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STATEMENT

OF

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

HEARING

ON

**STRATEGIC ENFORCEMENT PLAN
TO COMBAT WORKFORCE DISCRIMINATION**

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Congress has charged the Commission with broad and critical authority to enforce this Nation's equal employment laws. The current challenges facing the Commission in enforcing this authority, however, have never been greater. With the recent enactment of the Amendments to the Americans with Disabilities Act and the Genetic Information Non-Discrimination Act, the Commission's already expansive enforcement responsibility has yet again been enlarged. At the same time, the number of charges the Commission receives annually has swelled to about 100,000, more than it has received in recent memory, if ever. Yet, this austere fiscal climate precludes any commensurate growth in the Commission's budget, forcing it to do more with less. The Commission's approach to enforcement, therefore, must ensure it discharges the full range of responsibilities conferred on it by statute while deploying its overly-committed resources available for enforcement in strategic ways.

I. NEW APPROACHES TO CHARGE INVESTIGATION MUST BE EXPLORED

The Commission serves several important goals in processing charges which, to some extent, compete with each other. First, the Commission is required to investigate charges fairly and to the extent necessary to determine whether there is reasonable cause to believe discrimination exists and to do so wherever possible within 180 days. Second, where cause exists, the results of the investigation must be sufficient to permit the parties to engage in an informed conciliation process. Third, the investigations must provide the Commission information about the strengths and weaknesses of the charges sufficient to permit an informed judgment whether it should prosecute the charge on behalf of the United States.

The resources available to investigate charges are insufficient to reach all of these goals, making it necessary to set priorities that best serve the mission of the Agency. While all persons who file a timely charge within the Commission's jurisdiction have a right to have their charges investigated, not all investigations warrant the same commitment of resources. Based on early results of some investigations, it's highly unlikely that those charges will result in cause findings. Because of the subject of other charges or the evidence of the practice challenged or number of people aggrieved by it, there is a likelihood the charge falls within a Commission priority area or that it may raise a pattern or practice claim. Still other investigations may necessarily involve multiple witnesses or examination of workforce data, requiring a more protracted and advanced analysis. The Commission's protocol for investigations should account for these kinds of variation in the sophistication, complexity and amount of resources that each warrants.

Accordingly, the Commission's strategic enforcement plan should provide for variations in the way investigations are conducted that depend on the likelihood cause exists and whether other priorities of the Commission may be served by the charge under investigation. At the same time, new metrics must be developed that will measure and guide investigator performance which reflect these nuances and do not turn solely upon the number of charges closed.

Variations in the protocol prescribed for investigations that depend on the chances of cause existing and whether other Agency priorities are served by particular charges will help ensure the Commission has resources sufficient to dedicate to charges likely to serve its mission while affording other charging parties investigations appropriate to the likely merit and public significance of their charges. These variations in the investigation

protocol can take the form of a decision tree in which each juncture sets forth criteria for proceeding along different investigative paths, each of which is associated with different sets of queries each of which requires differing amounts of resources. Individual charges that offer no comparative or direct evidence or other, similar kinds of evidence, for example, may lead to no-cause findings at any early stage. In contrast, charges presenting issues of high priority to the Commission or which contest practices susceptible to a disparate impact analysis could warrant further investigation, commitment of additional resources and consultation with attorneys. In addition, checklists with lines of inquiry typically associated with particular types of claims could be used to ensure greater consistency in the approach to investigations. Some Fair Employment Practice Agencies have employed these decision trees and checklists in the past, offering some models for consideration.

In recognition that all investigations are not alike, as they vary by legal and factual complexity, the likelihood that cause exists, whether novel issues exist and other such factors, the metric for evaluating and guiding investigator performance should likewise recognize such variations. The volume of charges closed, while a legitimate factor, should not be the sole or primary basis for evaluating or guiding investigator performance. Other factors that should be considered include, whether the investigator correctly applied the applicable legal principles, whether the investigator collected and evaluated the evidence relevant to the claims presented, whether the investigator explored the potential for a systemic claim and, if the evidence warranted it, was such a claim developed and other factors such as the complexity of the charge, the number of

witnesses interviewed, documents reviewed and whether workforce data was collected and analyzed.

