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**VIA: [Public.Comments.RegulatoryReview@eoc.gov](mailto:Public.Comments.RegulatoryReview@eoc.gov)**

**RE:** Request for Public Comment on Plan for Retrospective Analysis of Significant Regulations pursuant to Executive Order 13563, which applies across the federal government. 76 Fed. Reg. 3821 (Jan. 21, 2011), <http://federalregister.gov/a/2011-1385>.

Dear Commission,

This document is submitted in response to the Equal Employment Opportunity Commission's ("EEOC") request for public comment on a plan for retrospective analysis of significant regulations pursuant to Executive Order 13563. The Commission has asked for public comment on factors that should be considered in doing a regulatory review, the process that should be used to select rules for review, and whether review should be focused on particular types of regulations.

These comments are submitted on behalf of the Center for Corporate Equality (CCE). CCE is a non-profit equal employment opportunity research organization that was established in 2007. CCE was formed to help companies proactively respond to a new generation of complex and technology-based affirmative action and non-discrimination compliance issues. CCE is designed to carry out the mission of creating workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and by promoting affirmative action and equal employment regulatory compliance. CCE makes all of its research available to the EEO community at no cost.

CCE congratulates the agency on conducting a retrospective analysis of significant regulations, and the request for stakeholder input into this process via a public review. One set of regulations that may benefit from review are the *Uniform Guidelines on Personnel Selection Procedures*<sup>1</sup> ("*Guidelines*") and their *Questions and Answers*.<sup>2</sup> These Guidelines describe how to measure adverse impact and present standards for legally defensible selection procedures in situations where adverse impact exists. However, adverse impact measurement as described by the Guidelines appears inconsistent with some contemporary EEO agency enforcement and case law (see Biddle, 2006; Cohen & Dunleavy, 2009 & 2010; Esson & Hauenstein, 2006; Zedeck, 2009).

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<sup>1</sup> [http://www.access.gpo.gov/nara/cfr/waisidx\\_10/29cfr1607\\_10.html](http://www.access.gpo.gov/nara/cfr/waisidx_10/29cfr1607_10.html)

<sup>2</sup> [http://www.eoc.gov/policy/docs/qanda\\_clarify\\_procedures.html](http://www.eoc.gov/policy/docs/qanda_clarify_procedures.html)

Adverse impact measurement is a topic on which CCE can contribute meaningful contemporary insight. In fact, in 2010 CCE organized a 69-member Technical Advisory Committee (TAC) on adverse impact.<sup>3</sup> The purpose of this TAC was to provide contemporary professional guidance on how to most appropriately conduct adverse impact analyses. The TAC was not intended to criticize a particular agency, to support a particular side in a courtroom, or to lead the charge for revision of the Guidelines. Instead, the TAC considered scientific standards, practical considerations, and an underlying goal of mirroring the reality of employment decisions to develop a set of best practice recommendations.

The TAC consisted of a wide variety of EEO experts including labor economists, plaintiff and defense attorneys, I-O psychologists, HR practitioners, and former federal agency leaders. Current federal agency staff were invited, but declined to participate. TAC members completed expert surveys, participated in in-person focus group discussions, and helped with writing and revising a best practices TAC report. This report (Cohen, Aamodt, & Dunleavy, 2010) was distributed to the EEO community without cost on September 15, 2010, and soon after CCE staff briefed EEOC, the Department of Justice (“DOJ”) and the Department of Labor (“DOL”) in a joint-agency meeting.

Based on reactions from both the EEO community and enforcement agencies, the TAC provided some useful contemporary recommendations. It is worth noting that a number of TAC recommendations were more detailed than the adverse impact measurement proscriptions in the Guidelines (e.g., who should be included in the analysis, what constitutes a positive employment decision, etc.). Other TAC recommendations considered some recent technological advances (e.g., the internet and corresponding changes to the world of employee selection and work) that may affect adverse impact measurement, while other TAC recommendations run contrary to the Guidelines (e.g., using a combination of statistical and practical significance measures as opposed to using the 4/5<sup>th</sup> rule as a stand-alone measure).

CCE congratulates the EEOC, DOJ and DOL for their work in identifying and eliminating discriminatory employee selection procedures over the last 33 years. However, the documented regulatory standards for measuring adverse impact should be consistent with contemporary case law, agency enforcement, and science-based best practices, as well as mirror the reality of employment decision systems. Unfortunately, there are some inconsistencies between the Guidelines, present day EEO enforcement, and some of the contemporary recommendations made by the TAC. These inconsistencies are likely a function of the fact that the Guidelines have not been revised since 1978.

Of course, the Guidelines themselves seem obligated to maintain currency and consistency with contemporary research. For example, in Section 5(C), the Guidelines are described as: *intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures*. Section 1 of the Executive Order 13563 echoes a similar notion: *Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science.*

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<sup>3</sup> The CCE TAC report can be found at: <http://ccee.org/>

CCE suggests that the Guidelines should be considered a high priority review, with emphasis on how adverse impact should be appropriately measured in today's world of work. This review may entail public discussion on the current state of adverse impact measurement, as well as the development of a scientific technical advisory committee to assist with the review. CCE requests involvement in this process.

Sincerely,

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## References

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