Statement of the U.S. Chamber of Commerce

ON: **THE NEED FOR MORE RESPONSIBLE REGULATORY AND ENFORCEMENT POLICIES AT THE EEOC**

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

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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage 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 issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

TESTIMONY OF CAMILLE A. OLSON

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
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THE NEED FOR MORE RESPONSIBLE REGULATORY AND ENFORCEMENT POLICIES AT THE EEOC

MAY 23, 2017

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 the need for more responsible regulatory and enforcement practices and policies at the Equal Employment Opportunity Commission's ("EEOC" or "Agency"). The EEOC is a vital Agency, but it has misplaced certain priorities, choosing to pursue an expansive, legislative-like agenda through far reaching guidance and novel litigation theories that seek to stretch the bounds of the laws it is charged with enforcing.

This testimony addresses: flaws in the EEOC's investigation and direct party litigation *amicus* program; the misguided focus and serious deficiencies contained within the EEOC Revised EEO-1 Report; and EEOC Guidance documents (which have at times been issued without an opportunity for public comment and also included guidance untethered to existing statutes). Many of these issues tend to be interrelated.[1]

[1] I am Chair 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 employers 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 also 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). Over the last decade I am grateful to have been recognized by my peers as one of the most influential human resource attorneys in the United States as documented by Human Resource Executive, Chambers USA, Illinois Super Lawyers, and Who's Who Legal who have cited by role in guiding employers through complex and evolving laws. I had the privilege of receiving, along with my colleagues, the Financial Times' 2016 Award for Innovation in Collaboration.

I would like to acknowledge Seyfarth Shaw LLP attorneys Lawrence Z. Lorber, Annette Tyman, Richard B. Lapp, and Michael Childers, as well as Jae S. Um and Korin T. Isotalo for their invaluable assistance in the preparation of this testimony.

I begin by acknowledging the very important role the EEOC plays in the shaping of equal employment opportunity practices and policies in the workplace. We know well how important the economy and jobs are to the well-being of our society. The Chamber echoes the sentiments of Acting EEOC Chair Vicki Lipnic, who recently described the EEOC's mission as consistent with the current Administration's focus on "jobs, jobs, jobs" in that the *name* of the Agency -- the Equal Employment Opportunity Commission -- necessarily invokes the concept of "Opportunity" for both employees and employers.

Certainly, the EEOC has the critical role of ensuring that employment practices are conducted without regard to protected characteristics. The laws the EEOC enforces are designed to ensure that all have equal access to the benefits, terms and conditions of employment.[2] Over the years, the EEOC has taken positive steps toward that mission. In FY 2016, the EEOC secured nearly $350 million in monetary relief through mediation, conciliation and settlement, representing tangible relief for thousands of complainants. Since 2008, the EEOC has made a concerted effort to address its backlog of unresolved cases and, in the period from 2010 to 2013, the EEOC demonstrated progress in reducing the charge backlog from its peak of 86,338 in 2010 to 73,508 as of the end of FY2016. However, the EEOC's track record from 2013 forward raises concerns that these positive developments have stalled as a result of misplaced priorities and incentives.

In the past 5 years since the approval of the current Strategic Plan in early 2012, the EEOC has increasingly embraced an enforcement and policy philosophy that emphasizes headline-grabbing systemic cases. This emphasis on novel theories and expansive litigation tactics has led the EEOC astray from its core mission. Unfortunately, the EEOC's recent record demonstrates misalignment of its priorities to its fundamental mission, with adverse effects on its overall efficacy and performance of its prime function.

With respect to the formulation of Guidance for employers, the EEOC recently has acknowledged the importance of making proposed guidance available for public comment prior to final issuance. Consistent commitment to public comment periods would signal a consistent intent by the EEOC to work collaboratively with its constituents to combat workplace discrimination and would allow interested parties to provide input with respect to the practicality of agency guidance and to note, where appropriate, any inconsistencies between the draft guidance and applicable law. Specifically, the Chamber applauds the EEOC for seeking public comments on its Proposed Enforcement Guidance on Unlawful Harassment Discrimination and welcomes the instructive checklists and best practices the EEOC offered to the employer community as suggestions to consider in determining how best to provide harassment-free workplaces, taking into consideration their individual and unique circumstances. Given the important role the EEOC's Guidance plays in assisting employers in complying with the law, this is a very positive step toward enhancing the usefulness of the EEOC's work.

[2] Congress established the EEOC to prevent unlawful employment practices by employers. The EEOC enforces Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Equal Pay Act ("EPA"), the Genetic Information Nondiscrimination Act ("GINA"), and the Age Discrimination in Employment Act of 1967 ("ADEA"), among other federal employment discrimination laws.

Despite these successes, the EEOC seems to have lost focus in favor of an enforcement and policy philosophy which appears to be driven by its desire to emphasize novel theories and expansive litigation techniques which detracts from its important agenda. This approach delays the resolutions of non-meritorious back-logged charges as well as the conciliation, mediation and, as a last resort, litigation of meritorious allegations of discrimination under existing equal employment opportunity laws.

More recently the EEOC has moved from an Agency designed to ensure "Equal Employment Opportunity" to an Agency that is engaged in (1) inappropriate efforts to expand existing policy beyond the law, (2) imposing burdensome new requirements on employers that do not serve a meaningful purpose or find a basis in statute, (3) ineffective and untimely investigations, and (4) unmeritorious and costly direct litigation.

In 2014 I provided testimony before this Subcommittee that included the Chamber's Paper entitled: "A Review of Enforcement and Litigation Strategy During the Obama Administration - A Misuse of Authority" (June 2014) ("Chamber's EEOC Enforcement Paper").[3] The Chamber's EEOC Enforcement Paper detailed the 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 demonstrated that the EEOC's litigation priorities included: pursuing investigations and settlements despite clear evidence that the alleged adverse action was not discriminatory and pursuing litigation described by federal court judges as frivolous, unreasonable and without foundation. In addition, the Chamber's analysis of 2013 court cases revealed the EEOC's focus on advancing novel, dubious legal theories well beyond accepted legal norms in both its enforcement guidance and *amicus* litigation program.

My testimony today concludes that the issues described in my 2014 testimony and identified in the Chamber's EEOC Enforcement Paper continued to persist through the end of the prior Administration. Further, these issues raise fundamental questions about the effectiveness of the Performance Measures articulated in the EEOC's Strategic Plan (FY 2012 - 2016). Since the implementation of its plan, the EEOC's investigation and litigation record shows a material decline in both the volume of cases and the monetary relief secured for injured parties.

In the EEOC's 2016 Performance and Accountability Report dated November 15, 2016, the Office of the Inspector General noted that the EEOC needed to "make major improvements in mission critical areas" and identified the development of a new strategic plan as a "significant challenge."[4] The Inspector General further noted a need for the Agency to ensure that the plan contains "meaningful goals" as well as "outcome-based" performance measures in its next strategic plan.[5] For these reasons, it is critical that the EEOC realign its strategic direction in a

[3] I request that the Subcommittee accept my written testimony as part of the written record of today's Hearing.

[4] 2016 Performance and Accountability Report available at, https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf (p. 54)

[5] 2016 Performance and Accountability Report.

manner that is consistent with the authority and role afforded to the Agency. Emphasis should be placed on the urgency of these needs, given that the EEOC is due to submit a draft of its 2018-2022 Strategic Plan to the Office of Management and Budget ("OMB") on June 2, 2017.

I. THE EEOC'S INVESTIGATION AND LITIGATION RECORD

A. EEOC Investigations

The EEOC appears unwilling to focus investigations on the charges actually before it. Rather, the Commission has too often treated charges as an opportunity for broad and expansive inquiries into issues unrelated to the actual charge. The Agency's focus on systemic litigation cases seems to be the guiding principle of the EEOC's enforcement efforts.

The Supreme Court previously admonished the EEOC to refrain from expanding its investigations beyond the reasonable scope of the charge. *EEOC v. Shell Oil Co.,* 466 U.S. 54 (1984). Cases following *Shell Oil* have held that the EEOC, no matter how it might try, cannot escape the requirement to show a nexus between the charge and its investigation.[6]

For instance in *EEOC v. Konica Minolta Business Solutions, USA, Inc.*, the Seventh Circuit admonished the EEOC that it must show that it has a "'realistic expectation rather than an idle hope' that the information requested will advance its investigation."[7] And most recently in *EEOC v TriCore Reference Laboratories,* the Tenth Circuit rejected an overly broad subpoena request in an ADA case because the "EEOC's real intent in requesting this [information was], in fact, difficult to pin down."[8] The EEOC appears to have been on a quest to either expand the scope of the allegations before it or convert a potentially legitimate individual charge into a large "systemic" level matter. The EEOC has not sought to more efficiently and impactfully enforce the laws through a well-developed individual case, instead searching for ways to bring expanded, lengthy "systemic" cases with all of the attendant procedural and litigation difficulties.

Under the 2012-2016 Strategic Plan, the EEOC has consistently prioritized its pursuit of large-scale litigation and settlements, at the expense of the tens of thousands of individuals whose charges are relegated to the backlog.

