January 24, 2013

***VIA* e-mail to fcp@eeoc.gov**

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Honorable Constance Barker, Commissioner
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Honorable Chai Feldblum, Commissioner
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Re: Comments Regarding Federal Sector Complement Plan

Dear Chair Berrien and Commissioners:

The National Employment Lawyers Association (NELA) appreciates the opportunity to submit the following comments concerning the Federal Sector Complement Plan (FCP) to the Commission's Strategic Enforcement Plan for Fiscal Years 2013-2016 (SEP), in response to the Commission's January 14, 2013 press release (*available at* http://www.eeoc.gov/eeoc/newsroom/release/1-14-13.cfm). NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on

behalf of workers throughout the United States. A substantial number of NELA members represent federal employees in employment law matters, and thus we have an interest in developments in the Commission's federal sector program.

As the Commission's January 14, 2013 press release specifically requested public comment on three particular topical areas, NELA will comment on those three areas separately:

Determining How the EEOC's Federal Sector Program Will Implement the SEP Priorities

Of the six priorities identified in the SEP, NELA believes that the most important improvements in its federal sector programs can be found in implementation of SEP Priority 5, "Preserving Access to the Legal System." Several major roadblocks to the EEO complaints process unjustly impair complainants' ability to exercise their rights, areas which the Commission would be well served in focusing its efforts under the FCP.

1. **Policies and Practices that Discourage or Prohibit Employees from Exercising Their Rights**

   According to the Commission's published statistics, over half of all federal sector complaints closed in FY 2011 were either procedurally dismissed or decided on Final Agency Decision (FAD) without a hearing. *See* http://www.eeoc.gov/federal/reports/fsp2011/index.cfm *at* Table 10. Especially for many *pro se* complainants, this portion of the federal sector process is their only avenue for adjudication of their claims. Even for those who choose to litigate claims further into the hearings process or in court, the results of the federal sector investigative process remain the core of the evidentiary record in the case. Accordingly, the Commission's focus on reducing barriers in this area carries the potential of manifestly improving the federal sector complaints process across the board.

   The ability of many complainants to have their cases investigated in the first place, however, is limited by improper dismissals of claims by agencies. As NELA discussed in greater detail in the March 21, 2003 Proposal to then-Chair Dominguez and Commissioners Miller and Silverman from NELA and other stakeholders (attached, incorporated here by reference), the lack of a uniform standard for dismissals for failure to state a claim has led to many agency EEO offices improperly dismissing meritorious EEO complaints. Indeed, the personal incentives actually align in favor of many EEO offices improperly dismissing claims in this fashion, as a docket-clearing device that allows the agency EEO offices to enhance their case-closure speed and productivity statistics with the least possible work. This problem is particularly pronounced in the case of harassment claims, which still are subject to attempts to dismiss using fragmentation strategies even despite the Commission's denunciation of that tactic at MD-110, Ch. 5, § III. While complainants can hypothetically seek reversal of such improvident dismissals through appeals to the Commission's Office of Federal Operations (OFO), as a practical matter such appeals would likely be extremely difficult for *pro se* complainants. Even the availability of OFO review is not a perfect panacea, as

the delays in OFO appeals processing often leads to deterioration of the evidentiary record over time through loss of records, fading memories, and witnesses becoming inaccessible. NELA believes that only a stronger, more consistent and less discretionary standard regulating dismissal of claims by agency EEO offices will address this problem.

Another impediment is some EEO offices' overuse of threatened dismissals under 29 C.F.R. § 1614.107(a)(7). The Commission has instructed an agency should only invoke dismissal under this provision when there is a clear record of delay or contumacious conduct by the complainant. *See Mignone v. Department of the Treasury*, EEOC Appeal No. 01960036 (November 6, 1996). NELA has observed, however, that many agency EEO offices and investigators will frequently threaten dismissals under this provision even on their first initial information request, when no clear record of delay or contumacious conduct is in evidence, with the effect of rushing complainants' responses to information queries and therefore degrading the quality of those affidavits. NELA believes that the Commission needs to establish clear guidelines prohibiting agencies from such overbroad abuse of threatened dismissals, and make clear that agencies should not be threatening dismissals from the first instance as a trick to truncate investigations.

Further, as NELA noted in comments filed with EEOC Chief Operating Officer Claudia A. Withers, Esq. in December 2010 and November 2011 (attached, incorporated here by reference), because of the draconian effect of case dismissals, NELA believes that the Commission should require that agencies give notice to complainants of proposed dismissals citing the grounds for dismissal, and a reasonable chance for complainants to respond to those grounds, before dismissal is effectuated at the agency level. In NELA's experience, this procedure does occur on an informal basis at some agencies (in particular in cases where the agency is only partially dismissing a complaint), and can be highly successful in reducing erroneous dismissals—as well as OFO's caseload.

Finally, as NELA noted in comments filed with EEOC Chief Operating Officer Claudia A. Withers, Esq. in December 2010 and November 2011 (attached, incorporated here by reference), NELA believes that the Commission should extend the present 45-day deadline for initiating EEO complaints for federal sector complaints to 180 days, matching the shortest deadline applicable to private sector complainants. NELA notes that this 45-day deadline is solely a creature of Commission regulation, and could be easily modified by the Commission in its discretion (as demonstrated by the Commission's historical extension of this deadline from the 30-day deadline from the Commission's early days managing the federal sector complaints process).

2. Policies and Practices that Impede the EEOC's Investigative and Enforcement Efforts

a. Agency-Level

As the Commission's own statistics reflect, far more federal sector cases are decided on FAD than thorough adjudication before an administrative judge. *See* http://www.eeoc.

gov/federal/ reports/fsp2011/index.cfm at Table 10. Accordingly, for well over 4,000 cases per year, the formal complaint investigation is the *only* development that the record will have as far as the federal sector administrative process is concerned. With no adversarial discovery available to round out deficiencies in the record, it is vital that the agency-led investigative process be thorough, and that the Commission establish clear guidelines and standards to require agencies to make a thorough record.

