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001. memo	Thomasina V. Rogers to Robert J. Funk re: Request for Legal Opinion (10 pages)	n.d	P5

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OA/Box Number: 9593

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [1]

ds69

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

EEOC CONFIRMATION BRIEFING BOOK

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TO COME

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(Itemized list behind tab)

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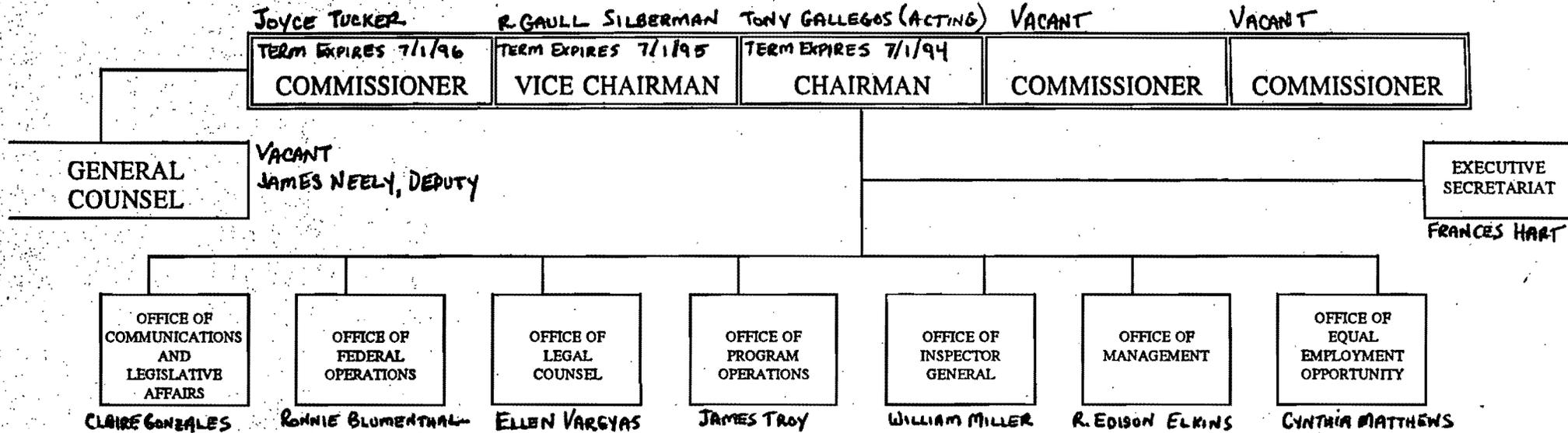
Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: _____ A _____

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION



OFFICES: DISTRICT (DO), AREA (AO), LOCAL (LO)		
ATLANTA (DO) Savannah (LO)	BALTIMORE (DO) Norfolk (AO) Richmond (AO)	BIRMINGHAM (DO) Jackson (AO)
CHARLOTTE (DO) Raleigh (AO) Greensboro (LO) Greenville (LO)	CLEVELAND (DO) Cincinnati (AO)	MEMPHIS (DO) Little Rock (AO) Nashville (AO)
MIAMI (DO) Tampa (AO)	NEW ORLEANS (DO)	NEW YORK (DO) Boston (AO) Buffalo (LO)
PHILADELPHIA (DO) Newark (AO) Pittsburgh (AO)	ST. LOUIS Kansas City (AO)	WASHINGTON FIELD OFFICE

OFFICES: DISTRICT (DO), AREA (AO), LOCAL (LO)		
ALBUQUERQUE (DO)*	CHICAGO (DO)	DALLAS (DO) Oklahoma City (AO)
DENVER (DO)	DETROIT (DO)	HOUSTON (DO)
INDIANAPOLIS (DO) Louisville (AO)	LOS ANGELES (DO) San Diego (AO)	MILWAUKEE (DO) Minneapolis (AO)*
PHOENIX (DO)	SAN ANTONIO (DO) El Paso (AO)	SAN FRANCISCO (DO) Fresno (LO) Honolulu (LO) Oakland (LO) San Jose (LO)
	SEATTLE (DO)	

* In 1994, the Commission approved the upgrade of the Albuquerque Area Office to district office level and the Minneapolis Local Office to area office level. Plans are underway to effectuate these upgrades.

TONY E. GALLEGOS CHAIRMAN

President Bill Clinton appointed Tony E. Gallegos on April 5, 1993, to serve as chairman of the U.S. Equal Employment Opportunity Commission. With this unprecedented fourth appointment to serve on the Commission, Mr. Gallegos became the first Hispanic chairman in the history of EEOC.

Chairman Gallegos was first appointed by former President Ronald Reagan to serve as a commissioner of EEOC in May 1982, and again in 1984 for a five year term. On March 5, 1990, with the unanimous consent of the U.S. Senate, former President Bush appointed Chairman Gallegos to serve as a commissioner of EEOC for a third term expiring July 1, 1994.

Prior to joining the EEOC, Chairman Gallegos worked for 30 years at Douglas Aircraft Company in California where he served in a number of managerial positions. At EEOC, Chairman Gallegos was instrumental in preserving and expanding the agency's Tribal Employment Rights Organizations program and had major input in EEOC's policy statement regarding the Indian preference provisions of Title VII of the Civil Rights Act of 1964. Chairman Gallegos also initiated the Hispanic charge study which contributed to expanding EEOC's community outreach activities through Voluntary Assistance and Expanded Presence Programs conducted by the agency field offices nationwide.

Since 1988, Chairman Gallegos has been an advisory member of the U.S. Senate Task Force on Hispanic Affairs. He was president of the Mexican-American Opportunity Foundation in Los Angeles and national chairman of the American G.I. Forum. Chairman Gallegos also served as vice-chairman of the board of directors of Service, Employment and Redevelopment (SER) for Progress, which focuses on training and employment of Hispanic youth. He is a former board member of Veterans in Community Service, Inc., a non-profit agency which assists seniors, veterans, handicapped and low-income individuals. He is a former member, as well, of the Board of Economic Development Programs for the County of Los Angeles. Chairman Gallegos is the recipient of commendations from California, Los Angeles city and county legislative bodies and national Hispanic organizations for his achievements and contributions to the Mexican-American community.

Chairman Gallegos graduated in 1951 from the Bisttram Institute of Fine Arts. He is married, has two children and resides in Arlington, Va.

R. GAULL SILBERMAN

Vice Chairman

Rosalie Gaull Silberman was appointed to a second term as Vice Chairman of the U.S. Equal Employment Opportunity Commission on July 26, 1990, by President George Bush.

First appointed to the Commission in late 1984, the Vice Chairman has played a major role in establishing the credibility and effectiveness of the EEOC as a law enforcement agency. Instrumental in the development of the Commission's policy on sexual harassment, fetal hazards and age discrimination issues, Vice Chairman Silberman has spoken throughout the country to bar associations, labor unions, trade organizations and personnel groups.

The Vice Chairman has served on the Anti Discrimination Task Force created by Congress in the Immigration Reform and Control Act of 1986 and is a member of the Administrative Conference of the United States where she has focused on Alternative Dispute Resolution and reform of the federal equal employment opportunity administrative process.

Vice Chairman Silberman who was graduated from Smith College began her career as an elementary school teacher. In 1974, President Richard M. Nixon appointed her to the National Advisory Council on the Education of Disadvantaged Children. She was Chairman of the Board of Widening Horizons, a volunteer organization which worked closely with the District of Columbia Board of Education to promote career planning programs for inner city students.

In 1977, as consultant to the National Republican Senatorial Committee, Vice Chairman Silberman organized and directed the Tidewater Conferences.

In 1979, she moved to San Francisco as director of public relations for the San Francisco Conservatory of Music. In 1983, returning to Washington, she was appointed special assistant to Commissioner Mimi Weyforth Dawson of the Federal Communications Commission.

Vice Chairman Silberman is married to Judge Laurence H. Silberman, U.S. Circuit Court of Appeals for the District of Columbia. They have three children and six grandchildren.

JOYCE E. TUCKER
COMMISSIONER

Joyce E. Tucker was unanimously reconfirmed by the U.S. Senate as a member of the United States Equal Employment Opportunity Commission on August 1, 1991 for a five-year term expiring July 1, 1996. Commissioner Tucker was initially appointed by former President George Bush on October 30, 1990. As one of five Commissioners of the U.S. Equal Employment Opportunity Commission, Ms. Tucker's responsibilities include making Equal Employment Opportunity policy, issuing Commissioner charges, approving litigation of employment discrimination lawsuits and speaking nationally to interested organizations, businesses and human rights agencies regarding Title VII, The Americans with Disabilities Act, sexual harassment and Equal Employment Opportunity policies.

Prior to this appointment, Ms. Tucker, an attorney, was Director of the Illinois Department of Human Rights, having been appointed to that cabinet post in June 1980 by Governor James R. Thompson. With that appointment, Ms. Tucker had the dual distinction of becoming the first Black female in the history of the state of Illinois to be appointed to a cabinet post with Senate confirmation, and the first director of the newly created agency. The Department of Human Rights is responsible for enforcing the Human Rights Act which prohibits unlawful discrimination in employment, housing, access to financial credit and public accommodations and for monitoring and enforcing equal employment opportunity and affirmative action programs of state agencies and public contractors.

Ms. Tucker joined Illinois state government in 1971 with the Department of Mental Health. Her civil rights career began in 1974 with that agency. In 1979, Ms. Tucker was appointed by Governor Thompson to the cabinet post of Acting Director of the Illinois Department of Equal Employment Opportunity.

Ms. Tucker is a trustee of the Abraham Lincoln Centre; board member, Illinois Chapter of the National Conference of Christians and Jews; board member of the Midwest Association for Sickle Cell Anemia; and a member of the Advisory Board, Women in Community Service. She has also served as legal counsel and chairperson of the League of Black Women, board member and President of the International Association of Official Human Rights Agencies, and member of the Illinois Advisory Committee to the United States Commission on Civil Rights.

Ms. Tucker is the recipient of numerous professional and civic awards and honors some of which are The John Marshall Law School Alumni Association Distinguished Alumnae Award; induction into the Chicago Commission on Human Relations Women's Hall of Fame; the Cook County Bar Association Edward H. Wright's Distinguished Service Award; the National Institute for Employment Equity Milestone Award for Civil Rights; the Black Book Outstanding Business and Professional Person Award; the Dollars & Sense Magazine America's Top 100 Black Business and Professional Women's Award; Chicago's Jaycees Ten Outstanding Young Citizens Award; the Kizzy Image Award; The John Marshall Law School Black Law Students Association's Kermit Coleman Award for Civil Rights Advocacy; the University of Illinois Black Alumni Association Ten Outstanding Persons Award; and the Cook County Bar Association Special Achievement Award.

Born in Chicago, Ms. Tucker is a graduate of the University of Illinois in Urbana-Champaign, and received her Juris Doctor from The John Marshall Law School in Chicago. She is licensed to practice law before the United States District Court, Northern District of Illinois and the Illinois Supreme Court.

**YOU CAN REACH YOUR NEAREST EEOC
FIELD OFFICE BY CALLING TOLL FREE
1-800-669-4000**

The following is a complete list of all EEOC field offices, their addresses and local phone numbers:

Equal Employment Opportunity Commission
Albuquerque Area Office
505 Marquette, N.W., Suite 900
Albuquerque, New Mexico 87102-2189
Telephone: (505) 766-2061

Equal Employment Opportunity Commission
Atlanta District Office
75 Piedmont Avenue, N.E., Suite 1100
Atlanta, Georgia 30335
Telephone: (404) 331-0604

Equal Employment Opportunity Commission
Baltimore District Office
City Cresnet Building
10 South Howard Street, 3rd Floor
Baltimore, Maryland 21201
Telephone: (410) 962-3932

Equal Employment Opportunity Commission
Birmingham District Office
1900 Third Avenue, North, Suite 101
Birmingham, Alabama 35203-2397
Telephone: (205) 731-0082

Equal Employment Opportunity Commission
Boston Area Office
One Congress Street, Tenth Floor
Boston, Massachusetts 02114
Telephone: (617) 565-3200

Equal Employment Opportunity Commission
Buffalo Local Office
Six Fountain Plaza, Suite 350
Buffalo, New York 14203
Telephone: (716) 846-4441

Equal Employment Opportunity Commission
Charlotte District Office
5500 Central Avenue
Charlotte, North Carolina 28212-2708
Telephone: (704) 567-7100

Equal Employment Opportunity Commission
Chicago District Office
500 West Madison Street, Suite 2800
Chicago, Illinois 60661
Telephone: (312) 353-2713

Equal Employment Opportunity Commission
Cincinnati Area Office
The Ameritrust Building
525 Vine Street, Suite 810
Cincinnati, Ohio 45202-3122
Telephone: (513) 684-2851

Equal Employment Opportunity Commission
Cleveland District Office
Tower City, Skylight Office Tower
1660 West Second Street, Suite 850
Cleveland, Ohio 44113-1454
Telephone: (216) 522-2001

Equal Employment Opportunity Commission
Dallas District Office
207 South Houston Street, Third Floor
Dallas, Texas 75202-4726
Telephone: (214) 655-3355

Equal Employment Opportunity Commission
Denver District Office
303 East 17th Avenue, Suite 510
Denver, Colorado 80203-9634
Telephone: (303) 866-1300

Equal Employment Opportunity Commission
Detroit District Office
477 Michigan Avenue, Room 1540
Detroit, Michigan 48226-9704
Telephone: (313) 226-7636

Equal Employment Opportunity Commission
El Paso Area Office
The Commons, Building C., Suite 100
4171 North Mesa Street
El Paso, Texas 79902
Telephone: (915) 534-6550

Equal Employment Opportunity Commission
Fresno Local Office
1265 West Shaw Avenue, Suite 103
Fresno, California 93711
Telephone: (209) 487-5793

Equal Employment Opportunity Commission
Greensboro Local Office
801 Summit Avenue
Greensboro, North Carolina 27405-7813
Telephone: (919) 333-5174

Equal Employment Opportunity Commission
Greenville Local Office
SCN Building
15 South Main Street, Suite 530
Greenville, South Carolina 29601
Telephone: (803) 241-4400

Equal Employment Opportunity Commission
Honolulu Local Office
677 Ala Moana Blvd., Suite 404
Post Office Box 50082
Honolulu, Hawaii 96813
Telephone: (808) 541-3120

Equal Employment Opportunity Commission
Houston District Office
1919 Smith Street, 7th Floor
Houston, Texas 77002
Telephone: (713) 653-3377

Equal Employment Opportunity Commission
Indianapolis District Office
101 West Ohio Street, Suite 1900
Indianapolis, Indiana 46204-4203
Telephone: (317) 226-7212

Equal Employment Opportunity Commission
Jackson Area Office
Cross Roads Building Complex
207 West Amite Street
Jackson, Mississippi 39201
Telephone (601) 965-4537

Equal Employment Opportunity Commission
Kansas City Area Office
911 Walnut, Tenth Floor
Kansas City, Missouri 64106
Telephone: (816) 426-5773

Equal Employment Opportunity Commission
Little Rock Area Office
425 West Capitol Avenue, Sixth Floor
Little Rock, Arkansas 72201
Telephone: (501) 324-5060

Equal Employment Opportunity Commission
Los Angeles District Office
255 East Temple Street, Fourth Floor
Los Angeles, California 90012
Telephone: (213) 894-1000

Equal Employment Opportunity Commission
Louisville Area Office
600 Martin Luther King Jr. Place
Suite 268
Louisville, Kentucky 40202
Telephone: (502) 582-6082

Equal Employment Opportunity Commission
Memphis District Office
1407 Union Avenue, Suite 621
Memphis, Tennessee 38104
Telephone: (901) 722-2617

Equal Employment Opportunity Commission
Miami District Office
One Northeast First Street, Sixth Floor
Miami, Florida 33132-2491
Telephone: (305) 536-4491

Equal Employment Opportunity Commission
Milwaukee District Office
310 West Wisconsin Avenue, Suite 800
Milwaukee, Wisconsin 53203-2292
Telephone: (414) 297-1111

Equal Employment Opportunity Commission
Minneapolis Area Office
330 South Second Avenue, Room 430
Minneapolis, Minnesota 55401-2224
Telephone: (612) 335-4040

Equal Employment Opportunity Commission
Nashville Area Office
50 Vantage Way, Suite 202
Nashville, Tennessee 37228
Telephone: (615) 736-5820

Equal Employment Opportunity Commission
Newark Area Office
One Newark Center, 21st Floor
Newark, New Jersey 07102-5233
Telephone: (201) 645-6383

Equal Employment Opportunity Commission
New Orleans District Office
701 Loyola Avenue, Suite 600
New Orleans, Louisiana 70113-9936
Telephone: (504) 589-2329

Equal Employment Opportunity Commission
New York District Office
Seven World Trade Center, 18th Floor
New York, New York 10048
Telephone: (212) 748-8500

Equal Employment Opportunity Commission
Norfolk Area Office
252 Monticello Avenue, First Floor
Norfolk, Virginia 23510
Telephone: (804) 441-3470

Equal Employment Opportunity Commission
Oakland Local Office
Oakland Federal Building, North Tower
1301 Clay Street, Suite 1170-N
Oakland, California 94612-5217
Telephone: (510) 637-3230

Equal Employment Opportunity Commission
Oklahoma Area Office
531 Couch Drive
Oklahoma City, Oklahoma 73102
Telephone: (405) 231-4911

Equal Employment Opportunity Commission
Philadelphia District Office
1421 Cherry Street, Tenth Floor
Philadelphia, Pennsylvania 19102
Telephone: (215) 656-7000

Equal Employment Opportunity Commission
Phoenix District Office
4520 North Central Avenue, Suite 300
Phoenix, Arizona 85012-1848
Telephone: (602) 640-5000

Equal Employment Opportunity Commission
Pittsburgh Area Office
1000 Liberty Avenue, Room 2038-A
Pittsburgh, Pennsylvania 15222
Telephone: (412) 644-3444

Equal Employment Opportunity Commission
Raleigh Area Office
1309 Annapolis Drive
Raleigh, North Carolina 27608-2129
Telephone: (919) 856-4064

Equal Employment Opportunity Commission
Richmond Area Office
3600 West Broad Street, Room 229
Richmond, Virginia 23230
Telephone: (804) 771-2692

Equal Employment Opportunity Commission
San Antonio District Office
5410 Fredericksburg Road, Suite 200
San Antonio, Texas 78229-9934
Telephone: (210) 229-4810

Equal Employment Opportunity Commission
San Diego Area Office
401 B Street, Suite 1550
San Diego, California 92101
Telephone: (619) 557-7235

Equal Employment Opportunity Commission
San Francisco District Office
901 Market Street, Suite 500
San Francisco, California 94103
Telephone: (415) 744-6500

Equal Employment Opportunity Commission
San Jose Local Office
96 North Third Street, Suite 200
San Jose, California 95112
Telephone: (408) 291-7352

Equal Employment Opportunity Commission
Savannah Local Office
410 Mall Boulevard, Suite G
Savannah, Georgia 31406
Telephone: (912) 652-4234

Equal Employment Opportunity Commission
Seattle District Office
909 First Avenue, Suite 400
Seattle, Washington 98104-1061
Telephone: (206) 220-6883

Equal Employment Opportunity Commission
St. Louis District Office
625 N. Euclid Street, Fifth Floor
St. Louis, Missouri 63108
Telephone: (314) 425-6585

Equal Employment Opportunity Commission
Tampa Area Office
Timberlake Federal Building Annex
501 East Polk Street, Tenth Floor
Tampa, Florida 33602
Telephone: (813) 228-2310

Equal Employment Opportunity Commission
Washington Field Office
1400 L Street, N.W., Suite 200
Washington, D.C. 20005
Telephone: (202) 275-7377

**PROCEDURES FOR CONDUCTING
COMMISSION MEETINGS**

PROCEDURES FOR COMMISSION MEETINGS

I. Quorum:

Quorum refers to the number of members entitled to vote who must be present in order to transact business. It refers to the number of such members present, not to the number actually voting. Section 705(c) of Title VII, 42 USC 2000e-4(c), provides that a quorum of the Commission is constituted by three members. Under Robert's Rules, in the absence of a quorum, any business transacted is void. The only actions that can take place in the absence of a quorum are to fix the time to adjourn, adjourn, recess, or take measures to obtain a quorum.

II. The Handling of Business:

Under Robert's Rules of Order, when there is no set agenda, a matter is considered and voted on using the following procedures. First, a member makes a motion. Until a matter has been brought to the attention of the assembly in the form of a motion proposing a specific action, there can be no debate. Second, another member seconds the motion. Third, the chair states the question on the motion. After a motion is made, seconded and stated by the chair, the chair normally asks the mover to begin debate. A member's remarks must be relevant to the question before the assembly. Fourth, members debate the motion. Where there is no rule, a member who has obtained the floor can speak no longer than ten minutes, unless there is unanimous consent to allow more time. The chair must recognize that a member has the floor before that member is allowed to speak. At the Commission, there is an agenda for each meeting, which takes the place of the first three steps. In its place, the Chairman announces each item of business and the members discuss the items.

The next step in the consideration of an item is for the chair to put the question to a vote. Most motions require a majority vote, which means more than half of the members voting. Where there is a tie vote, a motion requiring a majority vote is lost because a tie is not a majority. Some motions, specified below, require a two-thirds vote. While members who abstain or recuse themselves are counted for the purposes of a quorum, their decisions to abstain or to recuse are not counted as votes in the affirmative or the negative. (E.g., if four Commissioners are present at a meeting and two vote in favor of an item and two abstain, then the four Commissioners constitute a quorum and the item passes since a majority of those voting voted in favor of the item).

The last step is for the chair to announce the result of the vote. Normally, this consists of a report of the vote itself, a statement that the motion is adopted or lost, and a statement as to the effect of the vote or ordering its execution. The chair's announcement of the vote is important because it can be

overturned only by an appeal of the ruling of the Chair. Such a motion would have to be made, seconded and approved by a majority vote.

III. Classification of Motions:

There are two types of motions: main motions and secondary motions; secondary motions include subsidiary motions, privileged motions and incidental motions. Other than an appeal from the ruling of a chairman, we have not discussed the incidental motions.

