Statement
of the
U.S. Chamber
Of Commerce

ON: **THE REGULATORY AND ENFORCEMENT PRIORITIES OF THE EEOC: EXAMINING THE CONCERNS OF STAKEHOLDERS**

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

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DATE: **JUNE 10, 2014**

The Chamber's mission is to advance human progress through an economic,

Political and social system based on individual freedom,

Incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business — manufacturing, retailing, services, construction, wholesaling, and finance — is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

TESTIMONY OF CAMILLE A. OLSON

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

THE REGULATORY AND ENFORCEMENT PRIORITIES OF THE EEOC: EXAMINING THE CONCERNS OF STAKEHOLDERS

JUNE 10, 2014

Good morning Mr. Chairman and members of the Subcommittee. On behalf of the United States Chamber of Commerce, I am pleased to provide testimony of stakeholder concerns regarding recent Equal Employment Opportunity Commission ("EEOC") actions relating to its statutory mandate to: (1) properly investigate charges and reach a determination as promptly as possible, (2) endeavor to eliminate any alleged unlawful practice through informal methods including conciliation and persuasion, and (3) ensure compliance with federal equal employment opportunity laws through meritorious direct party litigation and amicus participation in federal courts as well as the promulgation of enforcement guidance containing legitimate interpretations of federal employment discrimination laws.[1]

Congress empowered the EEOC "to prevent unlawful employment practices by employers."[2] The EEOC administers Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), the Equal Pay Act ("EPA"), the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA"), among other federal employment discrimination laws. The Chamber is a long-standing supporter of reasonable and necessary

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[1] I am Chairwoman of the Chamber's equal employment opportunity policy subcommittee. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, industry sector, and geographical region. I am also a partner with the law firm of Seyfarth Shaw LLP, where I chair the Labor and Employment Department's Complex Discrimination Litigation Practice Group. In addition to my litigation practice, which has specialized in representing local and national companies in federal court litigation involving claims of employment discrimination, I also represent employers in designing, reviewing, and evaluating their employment practices to ensure compliance with federal and local equal employment opportunity laws. I have represented business and human resource organizations as amicus curiae in landmark employment cases, including *Wal-Mart v. Dukes, et al.*, 131 S. Ct. 2541 (2011), and also teach federal equal employment opportunity law topics at Loyola University Chicago School of Law.

I would like to acknowledge Seyfarth Shaw LLP attorneys Lawrence Z. Lorber, Paul H. Kehoe, Richard B. Lapp, and Chris DeGroff, as well as Jae S. Um for their invaluable assistance in the preparation of this testimony.

[2] 42 U.S.C. § 2000e-5(a).

steps designed to achieve the goal of equal employment opportunity for all.[3] However, the Chamber has serious concerns as to how these laws are currently being administered and enforced by the EEOC. Loosely-defined and overly broad grants of authority to agency officers have created an administrative climate at the EEOC which prioritizes enforcement, litigation and punishment over education, cooperation and conciliation.

Yet, a properly functioning EEOC is critical for employees and employers alike. An EEOC that timely investigates charges and objectively applies the law to the facts of each charge provides employees with critical information about their rights, and employers with critical guidance as to their obligations under applicable law. Congressionally-mandated bona fide EEOC conciliation and other dispute resolution processes can quickly eradicate and remedy an unlawful practice, while also instructing employers as to their legal obligations regarding individual employment decisions and compliant employment policies. The EEOC's vigorous pursuit of cases where unlawful discrimination has occurred as the end stage of enforcement protects affected workers and ensures employer compliance with federal laws.

As described by the Supreme Court, "[t]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, non-coercive fashion. Unlike the typical litigant . . . the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties."[4]

Attached to my testimony is the Chamber's recently-published Paper entitled: "A Review of Enforcement and Litigation Strategy During the Obama Administration - A Misuse of Authority" (June 2014) ("Chamber's EEOC Enforcement Paper"). The Chamber's EEOC Enforcement Paper details unreasonable enforcement efforts by the EEOC during the Obama Administration as documented in federal court decisions and as conveyed to the Chamber by its members. The analysis reveals the EEOC's litigation priorities have included: pursuing investigations and settlements despite clear evidence that the alleged adverse action was not discriminatory and bringing and continuing litigation described as "frivolous, unreasonable and without foundation" by federal district court judges.[5] In addition, the Chamber's analysis of 2013 court cases reveals the EEOC's priority is often to advance questionable legal theories in

[3] For example, the Chamber worked closely with the disability community to reach a compromise that resulted in the bi-partisan passage of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA").

[4] *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355, 368 (1977).

[5] Since January 2013 the EEOC has been increasingly criticized by numerous courts throughout the country that have sanctioned the EEOC for its overzealous litigation tactics, awarding over six million dollars in attorneys' fees and costs to employers as a result of the EEOC's inappropriate litigation.

both its enforcement guidance and *amicus* litigation program.[6] For these reasons, the EEOC and its priorities deserve greater attention and oversight. My testimony will include highlights of the Chamber's EEOC Enforcement Paper in two parts: The EEOC's Investigation and Conciliation Record and the EEOC's Private Party and *Amicus* Litigation Record.[7]

The EEOC's Investigation and Conciliation Record

EEOC Investigations

Title VII requires the EEOC "make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." Yet, Chamber members, as well as plaintiff and management attorneys and courts have recently criticized the EEOC for investigations that are too long, inconsistent and of questionable quality.[8]

Chamber members have voiced concern over numerous examples of EEOC enforcement tactics during the EEOC's investigation and attempts to resolve pending charges of discrimination.[9] Those abuses can be grouped in the following three categories: abuses relating to an investigator's conduct during an investigation; abuses relating to an investigator's conduct during a fact-finding conference; and abuses relating to an investigator's unwillingness to fairly mediate or negotiate a resolution of a charge.

