EQUAL EMPLOYMENT
ADVISORY COUNCIL

SUITE 400
1501 M STREET, NW
WASHINGTON, DC 20005

TEL 202/629-5650
FAX 202/629-5651

June 12, 2017

SUBMITTED ELECTRONICALLY VIA
HTTPS://WWW.WHITEHOUSE.GOV/REORGANIZING-THE-EXECUTIVE-BRANCH
AND HTTPS://WWW.REGULATIONS.GOV

Hon. Mick Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Re: Comments of the Equal Employment Advisory Council Responding to Executive Order 13781, *Comprehensive Plan for Reorganizing the Executive Branch*

Dear Director Mulvaney:

The Equal Employment Advisory Council ("EEAC") welcomes the opportunity to submit these comments in response to the administration's request for public input on Executive Order (E.O.) 13781, *Comprehensive Plan for Reorganizing the Executive Branch*, which was published in the *Federal Register* on May 15, 2017.[1]

These comments focus primarily on the proposal to merge the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") into the U.S. Equal Employment Opportunity Commission ("EEOC"), as summarized in the president's proposed budget for fiscal year ("FY") 2018 and supporting materials. Appendix, budget of the U.S. government, fiscal year 2018, at 749; FY 2018, congressional budget justification, Office of Federal Contract Compliance Programs, at 9-10.

As discussed more fully below, while we can appreciate the sensibility of establishing a single federal regulator responsible for the administration and enforcement of federal equal employment opportunity requirements, we do *not* believe that merging these two agencies is a prudent course of action at this time. To be sure, we believe that both the EEOC and OFCCP are in need of structural and operational reforms. But combining these agencies would likely result in legal and operational challenges that in our view outweigh any practical benefits that might flow from the merger, including the fact that the agencies have different purposes, different enforcement schemes, and entirely different and distinct sets of executive orders, statutes, and

[1] 82 Fed. Reg. 22,355. As directed in the *Federal Register* notice, these comments have been submitted through https://www.whitehouse.gov/reorganizing-the-executive-branch. We have also submitted these comments through https://www.regulations.gov to ensure that they are publicly accessible.

regulations they enforce. We are also concerned that the administration is recommending removing from a Cabinet-level agency the litigation and oversight functions of executive branch *procurement policies* and transferring those functions to an *independent* commission.

Notwithstanding our reservations about the proposed merger, however, our comments below offer a number of specific recommendations that we urge the administration to consider should the merger proceed as proposed.

STATEMENT OF INTEREST

EEAC is a nonprofit association of employers organized in 1976 to promote sound approaches to eliminate workplace discrimination. Our membership today includes more than 250 of the nation's largest private-sector employers collectively employing more than 8 million workers in the United States alone, and our directors and officers include many of the nation's leading experts in the field of workplace compliance. Together, their combined experience gives us a strong, real-world understanding of how federal equal employment opportunity and affirmative action compliance requirements can and should be effectively implemented, administered, and enforced.

All of our members are employers subject to the nondiscrimination laws enforced by the EEOC, including Title I of the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C. §§ 12111 *et seq.*, the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, Title II of the Genetic Information Nondiscrimination Act ("GINA"), 42 U.S.C. §§ 2000ff-1 *et seq.*, and the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d). In addition, the majority of our members also are federal government contractors subject to the laws administered by the OFCCP, including Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), 29 U.S.C. § 793, and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. §§ 4211 *et seq*.

Our member employers thus have considerable experience with the administrative procedures and enforcement practices of both the EEOC and OFCCP.

OVERVIEW AND SUMMARY OF RECOMMENDATIONS

As summarized below, our comments and recommendations regarding the possible merger of OFCCP into the EEOC highlight several issues of importance to the employer community EEAC represents, including the efficient and effective use of government resources, and the timely resolution of administrative enforcement activities. With those considerations in mind, we recommend:

- Refraining from folding OFCCP into the EEOC, which in our view would exacerbate many of the inefficiencies and quality control deficiencies the proposed merger is intended to correct;

- Developing meaningful strategies and accountability measures to improve each agency's civil rights enforcement mission; and

- Should a merger be mandated, establishing a detailed plan and process for ensuring its success, including legislative and regulatory proposals necessary to ensure proper transfer of regulatory responsibilities, as well as thoroughly developed and vetted procedures for successfully integrating the agencies' operational structures and cultures.

THE EEOC AND OFCCP SHOULD NOT BE COMBINED INTO A SINGLE WORKPLACE NONDISCRIMINATION ENFORCEMENT AGENCY

EEAC does not believe that the merger of OFCCP into the EEOC would be in the best interests of employees, employers, federal contractors, or the federal government. First, the two agencies have different purposes and enforcement schemes that, while perhaps complementary, are quite distinct. Second, we do not believe that responsibility for enforcing federal contract procurement processes should be transferred to an agency that is largely independent of the executive branch. Finally, we note that the proposed merger of OFCCP into the EEOC shares many qualities of corporate mergers gone awry, which further counsels against such an action.

The EEOC and OFCCP's Purposes and Enforcement Schemes Are Very Different

While the EEOC and OFCCP share one very important characteristic — that is, they exist to protect American workers by enforcing the nation's equal employment opportunity laws — we respectfully submit that the similarities effectively end there. Not only are the equal employment opportunity laws each agency enforces inherently different, but each agency has developed and honed its own enforcement mechanisms serving different purposes and, notably, achieving quite different results. Put simply, the EEOC investigates charges of discrimination arising under one set of nondiscrimination laws, and OFCCP audits federal contractors with an entirely different set of nondiscrimination laws. There is no statutory overlap between the two.

No Overlap in Statutory Authority

While both the EEOC and OFCCP have responsibility for enforcing workplace equal employment opportunity laws, they derive their authority from different sources. The EEOC is authorized by Congress to enforce:

- Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

- Title I of the Americans with Disabilities Act of 1990, which bars discrimination against qualified individuals on the basis of disability;

- The Age Discrimination in Employment Act of 1967, which prohibits discrimination against individuals age 40 and older because of age;

- Title II of the Genetic Information Nondiscrimination Act, which makes it unlawful for an employer to, among other things, discriminate in the terms, conditions, or privileges of employment based on an applicant's or employee's genetic information, or to "request, require, or purchase" an individual's genetic information, except as permitted under six exceptions; and

- The Equal Pay Act, which prohibits employers from paying men and women working at the same establishment and in the same job different rates of pay because of sex.

OFCCP enforces *none* of these laws. Instead, it is responsible for the administration and enforcement of:

- Executive Order 11246, which prohibits federal contractors from discriminating against applicants and employees on the basis of race, color, religion, sex, sexual orientation, gender identify, and national origin, and requires covered federal contractors to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, and national origin;

- Section 503 of the Rehabilitation Act of 1973, which prohibits discrimination and requires federal contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities;

- Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, which requires contractors to take affirmative action to employ and advance in employment qualified protected veterans and to list most employment openings with appropriate employment service delivery systems; and

- Executive Order 13496, which requires contractors to post a notice of rights under the National Labor Relations Act ("NLRA").

As discussed more fully below, while OFCCP and the EEOC from time to time may address similar discrimination issues, these statutes have produced entirely distinct enforcement schemes.

The EEOC's Enforcement Authority is Generally Triggered by the Filing of a Discrimination Charge

The EEOC is the federal regulator charged with enforcing the nation's primary workplace nondiscrimination laws. It does this by investigating charges of discrimination filed by individuals and, where it believes such charges have merit, attempting to resolve them through a process called conciliation. Where conciliation fails, the EEOC has the authority to bring suit in federal court.

A discrimination charge may be filed with the EEOC by or on behalf of any individual claiming to be aggrieved under these laws. A charge also may be filed by the commission itself where it has reason to believe unlawful discrimination has occurred but where an individual charge alleging that specific type of discrimination has not been filed. In the overwhelming majority of cases, however, the EEOC *responds* to a specific allegation of discrimination and conducts its investigation accordingly.[2]

Indeed, as the Supreme Court has observed, "unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled access only to evidence relevant to the charge under investigation." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984) (emphasis added) (citation and footnote omitted). Thus, "[i]n this respect the [EEOC's] investigatory power is significantly narrower than that of the Federal Trade Commission or of the Wage and Hour Administrator, who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrongdoing." *Id.* (citation omitted).

OFCCP Engages Government Contractors To Ensure They Are Complying With Their Federal Affirmative Action Requirements

In contrast, none of the laws enforced by OFCCP allows for a private right of action. OFCCP is responsible for auditing federal contractor compliance with the equal employment opportunity and affirmative action requirements of Executive Order 11246, Section 503, VEVRAA, and their implementing regulations. Those rules not only prohibit discrimination on the basis of protected veteran status, disability, sexual orientation, gender identity, and race, color, sex, religion, and national origin, they also require contractors to take additional steps to *ensure* they are not engaging in discrimination. These steps are referred to as "affirmative

[2] In fiscal year 2016, the EEOC received 91,503 charges of discrimination. In contrast, it pursued only 260 directed investigations.

action" and represent the overwhelming majority of OFCCP's enforcement activity. Examples of required affirmative action required of covered federal contactors include taking such steps as:

- Proactively recruiting in geographic areas and at institutions likely to yield diverse candidate pools;

- Monitoring the demographic patterns of actual selections made from those diverse pools;

- Comparing the demographic profiles of the workforce to those of the labor markets from which they have been selected; and

- Determining whether employees chosen for training programs, promotions, and other developmental opportunities reflect the diversity of the workforce segments from which they have been drawn.