In previous Strategic Plans, the EEOC utilized outcome-based performance measures including (1) the percentage of charges resolved in 180 days or fewer, (2) the percentage of investigative files meeting established criteria for quality, and (3) the number of individuals benefiting from the EEOC's enforcement programs for each Agency FTE (full-time equivalent)

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[6] *McLane Co., Inc. v. EEOC,* 137 S.Ct. 1159, 1165 (2017) (*citing University of Pennsylvania v. EEOC,* 493 U.S. 182, 191 (1990)).

[7] *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*, 639 F.3d 366, 369 (7th Cir. 2011) (*quoting EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002)).

[8] *EEOC v. TriCore Reference Laboratories*, 849 F.3d 929, 937 (10th Cir. 2017).

employee.[9] In contrast, the EEOC's Strategic Plan (FY 2012 - 2016) replaced the quantitative outcome-based measures in favor of certain "process" measures. [10] For instance, the practice of reporting the percentage of charges resolved within 180 days was discontinued under the current plan.

As the adage goes, what gets measured gets managed, and the EEOC's performance metrics essentially implemented incentives that both reflect and further promote its misaligned priorities. Indeed, the Urban Institute raised concerns with the EEOC's 2012-2016 Strategic Plan metric that evaluates the EEOC's performance, in part, on whether a target percentage of all active cases on the EEOC's litigation docket are "systemic" cases.[11] Among other issues, the Urban Institute noted that this measurement "could encourage excessive litigation on charges that might not otherwise be considered systemic or, or it could lead to failure to pursue sufficient "non-systemic" charges. The Urban Institute's concerns have become reality. Indeed, this approach provides an incentive for the EEOC to look for "systemic cases" behind every factual setting while adversely impacting the overall number of active cases on the docket.

Undoubtedly, this shift away from quantitative measures has been a factor in the EEOC's performance under the 2012-2016 Strategic Plan. As indicated in Figure 1 below, while the rate of charge resolutions increased steadily between 2006 to 2011, since 2012 there has been a general decline in the rate of resolved charges. Specifically, while the Agency reported a decline in the backlog of charges in FY2016 as compared to FY2015, in the past four years, the charge backlog in the private sector has *increased* by approximately 3.9%.[12]

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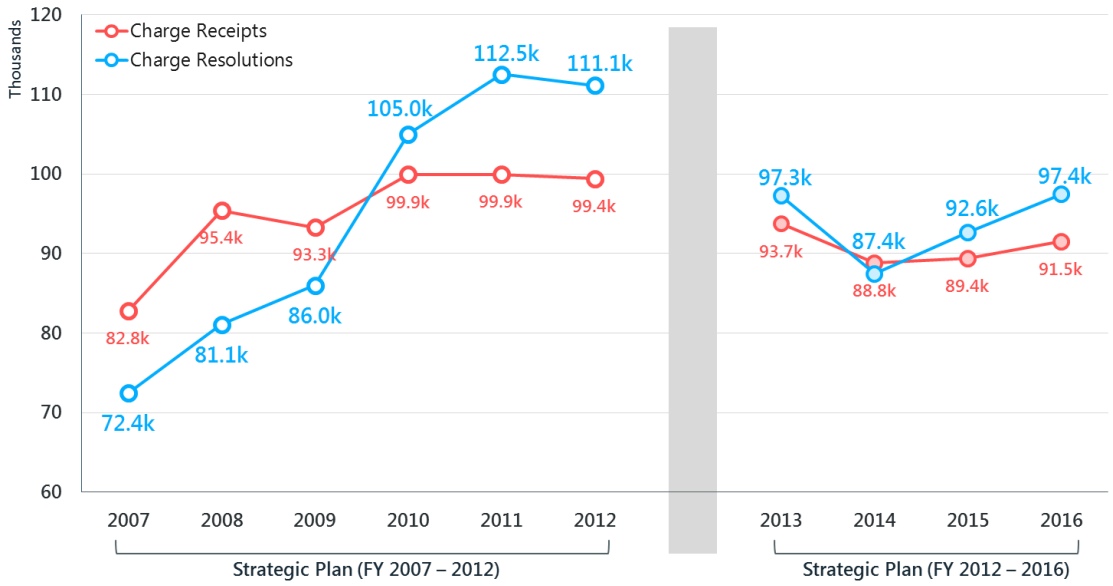
[9] See EEOC Strategic Plan for FY 2007 - 2012, available at https://www.eeoc.gov/eeoc/plan/strategic_plan_07to12_mod.cfm

[10] EEOC Strategic Plan for FY 2012 - 2016, available at https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf

[11] Urban Institute Evaluation of EEOC Performance Measures, available at https://www.eeoc.gov/eeoc/oig/performance_measures.cfm

[12] EEOC Performance and Accountability Report for FY 2016, available at https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf. See statements at p. 12 regarding 2015 to 2016 filings with Inspector General's statements at p. 55 relating to the recent history of the charge inventory: "[t]he inventory data show that the inventory increased 3.9% over the last four years. The inventory increased by less than 1 percent in fiscal year 2013, to 70,781. In fiscal year 2014, it increased 6.9 percent, to 75,658. In fiscal year 2015, inventory increased 1.4 percent, to 76,408. In fiscal year 2016, inventory decreased 3.7% to 73,559 (agency estimate)."

Figure 1. Charge Receipts and Resolutions by Year, 2007 - 2016
Source: EEOC Enforcement & Litigation Statistics



Although budget pressure remains a factor, an analysis of total dollars spent on charge processing against the number of resolutions achieved shows a troubling decline in the EEOC's cost controls and efficiency measurements, raising questions with respect to the Agency's resource allocation and utilization decisions. On a per-charge basis, costs increased 31% from $1,619 in 2011 to $2,121 in 2015.[13] Over the years, the EEOC has cited budgetary constraints as a key limitation on its ability to manage the backlog, but the significant increase in costs per charge suggests that the Agency is failing to leverage the budget it has been given.

An analysis of total dollars attributed to administrative charge processing as a percentage of monetary benefits also suggests that the Agency's efforts have been less effective as well as less efficient. In 2011, the EEOC reported roughly $182 million as the costs allocated to administrative charge processing, and that figure represented 50% of monetary benefits

[13] These figures were calculated based on the number of charge resolutions and monetary relief amounts reported by the EEOC in its Enforcement & Litigation Statistics as well as actual budget figures reported by the EEOC as allocated to administrative charge processing on its annual Congressional Budget Justifications from 2011 to 2017). The charge statistics are available at https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm; EEOC's Congressional Budget Justifications for current and past years are available at https://www.eeoc.gov/eeoc/plan/index.cfm

recovered through those efforts.[14] This figure rose to 68% in 2014 and 55% in 2015; particularly when compared to the range of 49% to 51% in 2011, 2012, and 2013, this analysis suggests that, despite the *increase* in its cost per charge, the EEOC is becoming *less successful or efficient* in leveraging its costs to secure monetary benefits and relief for charging parties.

In short, the available data produced by the EEOC demonstrates that its administrative charge resolution process continues to leave a backlog which represents the "many people who are waiting for some investigation, resolution, and assistance with a claim."[15]

In the 2016 Performance and Accountability Report ("2016 PAR"), the Inspector General noted that "in previous [years], we have encouraged EEOC to develop new methods for improving its resolution of charges of discrimination. EEOC has made no fundamental improvements in this area since the implementation of Priority Charge Handling Process ("PCHP") in 1995." The EEOC must focus on and drive measurable improvements in timeliness, quality and volume of charges processed.

[14] *Id.* Cost allocations to specific programs are detailed within the Congressional Budget Requests for each Fiscal Year. Monetary benefits recovered through the administrative charge process are reported in the EEOC's Litigation and Enforcement Statistics. Data from all relevant years were compiled from each of these sources:

	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Administrative Charge Processing Program Cost as Reported to Congress	$182.2m	$187.7m	$183.1m	$200.9m	$196.5m
Charge Resolutions	112,499	111,139	97,252	87,442	92,641
Cost per Charge Resolution	**$1,619**	**$1,689**	**$1,883**	**$2,297**	**$2,121**
Monetary Benefits from Charge Resolution	$364.7m	$365.4m	$372.1m	$296.1m	$356.6m
Charge Processing Cost as (%) of Benefits	50%	51%	49%	68%	55%

[15] Senate HELP Committee Hearing Transcript, November 19, 2009, available at https://www.gpo.gov/fdsys/pkg/CHRG-111shrg75510/html/CHRG-111shrg75510.htm (see former Chair Berrien testimony that the term 'backlog' referred to the "many people who are waiting for some investigation, resolution, and assistance with a claim").

