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U.S. Equal Employment Opportunity Commission
Office of Legal Counsel

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JUN 5 2013

Re: FOIA No.: 820-2013-180654

Your Freedom of Information Act (FOIA) request, received in this office on April 22, 2013 has been processed. Our search began on April 22, 2013. All agency records in creation as of April 22, 2013 are within the scope of the EEOC's search for responsive records.

In your request you seek copies of written response or letters from the EEOC to a Congressional Committee (not a congressional office or Committee Chair) from calendar year 2012 to present.

Attached are fours response letters for your review.

January 23, 2012 – The Honorable Michael B. Enzi (5 pages)
May 7, 2012 – The Honorable Harold Rogers – (3 pages)
May 18, 2012 – Ms. Jessica Berry (4 pages)
June 4, 2012 – The Honorable Frank Wolf (6 pages)

We hope this information has been helpful to you.

Sincerely,

Stephanie D. Garner
Assistant Legal Counsel FOIA Programs
(202) 663-4634

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of the Chair

January 23, 2012

The Honorable Michael B. Enzi
United States Senate
Washington, D.C. 20510

Dear Senator Enzi:

I am writing in response to your letter of December 20, 2011 regarding the U.S. Equal Employment Opportunity Commission's ("EEOC" or "Commission") recent public meetings on employer use of criminal background checks and credit checks to make employment decisions. In your letter, you expressed concern that the Commission may issue new guidance documents on these topics without considering input from relevant stakeholders. The Commission values your feedback and perspective, and I appreciate this opportunity to respond to your concerns.

As you know, the EEOC follows the rule-making public notice requirements established by Congress when approving regulations. Even though these requirements do not apply to our consideration of guidance and other technical assistance materials -- which inform the public about the requirements of the laws that we enforce, and thus help to promote voluntary compliance -- I assure you that the EEOC solicits feedback on its regulatory activities in various ways, and is committed to ensuring that it maintains a process open to input from the public and all of its stakeholders.

As you know, the EEOC is the federal agency responsible for enforcing the equal employment opportunity (EEO) laws for the public and private sectors, with a particular focus on Title VII of the Civil Rights Act of 1964, as amended (Title VII). Title VII prohibits employment discrimination on the basis of race, color, religion, national origin, or sex. A pre-employment inquiry concerning criminal or credit history does not in itself violate Title VII because Title VII does not prohibit such inquiries by employers. However, if a Title VII-covered employer *uses* criminal or credit history information in a discriminatory way, it may violate Title VII. Thus, an employer must not use criminal or credit history information differently depending on an applicant's or employee's race, national origin, or other protected status. Moreover, because disproportionate numbers of African Americans and Hispanics have criminal records and/or a poor credit history, the use of such information to make employment decisions is likely to have a disparate impact on these groups. Where there is such an impact, an employer or other Title VII-covered entity may use criminal or credit history information to make employment decisions *only* when it is job related for the position in question and consistent with business necessity.[1] For exclusions based on criminal records, the Commission and the courts consider

[1] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See also* EEOC COMPL. MAN. NO. N-915, SEC. 15: "RACE & COLOR DISCRIMINATION," §15.VI.B.2 (2006); EEOC POLICY GUIDANCE NO. N-915-061, "POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII" (1990); EEOC POLICY

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three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.[2]

As you noted in your letter, the EEOC has existing policy documents on the use of criminal records in employment decisions.[3] These documents, which were issued over twenty years ago but remain relevant today, discuss the well-established principles discussed above. More recently, in a case decided in 2007, the Third Circuit Court of Appeals sought to strike a careful balance between these Title VII principles and employer criminal record exclusion policies.[4] At the same time, the Third Circuit noted that the Commission's existing guidances were "not entitled to great deference" because the Commission's research and substantive Title VII analysis had not yet been updated to reflect new developments.[5] Thus, to ensure that it is aware of the latest research and diverse perspectives on this issue, the Commission recently held two public meetings on the use of criminal records in employment decisions.[6]

First, in November 2008, the Commission held a public meeting titled "Employment Discrimination Faced by Individuals with Arrest and Conviction Records."[7] During this meeting, the Commission received input from the employer perspective when Donald Livingston from Akin Gump Strauss Hauer & Feld LLP, and Rae T. Vann from the Equal Employment Advisory Council, offered their insights and experiences. In addition, the Commission heard from Professor Devah Pager of Princeton University, who gave remarks regarding the employment barriers faced by people with criminal records in the job market, and from Professor Shawn

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GUIDANCE NO. N-915, "POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964" (1987).