OFCCP's affirmative action regulations use both static and dynamic measures of whether a federal contractor is maintaining a level playing field. The static measure evaluates employee "representation" patterns — whether the contractor's workforce demographic representation patterns reflect what might reasonably be expected given the race and gender composition of the qualified labor force from which its employees have been drawn.[3] Current employment below expected levels could suggest to OFCCP the absence of a level playing field. This measure is often referred to as a contractor's "utilization" pattern.

The dynamic measure evaluates the relative rates at which different gender and race groups are selected for such things as hires, promotions, terminations, benefits, and training programs. Statistically significant disparities in selection rates between certain groups over a given period also could suggest to OFCCP the absence of a level playing field. This is often referred to as determining whether a contractor's employment decisions have an "adverse impact" against any particular race or gender group.[4]

Unlike the EEOC, OFCCP fulfills its enforcement responsibilities primarily through agency-initiated compliance evaluations, or "audits," of covered federal contractor and subcontractor establishments. These audits are proactive in nature, and in contrast to the EEOC charge investigation process, more often than not result in the voluntary exchange of compliance data and information between the federal government and the federal contracting community.

Indeed, the success of contractors' affirmative action programs is due in no small part to the fact that in the vast majority of OFCCP audits, the contractor and the agency can

[3] 41 CFR § 60-2.15(a).
[4] 41 CFR § 60-3.4.

communicate openly without the threat of litigation or punitive damages. For example, from fiscal year 2004 through FY 2016, OFCCP conducted 47,860 audits, with 82.52 percent of those audits concluding with a notice of compliance. During that time, the Labor Department initiated a total of 84 enforcement actions with DOL's Office of Administrative Law Judges. This figure represents 0.18 percent of all audits conducted during that period.

In contrast, the threat of potential litigation is embedded in *every* interaction with the EEOC. Indeed, absent settlement, every charge filed with the commission has only two possible outcomes: the EEOC either (1) sues on the individual's behalf; or (2) issues a "right-to-sue" letter allowing the individual to initiate litigation against the employer.

As noted above, there is no *statutory* overlap between the EEOC's and OFCCP's jurisdiction. While there is some *subject matter* overlap — notably, discrimination complaints involving race, color, sex, religion, and national origin — the agencies already have a basic agreement in place to refer individual claims alleging these types of discrimination to the EEOC.

More specifically, a federal contractor applicant or employee who believes he or she has been discriminated against is permitted to file a formal complaint with OFCCP using Form CC-4. Under a longstanding agreement between OFCCP and the EEOC, OFCCP will retain individual discrimination claims arising under Section 503 and VEVRAA, as well as those arising under E.O. 11246 that do not implicate Title VII, but generally will refer individual complaints or race, color, sex, religion, or national origin discrimination to the EEOC.

In practice, individual complaints of discrimination filed with OFCCP are extraordinarily rare, a fact which belies the argument that these agencies essentially perform the same function. For example, over the last four fiscal years (FY 2013 – FY 2016), OFCCP received a total of only 641 discrimination complaints, the majority (417) of which were classified as *not* involving Executive Order 11246 (the only possible area of overlap between the agencies). In contrast, during that same time period, the EEOC received a total of 363,393 charges.

When broken down by subject matter, a similar pattern emerges:

- **National Origin**: OFCCP received 49 complaints while the EEOC received 39,499.
- **Religion**: OFCCP received 16 complaints while the EEOC received 14,597.
- **Race**: OFCCP received 219 complaints, while the EEOC received 127,477.
- **Sex**: OFCCP received 139 complaints, while the EEOC received 107,044.
- **Color**: OFCCP received 26 complaints, while the EEOC received 11,837.

These data reinforce one of the fundamental reasons why we do not recommend merging these two agencies; the overlap between the two is clearly the exception rather than the rule.

Procurement Decisions and Oversight Should Remain With Cabinet Agencies

One of the major concerns we have with the proposed merger is the impact that would be caused by transferring oversight and enforcement of *federal procurement requirements* from a Cabinet-level agency to an independent commission. Historically, federal procurement policy has been considered a matter falling squarely within the executive branch's purview, and public policy suggests that there are good reasons for keeping OFCCP's procurement-related enforcement within a Cabinet-level agency.

OFCCP's jurisdiction is determined by an employer's status as a federal contractor or subcontractor. The agency's ability to conduct compliance evaluations flows from the employer's contractual relationship either directly or indirectly with the federal government, as does its authority to request and review an employer's records and data. In addition, the remedies available to OFCCP are determined by the fact that it audits and enforces compliance with the terms of a *contract*; if settlement cannot be reached, the agency typically seeks suspension of existing contracts and/or debarment from future contracts. The contractual relationship is thus central to OFCCP's overall enforcement scheme.

Importantly, OFCCP is accountable to the secretary of labor and ultimately to the president. In this way, the government is assured that its interests beyond the enforcement of E.O. 11246, the Rehabilitation Act, VEVRAA, and E.O. 13496 can be considered before a contract is suspended or a contractor is debarred. "Notwithstanding its severe impact upon a contractor, debarment is not intended to punish ...." *Gonzalez v. Freeman*, 334 F.2d 570, 576-77 (D.C. Cir. 1964); *see also* Federal Acquisition Regulations, 9.402(b) ("The serious nature of suspension and debarment requires that these sanctions be imposed only in the public interest for the Government's protection and not for the purposes of punishment.").[5]

OFCCP has considerable experience balancing these interests. To be sure, contractors do not always agree with the agency's enforcement approach, and there is considerable room for improvement of the agency's current enforcement practices. We respectfully submit, however, that there are existing systems in place that can help resolve what many employers have come to view as OFCCP's unreasonable and heavy-handed enforcement approach.

In contrast, the EEOC has none of this experience and contractors are concerned about whether the commission would adopt an appropriate enforcement approach that properly accounts for these unique procurement-related issues. For example, if the commission failed to properly account for the government's interest in making a procurement decision, would the

[5] 48 CFR § 9.402(b).

executive branch have any recourse? This concern was among the reasons that Congress rejected the proposal to merge OFCCP (then the Office of Federal Contract Compliance, or OFCC) and the EEOC in 1972 during consideration of the Equal Employment Opportunity Act of 1972. As stated by former Sen. William Saxbe (R-OH), who sponsored the amendment to remove the merger provision from the bill:

> The critical OFCC mission to insure equal employment opportunity can continue to register such success only if performed within the executive branch, and within that branch, the Department of Labor is clearly the most appropriate agency to further that mission. This is so because, to be effective, the contract compliance program must be an integral part of the procurement process. The process of procuring goods and services, as I am sure you recognize, is peculiarly a function of the executive branch.[6]

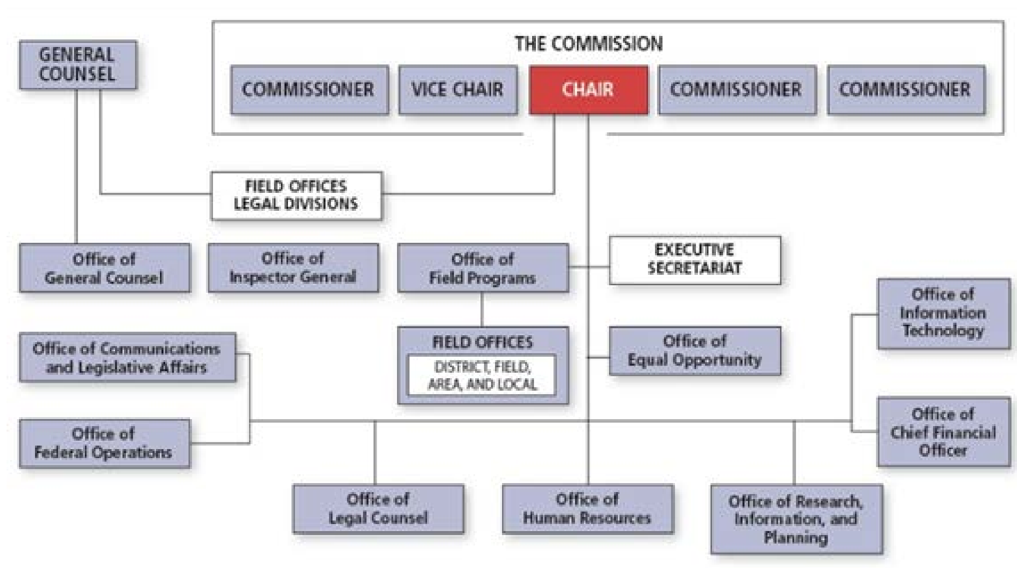
We submit that Sen. Saxbe's concerns about keeping procurement decision responsibility within the executive branch remain just as valid today as they were in 1972.

The EEOC and OFCCP's Management Structures Are Distinct

Another factor counseling against the proposed merger is the very different organizational structures in place at the EEOC and OFCCP. Title VII, which created the EEOC, established a commission of five members who serve staggered five-year terms, with one term expiring each year. Commissioners are appointed by the president and confirmed by the Senate. By law, not more than three commissioners may be from the same political party. The president may appoint a chair and vice chair from among sitting commissioners at his or her discretion. The chair is ultimately responsible for appointment of most subordinate officials within the agency.