B. The EEOC's Litigation Record

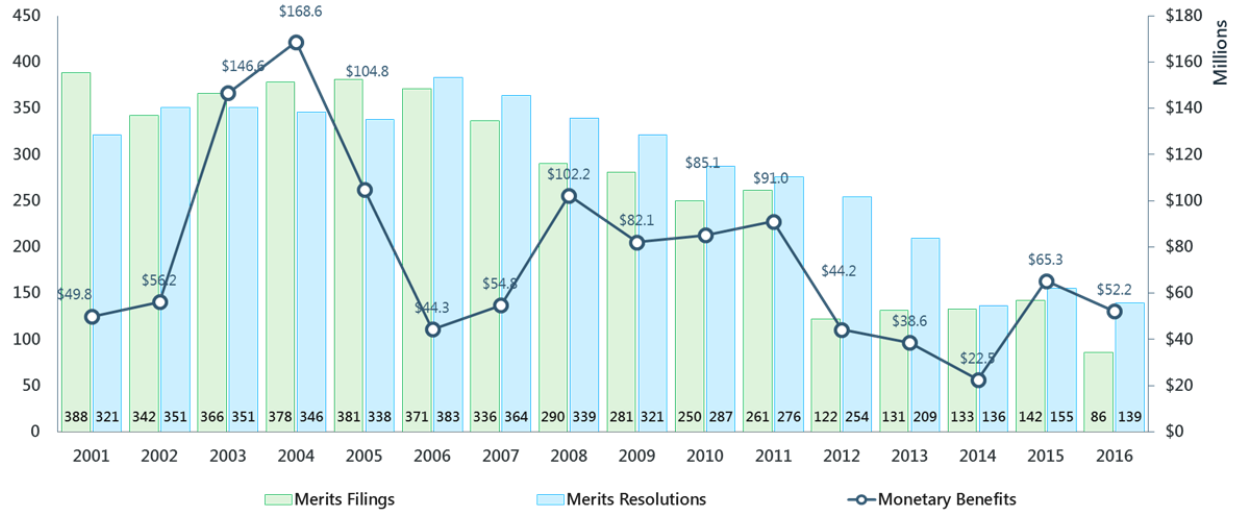
1. EEOC Initiated Lawsuits Are In Decline

As noted earlier, the Chamber's EEOC Enforcement Paper published in June 2014 revealed a record of ineffectiveness of the EEOC's litigation program. Specifically, the EEOC's litigation docket declined dramatically during the period since 2011. The decline in litigation filings highlighted in the Chamber's 2014 report has deteriorated further.

In 2016, the General Counsel's office filed only 86 lawsuits compared to the 142 lawsuits filed in 2015. Recoveries from lawsuits were similarly down from $52 million compared to $65 million. The active docket at the end of 2016 totaled 165 cases as opposed to 218 cases in 2015.

A historical analysis of the EEOC's litigation track record illustrates the misalignment of priorities plaguing its investigation processes, but perhaps to an even greater extent. Over the past 15 years, the drastic decline in the number of cases filed and resolved demonstrates a troubling willingness by the EEOC to make bigger bets on fewer cases. Moreover, while some fluctuation of monetary benefits recovered from year to year is to be expected, the general downward trend in recovered benefits does little to show a net positive impact as a result of the EEOC's focus on systemic litigation. While the Chamber does not encourage litigation for the sake of litigation or increasing the reported number of cases to simply present a better picture of activity, it does believe that appropriate, targeted litigation where the facts warrant litigation as a last avenue to resolving meritorious allegations of discrimination, represents appropriate enforcement of the non-discrimination laws.

Figure 2. EEOC Merits Litigation Filings, Resolutions and Monetary Benefits by Year, 2001 - 2016
Source: EEOC Enforcement & Litigation Statistics



Historical analysis of costs associated with private sector litigation against the EEOC's litigation outcomes and overall workload (ongoing cases from prior years plus the number of new filings) reflects poorly on the EEOC's priorities and resource allocation. The per-case cost

of litigation has increased 80% from $113,398 in 2011 to $279,561 in 2016.[16] In 2011, the total costs attributed to private sector litigation amounted to 87% of monetary benefits recovered. Indeed, in *every year* since 2012, the costs associated with litigation have exceeded the monetary benefits recovered.[17]

2. Courts Are Ordering Significant Fees Against the EEOC For Unfounded Litigation

Against the backdrop of declining EEOC-initiated lawsuits, in a number of cases the Agency has conducted litigation in a manner resulting in significant fee awards *against* it. Those are astounding results when one considers that the Supreme Court has determined that courts may award fees to a prevailing defendant in civil rights claims *only* in instances when the plaintiff's allegations are "frivolous, unreasonable, or without foundations."[18]

For instance, in *EEOC v. CRST Van Expedited, Inc.*, pending before the district court is the Defendant's renewed motion for $4.7 million in attorneys' fees following the Supreme Court's remand which reinstated the order granting summary judgement against the EEOC.[19] Likewise, in *EEOC v CVS Pharmacy, Inc.*, the court awarded CVS attorney's fees of over $300,000 in a case in which the EEOC challenged the use of standard terms in an employee separation agreement.[20]

In *EEOC v. Freeman*, the district court granted the defendant's motion for summary judgment and awarded $1 million in fees and costs against the EEOC. First, the court reasoned that the EEOC's case relied on statistical analysis from its expert which contained a "mind-boggling number of errors" which "render[ed] his disparate impact conclusions worthless."[21] The Fourth Circuit affirmed that; and, in a concurring opinion, one of the judges on the panel noted, "[t]he Commission's conduct in this case suggests that its exercise of vigilance has been lacking.

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[16] EEOC Performance and Accountability Reports, available at https://www.eeoc.gov/eeoc/plan/archives/annualreports/index.cfm ,

[17] *Id.* Costs attributed to private sector litigation were taken from the Financial Statements of the annual Performance and Accountability Reports.

[18] *See e.g.*, *Fox v. Vice*, 563 U.S. 826, 833 (2011); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

[19] *See EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR (N.D. Iowa); *CRST Van Expedited, Inc. v. EEOC*, 136 S.Ct. 1642, 1649 (2016).

[20] *EEOC v. CVS Pharmacy, Inc.*, 70 F.Supp.3d 937 (N.D. Ill. 2014); *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, 343 (7th Cir. 2015).

[21] *EEOC v. Freeman*, 961 F.Supp.2d 783, 796 (D. Md. 2013).

It would serve the Agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences of failing to do so."[22]

The Sixth Circuit reached a similar decision in *EEOC v. Peoplemark, Inc.* in which it affirmed an award of over $750,000 in fees against the EEOC.[23] In *Peoplemark*, the Commission had commenced litigation based on a statement by the company's Associate General Counsel that the company had a blanket policy of rejecting applicants with a felony record. During its investigation, the Commission received documents proving that no such policy existed; however, the Commission continued to litigate the case for over two years before agreeing to a voluntary dismissal with prejudice. In affirming the district court's decision, the Sixth Circuit noted that upon discovery that the prior statements "belied the facts, the Commission should have reassessed its claim" and that in failing to do so the EEOC had unreasonably continued to litigate a claim "based on a companywide policy that did not exist."[24]

Below we summarize a sample of recent decisions in which courts have assessed and/or are reviewing attorneys' fees and costs sanctions against the EEOC. The costs to taxpayers based on the EEOC's misguided litigation tactics is staggering.

Figure 3. Examples of EEOC Litigation Abuses
Source: EEOC Enforcement & Litigation Statistics & Case Filings

Case	Dismissed with Sanctions	Court's Criticism
EEOC v. Tricore Reference Laboratories	$140,000	EEOC's claims were "frivolous, unreasonable and without foundation."
EEOC v. Peoplemark, Inc.	$751,942	"...the complaint turned out to be without foundation from the beginning."
EEOC v. Freeman, Inc.	$938,771	"Because the EEOC insisted on playing a hand it could not win, it is liable for Freeman's reasonable attorneys' fees."
EEOC v. CVS Pharmacy	$307,902	"The EEOC failed to comply with its enabling act and its regulations, and a fee award is appropriate."
EEOC v. CRST Van Expedited, Inc.	$4,700,000 Sanction Motion Pending	"The EEOC's litigation strategy was untenable."

[22] *EEOC v. Freeman*, 778 F.3d 463, 472-73 (4th Cir. 2015) (Agee, J., concurring).

[23] *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 587 (6th Cir. 2013).

[24] *Id.*, at 592.

II. THE EEOC'S FAILED *AMICUS* PROGRAM

The EEOC's litigation record, when it has acted as an *amicus curiae* in litigation initiated by other parties, has similarly resulted in numerous defeats in recent years. The *amicus curiae* program -- literally "friend of the court"-- allows the Agency to weigh in on cases that "raise novel or important issues of law" or that present a "particularly important issue that falls within the EEOC's expertise."[25]

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 left employers searching as to where to find accurate, reliable guidance on their legal obligations under federal non-discrimination laws. *See* Chamber's EEOC Enforcement Paper at 18-25.

