 [organizations continued on following page]

ACLU

All of Us or None

Bazelon Center for Mental Health Law

Connecticut Legal Services

Faces & Voices of Recovery

FedCURE

Greater Hartford Legal Aid, Inc.

Heartland Alliance for Human Needs & Human Rights, National Transitional Jobs Network

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Legal Action Center

Legal Assistance Resource Center of Connecticut

Legal Services for Prisoners with Children

Massachusetts Law Reform Institute, Inc.

NAACP

NAACP Legal Defense and Educational Fund, Inc.

National African American Drug Policy Coalition

National Association of Social Workers

National Employment Law Project

National Women's Law Center

New Haven Legal Assistance Association

Ohio Justice & Policy Center

Safer Foundation

The Leadership Conference on Civil and Human Rights

The United Auto Workers (UAW)

Youth Represent

[Additional submissions of Ms. Berrien follow:]

[The EEOC report, "Strategic Plan for Fiscal Years 2012-2016," may be accessed at the following Internet address:]

http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf

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[The EEOC report, "Strategic Enforcement Plan FY 2013-2016," may be accessed at the following Internet address:]

http://www.eeoc.gov/eeoc/plan/upload/sep.pdf

[Questions submitted for the record and their response follows:]

U.S. CONGRESS,
Washington, DC, July 16, 2013.

Hon. JACQUELINE A. BERRIEN, *Chair,*
Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

DEAR CHAIR BERRIEN: Thank you for testifying at the May 22, 2013 Subcommittee on Workforce Protections hearing entitled, "Examining the Regulatory and Enforcement Actions by the Equal Employment Opportunity Commission." I appreciate your participation.

Enclosed are additional questions submitted by committee members following the hearing. Please provide written responses no later than August 16, 2013, for inclusion in the official hearing record. Responses should be sent to Owen Caine of the committee staff, who can be contacted at (202) 225-7101.

Thank you again for your contribution to the work of the committee.

Sincerely,

TIM WALBERG, *Chairman,*
Subcommittee on Workforce Protections.

QUESTIONS FROM CHAIRMAN WALBERG (MI-07)

Questions addressing the EEOC's recent and proposed enforcement guidance, and the process by which it is promulgated.

1. What new enforcement guidance is the EEOC considering issuing and can you provide a timetable for issuing any new guidance? Specifically, is the EEOC considering new guidance on reasonable accommodation under the Americans with Disabilities Act? Finally, can you give us your assurance that any future guidance will be provided to the public for comment prior to making it final? If not, why?

2. On May 8, 2013, the EEOC held a hearing regarding employer wellness programs under the varying requirements of federal non-discrimination laws, the Health Insurance Portability and Accountability Act, and the Patient Protection and Affordable Care Act. The health care law codifies and expands the existing rules for workplace wellness programs, and proposes to increase, from 20 to 30 percent, the amount by which health plans can vary their premiums for participation in wellness plans. The health care law also endorses the value of workplace wellness plans by requiring health plans offered through health care exchanges under the law to include wellness and chronic disease management as a core benefit. In light of the health care law's treatment of wellness programs and the existing federal regulatory scheme governing their structure, does the EEOC plan to issue guidance on workplace wellness programs? If so, will the EEOC work with the Departments of Labor and Health and Human Services in promulgating this guidance? Will the EEOC allow for a notice and comment period on any wellness guidance they consider?

3. The EEOC, along with other federal agencies, has specifically focused on gender pay discrimination. The EEOC is part of the National Equal Pay Task Force and provided compensation discrimination training to enforcement personnel across agencies. The Office of Federal Contract Compliance Programs (OFCCP) recently rescinded its enforcement guidance on pay discrimination and replaced it with broader investigation procedures, without providing much guidance to help employers determine proactively whether or not they are in compliance. What are the EEOC's current plans with regard to gender pay discrimination guidance and enforcement? How has the EEOC coordinated with other agencies, including the OFCCP to ensure employers do not face conflicting or overly burdensome regulation in this area?

4. Several studies show a relationship between a poor credit history and risk of loss to a business, a customer, or a fellow employee. How does the EEOC plan to use empirical, scientific-based evidence in the development of new guidance, specifically credit history guidance?

5. Employers conduct credit checks to protect them, their customers, and other employees from financial harm. For example, the Association of Certified Fraud Examiners (ACFE) said in a recent report that the top two red flag warnings exhibited by perpetrators associated with fraud were instances in which the fraudster was living beyond his or her financial means or experiencing financial difficulties. Further, employee theft accounts for nearly $1 trillion annually. Employers are troubled by the prospect of limits on the use of credit histories for employment. Will the EEOC issue credit guidance? If the EEOC intends to issue credit guidance what is the timing? Will that guidance go through the APA, OMB, or Comptroller General review process? If not, why not?

6. Your guidance on criminal background screening is 55 pages long and contains 167 footnotes. It requires complex individualized assessments involving a multitude of amorphous factors. Even sophisticated attorneys may not know how to advise their clients. Please provide the questions you have received regarding this guidance and the responses to those questions provided by the EEOC.

7. The EEOC and the Federal Trade Commission are working together on FAQs to the EEOC's criminal background check guidance. Will the FAQs address employers' responsibility under the EEOC guidance and the Fair Credit Reporting Act? What is the status of the FAQs?

8. Central to the EEOC's criminal background check guidance is the requirement that employers conduct an "individualized assessment" coupled with a targeted screen. While not mandating such, the guidance states that "although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII." It also states a targeted screen coupled with an opportunity for an individualized assessment is a circumstance in which the EEOC believes employers will consistently meet the "job related and consistent with business necessity" defense. How does the EEOC intend to enforce individualized assessments? By strongly urging employers to conduct "individualized assessments," the guidance imposes a new burden on responsible employers seeking to comply with it and avoid an EEOC investigation. Will enforcement in this area be driven by whether an employer has developed a screen and conducts individualized assessment, and, alternatively, will lack of any screen or individualized assessment be grounds for an EEOC investigation?

9. Is there a time or point in the hiring process when the EEOC believes it is appropriate to conduct a criminal check? Is it ever appropriate to ask about criminal history on an application? Is it ever appropriate to consider criminal history prior to an interview?

10. Regarding the EEOC's criminal background check guidance, what if an employer finds out an individual lied on his or her employment application regarding their criminal history? If that individual is fired for their lack of honesty about a prior conviction, could the employer still run afoul of the guidance?

QUESTIONS REGARDING THE EEOC'S DELEGATION OF LITIGATION AUTHORITY TO THE GENERAL COUNSEL

11. The general counsel is required to bring a case before the EEOC for a vote to proceed to litigation in four instances, including those in which the case would likely create public controversy. What types of cases would fall in this "public controversy" category? Given the high level of interest on the criminal history background checks guidance, and its controversy thus far, do you expect the general counsel to bring such cases before the commission for a vote to proceed prior to litigation?

12. Should the EEOC decide to pursue litigation that considers partners as "employees," would you expect the commissioners to vote on whether to commence any such litigation? Would you expect such litigation to trigger any of the instances in which the EEOC requires commissioners to vote to proceed? For example, do you believe the litigation would have a high likelihood for public controversy? Would it involve a major expenditure of resources? Would it present issues in a developing area of law?

13. In 2012, 122 lawsuits were filed in the name of the EEOC, but only three of those were submitted for the commission's consideration. Do you feel this is an appropriate proportion? Were fewer than 3 percent of the lawsuits brought in the commission's name last year appropriate for submission to the commission?

14. Courts have recently found several cases brought by the EEOC to be meritless. For example, the EEOC was ordered to pay the defendants' costs and attorneys' fees in the Peoplemark and CRST Van Expedited cases. Did the commissioners approve the commencement of litigation in those cases and if not, why not? Given that the EEOC as a whole is ultimately accountable for outcomes in litiga-

tion, do you agree the commissioners should play a greater role in approving cases that proceed to litigation?

15. The commission has delegated authority to district directors to negotiate settlements and conciliation agreements, and to make reasonable cause determinations in a wide range of circumstances. How does the commission exercise oversight of that delegation and what limits are imposed on the discretion of district directors?

QUESTIONS REGARDING THE EEOC'S POLICIES AND PROCEDURES IN INVESTIGATIONS AND LITIGATION

16. President Obama has commented on the importance of transparency in government. The EEOC's commissioner charges generally result in broad-based systemic investigations of an employer's business practices and can be based on a commissioner reading a newspaper article about a company or a company's hiring statistics. Is the EEOC required to explain or articulate any basis for the charge or what led to the charge before the employer is subjected to a broad-based systemic investigation by the EEOC? Do you believe the approach is consistent with the importance of transparency in government and due process in our legal system?

17. Why has the EEOC focused on conducting directed investigations, as opposed to investigations initiated in response to a complaint? How does the EEOC decide whether to spend resources on directed investigations in light of the substantial backlog of complaints?

18. In many cases, the EEOC engages in a "conciliation" or settlement process, regularly demanding the statutory maximum in terms of a monetary settlement offer and insisting on sweeping changes to the employer's human resource operations. Frequently, the settlement demands have no relationship to the historical jury verdicts in the region, and generally do not take the employer's defenses into consideration. What steps are you taking to ensure the EEOC is engaging in effective, good-faith conciliation prior to litigation?

19. For years, the EEOC has litigated challenges to proper conciliation with varying degrees of success. Currently, the EEOC is taking two completely new litigation positions: (1) courts have no authority to review the EEOC's conciliation efforts; and (2) no information about conciliation can be put before a court unless the EEOC consents. These positions make the EEOC accountable to no party or court for its conciliation efforts. After almost 40 years of litigating the issue of conciliation, why is the EEOC now attempting to take that issue off the table? Please provide any and all documentation regarding this EEOC position.

20. Why do certain EEOC regional directors refuse to share information about what the EEOC learned during its investigation during the conciliation process even though they ultimately must do so in litigation if conciliation fails? Wouldn't sharing relevant information with the target of the investigation help resolve more cases and accomplish the goal of compliance with Title VII?

21. Private lawyers who sue employers engage in a cost-benefit analysis to determine whether the cost and risk of going forward to trial is warranted by the potential financial outcome. As the steward of taxpayer dollars, do you believe the EEOC should do this too? What are the EEOC's procedures for resolving cases in a timely manner to reduce costs to employers, and ultimately the taxpayer?

22. The EEOC's Strategic Enforcement Plan states the EEOC has superior access to data, documents, and potential evidence of discrimination in recruitment and hiring, and therefore is better situated to eliminate barriers in recruitment and hiring than are individuals or private attorneys, who have difficulties obtaining such information. In determining whether to bring other systemic litigation, does the EEOC consider whether the individuals affected have the means and ability to seek redress through private civil litigation? In your view, should it do so?

23. In litigation, the EEOC claims an attorney client privilege with charging parties and claimants. But in practice the EEOC does not consider their wishes when deciding whether to settle a case or go to trial. Why should the EEOC be able to have it both ways unlike attorneys in other litigation?

24. The EEOC is required to establish or make available an Alternative Dispute Resolution (ADR) program that may be available for the pre-complaint process and the formal complaint process. The EEOC, however, may make a determination regarding whether to offer ADR in a particular case.

a. Once a decision has been made by EEOC as to whether to offer ADR, are the parties involved notified of that decision prior to further administrative contact? If not, why not?

b. What percentage of cases does the EEOC offer ADR in the pre-complaint process?

c. What percentage of cases does the EEOC offer ADR in the formal complaint process?

d. Does the EEOC offer ADR during initial counseling of the complainant? If not, what informal methods of resolution does the EEOC counselor offer?

e. How does the EEOC decide whether to offer ADR in a particular case?

f. In deciding whether to offer ADR in a particular case, does the EEOC take into account a claimant's desire to mediate, litigate, or settle?