A. Main motions bring business before the assembly, and can be made only when no other motion is pending. Generally, a main motion cannot be made when other motions are on the floor. It must be seconded, it is debatable, can be amended, reconsidered and a majority vote is usually required for its adoption. Types of main motions:

1. Main question
2. Adjourn at or to a future time, or in advance of a time already set, or when the assembly will be adjourned (this motion cannot be reconsidered)
3. Adopt, accept or agree to a report
4. Adopt bylaws
5. Adopt special rules of order (requires previous notice and two-thirds vote or majority of entire membership)
6. Adopt ordinary standing rules
7. Committee, i.e., to refer a matter that is not pending to a committee
8. Debate, to limit or extend limits of, for the duration of the meeting (requires two-thirds vote)
9. Fix the time for which to adjourn when another meeting scheduled for same or next day, or when no other motion is pending
10. Approve Minutes
11. Order, to make a special order when question is not pending, i.e., to set a specific item for a specific day or time (requires two-thirds vote)
12. Order of the day (i.e., to abide by the agenda), when pending

13. Question of privilege when pending or when another main motion pending
14. Ratify or confirm
15. Recess, if moved when no question pending (this motion cannot be reconsidered)
16. Voting, if moved when no question pending

B. Secondary motions

1. Subsidiary Motions assist the assembly in treating or disposing of a main motion. These motions take precedence over the main motion. They are always applied to a main motion while it is pending. Some subsidiary motions, as indicated below, may be debated. They must be seconded. The following are subsidiary motions listed in order of precedence:
 - a. Lay on the Table - to discontinue consideration of the main motion with the understanding it can be taken up again whenever the majority decides to (undebatable).
 - b. Previous Question - to close debate and call for an immediate vote (undebatable).
 - c. Limit or Extend Limits of Debate - Where there is a time limit on debate, to limit or extend those time limits (undebatable).
 - d. Postpone - to defer consideration of a main motion to another time at the same meeting or to a different meeting (debatable).
 - e. Commit or Refer - to send a main motion to committee for further study or drafting (debatable).
 - f. Amend - if main motion requires change in wording before it can be voted on (debatable).
 - g. Postpone Indefinitely - to dispose of main motion without bringing it to a vote (debatable).
2. Privileged Motions, unlike subsidiary motions, do not relate to pending main motions. They relate to special matters of overriding importance which are allowed to interrupt consideration of anything else. Privileged motions are not debatable.

- a. Fix the time to adjourn - Must be seconded.
- b. Adjourn - must be seconded.
- c. Recess - must be seconded.
- d. Raise a Question of Privilege - a member may interrupt pending business to state matter, such as inadequate ventilation or confidential subject in the presence of guests. If not informally resolved, chair must make a ruling. It does not require a second.
- e. Call for the Orders of the Day - a member can move to require the assembly to consider the business as scheduled if it is not being followed, unless assembly decides by two-thirds vote to set the orders of the day aside. It does not require a second.

3. Commission Meetings. More so in recent years, but throughout its history, the Commission has used a modified version of Robert's Rules of Order to conduct its meetings. The Commission observes the general outlines of Robert's Rules, but traditionally has not enforced restrictions contained in the Rules (e.g., the Commission does not limit a member to 10 minutes debate, but Commissioners rarely take that amount of time). We have prepared a briefing paper on Robert's Rules of Order. Briefly, there is a prepared agenda for the meetings and each item is introduced and discussed in order. Following discussion there is a vote and announcement by the Chairman of the vote and its implementation. If a decision is unexpected or controversial, the Chairman might wait to discuss with staff how to implement the Commission vote.

Agendas for Commission meetings have been traditional, but took on more importance with the passage of the Government in the Sunshine Act. The Sunshine Act requires that, when multi-member agencies meet to conduct business, the agency must announce the meeting and the items to be discussed. The meeting must be open to the public unless there is an applicable exemption to close a portion of the meeting (the two most common are that disclosure is prohibited by statute - Title VII - and that the meeting concerns the participation in a court proceeding). Two memoranda are included as attachment 3; one giving a general explanation of the Sunshine Act and the other explaining that decisions may be made by notation vote instead of at a Commission meeting.



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506
January 24, 1977

Attachment

3

2 of 3

MEMORANDUM

TO: Ethel Bent Walsh
Vice Chairman

Colston A. Lewis
Commissioner

Daniel E. Leach
Commissioner

FROM: Abner W. Sibal *AWS*
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SUBJ: Government in the Sunshine Act (Public Law 94-409)

The attached Briefing Paper on the Government in the Sunshine Act is intended to provide you with an interpretation of the major provisions of the new law and how the open meeting requirements can be expected to affect the business of this agency. Provisions in the Briefing Paper pertaining to restrictions on the Commission in the conducting of its meetings have been underlined.

This Briefing Paper will undoubtedly raise numerous questions as to the implementation of the provisions of the Sunshine law. Members of this office will be available to answer these questions, so that you will have a full understanding of this new law by its effective date on March 12, 1977.

The Sunshine Act's declaration of policy states that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government and that the purpose of the Act is to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

I. MEETINGS

Every portion of every meeting of an agency must be open to public observation, unless the meeting or a portion thereof comes within one of the 10 exemptions of subsection (c). Subsection (a)(1) of the Act defines agency as "...any agency...headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision 1/ thereof authorized to act on behalf of the agency." The Equal Employment Opportunity Commission is included in this definition.

1/ The term "subdivision" would apply to any panel, regional board, etc. of the EEOC, consisting of at least 3 Commission "members" and authorized to take action on behalf of the agency. A "member" is an individual who belongs to a collegial body heading an agency. The action by the subdivision need not be final in nature. Accordingly, panels or boards of three or more Commissioners authorized to submit recommendations, preliminary decisions, or the like to the full Commission, or to conduct hearings on behalf of the agency are required to open their meetings to the public. Under this interpretation, meetings held in the District or Regional Offices and composed of District and/or Regional Directors would not come under the Act unless three or more Commissioners were in attendance for the purpose of jointly conducting or disposing of agency business. When a subdivision is authorized to act on behalf of the agency, a majority of the entire membership of the subdivision is necessary to close a meeting.

The term "meeting" means the deliberations of at least the number of agency members required to take action on behalf of the agency. For the EEOC, three Commission members must be present. The deliberations must result in the joint conduct or disposition of official agency business. The discussions must be of some substance. Brief references to agency business where the Commission members do not give serious attention to the matter do not constitute a meeting. Discussions about a purely social gathering would not concern official business of the agency and would be outside the scope of the Act. The word "deliberations" includes not only a gathering of at least three Commissioners in a single physical place, but also, for example, a conference telephone call or a series of two-party calls involving the requisite number of members and conducting agency business. The conduct of Commission business includes all discussion relating to the business of the agency and not just the formal decisionmaking.

To constitute a meeting for purposes of the Act the requisite number of Commission members must at least be potentially involved in the discussion. The use of the word "joint" excludes situations where the requisite number of members is physically present in one place but not conducting business as a body, as when the Commissioners are present to hear a formal speech by one Commissioner. The word "joint" would also exclude from the requirements of the Act instances where a single Commissioner, authorized to conduct a meeting on behalf of the Agency, or to take action on behalf of the Agency, meets with members of the public or staff. In addition, communications not addressed to a quorum of Commissioners are not part of the deliberations that otherwise constitute a "meeting." Examples are the communi-

cations of an attorney-advisor to a Commissioner or a comment whispered by one Commissioner to another.

The location of the gathering is not determinative as to the application of the open-meeting provisions. A meeting outside the agency is equally subject to the Act if agency business is discussed and the other requirements of the law are met. The test is what the discussion involves, not where or how it is conducted. Thus, a meeting of three Commissioners at the residence of one of the Commissioners to discuss how they will vote on a contract or particular regulation would be covered by the Act and require public notification of time, place, and subjects to be discussed.

As previously stated, three Commission members must be present to constitute a quorum. However, the provisions of the Act are not intended to apply to instances where three or more Commissioners engage in informal background discussions which clarify issues and expose varying views. The line between these informal discussions and discussions which effectively predetermine official action is a very thin one which can be easily crossed over. In an effort to avoid such occurrences, it is recommended that every formal discussion of agency business by a quorum be treated as a "meeting" for purposes of the Act, whether or not the discussion is directly aimed at some particular determination. Such an approach could possibly prevent litigation that could be brought if the Commissioners were to discuss official business in a context not deemed at the time to be a "meeting" and later to take official action on the same or a related topic. In such a case, the Commission would have the burden of showing that its earlier discussion was not part of its decisionmaking process.

II. Meetings Open to Public Observation

The statutory requirement that agency meetings be "open to public observation" is intended to guarantee that ample space, sufficient visibility, and adequate acoustics will be provided 2/.

In order to comply with this provision, the Commission will have to furnish its meeting room with sound equipment which will permit those in attendance to hear the deliberations of the Commissioners. It will also be necessary to ensure that the seating arrangement utilized provides sufficient visibility of the proceedings.

Given the nature of the Commission's function, we anticipate a great deal of public interest in Commission meetings, at least initially. The meeting room should be "large enough to accom-

2/ As previously noted, telephone conferences involving the requisite number of Commission members fall within the Sunshine Act's definition of "meeting," and are therefore subject to the open meeting requirements of the Act. The effect is that if the members know in advance that such a "meeting" will be held, the agency is required to give 7-days advance public notice, obtain the General Counsel's certification if the meeting is to be closed, take a recorded vote on whether the meeting is to be open or closed, etc.

If the "meeting" is closed, the agency must keep an electronic recording or verbatim transcript of the meeting, unless the topic of such meeting is privileged under the litigation exemption of the Sunshine Act, in which case minutes may be kept instead. This would require the agency to install a recording device on the members' telephones, adequate to record the conversation, and where minutes are to be kept, to include in the conversation a staff member who will perform this function.

The logistical problems involved in making such a "meeting" open to public observation are apparent. We therefore strongly urge that agency deliberations not be made by telephone conference except in cases of emergency.

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modate a reasonable number of persons interested in attending." ^{3/}
The fifth floor conference room presently utilized for Commission meetings may prove to be inadequate for this purpose. In order to meet this possibility we recommend that the Commission consider the following:

1) requesting in the agency's public announcement of its meetings that persons interested in attending so advise the agency by a specified date and time prior to the meeting. This provision would not operate as a mechanism for excluding those persons who have not advised the agency in advance of their expected attendance, but solely as a means by which the agency can estimate the level of attendance and make appropriate arrangements.

2) providing closed-circuit television monitors in another room to permit unusually large numbers of interested persons to observe open meetings when the main meeting room is filled to capacity.

Although non-exempt meetings are open to the public, they are not open to public participation. The presiding officer of the meeting will have the authority to maintain order and decorum in the meeting room and to expel any person creating a disturbance or interfering with the orderly conduct of business.

The Commission should develop guidelines to govern the conduct of observers at open meetings, e.g., no participation, no smoking, no picture-taking, etc. These guidelines should be posted in a prominent place at the entrance to the meeting room.

We recommend that the Commission arrange for a security guard during open meetings to act as a sergeant at arms and maintain order in the meeting room. We further recommend that during open meetings the Commission make absolutely no exceptions to the non-participation rule. Once such a precedent has been set, denial to others of the opportunity to speak or participate may be construed as arbitrary or discriminatory on the part of the Commission.

^{3/} S.Rep. No. 94-1178, 94th Cong., 2d Sess. 11 (1976)
(Conference Report)

III. Exemptions from Open Meeting Requirements

Subsection (c) of the Sunshine Act contains 10 exemptions to the general requirement of openness, but provides that even if a meeting or information falls within one of them, it shall not be closed (or, in the case of information, withheld), if the public interest requires otherwise. This decision will have to be made by the Commissioners when they consider closing a meeting or withholding information.

Exemption (c)(1) covers matters that are specifically authorized under criteria established under an Executive Order to be kept secret in the interests of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order. Although the Commission does not consider matters relating to national defense or foreign policy, this exemption would authorize closing a meeting to avoid disclosure of properly classified information in documents obtained from other agencies.

Exemption (c)(2) includes matters relating solely to an agency's internal personnel rules and practices. It is intended to parallel the identically worded exemption of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(2). The Commission will invoke this exemption when it finds it necessary to protect the privacy of staff members and when handling strictly internal matters. It does not include discussions or information dealing with agency policies governing employees' dealings with the public, such as manuals or directives setting forth job functions or procedures, or to any personnel matter that is of genuine and significant public interest.

Exemption (c)(3) permits the closing of a meeting or the withholding of information where a statute other than Section 552 (The FOIA) requires the withholding of the information in question

and establishes particular criteria defining such information or refers to particular types of information. A statute that merely permits withholding, rather than affirmatively requiring it, would not come within this exemption, nor would a statute that fails to define with particularity the type of information it requires to be withheld. This exemption is likely to be used by the Commissioners when considering FOIA appeals where the Commission has denied requests for information under Sections 706(b) 4/ and 709(e) 5/ of Title VII. Neither of these provisions provide the agency with any discretion in making public the information sought.

Exemption (c) (4) protects trade secrets and commercial or financial information obtained from a person and privileged or confidential. It also includes matter subject to certain evidentiary privileges, e.g. doctor-patient, attorney-client. This exemption is identical to the trade secrets exemption of the Freedom of Information Act, 5 U.S.C. §552(b) (4) and was adopted with express recognition of judicial interpretations of the FOIA exemption 6/. Considering

4/ Section 706(b) provides, in part, "...Nothing said or done during and as part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned."

5/ Section 709(e) provides, in part, "It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information."

6/ The debates in the House, 122 Cong. Record H 7867 (July 28, 1976), specifically mentioned National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), wherein the Court held that information is confidential if its disclosure would either (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person or company from whom the information was obtained.

the number of times this exemption has been invoked in FOIA requests to the Commission (twice in the past year), it is not contemplated that this exemption will be of any major concern in Commission meetings, except perhaps in contract discussions.

The fifth exemption protects discussions that involve accusing any person of a crime or formally censuring any person. It applies to both natural persons and corporations. To be covered by this paragraph, the discussion must relate to a specified person or persons and, if a possible criminal violation is at issue, a specific crime or crimes. An example would be a discussion of an employer's submission of fraudulent Employer Information (EEO) Reports, accompanied by the consideration of whether the matter should be referred to the Justice Department. "Formally censuring any person" includes formal reprimands of agency employees. The exemption applies both to preliminary meetings and meetings at which a final decision is made, since the purpose of the exemption is to protect the reputation of persons from irreparable harm should the agency decide that a formal accusation or censure is not warranted.

Exemption (c)(6) permits the closing of a meeting where the discussion would reveal personal information whose disclosure would constitute a clearly unwarranted invasion of personal privacy, e.g., discussion of an individual's health or alleged drinking habits, or individual requests made pursuant to the Privacy Act.

As with the fifth exemption, the sixth exemption balances the need for openness against the individual's right to privacy. Thus, if the Commissioners make an initial determination that it would be in the public interest to hold an open discussion, then neither exemption need be invoked. In addition, there may be circumstances where the official status of the individual in question will help determine whether the exemption will be invoked, e.g., a discussion of an individual's competence to

perform his or her job, might be open if he or she is a high-ranking official in the agency, but closed if he or she is of lower rank.

Exemption (c)(7) applies to meetings which disclose information from investigatory records compiled for civil or criminal law enforcement purposes. It also includes non-written information, such as oral information obtained from a confidential source, which, if written, would be included in investigatory records compiled for law enforcement purposes. The meeting can be closed, however, only to the extent that disclosure of records would (A) interfere with the enforcement proceedings; (B) deprive a person of a right to a fair trial or an impartial adjudication (applies both to corporations and natural persons); (C) constitute an unwarranted invasion of personal privacy (relates to privacy of an individual only); (D) disclose the identity of a confidential source; (E) disclose confidential information furnished only by a confidential source in the course of a criminal or national security intelligence investigation; (F) disclose investigative techniques and procedures (matters already known to the public are not included); or, (G) endanger the life or physical safety of law enforcement personnel.

It should be noted that the above provisions are the same as those in the (b)(7) exemptions of the FOIA. It is anticipated that this exemption will be used often in the consideration of FOIA appeals by the Commission.

To justify closing under this exemption, the records in question must relate to a specific person or persons. The fact that the identity of a confidential source may be withheld does not justify the withholding of information secured from such a source which does not in and of itself reveal the identity of the source. Another governmental agency may not be a confidential source.

Exemption 8 applies to meetings which would, if open, disclose information contained in or relating to examination, operating, or condition reports on financial institutions. This provision is identical to exemption (b)(8) of the FOIA. The Commission will not be concerned with the eighth exemption, except to the extent that we obtain information from an agency responsible for regulating financial institutions.

The ninth exemption protects information whose premature disclosure would have certain adverse effects. Subparagraph (A) of the ninth exemption applies solely to agencies that regulate securities, currencies, commodities or financial institutions, and appears to be assertable only by those particular kinds of agencies. Should the Commission ever obtain information from an agency that regulates securities, commodities, or financial institutions, it could prevent disclosure under exemption (c)(7).

Subparagraph (9)(B) applies to all agencies and protects information whose premature disclosure would be likely to significantly frustrate an agency action that has not yet taken place. The use of the word "significantly" is intended to limit closings under this subparagraph to instances wherein

disclosure at the time in question would have a considerable adverse effect. Examples of the applicability of this exemption include: (1) discussion of the strategy an agency will follow in collective bargaining with its employees; (2) discussion of the possible relocation of a district or regional office; and (3) discussion of the agency's response to a Congressional request for views or testimony if the request itself stated that the reply was to be kept confidential.

As to the applicability of the (9) (B) exemption to agency discussions of its budget, the Office of Management and Budget has said:

"Although, as with the FOIA, it is not possible to determine merely by the generic category of such information whether such an agency would be authorized to close a particular meeting covered by the Government in the Sunshine Act, the premature disclosure of budgetary information may 'be likely to significantly frustrate implementation of proposed agency action' (5 U.S.C. 552b(c) (9) (B) added to section 3(a) of Public Law 94-409). Furthermore (sic), other exemptions from the open meeting requirements of the Act may apply." OMB Circular No. A-10, §7 (revised, Nov. 12, 1976).

Exemption (9) (B) does not apply in instances where the agency has already disclosed to the public the content of its proposed action. It is irrelevant that the precise terms or details of the proposal have not been revealed. The standard is whether the agency has disclosed enough of the substance of the proposed action to enable the public to gain an idea of what the agency is proposing. Thus, once the agency discloses that it is considering a proposal to relocate a district office, it cannot then close a meeting pursuant to this exemption in order to discuss the details of the proposed action. However, leaks of such information would not destroy the availability of

exemption (9) (B), since the disclosure must have been made by the agency to come within the provisions of the Act.

Where the agency is required by law to make disclosure on its own initiative prior to taking final agency action on the proposal, the exemption will not apply. For example, where the agency is required to publish for notice and comment proposed regulations under section 709(c) of Title VII prior to their becoming effective, it cannot close a discussion pursuant to this subparagraph. Where the agency is not required to publish in advance proposed rules, such as procedural regulations under section 713(a), the discussions may be closed.

The tenth exemption (c) (10), includes discussions specifically concern the agency's issuance of a subpoena, participation in a civil action, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal adjudication involving a determination on the record after opportunity for a hearing. This exemption serves two functions. First, it permits the closing of discussions which, if made public, could prejudice the agency's litigating position or the legitimate interests of other persons. Second, it allows Commissioners to debate fully and candidly the merits of a case. It is anticipated that this exemption will be invoked by the Commission when it discusses the issuance of a subpoena, commencement of a civil action under Title VII, and the making of a formal request to the Justice Department to commence a civil action.

The most important consideration regarding application of the 10 exemptions is that they are not made mandatory under the Act, and may be waived when the discussion or the information is deemed to be in the public interest. Where Title VII requires confidentiality, however, the Commission will be obligated to vote to close a meeting.

IV. Comparison of Sunshine Exemptions With FOIA Exemptions

The Sunshine Act exempts eleven classes of information, whereas the FOIA exempts nine. Five exemptions are identical in language and numbering in both Acts: exemptions 1, 2, 3, 4, and 8. Exemption 7 in both Acts covers investigatory records, but the Sunshine Act also protects oral discussion of information that would, if written, be in investigatory records.

One significant difference is that Sunshine contains no protection for inter-or intra-agency discussions similar to subsection (b) (5) of the FOIA. The absence of a (b) (5) type exemption in the Sunshine Act has several practical consequences. A meeting may not be closed simply because it is likely to involve the discussion of staff recommendations or the views of an individual Commissioner. Similarly, if such views or recommendations are discussed at a closed meeting, they may not be deleted from a transcript or minutes unless they contain information exempt under one of the Sunshine Act exemptions. Reliance on FOIA exemption (b) (5) alone would not justify deletion from a transcript under subsection (f) (2) of the Sunshine Act.

Subsection (c) (10) of the Sunshine Act, protecting discussions of subpoena issuance, court actions, and agency adjudications, probably reflects an intention by Congress to protect information that, if in documentary form, would fall under exemption (b) (5) of the FOIA, and the same may also be true of the discussions protected under subsection (c) (9). Neither of these two Sunshine Act exemptions appears in the FOIA.

Subsection (c)(6) of the Sunshine Act protects "information of a personal nature." Exemption 6 of the FOIA protects "personnel and medical files and similar files." This slight difference is not significant, however, since court interpretations of exemption 6 of the FOIA have not emphasized any specific definition of the term "files," nor have they attempted to narrow the application of exemption 6 because of this language. See, e.g. Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir. 1974); Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73 (D.C. Cir. 1974); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971). In addition, the legislative history of the Sunshine Act expresses no intention to vary the scope of exemption 6 from that of the similar FOIA exemption.

There is no Sunshine Act counterpart to FOIA exemption 9, which covers "geological and geophysical information and data, including maps, concerning wells." If the Commission acquires such data from a private party, (c)(4) would apply to discussions concerning it. If generated by another governmental agency and then obtained by the Commission, (c)(7) might apply 7/.

One final difference between the Acts is that the FOIA contains no exemption similar to subsection (c)(5) of the Sunshine Act, which protects discussions that "involve accusing any person of a crime, or formally censuring any person." Under the FOIA,

7/ The (c)(4) exemption cannot be asserted for confidential data generated by another agency and then obtained by the Commission, because subsection (c)(4) covers only information "obtained from a person," and a governmental agency is not a "person." See 5 U.S.C. §551(2). If, however, an agency obtains data from a "person" and then provides it to the Commission, we can assert (c)(4).

documents relating to the Commission's consideration of whether or not to so accuse or censure a person would probably be exempt from disclosure under either the subsection (b) (5) exemption for intra-agency memoranda, or under the subsection (b) (6) exemption for files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, or both. If the Commission does decide to accuse or censure a person, it also could then probably refuse to disclose documents relating to that determination under FOIA exemption 7(B), which protects investigatory records the disclosure of which would "deprive a person of a right to a fair trial or an impartial adjudication."

V. Procedure for Announcing Meetings.

The Act requires the agency to give seven days advance public notice of each meeting. Thus, the Commission will have to require submission of proposed agenda items sufficiently in advance to allow time for the Commission to review and agree upon the agenda for the forthcoming meeting and to vote upon whether the meeting will be open or closed to the public.

The present time schedule requiring submission of proposed agenda items a week and a day before the subject meeting is inadequate for this purpose. We recommend that the Commission develop a tentative agenda at least 2 weeks in advance of the meeting.

The requirement of advance public announcement of meetings contemplates that reasonable measures be used to assure that the public is fully informed of public announcements. Steps the agency should consider taking to insure maximum public awareness are: 1) posting notices on the agency's public notice bulletin boards; 2) publishing them in publications whose readers may have an interest in the agency's operations; 3) sending them to persons on the agency's general mailing list or a list maintained for those who desire to receive such material; 4) radio and newspaper announcements; and 5) recorded telephone announcements.

The public announcement of meetings must include the following information: the date, time and place of the meeting, the specific subject matter of the meeting (e.g., "discussion of proposal for agency day-care facility," rather than a general statement of the subjects to be discussed, such as "proposals under consideration for agency funding"), whether the meeting is to be open or closed, and the name and phone number of an agency official who will respond to requests for information regarding the meeting. It may be expedient for the Commission to assign this latter task to the Office of Public Affairs on a permanent basis.

