STATEMENT OF DELOITTE LLP

ON: H.R. 4959, THE "EEOC TRANSPARENCY AND ACCOUNTABILITY ACT"; H.R. 5422, THE "LITIGATION OVERSIGHT ACT OF 2014"; AND H.R. 5423, THE "CERTAINTY IN ENFORCEMENT ACT OF 2014"

TO: THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE, SUBCOMMITTEE ON WORKFORCE PROTECTIONS

BY: WILLIAM LLOYD, GENERAL COUNSEL

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Chairman Walberg, Ranking Member Courtney, Members of the Committee, thank you for inviting me to testify today. I am Bill Lloyd, the General Counsel for Deloitte LLP. We are one of the world's leading professional services firms. Among other things, we provide audit, tax, and advisory services to individuals and businesses of all sizes and to federal, state, and local governments and community organizations. We have about 65,000 people who provide these services in the United States, of whom about 2,870 (about 4%) are owners of the firm – Partners. I am grateful for the opportunity to testify because today's hearing is focused on three bills that would improve processes within, and the accountability of, the Equal Employment Opportunity Commission (EEOC).

I want to make it clear that Deloitte strongly supports the goals of eliminating workplace discrimination and fostering true equality of opportunity. We also strongly support the EEOC's mission, and we appreciate the dedication of its staff to that mission. Moreover, we are proud – but not satisfied – that Deloitte has regularly been recognized as a leader in inclusion efforts and in developing highly successful women and minorities who themselves are leaders in the profession. For example, during my nine-year tenure at Deloitte, I have had the pleasure of serving with a woman as our chairman and with a Hispanic CEO. I now serve with a chairman who was born in India. We have four major businesses. One is led by a woman and another by an African-American man. Most of these people are homegrown – they developed their professional and leadership skills at Deloitte.

Although we are strong supporters of the EEOC's mission, our recent experience with the EEOC suggests that its processes and transparency could use improvement. We need to insure that the EEOC enforces its important mandate in ways that are consistent with what Congress contemplated in the respective statutes that the EEOC is tasked to enforce. And we need to insure that important decisions about EEOC enforcement policy and allocation of scarce resources are made by the Commissioners who are appointed by the President and confirmed by the Senate.

The EEOC staff has recently challenged the fundamental structure, indeed the very existence, of Deloitte's business – our decision to organize as a limited liability partnership. For reasons related to state professional regulations, we must conduct our business as a partnership. Deloitte's Partners, each a sophisticated professional, voluntarily entered into a partnership agreeing to retire at age 62. Directors and employees are not subject to this retirement provision. Indeed, I am not a Partner, as I chose to become a Director when I joined Deloitte, which allowed me to work after age 62. The EEOC's allegations are relatively simple – that Deloitte is not a true partnership, and therefore, its mandatory retirement age violates the Age Discrimination in Employment Act. However, the impact of the EEOC's legal theory is decidedly more complicated, and ultimately raises significant economic and policy questions for Deloitte and all limited liability partnerships across the country, which will negatively impact many industries.

Congress did not grant jurisdiction to the EEOC to act on behalf of owners of businesses, yet that is exactly what the EEOC is doing. The EEOC seeks to extend statutory protections to individuals who are owners of this type of organization, all under the theory that at some undetermined point, partnerships grow so large that they cease to be "true" partnerships.

Equally concerning is the Commission's extensive delegation of authority to the General Counsel to initiate litigation. I was astounded to learn that the Commissioners do not review the overwhelming majority of cases filed by the EEOC. After all, Title VII permits only the five-member Commission to bring a civil action.[1] While the Commissioners ostensibly retain the authority to initiate litigation in cases involving a major expenditure of resources, cases presenting a developing area of the law, or cases presenting a public controversy, in practice, the General Counsel determines whether any particular case meets one of these criteria. In effect, the General Counsel decides whether any litigation should be subject to oversight by the Commission on whose behalf he litigates. The Commissioners are thereby excluded from the very function they were appointed to undertake. That structure should concern all legislators and taxpayers, and is a concern that could be partially alleviated by enacting the Litigation Oversight Act of 2014.

As the EEOC has limited resources, and the decision both to investigate and then to litigate allegations of systemic discrimination requires significant resources that cannot be used elsewhere, it would stand to reason that the Commissioners, upon whose behalf the General Counsel files suit, should review every case involving systemic litigation before it is filed, if not every case filed by the General Counsel. The people appointed by the President to make policy should make these important policy decisions.