Examples of EEOC enforcement abuses relating to an investigator's conduct during an investigation include: pursuing investigations despite clear evidence that an employee's termination was not discriminatory (including challenging a termination based on video capturing the charging party displaying pornography around the workplace); several examples of instances where employers have been required to submit detailed position statements,

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[6] The EEOC's *amicus curiae* program ("*amicus*") is one of its most important legal enforcement methods. In 2013, the EEOC's amicus program was a complete failure – not only were the EEOC's *amicus* positions rejected, the United States Supreme Court and the Courts of Appeals also rejected relevant provisions in the EEOC's underlying Enforcement Guidance documents, compliance manual positions, and policy statements under Title VII and the ADA. The courts' rejection of the EEOC's underlying regulatory guidance leaves employers searching as to where to find accurate, reliable guidance on their legal obligations under federal non-discrimination laws. *See* 12-14 *infra* and Chamber's EEOC Enforcement Paper at 18-25.

[7] I request that the Subcommittee accept my written testimony as well as the Chamber's EEOC Enforcement Paper as part of the written record of today's Hearing.

[8] *See* Meeting Transcript of EEOC's July 18, 2012 - Public Input into the Development of EEOC's Strategic Enforcement Plan Meeting at http://www.eeoc.gov/eeoc/meetings/7-18-12/transcript.cfm and Meeting Transcript of EEOC's March 20, 2013 - Development of a Quality Control Plan for Private Sector Investigations and Conciliations Meeting at http://www.eeoc.gov/eeoc/meetings/3-20-13/transcript.cfm.

[9] *See* Chamber's EEOC Enforcement Paper at 2-4.

information and documents relating to employees' claims that they had been terminated unlawfully when they were either still employed or had resigned voluntarily (resulting in the expenditure of thousands of dollars in legal fees); requiring the production of workplace policies completely irrelevant to the underlying charge; serving subpoenas for information or documents that were not previously requested by the investigator; communicating directly with employer agents though notified that the employer was represented by counsel; refusing to grant extensions of time to produce information or documents requested because, as a blanket rule, "extensions are not granted"; refusing to provide charging parties or employers with information regarding the case status while it is open; and refusing to close cases that are several years old, preferring instead to continually send employers additional requests for information.

Some employers have gone on the offensive against inappropriate EEOC enforcement tactics, including Case New Holland ("CNH"). In *Case New Holland, Inc. v. EEOC,*[10] CNH filed a lawsuit against the EEOC claiming it violated the Administrative Procedure Act and the U.S. Constitution during its investigation of an alleged age discrimination complaint. Specifically, CNH challenged the EEOC's unannounced surprise delivery of 1300 spam-like emails to CNH managers and employees to "troll" for potential class members at the employees' work email addresses, demanding that they cease their work to communicate with the EEOC on an attached questionnaire.[11]

The Code of Federal Regulations sets forth express guidelines for the EEOC's investigation of charges of discrimination. It states:

> The agency must develop an ***impartial and appropriate factual record*** upon which to make findings on the claims raised by the complaint. An appropriate factual record is defined in the regulations as one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Investigations are conducted by the respondent agency.[12]

Another EEOC practice during the investigations phase that is troubling both in theory and in practice is the EEOC legal staff's involvement in agency investigations from the start. In many instances, a team of one or more EEOC investigators and an EEOC attorney are assigned to a charge. The attorneys are often-times closely involved with all phases of the investigation, including charge intake and on-site interviews at employer locations. Yet, these may also be the same lawyers who will litigate related lawsuits against these employers. This practice of tag-teaming between legal and investigatory staff compromises the EEOC's requirement to implement "impartial" investigations. It is inappropriate for an investigation to be, in actuality, a pre-litigation vehicle to discovery, the scope of which would not ordinarily be allowed by any federal action governed by Fed. R. Civ. P. 26 and 37.

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[10] No. 13-cv-01176 (D.D.C. filed Aug. 1, 2013).

[11] Chamber's EEOC Enforcement Paper at 10-11.

[12] 29 C.F.R. § 1614.108(b) (emphasis added).

Various issues have also arisen with respect to EEOC enforcement abuses relating to an investigator's conduct during a fact-finding conference, including: requiring mandatory conferences; holding the conference prior to the start of the investigation and without first receiving an employer's position statement or statement of facts; conducting the conferences in a confrontational manner (aggressively questioning employer representatives, but not charging party); and refusing to allow an employer's representative to speak during the conference.

Additional EEOC enforcement abuses during settlement conversations include: urging an employer in writing to accept a mid-five figure settlement with respect to a charge based on a variety of alleged bad facts the EEOC claimed showed discrimination (though the EEOC had not at that time issued a determination letter), and, when the employer rejected the offer, days later dismissing the charge as without reasonable cause to believe discrimination existed; refusing to engage in a mediation with the employer, claiming the employer did not negotiate in good faith, notwithstanding the same investigator had a few months earlier mediated successfully with the same employer; demanding short turnarounds on any proposed conciliation counteroffers, even though the EEOC's response time for conciliation communications has taken several months; and refusals to provide employers in conciliation and settlement negotiations with information to support the underlying findings or requested relief or appropriate ways to revise policies or practices to comply with non-discrimination laws.