The statute also requires that notices of public announcements of meetings be submitted immediately to the Federal Register for publication. The Commission's practice of holding weekly meetings will necessitate weekly publication of announcements in the Federal Register.

If there is a change in the date, time, or place of a meeting subsequent to the agency's public announcement, the Commission must announce the change at the earliest practicable time, which should in no case be later than the commencement of the meeting or portion of the meeting in question. In the case of a change in the subject matter or determination to open or close a meeting, the vote of each member must also be announced.

The announcement of such changes must also be submitted immediately to the Federal Register for publication.

The Commission will have to determine which agency office or official should appropriately handle the public announcement of Commission meetings and the publication of such announcements in the Federal Register, and delegate these responsibilities.

VI. Requirements for Closing Meetings

Consistent with the Sunshine Act's presumption in favor of openness, meetings subject to the provisions of the Act may be closed only if the subject matter of such meetings is privileged from disclosure under one of the ten (10) exemptions of the Act.

The Act provides for three methods by which meetings may be closed. First, a meeting or portion thereof may be closed on the initiative of the Commissioners after a determination that the subject matter of such meeting or portion of a meeting falls within one of the statute's ten exemptions. Second, a meeting or portion of a meeting may, upon conditions, be closed at the request of a member of the public whose interests may be directly affected to the extent that such meeting or portion of a meeting would be privileged under exemptions 5, 6 or 7 of the statute, i.e., would involve formally censuring or accusing the person of a crime, would disclose information of a personal nature and constitute a clearly unwarranted invasion of personal privacy, or would disclose investigatory records compiled for law enforcement purposes. The conditions are that one member of the agency must conclude that the person may be directly and adversely affected by holding the meeting in public and the entire agency membership must then vote on whether or not to close the meeting. Third, the statute provides that a meeting or portion of a meeting may be closed pursuant to regulations promulgated by the agency, where a majority of the agency's meetings are likely to be closed to the public pursuant to exemptions 4, 8, 9A or 10, i.e., involve confidential trade secrets, commercial or financial information, information contained in reports

prepared by or for the use of agencies responsible for the regulation and supervision of financial institutions, information whose premature disclosure would be likely to lead to financial speculation or endanger the stability of a financial institution, adjudicatory matters before the agency 8/. For each of these methods a meeting or a portion thereof must be closed by at least majority vote of the entire agency membership (a simple majority of a quorum will not suffice). 9/

If the Commission needs to close only certain portions of a meeting, its vote must specifically refer to those portions of the meeting. A separate vote must be taken on each meeting or portion of a meeting the agency wishes to close, except that where a series of meetings to be held within a 30-day period involves the same "particular matters," a single vote may be taken as to whether to open or close the series of meetings. However, a series of meetings not requiring a separate vote must have more than a general similarity in content. The statute requires that the same particular agenda item be the subject of the series of meetings.

VII. Closed Meetings: Publication Requirements

Where a decision is made to close a meeting or portion of a meeting either because a Commissioner wishes to assert an ex-

8/ See further discussion in infra at pp. 20-21.

9/ We have defined the term "entire membership" of EEOC as "the number of Commissioners holding office at the time of the meeting in question." Though Title VII provides that the Commission is to be composed of five members, there are only three Commissioners presently holding office. Section 705(c) of Title VII provides that three members shall constitute a quorum for the purpose of conducting agency business. Thus, in EEOC's case, a majority vote of the agency's current membership will, of necessity, be a simple majority of the statutory quorum. However, such a vote is not inconsistent with the intent of the Sunshine Act as the three Commissioners currently holding office constitute the "entire membership" of the Commission as previously defined.

emption or in response to a request from a member of the public, each vote to close the meeting must be recorded and made public within one day, along with a full written explanation of the agency's decision to close the meeting. A list of persons expected to attend the meeting and their affiliation must accompany the explanation, unless such information is exempt from disclosure by the Sunshine Act.

The explanation must be specific. For example, the Commission will identify the applicable exemption, explain why the discussion falls within the applicable exemption, describe the relative advantages and disadvantages to the public of holding the meeting in closed or open session, and state why the agency concluded that, on balance, the public interest would be best served by closing the meeting. The publication provisions require: 1) publication in the Federal Register of the agency's public announcement of its meeting and that the General Counsel has certified that the meeting may be properly closed; 2) making available at an appropriate place within the agency the public certification by the General Counsel, explanation of the closing of the meeting, list of persons expected to be in attendance and their affiliations, record of votes, and sanitized transcripts of closed meetings.

VIII. Closed Meetings: General Counsel Certification 10/

The statute further requires that, in the case of meetings or portions of meetings closed to the public, the chief legal officer

10/ The act of §(f)(1) states that "the General Counsel or chief legal officer of the agency shall publicly certify that in his or her opinion, the meeting may be closed to the public and shall state each relevant exemption provision."

of the agency (in the case of the Commission, the General Counsel) publicly certify that in his opinion the meeting may be closed to the public, citing the exemptive provisions.

The position taken by the U.S. Administrative Conference on the role of the General Counsel or chief legal advisor of the agency is that the responsibility for certifying the closing of meetings is not delegable, but must be done by the General Counsel personally, or by his designee in his absence. The language of the statute appears to support this view. The conference further believes that the General Counsel's certification is not a legal prerequisite to closing agency meetings, since the provision for keeping transcripts of closed meetings (later added to the statute) lessens the prophylactic value of the General Counsel's certification, and since the Commissioners, themselves, are in a better position to assess the course of the discussions. However, the effect on any subsequent litigation of closing a meeting in the face of the General Counsel's refusal to certify should be given serious consideration.

IX. Closing Meeting by Regulation

As previously indicated, where a majority of the agency's meetings are likely to be exempt from the open meeting requirements under exemptions 4, 8, 9A or 10, the agency may promulgate regulations to provide for the closing of such meetings under an expedited procedure.

In order to determine whether it may invoke the expedited procedure under this provision of the Act, the agency must first determine whether a "majority" of its meetings are likely to be exempt under one of the three exemptions cited above. This determination must be based upon a review of the content of past agency meetings. Any of the following definitions of "majority of meetings" would be feasible:

1) a majority of the total number of agency meetings or portions of such meetings could have been closed under exemption 4, 8, 9A or 10.

2) a majority of the agenda items of such meetings fell within exemption 4, 8, 9A or 10.

3) a majority of the meeting time was spent discussing matters privileged under exemption 4, 8, 9A or 10.

Of the four exemptions under which an agency may promulgate regulations to close meetings, the only one which would apply to EEOC meetings with sufficient frequency to warrant a regulation would be exemption 10: meetings concerning "the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding..." The issuance of subpoenas, subpoena modification and revocation requests and litigation against respondents are often the subject of Commission meetings, with litigation being a weekly agenda item.

Once the agency has adopted such regulations, the members need only invoke the regulation by a majority vote of the entire agency membership taken at the beginning of such meeting or portion of a meeting to confirm the fact that the closing of such meeting or portion thereof is in order.

Closing a meeting by regulation dispenses with the requirements of giving seven-day's advance public notice; providing a written explanation for the closing; voting on whether to close prior to the time of the meeting; providing advance notice of the name of an official who will respond to requests about the meetings; and taking a vote of the agency membership to change the agenda for a meeting after it has originally been announced. However, the following requirements remain: General Counsel certification that the meeting may properly be closed; publication of the recorded agency vote; release of non-exempt portions of the transcript or minutes; and public announcement at the earliest practicable date of the date, place and subject matter of the meeting.

X. Approach to Closing Meeting

The most practical approach to compliance with the closed meeting provisions of the Sunshine Act would appear to be the following:

The Commission should develop a tentative agenda at least two weeks prior to the meeting.

No later than 10 days before the meeting, requests to close the upcoming meeting must be submitted to the Executive Secretary who will submit the request to the General Counsel for his certification, and schedule a meeting for the Commission to vote on whether the meeting should be open or closed.

No later than 8 days before the meeting, Commission members should meet to vote on whether to open or close the meeting, and whether or not to withhold information pertaining to the meeting. At this meeting, the Commissioners will have the General Counsel certification and explanation, or refusal to certify and be able to take the General Counsel's action into consideration before taking their vote. A motion to close a meeting or sensitive portions thereof should be worded to cover subsequent meetings scheduled to be held within a 30-day period on the same matter. A vote should then be taken, and the decision carried by a majority of the entire agency membership, and the vote of each member recorded. 11/

11/ In order to avoid the potentially disruptive effect of ushering members of the public in and out during sensitive portions of an otherwise open meeting, the Commission might schedule sensitive topics for discussion at a separate meeting, or at the beginning or end of an open meeting. Commission members will have to exercise special care, where meetings or portions of meetings have been closed to the public, not to engage in the discussion and determination of matters which fall outside the exemption(s) applicable to the closed meeting or portions thereof.

The Commissioners are then required to consider whether the information pertaining to the closed meeting or portion thereof, otherwise required by the statute to be made public, should be withheld under one of the statute's exemptions. If the withholding of such information is deemed to be necessary, a vote should be taken and the vote of each member recorded. 12/

No later than the seventh day before the meeting, the appropriate agency official must make public announcement of the meeting. On the same day, or as soon thereafter as practicable, a copy of the agency's public announcement must be submitted to the Federal Register for publication.

12/ The vote to close a meeting and to withhold the information pertaining to such meeting may be taken simultaneously.

JUDICIAL ENFORCEMENT

Subsection (h) (1) confers on district courts jurisdiction to enforce the requirements of subsections (b) through (f) the Act by declaratory judgment, injunction, or such other relief as might be appropriate. Actions may be brought by any person prior to, or within 60 days after, the meeting out of which alleged violation of the statute arose. However, if the public announcement of the meeting was not initially provided by the agency in accordance with the Act, an enforcement action may be instituted at any time prior to 60 days after the public announcement of the meeting is finally made. Such actions may be brought in the district in which the meeting is held, or where the agency has its headquarters, or in the District of Columbia. The agency must serve its answer within 30 days after service of the complaint, and the burden is on the agency to sustain its action. The reviewing court may examine in camera any of the information at question in the suit and take such further evidence as it deems necessary.

The Act authorizes suits both to open a meeting scheduled to be closed and to close a meeting scheduled to be open. It differs from the FOIA, which provides only for suits to obtain information withheld by an agency, but not to protect information that the agency intends to make public.

The question arises as to whether the Commission can insist that persons exhaust administrative procedures before seeking court relief under the Act. A provision requiring exhaustion of remedies was expressly rejected by the Conference Committee, which stated that:

"The Conference substitute does not contain the requirement of the Senate bill that a potential plaintiff formally notify the agency before commencing an action under this subsection because the conferees expect and encourage potential plaintiffs or their attorneys to communicate informally with the agency before bringing suit." 13/

13/ S. Rep. No. 94-1178, 94th Congress, 2nd Sess. 22 (1976). (Conference Report)

The intent would have been clearer had the rejection of the Senate version been based on a desire to expedite judicial review rather than on an expectation that individuals would communicate "informally" with the agency prior to bringing suit. However, there is other evidence that Congress sought to minimize barriers to judicial review. Most notably, attempts to impose standing requirements on plaintiffs were defeated notwithstanding the argument that the federal courts would be flooded with litigation under the Act as a result. ^{14/} In addition, the liberal provision for attorneys fees contained in subsection(1) was included in the Act despite objections that it would encourage suits.

Nonetheless, courts may require exhaustion of administrative remedies as a matter of general administrative law, especially where legislative intent is uncertain. Therefore, the issue of exhaustion will have to be addressed more thoroughly when, and if, we are sued under subsection(h) (1).

Subsection (h) (2) provides that any federal court otherwise authorized by a law to review agency action may, at the application of any person properly participating in the review proceeding, inquire into violations by the agency of the Sunshine Act and afford such relief as it deems appropriate. A court having jurisdiction solely on the basis on subsection (h) (1) may not set aside or invalidate any agency action (other than an action to close a meeting or withhold information under the Act) taken or discussed at any agency meeting out of which the violation of the Act arose. Thus, district courts under (h) (1) may only correct Sunshine violations, but a court of appeals reviewing Commission Action could, e.g., reverse an otherwise valid order if the Commission committed a serious violation of the Act.

We believe the chances are remote that any Commission determination will be invalidated for failure to comply with the Sunshine Act in an inadvertent and isolated

^{14/} 122 Cong. Rec. H 7875-76 (July 28, 1976)

instance. 15/

Litigation Costs

/ Act, the court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by the party who substantially prevails in the action. However, "costs" may be assessed against the plaintiff only where the court finds that the suit was initiated "primarily for frivolous or dilatory purposes." In the case of an assessment of costs against an agency, the costs may be assessed by the court against the United States.

Annual Reports to Congress

Under subsection (j) each agency must report annually to Congress regarding its compliance with the Act, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed, the reasons for closing such meetings, and a description of any litigation costs assessed against the agency. It is recommended that forms for routine use be drafted that will facilitate preparation of this report. The responsibility for preparing the annual report could appropriately be delegated by the Commission to the General Counsel's Office since that office will be responsible for handling suits brought against the agency under the Act and the General Counsel will be responsible for certifying the closing of meetings.

Subsection (k) of the Sunshine Act declares that nothing in the Act expands or limits the present rights of any person under the FOIA, except that the exemptions set forth in subsection (c) of the Sunshine Act shall govern in the case of any FOIA request to copy or inspect the transcripts, records, or minutes described in subsection (f) of the Act. This provision prevents an agency from withholding information deleted from a transcript unless it is exempt under subsection (c) of the Sunshine Act.

15/ The Conference Report stressed that overturning agency action is not favored: "The conferees do not intend the authority granted to the Federal Courts..... to be employed to set aside agency action.....in any case where the violation is unintentional and not prejudicial to the rights of any person participating in the review proceeding. Agency action should not be set aside for a violation of section 552b unless that violation is of a serious nature." S. Rep. No. 94-1178, 94th Cong. 2d Sess. 23 (1976) (Conference Report).

Subsection (k) also provides that the requirements of chapter 33 of Title 44, United States Code, establishing certain provisions for the treatment and disposition of government records, do not apply to transcripts, recordings, and minutes created in compliance with the Sunshine Act.

The Sunshine Act is not Pre-Emptive

The Act does not constitute authority to withhold from Congress any information, even though exempt under subsection (c), and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open. The first clause parallels the FOIA. Therefore, a Congressional request for information must be made by a committee or subcommittee chairman acting in his or her committee capacity. Otherwise, it is treated as if it were a request by a private individual.

Relationship to Privacy Act

Subsection (m) declares that nothing in the Sunshine Act authorizes any agency to withhold from an individual any record, including transcripts, recordings, or minutes, which is otherwise accessible to that individual under the Privacy Act.

Ex Parte Communications

Section 4 of the Sunshine Act amends the provisions of the Administrative Procedure Act governing adjudication and formal rulemaking (4 U.S.C. §557) by prohibiting ex parte communications in such formal, trial-type proceedings. It applies to all agencies governed by the Administrative Procedure Act, whether or not the agency is subject to the open meeting provisions of the Sunshine Act.

Since the prohibition of ex parte communications applies only to formal agency adjudications, it should have very little if any, affect on the business of this Commission. 16/

16/ In EEOC v. Raymond Metal Products Company, 530 F.2d 590 (5th Cir. 1976) the Court referred to the legislative history of Title VII and pointed out that Congress had considered, but rejected, a proposal to give the Commission adjudicative powers. The court said further at page 593:

"By restricting the Commission to issuance of procedural rules Congress intended to limit it to making rules for conducting its business, and to deny it the power to make substantive rules that create rights and obligations."

Informal rule-making proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

CONFORMING AMENDMENTS

Section 5 of the Act makes certain amendments to other provisions of the United States Code. Subsection 5(b) amends the third exemption of the Freedom of Information Act, 5 U.S.C. §552(b)(3). This exemption allowed the withholding of information specifically exempted from disclosure by statute. The Sunshine Law Changes the third exemption to permit withholding of information only if the applicable federal law leaves no discretion or provides specific criteria governing the withholding of material.

There are two important provisions of Title VII which are frequently used to withhold information. Section 706(d) prohibits the making public of anything said or done by the Commission during its informal endeavors to eliminate discrimination based on a Commission finding of reasonable cause. Section 709(e) prohibits officers and employees of the Commission from making public any information obtained by the Commission pursuant to its authority under Section 709 prior to the institution of any proceeding under Title VII involving such information. Since neither of these Title VII provisions permits any discretion in whether to disclose the information sought, the third exemption of the FOIA will continue to apply to the Commission as in the past.

Subsection 5(c) makes it clear that Federal Advisory Committee meetings may be closed if they meet a Sunshine exemption.

Effective Date

Section 6 of the Act provides that the Sunshine Act takes effect 180 days after enactment (March 12, 1977), and that regulations be promulgated by that time.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Thomasina V. Rogers to Robert J. Funk re: Request for Legal Opinion (10 pages)	n.d	P5

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[Equal Employment Opportunity Commission Confirmation Briefing Materials] [1]

ds69

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Divider Title: B

EEOC Enforcement Profile

PRIVATE SECTOR PROGRAMS

Context: In FY 1980, EEOC received 56,362 new private sector charges to process with a total staff of 3,390. In FY 1993, EEOC received a record-breaking 87,942 charge receipts, with a staff of 2,891 -- 559 fewer than in 1980.

Charge Receipts: EEOC's incoming work (receipts and net transfers/deferral from FEPA¹) has increased 41 percent from 1990 to 1993. Receipts during FY 1993 were 21.6 percent higher than in FY 1992. In FY 1993, charges filed under the ADA (15,274) or 17.4 percent of total receipts, greatly contributed to the increase.

Current staffing levels cannot keep pace with the increase in charge receipts, even though resolution rates have increased significantly, up 4.9% in FY 1993. EEOC now faces an overall ratio of resolutions to receipts which is significantly less than one-to-one. For every new charge EEOC receives, it resolves only .78 of its existing charges, (.94 in FY 91, .89 in FY 92). This has led to an increasingly higher inventory of pending charges.

Pending Inventory: EEOC had 73,124 private sector charges pending at the end of FY 1993, the highest recorded in more than 10 years, and 20,268 more than reported at the end of FY 1992. If EEOC accepted no new charges and productivity levels remained constant, it would take the Commission 12.2 months to resolve this caseload (called "months of pending inventory"). The average EEOC workload equated to 92.8 charges per investigator, up 25.2 cases from the 67.6 average caseload in FY 1992.

Without additional staff these trends are expected to continue. At the end of the second quarter of FY 1994, EEOC's pending workload is 85,212 charges, or 16.6 months of pending inventory. By the end of FY 1994 pending charges are expected to reach over the 100,000 mark, creating 18.6 months of inventory.

Systemics: During FY 1993, EEOC initiated 28 new systemic charges, down from 50 charges in FY 1992. EEOC resolved 41 systemic charges FY 1993 compared to 42 resolutions in FY 1992.

¹ Fair Employment Practice Agencies (FEPAs) are agencies with work-sharing agreements with EEOC.

Systemics are increasing in FY 1994. According to preliminary figures, at the end of the second quarter, EEOC approved 31 systemic charges and resolved 19.

FEDERAL SECTOR PROGRAMS

Charge Receipts: The increase in federal complaint receipts coupled with the new Regulation 1614 requirements of processing hearings within 180 days strained the Commission's resources during FY 1993 and is continuing to do so during the first five months of FY 1994. EEOC received 8,892 requests for hearings on Federal complaints during FY 1993, a 28.6 percent increase over FY 1992. During the same period, requests for appeals of Federal complaints increased 6 percent over FY 1992, but are showing an even greater rate of increase in FY 1994 (approximately 14 percent increase of the first five months of over the same period in FY 1993). Hearing requests are up by 20 percent for the comparable five-month period.

Pending Inventory: At the end of FY 1993 there were 3,991 pending charges or 5.4 months of inventory. In FY 1994 these figures are expected to rise to 5,064 pending charges and 6.5 months of inventory.

LITIGATION PROGRAM

Tracking: The Office of General Counsel's (OGC) tracking systems are largely inadequate. Therefore, EEOC's data from FY 1993 and early estimates from FY 1994 are preliminary.

Suits Filed: OGC filed 481 suits in FY 1993, a 7.6 percent increase from the 447 suits filed in FY 1992. By the end of FY 1993, OGC experienced a 24.1 increase from FY 1992 in the number (825) of Presentation Memoranda (charges to be considered for litigation) received from the field. The overall increase in charge receipts should result in an increase in the number of cases that field office will submit for litigation consideration in the future.

Class Action Suits: In FY 1993, the agency brought more class action lawsuits (63) than in FY 1992 (47). In the first quarter of this fiscal year, the Commission has brought 24 class action lawsuits.

INVENTORY

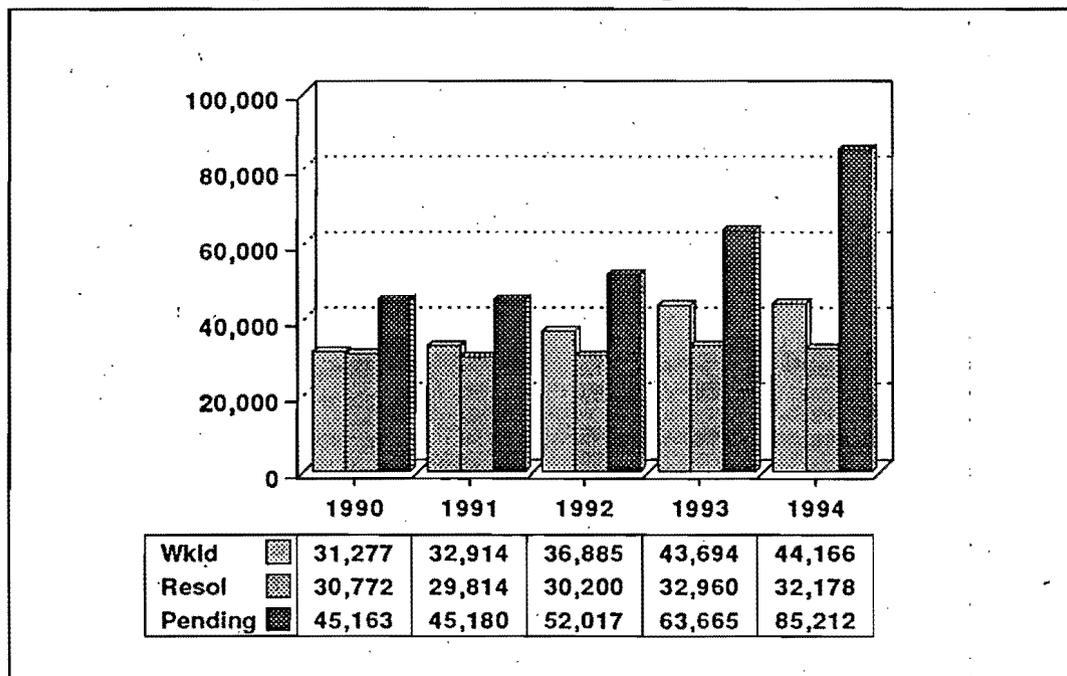
Table 6. Pending Inventory

SECOND QUARTER	FY 90	FY 91	FY 92	FY 93	FY 94
Pending	45,163	45,180	52,017	63,665	85,212
Change/Prior Year	-7,721	17	6,837	11,648	21,547
Percent Change	-14.6	0.0	15.1	22.4	33.8
Months Pending	8.2	8.8	10.2	12.5	16.6

Primarily attributable to the receipt of 8,672 ADA charges through second quarter, the pending inventory rose to 85,212. This represents a 33.8 percent increase over the 63,665 charges pending at the end of second quarter last year. Since implementation of the ADA and the Civil Rights Act of 1991 without additional staff, the Agency's pending inventory rose 88.6 percent. Months of pending inventory at 16.6, reached the highest level in thirteen years.