25. When a complainant wishes to file a class complaint after initial counseling, the complaint is sent to the relevant EEOC field or district office, where an EEOC administrative judge determines whether to accept or dismiss the class complaint. To be certified as a class, the administrative judge must decide the certification requirements of numerosity, commonality, typicality, and adequacy of representation are fulfilled.

a. Does the EEOC separately communicate with each member of the proposed class in its determination of the class certification requirements?

b. Does the EEOC collect documents and other non-testimonial evidence from each member of the proposed class in its determination of the class certification requirements?

c. Is the employer notified during this process a class complaint is under consideration? If not, why not?

26. In fiscal year 2012, how many lawsuits did the EEOC win outright, through jury verdict or summary judgment?

27. The EEOC claims process has a costly effect on small businesses, especially when the case is litigated. What are the EEOC's internal procedures for resolving cases in a timely manner to reduce costs to employers, and ultimately consumers?

QUESTIONS REGARDING PARTNERSHIP AGREEMENTS AND THE DEFINITION OF "EMPLOYEE" UNDER FEDERAL NON-DISCRIMINATION LAW

28. As the Supreme Court noted in Clackamas Gastroenterology Assocs. v. Wells, the definition of "employee" in anti-discrimination laws—that it is "an individual employed by an employer"—is "completely circular and explains nothing." Thus the determination as to whether partners in a particular partnership are "employers" or "employees" is based on a multi-factored, facts-and-circumstances test. To the extent the statute needs clarification, do you believe litigation is the proper avenue through which to define partnerships?

29. Today, most partnerships, particularly large partnerships, adopt internal management practices such as governing boards that allow them to delegate managerial functions while maintaining partner ownership of the firm, control over professional work product, and voice on issues critical to the partnership. In your view, does the delegation of partnership authority to internal governing boards transform the partners of a firm into employees rather than employers? What factors, in the EEOC's view, are most critical to determining whether and when such a delegation transforms partners into "employees?"

30. In the last decade the EEOC brought a highly publicized lawsuit against the law firm Sidley Austin, alleging its partners were employees and its retirement policy for partners therefore violated the Age Discrimination in Employment Act. What, in the EEOC's view, were the most significant characteristics of Sidley's partnership structure that led the EEOC to conclude that its partners were "employees?"

31. Is the EEOC currently pursuing directed investigations of mutually agreed upon retirement policies for partners that were not commenced following a charge filed by a partner? If so, what factors did the EEOC consider in deciding to prioritize those investigations over the tens of thousands of backlogged cases involving employee complaints?

32. The EEOC's Strategic Enforcement Plan lists six enforcement priorities. Do you intend to make mutually agreed upon retirement policies in legal and accounting professional partnerships a focus of the EEOC's enforcement efforts? If so, which of the six enforcement priorities identified in the Strategic Enforcement Plan make mutually agreed upon retirement policies for partners an EEOC priority?

QUESTIONS REGARDING THE EEOC'S INTERACTION WITH THE DEPARTMENT OF LABOR'S OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)

34. Did the EEOC comment on the OFCCP's rescission of the agency's 2006 Compensation Standards and the issuance of OFCCP Directive 307? Why not? The EEOC agreed with the 2006 Compensation Standards. Has the EEOC's position changed?

35. As you know, Executive Order (EO) 12067 requires the EEOC to ensure coordination of federal equal employment opportunity enforcement efforts. In particular, EO 12067 requires the EEOC "to develop uniform standards, guidelines, and policies defining the nature of employment discrimination" and "develop uniform standards and procedures for investigations and compliance reviews." Did the EEOC review OFCCP's notice of rescission of the 2006 Compensation Standards and the issuance of Directive 307 under EO 12067? Did the EEOC provide any feedback to OFCCP about the approach contained in Directive 307? Please provide any and all correspondence between the EEOC and OFCCP on this subject.

36. Under the EEOC's Compensation Manual, published in 2000, the EEOC instructs investigators to "determine the similarity of jobs by ascertaining whether the jobs generally involve similar tasks, require similar skill, effort, and responsibility, working conditions, and are similarly complex or difficult." The EEOC's Compensation Manual continues, "[t]he actual content of the jobs must be similar enough that one would expect those who hold the jobs to be paid at the same rate or level." Does the EEOC interpret OFCCP Directive 307 to be altogether consistent with these EEOC instructions?

37. As you know, in August, 2012, the National Research Council of the National Academies of Sciences (NAS) released a report entitled "Collecting Compensation Data from Employers." This report was commissioned by the EEOC. The report contained two primary recommendations:

Recommendation 1: In conjunction with the Office of Federal Contract Compliance Programs of the U.S. Department of Labor and the Civil Rights Division of the U.S. Department of Justice, the U.S. Equal Employment Opportunity Commission should prepare a comprehensive plan for use of earnings data before initiating any data collection.

Recommendation 2: After the U.S. Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, and the U.S. Department of Justice complete the comprehensive plan for use of earnings data, the agencies should initiate a pilot study to test the collection instrument and the plan for the use of the data. The pilot study should be conducted by an independent contractor charged with measuring the resulting data quality, fitness for use in the comprehensive plan, cost, and respondent burden.

a. What is the status of the EEOC's implementation of these recommendations? Has the EEOC and OFCCP developed a comprehensive plan? If so, please provide a copy of the comprehensive plan. If not, why not, and when will it be completed?

b. Has an independent contractor been selected for a pilot project?

c. How will the EEOC ensure coordination with OFCCP with regard to these recommendations?

d. Has the EEOC had any discussions with OFCCP about the comments OFCCP received in response to the Advance Notice of Proposed Rulemaking on a Compensation Data Collection Tool, 76 Fed. Reg. 49398 (Aug. 10, 2011)?

e. Will the EEOC commit to using its authority under EO 12067 to require OFCCP to adhere to the NAS recommendations before issuing any proposed regulations on collecting compensation data?

QUESTIONS FROM REPRESENTATIVE HUDSON (NC-08)

1. There is a case in which an employee filed a gender discrimination case against her employer. When the employer tried to meet with the EEOC representative and the employee for consultation, the employer instead found the EEOC representative acting as a prosecuting attorney for the employee instead of a negotiator between the parties. The employer was not notified prior to the meeting of the terms of these discussions, and whether or not the EEOC representative would be used in a mediating role or prosecuting role, leaving the impression these meetings were informal negotiations.

a. To what extent does the EEOC give a notice of terms to all parties involved prior to in person consultations?

b. In other cases is it protocol for an EEOC representative to play negotiator/ mediator and prosecutor during an investigation?

c. If employers are not notified of the status of the consultation meeting, what are their administrative rights to have counsel present and/or delay the meeting until counsel is present?

2. As you know, the EEOC's Chicago District Office is currently investigating PricewaterhouseCoopers regarding their partnership agreement and mandatory retirement age. The six-factor partnership test adopted by the Supreme Court in Clackamus would presume the partners at PricewaterhouseCoopers are not subject to the ADEA.

a. Should the EEOC decide to pursue litigation of this case, do you believe it would involve a major expenditure of resources or have a high likelihood for public controversy?

b. Given the Strategic Enforcement Plan's objective of retaining the decision to commence litigation over cases that (1) will involve a major expenditure of resources; (2) present issues in a developing area of law; or (3) cases with a high likelihood for public controversy, would you expect the commission, and not the general counsel, to vote on whether to commence litigation against PricewaterhouseCoopers?

EEOC Response to Questions Submitted for the Record

1. What new enforcement guidance is the EEOC considering issuing and can you provide a timetable for issuing any new guidance? Specifically, is the EEOC considering new guidance on reasonable accommodation under the Americans with Disabilities Act? Finally, can you give us your assurance that any future guidance will be provided to the public for comment prior to making it final? If not, why?

RESPONSE: Members of the Commission have spoken publicly about their interest in issuing revised guidance on reasonable accommodation under the ADA. In particular, the existing guidance does not reflect changes to the definition of "disability" resulting from enactment of the ADA Amendments Act of 2008 (ADAAA). Additionally, a number of legal issues concerning reasonable accommodation have arisen in the more than 10 years since our existing guidance was last revised, and others are likely to arise as the question of whether an individual has a disability within the meaning of the ADA becomes less important as a result of the ADAAA. For example, in June 2011, the Commission held a meeting on the extent of an employer's obligation to provide leave as a reasonable accommodation. *http://www.eeoc.gov/eeoc/meetings/6-22-11/index.cfm.*

Other areas of interest for the Commission, as evidenced by public meetings we have held in the past two years include pregnancy discrimination, *http://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm,* and the application of the ADA to employer-sponsored wellness programs. *http://www.eeoc.gov/eeoc/meetings/5-8-13/index.cfm.* Some Commissioners and a number of stakeholders present at those meetings expressed the hope that the EEOC would issue guidance on these subjects.

However, I cannot say whether the Commission will decide to issue guidance on these or other topics. The specific guidance that the Commission decides to issue, its content, and the time frame within which it is issued are all the product of a deliberative process, and a majority of Commissioners must agree on the outcome.

We value the views and varying perspectives of our stakeholders, and routinely seek input from the public in developing guidance.

2. On May 8, 2013, the EEOC held a hearing regarding employer wellness programs under the varying requirements of federal non-discrimination laws, the Health Insurance Portability and Accountability Act, and the Patient Protection and Affordable Care Act. The health care law codifies and expands the existing rules for workplace wellness programs, and proposes to increase, from 20 to 30 percent, the amount by which health plans can vary their premiums for participation in wellness plans. The health care law also endorses the value of workplace wellness plans by requiring health plans offered through health care exchanges under the law to include wellness and chronic disease management as a core benefit. In light of the health care law's treatment of wellness programs and the existing federal regulatory scheme governing their structure, does the EEOC plan to issue guidance on workplace wellness programs? If so, will the EEOC work with the Departments of Labor and Health and Human Services in promulgating this guidance? Will the EEOC allow for a notice and comment period on any wellness guidance they consider?

RESPONSE: As noted in response to Question 1, Commissioners and stakeholders present at the May 8, 2013 Commission meeting on the ADA and wellness programs certainly expressed interest in the Commission issuing guidance on this subject. Again, whether guidance is issued and what the content of that guidance will be will need to emerge from the Commission's deliberative process.

In developing any guidance, the Commission will coordinate closely with the Departments of Labor, Health and Human Services, and the Treasury (Internal Revenue Service), all of whom have issued regulations under the Affordable Care Act concerning wellness programs. The Commission has had considerable experience working with these agencies to understand laws that are outside our area expertise, most notably as part of the process of issuing proposed and final regulations to implement Title II of the Genetic Information Nondiscrimination Act. We will also consider input from the public, and already have access to both the written testimony

of participants at the Commission meeting as well as comments submitted during the 15 days following the meeting when the meeting record remained open for public comment.

3. The EEOC, along with other federal agencies, has specifically focused on gender pay discrimination. The EEOC is part of the National Equal Pay Task Force and provided compensation discrimination training to enforcement personnel across agencies. The Office of Federal Contract Compliance Programs (OFCCP) recently rescinded its enforcement guidance on pay discrimination and replaced it with broader investigation procedures, without providing much guidance to help employers determine proactively whether or not they are in compliance. What are the EEOC's current plans with regard to gender pay discrimination guidance and enforcement? How has the EEOC coordinated with other agencies, including OFCCP to ensure employers do not face conflicting or overly-burdensome regulation in this area?

RESPONSE: The Commission's current Strategic Enforcement Plan (SEP) emphasizes the importance of "a concentrated and coordinated approach" to enforcement that focuses on six priority issues, one of which is gender pay discrimination. EEOC plans to continue its enforcement and outreach to promote compliance. This emphasis on coordination is particularly well-established with respect to gender pay discrimination, because the EEOC and the Department of Labor have two longstanding Memoranda of Understanding about coordinating on training and investigations.