Most recently, between 2014 and April of 2017, the EEOC filed ninety-seven (97) *amicus* briefs.[26] One of these briefs was filed with the U.S. Supreme Court, eighty-three were filed in twelve Circuit Courts of Appeals, twelve were filed with various U.S. District Courts, and one was filed with the National Labor Relations Board ("NLRB"). In 2015, the EEOC filed briefs as *amicus curiae* in 22 cases in ten Circuit Courts of Appeals. One of these cases is still pending a decision,[27] one was decided on separate grounds than were argued in the EEOC's *amicus* brief,[28] and three others ended in a stipulated dismissal.[29] The EEOC's track-record on the remaining seventeen cases is decidedly mixed with the Courts of Appeals affirming either a motion for summary judgement or a motion to dismiss which contradicted the Agency's position in seven cases.[30] In both *DeWitt* and *Wade*, the courts' opinions explicitly rejected the position

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[25] U.S. Equal Employment Opportunity Commission, Amicus Curiae Program, (May 12, 2017), available at https://www.eeoc.gov/eeoc/litigation/amicus.cfm

[26] *See* U.S. Equal Employment Opportunity Commission, Amicus Curiae Program, (May 12, 2017), available at https://www1.eeoc.gov/eeoc/litigation/briefs.cfm and the U.S. Department of Justice, Office of the Solicitor General, Supreme Court Briefs, (May 12, 2017), available at https://www.justice.gov/osg/supreme-court-briefs

[27] *Guido v. Mt. Lemmon Fire Dist.,* 0:15-cv-15030 (9th Cir. 2016).

[28] *Woods v. FacilitySource, LLC,* 640 Fed.Appx. 478 (6th Cir. 2016).

[29] *Cooper v. United Air Lines, Inc.*, No. 15-15623 (9th Cir. 2017); *Cervantes v. Cemex, Inc.*, 14-17437 (9th Cir. 2016); *Eure v. Sage Corp.*, No. 14–51311 (5th Cir. 2015).

[30] *DeWitt v. Southwestern Bell Telephone Co.*, 845 F.3d 1299, 1316-17 (10th Cir. 2017); *Kovaco v. Rockbestos-Surprenant Cable Corp.*, 834 F.3d 128 (2d Cir. 2016); *Dunaway v MPCC Corporation*, 669 Fed. Appx. 21 (2d Cir. 2016); *Wade v. The New York City Dept of Education*,

taken by the EEOC's brief.[31] The EEOC had successes in ten cases where a Court of Appeals issued a ruling consistent with the EEOC's *amicus* position. However, only two [32] of the ten decisions explicitly referenced the EEOC's amicus position, while the other eight [33] made no mention of the EEOC's position or *amicus* filing. Thus, the EEOC's successes must be viewed in the context of the resources expended in furtherance of the *amicus* program.

In the sole *amicus* brief filed by the EEOC with the Supreme Court during this period, the Supreme Court rejected the EEOC's position. In *Young v. United Parcel Service, Inc.*, the EEOC sought to apply its guidance that:

> [a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job).[34]

The Supreme Court declined to give deference to the EEOC's guidance in part, because it had been issued after the Court had granted *certiorari* and in part because the Court determined a lack of "'consistency' and 'thoroughness' of 'consideration' in the Guidance. The majority also noted that the EEOC's position was inconsistent with both the Court's prior precedent and with the position taken by the government in prior cases, explaining:

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667 Fed.Appx. 311 (2d Cir. 2016); *Morriss v. BNSF Railway Co.*, 817 F.3d 1104 (8th Cir. 2016); *Villarreal v. R.J. Reynolds Co., et al*, 839 F.3d 958 (11th Cir. 2016); *Brandon v. Sage Corp.*, 808 F.3d 266 (5th Cir. 2015).

[31] *DeWitt*, 845 F.3d at 1316-17 (10th Cir. 2017) (rejecting the EEOC's argument "that an employer is [not] categorically free to terminate any and all disabled employees *at the first instance* of any and all disability-related performance deficiencies." (emphasis in original)); *Wade*, 667 Fed. Appx. at 313 (2d Cir. 2016) (finding EEOC's amicus position regarding the plaintiff's disability as immaterial to the decision regarding the motivating factors for the termination decision).

[32] *Daniel v. T&M Protection Resources, LLC*, 15-560-cv, 2017 WL 1476598 (2d Cir. Apr. 25, 2017); *Tate v. SCR Medical Transportation Inc.*, 809 F.3d 343 (7th Cir. 2015).

[33] *Anderson v. CRST International*, No. 15-55556, 2017 WL 1101101 (9th Cir. Mar. 24, 2017); *Connelly v. Lane Construction Corp.*, 809 F.3d 780 (3d Cir. 2016); *Stephenson v. Pfizer*, Inc., 641 Fed.Appx. 214 (4th Cir. 2016); *Guessous v. Fairview Property Investments*, 828 F.3d 208 (4th Cir. 2016); *Nesbitt v. FCNH*, 811 F.3d 371 (10th Cir. 2016); *Kilgore v. Trussville Development, LLC*, 646 Fed.Appx. 765 (11th Cir. 2016); *Savage v. Secure First Credit Union*, No. 15–12704, 2016 WL 2997171 (11th Cir. May 25, 2016); *Rosenfield v. GlobalTranz Enterprises*, 811 F.3d 282 (9th Cir. 2015).

[34] *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, 1351 (2016) (internal quotations omitted); see also 2 EEOC Compliance Manual § 626–I(A)(5), p. 626:0009 (July 2014)).

> In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated.[35]

More recently, the Seventh Circuit was unpersuaded by the EEOC's *amicus* arguments in *Carlson v. Christian Brothers Services* regarding what constitutes a "charge" of discrimination for the purpose of determining if a private litigant had exhausted administrative remedies. In *Carlson*, the plaintiff was terminated from her position as a customer service representative roughly a year after she had been injured in a car accident. She filed a complaint with the Illinois Department of Human Rights ("IDHR") alleging disability discrimination. The IDHR has a work-sharing agreement with the EEOC whereby charges filed with the IDHR are cross-filed with the Commission; however, the workshare agreement does not include non-charge complaints which are filed with the IDHR. When Carlson brought a private action under the ADA, her case was dismissed because she had failed to exhaust her administrative remedies by filing a charge with the EEOC.

The Supreme Court had previously weighed in on this issue by holding that in order to be deemed a charge, a filing "must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."[36] Despite this prior guidance, the EEOC's *amicus* filing took the position that filing an administrative complaint in this case was akin to filing a charge.[37] In rejecting the EEOC's position, the Seventh Circuit reasoned that in addition to Carlson's complaint form explicitly stating "THIS IS NOT A CHARGE," it also made no request for any remedial action and therefore could not be considered a "charge" in light of the Supreme Court's previous holding.

These decisions demonstrate that the EEOC is expending considerable resources in an *amicus* program that has not had a meaningful impact furthering its mission. Thus, EEOC should return to its role as a neutral enforcer of the law rather than remaining an activist litigant seeking to legislate through the courts.

III. THE EEOC'S EXPANSIVE ENFORCEMENT GUIDANCE

The Chamber is a long-standing supporter of reasonable and necessary steps designed to achieve the goal of equal employment opportunity for all -- including the EEOC's issuance of sub-regulatory enforcement guidance that "express[es] official agency policy and ... explain[s] how the laws and regulations apply to specific workplace situations"[38] *when that Guidance is*

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[35] *Id.*, at 1352.

[36] *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008).

[37] *Carlson v. Christian Brothers Services*, 840 F.3d 466, 468 (7th Cir. 2016).

[38] See https://www.eeoc.gov/laws/guidance/

enacted by notice-and-comment rulemaking, and represents the law, as passed by Congress and interpreted by the Courts, not the EEOC's expansive view of the law.

Such Guidance can protect employees from unlawful discrimination, harassment and retaliatory practices by providing accurate, specific direction to employers in complying with applicable laws that provide general protections to employees (through providing best practice examples regarding training, policy development, and ensuring best practices in employment decision making).[39] Guidance has the opportunity to serve as an effective ounce of prevention; far preferable than expensive, prolonged pounds of enforcement "litigation cure."

However, for EEOC Guidance to be accepted and embraced by stakeholders it must accurately and credibly reflect the current state of the law as well as the day-to-day realities of today's workplace. A solid grounding in the law and understanding of stakeholders' day-to-day issues in its application is essential for the EEOC to provide reliable guidance attuned to today's workforce.

Too often, over the past eight years, the EEOC has, instead, issued Guidance adopting substantive policy positions that create compliance requirements without the benefit of public comment.[40] In so doing the EEOC has acted contrary to the strong policy favoring pre-adoption notice and comment on guidance documents. OMB's "Final Bulletin for Agency Good Guidance Practices" counsels:

> 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.[41]

Over the past eight years, the EEOC has not consistently provided the public with an opportunity to comment on its enforcement guidance. For example, EEOC enforcement

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[39] For example, the Chamber has urged the EEOC to consider its filed comments with respect to the EEOC's recently-issued Proposed Harassment Enforcement Guidance so that valuable analysis, instructive checklists, and best practices recommendations contained in the Guidance are not overwhelmed by the three or four critical issues of legal misinterpretation contained in the EEOC's description of the guidance's legal underpinnings.

[40] While the EEOC does not have regulatory authority under Title VII, that does not preclude the Agency from seeking public comment to more fully understand the implications to stakeholders.

[41] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).

guidance related to the use of criminal convictions, pregnancy discrimination, credit background checks or other reasonable accommodation requirements under the ADA were not made available for public comment before their issuance.