As NELA discussed in greater detail in the March 21, 2003 Proposal to then-Chair Dominguez and Commissioners Miller and Silverman from NELA and other stakeholders (attached, incorporated here by reference), many agencies permit agency attorneys representing management to direct the complaints process and otherwise interfere in the investigative process. As a result, oftentimes investigators can solely conduct investigations into those areas which agency counsel permits, and the same agency counsel will—at the taxpayers' expense—edit management statements appearing in the investigative file in order to reduce the agency's risk of being held liable for unlawful discrimination and retaliation, rather than ensuring that the complainants' allegations receive an unbiased and objective investigation. NELA believes that the Commission needs to act affirmatively to stop this pernicious practice, and to ensure that investigations really examine possible discrimination in federal agencies and do not merely serve as administrative whitewash to protect discriminating agency managers. As discussed in greater detail in its comments filed with EEOC Chief Operating Officer Claudia A. Withers, Esq. in December 2010 and November 2011 (attached, incorporated here by reference), NELA believes that these conflicts could in part be ameliorated though the Commission enforcing the requirement of 29 C.F.R. § 1614.102(b)(4) that "The EEO Director shall be under the immediate supervision of the agency head", to be enforced though the Commission's public reporting of which agencies are not in compliance with this requirement. NELA also believes that the Commission must also issue more specific guidance (1) prohibiting agency counsel from interfering with the investigator's discretion as to how to conduct the investigation, and (2) prohibiting agencies from requiring that any agency employee's statement be cleared with or through agency counsel before the statement is submitted to the investigator.

To ensure that complainants have an unbiased and objective investigation of their claims—especially in cases which might be adjudicated through a FAD—it is important that complainants have their full opportunity to articulate pretext evidence in the record. NELA has observed that many agencies do not permit complainants to submit rebuttal affidavits after the full opportunity to review management's alleged legitimate reasons as part of the report of investigation (ROI); some agencies do not permit rebuttals at all, and others will only permit complainants to make rebuttals based upon summaries of the management statements rather than the statements themselves. For complainants to have a fair chance to articulate their pretext case in the FAD context, they need the opportunity to have their rebuttal affidavits included in the ROI, and to have the opportunity to prepare those rebuttals based on the full-text of management's affidavits.

As discussed in greater detail in its comments filed with EEOC Chief Operating Officer Claudia A. Withers, Esq. in December 2010 and November 2011 (attached, incorporated here by reference), NELA recommends that the Commission require agencies to provide a notice of rights and responsibilities to witnesses once they are identified during the investigation, including a statement that it is unlawful for the agency to retaliate against a witness for participation in the EEO process.

Further, NELA has observed that many agencies' ROIs often consist of statements by complainants, RMOs, and those corroborative witnesses favoring management. The potential for bias in this imbalance is clear. Accordingly, to ensure an unbiased and objective record—especially in the FAD context—NELA believes that investigators should be mandated to take testimony from those corroborative witnesses identified by the complainant, either in the complainant's initial affidavit or at the rebuttal phase.

Under the present system of complaint investigation, the Commission acts in a regulatory or oversight role over the agencies' conduct of EEO investigations, setting standards for investigative reports, and providing oversight and audit of deficient investigative programs. At present, this oversight role is not particularly transparent. While specific deficiencies in terms of information appearing in an ROI may be publicly noted in an OFO decision finding the investigative record incomplete and remanding for supplementation, no similar public record exists for cases where a given agency's EEO office was found deficient in a more categorical sense, and subject to corrective oversight actions by the Commission (such as through coordinated issuance of default judgment sanctions orders against particular agencies or through examination of the offending EEO office by the Commission's Office of Federal Programs under MD-110, Ch. 5, § IV.D). NELA believes that for this oversight to have sufficient deterrent effect, the oversight process needs to be more transparent, and suggests that this might best accomplished though the Commission's annual publication of information on which agency offices have been referred to the Office of Federal Programs, as well as statistical (non-complainant specific) information on which agencies have received default judgments by EEOC Administrative Judges and for what violations of Commission regulations.

As discussed in its comments filed with EEOC Chief Operating Officer Claudia A. Withers, Esq. in December 2010 and November 2011 (attached, incorporated here by reference), NELA also recommends that the Commission require that the Notice of Rights inform the complainant that s/he may file a hearing request with the EEOC on a mixed case complaint where the criteria for "firmly enmeshed" (see, e.g., *Lucas v. Dept. of the Navy*, EEOC Appeal No. 01965130 (October 1, 1998), or "inextricably intertwined" (*see, e.g., Blount v. Dept. of Homeland Security*, EEOC Appeal No. 0720070010 (October 21, 2009) are met.

Finally, NELA has observed the continuation of the noisome practice of agencies failing to even initiate investigations into complaints until after 180 days have passed and the complainant files a request for hearing—with the agency then conducting a slapdash

investigation in hopes of heading off the possibility of default judgment.[1] Given the pro-agency indulgence of certain EEOC Administrative Judges and the often nigh-yearlong delays in assigning new requests for hearing to AJs in certain of the Commission's offices, this tactic often succeeds as some AJs will let the agencies off the hook if *some* investigation is done, even though the Commission has clearly instructed that an agency's act of failing to complete its investigation within 180 days strikes at the very integrity of the federal sector complaints process. *See, e.g., Adkins v. Federal Deposit Insurance Corporation*, EEOC Appeal No. 0720080052 (January 13, 2012); *Royal v. Dept. of Veterans Affairs*, EEOC Appeal No. 0720070045 (Sept. 10, 2007); *Reading v. Dept. of Veterans Affairs*, EEOC Appeal No. 07A40125 (October 12, 2006); *DaCosta v. Dept. of Education*, EEOC Appeal No. 01995992 (February 25, 2000). Complainants should not be forced necessarily to file a request for hearing in order to get their complaints investigated, and agencies should not be permitted to weasel out of being sanctioned for their blatant refusal to timely investigate complaints due to backlogs in processing complaints at the Commission's field offices. Further, agencies should not be permitted to flout continually the Commission's authority with impunity, and NELA believes that this sort of agency abuse should receive zero tolerance from the Commission. To put a stop to this category of Agency abuse in the context of the present limited budgets and Commission staff resources, NELA suggests that the Commission instruct its field offices to begin actually enforcing MD-110, Ch. 7, § I in earnest, in particular its provision requiring that, "Upon receipt of the request for a hearing, the EEOC district or field office will send a docketing letter to the complainant and the agency, in which it will provide the parties with an EEOC Hearings Unit No., and **will request that the agency forward a copy of the complaint file within the earlier of fifteen (15) days of its receipt of the complainant's request for a hearing or receipt of the docketing letter**." (emphasis added)—in the form of an Order Directing Agency to Produce Complaint File such as found at EEOC Handbook for Administrative Judges, Appendix A—and then follow up that order with actual sanctions (including default judgments) if the agencies refused to produce the complaint file on time or else produces evidence showing that the complaint was not timely investigated. NELA believes that these basic adjudications could be easily handled by the supervisory or chief administrative judges before the claims are assigned to line AJs for hearing-stage adjudication. NELA notes that it would actually be more efficient in terms of Commission staff resources to dispose of defectively-