[2] *See* Green v. Mo. Pac. R.R., 549 F.2d 1158, 1160 (8th Cir. 1977). *See also* CONVICTION RECORDS, *supra* note 2.

[3] *See supra* note 2. The EEOC's 2006 Compliance Manual section on race and color discrimination also contains a brief discussion about disparate treatment and disparate impact analysis as it relates to the use of criminal records in employment decisions.

[4] *See* El v. SEPTA, 479 F.3d 232 (3d Cir. 2007) (providing detailed Title VII analysis for criminal record exclusion policies).

[5] *Id.* at 244.

[6] *See Employment Discrimination Faced by Individuals with Arrest and Conviction Records: Meeting of the Equal Employment Opportunity Comm'n* (2008), *available at* http://www.eeoc.gov/eeoc/meetings/11-20-08/index.cfm; *EEOC to Examine Arrest and Conviction Records as a Hiring Barrier: Meeting of the Equal Employment Opportunity Comm'n* (2011), *available at* http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm. Additionally, in May 2007, the Commission held a public meeting titled "Employment Testing and Screening." *See Employment Testing and Screening: Meeting of the Equal Employment Opportunity Comm'n* (2007), *available at* http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/index.html. Although this meeting was not focused on the use of criminal records in employment decisions, two of the panelists provided different perspectives on criminal records in their testimony and written statements. *See id.* (written statement of Rae T. Vann) (explaining employer use of, and justification for, criminal background checks as a selection tool), http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/vann.html; (written statement of Adam T. Klein) (explaining the increased employer use of criminal background checks and whether this use has caused a disproportionate number of individuals to be excluded from employment based on race), http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html.

[7] http://eeoc.gov/eeoc/meetings/11-20-08/index.cfm.

Bushway, of SUNY Albany, who described research assessing the risk of recidivism for ex-offenders.

After the 2008 meeting, the Commission continued to study this issue and subsequently held another public meeting in July 2011 titled "Arrest and Conviction Records as a Hiring Barrier."[8] In particular, the Commission heard about employer best practices from Michael F. Curtin from D.C. Central Kitchen, a local D.C. employer, and Victoria Kane, a human resources specialist in the hospitality services industry, both of whom had experience with hiring people with criminal records. The Commission also heard about some of the state and local restrictions on hiring and/or providing occupational licenses to individuals with certain criminal records from Professor Stephen Saltzburg (representing the American Bar Association) and Amy Solomon of the U.S. Department of Justice. Additionally, Robert Shriver of the Office of Personnel Management described the federal government's personnel policy about hiring individuals with criminal records. Mr. Shriver noted that there are several federal laws and/or regulations that restrict or prohibit hiring individuals with certain criminal records for certain jobs or occupations. Moreover, Barry Hartstein, a Shareholder of Littler Mendelson, P.C., discussed the employer perspective on whether it would be helpful for the Commission to update its current policy documents on this topic and the legal standards governing employer use of criminal record information.

For both the 2008 and 2011 meetings, the panelists submitted detailed written statements that are publically available on our website, as are transcripts of their testimony at the meetings. In addition, the EEOC established a process for keeping the public meeting record open for a period of time following Commission meetings so that additional interested parties could provide feedback and comments. As a result of this innovation, the Commission ultimately received approximately 300 written comments about using criminal records in hiring, with the majority coming from concerned citizens, human resources professionals, small business owners, and people with criminal records and their families. The Commission also received several comments from trade associations, business organizations, and groups that conduct background checks. Finally, civil rights organizations, organizations that work with people who have criminal records, and public defender associations submitted input. The EEOC has developed a system of storing all of these additional comments and they are generally available to the public.

In your letter, you also inquired about our consideration of the use of credit history information in employment decisions. The Commission has long recognized that such use may be discriminatory under federal anti-discrimination law.[9] Recently, the Commission renewed its focus on this topic because of the struggling economy and because of increased employer

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[8] http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm.