To illustrate, in April 2012, the EEOC issued 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.[42]

The EEOC itself sends mixed signals regarding the efficacy of its guidance positions. For example, in the *Texas v. EEOC* litigation, the EEOC described its guidance documents as "lack[ing] the force of law."[43] Yet, only months later, the Solicitor General of the United States asked the Supreme Court not to grant a writ of certiorari in *Young v. United Parcel Service* because the EEOC was about to issue enforcement guidance on the issue (guidance that was then issued before the Supreme Court's decision, and expressly rejected by the Supreme Court).[44]

Note the inherent inconsistency in those positions. Employers are forced to comply with policy positions set forth in enforcement guidance documents,[45] while the EEOC argues in court

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[42] Another flaw in this particular EEOC 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, the EEOC provides no guidance on how 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.

[43] *See* EEOC's Memorandum in Support of Motion to Dismiss, No. 5:13-CV-255 C, 2014 WL 549190, at 8 (N.D. Tex. Jan. 27, 2014).

[44] 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.

[45] One intended audience for any EEOC enforcement guidance is 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 the EEOC's guidance document as compliance with a statute. During an

that those positions have no force of law in Texas, 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.

Most importantly, too often, over the past eight years, the EEOC has issued Guidance untethered to enabling legislation and applicable legal precedent resulting in confusion and inconsistency in understanding. When it has done so, it fails in its opportunity and obligation to provide clear, consistent, helpful direction to stakeholders to ensure compliance with equal employment opportunity laws.

As discussed earlier, in *Young*, the Supreme Court declined to rely on the EEOC's reasoning in its Pregnancy Discrimination Act Guidance, "not because of any agency lack of 'experience' or 'informed judgment.' Rather, the difficulties are those of timing, 'consistency,' and `thoroughness' of 'consideration.'"[46]

Additionally, in the Chamber's EEOC Enforcement Paper, the Chamber cited numerous examples of federal courts declining to defer to the EEOC's guidance documents. For example, in *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013), the Supreme Court rejected EEOC's Enforcement Guidance on Vicarious Employer Liability as "a proposed standard of remarkable ambiguity." Similarly, in *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) the Supreme Court again declined to defer to the EEOC's Enforcement Guidance on Recent Developments in Disparate Treatment Theory as it 'fail[ed] to address the specific provisions of this statutory scheme, coupled with the generic nature of its discussion of the causation standards for status-based discrimination and retaliation claims, calling the manual's conclusion into serious question".

Most recently, in early January 2017, the EEOC issued Proposed Enforcement Guidance on Unlawful Harassment Discrimination ("Harassment Enforcement Guidance").[47] The EEOC introduces the Harassment Enforcement Guidance by describing its contents as an explanation of

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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, investigators and EEOC attorneys have built large systemic cases on questionable theories that force employers to settle before or in the early stages of litigation, or face expensive, protracted litigation against an opponent with unmatched resources to litigate the legal issues advanced by the EEOC's guidance documents. Those enforcement guidance theories have been rejected in the three instances they have been reviewed by the United States Supreme Court since 2008 and in numerous Appellate Court decisions.

[46] The Court took particular notice of the fact that the EEOC attempted to change its guidance during the course of the litigation in order to influence the litigation. This represents a clear example of the EEOC attempting to use Guidance not for its intended purpose but rather to use it in a partisan manner to attempt to change the law.

[47] EEOC, Proposed Enforcement Guidance on Unlawful Harassment (Jan. 10, 2017), available at https://www.regulations.gov/document?D=EEOC-2016-0009-0001.

"the legal standards for unlawful harassment and employer liability. ... a single analysis for harassment that applies the same legal principles under all equal employment opportunity statutes embraced by the Commission."[48] It "replaces, updates, and consolidates" four EEOC guidance documents on harassment in the workplace issued between 1990 and 1999. The EEOC describes its contents as expressing the uniform interpretations of laws regarding many harassment issues, and the Commission's considered positions where the interpretations of the law differ across jurisdictions.[49]

To be clear, the Chamber generally supports the purpose of the Harassment Enforcement Guidance, the flexible checklists and best practices offered as suggestions for employers to consider in connection with their efforts to ensure their workplaces are free from unlawful harassment. It should be noted, however, that while the Chamber believes that harassment of individuals on the basis of the protected characteristics under law is a wholly impermissible and abhorrent practice, it is concerned that the EEOC may be using its function of issuing sub-regulatory guidance, which should state the law in a manner understandable to the stakeholders, as a means for changing the law. Congress was clear when it denied the EEOC authority to issue regulations under Title VII — and only recently permitted regulations to be issued under the Americans With Disabilities Act, 42 U.S.C. § 12101 (ADA) — that it expected the EEOC to confine itself to charge processing and case prosecution and that it cannot engage in wholesale regulatory interpretation to restate the law.[50] We urge the EEOC to maintain credibility with the courts and its stakeholders by issuing guidance tethered to settled law so as not to undermine its effectiveness.

The following are three examples of legal positions contained in the January 2017 EEOC's Proposed Harassment Enforcement Guidance which are not consistent with federal law. It is imperative that these be corrected to ensure that the Harassment Enforcement Guidance is accepted by stakeholders as guidance that in its entirety applies the legal standards applicable to unlawful harassment in the workplace.

First, the Harassment Enforcement Guidance's description of covered bases is not consistent with the law. This is a significant misstep, as the question of whether conduct at issue is based on a complainant's legally protected status is a prerequisite to establishing that the conduct violated federal equal employment laws. In its Harassment Enforcement Guidance, the EEOC incorrectly states that race-based harassment includes harassment based on race-linked traits, such as facial features or hair, that are not associated with the complainant's race, but with another race.[51] Under the Harassment Enforcement Guidance, a Caucasian employee who is teased for a race-based characteristic such as a temporary hairstyle that incorporates braids or cornrows, or who sports a dark tan after a vacation is a complainant who temporarily is covered

[48] Enforcement Guidance at p. 4.

[49] *See id.*

[50]

[51] *See* Enforcement Guidance at p. 5-6.

by Title VII's prohibition against harassment on the basis of race (African-American or Hispanic), even though the complainant is neither African-American nor Hispanic. This is not an accurate reflection of the law.

The Commission's expanded definition of a protected immutable characteristic to encompass instances in which an individual may show a similarity with a protected classification without the individual actually possessing that characteristic distorts the protections of the statutes entrusted to the Commission for enforcement. Title VII's unambiguous language protects an applicant and employee from discrimination with respect to his or her compensation, terms, conditions, or privileges of employment, because of **such** individual's race, color, religion, sex or national origin[52] (emph. added). Moreover, in the seminal decision of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Supreme Court held that Title VII required that a plaintiff alleging prohibited discrimination must establish membership in a protected classification.[53]

Second, the EEOC incorrectly states that national origin-based harassment includes harassment based on national origin-linked traits, such as diet or attire of a person who is not of the national origin of those traits. Numerous district courts have rejected Title VII claims based on allegations of a plaintiff's perceived national origin, where the plaintiff is not actually a member of the perceived group.[54] The Guidance cites no case that supports its position that a plaintiff with a race or national origin-based trait that is unrelated to his or her race or national origin states a cause of action for harassment based on the plaintiff's race or national origin-linked trait.

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[52] 42 U.S.C. § 2000e-2(a)(1) (2006).

[53] In support of its contrary position, the Harassment Enforcement Guidance cites one inapposite case at footnote 5, *Ellis v. Houston*, 742 F.3d 307, 314, 320-321 (8th Cir. 2014). In *Ellis*, plaintiffs were found to have suffered a broad pattern of harassment, that included offensive comments about African-American hair and hairstyles, but the plaintiffs' race was African-American. The Enforcement Guidance cites no case where a plaintiff was found by a court to state a cause of action for harassment based on a protected category-related trait that is temporary and voluntarily engaged in unrelated to the plaintiffs race or national origin (compare *Saliceti-Valdespino v. Wyndham Vacation Ownership*, 2013 WL 5947140 (D. P.R. Nov. 6, 2013) (court rejects plaintiff's claims based on allegations of harassment towards women and Blacks, two protected categories of which plaintiff was not a member). As a result, the only case the EEOC relies upon does not support the Enforcement Guidance's legal position.

[54] *Burrage v. FedEx Freight, Inc.*, No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012) (rejecting an African American's claims for harassment based on race or color where the harasser's commentary clearly suggested the misconception that plaintiff was Mexican, and finding that plaintiff was not a member of a protected class for those claims); *Lopez-Galvan v. Mens Wearhouse, Inc.*, No. 3:06cv537, 2008 U.S. Dist. LEXIS 53456 (W.D.N.C. July 10, 2008) (rejecting plaintiff's race based claims because he was perceived to be Black but was in fact Latino).

Title VII does not prohibit harassment against an individual based on their choice of cuisine (for example, Chinese, Sushi, German, Italian, Mexican) or clothes style (for example, Ukrainian peasant blouses, handcrafted beaded Native American jewelry, gold embroidered silk Chinese jackets, or Mexican straw sombreros) unrelated to their own protected status. If a Caucasian employee likes Chinese food, a colleague's comments, even if viewed as insensitive, is not harassment covered by Title VII. Put another way, Title VII does not prohibit harassment or discrimination based on a person's affinity for certain cultural aspects which are closely associated with a particular protected class.