[1] In a related vein, NELA is aware of many agencies taking the position that they have the ability to continue in alleged "investigations" of complaints after a request for hearing has been filed, despite the clear text of MD-110, Chapter 7, § III.B and of OFO precedent (*e.g. Jones-Simms v. U.S. Postal Service*, EEOC Appeal No. 01A50251 (March 15, 2006), *aff'd* EEOC Request No. 05A60554 (April 16, 2006); *Katz v. Securities and Exchange Commission*, EEOC Appeal No. 01962676 (March 6, 1997)) stripping agencies of investigatory jurisdiction unless there has been an AJ's order for supplemental investigation. NELA believes that the Commission should clarify that an agency's receipt of a request for hearing does strip the agency of all investigatory jurisdiction, and that the Commission should require that agencies should immediately *stay* all investigation activities pending an AJ's review of the complaint file—and possible sanctions practice, if the Agency has failed to timely investigate the complaint.

investigated cases in this fashion rather than tying up AJs in conducting supplemental investigations, multiple rounds of sanctions motions practice, discovery and hearing. NELA believes that more active and public sanctioning of agencies for deficient investigation would more strongly deter them from their frequent failures to investigate claims on a timely basis. NELA is aware that there may be resistance from some AJs to beefing up enforcement in this regard due to concerns over their performance metrics, and believes that this problem could be avoided by adjustment of any relevant performance standards to ensure that AJs would have their productivity standards calculated from case assignment for issuance of an Acknowledgement and Order rather than from issuance of the Order Directing Agency to Produce Complaint File.

b. Hearing-Level

As discussed in greater detail in the March 21, 2003 Proposal to then-Chair Dominguez and Commissioners Miller and Silverman from NELA and other stakeholders (attached, incorporated here by reference), and in its comments filed with EEOC Chief Operating Officer Claudia A. Withers, Esq. in December 2010 and November 2011 (attached, incorporated here by reference), NELA proposes that the Commission's federal sector discovery procedures make allowances for differing levels of complexity with different complaints rather than apply its present "one size fits all" approach. To do so, NELA proposes that the Commission allow some greater agree of calibration of discovery and case deadlines through the use of multiple "litigation tracks," to be implemented in conjunction with the parties meeting and conferring in a manner similar to FED.R.CIV.P. 26(f).

As discussed in its comments filed with EEOC Chief Operating Officer Claudia A. Withers, Esq. in December 2010 and November 2011 (attached, incorporated here by reference), NELA recommends that the Commission more actively promote use of a case suspension procedure when needed for settlement or discovery purposes (perhaps similar to the MSPB's procedure under 5 C.F.R. § 1201.28) and/or use of liberal extensions when needed to complete discovery or settlement. NELA also believes that some form of stay or case suspension should automatically come into effect where discovery motions practice, sanctions motions practice or dispositive motions practice has been filed by one of the parties or initiated by the AJ *sua sponte.*

c. ADR

NELA supports the Commission's continuing policy of promoting ADR as an option for amicably resolving complaints. As discussed in greater detail in the March 21, 2003 Proposal to then-Chair Dominguez and Commissioners Miller and Silverman from NELA and other stakeholders (attached, incorporated here by reference), NELA believes that the Commission should further upgrade its federal sector ADR program to call for mandatory ADR at both the hearing stage and at the agency level.

Identifying Specific Federal Sector Enforcement Priorities and Strategies for Addressing Them

As discussed in greater detail in the March 21, 2003 Proposal to then-Chair Dominguez and Commissioners Miller and Silverman from NELA and other stakeholders (attached, incorporated here by reference), NELA believes that the Commission needs to aggressively seek systemic enforcement of discrimination laws by pursuing individual punishment against those individual managers found to have engaged in discrimination or reprisal. In NELA's experience, agencies almost never individually discipline RMOs even where a FAD, an EEOC administrative judge or a court has found discrimination. This lack of individual consequence leaves the discriminating managers free to reoffend over and over again. Congress has made perfectly clear that such violating managers not only ought to be fired, but even debarred from federal service and fined. *See* 5 U.S.C. §§ 1215(a)(1)(A), 1215(a)(3)(A), 2302(b)(1). NELA believes that the Commission should more strongly enforce this statutory policy of individual liability by instructing its administrative judges to make the requirement that agencies consider possibly discipline against RMOs a more regular part of their remedial orders, and by further instituting the practice of forwarding complaint files where discrimination has been found (whether by FAD, Final Agency Action after an AJ's decision, or OFO merits decision on appeal) to the U.S. Office of Special Counsel for its consideration of prohibited personnel practice prosecution against the offending RMOs under 5 U.S.C. § 1215(a)(1)(A).

Recommending Strategies to Improve Communication, Oversight, and Consistency Across the Federal Sector

To improve consistency across all Commission field offices, NELA strongly recommends that the Commission standardize its Acknowledgement and Orders, which currently are subject to wide variation from field office to field office (particularly in terms of discovery-related issues, such as the number of days for the discovery period and whether or not a party must initiate all discovery—including initiation of possible deposition practice—by the primary 20-day discovery initiation deadline).

NELA also recommends that the Commission adopt a consistent interpretation of the deadline for discovery motions practice under MD-110, Ch. 7, § IV.D.3.b. NELA has observed variation among the Commission's AJs as to whether this provision ought to require discovery motions 10 days from receipt, or 10 days from impasse on the discovery dispute. NELA favors the approach of setting the deadline at 10 days from impasse on the discovery dispute to maximize the opportunity for parties to resolve discovery disputes without burdening the assigned AJs.

Finally, NELA recommends that the Commission adopt a consistent e-filing system for its federal sector hearings process. Currently, a number of different pilot projects are operating in some Commission field offices with others rejecting e-filing entirely. NELA draws the Commission's attention to the success which the MSPB has had with its highly user-friendly eAppeal e-filing and case management system, which in NELA's

observations has had fewer docket filing difficulties than some of the systems such as HECAPS. NELA also notes the highly simple system e-filing procedure currently used in the Commission's New Orleans Field Office as an alternative the more formalistic HECAPS system. NELA observes that the Commission has identified streamlining electronic docketing as a priority under its present Strategic Plan. *See* Strategic Plan for Fiscal Years 201-2016, Performance Measure 3 for Strategy I.A.2 and Strategy III.A.2.