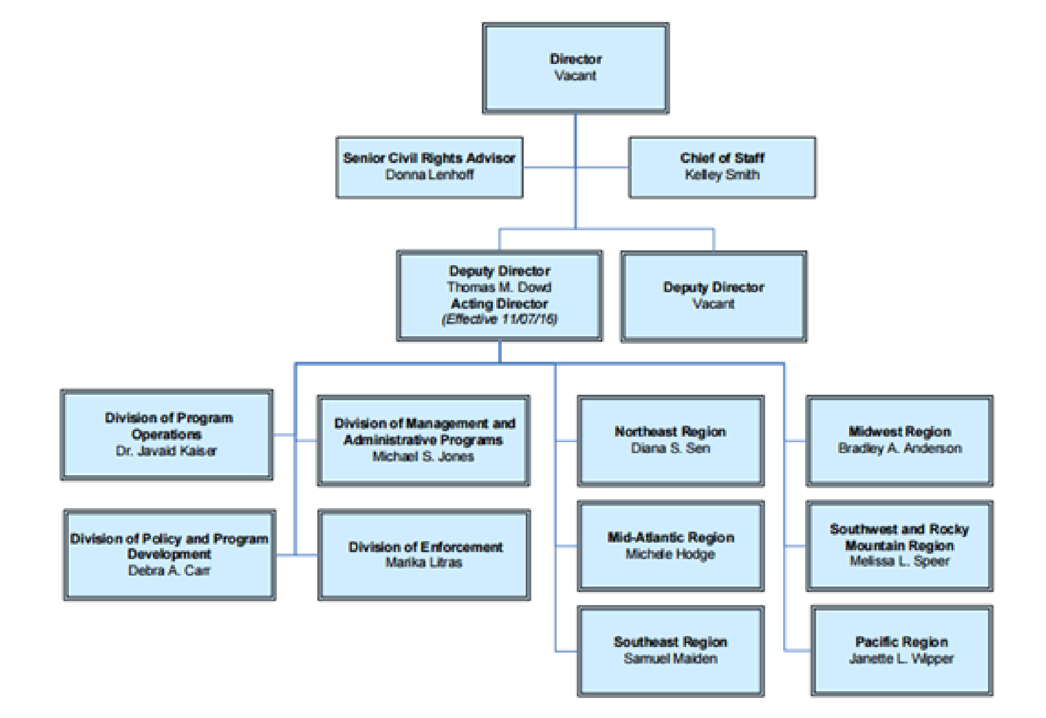
Title VII also established the position of general counsel within the EEOC. The general counsel, who serves a four-year term, is also appointed by the president and confirmed by the Senate. While Title VII sets forth the general counsel's responsibilities to conduct litigation, the general counsel also has been delegated, as discussed more fully below, considerable independent authority from the commission. Together the EEOC's general counsel and Chair share responsibility for appointment and supervision of regional attorneys. The EEOC chair is responsible for the agency's financial and operational management.

[6] Legislative History of the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 1386 (Jan. 26, 1972) (statement of Sen. Saxbe).



In contrast, OFCCP is led by a non-career director, who is appointed by the secretary of labor. The OFCCP director has responsibility for direction and oversight of OFCCP's three national office divisions (policy, operations, and administration) and six regions. The regions have responsibility for conducting compliance reviews and complaint investigations.

OFCCP, however, cannot seek enforcement action on its own. If it believes a violation has occurred and cannot resolve the matter, it *must* refer the matter to the Department of Labor's Office of the Solicitor. The solicitor's office may then file an administrative complaint with the Department of Labor's Office of Administrative Law Judges ("OALJ"). Appeals from OALJ decisions are heard by the Department's Administrative Review Board ("ARB"), with the ARB's decisions deemed final agency actions that contractors may appeal to federal courts under the Administrative Procedure Act.



As the above organizational charts illustrate, determining just how to merge OFCCP's structure into the EEOC's would be no simple matter. Among the many questions we believe must be addressed are:

- Will compliance evaluations be handled by the same or different personnel or field offices than those handling EEOC charge investigations?

- Will there be a functioning operational "firewall" between the two enforcement functions?

- If no such firewall is established, will information obtained during compliance reviews (which do not need to relate to a specific charge) be utilized for enforcement of Title VII, the EPA, or the ADA?

- If no such firewall is established, will compliance reviews be limited to information related to a filed charge?

- Will the EEOC's mediation program be available to address contract compliance matters before an administrative complaint is filed?

- Who will have the authority to determine if an administrative complaint is filed? Will the commission make such determinations? The general counsel?

- If an administrative complaint is filed, who will hear the case? Will an entity similar to DOL's Office of Administrative Law Judges be established?

- Who will decide any appeals? The commission itself? Will that be a conflict if the commission voted to initiate litigation in the first place?

- Will a tribunal similar to the Labor Department's Administrative Review Board be established? Or will contractors be able to appeal directly to federal court?

We respectfully submit that resolving these matters will take considerable thought and time that would instead be better spent implementing needed reforms at each agency.

The EEOC and OFCCP Exhibit Common Characteristics of Why Mergers Fail

Studies over the years have put the failure rate of corporate acquisitions and mergers somewhere between 70-90 percent,[7] far exceeding the current U.S. divorce rate.[8] Given these dreadful statistics, researchers have spent considerable time trying to understand why mergers fail. Through these efforts, they have identified three characteristics common among unsuccessful mergers:

- Lack of "strategic" fit;

- Different "cultures"; and

- Different "customers."

We address each of these characteristics as they relate to the proposed merger.

Lack of Strategic Fit – Different Missions

In the corporate world, if the target company is outside the acquirer's core mission, things are not likely to work. For example, if the acquirer sells its products through catalog and internet sales, it should be very circumspect about acquiring a company that relies on direct sales, even if the products it sells are in the same industry. Similarly, a company that is strong in selling its products to businesses might want to hold off on acquiring a company that focuses on consumer-based sales. Although both companies are sales oriented, the strategy required to meet business-

---

[7] Clayton M. Christensen, *et al.*, *The Big Idea: The New M&A Playbook*, Harvard Bus. Rev. (Mar. 2011), at 1.
[8] Kevin Voigt, *Mergers Fail More Often Than Marriages*, CNN (May 22, 2009), http://edition.cnn.com/2009/BUSINESS/05/21/merger.marriage/.

to-business opportunities is vastly different from the one required for business-to-consumer opportunities.

Applying these principles to a possible merger of OFCCP (the target) into the EEOC (the acquirer), one can see the potential difficulty. As discussed above, OFCCP's core mission is ensuring that federal contractors comply with their equal employment opportunity and affirmative action obligations under Executive Order 11246, Section 503, and VEVRAA. EEOC's core mission, on the other hand, is to prevent and correct discriminatory employment practices through enforcement of Title VII, the ADA, ADEA, GINA, and the EPA. Although both agencies operate in the "employment civil rights and nondiscrimination" arena, OFCCP's additional mandate — to ensure contractors undertake appropriate affirmative action where required — is well beyond the scope of the EEOC's core mission.

Different Enforcement "Cultures"

Just because two entities are in the same industry does not mean they have the same culture. In fact, according to experts, whether a merger is ultimately successful often comes down to cultural integration.[9] In the context of the proposed merger of OFCCP into the EEOC, it is fair to say that both are in the same industry; that is, "civil rights enforcement." However, as explained above, the enforcement culture of OFCCP is significantly different from the one at the EEOC, and successfully merging the two will likely be problematic.

OFCCP fulfills its enforcement responsibilities primarily through agency-initiated, non-adversarial compliance evaluations to determine whether a contractor is complying with its affirmative action and nondiscrimination obligations. If OFCCP determines a contractor is in compliance, it will close the evaluation with a notice of compliance. If OFCCP determines a contractor is not in compliance, however, it will engage in conciliation efforts. If the parties are unable to reach a conciliation agreement, OFCCP will move to administrative enforcement.

The EEOC, on the other hand, investigates discrimination charges filed either by individuals or by the commission itself. In some situations, the EEOC can also investigate without a charge having been filed.[10] The EEOC can also sue either on its own or on behalf of an alleged victim in federal district court. Additionally, if the EEOC does not bring its own lawsuit, it will issue a "right-to-sue" letter to the charging party, who then can file suit. Importantly, for the EEOC, it is the ultimate threat of litigation that makes its enforcement culture adversarial in nature from the beginning. Therefore, because the EEOC's enforcement culture of investigation and litigation is vastly different from OFCCP's culture of compliance evaluations, a merger of the two is likely to be unsuccessful.

---

[9] George Bradt, *The Root Cause of Every Merger's Success or Failure: Culture*, Forbes (June 29, 2015), https://www.forbes.com/sites/georgebradt/2015/06/29/the-root-cause-of-every-mergers-success-or-failure-culture/#170b7d09d305.

[10] 29 U.S.C. § 626(a) (ADEA directed investigations); 29 U.S.C. § 211(a) (EPA directed investigations).

Different "Customers"

One of the most fundamental tests for acquisition success is improved customer experience. Is the new combined entity delivering a customer experience that is qualitatively better than the customer experience under the previously separate entities? One way to increase the likelihood for an improved experience is not to combine very different customers under one entity. Unfortunately, this is exactly what a merger of OFCCP into the EEOC will do.

OFCCP's "customers" are *federal contractors*, and its primary enforcement mechanism is the compliance evaluation. The EEOC's "customers," on the other hand, are *individuals*, and its primary enforcement mechanism is charge investigation. Moreover, according to a recent Government Accountability Office ("GAO") report, it takes OFCCP on average 1,487 days to close an evaluation when discrimination violations are alleged. In contrast, the average time it takes the EEOC to investigate and resolve a discrimination charge is about 300 days. Merging OFCCP into the EEOC will likely increase the time it takes the EEOC to investigate and resolve charges, which would have a tangible negative impact on the EEOC's "customers."

