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U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Chair Berrien and Commissioners:

Thank you for inviting comments on the Commission's Draft of the Strategic Enforcement Plan (SEP) to guide its enforcement efforts over the period 2012–2016. This letter is submitted on behalf of the organizations that are identified below, many of which are participants in the Employment Task Force of The Leadership Conference on Civil and Human Rights.

We agree with the Commission's judgment that "this is an opportune moment to aim for bold and transformative change." (Draft, Section VII at page 10.) The current Draft of the SEP adopts a well considered, appropriate set of criteria for establishing priorities in enforcement and applies those criteria to adopt priority enforcement areas that are all timely and important. If the Strategic Enforcement Plan can be implemented to maintain the Commission's focus on these priority areas, the Plan will contribute effectively to promoting equal employment opportunity.

While the Draft SEP effectively identifies priority areas for enforcement, in the areas required for effective implementation it fails to outline any administrative measures to promote "bold and transformative change." The stated goals for "integration" of the Commission's functions and for supporting enforcement efforts of the private bar are critical to better enforcement, but the Draft SEP contains only the statement of worthy goals, with no hints of how the Commission might move from the existing cumbersome, slow, institutional processes toward the "bold and transformative change" that the Commission properly aspires to achieve.

Our members strongly endorse the substantive priority areas targeted for enforcement by the Commission (Section III, at pages 4-5), which we summarize as

- (1) Systemic barrier in recruitment and hiring – "class-based intentional hiring discrimination and facially neutral hiring practices that adversely impact particular groups."



- (2) Vulnerable workers – “disparate pay, job segregation, harassment, trafficking and discriminatory language policies”
- (3) Emerging Issues – including initially
 - (a) ADA Amendments Act – coverage issues and defenses, e.g. “undue hardship, direct threat, and business necessity”
 - (b) LGBT coverage under Title VII
 - (c) Pregnancy – accommodation for women equal to accommodations offered to similarly situated employees
- (4) Preserving Access to the Legal System – enforcement against retaliation
- (5) Combating harassment on the basis of race, color, sex, ethnicity, age, disability, religion.

We commend the Commission for selecting a focused set of priorities for enforcement. We also endorse the Commission’s clarification of the description of “systemic” cases as being cases involving “pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area.” (Draft, Section III-A-3, at page 6.) This appears to be a substantial advance over the prior criterion for systemic cases, which we understand included any cases involving more than twenty (20) employees.

There are, however, omissions from the priority list that should be added in the final Enforcement Plan. Systemic discrimination by employers in pay and promotions, particularly where subjective criteria are used, should be included in the enforcement priorities. The Supreme Court’s decision in *Wal-Mart v. Dukes* has made it extremely difficult for private plaintiffs to prosecute class cases involving pay and promotions, and only enforcement agencies like the Commission and the Department of Justice can prosecute these cases without having to meet the class action requirements of *Wal-Mart*. Additionally, private counsel believe it is perilous for them to attempt pay and promotion litigation without having substantial evidence prior to filing, in light of the Supreme Court’s decisions in *Iqbal* and *Twombly*. Only enforcement agencies like the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) can obtain the data prior to suit.



In order to achieve any “transformative change,” however, the Commission should include in the Strategic Enforcement Plan the broad outlines of administrative measures and review that can improve management oversight to improve the accountability of Commission staff in implementing both the Strategic Enforcement Plan and other responsibilities of the Commission. The SEP is not a proper vehicle for detailed description of such measures, but the current Draft is totally silent about them. There is neither any indication of the general path to improved oversight and accountability, nor any stated plan for developing administrative measures to achieve improved oversight and accountability.

Three major objectives that are essential to achieve the Commission’s goals and that can only be achieved by concrete changes in Commission procedures are (1) more effective cooperation between the investigative and enforcement functions of the Commission, (2) more timely completion of investigations of charges that offer enforcement opportunities in priority areas, and (3) more effective assistance to public interest organizations and members of the private bar who seek to fulfill the role of private attorneys-general in the enforcement of equal employment opportunity. The Draft Strategic Enforcement Plan should be augmented to include discussion of concrete steps the Commission will pursue in achieving at least these three major objectives.

The SEP could establish, for example, that performance evaluation measures for managers and staff will include objective indicators of the frequency with which investigators and legal staff are consulting to evaluate the classification of charges as priority or not priority. Performance evaluation could also include objective measures of the timeliness with which investigators are completing investigations of priority enforcement charges. Particularly important to achieve better coordination with enforcement activities of the private bar would be performance measures that reflect the frequency of cases in which effective assistance is provided by members of the private bar, the speed at which FOIA requests are processed in priority enforcement area cases, and the frequency with which substantial databases are shared with private counsel through the FOIA process or other means. The SEP itself should establish at least the general proposition that performance evaluations for Commission staff will incorporate appropriate objective measures of the extent to which each employee is taking steps in performing her tasks to implement the concrete goals of the SEP. The SEP should also indicate the additional steps the Commission will take to develop the particular performance standards, and the timetable within which the process will be completed.



With regard to cooperation with members of the public and the private bar who seek to perform the role of private attorneys general, the SEP should commit the Commission to a process that will evaluate, within a clear time frame, measures that will increase the transparency of investigations, both in sharing the process undertaken and in sharing the results obtained. The statement of good intentions in the Draft (Section V-F, at page 10), though certainly welcome, is wholly insufficient to achieve any progress in the Commission's efforts to change the current environment in which cooperation with the private bar is too often lacking, and varies greatly from one Region to another.

Respectfully Submitted,

Lawyers' Committee for Civil Rights Under Law

9to5, National Association of Working Women

American Association of University Women (AAUW)

American Civil Liberties Union

American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)

Bazelon Center for Mental Health Law

Farmworker Justice

NAACP

National Partnership for Women & Families

The Leadership Conference on Civil and Human Rights

Women Employed