Again, NELA appreciates the opportunity to comment on the proposed regulations, and wishes to thank the Commission for its attention and consideration.

Sincerely yours,

Terisa E. Chaw
Executive Director

TEC/jvk-ajp

March 21, 2003

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RE: PROPOSAL TO IMPROVE THE FEDERAL-SECTOR EEO PROCESS - 7 steps for improvement

Dear Chair Dominguez, Commissioners Miller and Silverman:

As stakeholders in the federal-sector EEO process, we are mindful that the process is in need of improvement. Improvement is necessary in order to achieve the important co-existing goals of: 1) adding (or restoring) credibility to the process; 2) making the process more timely; and 3) preserving the EEOC's primary federal-sector role as the adjudicator of claims of discrimination. To meet these goals, various changes will have to take place, including weeding out cases which fail to state a claim so that limited resources can be expended on those cases that do. In reviewing the basic construct of the federal-sector EEO process, we believe that the continuation of the two main prongs of the process – the report of investigation (ROI) and the hearing before an administrative judge – is essential to the maintenance of this process. However, both of these "prongs" are in need of improvement or reform, along with other reforms of the process, to make the entire federal-sector EEO process more responsive to the needs of all parties, and more importantly, to enable the EEOC to fulfill its mission as the adjudicator of federal-sector claims of discrimination.

Of late, there has been much discussion of possible ways to reform or improve the federal-sector EEO process. While no formal proposals have yet been issued, discussions have ranged from a complete overhaul of the system, on the one hand, to suggestions that only "tweak" the process, on the other. Neither of these extremes serves the interests of all stakeholders. Additionally, a major overhaul of the system would be time-consuming and likely leave many federal employees, and stakeholder groups, questioning whether the Equal Employment Opportunity Commission had lost its commitment to eradicate discrimination in federal employment. Any change that leaves that kind of question in the minds of federal employees cannot be good for the

federal sector as a whole, nor to the credibility of the EEOC. It is critical that confidence in the federal-sector process be strengthened, and the legal and moral power of the EEOC, as the key component to the eradication of discrimination in the federal workforce, be enhanced and preserved.

With that in mind, we stakeholders propose the following changes to the federal-sector EEO process which can be accomplished quickly, with minimal disruption yet maximum effect to achieve the goals described above. Each of these proposed changes can be adopted or implemented separate and apart from each other. Yet, taken together, we believe they demonstrate the adage that "the whole is greater than the sum of the parts." In other words, each proposal taken separately would effect only limited change. Taken together, however, we believe these proposals will effect major change in the processing of federal-sector EEO complaints so as to achieve the important co-existing goals mentioned earlier, to-wit: 1) adding (or restoring) credibility to the process; 2) making the process more timely; and 3) weeding out cases which fail to state a claim, while preserving the EEOC's primary federal-sector role as the adjudicator of claims of discrimination.

THE PROPOSALS:

1. ALTERNATIVE DISPUTE RESOLUTION (INCLUDING, BUT NOT NECESSARILY LIMITED TO, MEDIATION) SHOULD BE MANDATORY AT THE EEOC HEARING STAGE AND FOR MANAGERS AT THE INFORMAL/FORMAL ADMINISTRATIVE STAGES.

There is no dispute that the changes to Part 1614 brought by the 1999 revisions, requiring agencies to implement alternative dispute resolution (ADR) processes, are invaluable and result in the successful resolution of many complaints. But more can, and must, be done. Specifically, we propose that ***in addition*** to the current ADR processes during the counseling and/or investigation stage, the Commission should mandate alternative dispute resolution at the hearing stage. In any given case, even though ADR might have been tried unsuccessfully at the counseling or investigation stage, there is reason to try ADR yet again once the case is at the Commission for hearing. Specifically, by the time the case reaches the Commission for hearing, many more facts are generally known about the complaint than were known at the time ADR was first attempted at the agency level. Additionally, at the agency level, the agency is typically "represented" by the very managers or supervisors against whom the complaint was lodged. However, at the hearing stage, agencies are typically represented by counsel who were not involved in the facts which gave rise to the complaint, and who are knowledgeable of issues relating to burdens of proof and risks of litigation. These changed circumstances at the hearing stage warrant another attempt at alternative dispute resolution. Experience has shown that a large percentage of cases that undergo alternative dispute resolution, after a request for hearing has been submitted, settle.

It is important that the process be fluid as to when the parties would be required to participate in ADR at this stage. In some cases, parties may benefit from ADR early in the hearing process, before much time and expense are invested in the discovery process, while in other cases ADR will have best chance at success if it follows discovery. The timing of the ADR effort should be made on a case-by-case basis by the administrative judge in direct discussion with the parties. Just as "cookie cutter" approaches to the litigation of all cases must be avoided, so must "cookie cutter" approaches to ADR. Furthermore, agencies must be directed to have present at ADR sessions agency officials who have true settlement authority.

Parties in the EEO process are the aggrieved employee and the agency. Management officials are just witnesses in a complaint. Thus, the voluntariness part of ADR is fulfilled when an agency designs its own ADR Program and selects those instances in which ADR would not be appropriate or feasible. For example, some agencies have limited ADR geographically (if extensive travel would be required), or by issue. However, once an aggrieved employee has invoked mediation and the complaint meets the requirements sanctioned by the agency's ADR program, it is inappropriate for the agency to refuse to participate in mediation, and ADR should be made mandatory at the counseling or investigation stage of the administrative process.

2. THE EEOC SHOULD ADOPT A UNIFORM STANDARD FOR WHAT COMPLAINTS "STATE A CLAIM," WHICH STANDARD IS ACCEPTABLE TO ALL STAKEHOLDERS, CONSISTENT WITH LAW.

A frequent complaint of the federal-sector EEO process is that complaints which are frivolous, or lack merit, clog the system. We stakeholders do not favor the use of a priority case handling system analogous to the one used by the Commission in private-sector cases. The role of the Commission in the federal sector is very different from the role the Commission plays in the private sector. In the private sector, the Commission acts as the prosecutor. Given limited resources, prosecutorial discretion is a well-recognized tool for picking or choosing those violations of law which are meritorious and have significant impact on the community as to warrant the use of government resources. However, in the federal sector, the Commission does not play the role of prosecutor. Rather, the Commission plays the role of adjudicator. Therefore, the Commission's role is to determine whether or not discrimination has occurred and what the remedy for that discrimination shall be.