THE EEOC AND OFCCP NEED TO IMPROVE THEIR RESPECTIVE CIVIL RIGHTS ENFORCEMENT OBJECTIVES

As noted above, instead of merging OFCCP into the EEOC, we respectfully submit that greater efficiency and more effective enforcement can be achieved by internal reforms at each agency.

The EEOC Should Reassess the Priorities Established in its Strategic Enforcement Plan and its Overbroad Delegation of Litigation Authority; Quality of Charge Investigation and Conciliation Must Be Improved; and Greater Emphasis Should Be Placed on Encouraging Voluntary Resolution of Discrimination Claims

In addition to a number of regulatory and subregulatory guidance documents in need of review and reform,[11] we strongly recommend that the EEOC reassess the following three policy areas, which to date have hampered the agency's ability to carry out its critical civil rights enforcement responsibilities.

SEP Priorities and Delegation of Litigation Authority

First, the EEOC should revisit its strategic plan and related strategic enforcement plan ("SEP"), particularly in reference to the commission's current systemic enforcement strategy, which we believe has been carried out in a way that has detracted from the agency's core

[11] See, *e.g.*, EEAC's comments to the EEOC in response to its request for public input regarding significant existing regulations, which are attached to these comments.

mission. The EEOC's concerted emphasis on systemic enforcement has taken valuable time, focus, and energy away from other more meaningful discrimination prevention and correction efforts — such as education and outreach, technical assistance, *quality* charge investigations and conciliations, and — failing all else — thoughtful, meritorious litigation.

To that point in particular, while we appreciate that the EEOC is statutorily authorized to litigate in the public interest, it must do more to ensure that such litigation, when it does occur, is prosecuted competently, responsibly, and fairly. Over the last several years, the courts, Congress and the business community have criticized the EEOC for its overly aggressive enforcement and litigation strategy, which led in some instances to significant delays in prosecuting individual claims, or high-profile losses involving systemic allegations that simply were not borne out by the evidence.

One longstanding EEOC practice that seems to have contributed in recent years to a spate of ill-conceived agency litigation is its delegation of litigation authority to the general counsel, who in turn has delegated that authority to attorneys working in the field. Unfortunately, this delegation has made it much more difficult for the agency to establish uniformly applied policies and consistency across its regions, which in turn has hampered the meaningful enforcement of workplace civil rights laws. Despite these results, the commission has repeatedly reaffirmed the delegation of litigation authority, most recently in October 2016 over the dissents of its two Republican members.

Consequently, the general counsel wields considerable power in deciding which cases should be litigated. The lack of national headquarters oversight has exposed national employers operating within multiple EEOC offices to sometimes vastly different standards, requirements, and expectations — not only as to litigated matters, but also with respect to investigations and other activities preceding litigation. The agency's self-imposed pressure — stemming largely from the short- and long-range priorities set forth in its strategic plan and SEP — to fish for large, class-based claims has undermined the quality and effectiveness of its overall enforcement efforts and has detracted from ensuring that litigation remains an option of last resort.

Quality of Charge Investigations and Conciliations

Second, the EEOC should continue to prioritize improving the quality and timeliness of charge investigations and conciliations. To its credit, under Acting Chair Victoria Lipnic, the agency has taken steps recently to improve the quality of its stakeholder interactions and administrative charge investigation procedures. We applaud the EEOC's ongoing attention to improving the quality of discrimination charge investigations and conciliations and look forward to it becoming a top management priority. Establishing and implementing a meaningful quality control system for investigations and conciliations is critical to achieving the agency's statutory mission.

Also relevant to effective civil rights enforcement is the ability to conduct charge investigations as promptly and efficiently as possible. Because seemingly endless investigations of discrimination charges fails to serve the interests of the charging party or respondent, the EEOC should be encouraged, and provided with the necessary resources, to improve the time it takes to conduct charge investigations.

In addition, the EEOC should continue to improve the quality of its conciliation efforts. In *Mach Mining v. EEOC*, 135 S. Ct. 1645 (2015), the Supreme Court outlined the minimum standard the EEOC must achieve to satisfy its statutory conciliation obligation. It made clear that proper conciliation involves providing the employer with all the necessary information — including identifying "what practice has harmed which person" — that it needs to weigh and discuss its settlement position. The EEOC's current Title VII procedural regulations merely require that the agency attempt to achieve a "just resolution of all violations found," however.

We recommend that the EEOC revise its procedural regulations consistent with *Mach Mining* to identify specific factors that should be considered in evaluating the sufficiency of agency conciliation efforts. Such a standard would help improve the quality of conciliations by ensuring that employers are provided with a sufficient factual understanding of the agency's findings, as well as a meaningful opportunity for "voluntary compliance" in every instance.

<u>Encouraging Voluntary Resolution of Discrimination Claims</u>

Third, the EEOC has in place a nationally respected alternative dispute resolution ("ADR") program that we believe is undervalued and underutilized as a prompt, efficient, and effective means of resolving many discrimination charges. Indeed, the agency should be strongly encouraged to focus less on developing narratives through overbroad investigations that will support potential systemic lawsuits, and more on meaningful efforts to secure voluntary compliance through settlement.

To that end, the EEOC should expand the use of mediation at more stages of the investigation process than is currently its practice, and even during or after conciliation negotiations. Once the EEOC has determined that a charge has merit, the dynamics of the situation change significantly, and an employer that may have been disinclined to go to mediation beforehand may now see some value in doing so.

The EEOC also could utilize mediation as a viable alternative to litigation in the event conciliation is unsuccessful. At that stage, an outside neutral party with no stake in the outcome of the dispute may greatly assist the parties and the agency in reaching a mutually acceptable resolution that avoids the costs and time involved in federal court litigation. Whether or not the EEOC were to expand its mediation program to the conciliation stage of the charge resolution process, much more needs to be done, in our view, to assure that *all* charges in which reasonable cause has been found are subject to meaningful, good faith conciliation efforts.

We believe that by refocusing its efforts on voluntary compliance, rather than "gotcha" enforcement tactics, the EEOC will be able to achieve its mission-critical strategic aims more efficiently. It also would improve the agency's reputation among the stakeholder community for fairness and evenhandedness, and would afford charging parties — many of whom will be unwilling or unable to pursue private litigation — an opportunity to have their claims addressed on terms that are favorable to them.

OFCCP's Resources Should Be Spent Reforming and Refining the Agency's Enforcement Initiatives

OFCCP Should Develop a More Strategic Enforcement Processes

OFCCP issued its current active case enforcement ("ACE") directive on December 16, 2010, formally ending the active case management ("ACM") procedures suspended earlier in the Obama Administration. ACM was designed to focus agency resources on systemic discrimination and target the worst offenders with greater frequency, efficiency, and success. Under the process, many OFCCP audits were concluded after an abbreviated desk audit, unless indicators of possible systemic discrimination were observed.

The ACM process also included "quality control" measures requiring a full desk audit to be conducted on every 25th contractor listed in the Federal Contractor Selection System ("FCSS"), and a full compliance evaluation, including an onsite investigation, on every 50th contractor listed in the FCSS, regardless of whether there were indicators of discrimination.

In contrast, OFCCP's ACE procedures require full desk audits in every compliance evaluation and do not focus resources on contractors or establishments that are most likely to be out of compliance. Routinely, OFCCP now requests vast amounts of additional information and often sets inflexible submission deadlines. Audits can linger for months or even years, and it is not uncommon for audits to "go dark," effectively becoming inactive only to be picked up again months or sometimes years later. A single contractor may have dozens of OFCCP compliance evaluations conducted simultaneously, and OFCCP's procedures for selecting and scheduling these audits are not transparent.

A return to some version of the ACM procedures would benefit both the agency and the contracting community, particularly if the agency receives a budget reduction. A similar recommendation was made by the GAO, which in September 2016 issued a report recommending OFCCP make changes to the process for developing contractor scheduling lists that would help focus the agency's compliance efforts on those contractors with "the greatest risk of not following equal employment opportunity and affirmative action requirements."

OFCCP Should Establish a More Transparent Compensation Discrimination Enforcement Process

On February 28, 2013, OFCCP rescinded its systemic compensation discrimination interpretative standards, which were designed to provide both federal contractors and agency personnel with "definitive interpretations" regarding compensation discrimination under Executive Order 11246. They were replaced by Directive 307, effectively leaving contractors with no useful guidance as to how they should be evaluating compensation.

OFCCP's 2006 systemic compensation discrimination interpretative standards implemented a transparent investigatory process that relied on preliminary "indicators" to identify areas in which a "full-scale" compensation investigation might be appropriate. The process was widely adopted by contractors for their own internal investigations and self-audits, especially larger employers seeking a reasonable and effective method to evaluate compensation.

Much like the ACE process described above, Directive 307 effectively calls for a "full-scale" investigation in every compliance evaluation, regardless of the presence or absence of any indicators. These investigations go far beyond what contractors are reasonably able to do themselves, with no clear definition of appropriate pay analysis groups and no transparent, repeatable methodology. Although OFCCP has seen a nominal increase in findings of compensation violations, the agency identifies compensation "violations" in less than 1 percent of all audits conducted annually.

In April 2013, EEAC submitted a letter to OFCCP requesting technical assistance on Directive 307, seeking basic information on how contractors should be analyzing their compensation data under OFCCP's new directive. The agency declined to respond.[12]

OFCCP Should Follow the Uniform Guidelines and Title VII

OFCCP has no publicly available directive or guidance regarding the use of statistics in compliance evaluations. Under Title VII, establishing a "pattern or practice" of intentional discrimination typically involves the use of both statistical and non-statistical (or "anecdotal") evidence. While the courts acknowledge highly limited circumstances where statistics alone may be enough to prove discrimination, in recent years OFCCP has flipped this theory on its head, and has stated publicly that anecdotal evidence should not be required for *any* case of discrimination.