Chart 8, below, depicts second quarter incoming workload (receipts and net FEPA transfers), resolutions and pending inventory for second quarter 1990 through second quarter FY 1994. The chart shows that, for the third consecutive year, growth in incoming workload is causing pending inventory to rise, even with resolutions near historically high levels.

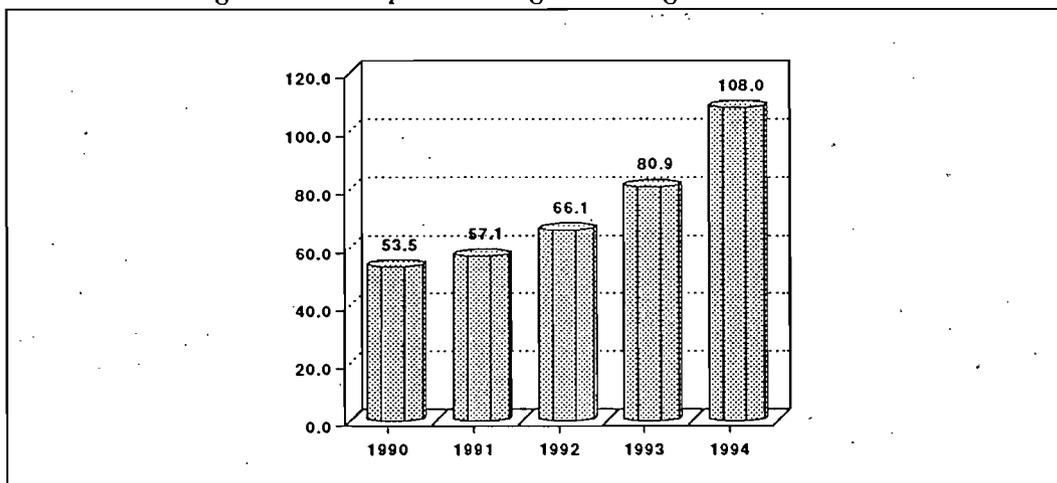
Chart 8. Incoming Workload/Resolutions/Pending Inventory



Excerpt from:
 FY 1994 Second Quarter Report to the Chairman
 from Office of Program Operations

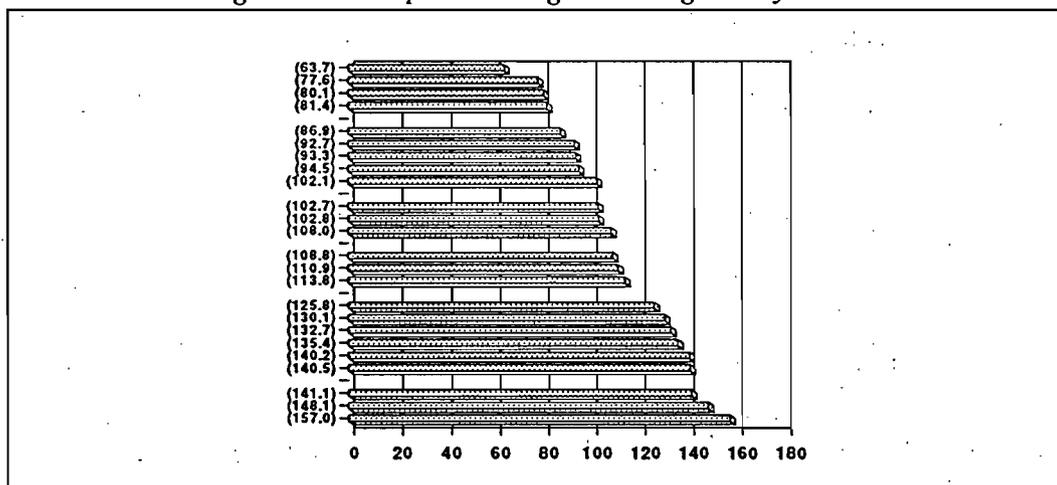
The continuing growth in receipts, without a proportionate increase in new investigators, resulted in a major increase in average caseload per investigator. Chart 9 shows FY 1994's second quarter investigator caseload of 108.0 as more than twice what it was in FY 1990.

Chart 9. Average Caseload per Investigator Assigned - Nationwide



Caseloads per investigator by district ranged from a low of 63.7 to a high of 157.0.

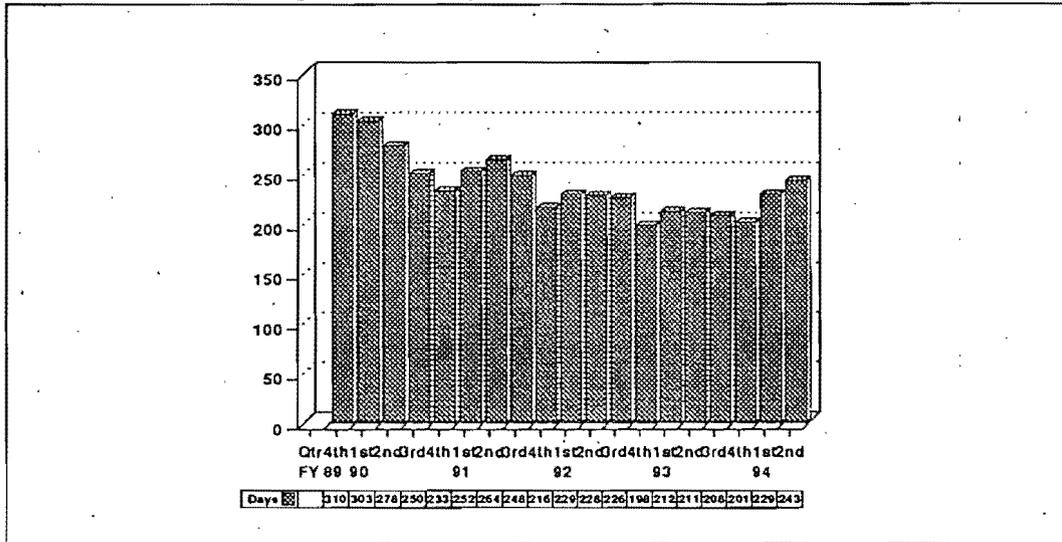
Chart 10. Average Caseload per Investigator Assigned By District



In the district with the lowest average caseload, the average age of charges pending was 232 days and 34.9 percent of the cases were over 270 days old. The district with the highest average caseload had an average charge age of 282 days with 45.5 percent of all open charges over 270 days old. Productivity in both districts was comparable, underscoring the overriding negative impact of excessively large individual caseloads on the resolution of charges in a timely manner.

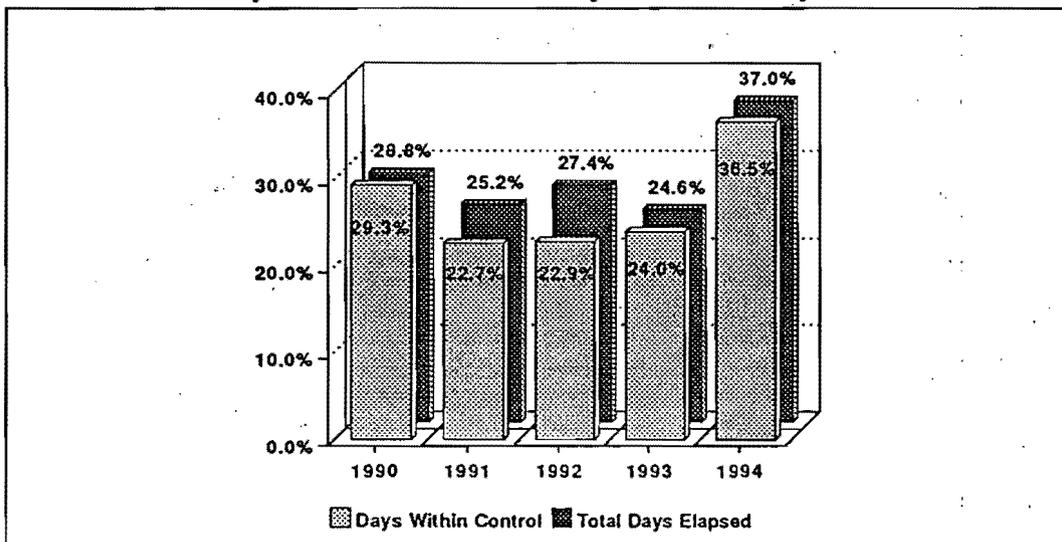
Average age of pending inventory has been tracked quarterly since fourth quarter FY 1989 when the average age was 310 days. As a result of rising workload, the average age of open cases was 243 days, 32 days more than second quarter last year, and the highest in the last eleven quarters.

Chart 11. Average Age of Pending Inventory



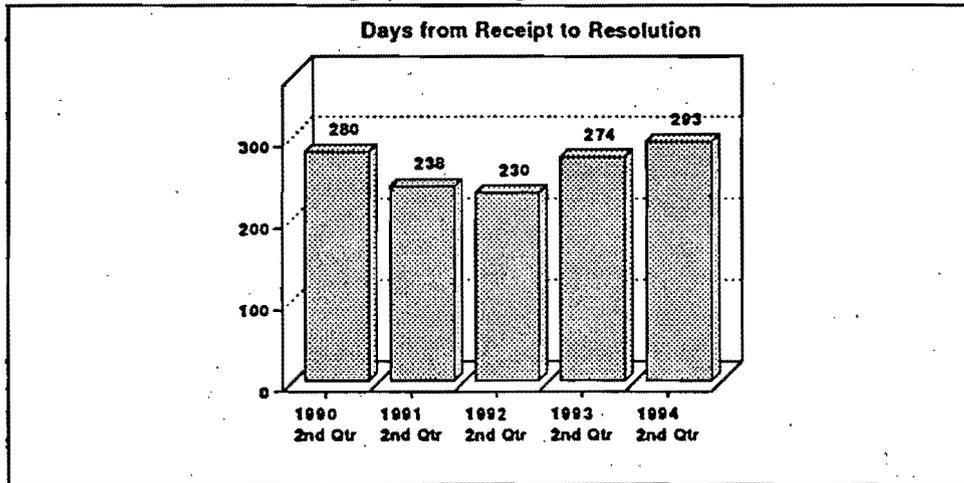
When total days elapsed from the date a charge is filed are counted, the percentage of charges in the inventory still open after 270 days jumped from last year's 24.6 to 37.0 percent. This is the highest percentage in the last five years and is another indication of the negative impact rising workloads are having. When charges are placed on hold due to subpoena actions, headquarters review or conciliation efforts, and the days allocated to these activities are excluded, the percentage of 270-day charges was 36.5 percent, also significantly higher than last year's 24.0 percent.

Chart 12. 270-Day Old Cases as Percent of Total Inventory



A consequence of the rise in the average age of open cases has been an increase in the number of days required to resolve a charge. This now stands at 293 days, up 19 days or 6.9 percent since last year.

Chart 13. Average Charge Processing Time





POLICY STATEMENT ON REMEDIES AND RELIEF FOR INDIVIDUAL CASES OF UNLAWFUL DISCRIMINATION

Approved February 5, 1985

On September 11, 1984, the Equal Employment Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency's law enforcement program is dependent upon securing prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices.

Predictable enforcement and full, corrective, remedial and preventive relief

The agency's standard is full remedial, corrective and preventive relief.

are the principal components of the method

with which the Commission intends to pursue this agency's mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

The Commission believes that a full remedy must be sought in each case where a District Director concludes the case has merit and has, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutes the agency enforces has been violated. The remedy must be fashioned from the wide range of remedial measures available to this law enforcement agency which has broad authority under the statutes it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

Accordingly, all remedial and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should

Remedies Policy

contain the following elements in appropriate circumstances:

- (1) A requirement that all employees of respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular types of discrimination found or conciliated will not recur;
- (2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;
- (3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position that person would have occupied but for the discrimination suffered by the person;
- (4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and
- (5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The components of these remedial elements are as follows:

(1) Notice Requirement

All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or to union members if respondent is a labor organization), prepared by the agency on EEOC forms, specifically advising respondent's employees or members of the following:

- (a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.
- (b) That federal law requires that there be no discrimination against any employee or applicant for employment because of the employee's race, color, religion, sex, national origin or age (between 40 and 70) with respect to hiring, firing, compensation, or other terms, conditions or privileges of employment (Federal sector notices will include handicap as an unlawful basis of discrimination).¹
- (c) That respondent supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

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- (d) That respondent will not engage in the specific unlawful conduct which the District Director believes has occurred or is conciliating, or which the Commission or a court has found to have occurred.²
- (e) That respondent will, or has, taken the remedial action required by the conciliation agreement or the order of the Commission or Court.³

(2) Corrective, Curative or Preventive Provisions

In appropriate circumstances, a remedy must provide that the respondent take corrective, curative or preventive action designed to ensure that similar violations of the law will not recur. Similarly, corrective, curative or preventive measures may also be adopted in those situations where those measures are likely to prevent future similar violations.

Thus, where a policy or practice is discriminatory, the policy or practice must be changed. Similarly, if a particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be required to take corrective action so that the discriminatee or similarly situated employees not be subjected to similar discriminatory conduct. This corrective action may be

accomplished, for example, by insulating employees from that individual for a period of time, or by requiring the respondent to discipline or remove the offending individual from personnel authority, or by requiring the respondent to educate the offender and other supervisors so that they may overcome their unlawful prejudices. These and any other appropriate measures, or any combination thereof, designed to meet this goal should be considered when negotiating settlements or drafting prayers for relief. This type of relief is not to be designed for punitive purposes. Rather, this relief is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the chance of its recurrence.

In addition, the respondent must be required to take all other appropriate steps to eradicate the discrimination and its effects, such as the expunging of adverse materials relating to the unlawful employment practice from the discriminatee's personnel files.

(3) Nondiscriminatory Placement

Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the respondent's workforce, to the position the discriminatee would have occupied

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absent discrimination, or to a substantially equivalent position, even if the placement of the discriminatee results in the displacement of another of respondent's employees ("Nondiscriminatory Placement"). The Nondiscriminatory Placement may take place by initial employment, reinstatement, promotion, transfer or reassignment and must occur without any prejudice to, or loss of, any employment-related rights or privileges the discriminatee would have otherwise acquired had the discrimination not occurred.

If a Nondiscriminatory Placement position that the discriminatee should occupy no longer exists, then employment for which the discriminatee is qualified must be offered to the discriminatee in other areas of the respondent's operation. Finally, if none of the foregoing positions exists in which the discriminatee may be placed, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

It is essential that victims of discrimination not suffer further and that respondents not gain by their misconduct. Accordingly, the contention by a respondent that a discriminatee is no longer suitable for Nondiscriminatory Placement due to a loss of skills, a change in job content or some other reason is not

an acceptable excuse for a respondent's failure to accomplish a Nondiscriminatory Placement of a discriminatee. The burden is upon the respondent to demonstrate that the inability of the discriminatee to accept Nondiscriminatory Placement is unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similarly, the burden is also on the respondent to demonstrate a contention that post-discrimination conduct by a discriminatee renders the discriminatee unworthy of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job displacement of another of the respondent's employees. If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

(4) Backpay

Each identified victim of discrimination is entitled to be made whole for any loss of earnings the

Remedies Policy

discriminatee may have suffered by reason of the discrimination. Each individual discriminatee must receive a sum of money equal to what would have been earned by the discriminatee in the employment lost through discrimination ("Gross Backpay") less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted ("Net Interim Earnings"). The difference between Gross Backpay and Net Interim Earnings is Net Backpay Due. Interest should be computed on all Net Backpay Due. Net Backpay Due accrues from the date of discrimination, except where the statutes limit the recovery, until the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements or reimbursement and fringe benefits such as pension and health insurance. Gross Backpay must also reflect fluctuations in working time, overtime rates, changing rates of pay, transfers, promotions, and other prerequisites of employment that the discriminatee would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and the Age Discrimination in Employment Act liquidated damages based on backpay will also be available.

(5) Cessation Provisions

All respondents must agree to be ordered to cease from engaging in the specific unlawful employment practices involved in the case. For example, a respondent should agree to cease discriminating on the unlawful basis and in the specific manner alleged or a respondent might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including broad cessation language in an agreement or order which is designed to order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirement of conciliation requires that agency to abdicate its principal law enforcement responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be reasonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within

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this scope, conciliation must be actively pursued by the agency. In this regard, in all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements as set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or counterproposals to the full range of remedies described in this policy may be considered if those compromises or counterproposals address fully the remedial concepts described in this policy. Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.

1. Editor's comment: The Commission also now has responsibility for enforcing the Americans With Disabilities Act which generally prohibits employment discrimination on the basis of disability. In addition, since the adoption of the Remedies Policy, Congress has removed the age 70 cap on protection from employment discrimination on the basis of age.

2. For example, the following types of assurances could be required of a respondent which committed several types of unlawful employment practices in a particular case:

"XYZ, Inc. will not refuse to hire employees on the basis of their sex;

"XYZ, Inc. will not refuse to promote employees on the basis their sex or their race; and

"XYZ, Inc. will not threaten to fire employees because they have filed charges with the Equal Employment Opportunity Commission."

3. For example, employees could be notified of the relief obtained in the following way:

"XYZ, Inc. will promote and make whole the employees affected by our conduct for any losses they suffered as a result of the discrimination against them. Specifically, Mary Jones and Susan Smith will be promoted to the position of shift supervisor and will be made whole for any loss in pay or benefits they may have suffered since the time that we failed to promote them to that position.

"XYZ, Inc. has adopted an equal employment opportunity policy and will ensure

Remedies Policy

that all supervisors in making selections for promotions abide by the requirements of that policy that employees not be discriminated against on the basis of their sex or race."

STATEMENT OF ENFORCEMENT POLICY

Adopted September 11, 1984



The Commission believes that two critical features of an effective law enforcement program are certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. Those critical features have never been fully developed by this law enforcement agency. The Commission believes that Commission employees, charging parties and respondents should

enforcement which will more directly carry out our law enforcement responsibilities.

In support of this goal, the Commission has determined that every case in which the District Director has found that one of our statutes has been violated should be submitted to the Commission for litigation consideration if attempts at conciliation fail. In the implementation of this law enforcement policy, the Commission believes that the following points need to be clearly understood:

"The Commission will review for litigation consideration all reasonable cause determinations and letters of violation where conciliation has failed."

understand that the Commission has adopted the goal of pursuing through litigation each case in which merit has been found and conciliation has failed. The achievement of that degree of certainty and predictability in enforcement requires a unity of purpose on the part of all segments of the Agency. The purpose of this memorandum is to articulate this enforcement policy and to direct that you develop those mechanisms necessary to more effectively integrate and allocate the Commission's legal and investigative resources so that this agency can achieve that degree of certainty and predictability in

- (1) The Commission will review for litigation consideration all reasonable cause determinations and all letters of violation where conciliation has failed;
- (2) The reasonable cause determination or letter of violation requires input by the Agency's legal staff before the determination is made;
- (3) The District Director is responsible for issuing all letters of determination and letters of violation. In so doing, the District Director will give serious consideration to the analysis, guidance and recommendation of all those providing input including the Regional Attorney;
- (4) One finding of discrimination is no

Enforcement Policy

more "worthy" of litigation than any other finding of discrimination. Accordingly, the Commission believes that an employment philosophy or operational system which attempts to determine which among several meritorious findings is "worthy" of governmental resources is inconsistent with our statutory obligations. The National Litigation Plan is designed to focus attention on additional areas of special concern for litigation consideration. It should not be interpreted as a limitation on the consideration of meritorious litigation proposals which may fall outside the defined parameters of the National Litigation Plan.

The Commission, in support of these principles, directs the Offices of the General Counsel and Program Operations to develop jointly, for approval by the Commission, the appropriate administrative mechanisms which will implement the following procedures:

- (1) The advice of attorneys should be sought, as appropriate, during the investigative process for all cases.
- (2) Before the issuance of a reasonable cause determination, or letter of violation, the District Director shall obtain from the Regional Attorney an analysis of whether the evidence supports such a finding in accordance with the following standard:

It is more likely than not that

the Charging Party(s) and or members of a class were discriminated against because of a basis prohibited by the statutes enforced by the Equal Employment Opportunity Commission. The likelihood that discrimination occurred is assessed on evidence that establishes, under the appropriate legal theory, a prima facie case. If the Respondent has provided a viable defense, evidence of pretext should be assessed.

If the Regional Attorney is of the view that the evidence does not support such a reasonable cause finding or letter of violation, the Regional Attorney shall specify in writing to the District Director the reasons therefor and those reasons shall be transmitted to the General Counsel for review following failure of conciliation.

- (3) The District Director, after considering the Regional Attorney's recommendation, shall:
 - a. Issue a determination of reasonable cause or letter of violation; or
 - b. Obtain additional evidence; or
 - c. Issue a finding of no reasonable cause or other appropriate closure.

Enforcement Policy

(4) Following the failure of conciliation in every case where a reasonable cause determination or letter of violation has been issued, the District Director shall forward the case to the Regional Attorney. The Regional Attorney shall then forward such information as required by the General Counsel to the Office of General Counsel (Headquarters) for review and submission of a presentation memorandum to the Commission, through the Executive Secretariat. The General Counsel's submission shall include:

- a. The General Counsel's recommendation and any additional legal analysis;
- b. The Letter of Determination or Letter of Violation;
- c. The Investigative Memorandum;
- d. The Respondent Position Statement (or an indication that such a Position Statement does not exist);
- e. Notice of Conciliation Failure where applicable; and
- f. Copy of proposed complaint.

The Commission expects that each required analysis shall be succinct and completed in an expeditious manner.

INVESTIGATIVE COMPLIANCE POLICY STATEMENT

Adopted July 14, 1986

Timely and complete compliance with the Equal Employment Opportunity Commission's investigative requests is critical to the successful performance of the Agency's law enforcement mission. The Commission's "Statement of Enforcement Policy" and the "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination" have established the goals of certainty and predictability in enforcement and the securing of full remedial, curative and preventive relief from unlawful employment discrimination. The Commission believes that the achievement of these goals is predicated on thorough, focused and expeditious investigations of charges of discrimination. When these investigations result in unnecessary delay or inappropriate diversion of Commission resources, the Commission's law enforcement responsibilities are impeded.