Consistent with the experience of Chamber members, at various Commission meetings aimed at developing the Commission's Strategic Enforcement Plan and Quality Control Plan, Commissioners were confronted with rare agreement between the plaintiff and management bars that the EEOC's investigations are too long, inconsistent, and of questionable quality.[13] The meeting attendees stressed that the EEOC should focus its resources on its priorities and introduced the concept of a "quality, limited investigation" for remaining charges. Unfortunately, the EEOC's recently-released draft Quality Control Plan ("QCP") that is intended to set quality standards for investigations and conciliations does not offer timeliness guidelines for quality investigations nor a definition of a "quality, limited investigation."[14]

Recently, and with more frequency, the sufficiency or the appropriateness of the EEOC's pre-suit obligations have been successfully challenged by employers in courts. "Before the EEOC is able to file a lawsuit in its name, it must establish that it has met four conditions precedent, namely: the existence of a timely charge of discrimination, the fact that EEOC conducted an investigation, issued a reasonable cause determination, and attempted conciliation prior to filing suit."[15] The most recent example of EEOC abuse in the investigation context

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[13] *See* Meeting Transcript of EEOC's July 18, 2012 - Public Input into the Development of EEOC's Strategic Enforcement Plan Meeting at http://www.eeoc.gov/eeoc/meetings/7-18-12/transcript.cfm and Meeting Transcript of EEOC's March 20, 2013 - Development of a Quality Control Plan for Private Sector Investigations and Conciliations Meeting at http://www.eeoc.gov/eeoc/meetings/3-20-13/transcript.cfm.

[14] Instead, the QCP adopts an "I know it when I see it" standard that offers no guidance to the field other than to correctly fill out a charge form and apply the law to the facts.

[15] *Id.* at 359-60; 42 U.S.C. §2000e-5(b).

occurred in *EEOC v. Sterling Jewelers, Inc*., a nationwide class action alleging discriminatory pay practices against female employees.[16] While 19 female employees from various states filed charges with the EEOC claiming pay-related sex discrimination, the EEOC filed suit on behalf of a nationwide class. However, rather than investigating the claims on a class-wide basis, the EEOC instead found reasonable cause that discrimination occurred based on reports conducted by plaintiffs' counsel and "experts." The court granted summary judgment in favor of Sterling because the EEOC failed to demonstrate that it had conducted *any* investigation into claims of company-wide pay and promotion discrimination on a nationwide basis prior to filing a lawsuit.[17]

Notwithstanding the above failures in the EEOC's investigative processes, the EEOC is unwilling to provide guidance to ensure investigations are run with the utmost professionalism, quality, and consistency throughout the country. The Chamber urges Congress to install much needed common sense safeguards within the EEOC if the EEOC continues to ignore these issues.

EEOC Conciliations

It is not surprising that in the last five years, we have seen the EEOC primarily focus on large-scale, high-impact and high-profile investigations and cases. The EEOC reported that, "[w]hile . . . [the EEOC's past] focus has primarily been on individual cases of discrimination, the agency has stated its bipartisan desire to shift emphasis to combating systemic discrimination."[18]

However, litigation is clearly established as a means of last resort. Before filing a suit, Title VII requires that the EEOC "endeavor to eliminate any… unlawful employment practice by informal methods of conference, conciliation, and persuasion."[19] Needless, expensive, protracted litigation should be avoided if compliance can be obtained through informal means.

Despite this statutory language, the EEOC now contends federal courts cannot review whether it complied with a statutory obligation; rather, they must accept the EEOC's contention that it has done so. Courts, however, are empowered to enforce the law, and to ensure that agencies do not exceed their statutory boundaries. Making compliance with a statute unreviewable is to make a violation of that statute irremediable. No legitimate reason exists to exempt the EEOC's statutory obligation to conciliate from judicial review, while other statutory

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[16] *EEOC v. Sterling Jewelers, Inc.*, No. 08-706, 2014 WL 916450, at *1 (W.D.N.Y. Mar. 10, 2014).

[17] *Id.*

[18] *U.S. Equal Employment Opportunity Commission: FY 2011 Congressional Budget Justification, Submitted to the Congress of the United States February 2010*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/plan/upload/Final-FY-2011-Congressional-Budget-Justification.pdf (last visited July 13, 2012).

[19] 42 U.S.C. § 2000e-5(b).

requirements – charge requirements, time limits and notice rules – are routinely subject to review, including by the Supreme Court.