Again, the cases cited by the EEOC simply do not support its position that national origin-based harassment includes harassment based on national origin-linked traits, if the complainant is not of the national origin associated with those traits.[55] The distinguishing feature of these cited cases is that all plaintiffs were of the national origin of the cuisine, clothes, or other characteristic that they were being mocked about. As a result, the cases do not stand for the proposition presented in the Harassment Enforcement Guidance -- that harassment on the basis of a race or national origin-linked trait that is voluntarily and/or temporarily associated with a person creates a cause of action for race or national origin harassment under Title VII.

Third, the EEOC's recently-proposed Harassment Enforcement Guidance also misrepresents Title VII's and the ADEA's causation requirements when it broadly states that federal employment discrimination statutes do not prohibit harassment unless it is based, *at least in part*, on a protected characteristic.[56] This test is not accurate under either Title VII or the ADEA. Under the ADEA, harassment is actionable only if it would not have occurred *but for* the person's age. Under Title VII, harassment is actionable if *a motivating factor* of the harassment is the person's protected status.

The Harassment Enforcement Guidance's "at least in part" formulation finds absolutely no basis in statute or decisional law and places a new standard, certainly less stringent than the "a motivating factor" standard, into the lexicon of employment discrimination law without any basis or explanation. Certainly, guidance which purports to describe the current status of the law is not the proper vehicle to introduce new standards, particularly in such an important area as harassment law.

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[55] *Compare* Harassment Enforcement Guidance, fn. 7 *with Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 800 (8th Cir. 2003)(holding "[t]o support this claim for hostile environment harassment by non-supervisory co-workers, Ms. Diaz had to show that she was a member of a protected group"); *Gonzales v. Eagle Leasing Co.*, No. 3:13-CV-1565(JCH), 2015 WL 4886489, at *5 (D. Conn. Aug. 14, 2015)(noting that "a plaintiff must establish 'that she was subjected to the hostility because of her membership in a protected class'"); *Syed v. YWCA of Hanover*, 906 F. Supp.2d 345, 355 (M.D. Pa. 2012)(holding that "[t]o establish the existence of an actionable hostile work environment claim under Title VII, a plaintiff must prove: (1) that she suffered intentional discrimination because of her membership in a protected class.").

[56] *See* Harassment Enforcement Guidance, at 11.

Congress specifically addressed the treatment of causation in the 1991 amendments to Title VII. In Section 107 of that Act, Congress added a new section addressing the standards to be followed in determining causation. 42 U.S.C. § 2000e-2(m) provides:

"Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was ***a motivating factor*** *for any employment practice, even though other factors also motivated the practice."*

This amendment served to clarify some confusion following the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). It made clear that a challenged practice had to amount to at least a motivating factor for the challenged employment decision or practice to be attacked.[57] A motivating factor is by now a well-established standard in employment discrimination law.

The Supreme Court also addressed the question as to what was the appropriate standard of causation to be applied under the ADEA. In *Gross v. FBL Financial Services, Inc.*, the Court observed that the standards of proof in ADEA cases were statutorily different than in Title VII cases and perhaps most importantly, the Congress did not apply its new causation definition established by 2000e-2(m) to the ADEA.[58] Thus, it is clear beyond any doubt that the ADEA requires a plaintiff to show that age was the but for factor in determining whether the ADEA was violated, either directly or in the form of harassment based upon age. As such, it would be inappropriate to apply the "at least in part" standard to harassment cases falling under the ADEA. Here again, the EEOC oversteps its charge to fairly interpret the laws entrusted to it and instead is seeking to change the law. The differing standard for harassment on the basis of one's age under the ADEA is not recognized by its most recently proposed Harassment Guidance.

As a result of the above flaws, while the EEOC's recently-proposed Harassment Enforcement Guidance contains useful suggestions as to how employers may address harassment and establish protocols and procedures to create effective means of communication, the guidance also attempted to restate the law and create examples of behavior which the EEOC labeled as illegal harassment but which well decided case law had found not to be prohibited. It serves no purpose for the EEOC to rewrite law in the form of guidance or to attempt to achieve in guidance what it was unable to be successful with in litigation.

And, as described above, there are numerous instances of appellate courts' rejection of EEOC guidance over the past eight years. These rejections leave employers 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. An individual expects that the EEOC is providing reliable guidance outlining their rights under the statutes within its jurisdiction. Employers look to the EEOC for thought-based, reasonable guidance to assist their compliance efforts. However, when the EEOC's enforcement guidance strays from the statutory intent and is ultimately struck down

[57] *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

[58] *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176-77 (2009).

by the Supreme Court or a Circuit Court of Appeals, the EEOC has failed all of its stakeholders and its congressional mandate.

IV. THE REVISED EEO-1 IMPOSES ONEROUS REQUIREMENTS ON EMPLOYERS THAT WILL SERVE NO PUBLIC BENEFIT

Another example of the EEOC's misguided focus as an Agency can be found in the changes it implemented to the EEO-1, Employer Information Report, in 2016 (described as Component 2), to collect pay and hours worked information from employers on an annual basis.[59] The EEOC referred to the revisions as "necessary" for the enforcement of Title VII, the EPA and Executive Order 11246.[60] Acting Chair Lipnic and then Commissioner Constance Barker both dissented from the Commission's vote to approve the changes to the EEO-1 Report.

As it currently stands, beginning in 2018, employers will be required to submit W-2 wages and hours worked information in a complicated format that combines race/ethnicity and sex, and organizes the data in 12 arbitrary pay bands within 10 EEO-1 job categories. To provide some context as to the scope of the changes, the current EEO-1 report requires employers to submit 180 data points, while the new report will require 3,660 data points for each employer establishment (i.e., locations with more than 50 employees).

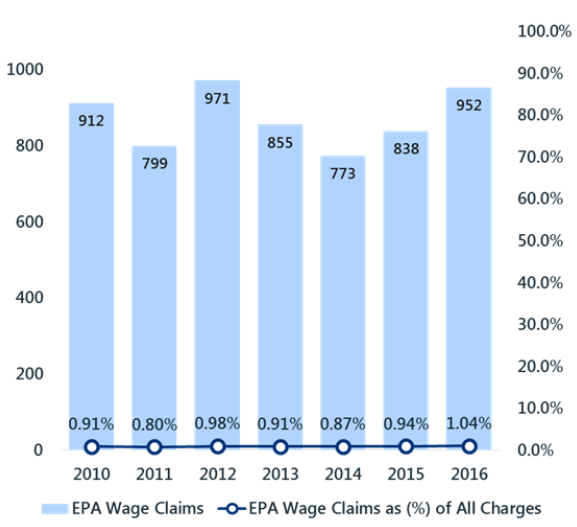
The EEOC justified its burdensome requirements by pointing to research and studies rather than closely examining the information that was specifically within its purview -- the charges filed by those individuals who raised specific allegations of pay discrimination. For instance, of the 91,500 charges filed with the EEOC in 2016, only 952 -- or 1.04% -- contained EPA allegations. Historically, from 2010 through 2016 less than 1% of all charges filed included an equal pay claim under the EPA.

Likewise, an analysis of Title VII charges that allege *any* kind of wage claim, whether because of alleged disparities in pay or, for example, failure to promote allegations from which pay disparities flow, is also unremarkable when evaluated against the burdensome requirements that the EEOC is imposing on most employers. The following chart demonstrates the year over year trends in pay related claims, even applying the broadest characterization of "pay" claims as reported by the EEOC.

Figure 4. Charge Receipts with Wage Claims under Equal Pay Act and Title VII by Year, 2010 - 2016
Source: EEOC Enforcement & Litigation Statistics

[59] 81 Fed. Reg. 5113 (February 1, 2016); 81 Fed. Reg. 45479 (July 14, 2016).

[60] 81 Fed. Reg. 45479, 45481 (July 14, 2016).


