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OF THE  
UNITED STATES OF AMERICA  
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202/463-5522

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March 22, 2011

Stephen Llewellyn  
Executive Officer  
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Equal Employment Opportunity Commission  
131 M Street, NE  
Suite 6NE03F  
Washington, DC 20507

**RE: Comments on EEOC's plan for retrospective analysis of significant regulations pursuant to EO 13563**

Dear Mr. Llewellyn:

We are pleased to submit these comments on behalf of the U.S. Chamber of Commerce (Chamber) in response to the request by the Equal Employment Opportunity Commission (EEOC or Commission) for public comment to help in the development of the Commission's plan to periodically review regulations.<sup>1</sup> The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.

As described in more detail below, we thank the Commission for asking for public input on this important matter and encourage the Commission to regularly solicit such stakeholder comments. We also urge the Commission to look beyond regulations that may be classified as "significant" and review other regulations, guidance, and other policy documents that have a real impact on stakeholders. Finally, we suggest the Commission should undertake review of its regulations under the Age Discrimination in Employment Act and its policy statement on binding arbitration.

**EEOC Should Request Such Information Regularly**

At the outset, it is important to note that we appreciate the fact that the Commission is soliciting public input as it develops its planned review of regulations pursuant to Executive Order 13563. While we understand that the Executive Order imposes a timeline on the Commission to

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<sup>1</sup> Request for comment was made through a March 8 press release, EEOC Seeks Public Comment on Plan to Review Its Significant Regulations, and on the agency's web site at: [http://www.eeoc.gov/laws/regulations/comment\\_retrospective.cfm](http://www.eeoc.gov/laws/regulations/comment_retrospective.cfm) (last accessed on March 21, 2011).

submit this plan, it must be acknowledged that the public comment period of two weeks is short and makes it very difficult for us to provide a comprehensive response to the Commission. For this reason, we encourage the Commission to institute a practice of regularly soliciting such advice so that stakeholders can, when appropriate, develop economic analyses, studies, and other tools that may help the Commission in reviewing its regulations, guidance, and other policy.

### **Significant Regulations**

Section 6(b) of Executive Order 13563 contains the mandate for the Commission and other agencies to submit preliminary plans to “periodically review ... significant regulations ...” The Commission’s solicitation of public comments likewise speaks in terms of “significant regulations.”

“Significant regulation” is a terms of art under Executive Order 12866. While it includes any action that is likely to result is a rule that may have an annual effect on the economy of \$100 million or more, it is broader and also includes any rule that may “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”<sup>2</sup> It also includes regulatory action that is likely to result in a rule that may “raise novel legal or policy issues arising out of legal mandates ...”<sup>3</sup>

We raise these points to emphasize that while some of the Commission’s regulations are significant based on the annual effect on the economy, others are likely to be considered significant if other aspects of the definition are examined. For example, the proposal to amend the Commission’s regulations under the Age Discrimination in Employment Act (ADEA) stated that the Commission concluded that the proposal would not have an annual effect on the economy of \$100 million or more.<sup>4</sup> Nevertheless, the proposal raised numerous novel legal and policy issues and is therefore significant.

We also urge the Commission to look beyond regulations that may be considered significant as defined in Executive Order 12866 because the general principles of regulation, as articulated by the President in section one of Executive Order 13563, are equally applicable to those regulations that do not meet the technical definition of significant. Likewise, the Commission maintains guidance and other policy documents that have a real impact on employers and should equally be subject to review.

For example, Title VII of the Civil Rights Act of 1964 does not give the Commission the power to promulgate substantive regulations.<sup>5</sup> However, this does not mean that the Commission has refrained from issuing policy documents that have, as a practical matter, greatly affected

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<sup>2</sup> Executive Order 12866, §3(f)(1).

<sup>3</sup> Executive Order 12866, §3(f)(4).

<sup>4</sup> 75 Fed. Reg. 7,212, 7,217 (Feb. 18, 2010).

<sup>5</sup> 42 U.S.C. §2000e-12(a) grants the Commission the authority to promulgate procedural regulations only.

employers and to which employers may be bound. For example, while the Uniform Guidelines on Employee Selection Procedures<sup>6</sup> are “guidelines,” the Supreme Court has stated that:

The EEOC Guidelines are not administrative “regulations” promulgated to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute “[t]he administrative interpretation of the Act by the enforcing agency,” and consequently they are entitled to great deference.<sup>7</sup>

We use this example to emphasize that Commission guidance, while perhaps not meeting the technical definition of “significant regulations” as defined in Executive order 12866, may have the same impact on the regulated community. The same concerns that led the President to implement Executive Order 13563 apply to this guidance as well. We hope that the Commission will cast its net broadly in examining the scope of regulations and other policy documents to be reviewed.

