STATEMENT OF

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Introduction

Chairman Byrne, Ranking Member Takano, and Members of the Subcommittee, thank you for inviting me to testify today regarding the challenges and potential opportunities facing the U.S. Equal Employment Opportunity Commission (EEOC) as it advances its mission to prevent and eliminate workplace discrimination. I appear here today as Vice President and General Counsel of the Equal Employment Advisory Council (EEAC).

EEAC is a nationwide association of employers whose mission since 1976 has been to promote sound approaches to promoting equal employment opportunity and compliance with nondiscrimination and other workplace rules. Its membership comprises over 250 major U.S. corporations, and its directors and officers include many of the nation's leading experts in human resources and equal employment opportunity compliance. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity, and thus fully support the EEOC's mission to investigate and correct discriminatory employment practices.

All of EEAC's members are employers subject to the laws enforced by the EEOC. As potential respondents to EEOC discrimination charges, EEAC member companies have a strong interest in ensuring that the agency's enforcement priorities are consistent with its statutory authority and are pursued in a fair, competent, and effective manner. To that end, EEAC regularly has testified before, and provided written comments to, the EEOC on a range of regulatory, policy, and administrative matters. These include, but are not limited to, the agency's development and implementation of its pivotal National Enforcement Plan (NEP) and Priority Charge Handling Procedures (PCHP); the efficacy of EEOC mediation; reorganization of agency operations; development and implementation of its Strategic Enforcement Plan (SEP); and the burdens and utility of various proposed and implemented data collection tools, including the EEO-1 report.

Recent Emphasis on Systemic Enforcement Has Detracted from EEOC's Core Mission

The EEOC's core mission is, and always has been, to prevent and correct discriminatory employment practices. It does so by conducting proper charge investigations and by attempting to correct alleged violations through informal means of "conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). Although the EEOC has many meaningful tools at its disposal to effectively investigate and resolve workplace discrimination – including a dedicated and hard-working staff of enforcement and policy professionals – regrettably the agency has fallen short of the mark in a few critical areas.

In particular, we believe that the EEOC's past commitment to redressing workplace discrimination through meaningful technical assistance and stakeholder education, top-notch customer service, and quality charge investigation and conciliation has been severely undermined by its strong emphasis in recent years on developing and prosecuting class-based, systemic litigation. In addition, while we appreciate that the EEOC is statutorily authorized to commence litigation where warranted and in the public interest, EEAC member companies are deeply concerned with ensuring that such litigation, when it does occur, is prosecuted competently, responsibly, and fairly.

Moreover, although the EEOC may litigate strategically in the public interest, voluntary resolution of discrimination claims remains "the preferred means for achieving the goal of equality of employment opportunities." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (internal quotation omitted). As described below, the agency's self-imposed pressure to "fish" for large, class-based claims has undermined the quality and effectiveness of its overall enforcement efforts and has detracted from ensuring that litigation remains an option of last resort.

By way of background, in early 2005, the EEOC appointed an internal Systemic Discrimination Task Force and charged the group both with evaluating the effectiveness of the agency's existing systemic program and coming up with recommended changes. The result was a 65-page report which recommended a number of significant changes designed to improve the agency's systemic investigations and litigation efforts, including a much more strategic and coordinated approach to identifying and developing systemic cases. The report also called on the EEOC field staff to more aggressively develop systemic discrimination charges and lawsuits, noting that the EEOC field offices had been reluctant to pursue systemic discrimination in the past because of the significant time and resources those cases require.