In fact, when Congress amended Title VII in 1972 granting litigation authority to the EEOC, it considered exempting the EEOC's conciliation efforts from judicial review. For example, an early version of the bill expressly stated that the EEOC may proceed with a suit if it cannot secure "a conciliation agreement acceptable to the Commission, *which determination shall not be subject to review*."[20] (emphasis added.) However, as ultimately passed, the 1972 Amendments did not exempt conciliation from judicial review and Title VII does not contain that italicized language above, showing that Congress intended that there be appropriate judicial oversight of EEOC conciliation activities.[21]

For the last forty years, courts have routinely reviewed whether the EEOC has sufficiently complied with conciliation obligations. Recently, in *EEOC v. CRST Van Expedited, Inc.*,[22] the Eighth Circuit Court of Appeals largely affirmed a district court's dismissal of an EEOC class action complaint which alleged sexual harassment of behalf of 154 women where the EEOC failed to identify the alleged victims during conciliation. The Eighth Circuit found that the EEOC stonewalled the company by making no meaningful attempt to conciliate and described the EEOC's tactic of seeking redress for victims identified after the beginning of litigation as follows:

> There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.[23]

As a result, the district court sanctioned the EEOC and awarded $4.7 million dollars to CRST for attorneys' fees and expenses.[24] In addition to taxpayers being assessed $4.7 million dollars for a federal agency failing to comply with the law that it enforces, 153 alleged victims' claims were dismissed without a hearing on the merits – a stark example of the harm caused by the EEOC's improper litigation tactics.

A recent Seventh Circuit Court of Appeals case, *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 184 (7th Cir. 2013) created a split among the Circuit Courts of Appeals regarding the issue of whether the EEOC's conciliation obligations are subject to judicial review, as courts in the

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[20] S. 2515, 92d Cong. § 4(f) (1971).

[21] 42 U.S.C. § 2000e-5(f)(1).

[22] 679 F.3d 657, 676-77 (8th Cir. 2012).

[23] *Id.* at 676.

[24] *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478, at *21 (N.D. Iowa Aug. 1, 2013).

Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits[25] had all determined that the EEOC's conciliation obligations were subject to review under varying standards.

The House of Representatives recognized these concerns with the EEOC's pursuit of litigation absent good faith conciliation efforts on May 30, 2014, when it voted on a bipartisan basis to approve the fiscal year 2015 Commerce, Justice, Science Appropriations bill.[26] The report accompanying the bill provided as follows:

> The Committee is concerned with the EEOC's pursuit of litigation absent good faith conciliation efforts. The Committee directs the EEOC to engage in such efforts before undertaking litigation and to report, no later than 90 days after enactment of this Act, on how it ensures that conciliation efforts are pursued in good faith.[27]

The EEOC should not be permitted to ignore Title VII's plain language, nor should courts abdicate their responsibilities in determining whether an executive branch agency complied with its statutory requirements. Yet, that is what the EEOC argues in courts throughout the country and in its brief filed in response to Mach Mining's petition for writ of certiorari currently pending before the United States Supreme Court.[28] Courts have an important role in ensuring that any agency, including the EEOC, does not manipulate, abuse, or evade its statutory duty.

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[25] The Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981). The Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co*., 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). As opposed to the EEOC's positions in these cases promoting a particular judicial standard of review of its conciliation efforts, today the EEOC asserts its efforts are not subject to judicial review.

[26] H. Rep. No. 113-448, at 83-84 (2014).

[27] *Id.*

[28] On December 20, 2013, the Seventh Circuit Court of Appeals broke from over 40 years of jurisprudence by holding that the EEOC's pre-conciliation efforts were not subject to judicial review at all in *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 184 (7th Cir. 2013). *See* Brief for the Respondent at 7-13, *Mach Mining, LLC v. EEOC*, (No. 13-1019) (May 27, 2014).

The EEOC's Private Party and *Amicus* Litigation Record

Recently, the EEOC has been sanctioned by multiple courts in connection with its investigatory and litigation procedures in various EEOC-initiated lawsuits. In the last two years, the EEOC has been ordered to pay employers over $5.6 million dollars as a result of its improper litigation and conciliation tactics. Five recent cases are of immediate note in which courts sanctioned the EEOC for its: failure to follow appropriate procedures prior to instituting litigation, failure to appropriately litigate the case, and failure to reasonably access the appropriateness of continuing its litigation once it became clear in discovery that its complaint's theory had no basis in fact.[29]

The $5.6 million sanctions against the EEOC does not take into account the value of the Commission's resources (in attorney and other staff time, hard litigation and expert witness and other costs and the opportunity costs of pursuing frivolous cases). In addition, there are no available estimates on the resources expended by the EEOC in connection with a number of other high profile losses suffered by the EEOC on its most highly publicized cases during the last year, including most recently, the dismissal of EEOC's nationwide sex discrimination litigation against Sterling Jewelers for its failure to investigate the alleged systemic allegations in the case prior to initiating litigation (*EEOC v. Sterling Jewelers, Inc.* W.D.N.Y. No. 08-706 3/10/2014).

[29] In *EEOC v. CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013), the court ordered the EEOC to pay $4.7 million in attorneys' fees, expenses and costs to the employer it sued based on its failure to conciliate, prior to instituting litigation. In *EEOC v. Bloomberg LP*, 2013 WL 4799150 (S.D.N.Y., Sept. 9, 2013), the court invited the employer to file a motion for attorneys' fees based on the EEOC's inappropriate conciliation and litigation conduct. In *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 2014 WL 37860 (M.D.N.C., Jan. 6, 2014), a magistrate judge imposed sanctions of approximately $23,000 against the EEOC for spoliation of evidence where the claimant destroyed documents during litigation relevant to her duty to mitigate damages. In *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. Oct. 7, 2013), the court upheld a fee award of $751,942 for continuing to pursue litigation based on a blanket no hiring policy for ex-convicts where no such policy existed and the EEOC obtained information during discovery that disproved its factual basis for its complaint. In *EEOC v. TriCore Reference Laboratories*, No. 11-2096, 2012 WL 3518580 (10th Cir. 2012), the Tenth Circuit Court of Appeals affirmed summary judgment for the employer determining that no material issue of fact remained, and awarded $140,571 in attorneys' fees to the employer based on the EEOC's pursuit of a failure to accommodate claim with no basis in fact.