The agency has, however, "adopted" the "Uniform Guidelines on Employee Selection Procedures" ("guidelines"), which are intended to establish a uniform set of principles for both the federal government and private employers to use when analyzing employment selection

[12] A copy of our 2013 letter is attached for your reference.

decisions. In recent years, however, OFCCP's adherence to the guidelines has been inconsistent across OFCCP districts and regions.

More specifically, certain OFCCP offices now combine race and ethnicity data into various groupings, not in response to any specific discrimination claim, but rather in a thinly veiled attempt to manufacture a statistical case of alleged unlawful discrimination. Thus, rather than utilizing the analytical process outlined in the guidelines, under which the selection rates of one race/ethnic group are compared to the selection rates experienced by the members of other individual race/ethnic groups, OFCCP is simply mixing and matching race/ethnicity data to create "favored" and "disfavored" groupings.

For example, OFCCP has alleged discrimination against "non-Asians," "non-Hispanics," and even identified individuals of "two or more races" as a "racial category" subject to discrimination. OFCCP's blind reliance on statistics has also produced untenable theories of discrimination where the agency alleges discrimination against *both* females and males by the same employer, at the same location, and in the same job title. OFCCP's lack of transparency regarding the use of statistics has left a void for federal contractors who must use such statistics to analyze their employee selection decisions each year.

OFCCP and the Contractor Community Would Benefit from an Ombudsman

Both OFCCP and federal contractors could benefit from some type of "ombudsman" to help create consistency across OFCCP enforcement processes, or even resolve good faith disputes between contractors and the agency. Today, there is no effective way for contractors to challenge overbroad information requests or basic threshold questions like OFCCP jurisdiction. With no effective means to push back against agency overreach, even a small minority of OFCCP compliance officers or district directors engaging in questionable enforcement tactics yields an enforcement environment that broadens and amplifies the impact of these "exceptions."

Unfortunately, the only way to resolve good faith disputes regarding OFCCP's authority is to allow the company to be sued by the agency. Contractors are not permitted to independently challenge OFCCP's authority in federal court. Under existing legal precedent, federal courts have held that the Administrative Procedures Act requires contractors to first exhaust all administrative remedies before challenging OFCCP actions in federal court. DOL's Office of Administrative Law Judges has in turn held that *only* DOL may file an administrative complaint with OALJ. Thus, the only way to exhaust administrative remedies with OFCCP is to openly defy the agency and allow the company to be sued.

ANY MERGER OF THE EEOC AND OFCCP SHOULD BE PRECEDED BY DETAILED ANALYSIS OF MERGER PREREQUISITES, INCLUDING ANY NECESSARY LEGISLATIVE ACTION

EEAC does not support merging OFCCP into the EEOC. However, if the administration moves forward with the merger, we encourage it to do so in a deliberate way that carefully considers the challenges that must be overcome if the agencies are to operate cohesively as one.

First, we urge the administration not to impose any arbitrary time limits on a merger, as it is far more important to execute such a merger correctly than it is to execute it quickly. The president's proposed budget makes it clear that the administration contemplates the merger being completed by the end of fiscal year 2018, but given the statutory and institutional changes necessary, this is a highly ambitious goal.

Second, the administration must carefully consider the statutes, executive orders, and other authorities that will need to be amended in order to effectuate the merger. As you know, the administration cannot fully merge the agencies on its own. For example, the Department of Labor is charged by statute with responsibility for enforcing Section 503 and VEVRAA, a responsibility that cannot be changed without the consent of Congress. Executive Orders 11246 and 13496 would also need to be amended.

In addition, the administration should carefully determine if there is executive authority to transfer enforcement authority under Executive Order 11246 to the EEOC. Executive Order 11246 itself states that the E.O. is authorized under the authority vested in the president by "the Constitution and statutes of the United States." Whether the Federal Property and Administrative Services Act, 40 U.S.C. §§101 *et seq.*, and other authorities permit transfer of authority for procurement to the EEOC is far from clear, however.

Even if the administration decides that it has authority to transfer many of OFCCP's functions to the EEOC through executive action, it should strongly consider doing so through use of a reorganization plan passed by Congress. Taking action through Congress will put the new agency on a stronger footing and remove the basis for what could be significant litigation challenging the authority for a merger. While the circumstances were different, this is analogous to how the Carter Administration proceeded when it transferred enforcement of the ADEA and EPA from the Labor Department to the EEOC in the 1970s. When the reorganization tool passed by Congress was found to be unconstitutional, Congress quickly passed new legislation ratifying the reorganization. See *EEOC v. Westinghouse Elec. Corp.*, 765 F.2d 389, 391 (1985).

After accounting for necessary statutory changes, the administration should carefully consider how OFCCP's enforcement regime should be integrated into the EEOC's existing structure. As discussed above, this will be no easy task, as it will involve functions that currently cut across several Labor Department agencies. In order to ensure that this process considers all appropriate concerns, the administration should consider establishing a working group or task

force to solicit input from stakeholders and make recommendations about the particulars of how functions would be transferred.

After an understanding is reached on how functions might be transferred, a comprehensive plan should be developed to review OFCCP's regulations and subregulatory guidance, including directives and the "Federal Contract Compliance Manual," to determine what revisions will be necessary before a transfer can be successful.

Of course, numerous other issues present themselves with any reorganization plan. Among those are practical considerations, such as any conflict between collective bargaining agreements that cover the EEOC's and OFCCP's workers and the extent to which employees will be reassigned or let go, and how such decisions will be made.

As these comments make clear, we recommend that the administration not move forward with its merger proposal, but instead move forward with needed reforms within each agency. However, if the merger does proceed, we look forward to working constructively with policymakers and stakeholders to ensure that the merger is accomplished in the best manner possible.

REFOCUS OF THE NATIONAL LABOR RELATIONS BOARD ALSO NEEDED

There is one other issue on which we are submitting comments. The National Labor Relations Board ("NLRB") is responsible for administering the National Labor Relations Act ("NLRA"). The NLRA, enacted in 1935, is the primary federal statute governing labor relations in the private sector. The purpose of the NLRA is to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain practices that can harm the general welfare of workers, businesses, and the economy.

Unfortunately, the board expanded the reach of the NLRA in the non-union workplace under President Obama, often in conflict with other laws. More specifically, the NLRB has struck down arbitration and class action waivers in employment contracts, regulated employee handbook policies (*e.g.*, social media, use of company email), and encumbered confidentiality in employment investigations. In many ways, these decisions conflict with compliance obligations under other employment laws, including Title VII of the Civil Rights Act of 1964.

The NLRB's history demonstrates that it has a poor track record of dismissing conflict between the NLRA and other statutes. See *Hoffman Plastics Compounds v NLRB*, 5 U.S. 137 (2002). Therefore, we respectfully submit that it is now necessary for the new administration to refocus the NLRB on its traditional mission of conducting union elections and regulating labor relations to serve the public interest by reducing interruptions in commerce caused by industrial strife. The NLRB should take significantly greater care in considering conflicts between the NLRA and other laws, such as Title VII and the Federal Arbitration Act.

CONCLUSION

We appreciate the opportunity to present these comments on Executive Order 13781. As discussed above, we recommend that the administration not proceed with its proposed merger of OFCCP and EEOC and instead proceed with needed reforms within both agencies. We also urge the administration to consider necessary reforms within the NLRB. If the merger proposal does move forward, however, we urge the administration to do so in a deliberate and thoughtful manner that takes all steps necessary to ensure the new agency can succeed in its important and diverse missions.

Please do not hesitate to call on us if we may be of additional assistance as you consider these important matters.

Sincerely,

Joseph S. Lakis, Jr.
President

/enclosure

EQUAL EMPLOYMENT
ADVISORY COUNCIL

SUITE 400
1501 M STREET, NW
WASHINGTON, DC 20005

TEL 202/629-5650
FAX 202/629-5651

April 20, 2015

Submitted Electronically via Public.Comments.RegulatoryReview@eeoc.gov

Ms. Bernadette Wilson
Acting Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, D.C. 20507

RE: Comments of the Equal Employment Advisory Council Responding to Equal Employment Opportunity Commission's Request for Public Input Regarding Significant Existing Regulations

Dear Ms. Wilson:

The Equal Employment Advisory Council (EEAC) welcomes the opportunity to submit written comments in response to the U.S. Equal Employment Opportunity Commission's (the EEOC or the Commission) March 18, 2015 request for public input on its significant existing regulations.[1]

We appreciate the Commission's solicitation of written comments from members of the public regarding whether, and how, any of the EEOC's significant existing regulations should be modified, streamlined, expanded, or repealed. We believe that obtaining input from interested parties will augment the Commission's expressed goal of making its regulatory program more effective in achieving its regulatory objectives and less burdensome to the public.