The emphasis on systemic enforcement was further endorsed in the EEOC's 2013-2016 Strategic Plan and its accompanying Strategic Enforcement Plan (SEP).[1] The initial SEP for Fiscal Years 2012-2016 was approved in December 2012. The SEP for Fiscal Years 2017-2021 was finalized in October 2016. Under the SEP, the EEOC has continued to direct substantial staff time and resources to investigating and prosecuting alleged systemic discrimination claims. The agency's current Strategic Plan goes so far as to require its district offices to achieve numerical quotas as to the minimum number of systemic cases on their litigation dockets. *See* Strategic Plan for Fiscal Years 2012 through 2016 (as modified on February 2, 2015), PERFORMANCE MEASURE 4 ("By FY 2018, 22-24% of the cases on the agency's active litigation docket are systemic cases").[2]

Inherent in the EEOC's systemic enforcement strategy is the assumption that widespread workplace discrimination is present in every district and region – and at every company – across the country. Thus, even where no individual has brought such discrimination to the EEOC's attention by filing a charge, it seems the agency feels it must go out and find it by whatever means necessary. Indeed, the agency has been roundly criticized by stakeholders and the courts alike for focusing more on conducting "fishing expeditions" in search of unasserted violations than on addressing and resolving meritorious, asserted claims. We question whether this approach is an appropriate use of the EEOC's limited resources or, more fundamentally, is consistent with Congressional intent in enacting Title VII.

Rather than focusing on increasing its systemic litigation docket, the EEOC should do more on the front end to ensure that all discrimination charges it receives are properly categorized, investigated, and resolved. We believe that the key to accomplishing the EEOC's statutory mission lies in ensuring that it maximizes investigative resources to more effectively address and resolve the actual claims presented to it, rather than chasing down unasserted and/or hypothetical indicators of potential systemic discrimination. In other words, the EEOC should develop clear standards that can be applied at each stage of the process to determine, as described in the NEP, "whether the strength of the case and the nature of the issue supports the decision to proceed." Section II. F.

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[1] The Strategic Plan stated that the SEP would replace the EEOC's 1996 National Enforcement Plan (NEP), the main objectives of which were to (1) reduce the substantial discrimination charge backlog that had built up to that point; (2) engage in more focused, strategic enforcement; and (3) better utilize mediation and education and outreach as a means of discrimination prevention.

[2] EEOC, FY 2016 Performance and Accountability Report 23, *available at* https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf.

The EEOC's Priority Charge Handling Procedures (PCHP) system, for instance, contemplates that each filed charge undergoes a thorough and deliberate review at the intake stage of the administrative process. We suspect that does not occur with regularity.

If the EEOC focused more intently on its stated goal of ensuring consistent, nationwide application of the PCHP, it could expedite the resolution of the vast majority of workplace disputes and redirect its resources to other critical program areas, such as education and outreach, as well as mediation, professional staff development, and quality assurance. On the other hand, failure to properly categorize charges can result in precious time wasted on investigating frivolous charges ("C" charges suitable for dismissal), as well as insufficient attention being paid to priority issues ("A" charges warranting prompt attention).

In addition, and further to that end, we urge the elimination of the above-referenced, Strategic Plan-mandated incentives tied to development of systemic investigations and litigation by field offices, which we believe have contributed to prolonged, costly investigations and frivolous court litigation. Requiring that specific systemic litigation goals be met further frustrates discrimination charge processing and informal resolution by incentivizing staff to forgo a proper investigation and find reasonable cause even in marginal cases. That in turn affects the quality of enforcement efforts as a whole, since effective *litigation* of discrimination claims (whether systemic or not) heavily depends on a thorough, complete, and proper *investigation* of the underlying discrimination charge.

Delegation of Litigation Authority to the General Counsel Should Be Scaled Back in Favor of Greater Commission Oversight of Civil Rights Enforcement

When the NEP was first approved by the EEOC in 1996, it authorized the Office of General Counsel (OGC) to commence or intervene in litigation without first having to obtain Commission approval in most cases.[3] Part of the reason ostensibly was to increase enforcement efficiencies by eliminating time-consuming reviews by the full Commission. Unfortunately, the delegation of litigation authority has made it much more difficult for the agency to establish uniformly applied policies and consistency across regions, which has detracted from meaningful civil rights enforcement. Nevertheless, the Commission has reaffirmed that delegation repeatedly over the years,

[3] The General Counsel since has redelegated that authority to Regional Attorneys in claims brought under or implicating Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA).

most recently in October 2016 over the dissents of its two Republican members.