The Commission intends to exercise its authority to secure compliance through the use of:

- (1) A subpoena process which provides for both expeditious processing of challenges to its use and more focused subpoenas which are tailored to the needs of a particular investigation;
- (2) A direct suit on the merits of a

charge where, in appropriate circumstances, issuance of a subpoena (and the resulting collateral subpoena enforcement litigation) against an uncooperative respondent is not absolutely necessary in reaching a determination on the charge: and/or

- (3) Adverse inference principles when a respondent has attempted to frustrate the Commission's investigative process.

Agency personnel should seek voluntary compliance with focused requests for information and should consider and respond to reasonable objections to those requests. However, the Commission is determined to invoke available enforcement mechanisms to obtain relevant information should such voluntary efforts fail.

The Commission has found that a

An adverse inference will be drawn when a respondent frustrates the Commission's processes.

Investigative Policy

number of impediments have caused delays and unnecessary diversion of Commission resources in the completion of the Agency's investigative responsibilities. Some respondents have failed to cooperate in providing information essential to the investigation until a lengthy subpoena enforcement process has been invoked. The Commission's subpoena enforcement program has enjoyed notable success in the courts. However, the Commission's investigative processes should not be frustrated by a respondent's ability to provoke extended subpoena litigation in an attempt to delay reaching a determination on the merits of a charge or to make settlement more attractive to charging parties because of the prospect of further delays in resolution. Similarly, the Commission's subpoena enforcement process is too complex, and at the same time, has not always sought information specifically tailored to an investigation. Moreover, some respondents have willfully destroyed or failed to maintain relevant information in an effort to impede the Commission's investigatory processes.

The Commission intends to provide its district offices with greater flexibility in dealing with uncooperative respondents through the enforcement options and principles set forth in this Policy Statement. The Commission also intends to reemphasize its responsibility to ensure that its subpoenas are focused and tailored to produce information relevant to an investigation.

In furtherance of the principles enunciated in this Policy Statement, the Commission directs the Office of Program Operations, the Office of Legal Counsel,

and the Office of General Counsel, where appropriate, to:

- (1) recommend expedited procedures for processing challenges to the Commission's Title VII subpoenas to include a single determination by the Commission on any Petition to Revoke or Modify Subpoena; and
- (2) establish mechanisms to ensure that district offices carefully focus and tailor subpoenas to the issues under investigation.

The Commission will continue to welcome receipt of information and evidence at any time. However, when a respondent fails to comply with requests for information in a timely manner, the Commission expects that district directors will consider, under appropriate circumstances, taking one or more of the following actions to complete its investigation responsibilities:

- (1) issue a subpoena to compel production of documents or testimony; or
- (2) in lieu of issuing a subpoena, issue a cause determination, engage in conciliation and, if unsuccessful, submit the matter to the Commission for litigation authorization in cases where the results of the investigation, although incomplete because of the conduct of an uncooperative respondent, contain probative evidence of discrimination; or
- (3) draw an adverse inference against a respondent as to the evidence sought,

Investigative Policy

when a respondent knowingly destroys or knowingly fails to maintain records in anticipation of the filing of a charge, or because of the Commission's investigation, or otherwise with the intent to defeat the purposes of the statutes enforced by the Commission. In such cases, the District Director may use the adverse inference, as to the evidence sought, to establish facts relevant to a determination on the merits. Should litigation on the merits of the charge thereafter result, all available uses of adverse inference principles will be urged upon the District Court in that litigation.

The Office of Program Operations, the Office of Legal Counsel and the General Counsel are directed to develop for Commission approval any necessary administrative mechanisms or regulatory changes to implement these objectives.

August 3, 1991

ENFORCEMENT POLICY IN CASES AGAINST PUBLIC EMPLOYERS

On September 11, 1984 the Equal Employment Opportunity Commission adopted its Statement of Enforcement Policy which requires that every case in which a District Director has found that one of EEOC's statutes has been violated be submitted to the Commission for litigation consideration upon failure of conciliation. The Enforcement Policy has resulted in certainty and predictability in EEOC's law enforcement efforts and has enhanced the quality of the investigation and analysis of those cause cases which have been considered by the Commission.

The Commission recognizes that charges filed against governments, governmental agencies and political subdivisions alleging violations of Title VII are another area of law enforcement activities that warrants the same degree of attention and consideration. While the Commission is not empowered under Title VII to bring a civil action against governmental respondents, the Commission is charged with the responsibility of fully investigating those charges, attempting conciliation and making referrals and recommendations for litigation to the Attorney General. Achieving consistency and predictability of law enforcement in these cases is no less important than in private sector cases. Indeed, the non-competitive nature of government enterprise may create an environment more conducive to unlawful considerations in employment decisions. It is, therefore, imperative that charges filed against public sector employers be handled by this agency in the same thorough and professional manner as those filed against private sector employers.

Accordingly, in order to ensure consistency and predictability in our law enforcement activities in the public sector and to ensure that cases transmitted to the Department of Justice for further action are fully developed and accompanied by appropriate recommendations, all cases in which a District Director has found that a government, governmental agency or political subdivision has violated Title VII and conciliation efforts have failed will be submitted directly to the Commission for litigation review.

Clinton Presidential Records Digital Records Marker

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Divider Title: _____ C _____

EEOC Appropriations Profile FY 1994 - FY 1995
(Funds in Thousands of Dollars)

	Budget Requested	House Allowance	Senate Allowance	Enacted	FTE Requested	FTE Actual
FY 1994 Request	234,845	230,000	227,305	230,000	3,000	2,850
State and Local	(25,000)	(26,000)	(28,500)	(26,500)	--	--
Total	234,845	236,000	227,305	230,000	3,000	2,850
FY 1995 Request	245,720	238,000*			3,020	
State and Local	(26,500)	(26,500)			--	
Total	245,720	238,000			3,020	

This is the full House committee mark-up from June 15, 1994.

Please note: At the mark-up, Congressman Frank Wolf proposed restrictions on the use of federal funds for implementation of any religious harassment guidelines but was defeated.

HOUSE FY 1995 APPROPRIATIONS FULL COMMITTEE MARK-UP

FY 1994 Appropriation	\$230,000,000
House FY 1995 Mark-up	<u>238,000,000</u>
Difference	+ \$8,000,000

President's FY 1995 Original Request	\$245,720,000
President's Adjustment (Rent)	<u>- 916,000</u>
President's FY 1995 Revised Request	\$244,804,000

President's FY 1995 Revised Request	\$244,804,000
House FY 1995 Mark-up	<u>238,000,000</u>
Difference	- \$6,804,000

KEY POINTS

- State and Local at FY 1994 funding level (\$26.5M)
- Additional 106 FTE vs. requested 170 FTE (- 64 reduction)
- Additional \$500,000 for systemic case support (requested level)
- Additional \$1,000,000 for information resources management vs. requested \$1,250,000 (- \$250,000)
- "The Committee recognizes that this amount may not be sufficient to allow the EEOC to adequately carry out both the provisions of the Americans with Disabilities Act and the Civil Rights Act of 1991, and continue its ongoing workload under existing statutes. However, the Committee has provided the EEOC the maximum amount possible within the constraints of its funding allocation, as evidenced by the fact that this amount is one of the few in the bill to receive funding for program enhancements."

[COMMITTEE PRINT]

NOTICE: This bill is given out subject to release when consideration of it has been completed by the full Committee. Please check on such action before release in order to be advised of any changes.

Calendar No.

103D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { 103-

DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY,
AND RELATED AGENCIES APPROPRIATIONS BILL, FISCAL YEAR 1995
AND SUPPLEMENTAL APPROPRIATIONS BILL, FISCAL YEAR 1994

JUNE , 1994.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. MÖLLOHAN, from the Committee on Appropriations,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

INDEX TO BILL AND REPORT

	Page number	
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Committee expects the Commission to concentrate its major efforts and a significant portion of these additional resources on the evaluation of Federal civil rights enforcement efforts.

The Committee has removed the statutory requirements which were included in the appropriations acts in recent years for the Commission which required certain amounts of funding to be spent on regional offices and advisory committees. The Committee has removed these requirements to provide the Commission with discretion to redeploy its resources in a more effective way.

In April, 1994, the General Accounting Office (GAO) produced a draft report on the travel activities of Commissioners at the U.S. Commission on Civil Rights. This audit report was based on a review of Commissioner travel documents for the period FY 1992 through February of FY 1994. One of the questions this audit was designed to answer was whether the statutory limitation on Commissioners' billable workdays and the statutory prohibition against the Commission accepting voluntary services effectively placed a limit on Commissioners' travel. In their draft report, the GAO concluded that the appropriations limitation on Commissioners' billable work days and the statutory prohibition against the Commission accepting volunteer services do not limit the amount of travel reimbursement Commissioners can receive. They added that as long as a Commissioner is performing official Commission business, he or she is entitled to travel reimbursement. GAO stated that the billable workday limitation does not limit the number of days the Commissioners can work in a year and receive travel reimbursement, only the number of days for which they can be paid. Further, the GAO stated that the statutory prohibition against acceptance of volunteer services does not apply to the Commissioners.

While this audit report is still in draft stage and has not yet been released publicly, this finding is counter to prior Commission interpretation of the billable days limitation as stated in the annual appropriations statute. The billable days cap was intended to restrict Commissioner activities to the set number of days per year to include salary time as well as time spent in reimbursable travel status.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SALARIES AND EXPENSES

The Committee recommends \$238,000,000 for the Salaries and Expenses of the Equal Employment Opportunity Commission for fiscal year 1995. This amount is \$6,804,000 less than the request, but is \$8,000,000 more than the current year appropriation enacted to date.

The bill also includes language included in previous appropriations acts allowing: (1) non-monetary awards to private citizens; (2) up to \$26,000,000 for payments to State and local agencies; and (3) up to \$2,500 for official reception and representation expenses. The bill also includes requested language permanently canceling \$242,000 of the budgetary resources available to the Commission in fiscal year 1995 for procurement and procurement-related expenses. The language also includes a definition of the term "procurement."

The Committee recommendation includes all of the adjustments to base for compensation and benefits except for the proposed increase in position utilization. The Committee recommendation includes an increase of \$4,042,000 for an additional 106 FTE for the Commission's law enforcement activities. In addition, the Committee recommendation reflects the FTE and administrative reductions proposed in the budget as well as the GSA rent reduction. The Committee recommendation also includes \$500,000 for adjustments to systemic case support costs as requested and an adjustment of \$1,000,000 for information resources management. The Committee did not approve the requested adjustment for other operation costs.

The Committee recognizes that this amount may not be sufficient to allow the EEOC to adequately carry out both the provisions of the Americans with Disabilities Act and the Civil Rights Act of 1991, and continue its ongoing workload under existing statutes. However, the Committee has provided the EEOC the maximum amount possible within the constraints of its funding allocation, as evidenced by the fact that this account is one of the few in the bill to receive funding for program enhancements.

FEDERAL COMMUNICATIONS COMMISSION

SALARIES AND EXPENSES

The Committee recommends total budget authority of \$166,832,000 for the Salaries and Expenses of the Federal Communications Commission (FCC) for fiscal year 1995, of which \$116,400,000 is to be derived from offsetting fee collections. The Committee recommendation provides for the full request, and is \$6,532,000 above the current year appropriation.

The FCC is an independent agency charged with regulating interstate and foreign communications by means of radio, television, wire, cable and satellite. The Commission's responsibilities were greatly increased as a result of the Cable Act, and will increase even more since the Commission will be one of the key agencies responsible for the information highway.

The Committee recommendation allows for requested adjustments to base, which will allow the Commission to annualize the program and staffing enhancements begun in fiscal year 1994. The Committee assumes staffing levels of 2,072 FTE for the FCC in fiscal year 1995.

The recommendation also increases the amount of section 9 fees to be collected by the Commission in fiscal year 1995 from \$95,000,000 to \$116,400,000. The FCC estimates that \$21,400,000 of its fiscal year 1995 request is associated with the direct and indirect costs of legal and executive activities related to or supporting the performance of its enforcement, policy and rulemaking, user information services and international activities. This \$21,400,000 increase in fee collections equals the amount necessary to recover these management costs related to the regulatory programs funded from these fees.

The Committee also recommends bill language, similar to that included in previous appropriations acts, which allows: (1) up to \$600,000 for land and structures; (2) up to \$500,000 for care of

[FULL COMMITTEE PRINT]

NOTICE: This bill is given out subject to release when consideration of it has been completed by the full Committee. Please check on such action before release in order to be advised of any changes.

Union Calendar No.

103D CONGRESS
2D SESSION

H. R.

[Report No. 103-]

Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies programs for the fiscal year ending September 30, 1995, and making supplemental appropriations for these departments and agencies for the fiscal year ending September 30, 1994, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE , 1994

Mr. MOLLOHAN, from the Committee on Appropriations, reported the following bill; which was committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1995, and making supplemental appropriations for these departments

1 *vided further*, That none of the funds appropriated in this
2 paragraph shall be used to reimburse Commissioners for
3 more than 75 billable days, with the exception of the
4 Chairman who is permitted 125 billable days.

5 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

6 SALARIES AND EXPENSES

7 For necessary expenses of the Equal Employment
8 Opportunity Commission as authorized by title VII of the
9 Civil Rights Act of 1964, as amended (29 U.S.C. 206(d)
10 and 621-634), the Americans with Disabilities Act of
11 1990, and the Civil Rights Act of 1991, including services
12 as authorized by 5 U.S.C. 3109; hire of passenger motor
13 vehicles as authorized by 31 U.S.C. 1343(b); nonmonetary
14 awards to private citizens; not to exceed \$26,500,000, for
15 payments to State and local enforcement agencies for serv-
16 ices to the Commission pursuant to title VII of the Civil
17 Rights Act of 1964, as amended, sections 6 and 14 of the
18 Age Discrimination in Employment Act, the Americans
19 with Disabilities Act of 1990, and the Civil Rights Act
20 of 1991; \$238,000,000: *Provided*, That the Commission
21 is authorized to make available for official reception and
22 representation expenses not to exceed \$2,500 from avail-
23 able funds: *Provided further*, That of the budgetary re-
24 sources available in fiscal year 1995 in this account,
25 \$242,000 are permanently canceled: *Provided further*,

1 That amounts available for procurement and procure-
2 ment-related expenses in this account are reduced by such
3 amount: *Provided further*, That as used herein, "procure-
4 ment" includes all stages of the process of acquiring prop-
5 erty or services, beginning with the process of determining
6 a need for a product or services and ending with contract
7 completion and closeout, as specified in 41 U.S.C. 403(2).

8 FEDERAL COMMUNICATIONS COMMISSION

9 SALARIES AND EXPENSES

10 For necessary expenses of the Federal Communica-
11 tions Commission, as authorized by law, including uni-
12 forms and allowances therefor, as authorized by 5 U.S.C.
13 5901-02; not to exceed \$600,000 for land and structures;
14 not to exceed \$500,000 for improvement and care of
15 grounds and repair to buildings; not to exceed \$4,000 for
16 official reception and representation expenses; purchase
17 (not to exceed sixteen) and hire of motor vehicles; special
18 counsel fees; and services as authorized by 5 U.S.C. 3109;
19 \$166,832,000, of which not to exceed \$300,000 shall re-
20 main available until September 30, 1996, for research and
21 policy studies: *Provided*, That \$116,400,000 of offsetting
22 collections shall be assessed and collected pursuant to sec-
23 tion 9 of title I of the Communications Act of 1934, as
24 amended, and shall be retained and used for necessary ex-
25 penses in this appropriation, and shall remain available

**EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

**FY 1995 HOUSE APPROPRIATIONS
SUBCOMMITTEE QUESTIONS AND ANSWERS**



QUESTIONS SUBMITTED BY CONGRESSMAN MOLLOHAN

INCREASE PROVIDED FOR FY 1994

QUESTION: I understand that approximately \$3.7 million of the increase was provided to fund 200 additional FTEs to deal with the Commission's increasing workload. How many new positions will you be able to fund in FY 1994?

ANSWER: The \$3.7 million was not provided to fund 200 additional FTEs and, in any event, would not have provided funding for 200 additional FTEs. Rather, the \$3.7 million of this increase would have enabled EEOC to fund more than 80 additional staff. The President's FY 1994 budget request for EEOC of \$234,845,000 with its \$12.85 million increase (which covered non-salary increases as well as increases to compensation and benefits) over the FY 1993 budget, would have supported more than 200 additional staff to help resolve the agency's increasing workload. However, the Commission received an appropriation of \$230,000,000 for FY 1994 -- an \$8 million increase over FY 1993 as opposed to the \$12.85 million contained in the President's request. Virtually all of the increased funding was absorbed by FY 1994 increases in locality pay, rent, inflation and the State and local program. Nevertheless, as a result of our increased efforts to reduce Headquarters staffing and shift resources to the field, the Commission will be adding 50 additional field enforcement staff in FY 1994.

FY 1995 INCREASE

QUESTION: What are the various elements of the \$15,000,000 increase that you are requesting?

ANSWER: The \$15,000,000 increase requested for FY 1995 will fund the additional costs associated with mandatory/fixed expenses over which EEOC has virtually no control or option but to fund. Included in this category are compensation and benefit expenses for existing staff and the additional 170 FTE requested for FY 1995, increased operation costs resulting from the effects of inflation and the costs to support an additional 170 FTE, and increase in General Services Administration rent, offset by the Administrative and Personnel reductions which are required by Executive Order. In addition, this increase will also be used to fund discretionary increases needed to enhance Private Sector Systemic Program and to continue improvements to the Information Resource Management Program.

QUESTION: In view of the President's plans to reduce personnel levels government-wide, how do you justify requesting an increase of 170 FTE for FY 1995?

ANSWER: Despite realizing significant productivity increases by EEOC investigators, charge receipts have increased at record levels, necessitating an increase in enforcement staff. In addition to the President's plans, Congress has legislated government-wide personnel reductions

through FY 1999. In the Federal Workforce Restructuring Act of 1994, Congress provided federal agencies with a mechanism by which they can seek a waiver from the mandated personnel reductions. In EEOC's Private Sector Program in FY 1990, EEOC investigators were able to resolve approximately 1.05 charges for each new charge taken. In this way, the agency was able to reduce its pending inventory and had begun to make significant progress toward reducing the average charge processing time. Since that time, EEOC's budgets have been inadequate to address the workload growth acquired as result of the passage of the Civil Rights Act of 1991 and the implementation of the Americans with Disabilities Act.

Because EEOC received virtually no additional resources when it received significantly more responsibility, the agency was already suffering from acute resource shortages when the President proposed plans to reduce personnel levels.

In the Federal Sector Program, EEOC is enduring similar workload problems as those being encountered in the Private Sector.

QUESTION: Many other agencies of the government are being asked to reduce their operations or to hold to present levels. Why do you believe an exception should be made for the EEOC?

ANSWER: We believe our investigators do 2 to 3 times the number of investigations that other similar Federal agencies do. Despite record productivity, staff cannot keep pace with the increase in charge filings which began with the passage of the Civil Rights Act of 1991 and the implementation of the Americans with Disabilities Act.

Our pending workload is already at a critical level (80,229 charges at the end of the first quarter). An investigator's average caseload is over 100 charges—almost double what it was in 1990, despite the fact that productivity has been at record highs for the last three years. The attached table, "Resolutions and Productivity", excerpted from a quarterly Report to the Chairman, illustrates the gains in average annual productivity (charge resolutions) per investigator for the last five years.

We conservatively estimate that with no additional staffing, we will have a pending workload of 131,734 (22.4 months) by the end of FY 1995.

The quality of evidence is significantly reduced as charges age. If charges cannot be investigated quickly, the evidence becomes "stale" or non-existent; witnesses disappear and memories of events fade.

If charges cannot be resolved timely, we cannot meet our obligation to the public. To ask charging parties and respondents to wait approximately two-years for a resolution is not reasonable.

RESOLUTIONS, PRODUCTIVITY AND STAFFING

During FY 1993 there were 71,716 charge resolutions, more than at any time in the past ten years. Productivity reached an all-time high at 97.1 resolutions per investigator. With 160.9 fewer investigators than in FY 1988, the Agency's highest staffing year (879.9 staff available), 967 more resolutions were completed in FY 1993 than in FY 1988 when resolutions totaled 70,749.

Table 4. Resolutions and Productivity

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 92-93 CHANGE	PERCENT CHANGE
Resolutions	66,209	67,415	64,342	68,366	71,716	+ 3,350	+ 4.9%
Investigators Available	838.1	762.2	727.1	736.3	738.3	+ 2.0	+ 0.3%
Productivity	79.0	88.4	88.5	92.8	97.1	+ 4.3	+ 4.6%
Investigators Assigned	880.1	818.4	779.4	782.3	788.0	+ 5.7	+ 0.7%
Available as a Percent of Assigned	95.2%	93.1%	93.3%	94.1%	93.7%	- 0.4%	N/A

QUESTION: Where will these additional FTEs be used within the Commission's various programs?

ANSWER: All of the additional FTE's are for field operations. The additional 170 FTE requested for EEOC in FY 1995, will be distributed among the field investigative staff (145 FTE) and field hearings staff (25 FTE).

PROCUREMENT SAVINGS

QUESTION: The President recently submitted a budget amendment which includes a reduction for the EEOC for savings in its procurement activities. How much is this amendment, and how will this reduction affect the Commission's procurement activities?

ANSWER: The amendment totals \$242,000. To date, the impact of this reduction has not been determined. We are currently assessing the impact.

WORKLOAD

QUESTION: Last year you indicated that the Commission was experiencing significant workload increases. Is that still the case, or has the workload leveled off?

ANSWER: Workload is still expanding well above our ability to meet the demand. In the Private Sector, EEOC's incoming work (receipts + net transfers/deferrals from FEPA) has increased by 41% from 1990 to 1993. More recently, from 1992 to 1993, there was a 23% increase. Our conservative estimates for future growth are for an additional 3% each year for FY 1994 and 1995.

In the Federal Sector, the Commission continues to experience a significant increase in hearings and appeals as evidenced from the workload charts contained in our budget submission. Reproductions of those charts follow for ease of reference. Hearings requests increased by over 28% from FY 1992 to FY 1993. Appeals receipts increased by 6% during the same period, but are showing an even greater rate of increase in FY 1994 (approximately 14% increase for the first five months over the same period in FY 1993). Hearings requests are up by 20% for the comparable five-month period.

FEDERAL SECTOR ENFORCEMENT HEARINGS			
WORKLOAD	FY 1993 ACTUAL	FY 1994 ESTIMATE	FY 1995 ESTIMATE
COMPLAINTS PENDING	3,982	3,991	5,064
COMPLAINTS RECEIVED	8,882	10,440	12,006
TOTAL WORKLOAD	12,864	14,431	17,070
COMPLAINTS RESOLVED	8,906	9,367	11,561
COMPLAINTS FORWARDED	3,991	5,064	5,509
MONTHS OF INVENTORY	5.4	6.5	5.7

FEDERAL SECTOR ENFORCEMENT APPEALS			
WORKLOAD	FY 1993 ACTUAL	FY 1994 ESTIMATE	FY 1995 ESTIMATE
COMPLAINTS PENDING	2,029	2,900	5,225
COMPLAINTS RECEIVED	6,361	7,590	8,729
TOTAL WORKLOAD	8,390	10,490	13,954
COMPLAINTS RESOLVED	5,490	5,265	5,265
COMPLAINTS FORWARDED	2,900	5,225	8,689
MONTHS OF INVENTORY	6.3	11.9	19.8

QUESTION: What other legislation is being considered that would increase the Commission's workload? For example, there are bills pending which would transfer to the EEOC all Federal employee discrimination complaints.