[9] *See* RACE & COLOR DISCRIMINATION, *supra* note 2, § 15.VI.B.2; EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMP. MAN., SEC. 612: "DISCHARGE/DISCIPLINE," § 612.8 (1981); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EMPLOYMENT TESTS AND SELECTION PROCEDURES (2007); EEOC Dec. No. 72-1176, EEOC Dec. (CCH) ¶ 6359 (Feb. 28, 1972) (stating that, because minorities are significantly over-represented among low-income groups and are more likely to suffer financial difficulties than Whites, Respondent's requirement that job applicants disclose financial problems would "have a foreseeable disproportionate adverse impact upon the employment opportunities of minorities as a class."); EEOC Dec. No. 72-427, EEOC Dec. (CCH) ¶ 6312 (Aug. 31, 1971) (same).

reliance on credit records as a screening tool. In October 2010, the Commission held a public meeting to gather information and to hear diverse perspectives on the use of credit history information in the context of employment.[10] During the meeting, the Commission heard from the Federal Trade Commission (regarding enforcement of the Fair Credit Reporting Act), from Michael Eastman of the U.S. Chamber of Commerce, and from Christine Walters of the Society for Human Resource Management (SHRM). Representatives of consumer advocacy and civil rights organizations also testified, including the National Consumer Law Center and the Lawyers Committee for Civil Rights Under Law. Similar to the criminal records meetings, the panelists submitted detailed written statements that are posted on our website along with transcripts of their testimony, and the public was invited to provide supplementary comments by email after the meeting. The Commission ultimately received nine such public comments, from groups including business and human resources organizations, and an organization that conducts background checks.

As the Commission continues to study the use of criminal and credit history information in the context of employment decisions, its staff will continue to always be available to meet with interested stakeholders. For example, Commission staff met with representatives of the U.S. Chamber of Commerce, SHRM, HR Policy Association, College and University Professional Association for Human Resources, and the Equal Employment Advisory Council in November 2011 to discuss the use of criminal records and credit history information as screening tools.[11] Commission staff also met several times with representatives of the National Association of Professional Background Screeners, the Leadership Conference on Civil and Human Rights and the National Employment Law Project. During these meetings, the discussions focused on topics such as: the types of information employers consider when evaluating the results of criminal background checks or credit checks; examples of federal and/or state laws that require background checks and restrict hiring individuals with certain criminal records; the inaccuracy of some criminal and credit check reports and the availability of opportunities for individuals to correct them; and the potential for Commission guidance on the use of criminal and credit history information to help employers during their decisionmaking process.

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[10] *Employer Use of Credit History as a Screening Tool: Meeting of the Equal Employment Opportunity Comm'n* (2010), *available at* http://www.eeoc.gov/eeoc/meetings/10-20-10/devata.cfm. Although the Commission's 2007 meeting on employment testing and screening was not exclusively focused on the use of credit history information in employment decisions, panelist Adam T. Klein discussed this topic in his written and oral statements. *See Employment Testing and Screening: Meeting of the Equal Employment Opportunity Comm'n* (2007) (written statement of Adam T. Klein), *available at* http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html.

[11] The Commission received detailed comment letters from the U.S. Chamber of Commerce, SHRM and the Equal Employment Advisory Council regarding the October 2010 credit meeting. The Commission also received detailed comment letters from the U.S. Chamber of Commerce, SHRM, HR Policy Association and the College and University Professional Association for Human Resources regarding the July 2011 criminal records meeting.

The Commission values this information, which it will carefully consider in the future if it decides to update or prepare policy documents on these topics.

We appreciate your feedback and we hope this information is helpful to you. We would be happy to meet with you to discuss our outreach in this area more fully. Thank you.

Sincerely,

Jacqueline A. Berrien
Chair

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

MAY 18 2012

Office of the Chair

Ms. Jessica Berry
Subcommittee on Commerce, Justice, Science
and Judiciary
SD - 142
United States Senate
Washington, D.C. 20510

Dear Ms. Berry,

I am writing concerning the FY 2013 Commerce Justice and Science Appropriations Report language. First, please accept my sincere gratitude for the work you have done on behalf of the EEOC – particularly in supporting the President's FY 2013 budget request. With your support of the agency's work, we can build on the progress we've made in the last few years. In appreciation for your long-standing leadership and support, I want to take this opportunity to address some of the concerns the Committee highlighted in the FY 2013 Report.

