

**Equal Employment Advisory Council®**

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DATE: May 27, 2008Please deliver the following **fax transmittal** to:**NAME:** Stephen Llewellyn**COMPANY:** EEOC**FAX NUMBER:** 202-663-4114**FROM:** Jeffrey Norris**Total number of pages (including coversheet):** 5

MESSAGE

Attached, please find EEAC's comments on the Uniform Guidelines on Employee Selection Procedures (OMB Number 3046-0017).

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May 27, 2008

VIA FACSIMILE TO (202) 663-4114

Stephen Llewellyn
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507

**Re: Comments on the Uniform Guidelines on Employee Selection Procedures
(OMB Number 3046-0017)**

Dear Mr. Llewellyn:

The Equal Employment Advisory Council ("EEAC") welcomes the opportunity to file these brief written comments on the recordkeeping requirements of the Uniform Guidelines on Employee Selection Procedures ("UGESP") (OMB Number 3046-0017). Our letter responds to the Equal Employment Opportunity Commission's ("EEOC") invitation to participate in the Paperwork Reduction Act ("PRA") clearance consultation program for this EEOC information collection, notice of which was published in the *Federal Register* on March 25, 2008. 73 Fed. Reg. 15754. Our comments today focus on the practical implications of the EEOC's decision not to finalize its more than four-year-old proposal entitled *Adoption of Additional Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures as They Relate to the Internet and Related Technologies* (hereinafter the "Additional Questions and Answers"). 69 Fed. Reg. 10152 (March 4, 2004).

The Additional Questions and Answers — jointly proposed by the EEOC, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), the Department of Justice ("DOJ"), and the Office of Personnel Management ("OPM") (hereinafter the "UGESP Agencies") — had been intended to provide employers with guidance on the equal employment opportunity and affirmative action ("EEO/AA") recordkeeping requirements that applied whenever they used the Internet and related technologies to recruit and select candidates for their open positions, and whenever job seekers used those same technologies to express an interest in being considered for those positions.

As explained in more detail below, in light of the separate "Internet Applicant" regulations published by the Labor Department's Office of Federal Contract Compliance

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Programs (OFCCP) that went into effect on February 6, 2006, 70 Fed. Reg. 58946, EEAC supports the EEOC's announced intent not to finalize the Additional Questions and Answers for the time being, and should it decide to go forward at some point in the future, we urge the EEOC to ensure that any Internet Applicant Guidance issued be consistent with the Internet Applicant regulations already issued by the OFCCP.

Statement of Interest

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to eliminate employment discrimination. Our members include more than 300 of the nation's largest private-sector corporations that are firmly committed to the principles and practice of workplace nondiscrimination and affirmative action.

All of EEAC's members are major employers subject to the compliance, recordkeeping, and reporting requirements established by Title VII of the Civil Rights Act of 1964 and its implementing regulations, including UGESP. In addition, nearly all of our member companies also are federal contractors subject to the affirmative action program requirements administered and enforced by the OFCCP.

Each year, EEAC members receive millions of résumés and other expressions of interest in employment, both through the Internet and related technologies and through more "traditional" mechanisms such as in-person job fairs, walk-in applications, and mailed responses to employment advertisements. They thus have a significant stake and interest in ensuring that UGESP's information collection requirements are reasonable, efficient, and effective in accomplishing the overarching objective of ensuring that their recruitment and selection practices are nondiscriminatory.

The Proposed Additional Questions and Answers

When the Additional Questions and Answers were first proposed more than four years ago, EEAC filed detailed comments with the EEOC expressing our view that they would, if finalized, help establish a clear legal framework around which employers could develop online recruitment and selection strategies that were both effective and compliant with federal EEO/AA recordkeeping requirements. We also pointed out that the UGESP Agencies' proposed Additional Questions and Answers were not the only guidance being developed in this regard, and that the OFCCP separately had proposed its own regulations defining an "Internet Applicant" for purposes of complying with that agency's EEO/AA recordkeeping and compliance requirements.

Our comment letter expressed the view that, in many ways, the OFCCP's then-proposed Internet Applicant regulations provided the "additional detail and clarity" that EEAC believed were needed to strengthen the legal framework that would have been

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established by the Additional Questions and Answers, most notably by clarifying that a job seeker could not be an "Internet Applicant" unless he or she possessed the basic qualifications for the position that the employer was trying to fill.

As a practical matter, however, the OFCCP's "Internet Applicant" regulations did not merely supplement or strengthen that legal framework as we had anticipated, but rather *became* that legal framework when they were published on October 7, 2005 and took full effect on February 6, 2006. The result, of course, was that the many thousands of employers (and nearly all of our members) subject to the OFCCP's regulations simply could not wait for the UGESP Agencies to finalize the Additional Questions and Answers before reengineering their systems, forms, and procedures to ensure compliance with those regulations, and at substantial cost.

Not surprisingly in light of the above, the recruitment and selection procedures that many large employers have in place today are very different from the ones that were in place when the UGESP Agencies first proposed the Additional Questions and Answers more than four years ago. Indeed, our members have told us that they have spent many thousands of hours and many millions of dollars over the past two years revising their recruitment and selection practices to ensure full compliance with the OFCCP's Internet Applicant regulations.

Given this reality, EEAC respectfully urges the EEOC to refrain from reinitiating the process of developing separate Internet Applicant guidance under UGESP or, if the EEOC believes that such guidance is necessary, to ensure that it is not inconsistent with the Internet Applicant regulations already issued by the OFCCP. We respectfully submit that the EEOC can accomplish this by articulating, clarifying, or reiterating in any future UGESP Internet Applicant guidance:

- that a job seeker cannot be an applicant unless he or she possesses the minimum (or basic) qualifications for the position that the employer is trying to fill;
- that the precise definition of the term "applicant" depends upon the employer's recruitment and selection procedures;
- that the core of being an "applicant" is asking to be hired to do a particular job for a specific employer;
- that a job seeker who has not followed the employer's standard procedures for submitting applications cannot be considered an applicant under UGESP; and
- that there is a fundamental difference between recruitment and selection, and that the UGESP requirements geared to monitoring selection procedures do not apply to recruitment procedures.

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We appreciate the opportunity to present our views on this important matter. Please do not hesitate to contact me or any of the EEAC staff if we can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey A. Norris". The signature is written in a cursive, flowing style.

Jeffrey A. Norris
President