ANSWER: EEOC estimates that the complaint processing structure proposed in pending legislation, S. 404/H.R. 2721, the Federal Employee Fairness Act of 1993, would increase the agency's federal sector workload by approximately 30 percent.

QUESTION: If such a bill were to become law, how much in additional resources would be required for the Commission to enforce its provisions?

ANSWER: Preliminary EEOC cost estimates, as of November 1993, for enforcing provisions such as those contained in S. 404 and H.R. 2721, range from \$70 million and more than 775 additional staff to \$98 million and nearly 1100 additional staff.

SYSTEMIC PROGRAMS

QUESTION: Does your budget for FY 1995 include any expansion of the Commission's Systemic programs?

ANSWER: Yes. Based on the increasing number of individual charges, a harder look must be taken at employers' policies, practices and patterns causing them. EEOC is now studying sets of individual charges, workforce statistics, and other employment information to determine where and how EEOC will initiate larger class charges. EEOC included additional funds for this purpose in the FY 1995 budget. More class investigations will ultimately utilize scarce Commission resources in a more efficient manner.

QUESTION: What are the advantages of using the Systemic approach in the Commission's enforcement responsibilities?

ANSWER: Systemic investigations address pattern-and-practice types of discrimination which require in-depth analysis and focus on an employer's overall employment practices. These types of investigations are lengthy and more complex than the usual individual harm charges brought by charging parties.

By addressing discrimination against classes of people and by addressing it at its core--the underlying policies and practices which discriminate--systemic investigations will hopefully act as a more general deterrent to discrimination and reduce the need for filing larger numbers of "individual harm" charges.

FUNDING FOR STATE AND LOCAL AGENCIES

QUESTION: In 1994 the appropriation for the Commission included \$26.5 million for grants to State and local enforcement agencies. This amount was an increase of \$1.5 million over the previous year. How will this increase be used?

ANSWER: The \$1.5 million was used to increase the rate per resolution from \$450 to \$500, to provide training and technical assistance to the agencies, and to provide computer hardware and software systems for charge reporting purposes. However, this funding level does not enhance State and Local agencies' ability to address their overall workload growth since the rate paid per resolution (\$500) only partially offsets their total costs.

QUESTION: You are not proposing an increase for grants to State and local agencies in FY 1995. Are the State and local governments experiencing the same level of workload growth as the Commission or is it leveling off?

ANSWER: The following table illustrates the rate of change in the State and Local agencies' workload since FY 1990. While their charge receipts are increasing, their charge growth rate is not as large as that of EEOC since FY 1990. As shown in the table, State and local agencies experienced a very large increase (17.5%) between FY 1992 and 1993, so charge filings do not appear to be leveling off.

STATE AND LOCAL - GROWTH IN INCOMING WORKLOAD

	FY 90	FY 91	% CHG FY 90-91	FY 92	% CHG FY 91-92	FY 93	% CHG FY 92-93
FEPA RECEIPTS	50,493	52,869	4.7%	52,177	-1.3%	61,289	17.5%

During this same period, agencies are transferring more work to EEOC to process (over 4,000 charges a year).

QUESTION: Are there other activities funded out of the State and local agencies' grants other than charge resolutions?

ANSWER: Yes. Some funds are used to provide training and technical assistance to the agencies as well as computer hardware and software systems for charge reporting purposes.

In 1995, EEOC is also planning projects that we hope will help address the dually-filed workload that we share, such as:

- (1) Expanding utilization of agencies to help with the charge resolution process.
- (2) More education and training of State and Local staff to effect changes in charge resolution methods similar to those EEOC will adopt.
- (3) Examine feasibility of joint projects with State and Local agencies (such as State systemic projects).

ALTERNATIVES TO HANDLE WORKLOAD INCREASES

QUESTION: If the Commission does not receive its requested increase of 170 FTEs, can you alter your investigative procedures to handle the workload in other ways?

ANSWER:

Private Sector

Even at the FY 1995 request level, EEOC must rethink the way we do business. This request will only offset some of the workload growth.

In any case, EEOC realizes that it must re-evaluate its "full investigations" philosophy and look more toward tailoring for each individual situation (which is being done in various ways in many offices now).

Federal Sector:

Other Federal agencies are responsible for investigating Federal sector EEO complaints. If the Commission did not receive its requested FTEs for the Federal sector, Administrative Judges would have caseloads far exceeding their capacity to handle. Since requests for hearings are up 20 percent, the results are evident. The Federal inventory would be enormous.

QUESTION: What about the possibility of using alternative dispute resolution or other techniques?

ANSWER: There are two major efforts by Commission staff to look into the possibility of using alternative dispute resolution (ADR). First, the Commission is nearing completion of an ADR pilot program that has been used in four field offices, emphasizing the use of mediation to resolve certain types of charges filed with the Commission. A report on the pilot program should be prepared for Commission review soon. The second major ADR effort is an overall ADR policy statement that is being drafted by the Commission's Office of Legal Counsel. The Commission approved a Notice seeking public comment that was published in the Federal Register in July 1993. The Office of Legal Counsel plans to present in the near future a policy statement and annual action steps to the Commission for its approval.

Internal EEO Program:

With respect to the Agency's internal EEO program, the use of an Alternative Dispute Resolution (ADR) program can help to achieve earlier resolution of many internal complaints of employment discrimination, particularly at the precomplaint stage. EEOC's Office of Equal Employment Opportunity plans to have an ADR program in operation during FY 1995 following a trial program during FY 1994.

Private Sector:

The Commission is currently examining any and all ideas put forth as possibilities for addressing the workload problem.

EEOC has tried a variety of charge resolution systems over the years and the successes of the various systems are embodied in EEOC's present Case Management System. The present system encourages maximum flexibility in charge resolutions.

Federal Sector:

The responsibility for investigating Federal sector EEO complaints rests with other Federal agencies. To the extent that the agencies can reduce the number of complaints and appeals forwarded to EEOC, ADR could have an impact on our workload.

Toward that end, the Commission has created a staff which is responsible for, among other things, facilitating the increased use of ADR in the Federal EEO area. The staff serves as a technical resource to agencies in their efforts to incorporate ADR into their administrative EEO procedures.

TECHNICAL ASSISTANCE TO THE PUBLIC

QUESTION: The Civil Rights Act of 1991 required the Commission to provide technical assistance to the public. What action has the Commission taken to provide more outreach to minority groups.

ANSWER:

Private Sector:

EEOC provides technical assistance both through its appropriated funds and through its recently established "Revolving Fund" program.

The attached table, "Outreach Presentations by Audience Type" shows the results of our outreach efforts (appropriated funds) for the last three years. (1,062 presentations in 1991, 2,161 in 1992 and 1,694 in 1993).

There is a demand for more presentations and these presentations serve a "preventive" effect by making more people aware of their rights and responsibilities.

OUTREACH PRESENTATIONS BY AUDIENCE TYPE

YEAR	NO PRESENTATIONS	RESPONDENTS	PER CENT	ADVOCACY GROUPS	PER CENT	GOVTS EMPLOYED	PER CENT	PROP EMPLOYED	PER CENT	INDENT	PER CENT	SEC	PER CENT
FY 1991	1,062	295	27.8%	181	17.0%	192	18.1%	134	12.6%	14	1.3%	106	10.0%
FY 1992	2,161	474	21.9%	234	10.8%	288	13.3%	817	37.8%	206	9.5%	90	4.2%
FY 1993	1,694	93	5.5%	185	10.9%	205	12.1%	980	57.9%	189	11.2%	42	2.5%
1ST QTR FY 1994	349	18	5.2%	31	8.9%	39	11.2%	205	58.7%	52	14.9%	4	1.1%

Field offices also provide structured Technical Assistance seminars for employers in order to educate them about the laws enforced by EEOC and their obligations under the laws. This particular program is administered through the Revolving Fund.

Federal Sector:

Thus far, in FY 1994, EEOC's Office of Federal Operations has conducted 48 presentations for the other Federal agencies, private organizations and advocacy groups to increase the effectiveness of its law enforcement and affirmative employment activities. Meetings are held with other Federal agencies to discuss agency specific affirmative employment and complaint processing concerns. Also, EEOC initiates meetings with high level Federal officials to address issues of mutual concern (e.g., the effect on staff of downsizing and major reorganizations of large agencies because of budget restrictions).

EEOC will conduct several technical assistance headquarters visits to help the other agencies improve their affirmative employment programs by addressing specific, identified problems.

In FY 1995, the Agency plans to continue making presentations to the other Federal agencies and organizations and conducting meetings on agency specific topics.

During the development stage of the new affirmative employment program, the Commission met with a wide range of constituent organizations including Blacks in Government, Executive Council of Hispanics for Government Employees, Federally Employed Women, National Association of Hispanic Federal Executives, National Task Force on Disability and the Small Agency Council to achieve a balanced, focused, user-friendly document.

PRODUCTIVITY ASSUMPTIONS

QUESTION: What are the productivity assumptions for FY 1994 and FY 1995, and how were they determined?

ANSWER: Productivity assumptions for the Private Sector Program are arrived at by assessing historical trends, with a given set of factors. As shown in the attached table, "Resolutions and Productivity" (excerpted from a quarterly Report to the Chairman) the average annual productivity (charge resolutions) per investigator for the last five years has ranged from 79 in 1989 to an all time high of 97.1 in 1993. The five-year average is 89. We are experiencing a slight decline in productivity during the early part of FY 1994. As stated in its budget request, EEOC's assumptions for the workload projections in the FY 1995 budget are based on a productivity rate of 88 resolutions per investigator available.

EEOC does not believe investigators can sustain the level of productivity at the FY 1992-1993 level because of the burn-out factor that accompanies this high level of activity and the more complex investigations required by the enforcement provisions of the Americans with Disabilities Act and the damages provisions under the Civil Rights Act of 1991.

RESOLUTIONS, PRODUCTIVITY AND STAFFING

During FY 1993 there were 71,716 charge resolutions, more than at any time in the past ten years. Productivity reached an all-time high at 97.1 resolutions per investigator. With 160.9 fewer investigators than in FY 1988, the Agency's highest staffing year (879.9 staff available), 967 more resolutions were completed in FY 1993 than in FY 1988 when resolutions totaled 70,749.

Table 4. Resolutions and Productivity

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 92-93 CHANGE	PERCENT CHANGE
Resolutions	66,209	67,415	64,342	68,366	71,716	+ 3,350	+ 4.9%
Investigators Available	838.1	762.2	727.1	736.3	738.3	+ 2.0	+ 0.3%
Productivity	79.0	88.4	88.5	92.8	97.1	+ 4.3	+ 4.6%
Investigators Assigned	880.1	818.4	779.4	782.3	788.0	+ 5.7	+ 0.7%
Available as a Percent of Assigned	95.2%	93.1%	93.3%	94.1%	93.7%	- 0.4%	N/A

In the Federal Sector area, the estimated productivity for Administrative Judges and appellate attorneys for FY 1994 and 1995 is as follows:

Administrative Judge -- 131 resolutions per year
Appellate Attorney -- 135 resolutions per year

These estimates are based on 1993 end-of-fiscal year actual productivity for both functions.

When compared to production standards in the other Federal agencies, the productivity assumptions are high.

IMPLEMENTATION OF 1614 REGULATIONS

QUESTION: The section 1614 regulation requires that Federal sector cases be investigated within 180 days. It was effective October 31, 1992. What action has the Commission taken to meet the workload increases resulting from the implementation of the 1614 regulations?

ANSWER: The Commission's strategy has been to work to ensure the success of the 1614 regulations by closely monitoring the regulations as implemented by the other agencies and employment trends at the other agencies.

EEOC has begun efforts to resolve the increased appeals without sacrificing the quality of the work while still working within the limits of the Commission's resources.

By working closely with the other Federal agencies and emphasizing technical assistance, the Commission provides the other Federal agencies with the necessary tools to meet the requirements of the 1614 regulations. EEOC issued Management Directive-110 which interprets the 1614 regulations to facilitate agency implementation.

QUESTION: What problems has the Commission experienced in implementing the 1614 regulations?

ANSWER: The Commission's primary problem with implementing the 1614 regulations has been a lack of adequate staffing both in the field and in the headquarters Office of Federal Operations.

In the field, the increase in workload, coupled with the 1614 requirements of processing hearings within 180 days, strained the Commission's resources during FY 1993 and the first six months of FY 1994. The increase in hearings requests can also be attributed to agencies' failure to process their investigations within 180 days, at which time complainants can request a hearing under the 1614 regulations. In addition, many investigations coming to hearing are inadequate, necessitating that these cases be remanded to the agency for further investigation.

In the Headquarters Office of Federal Operations, the appeals inventory, the number of appeals filed, the age of appeals inventory and the average processing time are increasing.

QUESTION: What other effects, if any, have the 1614 regulations had on the Commission?

ANSWER: The volume of correspondence being referred by the White House and Congress relative to constituent concerns has been steadily increasing since the implementation of the 1614 regulations. EEOC's Office of Federal Operations responded to 1,179 such inquiries during FY 1993, the highest number ever for a fiscal year. The volume so far this fiscal year indicates that the FY 1994 year-end total will approximate last year's record.

Telephone inquiries to EEOC also have been increasing with an estimated 28,000 having been received in FY 1993; an increase has been realized in the current year. Staff resources will be strained with such an increase.

Overall volume of correspondence has increased since the implementation of the 1614 regulations. Virtually, all of the correspondence comes from within the Federal community.

REVOLVING FUND

QUESTION: What activities of the Commission were funded through the Revolving Fund in FY 1993 and FY 1994?

ANSWER: During FY 1993 and 1994, the following activities were, and are being, funded through the Revolving Fund:

FY 1993

Over 40 Technical Assistance Program Seminars (TAPS) which reached almost 4,000 private sector employees.

11 seminars, covering the new 1614 procedures, delivered to 400 federal managers, supervisors, and EEO specialists.

Sexual harassment training to approximately 885 managers, supervisors, and EEO specialists of the Resolution Trust Corporation and provided training in how to investigate charges of sexual harassment to 10 investigators of the Capitol Hill Police Department.

FY 1994

Developing additional training seminars, audio-visual materials and other products.

Enhancing core curriculum offerings and generating new products to provide a strong financial base to introduce a greater array of programs during FY 1995.

QUESTION: What are your plans for use of the Revolving Fund in FY 1995?

ANSWER: For FY 1995, plans include: expanding the range of technical assistance offerings, with more specialized modules, such as one on sexual harassment; enhancing core TAP Seminar offerings with more audio-visual aids and a completely revamped resource manual; and enriching the standardized technical assistance modules for use by presenters in the field.

QUESTION: Do you anticipate that the Revolving Fund will be self-supporting through the fees charged for your services?

ANSWER: The Commission anticipates developing a fee structure which will eventually assure the self sufficiency of the Revolving Fund.

At present, the products/services offered via the EEOC Revolving Fund are limited. However, the current fee structure is designed to correlate with and capture the direct costs associated with the production and delivery of the service. As more products and services are offered through the EEOC Revolving Fund, the fees charged will also capture the various administrative and overhead expenses associated with a government enterprise. At that point, the Revolving Fund will be self-supporting.

LITIGATION ACTIVITIES

QUESTION: What is the Commission doing to bring more systemic or class action law suits?

ANSWER: In fiscal year 1993, the agency brought more class action lawsuits (63) than in fiscal year 1992 (47). In just the first quarter of this fiscal year, the Commission has brought 24 class action lawsuits.

In addition, the Office of General Counsel and the Office of Program Operations have sent headquarters staff to specific field offices to assist those offices in enhancing their litigation programs and in developing class and systemic cases.

QUESTION: We understand that the Commission has filed relatively few law suits under the Equal Pay Act. What is the reason for this?

ANSWER: Most sex based wage claims are brought not only under the Equal Pay Act, but also under Title VII of the Civil Rights Act. Title VII sex based wage claims have some procedural and legal advantages over straight Equal Pay Act claims. In addition, the passage of the Civil Rights Act of 1991 makes compensatory and punitive damages available for claims filed under Title VII. Therefore, most Commission lawsuits allege both Equal Pay Act claims and Title VII claims and are counted as concurrent lawsuits.

Therefore, in addition to the three lawsuits filed under the Equal Pay Act, fourteen lawsuits were filed under both statutes and are listed under the Commission litigation statistics as concurrent lawsuits.

EEOC receives a comparatively small number of Equal Pay charges as compared to the other statutes it enforces. In fiscal years 1991, 1992, and 1993, the Commission received only 1,045, 1,232, and 1,171 charges under the Equal Pay Act, respectively. In contrast, the Commission received 15,274 charges under the first full fiscal year enforcement of the Americans with Disabilities Act.

Furthermore, most of the charges filed under the Equal Pay Act are settled or resolved during the investigative process. For example, in fiscal years 1991, 1992, and 1993, the Commission resolved 1254, 1185, and 1120 Equal Pay charges during the investigative process, respectively.

OBJECT CLASS INCREASES

QUESTION: Please explain for the record the increase in each of the object classes.

ANSWER: The breakdown provided below explains the increases by object class:

Object Class 11 - Personnel Compensation: The increase will cover salaries for the additional 170 FTE as well as pay raise and annualizations for existing staff.

Object Class 12 - Personnel Benefits: This increase covers personnel benefits for current staff as well as for the additional 170 FTE.

Object Class 21 - Travel: The increase from FY 1994 to FY 1995 is in support of the additional staff which has been requested for FY 1995.

Object Class 23 - Other Rent and Communications: The increase in this object class provides the resources necessary to support the 170 additional staff, to cover the effects of inflation on existing rentals and to fund the acquisition of new leases in FY 1995.

Object Class 23 - Rental Payments to GSA: This increase will cover the projected rent increase required by GSA in FY 1995.

Object Class 25 - Other Services: This increase reflects the cost of inflation, planned enhancements to the Private Sector Systemic Program, and improvements to EEOC's Information Resource Management Program.

Object Class 26 - Supplies and Materials: The additional funding requested is needed to support the FTE increase, inflation costs, Systemic Program Enhancements, and Information Resource Management improvements.

Object Class 31 - Equipment: Increased funding in this object class reflects the cost of acquiring additional equipment to support staff increases, covers the purchase of equipment relative to EEOC's information resource management improvement initiative, enhancements to the Private Sector Systemic Program, and inflationary costs.

QUESTIONS SUBMITTED BY CONGRESSMAN WOLF

RELIGIOUS HARASSMENT

QUESTION: What kind of "religious harassment" has been documented in the workplace? Please describe some incidents.

ANSWER:

A. Drummer v. DCI Contracting Corp., 772 F. Supp. 821 (S.D.N.Y. 1991)

Plaintiff was an orthodox Jew who alleged that her supervisor repeatedly complained about her taking time off for sabbath. He and another superior were also allegedly concerned that plaintiff's beliefs and her pregnancy would disrupt operations. They allegedly told plaintiff that she would not be able to take off for the Jewish holidays, that she would not be paid for those days if she did take them off and that she would not be promoted because of her religion. Court did not reach the merits of plaintiff's claims because it found them time-barred.

B. Smallzman v. Sea Breeze, Inc., 60 FEP Cases 1031 (D. Md. 1993)

Plaintiff, who was Jewish, alleged that his manager told jokes about Jews and made repeated religious slurs and insulting comments such as calling plaintiff "Jew-boy," and suggesting that "you can't trust Jews around anything." When plaintiff complained, his manager retaliated by giving him difficult tasks and critical evaluations. The manager also increased his abusive conduct after plaintiff took off a week for the Jewish holidays. Plaintiff's Title VII claim was ultimately dismissed on procedural grounds.

C. Compston v. Borden, Inc., 17 FEP Cases 310 (S.D. Ohio 1976)

Jewish plaintiff filed a lawsuit against employer alleging that supervisor engaged in a barrage of verbal abuse because of plaintiff's religion. After bench trial, court ruled in favor of plaintiff.

D. Obrandovich v. Federal Reserve Bank of New York, 34 FEP Cases (S.D.N.Y. 1983)

Yugoslavian, Jewish plaintiff brought national origin and religious discrimination and harassment claims against his employer alleging that his supervisor harassed him by assigning him menial tasks, subjecting him to ethnic, racial and religious slurs and ultimately firing him. Defendant's motion to dismiss was denied.

E. Turner v. Barr, 806 F. Supp. 1025 (D.D.C 1992)

Plaintiff, a Jewish White male, who was employed as a Deputy United States Marshal at the District of Columbia Superior Court, alleged that, among other things, his co-workers and supervisors subjected him to derogatory comments about his faith. For example, when plaintiff was collecting money for a charity drive, he was told that he was an appropriate choice to solicit donations because Jews are supposedly skilled with money. On another occasion, a supervisory deputy told him a joke about the Holocaust, suggesting that the cost of Germany's reconstruction was high because it had a high gas bill during the war. At another point, when the plaintiff was assisting in executing a writ at a jewelry store, his co-workers suggested that "jeweler" was a good occupation for Jews. The court concluded that plaintiff had suffered religious harassment.

F. Yudovich v. P.W. Stone, 839 F. Supp. 382 (E.D. Va. 1993)

Plaintiffs, two Jewish employees, brought suit against the Army claiming, among other things, harassment on the basis of religion. The court noted that the "record in this case reeks with anti-Semitic and anti-Russian feelings." For example, the court noted that one of plaintiffs' superiors expressed anti-Jewish hostility by, among other things, keeping a coffee mug with a swastika on his desk prominently displayed and in public view. In addition, upon hiring one Russian emigre, plaintiffs' supervisor stated that he was glad that she was not Jewish. The court found in favor of the plaintiffs.

G. Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984)

Plaintiff, a Jewish man, alleged that he was the constant target of religious slurs and taunts from his co-workers and his supervisor. These slurs included such taunts as "resident Jew" "Jew faggot," "rich Jew," "Christ killer," "nail him to the cross," and "you killed Christ, Wally, so you'll have to hang from the cross." The court found in favor of the plaintiff. It noted that "when an employee is repeatedly subjected to demeaning and offensive religious slurs before his fellows by a co-worker and by his supervisor, such activity necessarily has the effect of altering the conditions of his employment within the meaning of Title VII." The court continued, "[c]ontinuous abusive language, whether racist, sexist, or religious in form, can often pollute a healthy working environment by making an employee feel uncomfortable or unwanted in his surroundings."

H. Diem v. City of San Francisco, 686 F. Supp. 806 (N.D. Cal. 1988)

Plaintiff, a Jewish man, brought claims under 42 U.S.C. § 1983 and Title VII alleging that his co-workers subjected him to derogatory and ethnic slurs, placed inflammatory and derogatory materials on the bulletin boards of the firehouse where he worked, threatened him, and ultimately assaulted him because of his religion. Plaintiff claims that these acts were condoned and encouraged by his supervisors. Defendants' motion to dismiss was denied.