In the federal sector, the EEOC's role is not to determine that some employees are entitled to have their discrimination remedied, while other employees shall suffer discrimination without adequate recourse, redress or remedy. The use of a system in the federal sector similar to the priority charge handling process in the private sector would, of necessity, result in the Commission saying, for the first time, that some discrimination in the federal workplace must be tolerated. As stakeholders, we find such result unacceptable.

Given the role of the Commission as adjudicator, yet recognizing the ever-increasing scarcity of resources, and further recognizing the validity of the view that the frivolous cases or those

lacking in merit drain resources from meritorious claims, we stakeholders propose an improvement/reform of the system which balances these competing interests but preserves the Commission's fundamental role as the agency charged with responsibility for eradicating discrimination in federal-sector employment. Specifically, we propose that the Commission adopt a uniform standard for what states a claim of employment discrimination. Cases could be dismissed on this grounds at either the agency stage, before the complaint is investigated, or after a hearing request is submitted.

At the agency level, if the complaint is dismissed for failure to state a claim, the complainant could request review by an administrative judge, rather than having the dismissal appealed directly to the Office of Federal Operations, as has been done in the past. The dismissal would then be reviewed by an administrative judge. The AJ should give the complainant notice as to what the standard for stating a claim is and give the opportunity to present evidence establishing a claim. The agency would be given the opportunity to respond. The judge would then issue an initial decision which is appealable like any other decision. To the extent that the "failure to state a claim" issue was not raised by the agency prior to the submission of the hearing request, an agency, or administrative judge *sua sponte*, should be able to raise this issue, initiating the same type of procedures described immediately above. In essence, this is similar to the MSPB's practice of determining whether it has jurisdiction over an appeal. (Under MSPB practice, when the administrative judge, or agency, believes the Board does not have jurisdiction over an appeal, the judge should issue a show cause notice to the employee requiring the employee to make a non-frivolous allegation of Board jurisdiction).

It is our proposal that in order for the complaint to state a claim the plaintiff must demonstrate "that he/she has suffered an actual injury which involves either a diminution in pay or benefits or some other materially adverse consequences effecting the terms, conditions, or privileges of employment or future employment such that a reasonable trier of fact could conclude that the employee has suffered objectively tangible harm." *See e.g., Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999). The Commission's own definition of "tangible harm," found in the Enforcement Guidance: "Vicarious Employer Liability for Unlawful Harassment by Supervisors" (June 18, 1999) provides the roadmap for determining tangible harm that could apply to all forms of discrimination, not just sexual harassment. In harassment cases where there is no tangible harm, the standard for what states a claim remains unchanged by this proposal: conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment." "The conditions of employment are altered if the harassment culminated was sufficiently severe or pervasive to create a hostile work environment." *See generally, Harris v. Forklift Systems, Inc.* 510 U.S. 17, 114 S.Ct. 367 (1993); *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998).[*] For cases of reprisal, a complaint states a claim where the complainant has engaged in protected activity, there is as adverse action (an action reasonably likely to deter

[*]The definition of the standards for what states a claim in our proposal is admittedly general, and will need to be expanded upon in any final issuance. However, the proposed standards are a framework for the final definitions.

employees from engaging in protected activity) and a causal connection between the two. *See e.g., Ray v. Henderson,* 217 F.3d 1234 (9th Cir. 2000).

If such uniform standards were adopted, the cases which are frivolous or lacking in merit would easily and readily be dismissed from the system, leaving the Commission with more resources to allocate to those cases which do, in fact, state a claim of illegal employment discrimination. Moreover, adopting the standard will eliminate the potential for disparate applications in determining which cases warrant the attention of EEOC resources, owing to individual judge's or Field Office's views on what cases are meritorious, as would occur if the priority case charge handling process is utilized.

We firmly believe that this approach, for determining which cases are frivolous or should not be in the EEO system, is a fairer, more objective system than other proposals which require EEOC administrative judges or other personnel to make decisions about the "merits" of cases based on incomplete information and in the absence of fact-finding hearings.

3. CASES SHOULD BE ASSIGNED TO ONE OF THREE "LITIGATION TRACKS" DEPENDING UPON THE COMPLEXITY AND DETAIL OF THE ISSUES INVOLVED.

A current complaint of the hearing process is that the Commission all too often attempts a "cookie cutter" approach to cases which approach does not consider the actual needs of the parties with respect to discovery and other pre-hearing processes. This often leads parties to file procedural motions which are time intensive, costly, and can result in unnecessary adversarial relations. On the receiving end, these motions require the judges' time and attention. The EEO process can be improved without eliminating this most crucial, and often dispositive, fact-finding process.

We fully endorse the recommendation of the "tripartite" group -- agency representatives, complainants' representatives and administrative judges, -- that, once a hearing has been requested, cases be separated into three "litigation tracks." These "litigation tracks" are not based on, or concerned with, the "merits" of the case. Rather, they concern the complexity of the case and the length of time it is expected to be required to adequately adjudicate the claims involved. The use of "litigation tracks" to determine the scheduling of cases is not a novel idea. Most courts now utilize "litigation tracks" to determine the scheduling of cases. The three litigation tracks proposed are fast track, standard track and complex track.

As envisioned, the "fast-track" (sometimes likened to small claims court) is for the relatively simple complaint, or cases where little to no additional discovery is required. The standard tracks is for the typical case where the issues are limited and the parties' needs for discovery to supplement the record is average. The complex track would be reserved for cases with multiple issues, such as multiple selections, amended complaints, and class litigation.

Is important to emphasize that for "litigation tracks" to be meaningful ways to manage litigation and meaningful predictors of cases scheduling, the "tracks" cannot be decided unilaterally by the administrative judge. Rather, like in the courts, a brief "scheduling conference," which can be telephonic, must be held by the judge with the parties. The judge first seeks the parties' agreement as to which track the case belongs. If the parties are in agreement, the judge would normally approve the track and schedule chosen. If the parties cannot agree, the judge may exercise his/her authority to decide upon the appropriate track. A benefit of involving the parties in the track selection, and seeking their agreement, is that the parties will determine the track knowing what discovery must be done. This should minimize the need for motions for extensions of time and motions to compel, which are so frequent and consume so much of an administrative judge's time and attention. In other words, this "litigation tracks" system should help reduce the "motions practice" currently pressing the judges.

4. AGENCY EEO DIRECTORS MUST REPORT DIRECTLY TO THE AGENCY HEAD; TO ENSURE COMPLIANCE WITH THIS REQUIREMENT, IN ITS ANNUAL REPORT TO CONGRESS, THE EEOC SHOULD SPECIFICALLY IDENTIFY WHICH AGENCIES ARE NOT IN COMPLIANCE WITH THIS REQUIREMENT.