In the Report, the Committee refers to the fact that the National Full Service Intake Model was not referenced in the EEOC's Draft Strategic Plan or the FY 2013 congressional budget justification. The Committee then "reiterates its direction to the EEOC to submit a report detailing its views on this model to the Committee within 60 days of enactment of this act." When I met with Committee staff on February 21st of this year, we had extensive discussions concerning the Full Service Intake Model and I pledged to provide the requested report and the necessary background materials. As promised, the staff of the EEOC's Office of Communications and Legislative Affairs provided you with a detailed response on March 19, 2012 (for your reference, a copy of the March 19th response is attached). We also provided our response to the Union.

The Committee report also notes that the Committee is concerned by the lack of subpoena authority and resurrection of the "Fast Track" proposal for Federal Sector hearings in the EEOC's Draft Strategic Plan. The EEOC is directed to "submit a copy of the updated Federal Sector hearing plan (adjusted for stakeholder input) to the Committee prior to the implementation of such a plan." The Committee then directs the EEOC to "submit to the Committee within 60 days of the enactment of this act an implementation plan for the new Federal sector hearing process, including background on the need for these changes, the proposed implementation schedule, and an analysis of the potential impacts, both positive and negative, on the ability of Federal employees to get a full and fair hearing under the track system."

As laid out in the EEOC Strategic Plan adopted by the Commission in February 2012, the EEOC will be developing case management categories for federal sector hearings and appeals in FY 2013 (I would note that Union representatives participated in the Strategic Planning Workgroup which helped develop the plan). As a part of this process we will be consulting with outside stakeholders, as well as Administrative Judges and staff in the Office of Federal Operations and the Union. Indeed, as with the Strategic Planning Workgroup, the Union will be represented on the work group that will be developing the system. We will be happy to keep you informed of our progress as we move toward the development and adoption of a system; however, Strategic Plan development will be continuing through FY 2013 and therefore, we will not be prepared to report to the Committee within 60 days of enactment of the appropriation.

The Committee also notes that "[t]he EEOC's litigation activities have received rebuke from Federal Courts in the Fifth and Eighth Circuits, including the extraordinary reprimand of awarding $4,400,000 in attorney fees against the EEOC." The Committee urges the EEOC to use litigation resources "more wisely by operating within the bounds of the law."

Responsible stewardship of our limited resources is a paramount concern of the leadership and staff of the EEOC as we seek to fulfill our mission of ending and remedying employment discrimination. This report language appears to refer to the adverse decision by the Eighth Circuit in EEOC v. CRST Van Expedited, Inc., which affirmed in part and reversed in part the district court's grant of summary judgment to the defendant, and remanded the case for further proceedings. I believe it would be useful to provide some context for you here. While the lower court in that case entered an order awarding $4.5 million in attorney's fees and costs against the EEOC, the Eighth Circuit vacated, without prejudice, the district court's award of attorney's fees against the EEOC.

The EEOC filed this lawsuit after investigating a sexual harassment charge filed by driver-trainee Monica Starke and finding cause to believe that CRST had failed to prevent and remedy the workplace harassment experienced by Starke and a class of female truck drivers and trainees. During discovery, the EEOC initially identified 270 women who were potentially affected by this harassment. By the end of discovery, 154 of these women had been deposed and remained in the case as potential claimants. After identifying 67 women who, in the court's view, alleged otherwise actionable harassment, the district court ruled that the EEOC had failed properly to investigate and conciliate their claims and, on that basis, dismissed the EEOC's entire lawsuit. The district court then awarded almost $93,000 in costs and $4.5 million in attorneys' fees and expenses.

A divided Eighth Circuit panel affirmed the district court's ruling that the EEOC had not individually investigated, issued findings and conciliated the individual claims as to 67 women. The Chief Judge filed a separate opinion concurring in part and dissenting in part. Specifically, the Chief Judge dissented from the majority's holding that the EEOC failed to fulfill its litigation prerequisites in this case and the resulting dismissal of the EEOC's trial worthy sexual harassment claim for these 67 women. In her opinion, the Chief Judge emphasized that the majority "imposes a new requirement that the EEOC must complete its presuit duties for each individual alleged victim of discrimination when pursuing its claim. This rule places unprecedented obligations on the EEOC and in effect rewards CRST for withholding information from the Commission."