1000
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400
200
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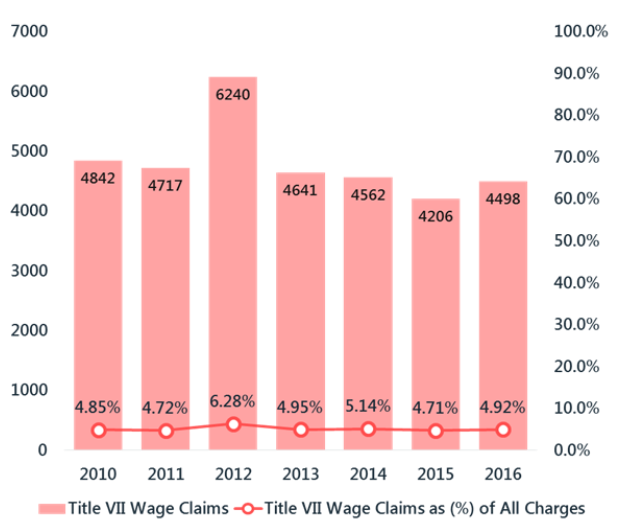
90.0%
80.0%
70.0%
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
912
799
971
855
773
838
952
0.91%
0.80%
0.98%
0.91%
0.87%
0.94%
1.04%
2010
2011
2012
2013
2014
2015
2016
EPA Wage Claims
EPA Wage Claims as (%) of All Charges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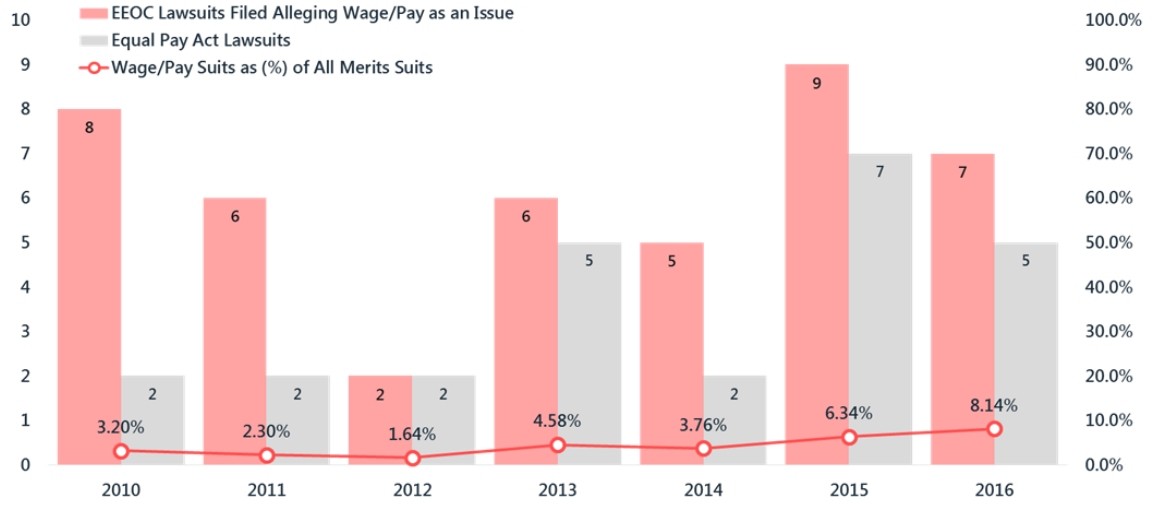
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
4842
4717
6240
4641
4562
4206
4498
4.85%
4.72%
6.28%
4.95%
5.14%
4.71%
4.92%
2010
2011
2012
2013
2014
2015
2016
Title VII Wage Claims
Title VII Wage Claims as (%) of All Charges

Figure 5. EEOC Lawsuits with Wage and Pay Discrimination Allegations, 2010 - 2016
Source: EEOC Enforcement & Litigation Statistics



Indeed, the EEOC's litigation trend and results with regard to EPA claims highlights the Agency's misguided efforts. Specifically, from 2010 to 2016, the Agency has pursued a total of only 25 EPA lawsuits in all years consecutively. And from 2010 to 2017, the Agency has recovered a total of only $700,000 in EPA lawsuits.

While the EEOC's recoveries are critically important for those individuals with specific pay claims, the small number of equal pay charges and EEOC-initiated pay litigation (coupled with low reported recoveries) are unremarkable when compared to the scope of the Agency's statutory mandate to address federal employment discrimination laws. Indeed, this objective data demonstrates that the EEOC is applying an overly broad approach that will serve no public benefit in requiring pay and hours data from employers across the country on an annual basis. A point which is underscored by the Agency's own admission: "The EEOC does not intend or expect that this data will identify specific similarly situated comparators or that it will establish pay discrimination as a legal matter."[61]

In response to the EEOC's proposal submitted under the Paperwork Reduction Act ("PRA"), the Chamber submitted extensive testimony which included detailed information from the employer community regarding the EEOC's flawed burden estimates and expert testimony that described the significant deficiencies with the EEO-1 report for purposes of evaluating whether pay discrimination exists in the workplace.

As set forth in the Chamber's submission to the EEOC, the new reporting requirements are inconsistent with the mandates of the PRA.[62] Specifically, the PRA requires an issuing

[61] 81 Fed. Reg. 45479, 45489 (July 13, 2016).

[62] *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990) (recognizing that the PRA was enacted in response to the federal government's "insatiable appetite for data.").

agency to: (1) minimize the burden on those required to comply with government requests; (2) maximize the utility of the information being sought; and (3) ensure that the information provided is subject to appropriate confidentiality and privacy productions.

The PRA does not create a burden versus benefit analysis, but rather creates an obligation that data collection requests be reviewed in light of their burdens and separately in light of their purported benefits. If the burden associated with a request is too great, no amount of benefit can justify it; similarly, if there is no utility to the data being collected, OMB should not authorize the request no matter how minimal the associated burden. EEOC failed to satisfy the PRA's requirements. For this reason, the Chamber submitted a request for review of the EEOCs' Revised EEO-1 report to the OMB earlier this year.

A. The Revised EEO-1 Report Imposes Undue Burdens on Employers With No Benefit

The burden estimates the EEOC submitted in connection with the new requirements of the EEO-1 report (1) underestimated the burdens of compiling, analyzing, and reporting the W-2 information; and (2) drastically underestimated the burdens of compiling, analyzing and reporting the hours information required by the new EEO-1 proposal. The EEOC calculated a one-time estimate for compliance at $27,184,381.28 based on its estimate that it will take 8 hours per filer at a wage rate of $55.81 for "developing queries related to Component 2 in an existing HRIS."[63] The revised proposal calculated the annual burden for compliance at **$53.5 million** based on its estimate that it will take filers 1,892,978 hours to file Components 1 and 2 of the EEO-1 report each year.

Throughout the revision process, the EEOC continually shifted its burden analysis demonstrating the lack of rigor that went into its initial projects. Despite specific survey information submitted by the Chamber from over 50 companies, who together file approximately 20,000 EEO-1 reports on an annual basis, the EEOC refused to base its burden analysis on anything other than speculation and failed to provide any explanation of how it arrived at the hours or wage estimates. Indeed, contrary to the EEOC's burden estimate of **$53.5 million** the Chamber's survey feedback estimated that employers would actually spend 8,056,045 hours complying with the reporting requirements at a cost of **$400.8 million.**

Indeed, the EEOC failed to adequately estimate the costs associated with capturing "hours-worked" data for employees -- a process that will require employers to exclude reporting on many of the hours components employees routinely receive such as vacation, sick pay, leave time, jury duty and other forms of paid-time-off. And while employers track hours data for non-exempt employees, the vast majority have no such system in place to capture the hours worked for salaried employees.

The Agency's burden estimates also demonstrated a gross misunderstanding of how employer human resource information systems function. Most employers do not maintain gender, race/ethnicity, payroll and hours worked information in one system. Retrieving this data

[63] 81 Fed. Reg. 45479, 45497 (July 13, 2016).

from the various separate databases will require developing queries for each system which maintains the required data -- a process that will take much more than the one-time estimated implementation costs.

The Agency's annual burden estimate of 31.09 hours per filer demonstrates a similarly tenuous relationship with reality. Despite its discussion of developing queries as a one-time burden, the fact is that queries will need to be reviewed each year to account for factors that may not be accounted for in the original queries such as new job codes or payroll codes and may need to be completely re-written in the event of system upgrades to any one of the many systems that houses the information necessary to prepare the EEO-1 report.

Furthermore, even the most sophisticated data queries will not return information in a format that is ready to be uploaded to the EEO-1 reporting system. Each year, companies will be required to collect, verify, validate and report information that must be collected from multiple human resource information systems. This will be a collaborative process involving much higher level employees than the administrative support personnel that the EEOC has estimated will be performing the majority of the work. HRIS (Human Resource Information Systems) professionals, HR professionals, legal professionals, and company leadership will all be involved in various parts of the process. Simply put, the EEOC failed to accurately evaluate the actual burden of the new EEO-1 report.

B. The Revised EEO-1 Report Serves No Benefit

Despite the excessive burden imposed on employers, the EEOC failed to articulate a clear benefit associated with its proposed data collection. Further, the Sage Report which the EEOC used to inform its proposal, recognized that "[s]ummary data at the organization level will likely be of very limited use in EEOC practice."[64] Despite this recognition, the EEOC pressed on with a one-size fits all solution for purposes of gathering pay and hours data. In this regard, the EEOC failed the PRA requirement to maximize the benefit to be derived from the new requirements imposed on employers.

Specifically, there is no utility in this data because the new EEO-1 form categorizes employees in broad occupational groups that inevitably results in comparison of employees in very different jobs, performing very different tasks, with very different skills. Such aggregate groupings are not permitted under the law.

For instance, the EPA requires that men and women at the same establishment be allotted equal pay for equal work. In addition to that requirement, Title VII prohibits employers from discriminating in pay on account of race, color, national origin, and a host of other protected characteristics. While prohibiting discrimination, both of these laws recognize that there may be

[64]" Sage Computing Final Report: To Conduct a Pilot Study for How Compensation Earning Data Could Be Collected from Employers on EEO's Survey Collection Systems (EEO-1, EEO-4, EEO-5 Survey Reports) and Develop Burden Cost Estimates for Both EEOC and Respondents for Each of EEOC Surveys (EEO-1, EEO-4, and EEO-5), p. 57 (Sept. 2015).

legitimate reasons for differences in pay. The EEOC Compliance Manual recognizes a variety of factors that can legitimately explain compensation differences.[65]

As noted, the EPA prohibits employers from discriminating in compensation between employees working at the same establishment who perform "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions"[66] based on sex. Any data that will be gathered under the revised EEO-1 will be useless for evaluating compensation under this standard. The EEO-1 report will provide the W-2 wage data within 10 broadly drawn EEO-1 job categories. These categories contain employees who work in jobs that are drastically different and will not allow for meaningful comparisons of employee compensation.