The Commission's regulations specifically provide that

> "The EEO Director shall be under the immediate supervision of the agency head."

29 CFR 1614.102(b)(4).

The MD-110 amplifies this requirement:

> Each federal agency shall appoint a Director of Equal Employment Opportunity (EEO Director), who shall be under the immediate supervision of the agency head. 29 C.F.R. § 1614.102(b)(4). The EEO Director shall be responsible for the implementation of a continuing affirmative employment program to promote equal employment opportunity and to identify and eliminate discriminatory practices and policies. The EEO Director cannot be placed under the supervision of the agency's Director of Personnel or other officials responsible for executing and advising on personnel actions.

MD-110, Chp 1.I.

The stakeholders believe that this is an important requirement because it sends a message to employees and managers about the importance of, and commitment to, the EEO program within each agency. Moreover, the EEO Directors' direct access to agency heads is important because it allows the EEO Directors to report significant problems, including, but not limited to, managers'

interference in, or lack of cooperation with, the EEO process, directly to the agency head. It is recognized that the EEOC only has "moral" authority to enforce this provision. However, in its annual reporting to the Congress, the EEOC should specifically identify those agencies that are not in compliance with this regulatory requirement. The list of agencies not in compliance should also be posted on the EEOC's web site. The EEOC should notify all agencies that its annual report to the Congress will include a statement of whether or not the agencies are in compliance with EEOC's regulations, including section 1614.102(b)(4), and that this information will be posted to the web.

It should be noted that the direct-report requirement is already a part of EEOC's regulations. However, a number of agencies are not in compliance. This proposal is a means for seeking compliance. This change or addition to the EEOC's annual report to the Congress will not impose on any agency any requirements with respect to the grade level or appointment authority of any EEO Director.

5. AGENCY COUNSEL MUST BE PROHIBITED FROM INTERFERING WITH THE EEO INVESTIGATION, AND THE EEOC SHOULD ADOPT MINIMUM STANDARDS FOR EEO INVESTIGATIONS

One of the complaints about the current federal-sector EEO process is that the investigation of an agency by itself lacks credibility, akin to "the fox guarding the chicken coop." However, all stakeholders recognize that the Report of Investigation is an invaluable tool in the ultimate settlement or litigation of cases. The importance of the Report of Investigation cannot be overstated. The issue is what can be improved to add credibility while not eliminating this vital tool and depriving complainants and agencies this valuable source of information. Too often, EEOC investigations are not controlled by the investigator, but by agency managers or in-house counsel. Specifically, in some agencies, managers or counsel inform the investigator who the relevant witnesses are and which witnesses may be contacted. It is not infrequent for agency counsel to require that all questions posed by an investigator go through agency counsel, and concomitantly, all responses from witnesses to the investigator be "vetted" through agency counsel. The effects of this interference is obvious. This interference results is an investigation that is not designed to uncover facts in an unbiased manner, but rather facts that are shaded by the light most favorable to the agency. Moreover it is often these same agency representatives or counsel, who are actively participating in developing the contours of the investigation, who will then be called upon to defend the agency at a hearing. This conflict of interest is manifest. It is this interference which, more than anything else, gives rise to the perception and reality that some EEO investigations lack credibility.

29 C.F.R § 1614.108(b), of the Commissions's regulations requires that "the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint." Further, the MD-110 provides that

VI. Investigator Must Be Unbiased and Objective

> In whatever the mix of fact-finding activity selected for a particular case, the investigator must be and must maintain the appearance of being unbiased, objective, and thorough. S/he must be neutral in his/her approach to factual development. The investigator is not an advocate for any of the parties or interests and should refrain from developing allegiances to them.

MD-110, Chapter 6.

These provisions cannot be realized if agency managers and/or counsel are permitted to determine the scope of the investigation notwithstanding the investigator's judgment. The Commission's regulations and MD-110 should be changed to clearly proscribe agency actions which interfere with the independent judgment of the investigator.

Additionally, the scope and quality of investigations vary widely. Inadequate investigations delay the process, take up administrative judges' time to deal with motions for sanctions, and result in more costly litigation due to the increased need for discovery. To ensure that investigations are as adequate as possible, the EEOC should adopt minimum standards for EEO investigations. These standards should vary depending on the complaint. For example, the requirements of a non-promotion claim, where there are multiple comparators in a competitive process, would be different than a claim of sexual harassment where improper touching was involved. Adoption of minimum standards will also increase employee confidence in the agency-conducted investigation process.

6. AGENCIES SHOULD BE REQUIRED TO ISSUE A "180-DAY LETTER", INFORMING THE EMPLOYEES OF THEIR RIGHT TO IMMEDIATELY REQUEST TO HEARING.

Another frequent complaint of the federal-sector EEO process is the length of time it takes to investigate the complaint. While agencies are required to complete investigation promptly within 180 days of the filing of the complaint, this is often practiced in the breach. Although employees are given the notice of their rights at the time they file a complaint, which notice informs them that they have a right to request an administrative hearing after 180 days, it appears that few employees understand that once an investigation has begun they have the right to request an EEOC hearing after 180 days have elapsed notwithstanding the status of the investigation. In reality, complaints about delays in the investigation process are often the product of employees not exercising their rights to forego the remainder of the investigation process in favor of the hearing. In other words, employees do not realize that they have some control over the length of time a formal complaint resides within the agency before coming to the Commission for adjudication. There is a simple cure to this issue, which cure should significantly reduce complaints about delays in the investigation process.

The EEOC should require the issuance of a "180-day" letter. Specifically, on the 181st day after the filing of a formal complaint, the agency should issue a letter to every complainant stating that because 180 days have elapsed since the filing of the complaint the employee has an election to make: The employee can immediately, or any time thereafter but before the issuance of a Report of Investigation, request a hearing before the EEOC, or allow the investigation process to continue.

There is a model for this procedure elsewhere in federal-sector employment disputes. Specifically, when an employee files a complaint of reprisal for protected whistleblowing with the Office of Special Counsel, the OSC has 120 days to investigate the complaint before the employee may file an individual right of action (IRA) appeal to the Merit Systems Protection Board. After the expiration of the 120-day period, the OSC issues a letter to the employee advising him/her that the employee may file with the MSPB or await further the OSC's investigation.