Indeed, in 2011 to 2012, the EEOC included OFCCP staff in its nationwide training about gender pay discrimination, so that staff from both agencies learned the same principles. This training reached approximately 2000 people. The EEOC's Memoranda of Understanding can be found at *http://www.eeoc.gov/laws/mous/index.cfm.*

4. Several studies show a relationship between a poor credit history and risk of loss to a business, a customer, or a fellow employee. How does the EEOC plan to use empirical, scientific-based evidence in the development of new guidance, specifically credit history guidance?

RESPONSE: The specific guidance that the Commission decides to issue, its content, and the time frame within which it is issued are all the product of a deliberative process, and a majority of Commissioners must agree on the outcome. Should the Commission decide to issue any guidance regarding employers' consideration of the credit histories of applicants and/or employees, it will consider the public input received from business and employee stakeholders as part of the October 2010 Commission meeting on credit histories, and will also consider relevant research in developing such guidance, as it does whenever it issues any policy or guidance.

5. Employers conduct credit checks to protect them, their customers, and other employees from financial harm. For example, the Association of Certified Fraud Examiners (ACFE) said in a recent report that the top two red flag warnings exhibited by perpetrators associated with fraud were instances in which the fraudster was living beyond his or her financial means or experiencing financial difficulties. Further, employee theft accounts for nearly $1 trillion annually. Employers are troubled by the prospect of limits on the use of credit histories for employment. Will the EEOC issue credit guidance? If the EEOC intends to issue credit guidance what is the timing? Will that guidance go through the APA, OMB, or Comptroller General review process? If not, why not?

RESPONSE: The specific guidance that the Commission decides to issue, its content, and the time frame within which it is issued are all the product of a deliberative process, and a majority of Commissioners must agree on the outcome. Since it has not been determined what form any such guidance would take were it to be issued, which review process might apply has not been determined. However, if and when the Administrative Procedure Act applies, the Commission will, as it has in the past, satisfy the requirements of the APA when issuing regulations.

6. Your guidance on criminal background screening is 55 pages long and contains 167 footnotes. It requires complex individualized assessments involving a multitude of amorphous factors. Even sophisticated attorneys may not know how to advise their clients. Please provide the questions you have received regarding this guidance and the responses to those questions provided by the EEOC.

RESPONSE: The EEOC recognizes that many of our stakeholders, including small businesses, job applicants, and employees, need information about this Guidance and our laws in general, but do not want (and do not have the time) to read the longer, more legally complex document itself.

Consequently, whenever the EEOC issues a substantive sub-regulatory guidance like the April 2012 Arrest and Conviction Guidance, it publishes one or more short, reader-friendly Q&A documents that serve two purposes: (1) to explain the most im-

portant points in the longer guidance in a straightforward manner; and (2) to respond directly to some of the most frequently asked questions about the longer document. While the EEOC does not archive all of the questions and comments received around the country, the most frequently-asked questions come to our attention and we strive to be responsive.

For the Arrest and Conviction Guidance, the EEOC issued two plain-language documents. First, the EEOC issued basic "Questions and Answers" shortly after the publication of the Guidance in April 2012. See *http://www.eeoc.gov/laws/guidance/qa—arrest—conviction.cfm.* There, the EEOC answered seven basic questions that reflect some of the comments and questions the Commission received after its July 2011 public meeting about arrest and conviction records as a hiring barrier. See *http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm.* This Question and Answer document begins by explaining how employment actions based on criminal background checks could become a Title VII issue, a question frequently raised by members of the public.

Later, to respond to questions about the Guidance itself, the EEOC published a "What You Should Know" document. Here, the EEOC explained in two sentences how an employer could show that its criminal background check was consistent with Title VII under the Guidance. The EEOC also emphasized that the Guidance does not prevent employers from using criminal background checks to screen applicants and employees in a meaningful way, a point about which public discussion continued. See *http://www.eeoc.gov/eeoc/newsroom/wysk/arrest—conviction—records.cfm.*

7. The EEOC and the Federal Trade Commission are working together on FAQs to the EEOC's criminal background check guidance. Will the FAQs address employers' responsibility under the EEOC guidance and the Fair Credit Reporting Act? What is the status of the FAQs?

RESPONSE: The EEOC and the FTC are working on two brief technical assistance publications with respect to background checks, one for employers and another for individuals. Written in plain language, the publications are designed to explain to employers what their responsibilities are under the equal employment opportunity laws and the Fair Credit Reporting Act with respect to background checks, and to explain to individuals what their rights are. The publications would not focus only on criminal background checks or set forth any new policy. The agencies are still designing the publications but hope to finalize them in the spring of 2014.

8. Central to the EEOC's criminal background check guidance is the requirement that employers conduct an "individualized assessment" coupled with a targeted screen. While not mandating such, the guidance states that "although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII." It also states a targeted screen coupled with an opportunity for an individualized assessment is a circumstance in which the EEOC believes employers will consistently meet the "job related and consistent with business necessity" defense. How does the EEOC intend to enforce individualized assessments? By strongly urging employers to conduct "individualized assessments," the guidance imposes a new burden on responsible employers seeking to comply with it and avoid an EEOC investigation. Will enforcement in this area be driven by whether an employer has developed a screen and conducts individualized assessment, and, alternatively, will lack of any screen or individualized assessment be grounds for an EEOC investigation?

RESPONSE: Enforcement in this area, like EEOC enforcement in other areas, generally will be driven by charges we receive. When the EEOC receives a charge of employment discrimination, we investigate the claim to gather relevant evidence. We first assess the potential merits of the charge, which includes a careful consideration of the underlying facts. As part of the investigative process, we provide the employer with the opportunity to respond to the allegations. In evaluating charges alleging that someone has been excluded from a job based on an arrest or conviction record, EEOC investigators will apply the legal standards in Title VII as explained more fully in the EEOC's guidance, including the principles favoring targeted screens and an opportunity for an individualized assessment. The outcome of a particular Title VII investigation will turn on the application of these principles to the unique facts of each case.

Simply asserting that a screen is "targeted" or that the employer has conducted an individualized assessment will not in itself be determinative. The EEOC investigators will focus on evidence of how the screen or the individualized assessment has been implemented in practice.

9. Is there a time or point in the hiring process when the EEOC believes it is appropriate to conduct a criminal check? Is it ever appropriate to ask about criminal

history on an application? Is it ever appropriate to consider criminal history prior to an interview?

RESPONSE: EEOC's guidance explains how an employer may appropriately and legally consider the criminal history of an applicant or employee. The guidance is intended to assist job seekers, employees, employers, and many other agency stakeholders. As a "best practice," the Commission recommends in the Guidance that employers avoid asking about criminal history on the job application itself. The policy rationale is that an employer is more likely to objectively assess the relevance of a conviction if it becomes known after the employer is already knowledgeable about the individual's qualifications and experience.

The Guidance also recognizes that "[the employer's c]ompliance with federal laws and/or regulations is a defense to a charge of discrimination." The Guidance notes that "employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations." Employers may want to inform applicants early in the hiring process if one of these federal exclusions applies.

10. Regarding the EEOC's criminal background check guidance, what if an employer finds out an individual lied on his or her employment application regarding their criminal history? If that individual is fired for their lack of honesty about a prior conviction, could the employer still run afoul of the guidance?

RESPONSE: Generally applicable and consistently implemented policies against falsifying or misrepresenting information in an application are enforceable. An employer whose practice is to terminate anyone whom it finds out has lied on an employment application may terminate someone who lies in response to a question about his or her criminal background. However, if the employee's prior arrest or conviction, not the fact that he or she lied about it on an application, is the reason that the employer terminated the employee, EEOC will apply the principles in the guidance to evaluate any charge of discrimination that is filed.

11. The general counsel is required to bring a case before the EEOC for a vote to proceed to litigation in four instances, including those in which the case would likely create public controversy. What types of cases would fall in this "public controversy" category? Given the high level of interest on the criminal history background checks guidance, and its controversy thus far, do you expect the general counsel to bring such cases before the commission for a vote to proceed prior to litigation?

RESPONSE: The Commission does not maintain a list of types of cases that may generate public controversy because what is considered controversial necessarily changes over time. In deciding whether litigation of a particular case is likely to generate public controversy, the General Counsel considers various factors, including whether the litigation of similar cases in the past generated public controversy or adverse publicity, whether any issue in the litigation has been the subject of discussion in the Congress, and whether any issue in the case has been the subject of significant debate in the media. The Commission recognizes that, as things currently stand, cases challenging an employer's use of criminal history as an exclusionary criterion are likely to generate public controversy. The General Counsel accordingly has presented all such cases to the full Commission for a vote, and will continue to do so for the foreseeable future.

12. Should the EEOC decide to pursue litigation that considers partners as "employees," would you expect the commissioners to vote on whether to commence any such litigation? For example, do you believe the litigation would have a high likelihood for public controversy? Would it involve a major expenditure of resources? Would it present issues in a developing area of law?

RESPONSE: A case in which the applicable legal standards are settled law, such as whether partners were covered as employees, would generally not be submitted to the Commission. The Supreme Court set out the factors to be considered in making such a determination ten years ago, and the Commission has litigated the issue in the context of law firms without generating public controversy. The decision whether any such case involves a developing area of the law, a major expenditure of resources, or is likely to generate public controversy is decided on a case-by-case basis.

13. In 2012, 122 lawsuits were filed in the name of the EEOC, but only three of those were submitted for the commission's consideration. Do you feel this is an appropriate proportion? Were fewer than 3 percent of the lawsuits brought in the commission's name last year appropriate for submission to the commission?

RESPONSE: Prior to the Commission's adoption of a Strategic Enforcement Plan in December 2012, there was no number or proportion of cases which were to be submitted to the full Commission. One of the primary purposes of the Commission's del-

egation of litigation authority to the General Counsel in the 1995 National Enforcement Plan (NEP) was to drastically reduce the number of litigation recommendations submitted to the Commission to free up the Commissioners to focus on larger policy issues. Delegation of authority to the General Counsel to approve litigation is especially appropriate for EEOC since EEOC has a presidentially appointed and Senate confirmed General Counsel whom Congress made responsible for the conduct of litigation on behalf of the Commission. The Commission carefully reviewed the delegation under the NEP and reaffirmed delegation under the Strategic Enforcement Plan in December 2012 with the addition that one litigation recommendation from each District Office be submitted to the Commission each fiscal year, including litigation recommendations which otherwise meet the criteria for Commission approval.

14. Courts have recently found several cases brought by the EEOC to be meritless. For example, the EEOC was ordered to pay the defendants' costs and attorneys' fees in the Peoplemark and CRST Van Expedited cases. Did the commissioners approve the commencement of litigation in those cases and if not, why not? Given that the EEOC as a whole is ultimately accountable for outcomes in litigation, do you agree the commissioners should play a greater role in approving cases that proceed to litigation?

RESPONSE: The Commission approved litigation in the Peoplemark case in September 2008. CRST was approved for litigation by the General Counsel in September 2007. While both of these cases were filed during the prior administration, it is clear that CRST was not a Commission-level case when the case was authorized for litigation.

The EEOC appealed the district court's award of attorney's fees in Peoplemark. The case has been briefed and argued and is currently awaiting decision by the United States Court of Appeals for the Sixth Circuit. The EEOC argued on appeal that Peoplemark is not entitled to attorney's fees because it failed to show that the EEOC's suit, at any time during the litigation, was frivolous, unreasonable, or without foundation—the standard the United States Supreme Court has established for awarding fees to a defendant in a Title VII action.

The EEOC appealed CRST to the 8th Circuit and although a divided panel upheld much of the lower court decision, it revived two individual claims and thus set aside the fees as the defendant was not a prevailing party. The CRST ruling held that the Agency must, at least in non-pattern-or-practice class cases, identify and conciliate for each claimant in the administrative process before filing suit on their behalf. This ruling departed from prior settled law and practice and was thus unforeseen at the time the case was filed. The EEOC later dismissed one claim and settled the one remaining claimant case this year. On remand, CRST filed a new petition for fees, which the district court granted, awarding $4.7 million in attorney's fees, expenses, and costs. EEOC anticipates that it will appeal the fees order.