The EEOC filed a petition for panel rehearing or en banc review. In its petition, the EEOC argued that the majority opinion misconstrued the steps that the EEOC is required to take under Title VII before filing suit, and pointed out that the Eighth Circuit's opinion conflicts with every other circuit court that has addressed the issue. The EEOC also pointed out that the Eighth Circuit's opinion is unprecedented and will impede the EEOC's ability to enforce Title VII in workplaces with the most widespread discrimination. The Eight Circuit recently vacated its decision, issued a revised opinion and dismissed the EEOC's petition as moot. However, because the revised opinion did not address the issues in the EEOC's petition, we will resubmit the petition for panel rehearing or en banc review.

The Committee also expresses concern "about the EEOC's plans to issue new guidance on the use of criminal and credit background checks in the employment context." The Committee directs that stakeholders be engaged in the discussion about the intended changes to background check guidance and that the new guidance be "circulated for public input at least 6 months before adoption."

Guidance documents approved by the Commission are sub-regulatory and thus do not rise to the level or effect of regulations. They are intended to inform the public and employers about the laws we enforce, and thus help to promote voluntary compliance. The EEOC has gone to great lengths to solicit feedback and encourage transparency when developing its sub-regulatory materials. The Commission held public meetings in 2008 and 2011 concerning the use of arrest and conviction records in employment. Transcripts of these meetings, as well as the written statements of witnesses are available on our website.

Additionally, in 2010 the EEOC established a process for keeping the public meeting record open for a period of time following Commission meetings to allow interested parties to provide feedback and comments. The Commission received approximately 300 written comments about using criminal records in hiring. Written comments were submitted by a diverse group which included civil rights and employee representatives, trade associations and business organizations as well as concerned citizens, human resources professionals, small business owners, people with criminal records and their families and groups that conduct background checks.

Throughout the process of drafting guidance, staff met with representatives of the U.S. Chamber of Commerce, SHRM, HR Policy Association, College and University Professional Association for Human Resources, and the Equal Employment Advisory Council, among others. Further, individual Commissioners have held numerous meetings with stakeholders to hear concerns about possible guidance. We note that Michael Eastman, Executive Director of Labor Law Policy for the Chamber of Commerce, who initially expressed concerns about a lack of transparency in the development of the guidance described the final guidance approved by the Commission as "much improved" over earlier drafts. We have attached a more detailed timeline of the process leading up to the bipartisan approval of the guidance.

As a partner and long-time supporter of the Commission and its work, please accept my sincere gratitude for your leadership and commitment to equality of opportunity. I greatly appreciate your support for the work of the EEOC. My staff and I welcome the opportunity to answer any questions and respond to any concerns that you may have.

Sincerely,

Claudia Withers
Chief Operating Officer

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

MAY - 7 2012

Office of the Chair

The Honorable Harold Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Rogers,

I am writing to express my opposition to the amendment offered by Rep. Jack Kingston and adopted during full committee consideration of the FY 2013 Commerce-Justice-Science appropriations bill. This amendment prohibits EEOC from using FY 2013 funding to "implement, administer, or enforce" the EEOCs final regulations on reasonable factors other than age (RFOA) under the Age Discrimination in Employment Act (ADEA). As adopted, it would undermine the vigorous enforcement of the nation's age discrimination laws at a time when older workers are particularly vulnerable. Most significantly, it would preclude outreach to employers, particularly small business, to educate them to comply with the law.

On November 16, 2011, the Commission approved the RFOA regulation, which was published in the Federal Register on March 30, 2012, and became effective on April 30, 2012. The rule was necessitated by two Supreme Court decisions (*Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008)) in which the Court rejected one part of the Commission's existing ADEA regulations. The Court upheld EEOC's longstanding position that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, even if the harm was not intentional. However, it disagreed with the part of the EEOC's regulations providing that, if an employee proved in court that an employment practice disproportionately harmed older workers, the employer had to justify it as a "business necessity." The Court said that, in an ADEA disparate impact case, the employer did not have to prove business necessity; it need only prove that the practice was based on "a reasonable factor other than age." The Court also said that the RFOA defense is easier to prove than the business necessity defense, but it did not otherwise explain what "reasonable" means in the context of RFOA.

The EEOC's purpose in issuing the rule was to bring its existing regulation into conformance with this Supreme Court precedent and to explain the meaning of the RFOA defense to employees, employers, and courts. The new rule makes the existing regulation

consistent with the Supreme Court's holding that the defense to an ADEA disparate impact claim is the RFOA defense, and not the business necessity defense. It also explains the meaning of the RFOA defense to employees, employers, and those who enforce and implement the ADEA.