Pursuant to his or her delegated litigation authority, the General Counsel wields considerable power in deciding which cases should be pursued in court. The lack of Headquarters oversight has resulted in national employers that appear before multiple EEOC offices often facing vastly different standards, requirements, and expectations from region to region – not only as to litigated matters, but also with respect to the investigations and other activities preceding it.

Consistency and uniformity in investigative standards has been a common concern over the years. Companies operating in multiple jurisdictions often have complained, for instance, that a "garden variety" discrimination charge capable of expeditious resolution in one region might trigger an "expanded" investigation in another, which in turn is much more likely to evolve into a potential systemic claim and threatened EEOC lawsuit.

For charging parties, these inconsistencies likely contribute to a sense of futility and lack of confidence in the process, and could well dissuade aggrieved persons from filing discrimination charges at all. For employers, it creates an unacceptable level of unpredictability that makes it much more difficult to ensure across-the-board compliance.

Overly Aggressive Litigation Goals Should Yield to Meaningful Efforts to Secure Voluntary Compliance

Title VII authorizes the EEOC to pursue civil action against a respondent believed to have engaged in unlawful discrimination, but only after it has satisfied its statutory duty to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation and persuasion" as a precondition to initiating a public enforcement action. 42 U.S.C. § 2000e-5(b). To be sure, there are times when litigation is unavoidable.

In most instances, however, we believe the EEOC's goal of preventing and correcting unlawful discrimination can be achieved quite effectively through voluntary means. For that reason, more emphasis should be placed on facilitating and promoting mutual resolution of charges through settlement, and less on the scorched earth litigation tactics pursued in recent years against all manner of respondents.

Mediation has been an effective charge resolution tool utilized nationally by the EEOC since the early 1990's. Outside evaluations of the

EEOC's mediation program over the years have found a very high level of satisfaction in the program, with over 90% of all employers and employees indicating that they would participate in the program again if given the opportunity to do so. In addition, the EEOC's mediation program has continued to produce favorable results. In FY 2016, for instance, the agency conducted 10,461 mediations, of which 7,989 (76 percent) were resolved successfully and netted charging parties a total of $163.5 million.

We urge the EEOC to continue to pursue opportunities for informal settlement throughout the charge investigation and resolution process by, among other things, expanding the use of mediation, both at the pre- and the post-cause stages. The EEOC in the past has considered offering mediation at the conciliation stage of the charge resolution process, and we suggest that it do so again.

Once the EEOC has determined that a charge has merit, the dynamics of the situation change significantly, and an employer who may have been disinclined to go to mediation beforehand may now see some value in doing so. The prospect of having an outside party facilitate conciliation is particularly attractive to many EEAC members, some of which in the past have felt pressured by the agency into signing conciliation agreements without being given a meaningful opportunity to negotiate their terms.

The EEOC also could utilize mediation as a viable alternative to litigation upon unsuccessful conciliation efforts. At that stage, an outside neutral with no stake in the outcome of the dispute may greatly assist the parties and the agency in reaching a mutually acceptable resolution that avoids the costs and time involved in federal court litigation.

From an employer's standpoint, the availability of post-conciliation mediation could be extremely valuable. Not only would it give the employer a chance to resolve a case that appears to be destined for federal court, but it also could provide one final opportunity to help to heal "bad blood" between the parties as a result of the adversarial positions taken during the administrative charge resolution process — or that is inevitable should the case proceed to litigation. Of course, the employer ultimately would retain the right (as would the charging party) to decline to participate in mediation, depending on the facts and circumstances of the case.

