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Mailed electronically to:

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

**Re: Request for Public Comment on Plan for Retrospective Analysis of Significant Regulations**

As the population ages, so does the labor force. More than 47 million men and women age 50 and older are in the labor force today. By 2018, nearly one-fourth (24 percent) of the labor force will be age 55 or older. Many of these workers will prefer to work past retirement age. However, in the face of shrinking pension and health benefits, longstanding wage stagnation and low savings rates, drops in home values, and market losses precipitated by the financial crisis, many more will *have* to work longer.

Employment is important to AARP's millions of members, almost half (47 percent) of whom are working full- or part-time. Practices that arbitrarily limit employment opportunities and earning power jeopardize workers' financial security not only while working but also in retirement. AARP is committed to removing barriers to employment opportunity and to expanding economic security for workers of all ages.

Significant barriers do still exist. Age discrimination remains a persistent problem, one that has been greatly exacerbated during the recent recession. Employment discrimination on grounds of disability is also a particular challenge for older workers. Antidiscrimination laws are essential, but the success or failure of these laws depends in significant part on the actions of the Equal Employment Opportunity Commission (EEOC) in promulgating strong, clear regulations to implement these laws, and in vigorously enforcing the law.

**Factors to Consider**

In response to the President's Executive Order 13563 on Improving Regulation and Regulatory Review (76 Fed. Reg. 3821, Jan. 18, 2011), the EEOC is formulating its plan for a retrospective review of its significant regulations. We commend the Commission for seeking public input on how it should go about this task. In particular, the Request for Comments asks for suggestions about what factors the EEOC should consider in doing the review, the process it should use to select rules for review, and input on specific regulations.

The most important factor that should guide the Commission's review is its expertise on what is necessary and effective to achieve the objectives of the laws it is charged with implementing. Whether prompted by the enactment of new statutes, developing case law, or new developments in the workplace, the issuance of clear, strong regulations and guidance help to increase certainty about rights and obligations and thereby reduce disputes and litigation. Clear

regulatory guidance can also incentivize self-evaluation and voluntary compliance. With few exceptions, the EEOC has a solid record of issuing regulations that are appropriately protective of employees' rights to work free of discrimination while being cognizant of employers' concerns and circumstances.

The Commission's request for comments may generate many suggestions to repeal or substantially weaken existing EEOC regulations (or to refrain from issuing new guidance), arguing that their costs outweigh their benefits. Cost-benefit analysis should not be the touchstone of the EEOC's review. The fundamental question of the "costs and benefits" of equal opportunity has been asked and answered by our Constitution and by our body of civil rights laws enacted by the Congress. They have already determined that the benefits gained – to the employee, to the business, and to the economy as a whole – of providing full and equal participation to all members of the workforce without regard to discrimination outweigh the "costs" of compliance.

### **Specific Regulations**

Periodic reviews to ensure regulations are still needed, effective, and up-to-date is an important component of a regulatory agency's effectiveness. However, the Commission already has a full agenda of rules in process or on its radar screen for possible regulatory action or guidance. AARP strongly urges the Commission not to let this retrospective review detract from or further delay the Commission's work on high-priority civil rights issues. We understand that the publication of a final rule to implement the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) is imminent. Accordingly, in these comments AARP next urges the EEOC to quickly issue final rules in other pending proceedings and to instigate rulemaking or guidance, as appropriate, to respond to recent developments.

- **Disparate Impact Burden of Proof Under the Age Discrimination in Employment Act and Reasonable Factors Other Than Age under the Age Discrimination in Employment Act** – The EEOC has initiated two interrelated rulemaking proceedings designed to protect older workers from practices that adversely impact their employment opportunities while preserving an employer's right to make reasonable business decisions. Now that the ADAAA regulations are nearly completed, the EEOC's top priority should be to finalize its Age Discrimination in Employment Act (ADEA) disparate impact and "reasonable factor" regulations as expeditiously as possible to ensure that the disparate impact theory is a meaningful tool for fighting age discrimination in the workplace.
- **Regulations to Address *Gross v. FBL Financial Services, Inc.*** – In this 2009 case, the US Supreme Court held that older workers do not have the same protections afforded employees whose claims arise under other federal work place civil rights laws. Specifically, it held that the ADEA does not authorize mixed-motive claims, and that older workers must prove that age was "the" but-for cause of their adverse treatment, making it far more difficult for older workers to get their day in court. The fallout from this case has spread to other areas of civil rights law. AARP urges the Commission, as a top priority, to undertake a rulemaking proceeding to narrow the damaging effects of the *Gross* decision under the ADEA and other civil rights laws.
- **Online Job Applications** – Online application systems are now ubiquitous. Many specifically request the applicant's date of birth and/or dates of graduation, and will not allow the applicant to continue with application until that information is submitted,

enabling employers to easily evade the purposes of the ADEA. The EEOC's current regulation states that a request for information such as date of birth or age on employment application forms is not necessarily a violation of the ADEA but instead will be closely scrutinized to assure that the request is for a permissible purpose. The Commission should revisit and strengthen its regulation on the use of age and date of birth in job applications, particularly in the online application process.

- **Discrimination against the Unemployed** – The Commission recently held a hearing on discrimination against the unemployed, and the issues of disparate treatment and disparate impact that, if proved, are raised by such practices. The EEOC has also begun to focus attention on other practices such as credit and background checks that could also be having a deleterious impact on the employment prospects of groups hard-hit by the recession. Once jobless, older workers remain unemployed for much longer periods of time than younger workers. AARP urges the Commission to continue these inquiries and to issue guidance directing that discriminatory practices must be justified by business necessity.
- **Revisit the Retiree Health Rule** – Employer-sponsored health benefits play a critical role in helping retirees achieve economic security. The decline in the number of employers offering retiree health coverage and the curtailment of retiree health benefits for Medicare-eligible retirees are of serious concern to AARP. At a time when policymakers are calling on older workers to work longer, AARP continues to believe that the EEOC's regulation permitting employers to reduce or even eliminate retiree health benefits for older workers who are eligible for Medicare is age discriminatory and counterproductive. Moreover, the Affordable Care Act will make many changes in the delivery of employer-sponsored health care benefits. For these reasons, we call on the EEOC to reevaluate and withdraw its regulation exempting retiree health benefits from ADEA protections and restore appropriate guidance prohibiting discrimination against older retirees.

Thank you again for your consideration of these comments and suggestions. We would be pleased to meet with you to further discuss these comments. If you have questions, please contact Deborah Chalfie on our Government Relations staff at (202) 434-3723.

Sincerely,



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