Peoplemark, CRST and the few other losses we have suffered over the past few years are but a small part of the EEOC's highly successful litigation program. For example in 2012, we resolved 253 merits lawsuits for a total of $44,205,586 in monetary relief. Our success rate in litigation has been more than 90 percent for the past 5 years at least. This year we conducted 10 trials and won 8 of them, all of the victories involving cases filed pursuant to the Commission's delegated authority.

As noted above, the Commission has carefully reviewed the delegation of litigation authority to the General Counsel and reaffirmed that delegation under the Strategic Enforcement Plan in December 2012 with the addition that one litigation recommendation from each District Office be submitted to the Commission each fiscal year.

15. The commission has delegated authority to district directors to negotiate settlements and conciliation agreements, and to make reasonable cause determinations in a wide range of circumstances. How does the commission exercise oversight of that delegation and what limits are imposed on the discretion of the district directors?

RESPONSE: The EEOC has received nearly 100,000 charges each year for the last three years. Agency staff, including District Directors, is responsible for investigating and resolving charges. Delegation to the District Directors is critical to an efficient charge resolution system, as without it, the inventory of charges would increase dramatically.

There is no express limitation on the exercise of delegated authority by District Directors, but they are guided in their exercise of delegated authority by the agency's Strategic Plan and Strategic Enforcement Plan (both were Commission-approved). The Chair is responsible for overall management of agency operations and personnel; various intermediate personnel directly supervise agency staff. The Director of the Office of Field Programs (OFP) is responsible for day-to-day supervision

and oversight of the work of the District Directors. Among his regular interactions with the Chair and members of the Commission, the Director of OFP briefs the Commission quarterly on the administrative enforcement program of the agency (which includes investigation and resolution of private sector charges through mediation or conciliation), as provided in the Strategic Enforcement Plan. As members of the Senior Executive Service, District Directors' performance is evaluated at least annually by the Director of the Office of Field Programs, and reviewed by a group of Senior Executives from within and outside the EEOC who are appointed by the Chair in accordance with Office of Personnel Management guidelines.

In addition, as part of the agency's Strategic Plan, a Quality Control Plan (QCP) is being developed that establishes specific criteria for evaluating the quality of EEOC investigations and conciliations and provides for an expanded review system to conduct assessments of investigations and conciliations in each district.

16. President Obama has commented on the importance of transparency in government. The EEOC's commissioner charges generally result in broad-based systemic investigations of an employer's business practices and can be based on a commissioner reading a newspaper article about a company or a company's hiring statistics. Is the EEOC required to explain or articulate any basis for the charge or what led to the charge before the employer is subjected to a broad-based systemic investigation by the EEOC? Do you believe the approach is consistent with the importance of transparency in government and due process in our legal system?

RESPONSE: The EEOC uses Commissioner charges under Title VII of the Civil Rights Act and the Americans with Disabilities Act when there is reason to believe discrimination has occurred. Congress authorized the use of Commissioner charges when it enacted Title VII in 1964 and they have been used for decades for investigations of varying scope, from individual to class-based.

In 1972, Congress broadened the Commissioner charge authority, removing a requirement that there be "reasonable cause" to investigate. In 1984, the Supreme Court upheld the authority of the Commission to issue and investigate Commissioner charges, under the same standards applicable to charges filed by members of the public, to determine whether the law has been violated. Equal Employment Opportunity Commission v. Shell Oil Company, 466 U.S. 54 (1984). The Supreme Court stated that this authority was essential to achieving the purposes of Title VII. Id. at 77.

Investigations initiated through these mechanisms are consistent with requirements of transparency in government and due process. As required by statute, the EEOC advises the employer of the alleged discrimination in the Commissioner charge, and explains its findings at various stages in the process, including in the predetermination interview, Letter of Determination, and conciliation. The employer is given opportunities to resolve the findings voluntarily through conciliation, and the employer is not bound by the EEOC's findings in the administrative process but has the right to a trial de novo in court.

While the employer is apprised of the alleged discrimination, the statute limits the bounds of transparency. Title VII explicitly prohibits the agency and its staff from making "public in any manner whatever information" the Commission may obtain in an investigation, including the existence of an investigation. 42 U.S.C. § 2000e-8(e).

17. Why has the EEOC focused on conducting directed investigations, as opposed to investigations initiated in response to a complaint? How does the EEOC decide whether to spend resources on directed investigations in light of the substantial backlog of complaints?

RESPONSE: The EEOC devotes the vast majority of its resources to investigations initiated in response to charges filed by members of the public. In contrast, directed investigations comprise a small portion of the Commission's resources. For example, in FY 2012, almost 100,000 charges were filed with EEOC, and over 111,000 were resolved. In contrast, the agency initiated only 24 directed investigations in FY 2012.

The authority for directed investigations is found in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(a) and (b), and the Equal Pay Act (EPA), 29 U.S.C. § 206(d), both of which give the EEOC the authority to investigate under sections 9, 11 and 17 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 209, 211 and 217. The term "directed investigation" is not a statutory term but is used by the EEOC to refer to investigations initiated by the agency under these provisions, which authorize the EEOC to investigate without an existing charge of discrimination filed by a member of the public. The ADEA language grants the EEOC the power to make investigations when "necessary or appropriate for the administration" of the ADEA, 29 U.S.C. § 626(a). Section 11 of the FLSA gives the

EEOC the authority to "investigate such facts, conditions, practices, or matters as [it] may deem necessary or appropriate to determine whether any person has violated any provision of this chapter or which may aid in the enforcement of the provisions of this chapter * * *" 29 U.S.C. § 211(a).

The EEOC exercises its statutory authority to initiate directed investigations and Commissioner charges to maximize the effectiveness of its law enforcement efforts when the agency has reason to believe that discrimination has occurred, even though an individual member of the public may not have come forward to file a charge. Congress authorized Commissioner charges and directed investigations in order to provide the EEOC with a mechanism to address possible discriminatory acts that otherwise might go unaddressed.

The EEOC uses these tools to investigate situations where individuals may for various reasons be unwilling or unable to file charges, for example when the employee fears retaliation should he or she file a charge. Other cases may be initiated on behalf of victims who are in underserved communities, have been totally excluded from the workplace, or are unaware of discriminatory hiring or job referral barriers, such as racial, gender or age preferences covertly used by employment agencies at the behest of an employer. Commissioner charges and directed investigations are methods of seeking relief for these victims of discrimination.

In 2006, the Commission unanimously voted to reaffirm the importance of Commissioner charges and directed investigations as a central component of the EEOC's systemic program. In adopting the recommendations of its Systemic Task Force, led by Vice Chair Leslie Silverman, the Commission approved a series of measures to strengthen the agency's efforts to address pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location. The Task Force found that Commissioner charges and directed investigations "are important tools in the effort to combat systemic discrimination, as many victims of discrimination do not come to EEOC because they fear retaliation, do not know about their rights, or are unaware of the discrimination (particularly where the issue is hiring)."

18. In many cases, the EEOC engages in a "conciliation" or settlement process, regularly demanding the statutory maximum in terms of a monetary settlement offer and insisting on sweeping changes to the employer's human resource operations. Frequently, the settlement demands have no relationship to the historical jury verdicts in the region, and generally do not take the employer's defenses into consideration. What steps are you taking to ensure the EEOC is engaging in effective, good-faith conciliation prior to litigation?

RESPONSE: Conciliation is the statutorily required process by which the EEOC attempts to resolve discrimination through "informal means of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5. The purpose of conciliation is to remedy the violation, as required by statute. If a particular policy or practice was found to be discriminatory, the EEOC would seek to have the employer change its practices to end the discrimination and to prevent further discrimination from occurring. Conciliation occurs only after the investigation of a charge has been completed, and the EEOC has reached a determination that the evidence establishes that there is "reasonable cause" to believe that discrimination occurred.

The percentage of successful conciliations has been increasing during the Chair's tenure. Successful conciliation rates: FY 2010–27 percent; FY 2011–31 percent; FY 2012—38 percent; FY 2013 (midyear)—40 percent. Specific data is reflected below:

Fiscal year	Cause resolutions	Conciliations	Percentage
FY 2010	4,981	1,348	27.1%
FY 2011	4,325	1,351	31.2%
FY 2012	4,207	1,591	37.8%

One of the steps the Commission is taking to insure effective, good-faith conciliations is the development of a Quality Control Plan that establishes criteria for evaluating the quality of investigations and conciliations. The proposed Quality Control Plan was developed by a staff work group with extensive public and internal input. It is currently under consideration by the Commission.

Further, the Commission disagrees with the notion that it fails to consider employer defenses or insists upon excessive monetary demands in conciliation. The Commission is responsible for furthering the public interest in remedying discriminatory conduct and that is our primary consideration in framing our relief demands.

EEOC has consistently taken steps to ensure effective and fair conciliations. The Office of the General Counsel and the Office of Field Programs routinely train employees on conciliations and issued field guidance on issues raised by recent case law concerning the Agency's conciliation obligations. As part of the litigation review, the Office of the General Counsel and the Commission, as appropriate, review the conciliation history of each case prior to authorizing litigation. If conciliation is insufficient legally or otherwise, the case is returned to the local office to conduct further conciliations or is disapproved for litigation.

19. For years, the EEOC has litigated challenges to proper conciliation with varying degrees of success. Currently, the EEOC is taking two completely new litigation positions: (1) courts have no authority to review the EEOC's conciliation efforts; and (2) no information about conciliation can be put before a court unless the EEOC consents. These positions make the EEOC accountable to no party or court for its conciliation efforts. After almost 40 years of litigating the issue of conciliation, why is the EEOC now attempting to take that issue off the table? Please provide any and all documentation regarding this EEOC position.

RESPONSE: With regard to judicial review of the Commission's efforts to obtain a conciliation agreement, the Commission recently has addressed the issue in several judicial districts where there are no controlling appellate decisions on whether Title VII authorizes judicial review of EEOC conciliations. The Commission has relied upon the plain language of Title VII, which allows the Commission to declare conciliation unsuccessful if it has been "unable to secure from the respondent a conciliation agreement acceptable to the Commission." The Commission has argued in its cases that this language evidences an intent to commit conciliation, which the statute describes as an "informal" method of achieving an agreement, to the discretion of the Commission and to make it non-reviewable by a court. 42 USC § 2000e-5(f)(1). Similarly, the plain language of 42 USC § 2000e-5(b) states that nothing said or done in conciliation may be made public or used as evidence in a subsequent proceeding without the consent of the persons concerned. The Commission has argued that this statutory provision reflects congressional intent to keep the negotiations of the conciliation process, like those in any settlement process, generally confidential and unrestrained by the concern of subsequent judicial scrutiny.

Significantly, some appellate courts have recognized that other parts of the EEOC's administrative process—namely its investigation and reasonable cause determination—are judicially unreviewable. See, e.g. EEOC v. Caterpillar, 409 F.3d 831 (7th Cir. 2005).

The EEOC recognizes that it has a duty to attempt to conciliate before bringing a civil action and, moreover, it has an enormous incentive to conciliate effectively. Over the last five years, the EEOC has attempted conciliation in 4,000 to 6,000 cases a year. As stated in response to Question 18, many matters are successfully conciliated by the Commission each year, but when conciliation fails, the EEOC is able to pursue litigation in only a small fraction of those cases.

20. Why do certain EEOC regional directors refuse to share information about what the EEOC learned during its investigation during the conciliation process even though they ultimately must do so in litigation if conciliation fails? Wouldn't sharing relevant information with the target of the investigation help resolve more cases and accomplish the goal of compliance with Title VII?