As the assessment of many of these factors will require examination of the investigation files, reviews will have to be conducted of the investigations themselves rather than simply of the results. Reviews might be conducted of a sample of investigations for each investigator, rather than of each investigation, to ensure this process is manageable. The Strategic Plan proposal to have such reviews conducted by peers may be sound, as it ensures an appreciation of the conditions and challenges facing investigators will inform the assessments. But, the Commission must be alert that the reviews, if they're conducted by peers, faithfully and fully apply the standards for assessment that the Commission intends.

II. LITIGATION SHOULD BE FOCUSED NARROWLY ON THE COMMISSION'S HIGHEST PRIORITIES

The current judicial climate and the limited resources available to bring and sustain litigation make it especially critical that the litigation program focus on the Commission's highest priorities.

Litigation choices should be responsive both to the Commission's national priorities and to the priorities of the community in which each regional office is located. The delegation of most litigation decision-making to the field continues to serve the Commission well, as it can be responsive to the barriers and needs of each community. And the litigation decisions can be made at the locales where most of the investigations are undertaken, making coordination between investigation results and litigation choices possible.

At the same time, the Commission is a national agency with national priorities that also must be served. In general, the Commission should focus its litigation on industries where patterns from data collected by the Agency and census information suggest the existence of barriers operating adverse to protected groups. While some litigation on behalf of individuals may be warranted where it addresses important policy priorities, most of the Commission's scarce litigation resources should be dedicated to addressing systemic discrimination. Building upon the Systemic Initiative adopted in 2006, systemic investigations and litigation permits the Commission to marshal its limited resources to highlight the existence of, and challenge and redress discrimination caused by, employment practices that have adversely affected groups of workers. Systemic litigation has grown even more expensive to the Commission, as the courts have adopted heightened requirements for proving liability and awarding relief to groups of employees and defenses mounted to systemic litigation have become more aggressive. Nonetheless, economies are still better served by the pursuit of systemic litigation, as it offers the promise of providing broad relief and achieving reforms to discriminatory practices, than by the routine litigation of individual claims.

Even within its broad array of potential targets for systemic litigation, the Commission should focus its limited resources, wherever possible, on new and developing areas of discrimination and on subjects that complement private enforcement efforts. Such areas should include: 1) hiring discrimination, which is generally hard to detect and which EEO-1 data and pursuit of civil rights testing may permit the Commission to target narrowly its investigations and possible systemic litigation; 2) whether telecommuting has had an adverse effect on access to mentors and

advancement for protected groups; 3) whether use of employment tests to screen candidates for hire and promotion has had an adverse effect on protected groups; and 4) whether use of prior criminal histories and credit scores have had an adverse effect on protected groups.

III. BETTER COORDINATION OF ACTIVITIES ACROSS THE COMMISSION WOULD REDUCE DUPLICATION AND IMPROVE CONSISTENCY IN STANDARDS AND OPERATIONS

While delegation of authority to the field to oversee investigations and make most litigation decisions remains an important feature of the Commission's decentralized structure, better coordination of the investigation and litigation operations should be developed. It is ultimately the responsibility of the Commission, through its Commissioners and General Counsel, to set priorities for deployment of the field resources and common standards and procedures for field operations. Too often we hear reports from charging parties and counsel that the standards applied to investigations vary by the office in which they occur and that approaches to pending litigation likewise vary considerably. While field operations cannot proceed in rigid lockstep in such a decentralized environment, more regular oversight of investigations and litigation by the Commission could improve the consistency with which critical decisions are made on behalf of the Agency.

CONCLUSION

In conclusion, for the foreseeable future, the Commission will need to fulfill its noble and expansive mission with resources inadequate to achieve most of the goals. The Commission's enforcement program, therefore, must make hard choices about how to deploy its scarce resources. New protocols should be developed that permit

investigations to be more closely tailored to the particular needs posed by each charge and the Commission's priorities. Likewise, litigation choices must focus on the Commission's priority areas and upon systemic litigation that can deliver relief to multiple employees and secure lasting changes to discriminatory employment practices. Better coordination and consistency between the investigations and approaches to litigation in the field would also ensure common methods and standards are applied throughout this national enforcement agency.