I. Rasheed v. Chrysler Motors Corp., 196 Mich App. 196, 493
N.W.2d 104 (1992)

Plaintiff, a member of the American Muslim Mission, alleges that after he was transferred from one Chrysler plant to another, he was harassed on the basis of his race and religion. The court noted that plaintiff produced evidence at trial that his co-workers and his supervisor subjected him to religious harassment on a daily basis. In addition, plaintiff submitted evidence that he complained to his supervisor as well as to other managerial personnel about the harassment that he was facing. These officials failed to rectify the problem. Indeed, plaintiff's supervisor informed plaintiff that he disliked those who adhere to plaintiff's religion and himself joined in the harassment. A jury found that plaintiff had suffered religious discrimination and awarded plaintiff damages of \$61,000. The Michigan Supreme Court upheld the award.

J. Turic v. Holland Hospitality, Inc., 63 FEP Cases 1267 (W.D. Mich. 1994)

Plaintiff, an unwed mother who was contemplating abortion, alleged that she was fired to protect the sensibilities of religious co-workers. She also alleged that her co-workers' religion was impermissibly forced upon her when management forbade plaintiff from discussing her pregnancy with co-workers because the staff became very upset when they heard that plaintiff might get an abortion. Management did not apply the same rule to plaintiff's co-workers who remained free to discuss the issue. Defendant moved for summary judgment arguing that plaintiff did not have a religious belief about abortion and that defendant therefore could not have discriminated against her on the basis of religion. The court denied defendant summary judgment on this claim holding that "religious atmosphere" claims of religious discrimination are viable.

K. Karriem v. Oliver T. Carr Co., 38 FEP Cases 882 (D.D.C. 1985)

Plaintiff, an African-American adherent of Islam, alleged that his employer harassed him by, among other things, suggesting that he be required to remove a pin that he wore that was associated with Islam and that identified him as Islamic. The employer claimed that an Employee Manual as well as District of Columbia regulations prohibited security officers such as plaintiff from wearing metal badges. The court emphasized, however, that the regulation was not discussed with plaintiff, nor was it intended to control the wearing of religious symbols or pins. In addition, the court noted that plaintiff's pin bore no resemblance to the official badge of District of Columbia police officers. Accordingly, the court concluded that plaintiff's supervisors' request that he remove the pin was motivated by religious enmity and was evidence of religious discrimination.

L. Vaughn v. AG Processing, Inc., 57 FEP Cases 1227 (Iowa Sup. Ct. 1990)

Plaintiff, a Catholic, alleged that his supervisor, Mr. Mueller, constantly referred to him by religious slurs and stated on another occasion, "Is that all you people do is have kids," referred to one employee in plaintiff's presence as "[a]nother dumb Catholic," and to another as a "pus-gutted Catholic." Even though plaintiff complained to Mr. Mueller's superior who ultimately reprimanded Mr. Mueller, Mr. Mueller continued to make statements such as, "You people like fish, don't you?" and "I suppose you're going to raise your son Catholic." Following another incident, plaintiff left the job and filed a civil rights complaint with the state. The court found that the Iowa Civil Rights Act protects employees from religious harassment in the same manner that it protects individuals from racial and sexual harassment in the workplace. It ultimately concluded that the evidence supported the lower court's finding that plaintiff was subject to religious discrimination, but that the employer should not have been found liable for failing to take prompt action to rectify the religious harassment.

QUESTION: How many complaints of religious harassment do you receive a year?

ANSWER: Listed below are the religious harassment charges received by EEOC's Private Sector Program and State and local agencies combined for the last four years, FY 1990-1993.

	FY 1990	FY 1991	FY 1992	FY 1993
All Harassment Charges	12,533	12,038	16,393	18,925
Religious Harassment	389	390	524	587
% Total Harassment	(3.1%)	(3.2%)	(3.2%)	(3.5%)

Religious harassment charges comprised 0.3 percent of total EEOC-State and local agencies receipts during FY 1990-1991 and 0.4 percent during FY 1992-1993.

The following chart shows the number of requests for Federal sector hearings and appeals which include an allegation of religious harassment received for fiscal years 1992, 1993 and 1994 (through February).

RELIGIOUS HARASSMENT	FY 1992 ACTUAL	FY 1993 ACTUAL	FY 1994 OCT - FEB
HEARINGS REQUESTS All Harassment	542	1062	544
HEARINGS REQUESTS Religious Harassment % Total Harassment	25 (4.6%)	59 (5.5%)	16 (2.9%)
APPEALS RECEIVED All Harassment	646	743	313
APPEALS RECEIVED Religious Harassment % Total Harassment	54 (8.4%)	52 (7%)	13 (4.2%)

QUESTION: The first amendment of the Constitution provides for freedom of religion. Should "religious harassment" and "sexual harassment" be considered in the same context given the Constitutional protections afforded religion?

ANSWER: The principle that employees have a right to "work in an environment free from discriminatory intimidation, ridicule and insult," was recognized by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). Though *Meritor* was a sexual harassment case, the Court made clear that it was applying principles applicable to other classes covered by Title VII. The Court specifically accepted the principle that creation of a hostile environment based on discriminatory racial, religious, national origin, or sexual harassment constitutes a violation of Title VII. See *id.* at 66. Recently, in *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993), the Court reiterated that harassment premised on any of the bases covered by Title VII would be equally unlawful. See *id.* at 371; see also *id.* at 372-73 (Ginsburg, J., concurring); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality) (Court recognizes that "the statute on its face treats each of the enumerated categories exactly the same").

The question of whether the free exercise clause confers greater protection than the First Amendment right to free expression is one that the Commission is exploring. Note that the Commission has recognized that an individual has a right to free exercise in the workplace. For example, in *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), the Commission argued that the employer and the employees' rights to free exercise of religion must be balanced. The Commission has supported employees who need to be accommodated in order to freely exercise their religion.

QUESTION: What if any religious expression or symbol could be considered religious harassment under these guidelines?

ANSWER: Under the proposed Guidelines, conduct may be considered to create a hostile environment only if (1) it is hostile or denigrating (2) a reasonable person in the same or similar circumstances would view the conduct as severe or pervasive enough to create a hostile or abusive environment and (3) the charging party/plaintiff actually perceives the environment to be hostile or abusive. A reasonable person would not view the wearing of a religious symbol to be enough to create a hostile environment. On the other hand, wearing a symbol that denigrates a particular religion, *i.e.*, wearing a pin with a swastika, may be enough to create a hostile environment. See, e.g., Yudovich v. P.W. Stone, 839 F. Supp. 382 (E.D. Va. 1993)(suggesting that prominent display of coffee mug with swastika created a hostile environment for Jews). Each case must be judged on its own facts. However, it is clear that merely wearing a cross or a Star of David, displaying a Bible or the Koran would not constitute harassment.

QUESTION: The ACLU and various Christian legal and social groups oppose these regulations because of the potentially chilling effect on the freedom of religious expression through words, symbols or actions. How have you responded to their concerns?

ANSWER: Initially, it should be noted that the American Civil Liberties Union has expressed support for the Guidelines as a whole. See Letter from Sara L. Mandelbaum, American Civil Liberties Union's Women's Rights Project to Fran Hart, Executive Officer of the Equal Employment Opportunity Commission (Nov. 29, 1993)(*inter alia* endorsing comment of National Women's Law Center, et al.)(on file at the Commission library); Comment of National Women's Law Center et al. (Nov. 1993)(on file at the Commission library).

The Commission has attempted to learn about the concerns of these groups. To this end, it has conducted a meeting with some Christian Legal groups and a representative of the American Civil Liberties Union which enabled these parties to express their concerns more fully. The Commission has also agreed to accept comments by these groups after the expiration of the comment period. In addition, the Commission held a forum on the potential conflict between the Guidelines and the First Amendment which featured two attorneys from the American Civil Liberties Union. Staff members of the Commission have also met with representatives of People for the American Way, the Baptist Joint Committee, the American Jewish Congress and other religious groups who stressed the importance of keeping religion in the Guidelines.

The Commission is currently reviewing all of the comments submitted and has not yet made any determinations about what changes in the Guidelines are required. The Commission is taking seriously all suggestions and fully expects that the final Guidelines will address any major concerns that these groups may have. Note that the intent of the Guidelines was not to expand upon but merely to explain existing law. The fact that the intent has been misconstrued suggests that modifications are necessary.

QUESTION: Doesn't existing law already protect employees from any type of religious harassment in which an employee is subjected to religious slurs or inappropriate activities?

ANSWER: Yes. As indicated in the preceding response, the Commission's purpose in issuing the Guidelines was to help employers and employees understand existing law about harassment.

Existing law provides a cause of action for hostile environment harassment on the basis of religion. The definitions contained in the Guidelines were derived from case law, the Commission's pre-existing Guidelines on National Origin Harassment, the Guidelines on Sexual Harassment and the Policy Guidance on Sexual Harassment. They were not intended to create any new obligations on employers.

Because of the recent emphasis on sexual harassment, the Commission believed that it was important to clarify the fact that workplace harassment was prohibited on any and all of the bases covered by the laws the Commission enforces. Much of the public is unaware that the anti-discrimination statutes prohibit harassment on each of the enumerated bases. Employees and employers are often unsure of their rights and responsibilities under the law. The purpose of the Guidelines is to ensure that all individuals in the workplace will be apprised of their obligations and privileges under Title VII, the ADEA and the ADA.

QUESTION: What factors in addition to a "mere statement" would meet the standard of harassment?

ANSWER: As indicated in the response to question number 4, conduct violates Title VII only when it is so severe or pervasive that reasonable people would find it hostile or abusive and when the person involved actually perceives it as such. Thus, discussions of religious belief with those who welcome such conversations would not violate the law. General statements of belief that do not denigrate or show hostility to those of other beliefs would generally not violate the law.

On the other hand, courts are likely to find a hostile environment if an individual makes statements that different beliefs held by other individuals are evil or worthless, provided the statements are found to be severe or pervasive.

QUESTION: Would "witnessing" to fellow employees on an occasional basis or encouraging a colleague to attend a Bible study combined with a "mere statement" meet the standard?

ANSWER: Asking a fellow employee to accompany one to a place of worship or to a Bible study meeting, by itself, would not create a hostile environment. Repeatedly asking a fellow employee to a place of worship or to attend a Bible study meeting after s/he has indicated no desire to attend may constitute a hostile environment. It would depend upon whether, given all of the surrounding facts and circumstances, the conduct would reasonably be seen as severe or pervasive enough to create a hostile environment.

Similarly, "witnessing" or making positive statements about one's own religion would probably not be enough to constitute hostile environment harassment provided that in "witnessing," the individual does not denigrate others' beliefs or religions. If, however, "witnessing" involved

deriding other religions, the complaining employee is more likely to be able to show that he/she was subjected to a hostile environment. The determination will turn on the severity and the pervasiveness of the conduct. In addition, courts will examine the nature of the relationship between the individual who "witnesses" and the individuals to whom these actions are directed. Courts would probably require several instances of a co-worker "witnessing" in which other religions are denigrated before finding a hostile environment. With respect to supervisors, the threshold would be lower. The supervisor-employee relationship is inherently unequal. Therefore, courts require less in these circumstances before making a finding of harassment. Finally, as noted in the response to question 7a, persistent "witnessing" by a supervisor after an employee tells him/her to cease would implicate the employee's right to reasonable accommodation.

QUESTION: How far beyond a "mere statement" could employers or employees venture in expressing their faith in any kind of workplace context?

ANSWER: An employee or an employer may not create a hostile or intimidating environment for others in pursuing his/her own religion. For example, in EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), the Ninth Circuit held that while it was permissible for the Townleys, who owned an engineering concern, to hold Bible study meetings at their company, it was not permissible for them to require their employees to attend.

QUESTION: How would employers or employees be expected to know what is offensive to individuals of varying religions?

ANSWER: Employers covered by Title VII are expected to know that modern workplaces are "melting pots" and that it is hostile and abusive to use religious epithets or otherwise disparage members of particular religions. Illustrations of such unlawful conduct are found in the cases discussed in response to your first question. On the other hand, where statements would not commonly be seen as denigrating or hostile, the affected employee would have to inform the employer or the alleged harasser that the remarks are unwelcome in order to prevail on a hostile environment cause of action.

QUESTION: Would ridiculing the custom of cutting off a hand for stealing be offensive to someone from a conservative Arab religion?

ANSWER: Because public policy governing this country does not provide for cutting off hands as a penalty for theft, it is hard to imagine that criticizing such a practice could ever be deemed to be unlawful harassment. On the other hand, making derogatory stereotypical assumptions about the beliefs of people of conservative Arab religions could constitute harassment if it is sufficiently severe or pervasive.

QUESTION: What would be the standard for an employer or an employee who worked with an individual who found religion offensive in all forms or expressions?

ANSWER: Again, as the Townley case indicates, employers and employees have the right to religious expression, as long as they do not engage in conduct that is hostile or abusive toward those who did not share their beliefs.

QUESTION: Won't these provisions place employers and employees of every religious faith in the position of having to anticipate the reaction of each employee or co-worker, taking into account each employee's individual religious beliefs (or lack thereof) to every manifestation of religious expression in the workplace?

ANSWER: No. See preceding responses. The reasonable person in the same or similar circumstances test was formulated in response to Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir.), cert. denied, 481 U.S. 1041 (1987), in which the Sixth Circuit concluded that despite the outrageous nature of the conduct in the workplace, the "reasonable person" would not have been offended. After that decision was rendered, the Commission and various courts qualified the reasonable person test by including the perspective of the victim to encourage the trier of fact to factor into the reasonable person test the history of discrimination against particular groups.

QUESTION: The recently enacted Religious Freedom Restoration Act prohibits a law from "substantially burdening a person's exercise of religion. Given the opposition across the ideological spectrum to these EEOC guidelines, are you satisfied they meet RFRA standards?

ANSWER: We note that the Religious Freedom Restoration Act was enacted after the Proposed Guidelines were printed in the Federal Register. Accordingly, in reviewing the Guidelines, staff members are currently studying the issue.

QUESTION: To what activities will you be dedicating your 170 additional FTEs?

ANSWER: All of the additional FTE's are for field operations. The additional 170 FTE requested for EEOC in FY 1995, will be distributed among the field investigative staff (145 FTE) and field hearings staff (25 FTE).



WOMEN'S RIGHTS PROJECT

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November 29, 1993

VIA FEDERAL EXPRESS

Francce Hart
Executive Officer
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Equal Employment Opportunity Commission
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Guidelines on Harassment, 29 CFR Part 1609

Dear Ms. Hart:

The ACLU Women's Rights Project endorses the Comments of the National Women's Law Center, et al., but writes separately in order to clarify a point of special concern to the American Civil Liberties Union Foundation ("ACLUF").

The proposed guidelines define harassment, inter alia, as conduct which "[h]as the purpose or effect of creating an intimidating, hostile, or offensive work environment..." 29 CFR § 1609.1 (b) (1) (i). The ACLUF believes that this language should be altered to reflect, in conformity the Supreme Court's decision in Harris v. Forklift Systems, that "merely offensive" conduct, without more, is not actionable. It is clear under Title VII that the conduct must be sufficiently severe or pervasive to create a hostile work environment in order to be actionable.

Sincerely yours,

Sara L. Mandelbaum
Staff Attorney

cc: Robert Peck, Esq.

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OFFICE OF THE SECRETARY

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NATIONAL WOMEN'S LAW CENTER

November 30, 1993

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Elizabeth M. Thornton
Deputy Legal Counsel
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Dear Ms. Thornton:

Enclosed please find comments on the EEOC's proposed Guidelines Based on Race, Color, Religion, Gender, National Origin, Age or Disability, submitted on behalf of the National Women's Law Center and the following organizations: American Association of University Women, Connecticut Women's Education and Legal Fund, American Civil Liberties Union - Women's Rights Project, Center for Women Policy Studies, Employment Law Center, Equal Rights Advocates, Federally Employed Women, Fund for a Feminist Majority, Washington Lawyer's Committee for Civil Rights and Urban Affairs, Women Employed, Women's Law Project, and Women's Sports Foundation. We welcome the opportunity to comment on the Commission's excellent work product. Any questions about the issues raised in these comments should be directed to Deborah Brake at the National Women's Law Center.

Very Truly Yours,

Deborah Brake
Staff Attorney

Enclosure

*Affiliations listed for identification purposes only

NATIONAL WOMEN'S LAW CENTER



COMMENTS ON THE PROPOSED EEOC GUIDELINES ON HARASSMENT BASED ON RACE, COLOR, RELIGION, GENDER, NATIONAL ORIGIN, AGE OR DISABILITY SUBMITTED ON BEHALF OF THE NATIONAL WOMEN'S LAW CENTER AND THE FOLLOWING ORGANIZATIONS:

- Nancy Duff Campbell
Marta D. Greenberger
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National Women's Law Center
- Becker of Dickinson
- Bookley Barn, Chairperson
Arnold & Porter
- Elizabeth G. Barnes
Vice President, Corporate Relations
Pomona Electric Power Co.
- Richard J. Beatty
Simpson, Thatcher & Barnett
- Nancy Duff Campbell
- Elizabeth J. Coleman
Stroup & Coleman
Chairman, Mountaintop, Inc.
- Donna de Vanna
Chair, Board of Stewards
Women's Sports Foundation
- Marta D. Greenberger
- Antonia Hernandez
President and General Counsel
Mexican American Legal Defense
and Educational Fund
- Anna F. Hill
Professor of Law
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- Elizabeth Jones
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Los Angeles Network
- Jo Harriet Strickler
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New Orleans Network
- Sheila Birnbaum
Skadden, Arps, Slate, Meagher & Flom
New York Network
- Kim Rives, Boley, Jones & Gray
Portland Oregon Network
- Karen Hastie Williams
Crowell & Moring
Washington, DC Network

- American Association of University Women
- Connecticut Women's Education and Legal Fund
- American Civil Liberties Union -- Women's Rights Project¹
- Center for Women Policy Studies
- Employment Law Center
- Equal Rights Advocates
- Federally Employed Women
- Fund for a Feminist Majority
- Washington Lawyer's Committee for Civil Rights and Urban Affairs
- Women Employed
- Women's Law Project
- Women's Legal Defense Fund
- Women's Sports Foundation

November 30, 1993

The National Women's Law Center submits the following comments on behalf of itself and the undersigned organizations regarding the proposed EEOC Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability. As organizations dedicated to the advancement of women's rights and equality in the workplace, we have an overriding interest in ensuring the existence of strong legal protections from discriminatory harassment on the job. For this reason, we commend the Commission for its decision to promulgate new Guidelines clarifying these protections. The proposed Guidelines provide a clear and coherent framework for analyzing discriminatory harassment and serve a significant purpose in clarifying that gender-based harassment is unlawful even if it does not involve conduct of a sexual nature. We present the following comments for the joint purposes of expressing our support for many of the Commission's positions and offering

¹ The ACLU -- Women's Rights Project is also submitting additional comments on separate issues not addressed here.

*Affiliations listed for identification purposes only.

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suggestions for further refining and improving the Guidelines in several key respects. In addition, we endorse the comments submitted by the Women's Legal Defense Fund, in conjunction with other concerned organizations, regarding the proposed Guidelines.

1. Relationship between the Commission's Existing Sexual Harassment Guidelines and the New Proposed Guidelines

The proposed Guidelines explicitly recognize that gender-based harassment of a nonsexual nature is prohibited by Title VII. We applaud the Commission for its clear statement of this principle, which is entirely consistent with relevant case law. See, e.g., Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8th Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987). Under the proposed Guidelines, gender-based harassment, defined as conduct that is not sexual in nature, but that denigrates or shows hostility or aversion toward an individual because of her/his gender, will now be governed by the proposed Guidelines, while sexual harassment, which encompasses unwelcome sexual advances and other verbal or physical conduct of a sexual nature, will continue to be covered by the Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1992) ("Sexual Harassment Guidelines").

The application of different Guidelines to sexual harassment and gender-based harassment is, as the Commission recognizes, entirely appropriate in light of the differences between the two forms of sex discrimination. 58 Fed. Reg. at 51267. While conduct must be unwelcome in order to constitute sexual harassment, no similar inquiry into unwelcomeness is necessary to evaluate gender-based harassment. However, because many cases will involve incidents of both sexual harassment and gender-based harassment, and because individual incidents of harassment may often be viewed as both sexual harassment and gender-based harassment, the Commission should provide greater clarity with respect to the relationship between the proposed Guidelines and the Sexual Harassment Guidelines.

a. The Commission Should Clarify that It Will Apply Both the Sexual Harassment Guidelines and the Proposed Guidelines to Cases Involving Incidents of Both Sexual Harassment and Gender-Based Harassment

Although the Commission states in its introductory remarks that the proposed Guidelines are complementary to, and do not supersede the Sexual Harassment Guidelines, 58 Fed. Reg. at 51267, the treatment of gender-based harassment and sexual harassment as two discrete categories of conduct may create uncertainty as to which Guidelines apply in cases involving incidents of both types of harassment. To avoid any confusion,

gender-based harassment separately, the two forms of harassment are by no means mutually exclusive and in fact often occur together. Specifically, the Commission should explain that where both forms of harassment occur, it will apply the Sexual Harassment Guidelines to incidents of sexual harassment and the proposed Guidelines to incidents of gender-based harassment. Such an explanation should follow the reference to the Commission's Sexual Harassment Guidelines in footnote one of Section 1609.1(a).

- b. Where Cases Involve More Than One Type of Harassment, the Guidelines Should Expressly Provide that the Commission Will Consider All Incidents of Discriminatory Harassment Together to Determine Whether the Challenged Conduct is Unlawful

Although sexual harassment and gender-based harassment are governed by separate sets of Guidelines, the Commission should explicitly state that all incidents of sexual harassment and gender-based harassment should be aggregated for the purpose of determining whether the conduct rises to the level of creating a hostile work environment. See, e.g., Hall, 842 F.2d at 1014 (combining evidence of sexual harassment and gender-based harassment to determine whether unlawful discrimination has occurred). Similarly, other types of harassment, such as gender-based and racial harassment, should also be viewed together to determine whether the total harassment was sufficiently severe or pervasive to create a hostile or abusive work environment. See, e.g., Hicks, 833 F.2d at 1416-1417 (aggregating evidence of racial hostility with evidence of sexual hostility in determining the pervasiveness of the harassment). To clarify the application of the proposed Guidelines and the Sexual Harassment Guidelines to the determination of severity or pervasiveness in cases involving more than one type of harassment, the Commission should modify Section 1609.1(c) to incorporate this important principle. Specifically, the Commission should state that in determining whether the conduct is sufficiently severe or pervasive to create a hostile or abusive work environment, the Commission shall aggregate all incidents of discriminatory harassment and weigh such incidents collectively.