RESPONSE: There are multiple opportunities to provide and receive information concerning a pending investigation. An investigation typically begins when an individual files a charge of employment discrimination alleging that the employer discriminated against him/her because of a basis prohibited by the statutes EEOC enforces. In EEOC's 53 field offices, our staff sends a copy of the charge to the employer and then investigates the allegations contained in the charge, collecting documentary evidence and in some cases interviewing witnesses. The employer has an opportunity to submit a position statement in response to a charge and information may be shared with the employer at various points during the investigation if doing so facilitates the investigation. As the investigation ends, the EEOC investigator holds a Pre-Determination Interview (PDI) with the employer, in most cases, by phone. During the PDI, the investigator reviews with the employer or the employer's representative the evidence collected and also asks the employer whether it wishes to submit any additional evidence which might be relevant to EEOC's analysis of the evidence. If EEOC concludes based on the evidence that there is "reasonable cause to believe discrimination has occurred," the agency issues a Letter of Determination, which details the legal and factual bases for the "reasonable cause" finding.

During the conciliation process, which begins only after a Letter of Determination has been issued, the charging party, the employer and EEOC discuss how the mat-

ter might be resolved. Conciliation focuses on two issues: (1) how the charging party can be made "whole," i.e., what relief is necessary to place the charging party as near as possible in the situation he or she would have been if the discrimination had not occurred, and (2) what steps the employer should take to end the discrimination and prevent further discrimination. During conciliation, the central focus of the discussion is the appropriate relief to remedy the discrimination, rather than liability issues. EEOC staff share information with the employer during the Pre-Determination Interview and during conciliation.

21. Private lawyers who sue employers engage in a cost-benefit analysis to determine whether the cost and risk of going forward to trial is warranted by the potential financial outcome. As the steward of taxpayer dollars, do you believe the EEOC should do this too? What are the EEOC's procedures for resolving cases in a timely manner to reduce costs to employers, and ultimately the taxpayer?

RESPONSE: Unlike private litigation, the potential financial outcome is not the only or even the primary benefit the Commission considers. Advancing the public interest in stopping and remedying discrimination is the most important consideration for EEOC as a law enforcement agency. In many cases, broad-based injunctive relief is an equally or more important benefit than the financial outcome. The pace of EEOC litigation, like all litigation in the federal courts, depends upon numerous factors, including factors beyond the litigants' control. However, the Commission generally makes early attempts to settle cases and continues to identify settlement opportunities throughout the litigation.

22. The EEOC's Strategic Enforcement Plan states the EEOC has superior access to data, documents, and potential evidence of discrimination in recruitment and hiring, and therefore is better situated to eliminate barriers in recruitment and hiring than are individuals or private attorneys, who have difficulties obtaining such information. In determining whether to bring other systemic litigation, does the EEOC consider whether the individuals affected have the means and ability to seek redress through private civil litigation? In your view, should it do so?

RESPONSE: Yes, in all litigation decisions the Commission considers whether the affected individuals have the resources to seek redress. As a federal law enforcement agency with extensive responsibilities and limited resources, however, the Commission also considers broader law enforcement interests. In systemic cases in particular, the Commission has a strong interest in securing broad-based injunctive relief to prevent future discrimination, and must consider whether private enforcement efforts would result in such relief or whether the Commission's participation in the litigation is necessary to ensure that adequate remedies, including targeted equitable relief, are obtained.

23. In litigation, the EEOC claims an attorney client privilege with charging parties and claimants. But in practice the EEOC does not consider their wishes when deciding whether to settle a case or go to trial. Why should the EEOC be able to have it both ways unlike attorneys in other litigation?

RESPONSE: As a law enforcement agency supported by tax dollars, the EEOC, unlike private attorneys, not only has an obligation to seek relief for aggrieved individuals, but must also ensure that the public interest is served when it conducts litigation. EEOC does consider the interests of charging parties in its litigation. Although EEOC determines the conditions under which it will resolve litigation it brings, the monetary relief it will accept in a settlement often depends on what the claimant(s) believes is satisfactory. But even where there is agreement among EEOC, claimants, and the defendant on the amount of monetary relief to be paid to the claimants, EEOC will not settle a case unless adequate injunctive and affirmative relief are also provided.

EEOC files suits in its own name, and unless a charging party or other claimant intervenes, it is the only plaintiff. Like any other party, EEOC has sole discretion regarding the terms on which to resolve the claims it brings. Although EEOC usually seeks relief for one or more individuals in its suits, its primary purpose in bringing litigation is to further the public interest in eliminating employment discrimination. Charging parties are informed prior to the initiation of an EEOC suit that although EEOC will be seeking particular relief for them, its first obligation is to the public interest, and thus at some point in the litigation EEOC may act in a manner that the charging party believes is contrary to his or her interests. In Title VII, ADA, and GINA suits, charging parties also are informed of their right to intervene in EEOC's suit.

EEOC does not claim an attorney-client relationship with claimants, and therefore there is no inconsistency in its refusal to settle a case even though monetary relief has been offered that is satisfactory to the claimants—a situation that rarely occurs.

EEOC believes that in providing the agency with litigation authority in 1972 for the purpose of both "implement[ing] the public interest [and] bring[ing] about more effective enforcement of private rights," General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326 (1908), Congress could not have intended that claimants in EEOC suits would be denied the right to communicate confidentially with EEOC attorneys, putting them in a worse position than if they had filed separate actions, which Congress believed many could not afford to do. Thus, EEOC takes the position that although it does not have an attorney-client relationship with claimants, the elements of the attorney-client privilege apply to EEOC's interactions with claimants that are necessary for the agency to litigate its claims effectively. This means not only that communications between EEOC attorneys and claimants are protected from disclosure, but ex parte contacts by opposing attorneys with claimants are prohibited.

24. The EEOC is required to establish or make available an Alternative Dispute Resolution (ADR) program that may be available for the pre-complaint process and the formal complaint process. The EEOC, however, may make a determination regarding whether to offer ADR in a particular case.

a. Once a decision has been made by EEOC as to whether to offer ADR, are the parties involved notified of that decision prior to further administrative contact? If not, why not?

b. What percentage of cases does the EEOC offer ADR in the pre-complaint process?

c. What percentage of cases does the EEOC offer ADR in the formal complaint process?

d. Does the EEOC offer ADR during initial counseling of the complainant? If not, what informal methods of resolution does the EEOC counselor offer?

e. How does the EEOC decide whether to offer ADR in a particular case?

f. In deciding whether to offer ADR in a particular case, does the EEOC take into account a claimant's desire to mediate, litigate, or settle?

RESPONSE: The procedures applicable to discrimination charges filed against private and state and local government employers differ from the procedures applicable to complaints filed against the federal government as an employer. This question appears to confuse the Federal complaint process (complaints against federal agencies) with the system EEOC uses to process complaints against private sector and state and local government employers. We are providing a general explanation as to how EEOC uses mediation to resolve disputes involving employees and employers in the private and public sectors.

EEOC uses mediation extensively as part of its processing of charges filed against private and state and local government employers. Participation in mediation is strictly voluntary and at no cost to the parties. EEOC supplies the neutral who leads the discussion between the charging party and employer as they seek to come to a mutual agreement as to how to resolve the matter. Mediation is offered to approximately 65 to 70 percent of all charging parties. Once the charging party accepts the offer, we then ask the employer whether they wish to mediate the dispute. As shown below, the majority of employers do not agree to mediation:

2010 Respondent acceptance rate: 24.4%
2011 Respondent acceptance rate: 25.6%
2012 Respondent acceptance rate: 25.5%

If the parties agree to mediate, the success rate is extremely high: more than 70 percent of the mediations result in resolution of the charge.

2010 73.7%; 2011 73.4%; 2012 76.6%

In addition, the agency encourages the employer community to enter into Universal Agreements to Mediate (UAMs). These agreements reflect employers' commitment to participate in mediation. At the conclusion of FY 2012, the agency had secured a cumulative multi-year total of 2,140 UAMs, which is a 7.1 percent increase from FY 2011.

For complaints against federal agencies as employers, complainants must first participate in counseling by an EEO counselor employed by the federal agency. The federal sector process delineates between a pre-complaint process (counseling), during which ADR is routinely offered, and the formal complaint process. Accordingly, we cannot provide specific answers to questions A-F.

25. When a complainant wishes to file a class complaint after initial counseling, the complaint is sent to the relevant EEOC field or district office, where an EEOC administrative judge determines whether to accept or dismiss the class complaint. To be certified as a class, the administrative judge must decide the certification requirement of numerosity, commonality, typicality, and adequacy of representation are fulfilled.

a. Does the EEOC separately communicate with each member of the proposed class in its determination of the class certification requirements?

b. Does the EEOC collect documents and other non-testimonial evidence from each member of the proposed class in its determination of the class certification requirements?

c. Is the employer notified during this process that a class complaint is under consideration? If not, why not?

RESPONSE: The processing of class complaints of discrimination filed by Federal employees against Federal Agency employers is governed by 29 CFR 1614.204 and differs from the private sector administrative process.

In the Federal sector process, a Federal employee files a complaint with the Agency that allegedly discriminated against him or her. A complainant may move for class certification at any point in the process when it becomes apparent that there are class implications to the claims raised in the individual complaint, but they must first seek counseling with an agency counselor. Once the class complaint is filed with the agency, the agency representative forwards the complaint and the counselors report to the Commission. The Commission assigns the complaint to an administrative judge or complaints examiner. (§ 1614.204(c)).

(a) The EEOC does not separately communicate with the individual class members or collect documents or other evidence directly from class members. The administrative judge communicates with the class agent, who acts for the class during the proceeding. (§ 1614(a)(3)).

(b) The administrative judge communicates with the class agent if more information is needed to make a decision regarding the prerequisites for certification of a class complaint. 29 CFR 1614.204(d)(2). The administrative judge does not communicate directly with class members.

(c) The administrative judge transmits the decision to accept or dismiss the class complaint to the Federal Agency and the class agent. The Agency then takes final action by issuing an order within 40 days of receiving the hearing record and the administrative judge's decision. (§1614.204(d)(7)). The final order notifies the class agent whether the Agency will implement the decision of the administrative judge. The Agency must use reasonable means to notify all class members of the acceptance of the complaint for further processing. (§1614.204(7)(e)).

26. In fiscal year 2012, how many lawsuits did the EEOC win outright, through jury verdict or summary judgment?

RESPONSE: In FY 2012, the Commission resolved 13 litigation cases through a favorable court order (judgment following a verdict, default judgment, or summary judgment for the Commission).

27. The EEOC claims process has a costly effect on small businesses, especially when the case is litigated. What are the EEOC's internal procedures for resolving cases in a timely manner to reduce costs to employers, and ultimately consumers?

RESPONSE: EEOC is sensitive to the concerns of small business and devotes significant resources to educating small businesses so that they do not run afoul of the EEO laws. In fact, the Small Business Administration Ombudsman has given EEOC a rating of "A" or "A−" for every year of this last decade for its efforts in responding to small business concerns. EEOC's administrative enforcement procedures provide small business with opportunities to resolve charges efficiently. EEOC offers mediation to both parties at the beginning of a charge. If both the employer and employee agree to mediation, over 75 percent of those charges are resolved successfully in the mediation process, and those resolutions occur in an average of 90 days. Likewise, employers are encouraged to settle charges prior to the completion of our investigation and to provide timely information to EEOC to rebut the allegations in a charge. Either can ensure efficient resolution of a charge.

EEOC has created fact sheets, brochures and compliance guidance which are available through the EEOC website. Small businesses can obtain these materials free of charge through EEOC's publication center. Copies may be ordered through EEOC's website at *http://www/eeoc.gov/eeoc/publications/index.cfm or via a toll free telephone number (1-800-669-3362). EEOC has also developed fact sheets and publications specifically for small employers, such as "Small Employers and Reasonable Accommodation" and "Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors." To help small employers understand newly enacted laws, the EEOC has posted "Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008" and "Questions and Answers for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008" on its website. These documents also invite small employers to contact our Small Business Liaisons to obtain confidential assistance with compliance in specific workplace situations.*

Also, EEOC provides no-cost outreach and education programs as well as fee-based training and technical assistance to all employers. The training and materials we provide to small employers have been designed to give them the information they need to comply with the federal anti discrimination laws enforced by EEOC.