If this procedure is adopted, the onus of continued delay shifts somewhat to the employees. While this clearly does not excuse agency delay in the investigation process, it will make employees understand they that they are not held "hostage" to the agency's untimely investigation process. Moreover, when the hearing request is submitted and an administrative judge appointed, the administrative judge can issue appropriate orders to the agency requiring the prompt production of a Report of Investigation.

The stakeholders believe that proposals 5 and 6 above, when taken together, will enhance the credibility and timeliness of the administrative investigation process while preserving the objective of developing an impartial factual record deemed important by the EEOC and crucial to the fair adjudication of employee discrimination complaints.

7. THE EEOC MUST TAKE STEPS TO REGAIN ITS PROMINENCE AS THE AGENCY OF THE UNITED STATES GOVERNMENT RESPONSIBLE FOR ENSURING COMPLIANCE WITH ANTI-DISCRIMINATION LAWS AND TO BECOME A "CHANGE AGENT" FOR THOSE AGENCY CULTURES WHERE DISCRIMINATION IS TOLERATED.

A finding of discrimination should bring adverse consequences to the discriminator. Consistent with the spirit of the No Fear Act, which is designed to increase agency responsibility for acts of discrimination, we propose that EEOC compliance notices require agencies to provide two additional pieces of information: 1) What action was taken by the agency to assure that the workplace will be free from discrimination, including, in particular, whether any disciplinary action was taken against the discriminating official; and 2) If the agency did not take disciplinary action against the discriminating official, why not? These additions to the compliance requirement will serve to deter discrimination. They will also force agencies to better confront the causes of discrimination within their cultures, hopefully resulting in workplaces where discrimination is reduced, if not eradicated. Additionally, individuals who

have been found to have engaged in acts of discrimination should be specifically named in the decision. As of now, all personal information about the Complainant, including intimate details about emotional damages, is contained in the Commission's decisions. However, all identifying information about the discriminating supervisors is omitted. Supervisors who discriminate against federal employees should not be shielded and protected by the Commission. Additionally, the Commission should forward all findings of discrimination to the Office of Special Counsel (OSC) for that office's consideration of appropriate action toward the discriminator, consistent with its own jurisdiction to remedy prohibited personnel practices. Naming these individuals in the Commission's decisions, and referral to the OSC, will act as a deterrent to future discrimination and will assist the Commission in pressing the message that discrimination will not be tolerated.

CONCLUSION:

The three goals we have identified are those which, if kept in mind while framing improvements, will preserve and enhance the integrity and credibility of the processing of EEO complaints, and perforce the credibility and prestige of the Commission. We stakeholders are committed to working with the Commission to seek the improvement of the federal-sector EEO process. We look forward to a discussion of these proposals and to working with the Chair, the Commissioners and the Commission staff to help make the federal-sector EEO process the best possible to eradicate discrimination from the federal workforce.

In order to discuss these proposals, we request a meeting with the Chair, and each of the Commissioners. Our contact person for scheduling the meeting is Ms. Delia Johnson, Co-President, Council of Federal EEO and Civil Rights Executives. Ms. Johnson may be reached at: 202-619-5151. We would appreciate scheduling this meeting as soon as possible.

Sincerely,

(The Following stakeholders, in alphabetical order):

American Federation of Government Employees

Blacks in Government, Region XI Council

California Employment Lawyers Association

Council of Federal EEO and Civil Rights Executives

Delany, Siegel, Zorn & Associates, Inc.

Florida Employment Lawyers Association

JDG Associates, Inc.

Kator, Parks & Weiser, PLLC

Kalijarvi, Chuzi & Newman

Law Office of Mary Dryovage

Law Office of Kitty Grubb

Metropolitan Washington Employment Lawyers Association

National Association for the Advancement of Colored People

NAACP, Federal Sector Task Force

National Congress of Vietnamese Americans

National Employment Lawyers Association

National Employment Lawyers Association, Federal Rights Committee

Passman & Kaplan, PC.

Workplace Fairness

December 2, 2010

Claudia A. Withers, Esq.
Chief Operating Officer
U.S. Equal Employment Opportunity Commission
131 M Street, NW
Washington, DC 20507

Re: Meeting To Discuss Federal Sector EEO Compliance Issues

Dear Claudia:

On numerous occasions in the past, NELA and the EEOC have discussed issues of concern relating to both the public and private sector complaint processes. As Donna Lenhoff has mentioned to you, we are eager to continue this dialog with the EEOC under Chair Jacqueline Berrien's leadership. For an initial topic, we would like to focus on federal sector equal employment opportunity (EEO) compliance issues and our recommendations to improve the process. My thought is that we meet first with you (and others you wish to involve) to present our recommendations for reforms and to discuss steps for further action, including appropriate meetings with the Chair, the Commissioners, and other key managers involved with federal sector EEO compliance. We defer to your guidance as to how best to proceed.

The following list of suggested reforms was prepared by Joseph Kaplan and me in consultation with other NELA members who have substantial experience representing federal employees before the EEOC and in federal court. We believe that these simple reforms would be relatively easy to implement and significantly improve the ability of federal employee complainants to understand and participate in the EEO compliance process. With the exception of items 1 and 10, none of the recommendations requires regulatory action.

Recommendations to Improve the Federal Sector Compliance Process

1. Finalize the proposed regulation requiring that agencies issue a "180-day letter" informing the complainant of the right immediately to request a hearing or to file a complaint in federal court at the close of 180 days. See 74 Fed.Reg. 243, pp. 67839-67844 (December 21, 2009) (NPRM).

2. In order to eliminate regional inconsistencies and the resulting confusion, standardize the Acknowledgment Order nationwide.

3. Require that (a) the Acknowledgment Order notify the complainant of his/her right to withdraw from the administrative process and file a complaint in federal court, and (b) the Office of Field Operations notify the complainant of this right as well, in a separate letter.

4. Require that the Notice of Rights inform the complainant that s/he may file a hearing request with the EEOC on a mixed case complaint where the criteria for "firmly enmeshed" (see, e.g., *Lucas v. Dept. of the Navy*, EEOC Appeal No. 01965130 (October 1, 1998), or "inextricably intertwined" (see, e.g., *Blount v. Dept. of Homeland Security*, EEOC Appeal No. 0720070010 (October 21, 2009) are met.

5. Require the agency to provide a notice of rights and responsibilities to witnesses once they are identified during the investigation, including a statement that it is unlawful for the agency to retaliate against a witness for participation in the EEO process.

6. Prohibit agency counsel interference with EEO investigations, and ensure that there is a process in place to address such interference *during* the investigation. Specifically, authorize an official in the Office of Field Operations to review allegations of interference and to direct compliance with MD-110, including transfer of the investigation to the EEOC in appropriate cases.