One example of the type of inappropriate comparisons that might be made under the EEO-1 data is a comparison of data entered by a hospital within the "Professionals" job category. This job category contains registered nurses, lawyers, accountants, computer programmers, dieticians, physicians and surgeons. These jobs do not involve similar skills or certifications nor do they require the employee to perform similar tasks, yet they are all reported within the same job category. The EEOC's Compliance Manual recognizes that a comparison of such jobs is inappropriate under the EPA:

> [A]n inquiry should first be made as to whether the jobs have the same common core of tasks, i.e., whether a significant portion of the tasks performed is the same. If the common core of tasks is not substantially the same, no further examination is needed and no cause can be found on the EPA violation.[67]

By its own admission, the data that it purports to collect should not be used to evaluate compensation discrimination under the EPA.

The data is similarly useless for evaluating compensation discrimination under Title VII's "similarly situated" employees standard.[68] As discussed above, the EEO-1 job categories are so

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[65] *See* EEOC Compl. Man. Ch. 10.

[66] 29 U.S.C. § 206(d).

[67] EEOC Comp. Man. Ch. 10, at p. 22, available at www.eeoc.gov/policy/docs/compensation.html, citing *Stanley v. University of S. Cal.*, 178 F.3d 1069, 1074 (9th Cir.) (EPA requires two-step analysis: first, the jobs must have a common core of tasks; second, court must determine whether any additional tasks incumbent on one of the jobs make the two jobs substantially different), cert. denied, 120 S. Ct. 533 (1999); *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998) (critical issue in determining whether two jobs are equal under the EPA is whether the two jobs involve a "common core of tasks" or whether "a significant portion of the two jobs is identical"); *Brewster v. Barnes*, 788 F.2d 985, 991 (4th Cir. 1986) (same).

[68] The EEOC Compliance Manual states that, "similarly situated employees are those who would be expected to receive the same compensation because of the similarity of their jobs and other

broad that they are not appropriate for conducting a meaningful comparison under Title VII. Using the same example of hospital professionals, it is implausible that a surgeon and an accountant either would be paid the same or that the content of those jobs would create the expectation that those jobs would be paid the same. Guidance by courts across the country suggests a similar skepticism of considering jobs comparable because they fall within the same EEO-1 category.[69] Finally, the EEOC's Compliance Manual states that "differences in job titles, departments, or other organizational units may reflect meaningful differences in job content or other factors that preclude direct pay comparisons between employees,"[70] however, neither these nor any other non-discriminatory factors which might explain a compensation disparity are captured under the proposed EEO-1 revisions.

Employer compensation systems are all unique and there are myriad factors that impact compensation decisions and outcomes. Such systems cannot be normalized to conform to a one-size-fits all comparison. Employers are entitled to value jobs differently based on a wide-range of non-discriminatory factors; however, the EEOC ignored this reality.

Furthermore, even if two jobs are similar enough to allow appropriate comparison, employee choice may be the root cause of a pay difference between two employees. One employee may choose to work night shifts or weekends while another employee chooses to work a normal weekday schedule. The EEO-1 data would simply see two employees who worked the same number of hours, but who made different amounts despite the fact that the disparity is easily explained. This failure to account for differences that might arise because of employee choice is compounded by the use of W-2 wages, which includes "performance pay" such as commissions and overtime which are more a reflection of employee skill than of employer compensation decisions.

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objective factors" and that for jobs to be deemed similar the "actual content of the jobs must be similar enough that one would expect those who hold the jobs to be paid at the same rate or level." EEOC Comp. Man. Ch. 10, at p. 6-7, available at www.eeoc.gov/policy/docs/compensation.html.

[69] *Eskridge v. Chicago Bd. of Educ*., 47 F. Supp. 3d 781, 790-91 (N.D. Ill. 2014). Although a similarly situated employee need not be "identical," *Caskey v. Colgate–Palmolive Co*., 535 F.3d 585, 592 (7th Cir.2008), he must be "directly comparable to the plaintiff in all material respects...." citing *Naik v. Boehringer Ingelheim Pharm., Inc*., 627 F.3d 596, 600 (7th Cir.2010); *Lopez v. Kempthorne*, 684 F.Supp.2d 827, 856-57 (S.D.Tex. 2010) ("'Similarly situated' employees are employees who are treated more favorably in 'nearly identical' circumstances; the Fifth Circuit defines 'similarly situated' narrowly. Similarly situated individuals must be 'nearly identical' and must fall outside the plaintiff's protective class. Where different decision makers or supervisors are involved, their decisions are rarely 'similarly situated' in relevant ways for establishing a prima facie case."); *Alexander v. Ohio State University College of Social Work*, 697 F.Supp.2d 831, 846-47 (S.D. Ohio 2012) (To be similarly situated, a plaintiff's purported comparators must have the same responsibilities and occupy the same level position).

[70] EEOC Comp. Man. Ch. 10, at p. 8, available at www.eeoc.gov/policy/docs/compensation.html.

Collecting "hours worked" further degrades the usefulness of the data. The EEOC's proposal invites employers to report "hours worked" by exempt employees by using either proxy values of 40 hours per week for full-time employees and 20 hours per week for part-time employees or to report the actual hours worked if the employer currently tracks that information. As discussed above, the majority of employers do not currently track such information, nor is the cost associated with starting to track such information considered in the EEOC's burden estimate and therefore employers are likely to use the proxy variables which may not accurately reflect the hours the employee actually works.

Also, using "hours worked" a term that expressly excludes hours spent on vacation, sick time, jury duty or similar hours, will result in a disconnect between the hours attributed to an employee and the employee's W-2 wages. This disconnect would lead to a difference in rate of pay between employees and may lead the EEOC to incorrectly infer that the company is discriminating when in fact any disparity would be owing to a benign and neutral factor.

In addition to the problems inherent in the data that the EEOC proposes to collect, its proposed statistical approach will also be unhelpful in identifying discrimination. The EEOC has proposed analyzing the collected data under the Mann-Whitney and the Kruskal-Wallis tests.[71]

However, these types of analyses could easily lead to both false positives--flagging a company for closer review where all employees working the same job are paid equally--and false negatives--determining that pay disparities do not exist even if unambiguous compensation discrimination is occurring. Such results are possible because the aggregated data collected will not include the factors necessary to evaluate compensation.

In addition to testing a company's data internally, the EEOC's proposal also suggests that the Agency may "examine how the employer compares to similar employers in its labor market by using a statistical test to compare the distribution of women's pay in the respondent's EEO–1 report to the distribution of women's pay among the respondent's competitors in the same labor market."[72] There is no statutory requirement that a company pay its employees in accordance with industry or geographic trends. Just as employers cannot defend themselves against claims of discrimination by claiming that such inequity is occurring throughout its industry or labor market, employers cannot be charged with discrimination because they pay less than their competitors.

C. The Revised EEO-1 Report Fails to Ensure Confidentiality

The EEOC will be collecting highly sensitive personal data regarding compensation at thousands of U.S. companies in a format which will not serve any of its statutory purposes but which will certainly be of great use to any hacker who is interested in the compensation practices of employers.

[71] 81 Fed. Reg. 5118, fn. 47 (February 1, 2016).

[72] *Id.,* at 45490.

In the hands of the wrong people, the original pay data from the EEO-1 report could cause significant harm to EEO-1 responders and subject employees to potential violation of their privacy. By letter dated September 23, 2016 the Chamber called to the attention of former Administrator Shelanski the GAO report of September 19, 2016 which criticized the government's response to cyberattacks, and noted that "[c]yber incidents affecting federal agencies have continued to grow, increasing about 1,300 percent from fiscal year 2006 to fiscal year 2015."[73] Unfortunately, although it is statutorily required to do so, the EEOC has failed to set forth appropriate steps or protocols to ensure the privacy and confidentiality of EEO-1 data.

In addition, the EEOC has failed to address the problem that it disseminates information collected under the current EEO-1 to other federal agencies, state and local agencies and even private researchers without the protection required of this data by Section 709(d)(e) of Title VII. It has completely ignored the additional risk of disclosure of the significantly more sensitive information to be generated by the revised EEO-1 report.

CONCLUSION

The EEOC has been granted a critical function in the oversight of employment decisions and the enforcement of the federal employment anti-discrimination laws so vital to our workplace. Indeed those laws represent at the highest level the recognition of our diverse and dynamic economy. While the EEOC has secured certain positive outcomes, the Agency's failure to conduct its responsibilities in a manner consistent with the purpose of its statutes has led to mission critical failures which should not be accepted.

[73] GAO 16-885-T: "Federal Information Security: Actions Needed to Address Challenges" (September 19, 2016), available at http://www.gao.gov/assets/680/679877.pdf .