In FY 2012, EEOC conducted 577 free outreach events directed toward small businesses, which reached about 63,000 small business representatives. An additional 4,654 small business representatives attended fee-based events. The most popular topics for small business audiences were Mediation, An Overview of EEOC, Sexual Harassment, Charge Processing, Title VII of the Civil Rights Act and the Americans with Disabilities Act.

A Small Business Liaison is assigned to every EEOC office. Small Business Liaisons answer questions about the laws EEOC enforces, our mediation program and what to expect during an investigation. When a charge of discrimination is filed with EEOC against a small business, our field offices send a letter informing the employer of the availability of the Small Business Liaison. The letter invites small businesses to visit our website and informs small employers that any inquiry or request for assistance directed to the Small Business Liaison will not adversely affect the investigation of the charge.

Mindful of the importance of continuing to improve our outreach to small businesses, EEOC's Small Business Task Force, led by Commissioner Constance S. Barker, was established at Chair Berrien's request in FY 2011.

28. As the Supreme Court noted in Clackamas Gastroenterology Assocs. v. Wells, the definition of "employee" in anti-discrimination laws—that it is "an individual employed by an employer"—is "completely circular and explains nothing." Thus the determination as to whether partners in a particular partnership are "employers" or "employees" is based on a multi-factored, facts-and-circumstances test. To the extent the statute needs clarification, do you believe litigation is the proper avenue through which to define partnerships?

RESPONSE: Although the anti-discrimination statutes do not provide an extensive definition of the term employee, the Supreme Court has observed in several decisions that "'when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 445 (2003) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992)). In Clackamas, the Court relied on EEOC Guidelines that "discuss both the broad question of who is an 'employee' and the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees." Id. at 448-49 (citing 2 Equal Employment Opportunity Commission, Compliance Manual §§ 605:0008—605:00010 (2000)).

Like many federal employment and labor statutes, the statutes EEOC enforces broadly define employee. Court decisions and EEOC Guidelines provide a sufficiently clear framework for assessing the factually-intensive question of whether particular individuals are employees covered by the anti-discrimination statutes.

29. Today, most partnerships, particularly large partnerships, adopt internal management practices such as governing boards that allow them to delegate managerial functions while maintaining partner ownership of the firm, control over professional work product, and voice on issues critical to the partnership. In your view, does the delegation of partnership authority to internal governing boards transform the partners of a firm into employees rather than employers? What factors, in the EEOC's view, are most critical to determining whether and when such a delegation transforms partners into "employees?"

RESPONSE: As the Commission has explained in its Compliance Manual, the determination of whether an individual is an employee, rather than an independent contractor, partner, or other non-employee, is fact-specific. This determination depends on the actual working relationship between the individual and the partnership. The relevant question is whether the individual acts independently and participates in managing the organization (not an employee), or whether the individual is subject to the organization's control (an employee). The EEOC has identified six non-exhaustive factors relevant to making this determination:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- Whether and, if so, to what extent the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent the individual is able to influence the organization;

• Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and

• Whether the individual shares in the profits, losses, and liabilities of the organization.

In Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449-50 (2003), the Supreme Court approved of the EEOC's emphasis on "the common-law touchstone of control" when determining whether an individual with the title of partner is an employee under the EEO laws. The Court noted that whether shareholder-directors in that case were employees could not be determined by asking if the director-shareholder position "is the functional equivalent of a partner" because "there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." Id. at 445-46. The Court adopted the six-factor control test from EEOC's guidance, emphasizing that the coverage determination depends on "all the incidents of the relationship * * * with no one factor being decisive." Id at 451.

Thus, if a determination were made in a particular case that individuals holding the title of "partner" are actually employees, it would be a factual determination guided by existing law.

30. In the last decade the EEOC brought a highly publicized lawsuit against the law firm Sidley Austin, alleging its partners were employees and its retirement policy for partners therefore violated the Age Discrimination in Employment Act. What, in the EEOC's view, were the most significant characteristics of Sidley's partnership structure that led the EEOC to conclude that its partners were "employees?"

RESPONSE: In its brief to the U.S. Court of Appeals for the Seventh Circuit, the EEOC looked at a number of factors that led it to conclude that at least some of Sidley's partners could properly be considered employees. In particular, the Commission's brief discussed remuneration, noting that the extent to which partners share in the firm's profits varies tremendously, and many received most of their pay in a form that resembled salary. The brief discussed ownership, and noted that the amount of each partner's required capital contribution varied considerably from individual to individual. Finally, the Commission's brief discussed management. Sidley was governed by a 36-member executive committee; members of that committee owned almost 80 percent of the firm. The executive committee, and its 8-member management committee, made all of the firm's critical decisions, including partnership admission, partner expulsion, pay/ownership allocations, practice group head appointments, opening and closing of offices, and who will join the executive committee.

31. Is the EEOC currently pursuing directed investigations of mutually agreed upon retirement policies for partners that were not commenced following a charge filed by a partner? If so, what factors did the EEOC consider in deciding to prioritize those investigations over the tens of thousands of backlogged cases involving employee complaints?

RESPONSE: There are currently two pending directed investigations of alleged violations of the Age Discrimination in Employment Act (ADEA) based upon policies which mandate retirement at a specified age for person employed in various positions, including as partners.

32. The EEOC's Strategic Enforcement Plan lists six enforcement priorities. Do you intend to make mutually agreed upon retirement policies in legal and accounting professional partnerships a focus of the EEOC's enforcement efforts? If so, which of the six enforcement priorities identified in the Strategic Enforcement Plan make mutually agreed upon retirement policies for partners an EEOC priority?

RESPONSE: Retirement policies are not a priority issue under the EEOC's Strategic Enforcement Plan. Whether individuals are employees under the federal civil rights laws is an important issue of access to justice that is a priority (#5) for the agency under the Strategic Enforcement Plan.

While the establishment of priorities in the SEP is designed to provide focused attention and resources in order to have greater impact, the SEP does not preclude the agency from addressing other issues of discrimination.

QUESTIONS REGARDING THE EEOC'S INTERACTION WITH THE DEPARTMENT OF LABOR'S OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)

34. Did the EEOC comment on the OFCCP's rescission of the agency's 2006 Compensation Standards and the issuance of OFCCP Directive 307? Why not? The EEOC agreed with the 2006 Compensation Standards. Has the EEOC's position changed?

RESPONSE: The EEOC reviewed OFCCP's notice of proposed rescission of the 2006 compensation standards in January 2011 after it was published in the Federal Register; reviewed a draft notice of final rescission in January 2012 pursuant to EO 12067; and reviewed draft notices of final rescission in November and December of 2012 as part of the Office of Management and Budget's EO 12866 interagency review process. The EEOC commented on the notice of rescission in November 2012. The EEOC did not review Directive 307 and therefore did not comment on it.

The substance of the EEOC's interagency comments and conversations is protected from disclosure by the deliberative process privilege.

The EEOC's position in 2006 that the OFCCP's compensation standards were consistent with Title VII has not changed. However, the EEOC also does not disagree with the OFCCP's decision to rescind the standards and to adopt new standards that are also consistent with Title VII and that give the agency more flexibility to enforce EO 11246 in a manner consistent with Title VII.

35. As you know, Executive Order (EO) 12067 requires the EEOC to ensure coordination of federal equal employment opportunity enforcement efforts. In particular, EO 12067 requires the EEOC "to develop uniform standards, guidelines, and policies defining the nature of employment discrimination" and "develop uniform standards and procedures for investigations and compliance reviews." Did the EEOC review OFCCP's notice of rescission of the 2006 Compensation Standards and the issuance of Directive 307 under EO 12067? Did the EEOC provide any feedback to OFCCP about the approach contained in Directive 307? Please provide any and all correspondence between the EEOC and OFCCP on this subject.

RESPONSE: As stated in the answer to Question 34 above, EEOC did review OFCCP's notice of rescission and provided feedback to OFCCP. The EEOC did not review Directive 307 and therefore did not comment on it. Attached are copies of nonprivileged correspondence between OFCCP and EEOC on this subject.

36. Under the EEOC's Compensation Manual, published in 2000, the EEOC instructs investigators to "determine the similarity of the jobs by ascertaining whether the jobs generally involve similar tasks, require similar skill, effort, and responsibility, working conditions, and are similarly complex or difficult." The EEOC's Compensation Manual continues, "[t]he actual content of the jobs must be similar enough that one would expect those who hold the jobs to be paid at the same rate or level." Does the EEOC interpret OFCCP Directive 307 to be altogether consistent with these instructions?

RESPONSE: There is no conflict between the EEOC Compliance Manual language quoted above, which appears in the Guidance section about disparate treatment, and the relevant language in OFCCP Directive 307. In particular, Directive 307 states at pp. 12-13: "For purposes of evaluating compensation differences, employees are similarly situated where it is reasonable to expect they should be receiving equivalent compensation absent discrimination. Relevant factors in determining similarity may include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors." In addition, the EEOC's Compliance Manual's disparate treatment subsection also states that the method suggested for conducting a comparative compensation analysis is not intended as an exclusive method, and subsequent subsections detail other methods for determining whether compensation discrimination or discrimination in practices that affect compensation have occurred—topics that are also addressed in Directive 307.

37. As you know, in August, 2012, the National Research Council of the National Academies of Sciences (NAS) released a report entitled, "Collecting Compensation Data from Employers." This report was commissioned by the EEOC. The report contained two primary recommendations:

Recommendation 1: In conjunction with the Office of Federal Contract Compliance Programs of the U.S. Department of Labor and the Civil Rights Division of the U.S. Department of Justice, the U.S. Equal Employment Opportunity Commission should prepare a comprehensive plan for use of earnings data before initiating any data collection.

Recommendation 2: After the U.S. Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, and the U.S. Department of Justice complete the comprehensive plan for use of earnings data, the agencies should initiate a pilot study to test the collection instrument and the plan for the use of the data. The pilot study should be conducted by an independent contractor charged with measuring the resulting data quality, fitness for use in the comprehensive plan, cost and respondent burden.

a. What is the status of the EEOC's implementation of these recommendations? Has the EEOC and OFCCP developed a comprehensive plan? If so, please provide a copy of the comprehensive plan. If not, why not, and when will it be completed?

b. Has an independent contractor been selected for a pilot project?

c. How will the EEOC ensure coordination with OFCCP with regard to these recommendations?

d. Has the EEOC had any discussions with OFCCP about the comments OFCCP received in response to the Advance Notice of Proposed Rulemaking on a Comprehensive Data Collection Tool, 76 Fed. Reg. 49398 (Aug. 10, 2011)?

e. Will EEOC commit to using its authority under EO 12067 to require OFCCP to adhere to the NAS recommendations before issuing any proposed regulations on collecting compensation data?

RESPONSE: a. EEOC is thoroughly considering the NAS Study recommendations and will take them into account before proceeding with new collections of compensation data. As part of the review and consideration of the NAS Study recommendations, EEOC staff has discussed the recommendations with representatives of the U.S.D.O.J. Civil Rights Division and OFCCP, as well as agency stakeholders such as the National Industry Liaison Group.

b. EEOC has neither sought nor selected an independent contractor for a pilot project.

c. See responses to a and b, above.

d. EEOC has reviewed comments received by OFCCP in response to its ANPRM. We have not had formal discussions with OFCCP about those comments.

e. Pursuant to E.O. 12067, EEOC will, as it has to date, communicate with OFCCP and continue to work closely with the OFCCP concerning the collection of compensation data.