Whether or not the EEOC were to expand its mediation program to the conciliation stage of the charge resolution process, much more needs to be done, in our view, to assure that *all* charges in which reasonable cause has been found are subject to meaningful, good faith conciliation efforts. In our experience, EEOC investigators have been far too quick to deem conciliation

a failure based merely on a respondent's reasonable inquiries as to the basis of a finding or its efforts to negotiate additional conciliation terms. This cursory treatment of conciliation by some in the field falls short of satisfying the agency's statutory conciliation obligation, and undermines the concept of voluntary settlement as the preferred means of resolving discrimination charges.

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

The EEOC Should Continue to Prioritize Improving the Quality and Timeliness of Charge Investigations and Conciliations

Over the last few years, the EEOC has taken steps to improve the quality of its stakeholder interactions and administrative charge investigation procedures. We believe that quality assurance and top-notch customer service should remain EEOC management priorities. Establishing and implementing a meaningful quality control system for investigations and conciliations not only is important to ensuring that the agency's enforcement objectives are achieved, but it also can serve as a helpful professional staff development tool.

Also relevant to effective civil rights enforcement is the ability to conduct charge investigation as promptly and efficiently as possible. Although Title VII requires the Commission to "make its determination on reasonable cause as promptly as possible and, as far as practicable, not later than one hundred and twenty days from the filing of the charge…," this statutory standard is routinely disregarded. Because seemingly endless investigation of discrimination charges fails to serve the interests of the charging party or respondent, the EEOC should be encouraged, and provided with the necessary resources, to improve the time it takes to conduct charge investigations.

The EEOC also should continue to strive to improve the quality of its conciliation efforts. The EEOC's failure to provide sufficient information on which to evaluate a settlement offer, its refusal to explain the basis for a monetary demand or to identify specific victims and/or class size, its insistence on unreasonable deadlines, and/or its unwillingness to engage the

respondent in meaningful negotiation of terms all can contribute to unsuccessful conciliation.

In *Mach Mining, LLC v. EEOC,* the Supreme Court clarified that to meet its statutory conciliation obligation the EEOC at a minimum "must tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." 135 S. Ct. 1645, 1652 (2015). The EEOC's current Title VII procedural regulations merely require that the agency attempt to achieve a "just resolution of all violations found," however. 29 C.F.R. § 1601.24(a).

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

The EEO-1 Compensation Data Collection Tool Has No Practical Utility as an Enforcement Tool

Last year, the EEOC proposed, and the Obama Administration subsequently approved, significant and expansive revisions to the EEO-1 Report. The EEO-1 Report is an annual filing requirement that obligates covered employers to report the number of employees, per establishment, by each of seven race and ethnicity categories, two gender categories, and ten job groups.

The revised EEO-1 Report now requires employers report summary employee compensation and hours worked broken down by 12 pay bands within each of the ten EEO-1 job groups. The total number of new data fields to be reported by employers each year under these revisions is between 2.9 billion and 4.5 billion, placing a significant new burden on employers.

But this added burden is unlikely to produce any meaningful benefit from an enforcement standpoint, as the new data collection will be of no real help in identifying unlawful or improper pay practices. First, because the form requires employers to submit summary data in categories that likely do not match the way they actually pay their employees, the data produced is not going to be helpful in identifying true disparities.

Second, because the manner in which compensation is to be reported does not allow for consideration of any of the potential variables that can affect total compensation (such as, for instance, part-time or full-time status), any potential "flag" would be unreliable on its face and would require additional refinement. Apart from enforcement, because compensation systems and practices vary so significantly from company to company, the data collected from the revised report would have no real value to employers from a general benchmarking perspective.

Because its implementation would impose substantial burdens on employers with no meaningful enforcement benefit, the EEOC should remove the compensation data collection component from the EEO-1 form, and explore other possible alternatives to enhancing its ability to detect and correct potential compensation discrimination.

Conclusion

Thank you again for the opportunity to testify. I will be pleased to answer any questions you may have.