Reestablishing The Commission's Oversight of The Initiation of Multi-Plaintiff Litigation

Title VII confers authority to initiate litigation to the five-member Equal Employment Opportunity Commission. Title VII authorizes the EEOC's General Counsel to "conduct" litigation. Yet today, the overwhelming majority of EEOC-initiated litigation is initiated throughout the United States by EEOC Local District offices, without review and a grant of authority from the Commission.

This has not always been the case. In 1995, the Commissioners delegated their authority to initiate litigation to the General Counsel, who subsequently delegated much of that authority to the district offices. Since then, the Commission has only exercised authority to initiate litigation in some but not all cases involving a major expenditure of resources, cases presenting a developing area of the law, cases likely to present a public controversy, and cases where an EEOC amicus brief is sought.

In the early- to mid-2000s, as many as 75-80 litigation recommendations were submitted annually to the Commission for authorization. Yet, in recent years, the number has decreased dramatically. In the three-year period covering 2010, 2011 and 2012, a total of approximately 15 cases (of any type) were submitted to the Commission for authorization. In late 2012, the EEOC adopted its Strategic Enforcement Plan, which continued the EEOC's focus on systemic litigation, but slightly modified the delegation of authority to the General Counsel, which required "most" systemic cases to be submitted to the Commission for review. Overall, the Commission required a minimum of 15 cases, one from each district office, be presented for review each fiscal year. In fiscal year 2013, the EEOC filed 21 systemic cases and 21 non-systemic multi-plaintiff cases. Based on information provided before each public Commission meeting, it is clear that many of these cases were initiated by the district offices without approval from the Commission.

Given the significant expenditure of resources by both the EEOC and private employers in connection with multi-plaintiff cases in 2013, the Chamber urges that all multi-plaintiff litigation be submitted to the Commissioners for review and approval prior to initiation of litigation.

Private Party Litigation Failures

Despite significant budgetary increases in 2009 and 2010,[30] and consistent funding at high levels since, EEOC litigation is down almost 55%.[31] Since April 2010, however, the number of cases that the EEOC has lost due to litigation abuses is troubling.[32]

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[30] *See* http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm. Between fiscal year 2008 and fiscal year 2010, the EEOC's budget increased by over $38M or 11.5%.

[31] *See* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm. In fiscal year 2008, the EEOC filed 290 merits cases. In fiscal years 2012 and 2013, the EEOC filed 122 and 133 merits cases, respectively.

For example, in a race discrimination case, the EEOC alleged that a staffing company's blanket policy of not hiring individuals with a criminal record had a disparate impact on African-Americans.[33] However, the company simply did not have a blanket no-hire policy. Despite becoming aware of the fatal false premise of its case during discovery, the EEOC continued to litigate anyway. The U.S. District Court for the Western District of Michigan determined that "this is one of those cases where the complaint turned out to be without foundation from the beginning." As a result, the court ordered the EEOC to pay a total of $751,942.48 for deliberately causing the company to incur attorneys' fees and expert fees after the agency learned that the company did not have the blanket no-hire policy.

A federal court in New York dismissed a pregnancy discrimination lawsuit filed by the EEOC, granting summary judgment for the employer, ruling that the EEOC did not present sufficient evidence to establish that, once again, the employer engaged in a pattern or practice of pregnancy discrimination.[34] The EEOC, which represented 600 women against the employer, based its claim on anecdotal accounts that the company did not provide a sufficient work-life balance for mothers working there. The court ruled that the law does not mandate work-life balance. The court criticized the EEOC for using a "sue-first, prove later" approach, noting that, "'J'accuse!' is not enough in court. Evidence is required."[35]

Similarly, in a case alleging discrimination under the ADA, the EEOC continued to litigate even when it became clear that the case had no merit.[36] Specifically, the EEOC admitted that the alleged victim of discrimination could not perform the essential functions of the job but "continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed." Thus, the EEOC's claims were "frivolous, unreasonable and without foundation." The district court dismissed the claim and awarded the employer over $140,000 in attorneys' fees and costs. The Court of Appeals affirmed.[37]

While litigating disparate impact claims, which do not require that the EEOC prove intentional discrimination against any alleged victim, the EEOC has fared no better. For example, in an Ohio case alleging that an employer's use of credit background checks violated Title VII, the Sixth Circuit affirmed summary judgment because the EEOC lacked sufficient evidence to even form a prima facie case of discrimination. There, the EEOC used a novel "race rating" system to establish that the credit background check had a disparate impact against

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[32] For additional analysis regarding the EEOC's litigation abuses, see the Chamber's EEOC Enforcement Paper at 7-11.

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

[34] *EEOC v. Bloomberg LP*, 2013 U.S. Dist. LEXIS 128388 (S.D.N.Y., Sept. 9, 2013); *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011).

[35] *Id*.