### **Specific Regulations and Policy for Review**

We are not at this time suggesting that the Commission review regulations under the Genetic Information Nondiscrimination Act, as the final regulations are relatively new and we are still assessing their implementation. Likewise, we anticipate that regulations implementing the ADA Amendments Act will be published in the next few days and we believe it would be inappropriate for us to suggest review of any of the Commission’s regulations under the Americans with Disabilities Act until the new regulations can be fully assessed. Nevertheless, we offer the following specific examples of regulations and policy for review with the caveat that, given the short comment period, we have not vetted the Commission’s request as fully as we would like. We would very likely include additional examples should the Commission undertake similar requests on a periodic basis.

#### ADEA – Reasonable Factors Other than Age

We respectfully suggest that the Commission’s regulations under ADEA warrant careful review, especially with respect to section 1625.7, differentiations based on reasonable factors other than age. In light of the decisions of the Supreme Court in two cases, the Commission has proposed significant revision to this section. For a complete discussion of our concerns with this provision, we urge you to review the Chamber’s comments filed during the rulemaking process and also available on the Chamber’s website.<sup>8</sup> However, we feel compelled to raise it here for two reasons. First, it is unclear just what the Commission has proposed. The Commission published a NPRM<sup>9</sup> to revise this section in 2008 after the Supreme Court’s decision in *Smith v.*

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<sup>6</sup> 29 C.F.R. part 1607.

<sup>7</sup> *Abemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)(citations omitted).

<sup>8</sup> The comments are available at: <http://www.uschamber.com/issues/comments/2010/comments-definition-reasonable-factors-other-age-under-age-discrimination-emplo> (last accessed March 22, 2011).

<sup>9</sup> 73 Fed. Reg. 16,807 (Mar. 31, 2008).

*City of Jackson*.<sup>10</sup> It then published a second NPRM<sup>11</sup> in 2010 after the Supreme Court's decision in *Meacham v. Knolls Atomic Power Lab.*<sup>12</sup> However, the relationship between the first and second NPRM was never explained and it is still not clear just what the Commission has proposed.

Second, it is clear to us that the substantive issues raised by the proposals are of the utmost concern to employers, particularly in that they could lead to the Commission second-guessing routine management decisions, as described more in our comments.

While we understand the Commission has not yet finalized any revisions to section 1625.7 in light of the two Supreme Court decisions, we include this matter here to stress the importance of the issues raised.

### Policy Statement on Binding Arbitration

In 1997, the Commission issued a Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.<sup>13</sup> As the Commission is aware, this policy statement takes the position that “agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evidenced in these laws.”<sup>14</sup> However, this position has now been rejected time and time again by our federal courts. Indeed, every circuit has now rejected the EEOC's interpretation.<sup>15</sup>

There is now no argument that the policy statement remains a valid interpretation of law and it should be repealed. Maintaining incorrect policy statements does not offer any benefit. To the contrary, it burdens all stakeholders by confusing them with respect to their rights and obligations under the law.

### **Conclusion**

The Chamber thanks the Commission for soliciting public input as part of this important process. We urge the Commission to regularly undertake such a review and to look at the broad array of policy documents the Commission utilizes, such as guidance, in addition to significant regulations. As part of this particular review, we urge the Commission to consider its regulations, including proposed revisions, under ADEA and its policy guidance on binding arbitration.

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<sup>10</sup> 544 U.S. 228 (2005).

<sup>11</sup> 75 Fed. Reg. 7,212 (Feb. 18, 2010).

<sup>12</sup> 554 U.S. 84 (2008).

<sup>13</sup> Notice 915.002. Available at <http://www.eeoc.gov/policy/docs/mandarb.html> (last accessed March 21, 2011).

<sup>14</sup> *Id.*

<sup>15</sup> *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (citing *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith*, 170 F.3d 1 (1st Cir. 1999); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); and *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992)).

Thank you for your consideration of these comments. Please do not hesitate to contact us if the Chamber may be of further assistance in this matter.

Sincerely,



Randel K. Johnson  
Senior Vice President  
Labor, Immigration & Employee Benefits



Michael J. Eastman  
Executive Director  
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