Statement of Interest

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership is comprised of over 250 of the nation's largest private sector companies, collectively providing employment to millions of people throughout the United States. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of

---

[1] See EEOC Press Release, *EEOC Seeks Public Input on Plan to Review its Significant Regulations* (Mar. 18, 2015), *available at* http://www1.eeoc.gov//eeoc/newsroom/release/3-18-15.cfm?renderforprint=1. We understand that these public comments have been solicited as part of the Commission's "Final Plan for Retrospective Review of Significant Regulations," conducted pursuant to Executive Order 13563, "Improving Regulation and Regulatory Review," as published in the *Federal Register* on January 21, 2011. *See* 76 Fed. Reg. 3821 (Jan. 21, 2011).

understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title I of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101 *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, Title II of the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff *et seq.*, as well as other federal equal employment statutes and regulations. Its members thus have a direct and ongoing interest in the proper application and interpretation of these laws and regulations by the courts, the Commission, and other enforcement agencies. For that reason, EEAC has testified at EEOC public hearings and submitted written comments to the Commission and other federal agencies on numerous regulatory proposals affecting its members.[2]

Overview and Summary of Recommendations

As summarized below, our comments and recommendations regarding existing regulations highlight several issues that are of ongoing importance to the business constituency that EEAC represents:

ADEA Regulations

- The application of tort principles in defining "reasonableness" for purposes of 29 C.F.R. § 1625.7 ("Differentiations based on reasonable factors other than age") is confusing and impractical, and thus should be reconsidered.
- In undertaking an analysis of whether a particular employment practice is based on a "reasonable factor other than age" ("RFOA"), the ADEA regulations provide that relevant considerations include "[t]he extent to which the employer assessed the adverse impact of its employment practice on older workers." 29 C.F.R. § 1625.7(e)(2)(iv). For the reasons discussed in detail below, this factor should not be part of an RFOA analysis, and therefore should be eliminated from the list of relevant considerations.
- In addition, the extent of subjective decision-making and reliance on negative age-based stereotypes is not an appropriate consideration for

---

[2] For example, EEAC submitted written comments in response to the EEOC's requests for public comments regarding the following rulemaking proposals: (1) proposed amendment to regulations regarding the definition of the "Reasonable Factors Other than Age" provision of the ADEA (RIN 3046-AA87; 75 Fed. Reg. 7212 (Feb. 18, 2010)); (2) proposed regulations to implement Title II of GINA (RIN 3046-AA84; 74 Fed. Reg. 9056 (Mar. 2, 2009)); and (3) proposed regulations to implement the equal employment provisions of Title I of the ADA, as amended (RIN 3046-AA85; 74 Fed. Reg. 48,431 (Sept. 23, 2009)).

evaluating the existence of Reasonable Factors Other than Age (RFOA), which by definition are not age-based. Accordingly, this factor also should be deleted from the list of relevant considerations in making an RFOA determination.

ADA Regulations[3]

- The list of "Predictable Assessments" set forth in 29 C.F.R. § 1630.2(j)(3)(iii) is arbitrary and unnecessary, and could lead to unnecessary litigation concerning its scope. Thus, it should be repealed.
- Consistent with the ADA Amendments Act's legislative history, the regulations should be revised to provide that the determination of whether an impairment is "transitory and minor" is a threshold coverage issue, as opposed to an affirmative employer defense.
- The Commission should revise the regulations to include representational examples of "temporary, non-chronic impairments of short duration with little or no residual effects" that ordinarily will not be considered disabilities, as had been included in the ADAAA proposed rule.
- The Commission should revise the regulations to include definitional guidance as to the term "active" in the context of chronic/episodic conditions and ADAAA coverage.

GINA Regulations

- The Commission should clarify its GINA regulations expressly to provide that a medical professional who from time to time conducts employer-initiated workplace medical examinations does not fall within the definition of "employer."

<u>ADEA REGULATIONS, 29 C.F.R. Part 1625</u>

All of EEAC's comments regarding the Commission's ADEA regulations relate to 29 C.F.R. § 1625.7, which concerns the interpretation of RFOA in the context of disparate impact claims brought under the ADEA.

Legal Framework

The ADEA, 29 U.S.C. §§ 621 *et seq.*, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any

[3] EEAC is aware that the Commission has published a Notice of Proposed Rule Making (NPRM) to amend the regulations and interpretive guidance implementing the ADA as related to employer wellness programs. 80 Fed. Reg. 21,659 (Apr. 20, 2015) (to be codified at 29 CFR pt. 1630). EEAC makes no comments regarding current ADA-related regulations vis-à-vis employer wellness programs, since the regulations are in the midst of the rulemaking process. EEAC will provide any comments applicable to the proposed wellness regulations in direct response to the aforementioned NPRM.

individual … because of such individual's age." 29 U.S.C. § 623(a). Section 4(f)(1) of the ADEA further provides, however, that "[i]t shall not be unlawful for an employer … to take any action otherwise prohibited … where the differentiation is based on reasonable factors other than age…." 29 U.S.C. § 623(f)(1).

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the U.S. Supreme Court ruled that the disparate impact theory of discrimination is available under 29 U.S.C. § 623(a)(2). Importantly, however, the Court expressly limited the scope of disparate impact claims under the ADEA, concluding that an employment practice causing disparate impact against older workers will not be unlawful if it is based on "reasonable factors other than age." *Id.* at 241.

Recognizing the textual differences between the ADEA and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, the Supreme Court declined to extend to the former the latter's requirement that an employer prove (1) its continued use of a procedure having statistically significant adverse impact is justified by business necessity, and (2) that there exist no equally effective alternative measures which, if implemented, would reduce or eliminate the adverse impact. As the Court observed, "the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" 544 U.S. at 239.

The Court subsequently ruled in *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), that "reasonable factors other than age" is an affirmative defense with respect to which the employer bears both the burden of proof and persuasion as to its merit. The Court in *Meacham* observed in a footnote that the Commission "has lately proposed rulemaking that would … eliminate[] any reference to business necessity and plac[e] the burden of proof on the employer [w]henever the exception of a reasonable factor other than age is raised." *Id.* at 93 n.9 (citation omitted and internal quotations omitted). The Commission in its Preamble to the March 30, 2012 Final Rule thus provided that "[t]he purpose of the rule is to help explain the implications of the Supreme Court's decisions in *Smith* and *Meacham* and the type of conduct that would support an RFOA defense in court." 77 Fed. Reg. 19,080, 19,090 (Mar. 30, 2012) (codified at 29 C.F.R. pt. 1625).

Although the Commission made helpful clarifications and changes to the proposed RFOA rule prior to final publication, some of which were responsive to concerns EEAC highlighted in written comments submitted in response to the NPRM, the final rule still retains a number of provisions that are problematic. Accordingly, while EEAC welcomed practical regulatory guidance on the meaning of RFOA under the ADEA, we respectfully submit that the regulation goes beyond the plain text of the ADEA and the Supreme Court's interpretations of the statute in *Smith* and *Meacham* regarding the proper scope of disparate impact claims brought under the ADEA.

The Application of Tort Principles in Attempting to Define "Reasonableness" for Purposes of § 1625.7 Is Misplaced

In addressing how the term "reasonable" should be construed as it is used in the RFOA defense, § 1625.7(e)(1) draws upon common law tort principles to provide that a "reasonable" factor will be one that is "objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances." The Preamble to the Final Rule provides that a reasonable employer would or should know that the ADEA "prohibits the use of neutral practices that disproportionately affect older workers and are not based on reasonable factors other than age." 77 Fed. Reg. 19,080, 19,083 (Mar. 30, 2012) (codified at 29 C.F.R. pt. 1625).

Section 1625.7(e)(1) thus provides that to assert the RFOA defense successfully, an employer must demonstrate both that the employment practice at issue was "reasonably designed to further or achieve a legitimate business purpose" *and* was "administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer." The tort-based, avoidance-of-risk approach taken by the regulation is unhelpful in assessing, after-the-fact, whether an employment practice discovered to have adverse impact is reasonable, and therefore should be revised accordingly.

The ADEA Does Not Require Employers to Monitor Their Employment Processes for Adverse Impact on Older Workers, and Thus § 1625.7 Exceeds the Commission's Authority

Section 1625.7 applies facets of the "business necessity" defense utilized in disparate impact claims brought under Title VII to the RFOA defense under the ADEA, notwithstanding the fact that the Commission acknowledges in the Preamble that the ADEA contains no such requirements. Specifically, improperly borrowing from Title VII jurisprudence, the regulation imposes on employers an affirmative obligation, as part of the RFOA defense, to monitor their employment selection procedures for adverse impact against ADEA-protected individuals – a requirement that, with respect to age, has no basis in the law or relevant Supreme Court precedent.

Section 1625.7(e)(2) provides that in evaluating the reasonableness of a challenged employment practice, "[t]he extent to which the employer assessed the adverse impact of its employment practice on older workers" is a relevant consideration. Although the Preamble to the Final Rule explains that it was revised to focus on whether, not how, an employer assessed the potential impact of a procedure on older workers, which will vary depending on the particular facts, the Commission also made clear that if an employer conducts other types of adverse impact analyses, it will be required to do so with respect to age as well. For instance, the Preamble states that while a small employer that does not ordinarily conduct adverse impact analyses may be able to establish RFOA in other ways, "an employer that assesses the race- and sex- based impact of an employment practice would appear to be acting unreasonably if it does not similarly

assess the age-based impact." 77 Fed. Reg. 19,080, 19,089 (Mar. 30, 2012) (codified at 29 C.F.R. pt. 1625).

Not only is the notion of conducting detailed analyses to determine adverse impact on older workers outside the bounds of well-established law,[4] being required to do so as a matter of course would virtually be impossible, as age is a constantly changing characteristic – the quintessential "moving target." As the Supreme Court explained in *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308 (1996), the comparator for the purposes of assessing potential age discrimination need not be outside the protected class, *i.e.*, under 40. Accordingly, to fully monitor every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age.