7. Implement a standardized interactive process for resolving potential dismissals by the agency. Specifically, *before* the agency dismisses a complaint, it should be required to issue a written notice to the complainant informing him/her of the reasons for the proposed dismissal and providing an opportunity for the complainant to present evidence or argument in response.

8. Adopt a "meet and confer" rule akin to Federal Rule of Civil Procedure 26 (FRCP 26), requiring the parties to file a proposed discovery schedule prior to the Administrative Judge (AJ) sending out the Acknowledgment Order containing pre-hearing discovery orders. *A copy of FRCP 26 is attached for your reference.*

9. Institute a "case suspension" procedure providing for automatic suspension of case processing upon request of either party if needed for discovery. Under such a procedure, all deadlines in the case would be stayed pending resolution of a discovery motion, and the AJ would be required to issue a new schedule after deciding the motion.

10. Extend the time for initiating the EEO process for federal sector employees to the 180–day statute of limitations for private sector employees.

We look forward to the opportunity to discuss these recommendations with you. Please call or e-mail me at your convenience with any questions you might have, as well as suggested dates and times for us to meet.

Sincerely,

David R. Cashdan
First Vice President
National Employment Lawyers Association

cc: Joseph V. Kaplan, Esq.
Passman & Kaplan, P.C.

Donna R. Lenhoff, Esq., Legislative & Public Policy Director
National Employment Lawyers Association

Cheryl Polydor, Esq., Advocacy Fellow
National Employment Lawyers Association

Attachment: Federal Rules of Civil Procedure 26

November 7, 2011 Via E-mail

Claudia A. Withers, Esq.
Chief Operating Officer
Patrick O. Patterson, Esq
Senior Counsel
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Claudia and Patrick:

Thank you very much for meeting with us on October 13 along with Chair Berrien and Mona Papillon. Also, we appreciate Claudia's invitation to meet in December to discuss the federal sector complaint process. We would like to meet with both of you as soon as possible (preferably before December, and if need be with one of you before then) to discuss a concrete and specific list of action items, all of which we believe EEOC can and should work to implement within the next three to six months.

We have focused on those action items that we believe are both necessary and feasible – i.e., they can be implemented without complex process (i.e., regulations or legislation) or consultation (i.e., with other agencies or Congress). We welcome your candid feedback and, in particular, whether you see any impediments to implementation of these action items. If you have any concerns, we look forward to the opportunity to address them when we meet.

A. Private Sector Charge Processing

We believe that Items 1 and 2 below can be implemented within three months, and Item 3 within six months.

1. For all charges filed with the Commission, respondents should be required to submit a certified response to the charge (i.e., made under oath), and the response should be promptly shared with the charging party or parties. Any reply submitted by the charging party likewise should be certified (i.e., made under oath) and promptly shared with the respondent. (To this end we recommend a requirement, to be implemented as soon as possible if not immediately, that the response be filed electronically in PDF form for easy sharing with the charging party.)

A Charge must be certified; so should the response be. A Charge is routinely served to the opposing party; so should the response be. Not only is this a matter of fundamental fairness; it also would improve the quality of the response and furthermore allow for the charging party to reply. Based on a certified Charge, Response and Reply, the Commission would be in a much better position to determine how to handle the Charge and to determine whether and the extent to which it has merit.

2. A communication should be sent to all EEOC offices declaring that – consistent with Section 83 of the Compliance Manual, and notwithstanding any contrary

procedure now in effect – once a right to sue notice has been sent, charging parties should be routinely and promptly (within thirty days) provided a copy of the charge file.

This is necessary to assure that charging parties receive timely and complete information essential to their determination whether to pursue a claim in court. Accordingly, a notice of the rights of charging parties to their file should be provided with the right to sue letter.

3. Agreements between the EEOC and state and local FEPAs regarding charge-processing should be posted on the EEOC's and the state agencies' websites for easy reference by charging parties and respondents.

B. Federal Sector Charge-Processing

The list below is derived from NELA's letter of December 2, 2010 to Claudia (attached to this e-mail) regarding federal sector EEO compliance issues. We believe Items 1-4 can be implemented within three months, and Items 5-6 within six months.

1. "Finalize the proposed regulation requiring that agencies issue a '180-day letter' informing the complainant of the right immediately to request a hearing or to file a complaint in federal court at the close of 180 days." See Fed. Reg. 243, pp. 67839-676844 (December 21, 2009)(NPRM)." (12-2-10 letter, Item 1)

This rule would facilitate timely resolution of federal sector complaints. It has been pending for nearly two years and there is no reason we can see not to finalize it immediately.

2. "Adopt a 'meet and confer' rule akin to Federal Rule of Civil Procedure 26 (FRCP 26), requiring the parties to file a proposed discovery schedule prior to the Administrative Law Judge (ALJ) sending out the Acknowledgment Order containing pre-hearing discovery orders. . . ." (12-2-10 letter, Item 8)

3. "Institute a 'case suspension' procedure providing for automatic suspension of case processing upon request of either party if needed for discovery. Under such a procedure, all deadlines in the case would be stayed pending resolution of a discovery motion, and the ALJ would be required to issue a new schedule after deciding the motion." (12-2-10 letter, Item 9)

4. "Implement a standardized interactive process for resolving potential dismissals by the agency. Specifically, before the agency dismisses a complaint, it should be required to issue a written notice to the complainant informing him/her of the reasons for the proposed dismissal and providing an opportunity for the complainant to present evidence or argument in response." (12-2-10 letter, Item 7).

5. "Extend the time for initiating the EEO Process for federal sector employees" to 180-days – the statute of limitations for private sector employees – from the current limit of 45 days.

This is the most important item on the 12-2-10 list, but we recognize it is a harder "lift" because it would require the issuance of a regulation.

6. Finally, we would appreciate concrete and specific responses to each of the other items on our list of 12-2-10 (Items 2, 3, 4, 5, and 6).

C. Forced Arbitration

We request that a communication be sent immediately to all EEOC offices reaffirming the commitment of the Commission to implement its 1997 guidance on mandatory pre-dispute arbitration to the maximum extent permissible and consistent with current law.

We look forward to hearing from you and to our meeting to discuss these important issues.

Sincerely yours,

Terisa E. Chaw
Executive Director

Daniel B. Kohrman
Vice President of Public Policy

Eric M. Gutiérrez
Legislative & Public Policy Director

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Advancing employee rights and serving lawyers who advocate for equality and justice in the American workplace.