In July 2009 and November 2010, the Commission held public meetings on age discrimination and the plight of older workers in the current economic climate. At the July 2009 meeting, experts testified about recent Supreme Court cases and the need for the EEOC to update its RFOA regulation. In November 2010, we heard testimony that age discrimination is causing older workers to have a difficult time maintaining and finding employment, a problem exacerbated by the downturn in the economy. The number of age discrimination charges filed with the EEOC has grown, rising from 16,548 charges filed in fiscal year 2006 to 23,465 in fiscal year 2011. Dr. William Spriggs, Assistant Secretary for Policy, U.S. Department of Labor, testified that the rate of unemployment for people age 55 and over "rose from a pre-recession low of 3.0 percent (November 2007) to reach 7.3 percent in August, 2010, making the past 22 months the longest spell of high unemployment workers in this age group have experienced in 60 years."

When considering the effects of the rule, it is important to note that it applies to only a few kinds of employment practices. Specifically, it applies only to practices that are **neutral** on their face, that **might harm older workers** more than younger workers, and that apply to **groups** of people. For instance, it applies to certain tests used to screen employees, and to certain procedures used to identify persons to be laid off in a broad reduction-in-force ("RIF"). Additionally, an employer would be required to prove the defense only after an employee has identified a specific employment policy or practice, and has established that the practice harmed older workers substantially more than younger workers.

In offering his amendment, Representative Kingston stated that he proposed the rider because the new rule "could preclude employers from using education attainment, technical skills and health for making hiring, promoting, salary adjusting, or firing decisions." However, the rule does not preclude employers from using such criteria if they are relevant to the job. The requirement that such criteria be relevant to the job is found in decisions of the Supreme Court; the Commission's rule simply restates and applies this governing law.

Finally, we believe the final rule strikes the appropriate balance between protecting older workers from discriminatory practices and preserving an employer's ability to make reasonable business decisions. Because the regulation simply clarifies the statutory requirements identified by the Supreme Court in *Smith* and *Meacham*, the rider would, in effect, prevent EEOC from fully enforcing the civil rights provided to older workers by Congress.

Thank you for your consideration of the information that I have shared in this letter. My staff and I stand ready to address any questions or concerns that you might have regarding the RFOA rule.

Sincerely,

Jacqueline A. Berrien
Chair

cc: The Honorable Frank Wolf
The Honorable Chaka Fattah

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

JUN 04 2012

The Honorable Frank Wolf
Chairman
Subcommittee on Commerce, Justice, Science,
and Related Agencies
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Wolf:

I am writing in response to your letter dated May 22, 2012, asking the U.S. Equal Employment Opportunity Commission's ("EEOC" or "Commission") "to immediately reassess the Commission's conference policies and procedures ...confirming that your policies and procedures are adequate to prevent waste and abuse." You also asked the Commission to "confirm that any and all current year actual and planned conference expenditures represent necessary activities that are directly related to the mission and core responsibilities of the Commission, and adhere to legal and regulatory standards and the strictest standards of responsibility and accountability."

As a public servant, the Chair understands that she is expected to be a watchful steward of the public's finances and a conscientious guardian of the public's confidence. To that end, she has worked vigilantly to eliminate wasteful and abusive spending throughout the Commission, particularly in the area of conferences. Additionally, the process for planning and implementing conferences at the Commission is subject to rigorous procedural reviews that provide the opportunity for a thorough examination of expenditures. We are pleased to report that the Commission has consistently adhered to all legal and regulatory standards and to strict standards of responsibility and accountability.

Our Office of Legal Counsel provides ethics and fiscal law advice to EEOC program offices that plan annual training conferences. They review conference plans and advise the conference planners on the ethical and legal expenditures of appropriated funds for the conferences. They also routinely provide ethics and legal advice to EEOC's Technical Assistance Training Institute, which operates EEOC's Education, Technical Assistance, and Training Revolving Fund established by Pub. L. 102-411 (Oct. 14, 1992) and which funds many of these conferences.