REP. HUDSON QFRS

1. There is a case in which an employee filed a gender discrimination case against her employer. When the employer tried to meet with the EEOC representative and the employee for consultation, the employer instead found the EEOC representative acting as a prosecuting attorney for the employee instead of a negotiator between the parties. The employer was not notified prior to the meeting of the terms of these discussions, and whether or not the EEOC representative would be used in a mediating role or prosecuting role, leaving the impression these meetings were informal negotiations.

a. To what extent does the EEOC give a notice of the terms to all parties involved prior to in person consultations?

b. In other cases is it protocol for an EEOC representative to play negotiator/mediator and prosecutor during an investigation?

c. If employers are not notified of the status of the consultation meeting, what are their administrative rights to have counsel present and/or delay the meeting until counsel is present?

RESPONSE: a. It is unclear from the questions at what stage of the EEOC investigation the consultation meeting occurred. Generally, employers and employees may meet in a mediation, which is a confidential process separate from the investigation. (See answer 25). Parties to an EEOC mediation generally do not, in advance of the mediation session, share positions or terms to which they would agree. There is considerable sharing of terms of settlement during the mediation.

They may also meet during conciliation, which only occurs after the investigation if the agency has made a determination that there is reasonable cause to believe discrimination has occurred. (See answer 20.) In conciliation, EEOC invites both parties to meet, either in person or over the phone. EEOC generally conducts conciliation in one of two ways, i.e., the EEOC office shares the details of the proposed conciliation terms in advance in a letter, or plans to share the terms during the conciliation conference so they can be explained and questions answered.

b. During an investigation of a charge, the EEOC acts as a neutral fact-finder and gathers and evaluates evidence. The investigator may also seek to resolve the charge through a settlement agreement prior to a determination on the merits of the charge. At the end of the investigation, the EEOC makes a determination on whether the evidence establishes that there is "reasonable cause" to believe that discrimination occurred. If the evidence establishes a violation, the investigator now shifts roles. As required by the statutory conciliation process, the investigator must represent the EEOC's interest in obtaining an appropriate remedy for the discrimination found.

c. Employers are notified of the status and scheduling of a conciliation conference and have the right to have counsel present. Scheduling of the conference is done

at a mutually agreeable time. The EEOC's Compliance Manual provides that conciliation with respondents should generally occur face-to-face, or by phone if this cannot be arranged or if the proposed agreement is straightforward and brief. It also provides that whenever possible, conciliation should occur with respondent officials who have authority to enter into an agreement.

2. As you know, the EEOC's Chicago District Office is currently investigating PricewaterhouseCoopers regarding their partnership agreement and mandatory retirement age. The six-factor partnership test adopted by the Supreme Court in Clackamas would presume the partners at PricewaterhouseCoopers are not subject to the ADEA.

a. Should the EEOC decide to pursue litigation of this case, do you believe it would involve a major expenditure of resources or have a high likelihood for public controversy?

b. Given the Strategic Enforcement Plan's objective of retaining the decision to commence litigation over cases that (1) will involve a major expenditure of resources; (2) present issues in a developing area of law; or (3) cases with a high likelihood for public controversy, would you expect the commission, and not the general counsel, to vote on whether to commence litigation against PricewaterhouseCoopers?

RESPONSE: The Supreme Court's decision in Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440, 446 (2003) held that "there are partnerships that include hundreds of members, some of whom may well qualify as 'employees.'" The Court endorsed the multi-factor, fact-based approach set forth in EEOC's Compliance Manual as the correct approach to determining whether a person impacted by a mandatory retirement policy should or should not be considered an employee. See also Responses 28-29 above.

The General Counsel sought Commission approval for litigation against PriceWaterhouseCoopers based upon the findings of the Chicago District Office's direct investigation of the firm's mandatory retirement policy for partners. The Commission voted to disapprove the recommended litigation.

[Addendum to EEOC's response to questions submitted follows:]

PATRICK PATTERSON - PUBLISHED: NPR on 2006 Compensation Guidance

From: "Mehta, Parag V - OFCCP" <Mehta.Parag@dol.gov>
To: JACQUELINE.BERRIEN@EEOC.GOV; tom.perez@usdoj.gov
Date: 1/7/2011 4:14 PM
Subject: PUBLISHED: NPR on 2006 Compensation Guidance
CC: CLAUDIA.WITHERS@EEOC.GOV; SHARON.ALEXANDER@EEOC.GOV; PATRICK.PATTERSON@E...
Attachments: Federal Register NPR-Interpretive Stand-Vol-Guid-01-03-11.pdf

Dear AAG Perez and Chairwoman Berrien:

Director Shiu wanted to make sure you were aware that OFCCP published a Notice of Proposed Rescission of the 2006 standards and guidelines dealing with how we investigate compensation cases. Attached is a copy of the NPR as it appears in the *Federal Register*. Public comment is open for 60 days, until March 4, 2011. Further details on the NPR, including how to submit comments for the record, are below.

Once the comment period ends, we will review the input we receive and make a final determination regarding the standards and guidelines.

Please let us know if you have any questions.

Thanks,
Parag

==========
PARAG MEHTA, Special Assistant to the Director
Office of Federal Contract Compliance Programs
U.S. Department of Labor
202.693.0814
mehta.parag@dol.gov

For your information, the attached Notice of Proposed Rescission (NPR) of the *Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices under Executive Order 11246* was published in Federal Register on Monday, January 3, 2011.

OFCCP is proposing to rescind the Interpretive Standards and Voluntary Guidelines because they have been found to significantly limit OFCCP's ability to identify compensation discrimination by imposing overly narrow investigation procedures. Additionally, since its adoption in 2006, the Voluntary Guidelines have rarely been utilized by contractors when analyzing their compensation practices and, when utilized, the Guidelines were also limiting and ineffective. With the rescission of the Interpretive Standards and Voluntary Guidelines, OFCCP will continue to adhere to Title VII principles in investigating compensation discrimination and will reinstitute flexibility in its use of investigative approaches and tools.

The general public can submit comments for the record for sixty day. Following is information about how and when to send comments on the NPR:

DATES: Comments must be received on or before ***March 4, 2011***.
ADDRESSES: You may submit comments, ***identified by number 1250-ZNE***, by any of the following methods:

- Federal eRulemaking Portal: **http://www.regulations.gov** – follow the instructions for submitting comments.
- Fax: (202) 693-1304 – for comments of 6 pages or fewer
- Mail: Director, Division of Policy, Planning, and Program Development
  Office of Federal Contract Compliance Programs
  U.S. Department of Labor, Room N-3422
  200 Constitution Avenue, NW
  Washington, DC 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693-010

All comments received, including any personal information provided, will be available online at http://www.regulations.gov and for public inspection during normal business l

FOR FURTHER INFORMATION CONTACT:
Telephone: (202) 693-0102 (voice)
TTY: (202) 693-1337
E-mail: OFCCP-Public@dol.gov

* * * * *

(h) *Soliciting under permit.* (1) The in-person soliciting or demanding gifts, money, goods or services is prohibited, unless it occurs as part of a permit issued for a demonstration or special event.

(2) Persons permitted to solicit must not:

(i) Give false or misleading information regarding their purposes or affiliations;

(ii) Give false or misleading information whether any item is available without donation.

* * * * *

Dated: December 22, 2010.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–33071 Filed 12–30–10; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Parts 60–1 and 60–2

RIN 1250–ZA00

Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246; Notice of Proposed Rescission

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice of proposed rescission.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is proposing to rescind two guidance documents addressing compensation discrimination: Interpreting Nondiscrimination Requirements of Executive Order 11246 with respect to Systemic Compensation Discrimination (Standards) and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with respect to Systemic Compensation Discrimination (Voluntary Guidelines). OFCCP is proposing to rescind the Standards which have limited OFCCP's ability to effectively investigate, analyze and identify compensation discrimination. In so doing, OFCCP will continue to adhere to the principles of Title VII of the Civil Rights Act of 1964, as amended (Title VII) in investigating compensation discrimination and will reinstitute flexibility in its use of investigative approaches and tools. OFCCP also proposes to establish procedures for investigating compensation discrimination through the traditional means of using its compliance manual, directives and other staff guidance. OFCCP is proposing to rescind the Voluntary Guidelines because they are largely unused by the Federal Government contracting community and have not been an effective enforcement strategy.

DATES: Comments must be received on or before March 4, 2011.

ADDRESSES: You may submit comments, identified by number 1250–ZNE, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 693–1304 (for comments of 6 pages or fewer).
- *Mail:* Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room N3422, 200 Constitution Avenue, NW., Washington, DC 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693–0102 (voice) or (202) 693–1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available online at *http://www.regulations.gov* and for public inspection during normal business hours at Room C3325, 200 Constitution Avenue, NW., Washington, DC 20210. Individuals needing assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice of Proposed Rescission will be made available in the following formats: Large print; Braille; electronic file on computer disk; and audiotape. To schedule an appointment to review the comments and/or to obtain this Notice of Proposed Rescission in an alternate format, contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, NW., Room N3422, Washington, DC 20210. Telephone: (202) 693–0102 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor's OFCCP enforces Executive Order 11246 which requires Federal Government contractors and subcontractors to provide equal employment opportunity through affirmative action and nondiscrimination based on race, color, national origin, religion, or sex. Compensation discrimination is one form of discrimination prohibited by the Executive Order.

OFCCP enforces contractors' compliance with this obligation primarily by conducting compliance evaluations. (*See* 41 CFR 60–1.20.) OFCCP's longstanding policy is to follow Title VII principles when conducting analyses of potential discrimination under Executive Order 11246, including compensation discrimination. Compensation discrimination may occur on an individual basis, or systemically, that is, it is widespread in an organization due to discriminatory compensation systems. OFCCP traditionally has established procedures for investigating compensation discrimination, as well as other forms of discrimination, through instructions for its compliance officers contained in the OFCCP Federal Contract Compliance Manual (FCCM), directives and other staff guidance materials.

Identifying and remedying compensation discrimination has been an important part of OFCCP compliance efforts for many years. Concerns about compensation discrimination led OFCCP in Calendar Year (CY) 2000 to begin requiring contractors to submit compensation data requested in the scheduling letter at the outset of a compliance evaluation as a matter of course and as part of the data reported in a new Equal Opportunity Survey, which covered contractors were required to submit to OFCCP. (The Scheduling Letter was approved under the Paperwork Reduction Act OMB NO. 1215–0072; see 65 FR 68022, 68036 (November 13, 2000) for the notice regarding the Equal Opportunity Survey.) In CY 2000, OFCCP also began requiring contractors to proactively conduct in-depth analyses of their compensation systems to ensure that those systems were not discriminatory. (*See* 41 CFR 60–2.17(b)(3).)

OFCCP changed its approach to investigating compensation discrimination in 2006. On June 16, 2006, OFCCP published in the **Federal Register** two final guidance documents related to identifying compensation discrimination under Executive Order 11246 that contained interpretations of OFCCP regulations and Title VII principles: Interpreting Nondiscrimination Requirements of Executive Order 11246 with respect to Systemic Compensation Discrimination

(Standards) and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with respect to Systemic Compensation Discrimination (Voluntary Guidelines). (*See* 71 FR 35124 (June 16, 2006) for the Standards and 71 FR 35114 (June 16, 2006) for the Voluntary Guidelines.) Further, OFCCP rescinded the Equal Opportunity Survey in 2006. (*See* 71 FR 53032 (September 8, 2006).)

The Standards set forth a new, rigid procedure for investigating and analyzing systemic compensation discrimination cases. Systemic compensation discrimination is defined as discrimination under a pattern or practice of disparate treatment. (*See* 71 FR at 35140.) The Standards prescribe procedures to be followed by OFCCP compliance officers when conducting investigations of systemic compensation discrimination in all cases, including how to group employees whose compensation is to be compared in a discrimination analysis, requiring anecdotal evidence of compensation discrimination except in unusual cases, and requiring the use of multiple regression analysis when deciding whether wage differences between groups are discriminatory. These procedures are to be followed regardless of the facts of a particular case. The rigidity of the Standards represents a significant departure from OFCCP's traditional tailoring of compensation investigation and analytical procedures to the facts of the case based on Title VII principles. Investigations of systemic compensation discrimination are complex and nuanced. During the conduct of compliance evaluations, OFCCP has traditionally focused on identifying compensation discrimination through the development of a variety of investigative and analytical tools. The use of a particular tool, or combination of tools, depends upon the facts of a specific case, and includes consulting with labor economists and other experts, as appropriate.