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

[37] *Id.*

minority applicants. While castigating the EEOC for using a "homemade" method that the EEOC itself prohibits, the Sixth Circuit noted that "[i]n this case the EEOC sued defendants for using the same type of background check that the EEOC itself uses." *The Wall Street Journal* called the Sixth Circuit's opinion "The Opinion of the Year".[38]

In a Maryland case alleging that an employer's criminal background policy had a disparate impact on minorities, the EEOC attempted to prove its case through hiring statistics.[39] Unable to establish a prima facie case of discrimination, the court awarded summary judgment for the employer. The court found that EEOC's expert analysis contained a "mind-boggling number of errors." The court also found the EEOC's statistical evidence to be "skewed," "rife with analytical errors," "laughable," and "an egregious example of scientific dishonesty." Accordingly, the court dismissed the case, noting that, "The story of the present action has been that of a theory in search of facts to support it."

EEOC abuses can also be found during the discovery phase of litigation. For example, in *EEOC v. Honeybaked Ham*[40], a Colorado district court sanctioned the EEOC for its efforts to evade discovery where the EEOC was "negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court[.]" In *EEOC v. Womble Carlyle Sandridge & Rice, LLP*,[41] a North Carolina court sanctioned the EEOC almost $23,000 for the charging party's destruction of evidence after the EEOC had initiated litigation, laying blame for the destruction on the EEOC's attorneys.

The EEOC's Failed Amicus Program[42]

Not only has the EEOC been unsuccessful in its major cases in which it is a party, the EEOC's *amicus curiae* program was equally unsuccessful in 2013. One of the most important legal enforcement methods available to the EEOC is its *amicus curiae* program.[43] *Amicus* briefs

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[38] http://online.wsj.com/news/articles/SB10001424052702304512504579491860052683176.

[39] *EEOC v. Freeman*, 961 F. Supp. 2d 783, 797-799 (D. Md. 2013).

[40] *EEOC v. Original Honeybaked Ham Company of Georgia, Inc.*, 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb 27, 2013).

[41] *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 13-CV-46 (M.D.N.C. Jan. 6, 2014); see also *EEOC v. Womble Carlyle Sandridge & Rice*, LLP, 13-CV-46 (M.D.N.C. April 29, 2014).

[42] For a more in depth analysis of the EEOC's failed amicus program, see the Chamber's EEOC Enforcement Paper at 18-25.

[43] The EEOC has not included information regarding its 2013 *amicus* record on its website, in its 2013 PAR, or in its General Counsel's Law360 article criticizing other analyses of the EEOC's litigation record as failing to perform a comprehensive review of all 2013 EEOC litigation efforts. Without considering the EEOC's 2013 *amicus* record, its General Counsel asserted that when one reviewed the EEOC's entire record instead of a few EEOC losses still on appeal, "…we [EEOC] have a record of success in reversing adverse decisions when a case moves to the

are "friend of the court" briefs filed by the EEOC "in a case that raises novel or important issues of law" that fall within EEOC's expertise.[44] The EEOC has an intensive approval process for *amicus* participation, with all recommendations in favor of *amicus* participation approved by a majority of the five-member Commission. *Amicus* briefs are part of the EEOC's targeted and integrated approach to law enforcement, focused on the EEOC's priorities, and often seeking judicial approval of EEOC positions contained in its enforcement guidelines and policy statements.

In 2013, the U.S. Supreme Court and five Courts of Appeals decided 13 cases in which the EEOC filed amicus briefs. Three of the 13 cases raised contested procedural issues on which the EEOC's *amicus* position prevailed.[45] Ten of the cases involved substantive issues of the appropriate interpretations of applicable federal law.[46] The EEOC's position was rejected in

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appellate court."). P. David Lopez, *'EEOC Overreach' Analysis Distorted The Record*, LAW360 (Jan. 3, 2014, 12:17 PM).

[44] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS CURIAE PROGRAM, (Jan. 15, 2014), available at http://www.eeoc.gov/eeoc/litigation/amicus.cfm.

[45] The EEOC prevailed on procedural arguments in the following three *amicus* cases in 2013: *Mandel v M&Q Packaging Corp.*, 706 F.3d 157 (3d Cir. Jan. 14, 2013) (adopting the EEOC position that the district court erred in refusing to consider evidence of harassment over 300 days old in this hostile work environment claim); *Boaz v. FedEx Customer Info. Svs., Inc.*, 725 F.3d 603 (6th Cir. Aug. 6, 2013) (adopting DOL & EEOC argument that an employment contract cannot shorten the statute of limitations under the EPA or FLSA); *Ellis v. Ethicon, Inc.*, 529 Fed. Appx. 310 (3d Cir. Jul. 9, 2013) (adopting the EEOC argument that reinstatement can be an appropriate remedy).