In addition, the Office of Legal Counsel reviews most training contracts for legal sufficiency. Legal sufficiency reviews include confirmation that the statements of work provide for sufficient competition, that expenditures are being made only for necessary training activities, and that the prices are fair, reasonable, and provide the best value to the government. The office

reviews the contracts to ensure that they comply with the Federal Acquisition Regulations and all applicable fiscal laws.

Additionally, competitive procurement actions with an estimated value of $100,000.00 or more require Commission approval before a contract is awarded. This allows each Commissioner the opportunity to review the contract, be briefed on the purpose and details of the conference, and vote to approve or reject the contract.

The Commission is sponsoring three major training conferences this year: the Examining Conflicts in Employment Law (EXCEL) Conference, the EEOC/Fair Employment Practices Agencies (FEPA) Conference and the Executive Leadership Conference (ELC).

The annual EXCEL Conference serves the federal EEO community by offering training courses designed specifically on skills based training. The sessions offered during the EXCEL event provide information on new developments in processing of federal sector complaints and legal updates based on developments in case law during the preceding period. In addition to the general sessions, specialty tracks are delivered to segments of the federal EEO community, allowing individuals working in those areas to earn needed certificates and in some instances, Continuing Legal Education credit.

The EXCEL Conference is held under the auspices of the EEOC Training Institute. As part of the Commission's Training Institute, the EXCEL Conference is not funded through the Commission's annual appropriation. Instead, the expenses for this event are covered by fees collected from those who attend the conference. The FY 2012 EXCEL Conference is planned for July 30th through August 2nd in Dallas, Texas.

The annual EEOC/FEPA Conference serves the directors of the 95 Fair Employment Practices Agencies around the country by offering legal and substantive topics designed to allow continuing partnerships between agencies enforcing civil rights statutes. The EEOC/FEPA Conference is an activity of the Commission's State and Local Program and funded through the Agency's annual appropriation. The funding covers the cost for FEPA Directors to attend the EEOC/FEPA Conference. The FY 2012 EEOC/FEPA conference was held May 29th through May 31st in St. Louis, Missouri.

Under EEOC's procedures, the EXCEL and EEOC/FEPA conferences are approved by a vote of the Commission. The Commission is informed of the budget of the conference and is provided with the agenda of courses and presentations from prior conferences. The Commission's vote to approve the conference grants the organizers the authority to develop an agenda and deliver the training courses and presentations. Both conferences are necessary activities that are directly related to the mission and core responsibilities of the Commission. Both the EXCEL and EEOC/FEPA conferences are subject to audit and follow the standards set out by the Comptroller General for the conduct of government business. All expenditures are

entered into the Commission's financial management system and are available to be audited through the Commission's annual financial statement audit.

The third conference, the Executive Leadership Conference, was created in response to requests from senior federal EEO personnel who noted a vacuum in training courses designed to address leadership skills for the senior federal EEO community. The sessions offered during the ELC provide information to assist senior federal EEO leaders with creating model federal workplaces, as required by the statutes and directives enforced by the Commission. The ELC was convened from May 14th through May 17th in Cambridge, Maryland.

The ELC is presented using a unique contracting process called a no-cost contract. Under this process, the Commission contracts with a third party to handle all logistics and bear all the costs associated with the conference. In exchange, the third party charges fees to conference attendees to cover the cost of arranging the conference. The Commission expends no funds to host the ELC. This conference requires a minimal amount of Commission resources. Any expenditure for attendance is entered into the Commission's financial management system and is available for inspection through the Commission's annual financial statement audit.

The Commission maintains complete control over the agenda of the ELC. The agenda both in 2011 and 2012 focused on improving the leadership and practical skills of EEO executives throughout the federal government. Because EEOC requires federal agencies to take all necessary steps to ensure equal employment opportunity and become a model employer, the ELC is designed to prepare senior EEO officials to meet these challenges.

As the fiscal steward of the EEOC, the Chair is mindful of the public trust especially in the face of the financial challenges posed by the current fiscal environment. Please be assured that the Commission shares your concern about wasteful and abusive spending associated with conferences.

We hope that the information provided above is helpful and responds to any concerns you may have about the conferences sponsored by the EEOC. We appreciate your continued support of the Commission and are available to answer any questions.

Sincerely,

Todd A. Cox, Director
Office of Communications
and Legislative Affairs

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515–6015

May 22, 2012

The Honorable Jacqueline A. Berrien
Chairwoman, U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Chairwoman Berrien:

I am deeply concerned about wasteful conference spending, such as the abuses revealed in the recent GSA Las Vegas conference scandal.