The Standards also significantly limit OFCCP's ability to identify compensation discrimination by imposing overly narrow investigation procedures that go beyond what would be required under Title VII principles in litigation. For example, the Standards state that, except in unusual cases, OFCCP will not issue a notice of violation (NOV) without providing anecdotal evidence to support OFCCP's statistical analysis. But under Title VII, a pattern or practice class-wide disparate treatment case may be proven by statistics. *See, e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339–40 (1977); *Palmer* v. *Shultz*, 815 F.2d 84, 90–91 (DC Cir. 1987). *Cf. OFCCP* v. *Greenwood Mills, Inc.*, No. 89–OFC–39, Decision and Order of Remand, slip op. at 14 (Sec'y of Labor Nov. 20, 1995); *OFCCP* v. *Jacksonville Shipyards*, 89–OFC–1, Decision and Remand Order, slip op. at 5 (Sec'y of Labor May 9, 1995). Moreover, requiring anecdotal evidence is particularly problematic in compensation cases as employees often are unaware of the compensation received by co-workers and, as a result, anecdotal evidence from victims of pay discrimination may not exist.

The Standard's mandate to use a multiple regression analysis to identify compensation discrimination is also overly narrow and is not required under Title VII principles. While a multiple regression analysis may be a useful tool in identifying compensation discrimination, other statistical or nonstatistical analyses may be better suited, depending on the facts of the case.

In short, we now believe the Standards significantly undermine OFCCP's ability to vigorously investigate and identify compensation discrimination.

The Voluntary Guidelines establish procedures that contractors can elect to use in conducting the self-analysis of their pay practices required by 41 CFR 60–2.17(b)(3). As an incentive to encourage contractors to use the analytical procedures contained in the Voluntary Guidelines, OFCCP would deem a contractor, whose self-evaluation "reasonably meets" the procedures outlined in the Voluntary Guidelines, to be in compliance with section 60–2.17(b)(3) and would coordinate OFCCP's review of the contractor's compensation practices during a compliance evaluation in the manner specified in the Voluntary Guidelines. (*See* 71 FR at 35122.) In OFCCP's experience since 2006, contractors have rarely utilized the analytical procedures outlined in the Voluntary Guidelines when analyzing their compensation practices under section 60–2.17(b)(3).

Additionally, the analytical model set forth in the Voluntary Guidelines suffers from many of the same flaws as the investigative procedures prescribed by the Standards. For example, the Voluntary Guidelines established certain rigid numerical thresholds by which the similarly situated employee groupings are to be analyzed. OFCCP believes that for some contractors, these thresholds may be exceedingly difficult to meet.

II. Proposal

OFCCP proposes to rescind the Standards and the Voluntary Guidelines in their entirety. OFCCP believes it is unnecessary to issue new **Federal Register** notices articulating its interpretations of Title VII principles related to compensation discrimination. OFCCP will continue to follow Title VII principles in investigating and analyzing compensation discrimination and in interpreting regulations related to compensation discrimination. The agency is proposing to normalize its treatment of those cases with other types of OFCCP discrimination investigations. Once rescinded, nothing in the Standards or the Voluntary Guidelines or their preambles could be relied upon as a statement of OFCCP's interpretation of Title VII principles or OFCCP regulations.

If the Standards are rescinded, OFCCP will reinstitute the practice of exercising its discretion to develop compensation discrimination investigation procedures in the same manner it develops other investigation procedures. OFCCP will continually refine those procedures to ensure that they are as effective and efficient as possible. OFCCP will develop and issue compensation investigation procedures in the same manner as procedures for investigating other forms of discrimination, for example through the FCCM, directives and staff guidance materials.

As mentioned above, OFCCP has found that contractors rarely use the analytical procedure suggested in the Voluntary Guidelines for conducting the compensation analyses required by section 60–2.17(b)(3). In the few instances when contractors have conducted their compensation analysis in the manner suggested in the Voluntary Guidelines, the coordination procedures of the Voluntary Guidelines have not proved to be an efficient method for verifying that the contractor's compensation system is not discriminatory. The agency has concluded that the Voluntary Guidelines have not proved to be either an effective vehicle for providing guidance about how to conduct the analyses required by section 60–2.17(b)(3) or an effective incentive for contractors to conduct the analysis in the manner described in the Voluntary Guidelines.

In the absence of the Voluntary Guidelines, contractors will still be obligated to conduct self-evaluations of compensation practices as required by 41 CFR 60–2.17(b)(3). OFCCP will continue to provide any needed compliance assistance on section 60–

2.17(b)(3) through various means, including webinars and the Web site distribution of Frequently Asked Questions as appropriate, rather than through the issuance of a **Federal Register** notice.

OFCCP invites any interested party to comment on the proposal to rescind the Standards and the Voluntary Guidelines.

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

[FR Doc. 2010–32602 Filed 12–30–10; 8:45 am]

BILLING CODE 4510–45–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 228

[Docket No. FRA–2009–0042]

RIN 2130–AC13

Safety and Health Requirements Related to Camp Cars

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: To carry out a 2008 Congressional rulemaking mandate, FRA is proposing to create regulations prescribing minimum safety and health requirements for camp cars that a railroad provides as sleeping quarters to any of its train employees, signal employees, and dispatching service employees and individuals employed to maintain its right of way. The proposed regulations would supplant existing guidelines that interpret existing statutory requirements, enacted decades earlier, that railroad-provided camp cars be clean, safe, and sanitary, and afford those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the railroad. In further response to the rulemaking mandate, the proposed regulations would include the additional statutory requirements, enacted in 2008, that camp cars be provided with indoor toilets, potable water, and other features to protect the health of such workers.

Under separate but related statutory authority, FRA is proposing to amend regulations on construction of employee sleeping quarters. In particular, FRA proposes to implement a 2008 statutory amendment that, on and after December 31, 2009, camp cars provided by a railroad as sleeping quarters exclusively for individuals employed to maintain the right of way of a railroad are within the scope of the prohibition against beginning construction or reconstruction of employee sleeping quarters near railroad switching or humping of hazardous material. FRA's existing guidelines with respect to the location, in relation to switching or humping of hazardous material, of a camp car that is occupied exclusively by individuals employed to maintain a railroad's right of way would be replaced with regulatory amendments prohibiting a railroad from positioning such a camp car in the immediate vicinity of the switching or humping of hazardous material.

Finally, FRA would make conforming changes, clarify a provision on applicability, remove an existing provision on preemptive effect as unnecessary, and move, without change, an existing provision on penalties for violation of FRA regulations.

DATES: (1) Written comments must be received by March 4, 2011. Comments received after that date will be considered to the extent possible without incurring additional delay or expense.

(2) FRA anticipates being able to resolve this rulemaking without a public hearing. However, if FRA receives a specific request for a public hearing prior to March 4, 2011, one will be scheduled, and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: Comments, which should be identified by Docket No. FRA–2009–0042, may be submitted by any one of the following methods:

- *Fax:* 1–202–493–2251;
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590;
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- Electronically through the Federal eRulemaking Portal, *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket name, and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please *see* the Privacy Act section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Alan Misiaszek, Certified Industrial Hygienist, Staff Director, Industrial Hygiene Division, Office of Safety Assurance and Compliance, Office of Railroad Safety, FRA, 1200 New Jersey Avenue, SE., Mail Stop 25, Washington, DC 20590 (telephone: (202) 493–6002), *alan.misiaszek@dot.gov* or Ann M. Landis, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Mail Stop 10, Washington, DC 20590 (telephone: (202) 493–6064), *ann.landis@dot.gov*.

SUPPLEMENTARY INFORMATION:

I. Statutory, Regulatory, and Factual Background

This proposal is being issued primarily to help satisfy the requirements of section 420 of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110–432, Div. A, 122 Stat. 4848, October 16, 2008 (amending a provision of the hours of service laws at 49 U.S.C. 21106). RSIA requires the Secretary of Transportation (Secretary) to adopt regulations no later than April 1, 2010 establishing minimum standards for "employee sleeping quarters" in the form of "camp cars" that are provided by railroads. 49 U.S.C. 21106(a)(1), (c). Specifically, RSIA instructs the Secretary to prescribe regulations "to implement [49 U.S.C. 21106(a)(1)] to protect the safety and health of any employees and individuals employed to maintain the right of way of a railroad carrier that use camp cars. * * *" 49 U.S.C. 21106(c). The statutory term "employee" is defined in 49 U.S.C. 21101(3) to include a train employee, a signal employee, and a dispatching service employee, who as a group are sometimes referred to as "covered service employees." As amended through 2008, 49 U.S.C. 21106(a)(1) provides that such camp cars must be—

clean, safe, and sanitary, give those employees and individuals an opportunity for rest free from the interruptions caused by

From: SHARON ALEXANDER
To: Burrell, Meredith (CRT); Coukos, Pamela - OFCCP
Date: 1/10/2012 12:04 PM
Subject: Re: Electronic version of Rescission Text

Thanks, Pam. What's your time line for final DOL clearance?

>>> "Coukos, Pamela - OFCCP" <Coukos.Pamela@dol.gov> 1/9/2012 7:06 PM >>>
Great seeing you guys today. Attached is an electronic version of the document I gave you. As I mentioned this is being shared informally with some of our Task Force partners in advance of the final DOL clearance so please take care with the draft.

Let me know if you have any questions or want to discuss.

From: "Coukos, Pamela - OFCCP" <Coukos.Pamela@dol.gov>
To: SHARON.ALEXANDER@EEOC.GOV
Date: 1/10/2012 12:53 PM
Subject: RE: Electronic version of Rescission Text

I think it's imminent.

-----Original Message-----
From: SHARON ALEXANDER [mailto:SHARON.ALEXANDER@EEOC.GOV]
Sent: Tuesday, January 10, 2012 12:05 PM
To: Coukos, Pamela - OFCCP; Meredith (CRT) Burrell
Subject: Re: Electronic version of Rescission Text

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From: "Coukos, Pamela - OFCCP" <Coukos.Pamela@dol.gov>
To: SHARON.ALEXANDER@EEOC.GOV
Date: 1/10/2012 1:08 PM
Subject: RE: Electronic version of Rescission Text

Looks like it will be over at OMB in the next couple of days.

-----Original Message-----
From: SHARON ALEXANDER [mailto:SHARON.ALEXANDER@EEOC.GOV]
Sent: Tuesday, January 10, 2012 12:05 PM
To: Coukos, Pamela - OFCCP; Meredith (CRT) Burrell
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From: SHARON ALEXANDER
To: Coukos, Pamela - OFCCP
Date: 1/10/2012 1:09 PM
Subject: RE: Electronic version of Rescission Text

OK. Thanks-
Sharon

>>> "Coukos, Pamela - OFCCP" <Coukos.Pamela@dol.gov> 1/10/2012 1:08 PM >>>
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From: SHARON ALEXANDER [mailto:SHARON.ALEXANDER@EEOC.GOV]
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Let me know if you have any questions or want to discuss.

PATRICK PATTERSON - Our Compensation Guidance Rescission Notice

From: "Coukos, Pamela - OFCCP" <Coukos.Pamela@dol.gov>
To: SHARON.ALEXANDER@EEOC.GOV; PATRICK.PATTERSON@EEOC.GOV
Date: 1/31/2012 4:40 PM
Subject: Our Compensation Guidance Rescission Notice

Have you had a chance to read it? Do you have any feedback? Let me know if you need another copy.

[Whereupon, at 11:10 a.m., the subcommittee was adjourned.]

○