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OF THE
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April 2, 2011

The Honorable Cass R. Sunstein
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
1650 Pennsylvania Avenue NW, Room 262
Washington, DC 20503

Re: Forthcoming Significant Guidance from EEOC on Employer Use of Credit and Criminal History

Dear Administrator Sunstein:

We are writing on behalf of the U.S. Chamber of Commerce (Chamber), the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, to bring to your attention serious issues related to forthcoming guidance that is being developed by the Equal Employment Opportunity Commission (EEOC).

For some time, the EEOC has been considering issuing two guidance documents, both of which relate to the interaction of disparate impact under Title VII of the Civil Rights Act of 1964 and employer use of information obtained during applicant and employee background checks. The first guidance document is related to credit history information, while the second concerns criminal history information. By all accounts the EEOC is now preparing to approve these significant guidance documents without making them available for public comments and without seeking review by the Office of Management and Budget (OMB).

When you spoke at the November 2011, meeting of the Chamber's Labor Relations Committee, you made it clear that your office was not only interested in hearing stakeholder concerns about regulations under review pursuant to Executive Order 12866, but was also interested in hearing concerns with agency guidance. The EEOC's potential guidance at issue here warrants your review for both procedural and substantive reasons.

As a procedural matter, the EEOC has not shared its draft guidance for the opportunity to provide comment. To be sure, the EEOC has held public meetings on the very broad topics of employer use of background checks including credit or criminal history. Likewise, various agency Commissioners have held meetings with stakeholders to hear concerns. However, at this stage, members of the public can only guess as to the direction that the guidance will take. This is contrary to the strong policy favoring pre-adoption notice and comment on guidance documents. As the OMB has stated:

Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.¹

The guidance documents under consideration by the EEOC satisfy the above criteria. It is without question that they involve complex areas of the law and will be very consequential to employers, employees, and those in the business of performing background checks or collecting and disseminating relevant information. They are also likely to be extremely controversial. Pre-adoption notice and comment has a good chance at helping the agency arrive at guidance that better reflects the law while limiting controversial elements of the proposal.

We would also draw your attention to unfortunate past practice by the EEOC in developing and maintaining guidance. In 1997, the EEOC adopted its *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*.² This document opines that pre-dispute binding arbitration as a condition of employment is inconsistent with Title VII and that therefore the Commission would “closely scrutinize” all charges involving an arbitration agreement to see if it was entered into “under coercive circumstances (e.g., as a condition of employment).” The Commission did not enter into pre-adoption notice and comment at the time.

¹ Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).

² Available at: <http://www.eeoc.gov/policy/docs/mandarb.html>.

Courts have now uniformly rejected this guidance and its inconsistency with federal law is no longer subject to legitimate debate.³ Yet, the Policy Statement remains the position of the Commission and is still displayed on its website without any notation that courts have uniformly rejected it. How many employers changed behaviors based on the unlawful guidance? How many instead choose to settle allegations that they had violated the law? How many chose to litigate the matter? How much did it cost them?

Chamber members have significant concerns that the guidance under consideration by the EEOC will not interpret Title VII in a fair and balanced manner. Intervention at this stage can help ensure that any guidance the EEOC adopts in these areas will not follow in the unfortunate footsteps of its binding arbitration guidance.

Of course, we also have serious substantive concerns about the guidance under consideration. Some stakeholders, for example, have claimed that employer use of credit history, for example, can never be appropriate under Title VII.⁴ Others have argued that employers should not be allowed to consider criminal conviction records of a certain age or that employers only consider criminal conviction history at the final stages of the hiring process.⁵ Clearly agency guidance does not have the force and effect of law and is not entitled to great deference by courts. However, as enforcement guidance, the agency can be expected to enforce Title VII according to the terms of the guidance and there can be no doubt that the EEOC expects any such guidance to significantly alter employer practices.

Employers are concerned that the anticipated guidance will remove or significantly limit the use of two important tools that employers use in hiring and related decisions. The impact could be significant both in terms of costs but also in terms of increased exposure and risk to co-workers, customers and clients, and the public. We believe it is extremely likely that either guidance, standing alone, would easily meet the threshold to be considered economically significant. In addition, these guidance documents could well conflict with the myriad state and federal laws that recommend or require that employers perform comprehensive background checks, including on credit or criminal conviction history. Obviously, such an outcome raises serious concerns for employers.

³ See, e.g., *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 748 (“All of the other circuits have concluded that Title VII does not bar compulsory arbitration agreements.”).

⁴ See, e.g., Chi Chi Wu, National Consumer Law Center, testimony before the Equal Employment Opportunity Commission, *Employer Use of Credit History as a Screening Tool* (Oct. 20, 2010) (“The EEOC should issue written guidance barring or restricting the use of credit reports in employment as discriminatory.”), available at: <http://www.eeoc.gov/eeoc/meetings/10-20-10/wu.cfm>.

⁵ See, e.g., Maurice Emsellem, National Employment Law Project, testimony before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security at 6-7 (April 26, 2007), available at: http://nelp.3cdn.net/09844c01251e45bbf4_6gm6ii9ld.pdf.

For these reasons, we strongly urge you to ensure that the EEOC not finalize any guidance on employer use of criminal convictions or credit history until such time as the draft guidance has been properly reviewed by OMB and been made available for public notice and comment.

Thank you very much for your consideration of this request. Please do not hesitate to contact us if the Chamber may be of further assistance.

Sincerely,



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



Michael J. Eastman
Executive Director
Labor Law Policy

cc: Hon. Jacqueline A. Berrien, Chair
Equal Employment Opportunity Commission