The attached Fox News report describes an extravagant Ninth Circuit Judicial Conference in Hawaii. Such actions not only raise questions about the possible waste of public funds; they also undermine public confidence in government.

I ask you to immediately reassess the Commission's conference policies and procedures and report back to the Committee by June 5, 2012, confirming that your policies and procedures are adequate to prevent waste and abuse. In your response please also confirm that any and all current year actual and planned conference expenditures represent necessary activities that are directly related to the mission and core responsibilities of the Commission, and adhere to legal and regulatory standards and the strictest standards of responsibility and accountability.

Thank you for your attention to this matter.

Sincerely,

Frank R. Wolf,
Chairman, Subcommittee on Commerce,
Justice, Science, and Related Agencies

Judges' plans for lavish $1 million Hawaii conference bring scrutiny

Published May 21, 2012
FoxNews.com

On the heels of the scandal surrounding one government agency's lavish Las Vegas conference, federal judges in the western U.S. circuit are catching flak from Congress for a planned Maui getaway that could cost taxpayers more than $1 million.

The Maui meet-up is scheduled for August under the banner of the 2012 Ninth Circuit Judicial Conference, and will include judges, attorneys, staff and "special guests" from various federal courts spread across nine western states—including judges on the California-based Ninth Circuit Court of Appeals.

While in Hawaii, the guests are scheduled to stay in the upscale Hyatt Regency Maui Resort & Spa. And they'll have the chance to kick back with an array of recreational activities—sport fishing, golf, paddle-board lessons, yoga, Zumba, even a floral design workshop.

The official website for the conference stresses that "government funds are not used for any recreational or sporting activities."

But Sens. Jeff Sessions, R-Ala., and Chuck Grassley, R-Iowa, in a letter to Ninth Circuit Chief Judge Alex Kozinski, called the activities "unrelated to the business of the court" and questioned whether the Ninth Circuit really needed to ship everyone out to the islands—a trip that incurs substantial costs in travel and lodging alone.

"The programs read more like a vacation than a business trip to discuss the means of improving the administration of justice," they wrote. "We are concerned about the overall cost of this conference and do not believe that discussions about the administration of justice would be less successful were they held somewhere other than a spa and resort in Hawaii."

A statement from the senators estimated the trip could cost more than $1 million—pegging the cost of accommodations alone at more than $500,000. That factors in room rates of between $230 and $250 per night for four nights.

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The government also provides a per diem—according to the conference website, this per diem starts at a base level of $289.

Circuit Court Executive Cathy Catterson issued a written response to the complaints Monday afternoon saying the senators' letter is being reviewed and defending the upcoming conference.

"As part of the Third Branch of government, the Ninth Circuit is fully aware of its responsibilities as a steward of public funds," Catterson said, noting the conference is "authorized by law" for the purposes of considering court business and ways to improve the administration of justice.

"The conference fully adheres to these goals, providing an exceptional educational program and the opportunity to conduct numerous business meetings that further circuit governance. Judges and other attendees take seriously their obligation to participate fully in the conference," she said. "Costs for lodging and air travel to attend the conference are comparative to those found at mainland venues. Any sporting and recreational activities are paid for by individuals and are not reimbursable."

The hotel itself is situated on Kaanapali Beach, in the northwestern corner of the island on the outskirts of the island's lush rainforests. The resort features a full-service spa, a salon, 1,800 feet of beachfront property, two pools with waterfalls, a rope bridge and an outdoor whirlpool.

The GOP senators, in their letter, fired off a slew of questions for the Ninth Circuit about the cost of past conventions and the rationale for the upcoming one. They referenced the scandal over the General Services Administration conference in Las Vegas, which cost taxpayers more than $800,000.

"Technology is so advanced that people are earning college degrees online and soldiers serving halfway across the world use Skype with their families at home," Grassley said in a statement.

"Likewise, a judicial circuit court should be capable of using technology to share information without requiring a trip to an island paradise. It's especially tone-deaf to plan a pricey conference after the GSA debacle. The taxpayers can't sustain this kind of spending, and they shouldn't have to. The court should re-examine whether this is the best use of tax dollars."

http://www.foxnews.com/politics/2012/05/21/senators-scrutinize-judges-over-tone-deaf-conference-on-island-paradise/