Since a meaningful statistical comparison requires a sufficient sample size, this calculation could actually degenerate to a mere cohort analysis – in other words, a disparate treatment analysis. More fundamentally, however, unlike race/ethnicity and gender, employers do not collect and report to the government statistics on the *ages* of applicants and employees. As such, in some cases – those involving hiring practices, for instance – employers will have *no data* at their disposal in order to conduct mandated adverse impact analyses, since job applicants are not asked to disclose their age as part of the application process.

The Commission advises employers, as a "best practice," to explore the existence of other, equally effective selection procedures having less adverse impact where statistical disparities based on age are found. *See EEOC Fact Sheet on Employment Tests and Selection Procedures* (June 2008). While monitoring for adverse impact may very well constitute an employer "best practice," failure to do so *never* should give rise to a violation where the challenged practice is reasonable and based on non-age factors. There is simply no legal authority found in the text of the ADEA or in applicable Supreme Court precedent justifying use of such a criterion in determining whether the RFOA defense is met.

The Use of Subjective Decision-Making and Reliance on Age-Based Stereotypes Is Not an Appropriate Standard Consideration for Evaluating a RFOA Defense.

The RFOA defense is *only* available to employers in disparate impact cases in which it is alleged that a facially nondiscriminatory practice, procedure or criterion has an adverse impact on ADEA-protected persons. Section 1625.7(e)(2)(iii) sets forth as a condition relevant to whether a practice is based on a reasonable factor other than age

---

[4] The Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines), 29 C.F.R. pt. 1607, provide the framework for conducting statistical analyses to determine whether tests and other selection practices have an adverse impact on women or minorities and have been codified by the Commission in its Title VII procedural regulations, *see* 29 C.F.R. pt. 1607. Like Title VII, the use of any selection procedure that has adverse impact is considered discriminatory under the Uniform Guidelines, unless doing so is justified by business necessity. The Uniform Guidelines do not apply to adverse impact in the contexts of disability or age, however, and employers generally are not required under federal law to collect and report on workplace demographics based on those characteristics.

"[t]he extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes." The use of subjective decision-making, however, must be established by the plaintiffs as part of their prima facie case *before* the employer is called upon to justify its reliance on the alleged "practice." It has no place as a criterion in evaluating the availability of the RFOA defense. As the Supreme Court in *Smith* held, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities." 544 U.S. at 241 (internal quotations and citations omitted).

Furthermore, the use of *age-based* stereotypes is, by its terms, *not* age-neutral – and thus does not implicate ADEA disparate impact principles in any event. By requiring the employer as part of the RFOA showing to prove that a decision-maker did not use age-based stereotypes in making employment selections, the use of this consideration, in effect, impermissibly shifts the burden to the employer in what would amount essentially to a disparate *treatment* case. Accordingly, because § 1625.7(e)(2)(iii) improperly conflates the two distinct concepts of disparate treatment and disparate impact, it should be deleted as a consideration relevant to an RFOA determination.

ADAAA REGULATIONS, 29 C.F.R. Part 1630

All of EEAC's comments in this Section relate to the implementing regulations issued by the Commission in response to the passage of the Americans with Disabilities Act Amendments Act (ADAAA) of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (Sept. 25, 2008). Those regulations took effect on May 24, 2011. EEAC fully supports the ADA's original, and the ADAAA's continuing, aim of eliminating workplace discrimination against employees and applicants with disabilities. As was the case when the ADA first was passed in 1990, protecting the rights of individuals with disabilities is a public policy imperative.

While aspects of the ADAAA regulations reflect, in our view, a reasonable regulatory interpretation of the ADAAA, we believe others exceed the specific rulemaking mandate conferred upon the Commission by Congress and/or represent an interpretation of that law that is contrary to legislative intent. We also believe the Commission should add certain definitional provisions in order to achieve better clarity as to the applicable standards, and thereby reduce the need for unnecessary litigation regarding particular threshold issues.

EEOC's List of "Predictable Assessments" Is Arbitrary and Should Be Repealed

Purporting to construe the definition of "'substantially limits' . . . broadly in favor of expansive coverage," § 1630.2(j)(3)(iii) includes a list of impairments[5] that "will, at a minimum, substantially limit the major life activities indicated", specifically:

- **Deafness** substantially limits hearing;
- **Blindness** substantially limits seeing;
- **Intellectual disability** substantially limits brain function;
- **Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair** substantially limits musculoskeletal function;
- **Autism** substantially limits brain function;
- **Cancer** substantially limits normal cell growth;
- **Cerebral palsy** substantially limits brain function;
- **Diabetes** substantially limits endocrine function;
- **Epilepsy** substantially limits neurological function;
- **Human Immunodeficiency Virus (HIV) infection** substantially limits immune function;
- **Multiple sclerosis** substantially limits neurological function;
- **Multiple dystrophy** substantially limits neurological function;
- **Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder**, and **schizophrenia** substantially limit brain function.

EEAC continues to oppose the inclusion in the regulations of a list of impairments that "will, in virtually all cases" substantially limit the major life activities specifically indicated. Given the expansive language of the ADAAA providing that the definition of disability "be construed in favor of broad coverage" of individuals under the statute, *see* 42 U.S.C. § 12102(4), the inclusion in the regulations of a list of impairments that will substantially limit at least one major life activity is wholly unnecessary and both over- and under- inclusive. Such a result is not beneficial to either employers or employees.

[5] The impairments identified in § 1630.2(j)(3)(iii) that "will, at a minimum, substantially limit the major life activities indicated" are the exact same as those impairments that were contained in the NPRM as "impairments that will consistently meet the definition of disability." *See* 74 Fed. Reg. 48,431, 48,441 (proposed Sept. 23, 2009).

Moreover, while the Commission makes clear that the "predictable assessments" list is non-exhaustive, it is unclear how, and under what circumstances, other conditions would be deemed to qualify for inclusion on the list. Surely, there exist many other, possibly more severe conditions that could have been, but were not, included on the "predictable assessments" list. By the fact that such conditions are not on the list, does that suggest that a more extensive coverage analysis would be required for those conditions? Or would a plaintiff, a court or the EEOC itself be free to declare other conditions worthy of inclusion on the list as each additional case arises? Either approach would be unworkable as a practical matter, and would encourage unnecessary litigation as to whether or not a coverage analysis is appropriate at all.

Finally, and perhaps most importantly, the establishment of a list of impairments that "will" be found to substantially limit particular major life activities undermines the ADA's policy aim of treating persons with disabilities as individuals, not as members of the collective.

Therefore, EEAC strongly recommends that the Commission repeal in its entirety the list of impairments that will substantially limit particular major life activities set forth in § 1630.2(j)(3)(iii).

The Regulations Should Be Revised to Provide that the Determination of Whether an Impairment Is "Transitory and Minor" is a Threshold Coverage Issue, and Not an Affirmative Employer Defense

Pursuant to the ADAAA, "regarded as" discrimination coverage *does not apply* to impairments that are "transitory and minor", with "transitory" impairments defined as "an impairment with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(3)(B). The ADAAA itself is silent as to whether the employee or the employer carries the burden of proving or disproving this fact, although applicable legislative history referred to the "transitory and minor" provision as an "exception" to coverage. *See infra.*

In its ADAAA implementing regulations, however, the EEOC takes the position that the employer has the burden of proving that the impairment is both "transitory and minor" in order to avoid liability under a "regarded as" theory. *See* 29 C.F.R. § 1630.15(f). Specifically, the employer must show, based on objective evidence, that the impairment is or would be "transitory and minor." *See id.* The Preamble does not provide any explanation as to the Commission's rationale for transforming this statutory exception into an affirmative employer defense. The Appendix contains some discussion of the defense, but it recites legislative history in which Congress refers to "transitory and minor" as an *exception* to coverage, rather than an employer defense.

Specifically, the Appendix expressly references the following legislative history:

> As prescribed in the ADA Amendments Act*, the regulations provide an exception to coverage* under the "regarded as" prong where the impairment on which a prohibited action is based is both transitory (having an actual or expected duration of six months or less) and minor. The regulations make clear (at § 1630.2(l)(2) and § 1630.15(f)) that this exception is a defense to a claim of discrimination. "Providing this *exception* responds to concerns raised by employer organizations and is reasonable under the 'regarded as' prong of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in the first two prongs of the definition." 2008 Senate Statement of Managers at 10; *see also* 2008 House Judiciary Committee Report at 18 (explaining that "absent this *exception*, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu, and this *exception* responds to concerns raised by members of the business community regarding potential abuse of this provision and misapplication of resources on individuals with minor ailments that last only a short period of time).

76 Fed. Reg. 16,978, 17,015 (Mar. 25, 2011) (codified at 29 C.F.R. pt.1630) (emphasis added).

Based on the aforementioned legislative history, the EEAC requests that the Commission revise the regulations to provide that the determination of whether an impairment is "transitory and minor" is a threshold coverage issue, rather than an affirmative employer defense in "regarded as" cases.

The Commission Should Incorporate into Its Regulations Representational Examples of "Temporary, Non-Chronic Impairments of Short Duration with Little or No Residual Effects" that Ordinarily Will Not Be Considered Disabilities

In its ADAAA proposed rule, the Commission included a list of examples of "[t]emporary, non-chronic impairments of short duration with little or no residual effects" which usually will not be disabilities, including "the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely." 74 Fed. Reg. 48,431, 48,443 (proposed Sept. 23, 2009). This list of conditions that ordinarily will not be considered disabilities was not included in the Commission's final ADAAA regulations, however.