[46] The EEOC's substantive arguments were rejected in the following eight *amicus* decisions in 2013: *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance definition of "supervisor" under Title VII when determining vicarious liability for unlawful harassment); *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance that the motivating factor standard applies to retaliation claims); *Basden v. Prof. Transportation, Inc.*, 714 F.3d 1034 (7th Cir. May 8, 2013) (rejecting EEOC Enforcement Guidance that attendance is not an essential function of the job); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. Dec. 3, 2013) (rejecting the position offered in a joint brief filed by the EEOC and DOL while the proceedings were before the NLRB that arbitration agreements are inconsistent with federal law); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013) (rejecting the EEOC's argument, filed jointly with the DOL, that arbitration agreements barring class claims are impermissible); *McKinley v. Skyline Chili, Inc.*, 2013 WL 4436537 (6th Cir. Aug. 21, 2013) (affirming summary judgment for the employer because loss of confidence and poor performance were not pretextual reasons for termination); *Foco v. Freudenberg-NOK Gen. P'ship*, 2013 WL 6171410 (6th Cir. Nov. 25, 2013) (affirming summary judgment for the employer as the pay disparity was based on something other than sex); *Bailey v. Real Time Staffing Servs., Inc.*, 2013 WL 5811647 (6th Cir. Oct. 29, 2013) (affirming summary judgment for the employer because the employee's failed drug test, even if caused by medication taken to treat HIV, was a legitimate, non-discriminatory reason for

eight of the ten substantive positions it advanced in the appellate courts. In comparison, the United States Chamber of Commerce ("Chamber") filed *amicus curiae* briefs in three of these same cases, with a 100% win rate.[47]

The Supreme Court itself rejected two long-held EEOC guidance positions. First, in *Vance v. Ball State Univ.*, the Supreme Court rejected the EEOC's expansive definition of "supervisor" and held that an employer may be vicariously liable for an employee's unlawful harassment only when that employee has the employer's authorization to effect significant changes in employment status of the employee (such as hiring, firing, promoting, demoting or significantly changing their responsibilities or employee benefits).[48] Second, in *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, the Supreme Court rejected EEOC's amicus position and held that in a Title VII retaliation claim, the plaintiff must prove that the harm would not have occurred "but for" the employer's retaliatory motive.[49]

The Supreme Court's adverse rulings in 2013 striking down EEOC guidance were not an anomaly. In 2012, the Supreme Court unanimously rejected the EEOC's position that the ministerial exception did not apply to ADA retaliation cases.[50] In 2009, the Supreme Court rejected the EEOC's position that the mixed motive instruction was permissible under the ADEA, which the EEOC had argued as amicus before the Eighth Circuit Court of Appeals and in which the Department of Justice appeared as amicus at the Supreme Court.[51]

In addition to the Supreme Court rejecting EEOC guidance, the Courts of Appeals rejected the EEOC's substantive positions found in its *Enforcement Guidance*: *Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*[52] as well as the

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termination). The EEOC prevailed on substantive *amicus* arguments in only two cases in 2013: *Waldo v. Consumers Energy Co.*, 726 F.3d 802 (6th Cir. Aug. 9, 2013) (adopting the EEOC's argument that a sexual harassment victim does not need to prove that the harassment unreasonably interfered with her work performance, only that work conditions were discriminatorily altered) and *Latowski v. Northwoods Nursing Ctr.*, 2013 WL 6727331 (6th Cir. Dec. 23, 2013) (reversing summary judgment for employer on a pregnancy discrimination claim where a fact issue existed regarding whether the employer's proffered reason for terminating plaintiff was pretextual).

[47] The U.S. Chamber of Commerce filed *amicus* briefs in *Vance v. Ball State Univ.*, *Univ. of Texas Southwestern Med. Ctr. v. Nassar* and *DR Horton v. NLRB.*

[48] *Vance*, 133 S. Ct. at 2454.

[49] *Nassar*, 133 S. Ct. at 2533-34.

[50] *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 707 (2012).

[51] *Gross v. FBL Services, Inc.*, 557 U.S. 167, 173 (2009).

[52] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH

EEOC's *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes*.[53] For example, in *Basden v. Prof. Transportation, Inc.*,[54] the Seventh Circuit rejected the EEOC's much maligned position that attendance is not an essential function of a job. In *D.R. Horton v. NLRB*,[55] the Fifth Circuit Court of Appeals rejected the EEOC's policy position that arbitration agreements are inconsistent with federal civil rights laws.

Whether the EEOC's *amicus* program's success is measured on a pure numerical win/loss basis, or on the importance of the substantive interpretations of federal law it supported in its *amicus* efforts, one thing is clear: it was an overwhelming failure. More important, however, is that courts consistently rejected substantive policy positions adopted by the EEOC, which creates an untenable atmosphere for employees and employees, both of whom are left searching for reliable guidance on rights and obligations under federal employment civil rights laws.

Expansive Enforcement Guidance

As is clear from the appellate courts' rejection of EEOC guidance, employers find themselves between a rock and a hard place when it comes to determining whether to revise policies and practices to conform to new EEOC enforcement guidance. Guidance represents not the law, but the EEOC's view of the law. Employers look to the EEOC for thought-based, reasonable guidance to assist their compliance efforts. An individual expects that the EEOC provides reliable guidance outlining his or her rights under the statutes within its jurisdiction. However, when any enforcement guidance strays from the statutory intent and is ultimately struck down by the Supreme Court or a Circuit Court of Appeals, the EEOC has failed all of its stakeholders and its congressional mandate.

One potential reason for the continued disregard of EEOC guidance is because it adopts substantive policy positions that create compliance requirements without the benefit of public comment.[56] This is contrary to the strong policy favoring pre-adoption notice and comment on guidance documents. OMB's "Final Bulletin for Agency Good Guidance Practices" states:

DISABILITIES ACT, (Oct. 17, 2002), available at http://www.eeoc.gov/policy/docs/accommodation.html.