- c. Where a Particular Incident May Be Viewed As More Than One Type of Harassment, the Commission Should Clarify That It Will Analyze That Incident Under All Applicable Theories

Notwithstanding the propriety of addressing sexual harassment and gender-based harassment in separate sets of Guidelines, many incidents of discriminatory harassment will not be readily classifiable as either sexual harassment or gender-based harassment, and in fact may be both simultaneously. For

example, a female employee who has rejected her boss' overtures and is treated worse than male employees may well be able to allege both sexual harassment, in that her boss retaliated against her for rejecting his advances, and gender-based harassment, in that her boss singled her out for inferior treatment based on her gender. Although subsequent fact-finding may place the incident into one category of harassment, at the time of formulating the initial allegations of harassment, a charging party should be encouraged to allege every form of harassment which fairly describes a particular incident. In discussing the relationship between the Sexual Harassment Guidelines and the proposed Guidelines, the Commission should acknowledge that incidents of harassment may often be fairly viewed as both sexual harassment and gender-based harassment. Where facts are alleged which may constitute both sexual harassment and gender-based harassment, the Commission should announce that it will analyze the incident in question under both sets of Guidelines to determine whether a Title VII violation has occurred.

2. "Reasonable Person" Standard

The proposed Guidelines explicitly adopt a "reasonable person" standard for evaluating whether conduct is sufficiently severe or pervasive to constitute actionable harassment. Under the proposed Guidelines, the standard for determining unlawful harassment is whether a reasonable person under similar circumstances, taking into account the alleged victim's race, color, religion, gender, national origin, age or disability, would find the conduct intimidating, hostile or abusive. This position is consistent with the Supreme Court's decision in Harris v. Forklift Systems. Although the Supreme Court has now adopted the "reasonable person" standard as the governing standard for determining unlawful harassment, several aspects of the standard warrant further clarification in light of recent case law developments.

a. Determination of Reasonableness of Gender-Based Harassment Includes Consideration of the Alleged Victim's Gender

First, the Commission should explain that the more generic term "reasonable person," rather than the "reasonable woman" formulation that many courts have adopted, see, e.g., Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Yates v. AVCO Constr. Co., 819 F.2d 630, 637 (6th Cir. 1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991), does not in any way reflect a determination that the gender of the victim is

not an important factor.² As the Commission properly notes, the relevant perspective "includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age or disability." Because of the potential for confusion on this issue, however, we urge the Commission to explain expressly that its use of the term "reasonable person" does not in any way diminish the need to evaluate reasonableness from the perspective of a person in the same or similar circumstances as the alleged victim, including consideration of the alleged victim's gender. Moreover, the choice of the more generic formulation properly reflects the fact that harassment victims may be both male and female, in addition to the fact that the Guidelines apply to other forms of harassment as well as gender-based harassment. In light of the significant attention devoted to the use, by some courts, of the gender-specific "reasonable woman" standard, the Commission should explicitly discourage courts and litigants from reading unintended significance into the Commission's choice of term by explicitly explaining this point in its discussion of the "reasonable person" standard in Section 1609.1(c).

b. Effect of Pre-existing Harassment in the Workplace

As the Commission recognizes in its introductory comments, 58 Fed. Reg. at 51267, in applying the reasonable person standard, the harassment victim's perspective should not be replaced with prevailing societal notions of "reasonable" workplace behavior. Because some courts have embraced the concept that high levels of pre-existing harassment should cause a reasonable person to accept such harassment as a fact of life, see, e.g., Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), this point is sufficiently important to warrant explicit discussion in the text of the Guidelines themselves.

As the Supreme Court stated in Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986), "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Accordingly, a "reasonable person" should not be expected to assume the risk of harassment by accepting a job in an environment permeated with discriminatory harassment, such as a traditionally male-dominated workplace. The Commission should explicitly reject the Rabidue approach and affirmatively state in Section 1609.1(c) that the mere fact of pre-existing

² Similarly, the "reasonable person" standard, rather than a more specific formulation that refers to the plaintiff's protected class status, see, e.g., Harris v. International Paper Co., 765 F. Supp. 1509, 1516 & n.12 (adopting "reasonable black person" standard), does not minimize the importance of taking into account the perspective of a person who possesses those characteristics which precipitated the discrimination.

harassment in the workplace does not in any way suggest that such harassment is something that a reasonable person should tolerate, nor does it mitigate an employer's duty to provide a harassment-free environment. In addition, in order to firmly establish the centrality of the victim's perspective, rather than existing societal notions of acceptable levels of discrimination, the Commission should insert a footnote after the first sentence in Section 1609.1(c) to the effect that, as the Ninth Circuit said in Ellison, "in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim." Such language would secure the importance of the victim's perspective, rather than societal standards of behavior, in evaluating reasonableness.

c. Challenged Conduct Need Not Offend Other Similarly Situated Employees

The "reasonable person" standard does not require that the challenged conduct offend all employees who are members of the same protected class as the alleged harassment victim. As courts have recognized, the fact that some female employees do not find the alleged sexual harassment objectionable is irrelevant, provided that the plaintiff did find such conduct objectionable, and that the plaintiff's reaction was a reasonable one. Robinson, 760 F. Supp. at 1525; Cardin v. Via Tropical Fruits, Inc., No. 88-14201 CIV, 1993 U.S. Dist. LEXIS 16302 at *51-*52 (S.D. Fla. July 9, 1993); Morgan v. Hertz Corp., 542 F. Supp. 123, 128 (W.D. Tenn. 1981). In many harassment situations, there is more than one "reasonable" reaction to the conduct in question. Moreover, some workers will claim not to be offended by even the most egregious harassment. Consequently, testimony by other similarly situated employees in the workplace that they did not find the challenged behavior offensive does not negate the reasonableness of a person who is offended by the same conduct. To assure the application of this important principle, the Commission should supplement its explanation of the "reasonable person" standard in Section 1609.1(c) with the statement that there is frequently more than one "reasonable" reaction to harassment, and that simply because other employees in the workplace were not offended by the alleged harassment does not mean that a reasonable person could not find the same conduct intimidating, hostile or abusive. The "reasonable person" standard does not require that the challenged conduct offend all employees within the victim's protected class.

d. Fact-finders May Not Substitute Their Own Views For That of a Reasonable Person in the Same or Similar Circumstances of the Victim

In focusing on the perspective of a reasonable person in the same or similar circumstances as the victim, the Commission's introductory comments properly emphasize the importance of

it is not limited as such. Gender-based harassment of a nonsexual nature and other types of discriminatory harassment may also be accomplished through the exercise of supervisory authority. For example, denigrating an employee's job performance in an evaluation or assigning demeaning and humiliating tasks to an employee because of the employee's gender involve the use of supervisory authority to perpetrate harassment, and should result in employer liability. See Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904-905 (11th Cir. 1988) (finding that supervisor's harassment of plaintiff in "grabb[ing] [her] by the arm and physically mov[ing] her a few feet, ... berat[ing] her job performance," occurred in the course of exercising the authority delegated by the employer, and supports employer liability for the supervisor's harassment). The Commission should explicitly state, as an alternative basis for employer liability for supervisory conduct, that an employer may be liable where a supervisor relies on authority delegated by the employer in perpetrating the harassment.

4. Employer Accountability for Failure of a Non-Employee with Knowledge of Harassment to Respond to the Harassment or to Notify the Employer of the Harassment Where the Employer Has Delegated Supervisory Authority to the Non-Employee

The proposed Guidelines, like the Commission's Sexual Harassment Guidelines, correctly establish employer liability for harassment by non-employees where the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action. In addition to holding employers liable for harassment by non-employees under certain circumstances, Section 1609.2(c) of the Guidelines should clarify that employers are also accountable, under certain circumstances, for the failure of a non-employee to respond to harassment or to notify the employer that harassment is occurring. Where an employer structures an office so that an employee is supervised by a person who is not an employee of the employer, such as an independent contractor, for example, the non-employee may be a natural conduit for harassment complaints by the employee. However, absent clear direction from the Commission, some employers may attempt to insulate themselves from the obligation to address discriminatory harassment by placing non-employees in positions of authority in the workplace. See, e.g., Karibian v. Columbia Univ., 91 Civ. 3135, Slip Op. at 8-9 (S.D.N.Y. February 2, 1993) (accepting defendant's argument that notice to plaintiff's supervisor that plaintiff, an employee of defendant, was being harassed by another employee of defendant did not constitute notice to defendant where plaintiff's supervisor was an independent contractor rather than defendant's employee),

appeal pending, No. 93-7188 (2d Cir.).³

Where a non-employee has been positioned by the employer to have substantial authority over the employee's work environment, notice of sexual harassment to the non-employee should serve as notice to the employer. In other words, where the person to whom the harassment was reported has supervisory authority over the harassment victim, the employer should not be shielded from notice simply because this person was technically not employed by the employer. This principle is consistent with the general principle in discrimination law that an employer may not "contract out" of its Title VII obligations. See Arizona Governing Committee v. Norris, 463 U.S. 1073, 1089-90 & n.21 (1983); cf. EEOC Policy Guidance on Sexual Harassment, 8 Fair Emp. Prac. Manual (BNA) 405:6681, 405:6699 (March 19, 1990) ("An employer cannot avoid liability by delegating to another person a duty imposed by statute."). The Commission should clarify section 1609.2(c) to explicitly incorporate this important principle.

In conclusion, we compliment the Commission on its formulation of clear and cohesive principles governing discriminatory harassment in the workplace and appreciate the opportunity to offer our suggestions for improving this fine effort.

³ The Commission has addressed other issues raised in this case in an amicus brief filed in the Second Circuit on behalf of the plaintiff.



WOMEN'S LEGAL DEFENSE FUND

COMMENTS OF THE WOMEN'S LEGAL DEFENSE FUND,
AMERICAN ASSOCIATION OF RETIRED PERSONS,
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES,
COALITION OF LABOR UNION WOMEN,
FEDERALLY EMPLOYED WOMEN,
GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC,
MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION,
NATIONAL COUNCIL OF JEWISH WOMEN,
NATIONAL SENIOR CITIZENS' LAW CENTER,
NATIONAL WOMEN'S LAW CENTER,
NORTHWEST WOMEN'S LAW CENTER,
OLDER WOMEN'S LEAGUE,
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS,
WIDER OPPORTUNITIES FOR WOMEN,
WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA,
WOMEN EMPLOYED, AND
WOMEN WORK! THE NATIONAL NETWORK FOR WOMEN'S EMPLOYMENT
(formerly the National Displaced Homemakers Network)
ON THE EEOC'S PROPOSED GUIDELINES ON HARASSMENT
BASED ON RACE, COLOR, RELIGION, GENDER, NATIONAL ORIGIN,
AGE, OR DISABILITY

November 30, 1993

In general, we applaud the Commission's development of these proposed Guidelines. We enthusiastically share the Commission's belief that it is important "to reiterate and emphasize that harassment on any of the bases covered by the federal antidiscrimination statutes is unlawful." 58 Fed. Reg. 51,267 (October 1, 1993). We welcome the opportunity to comment. In addition, we endorse the comments on the proposed Guidelines submitted by the National Women's Law Center on behalf of other concerned organizations.

First, the text of the Guidelines should emphasize the fundamental principle that the same standards for determining liability and remedy should be applied to all forms of hostile work environment harassment. Although we agree that sexual harassment "raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus, may warrant separate emphasis," id., we believe this is true only with respect

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to determining whether sexual behavior in the workplace is welcome. Thus, the proposed Guidelines should expressly state that the standards for evaluating evidence, determining whether conduct is sufficiently severe or pervasive to create a hostile or abusive work environment, determining employer liability, and evaluating preventive and remedial action are the same for all types of hostile work environment harassment, both sexual and non-sexual. This position is consistent with the Supreme Court's rulings in Harris v. Forklift Systems and Meritor Savings Bank v. Vinson, which provide guidance for evaluating all forms of harassment, not just sexual harassment.

Proposed section 1609.1(a)

We particularly applaud the Commission's explicit recognition that "sex harassment is not limited to harassment that is sexual in nature, but also includes harassment due to gender-based animus." 58 Fed. Reg. 51,267. Stating this rule in guideline form will provide welcome clarification and emphasis.

The Commission should further make clear that harassment is often based on several impermissible grounds and that a plaintiff need not separate the different types of harassment for analysis. For example, women of color often face harassment based inextricably on both sex and race, and should not be forced to parse out this harassment into separate or alternative claims.²

¹ Without question, some sexual behavior in the workplace is welcome and consensual and thus should not give rise to Title VII liability. In contrast, an inquiry into welcomeness has no place when harassing conduct that "denigrates or shows hostility or aversion toward an individual" is involved. For example, some of the comments made in the Harris case ("You're a dumb ass woman" or "You're a woman, what do you know") are examples of gender-based, rather than sexual, harassment, and could never be considered welcome by the target. Racial epithets and slurs are additional examples of harassing behavior that could never be viewed as welcome.

² A number of courts have successfully recognized the intersection of race and sex or national origin and sex in harassment experienced by women of color. The Tenth Circuit, for example, has held that Title VII permits evidence of racial animus to be considered in evaluating a sexual harassment claim. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987); see also Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980) (concluding that Title VII recognizes compound discrimination claims brought by African American women and that discrimination against African American women can exist even in the absence of discrimination against men of color or against white

Moreover, the combined impact of multiple forms of harassment should be considered in determining the appropriate remedy, such as the proper level of compensatory and/or punitive damages.

Compensatory and punitive damages should also be available when harassment is based on multiple grounds that are prohibited by different statutes -- such as age and sex. For example, an older woman who is repeatedly called "a senile old woman" or "old warhorse" or "little old lady" may well face a hostile work environment based both on age and sex that older men and younger women do not face. It is difficult, if not impossible, for an older woman in this situation to separate her age from her gender or race for legal analysis. And in this context, the harasser will not be exempt from liability for compensatory and punitive damages under Title VII just because the ADEA is implicated. Indeed, the combined impact of both age- and sex-based harassment should be considered in assessing the appropriate amount of damages.

Proposed section 1609.1(b)(1)

The proposed guidelines correctly make clear that denigrating or hostile behavior is unlawful if it has the purpose or effect of creating an intimidating, hostile, or offensive work environment, or has the purpose or effect of unreasonably interfering with an individual's work performance, or otherwise adversely affects an individual's employment opportunities. For example, a plaintiff need show only that the derogatory gender-based behavior affected her job performance or her working environment, but not both. Stating this test in the disjunctive correctly mirrors the approach taken by the Commission's 1980 Guidelines on sexual harassment and ratified by the Supreme Court in Meritor³ and Harris.⁴ Yet some lower courts have inaccurately rewritten the disjunctive into a conjunctive test. E.g., Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986). By parsing the alternative prongs of this

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³ "Sexual misconduct constitutes prohibited 'sexual harassment,' . . . where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'" 477 U.S. at 65 (quoting 29 C.F.R. section 1604.11(a)(3)) (emphasis added).

⁴ "[N]o single factor is required" in demonstrating whether a work environment is hostile or abusive. Slip opinion at 5-6.

⁵ The Rabidue court described one of the required elements of a hostile environment claim in this manner:

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test out as separate subparagraphs (section 1609.1(b)(1)(i-iii)), the proposed Guidelines are especially effective in making this point clear.

Proposed section 1609.1(b)(2)

The illustrative examples of harassing conduct set forth in proposed section 1609.1(b)(2) are very helpful. We especially commend the specific reference in subparagraph (ii) to denigrating written or graphic material placed on walls, bulletin boards, and elsewhere on the employer's premises. Indeed, such an example further supports the need to note explicitly that the standards for evaluating sexual and non-sexual harassment are largely parallel: although the Commission's 1990 policy guidance on sexual harassment discusses written and graphic materials as possible examples of sexual harassment, 8 F.E.P. Manual (BNA) 405: 6681, 6692 (issued March 19, 1990), the 1980 Guidelines are silent on this subject. We recommend that the proposed Guidelines make clear that these principles also apply to sexual harassment claims.

We urge that the Commission also make clear that facially neutral harassment that targets or adversely affects members of a protected class is just as unlawful as harassment that is denigrating to members of protected classes by its very nature (e.g., racial epithets or slurs). For example, age-based harassment may include not only ageist insults and epithets, but also behavior that is directed at older workers -- such as repeated pressure to retire early, repeated exclusion from decisionmaking, meetings, desirable project assignments, or office space, or especially intense criticism or scrutiny. Thus the illustrative list set forth in proposed section 1609.1(b)(2) should include

"the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psycho logical [sic] well-being of the plaintiff."

805 F.2d at 619 (emphasis added).

⁶ Certainly this sort of behavior constitutes illegal harassment if it has the purpose or effect of creating an intimidating, hostile, or offensive working environment; has the purpose or effect of unreasonably interfering with an individual's work performance; or otherwise adversely affects an individual's employment opportunities. Such conduct -- such as designating work assignments or office space on the basis of age or some other protected class membership -- may also be characterized as "garden-variety" discrimination in the terms and conditions of employment that is also illegal under the federal antidiscrimination statutes.

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examples of facially neutral harassment that affect only members of a protected class.

Finally, we urge that the Commission make explicit in the Guidelines what is certainly implicitly understood: that verbal harassment alone, and unaccompanied by physical acts, may be sufficient to establish liability. Although this statement may seem self-evident to those familiar with harassment law, we have found that some employers and supervisors still believe that harassment must have some physical component before it becomes actionable.

Proposed section 1609.1(c)

Proposed section 1609.1(c) contains the Commission's statement of the test for evaluating whether workplace conduct is sufficiently severe or pervasive to create a hostile or abusive work environment under proposed section 1609.1(b)(1)(i). We strongly support the Commission's understanding of the need to include "consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age or disability." Indeed, such a test is fully consistent with the Supreme Court's unanimous decision in *Harris*. In particular, consideration of all of these characteristics is necessary to evaluate the harassment claims of women of color, who often face harassment based inextricably on both gender and race (indeed, women of color are often targeted for harassment precisely because they are women of color). The same is certainly true for other victims of multiple discrimination, such as older women, or persons with disabilities who are also national origin minorities.

In applying this standard, however, it is essential to make clear that any "reasonableness" analysis should reject stereotyped attitudes that reinforce the status quo of traditionally discriminatory environments -- and that this is true for sexual harassment claims as well as other sorts of harassment claims. The Commission should emphasize that it will not institutionalize as "reasonable" the silence of workers afraid to speak out against

⁷ See *Ellis, Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. Legis. 30 (1981). Too often, "women of color who experience race-based gender discrimination find their claims treated as predominantly or entirely gender-based." Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Calif. L. Rev. 775, 805 (1991); cf. *Degraffenreid v. General Motors Assembly Division*, 413 F. Supp. 142 (E.D. Miss. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977) (refusing to recognize an intersection of racial and sexual discrimination).

harassment for fear of losing their jobs -- indeed, the extent to which "reasonable" people react to insults, propositions, and abuse in the workplace generally has less to do with the severity of the harassment than with their need for a continuing paycheck. Similarly, a general societal acceptance of ageist epithets or insults targeted at persons with disabilities should not be the standard for determining what is "reasonable"; to adopt such a standard would only reinforce discriminatory norms. Instead, the Commission should evaluate behavior from the standpoint of a reasonable person seeking equal employment opportunity in the workplace -- and not from the perspective of economically vulnerable workers who must "tolerate" harassment in order to keep their jobs or who appear to have been conditioned to accept denigrating treatment.

Moreover, the Commission should explicitly reject any suggestion, like that made in Rabidue, 805 F.2d at 620-621, that the pervasiveness of harassment in a workplace would lead a "reasonable person" to expect and accept it as a risk of employment. When Congress enacted Title VII, it did so not because it thought that employment discrimination was the rare exception; rather, it knew that such discrimination was pervasive and sought to eradicate it. See, e.g., H.R. Rep. No. 914, reprinted in 1964 U.S.C.C.A.N. 2355, 2401.

In short, application of the "reasonable person" standard must not in any way condone offensive and demeaning conduct by incorporating the views of those doing the harassing -- or those indifferent or blind to the barriers to equal access erected by others' harassment. Federal antidiscrimination law cannot be limited by the acquiescence of some -- or even of all but one -- to barriers to equal access.

In addition to the alleged victim's race, color, gender, religion, national origin, age, and disability, the Commission should also consider other attributes of the plaintiff that are not protected characteristics but that may affect a reasonable person's evaluation of what is severe or pervasive. For example, a physically small person may find certain hostile behavior more threatening than a larger person; similarly, a worker with relatively little job tenure may be more vulnerable to harassment than a worker with well-established seniority and job security.

We commend the discussion in the proposed Guidelines' preamble of the interrelationship between the factors of "severity" and "pervasiveness" in evaluating harassment claims, and the Commission's recognition that a showing of either is sufficient to establish harassment. Even though isolated epithets may not generally give rise to a "hostile or abusive" environment, there may be instances -- for example, when a supervisor directs an outrageous gender-based slur at a worker -- when a single remark is sufficiently "severe" to give rise to liability. We recommend that

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the Commission make this point in the text of the Guidelines as well.

Proposed section 1609.1(d)

We particularly commend the Commission's recognition that employees have standing to challenge a hostile work environment even when the harassment is not targeted specifically at them. Such a position is most consistent with the 1980 Guidelines' prohibition (cited approvingly by the Supreme Court in Meritor) of conduct that has either the purpose or the effect of creating an intimidating, hostile, or offensive work environment, or of unreasonably interfering with an individual's work performance. Such a focus on the effects of certain conduct necessarily includes conduct that may not be specifically targeted at a certain individual, yet may nevertheless alter the terms and conditions of his or her employment. Again, we urge that these Guidelines make clear that this specific principle also applies to sexual harassment claims.

Proposed section 1609.2:

We strongly support the Commission's conclusion in proposed section 1609.2(a)(2) that "apparent authority" -- and, thus, employer liability -- is established where the employer fails to institute an explicit policy against harassment that is clearly and regularly communicated to employees, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials who are in a position to act on complaints. Again, these Guidelines should make clear that this principle is equally applicable to sexual harassment claims.

The proposed Guidelines should also make clear that an employer may be liable for a supervisor's harassment committed through the use of authority delegated to him or her -- e.g., the authority to hire, fire, and make decisions about the terms and conditions of employment -- regardless of whether preventive efforts have been established. Such a position is consistent with the Commission's policy on sexual harassment. For example, the 1980 Guidelines on sexual harassment state that an employer is responsible for the acts of its agents and supervisory employees "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence" (emphasis added). And, as the Commission made clear in its 1990 policy guidance on sexual harassment, "no matter what the employer's policy, the employer is liable for any supervisory actions that affect the victim's employment status, such as hiring, firing, promotion, or pay." 8 F.E.P. Manual (BNA) 405: 6681, 6697

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n.36. The 1990 policy guidance goes on to state: "[A]n employer also may be liable if the supervisor 'was aided in accomplishing the tort by the existence of the agency relation.'" 8 F.E.P. Manual (BNA) 405: 6699 (citing the Restatement (Second) of Agency section 219(2)(d)).

The Guidelines' emphasis on the importance of preventive efforts in proposed section 1609.2(d) is especially important. But even as more and more employers are instituting sexual harassment and/or diversity training, it is unclear to what extent these programs expressly address age bias and disability bias. Proposed section 1609.2(d) should address each of the protected characteristics as separate and distinct issues that merit specific attention in employer policies and trainings.

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In conclusion, we commend the Commission's thoughtful and timely attention to these issues and we appreciate the opportunity to offer our comments. If you have any questions about the issues we have raised, please contact Helen Norton at the Women's Legal Defense Fund at 202/986-2600