EEAC continues to believe that incorporation of such a list in the regulations would provide very helpful guidance to employers and employees alike regarding the category of impairments which usually are not covered disabilities under the ADAAA, and such regulatory amendment potentially would serve to limit unnecessary litigation regarding this threshold issue. Such a regulatory provision certainly would meet the EEOC's goal to promulgate regulations that "provide clear, strong, consistent,

enforceable standards" for interpreting the ADAAA. 29 C.F.R. § 1630.1(a). Accordingly, EEAC requests that the regulations be amended to include representational examples of "temporary, non-chronic impairments of short duration with little or no residual effects" which typically will not be disabilities under the ADAAA, similar to that which was included in the NPRM.

The Commission Should Amend Its Regulations to Include Definitional Guidance as to the Term "Active" in the Context of Chronic/Episodic Conditions and ADAAA Coverage

The regulations state that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 29 C.F.R. § 1630.2(j)(vii). EEAC recommends that the Commission explain what is meant by "active" in the context of chronic/episodic conditions and ADA coverage. In addition, further guidance is needed to distinguish between conditions that *are* episodic from those that *may be* episodic, as well as between those conditions that are very likely to flare up within a definite period versus those that may someday again render an individual substantially limiting.

EEAC recommends that the Commission consider adopting the following statement or similar language:

> Determining whether a diagnosis of an episodic condition renders a person substantially limited in a major life activity is a case-by-case assessment that requires an individualized inquiry of such factors as whether the person has exhibited any actual symptoms in the last 12 months or has been diagnosed by a physician as likely to suffer a recurrence of symptoms in the next 12 months.

GINA REGULATIONS, 29 C.F.R. Part 1635

The EEOC is authorized by Congress to enforce Title II of GINA, 42 U.S.C. §§ 2000ff *et seq.*, which makes it unlawful for an employer to, among other things, discriminate in the terms, conditions or privileges of employment based on an applicant's or employee's genetic information, or to "request, require, or purchase" an individual's genetic information, except as permitted under six exceptions. In interpreting the prohibition on requesting, requiring or purchasing genetic information, the Commission's implementing regulations provide:

> The prohibition on acquisition of genetic information, including family medical history, applies to medical examinations related to employment. A covered entity must tell health care providers not to collect genetic information, including family medical history, as part of a medical examination intended to determine the ability to perform a job, and must take additional reasonable measures within its control if it learns that genetic information is being requested or required.

29 C.F.R. § 1635.8(d). Section 1635.3(b) defines "family medical history" as "information about the manifestation of disease or disorder in family members of the individual." "Family medical history" is, by definition, an individual's genetic information.

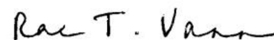
In the Preamble to its GINA proposed rule, the Commission explained that the legislative history of Title II suggests that "the term 'family medical history' [should] be understood as it is used by medical professionals when treating or examining patients." 74 Fed. Reg. 9056, 9059 (Mar. 2, 2009). It acknowledged that physicians routinely utilize the American Medical Association-approved "adult family history form" in examining and treating patients, *id.*, and stated affirmatively that "GINA is not intended to limit the collection of family medical history by health care professionals for diagnostic or treatment purposes." *Id.* at n.5.

EEAC requests that the Commission expressly provide that a medical professional who from time to time conducts employer-initiated workplace medical examinations does not fall within the definition of "employer." Such provision is in accordance with the plain text of the statute.[6]

Conclusion

EEAC appreciates the opportunity to comment on the Commission's significant existing regulations, and respectfully requests that the EEOC modify its current regulations as discussed above.

Respectfully submitted,



Rae T. Vann, General Counsel
Equal Employment Advisory Council

[6] GINA incorporates by reference Title VII's definition of "employer", which defines the term as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person…." 42 U.S.C. § 2000e(b).

April 8, 2013

Submitted via electronic submission and FedEx

Ms. Pamela Coukos
Senior Program Advisor
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW, Room C-3325
Washington, DC 20210

Re: Request for Technical Compliance Assistance on the Treatment of Race/Ethnicity in Compensation Analyses

Dear Ms. Coukos:

The Center for Corporate Equality ("CCE") and the Equal Employment Advisory Council ("EEAC") respectfully submit this joint letter seeking technical assistance on certain questions raised by OFCCP's February 28, 2013 Directive 307, *Procedures for Reviewing Contractor Compensation Systems and Practices*, and the agency's compliance assistance Webinars held on March 11 and March 22, 2013.

Based on the information presented by OFCCP during the Webinars, as well as what we have noticed in some recent compliance reviews, we have a few technical policy questions regarding how OFCCP is conducting its regression analyses when evaluating federal contractor compensation data. As you know, OFCCP audits only a small fraction of all federal contractor establishments each year, and answers to the technical policy questions we pose herein will help the broader federal contracting community ensure compliance with their OFCCP-enforced requirements pertaining to compensation discrimination. And while we have questions about several issues raised by OFCCP's Directive 307 and its two recent Webinars, we have limited our request for compliance assistance to a narrow, but critically important issue: the coding and handling of race/ethnicity data in regression analyses.

On both the March 11 and March 22 Webinars, you indicated that OFCCP is looking at differences in compensation by individual racial and ethnic categories, rather than OFCCP's more "traditional" white-to-total-minority comparison. This statement is consistent with the agency's statement in the Note to Reviewer[1] submitted to OMB as part of the request to revise the current Scheduling Letter. Specifically, OFCCP wrote:

[1] Note to Reviewer sent to OMB titled "Final Supply and Service Supporting Statement 9-12-2011 Final". Page 25 specifically addresses the issue of the appropriateness of individual racial and ethnic comparisons

> *Presenting data for "minorities" in the aggregate is useful for the utilization analyses and goal setting components of the contractor's affirmative action programs. However, to determine whether the contractor has discriminatory employment practices requires analyzing data by sex, and by separate racial or ethnic groups.*

On the basis of OFCCP's statements and the written information in the Note to Reviewer, are contractors to understand that OFCCP has moved away from analyses comparing all minorities in the aggregate to all non-minorities? In other words, should contractors conduct compensation analyses that compare compensation between and among specific race/ethnicity subgroups?

Our main area of interest concerns the racial/ethnic group that will be the comparator in OFCCP's compensation analyses. We have three specific questions as it relates to this comparison:

1. Is the comparator always non-Hispanic white (i.e., non-minority) employees? In other words, should a contractor's compensation analyses compare non-Hispanic White employees to each of the other racial/ethnic subgroups? Alternatively, perhaps the comparator should always be the *highest paid* group as is the case under a typical adverse impact analysis under the Uniform Guidelines on Employee Selection Procedures (UGESP), where the *highest selected* group is compared to each subgroup. If so, is the "highest selected group" (or, in the case of compensation, the highest compensated group) defined by a mean, median, or some other measure of central tendency? Is this standard determined pre-regression or post-regression? For example, non-Hispanic whites may have the highest average salary, but once a regression analysis is conducted and variables are controlled for, Hispanics may become the highest paid group.

2. Will the comparison group change across each "pay analysis group," or will the comparison group remain constant in each pay analysis group within each AAP (*e.g.*, comparator held constant as non-Hispanic white employees).

3. What is the minimum number of employees that must be in the comparator group? For example, Question 16 of the 1979 *Question and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures* asks "Should adverse impact determinations be made for all groups regardless of their size"? The answer to that question is as follows: "No, Section 15A(2) calls for annual adverse impact determinations to be made for each group which constitutes either 2% or more of the total labor force in the relevant labor area, or 2% or more of the applicable workforce." Does OFCCP have a similar metric for compensation analyses? Take for example the situations below. In Situation A, would OFCCP use Hispanics as the comparator and vector code white, black, and Asian employees such that each group is analyzed relative to

Hispanic employees? In Situation B, the highest paid group has only three employees representing less than 1% of the group. Would OFCCP maintain Hispanics as the comparator or would whites now become the comparator? If whites are now the comparator, are the Hispanics removed from the analysis and blacks and Asians vector coded such that each is analyzed relative to white employees?

Situation A

Group	N	Average Salary
Hispanic	10	$45,000
White	30	$43,000
Black	5	$42,000
Asian	5	$41,000

Situation B

Group	N	Average Salary
Hispanic	3	$45,000
White	300	$43,000
Black	50	$42,000
Asian	47	$41,000

We also wonder how the two situations depicted below would be handled. In these cases there are only a small number of employees in most of the subgroups. Would OFCCP conduct a white-minority comparison regardless of which group is the highest paid? Or would OFCCP use a small-group test (*e.g.*, Fisher's exact test) to compare the highest paid group to the other subgroups?

Situation C

Group	N	Average Salary
White	30	$45,000
Hispanic	3	$43,000
Black	3	$42,000
Asian	4	$41,000

Situation D

Group	N	Average Salary
Hispanic	2	$45,000
White	30	$43,000
Black	3	$42,000
Asian	3	$41,000

Although we understand that OFCCP will tailor its future analyses on a case-by-case basis, there are certain aspects of any statistically and legally reliable analysis for which there

must be consistency.[2] We would appreciate answers to the questions we have presented in this letter as soon as possible, and look forward to your response.

Sincerely,

David Cohen
Sr. Vice President
The Center for Corporate Equality

Joseph S. Lakis, Jr.
President
Equal Employment Advisory Council

cc: Hon. Patricia Shiu

[2] For example, imagine the uncertainty and inconsistency that would occur in adverse impact analyses if UGESP had not standardized the highest-selected group as the comparator and provided the 2% rule.