[53] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, (Jul. 10, 1997), available at http://www.eeoc.gov/policy/docs/mandarb.html.

[54] 714 F.3d 1034, 1037 (7th Cir. May 8, 2013).

[55] 737 F.3d 344, 360 (5th Cir. Dec. 3, 2013).

[56] Notably, the EEOC placed complete drafts of its Strategic Plan and Strategic Enforcement Plan for public comment. *See* http://www.eeoc.gov/eeoc/newsroom/1-18-11a.cfm and http://www.eeoc.gov/eeoc/newsroom/release/9-4-12c.cfm. It did not provide a complete draft of either its draft Quality Control Plan, enforcement guidance related to the use of criminal convictions, anticipated guidance related pregnancy discrimination, or other draft guidance

> Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.[57]

For example, one intended audience for any EEOC enforcement guidance is the EEOC investigators, who are trained to implement the relevant guidance document in their day-to-day investigations. EEOC investigators will determine whether reasonable cause exists that discrimination occurred based on an employer's compliance with the relevant enforcement guidance, essentially equating compliance with a guidance document as compliance with a statute. During an investigation, employers are held to the standards set forth in the EEOC's guidance documents. As many guidance documents take expansive views of rights and obligations under the law, it allows investigators to build large systemic cases on questionable theories that force employers to settle before or in the early stages of litigation.

In April 2012, the EEOC adopted its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. This guidance was not issued for notice and comment pursuant to OMB's Final Bulletin for Agency Good Guidance Practices. The rule contained in this guidance is relatively simple – employers commit race discrimination if they choose to hire applicants without criminal histories over applicants with criminal histories unless the employer conducts a highly subjective individualized assessment of the applicant with a criminal history. If the applicant with a criminal history is excluded after an employer considers these factors, presumptively no race discrimination exists. If the applicant is excluded without an individualized assessment, presumptively race discrimination exists. However, there is no individualized assessment requirement under Title VII. The EEOC fails to provide any justification for this logical flaw – that an unsuccessful applicant who received an individualized assessment is not discriminated against while an unsuccessful applicant who did not receive an individualized assessment has been discriminated against.

A second flaw in the EEOC's guidance is its treatment of state laws. While Title VII does contain a provision that Title VII supersedes state law only where a state or local law requires or permits an act that would violate Title VII,[58] the EEOC provides no guidance on how

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documents regarding credit background checks or under reasonable accommodation requirements under the ADA.

[57] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).
[58] 42 U.S.C. § 2000e-7.

an employer should weigh competing federal and state interests, other than to say that an employer will have to establish that a screen based on state law is job-related and consistent with business necessity. It is an expensive endeavor for a nursing home or other health care facility to show that not hiring a serial rapist or drug dealer pursuant to state law is job-related and consistent with business necessity, yet that is what this guidance contemplates.

Finally, the EEOC gives short shrift to common sense employer concerns – workplace safety and the hiring of violent felons, sexual harassment concerns and the hiring of rapists, trust and reliability in one's workforce. In classic "Do as I say not as I do" fashion, the EEOC itself conducts criminal background checks on potential hires because a history or pattern of criminal activity creates doubt about a person's judgment, honesty, reliability and trustworthiness.

In addition to the poor showings in court, the EEOC continues to send mixed signals regarding the efficacy of its guidance positions. For example, in the *State of Texas v. EEOC* litigation, the EEOC describes its guidance documents as "lack[ing] the force of law."[59] Yet, only months later, the Solicitor General of the United States asked that the Supreme Court not to grant a writ of certiorari in *Young v. United Parcel Service* because the EEOC is about to issue enforcement guidance on the issue.[60] Note the inherent inconsistency in those positions. Employers are forced to comply with policy positions set for in enforcement guidance documents, while the EEOC argues in court that those positions have no force of law, while at the same time the Department of Justice requests that the Supreme Court deny granting a writ of certiorari in *Young* because the EEOC's anticipated guidance will resolve the issue.

[59] *See* EEOC's Memorandum in Support of Motion to Dismiss, No. 5:13-CV-255 C, at 7 (N.D. Tex 2013).

[60] Amicus Brief for the United States at 21-22, *Young v. United Parcel Service, Inc.*, No. 12-1226 (May 19, 2014). Notably, the EEOC is not a signatory to that brief, indicating that at least three Commissioners do not with the argument set forth by the Department of Justice.

Conclusion

Combating discrimination in the workplace is a worthy goal and one that the U.S. Chamber of Commerce supports. However, the EEOC's abusive enforcement tactics must be addressed. While federal judges have pushed back in certain cases, the EEOC clearly has not gotten the message. Moreover, relying on federal court judges as the final check on EEOC enforcement is often a case of "too little, too late"; by that time, employers have already spent significant time and resources defending themselves against unmeritorious allegations and the EEOC's misplaced priorities and overzealous litigation tactics leave fewer resources and longer delays in investigating and resolving meritorious discrimination allegations and providing employers with accurate guidance around which to shape their workplace policies. We encourage the EEOC to adopt institutional procedures to provide for internal accountability, more efficient use of resources and adherence to its own statutory conciliation and other obligations. If the EEOC continues to ignore the problem, we encourage Congress to use its oversight authority to install much needed safeguards within the EEOC.

Mr. Chairman and members of the Committee, thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

cc: Randel K. Johnson, Esq.