As I mentioned, many of Deloitte's businesses are highly regulated under state laws that require Deloitte to be structured as a partnership. Therefore, the EEOC's recent focus on professional service organizations structured as limited liability partnerships and its emphasis on systemic litigation are very troubling for organizations such as ours. We understand that the EEOC attempted to initiate identical litigation against a peer partnership less than eighteen months ago, but after a public controversy, the Commission considered and rejected it.

For Deloitte, the EEOC began a directed investigation in 2010, meaning that no individual filed a charge with the EEOC alleging discrimination. To date, we are not aware of any retired Partner who has complained to the EEOC about age discrimination.

We recently received a reasonable cause determination from the EEOC finding age discrimination based upon Deloitte's mandatory retirement age provision for Partners. This determination was accompanied by a demand that Deloitte eliminate the retirement provision, offer reinstatement to retired Partners to return to Deloitte, and create a fund of an undisclosed amount to compensate those retirees. This determination provides no basis whatsoever for the finding. We are concerned that if conciliation fails, the General Counsel will file a lawsuit under the delegation of authority without consideration and a vote of the Commissioners. This is not only a matter of great public controversy, but,

[1] 42 U.S.C. §§ 2000e-4(a), 2000e-5(f)(1).

given the powers and rights of Deloitte's Partners, it is also a novel interpretation of law that the Commission itself clearly should consider and approve before any litigation is commenced. H.R. 4959, the EEOC Transparency and Accountability Act, seeks to address some of these issues by providing those who are accused of having engaged in an unlawful employment practice with the legal and factual bases for the determination.

Deloitte is a true partnership. Partners are admitted based upon a vote of the Partners as a whole. Our Partners share in the profits and losses of the firm. Partners regularly vote on matters presented before the firm, and they elect a new slate of directors each year. Each Partner has the ability to bind the partnership. As owners, Partners enjoy extraordinary security. Unlike employees at Deloitte, they do not serve at will, and they cannot be "fired." Partners cannot be removed from the Partnership except by a vote of the whole Partnership, or except in very narrowly-defined circumstances involving immediate risk to the firm.

There are legitimate reasons why the Partnership needs a mandatory retirement age for its Partners. In a structure in which involuntary attrition is rare, agreeing to a date certain for retirement maintains the partnership at an optimal size, and provides certainty in succession planning, particularly in the management of client relationships. In a highly regulated industry, it insures a pool of Partners with appropriate training and experience to meet regulatory requirements, such as lead audit Partner rotations after five years as mandated by Sarbanes-Oxley, thus providing for future continuity and profitability of the organization. And, as noted, state regulators require registered CPA firms to be structured as partnerships.

In fact, many Partners retire before reaching age 62. The average age for retiring Partners is 58. These Partners are highly compensated before and after retirement. In the fiscal year that just ended, approximately 34 individuals retired under the mandatory-retirement provision. Yet, the EEOC seeks to protect this class of "victims" in lieu of seeking out true victims of discrimination. For every class case of questionable validity that the EEOC brings, it requires that the agency forego many worthy cases of discrimination on behalf of individuals who have fewer resources to pursue grievances and are genuinely in need of regulatory protection.

Pursuing this litigation strategy is a questionable use of limited agency resources, and the specific subject matter does not fit easily within the agency's priorities. There are no "victims" of age discrimination under Deloitte's partnership agreement. Each individual who becomes a Partner voluntarily chooses to do so, and formally agrees to all of the rights and obligations of partnership, including the retirement provision.

This is the wrong case at the wrong time for the EEOC to pursue, in light of the lack of true victims, agency budgetary constraints, the disruption of settled legal relationships in an important regulated industry, and the necessary tradeoffs that would confront the EEOC by litigating this matter. Ironically, Deloitte's retiring Partners are overwhelmingly white males, while the newly admitted Partners over the past decade have been significantly more diverse. Eliminating the retirement age would ultimately limit the partnerships available to an increasingly female and minority talent pool.

Many cases are filed by the EEOC with clear jurisdiction and a clear strategic purpose. However, recent decisions indicate that the agency may have wandered from its statutory roots in ways that can actually detract from its effectiveness in its core missions. The bills being discussed today can help insure the effectiveness of the EEOC's conciliation procedures on systemic cases, improve its processes and oversight in deciding to initiate systemic litigation, and enhance its accountability to the public. All of these issues are important, not just to Deloitte, but also to an entire industry and the broader American economy. At a minimum, all systemic litigation should be submitted to Commissioners for approval. Both the EEOC Transparency and Accountability Act and the Litigation Oversight Act of 2014 make common sense changes to the Commission that would benefit employees and employers alike.

I thank the Committee for the opportunity to share our perspective and will be happy to answer any questions.