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May 27, 2008

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

Dear Mr. Llewellyn:

The Chamber of Commerce of the United States ("the Chamber") submits the following comments in response to the Request for Comments issued by the United States Equal Employment Opportunity Commission ("EEOC") on March 25, 2008, regarding the Agency Information Collection Activities: Notice of Submission for OMB Review ("the Notice").

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. The Chamber's mission is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility. An important function of the Chamber is to represent the interests of its members in employment matters before the courts, Congress, the Executive Branch, and independent federal agencies.

INTRODUCTION

In 2000, the Office of Management and Budget ("OMB") instructed the EEOC to work with the Department of Labor, the Department of Justice, and the Office of Personnel Management (collectively the "UGESP agencies") to address the "issue of how use of the Internet by employers to fill jobs affects employer recordkeeping obligations." Notice of OMB Action, OMB No. 3046-0017 (July 31, 2000). Four years later, in 2004, the UGESP agencies issued proposed questions and answers to

supplement the Uniform Guidelines on Employee Selection Procedures ("UGESP"). The agencies cited a need to "clarify and provide a common interpretation" of the definition of an "applicant," and stated that, due to the rise of internet recruitment, "which has created a new context for the employment market, the agencies have concluded that they ***must*** update the Questions and Answers accompanying UGESP." 69 FR 10153 (emphasis added).

The comments submitted in response to the UGESP agencies' proposal verified the compelling need for a more clarity regarding the definition of the key term "applicant." In its comments, the Chamber noted the difficulties that many employers were having in conforming their recruitment practices to the existing definition, as set forth in the existing UGESP questions and answers. The Chamber then commended the UGESP agencies for issuing guidance that clarified the definition of applicant and appeared to recognize that only individuals who possess the basic qualifications for a position sought should be considered "applicants." See May 3, 2004 Comments, attached as Tab 1. This clarification in the proposed questions and answers was consistent with controlling law.

The need for guidance and clarity is even greater now, as more employers turn to internet-only recruitment, and the number of online applicants continues to climb each year. However, after four years of inaction by the UGESP agencies, the EEOC – remarkably – not only has requested yet another renewal of the UGESP, issued in 1979, but states affirmatively that "***the EEOC does not intend to finalize the five additional Questions and Answers that include clarification of the definition of 'applicant***.'" 73 FR 15754.

As explained in the prior comments submitted by the Chamber, the 1979 UGESP applicant definition conflicts with controlling Title VII case law and places an untenable recordkeeping burden on employers. As employers develop recruiting methods to locate and attract top talent in the internet age, it is incumbent on the EEOC and the other UGESP agencies to develop a realistic applicant definition that provides employers much-needed consistency and clarity. A top priority of the EEOC should be – as it was in 2004 – to issue a clear, appropriate applicant definition. Rather than completely abdicate its duty, as the EEOC proposes in its Notice, the EEOC and the other UGESP agencies should issue guidance for notice and comment without further delay.

DISCUSSION

I. Definition of "Applicant" in the 1979 UGESP is Untenable

The 1979 UGESP definition of an applicant as "a person who has indicated interest in being considered for hiring, promotion or other employment

opportunities" is in conflict with Title VII case law because it does not incorporate the concept of established qualifications. Courts have long held that only an individual who was *qualified* for the position he or she sought can establish a viable discriminatory hiring claim. Likewise, courts have rejected applicant pools that included people who did not possess the basic qualifications for the positions sought. The UGESP's far broader definition of this key term is simply in conflict with decades of precedent. *See, e.g., McDonnell Douglas v. Green,* 411 U.S. 792 (1973); *Griggs v. Duke Power*, 410 U.S. 424 (1971); *Ward's Cove Packing Co. v. Antonio,* 490 U.S. 642 (1989).

The 1979 UGESP definition also conflicts with EO 11246, which requires government contractors to ensure equal employment opportunity for all "*qualified* applicants." The broad UGESP definition provides no such practical limitation, sweeping into the definition any individual who expresses any interest in a position. As a result, strict adherence to the UGESP definition would require employers to track race and gender data for multitudes of individuals who were not qualified for the positions they sought and would never have been eligible for the jobs.

II. Increased Internet Recruiting Highlights the Heightened Need for a Clear Definition of "Applicant"

The need for a clear, defensible applicant definition only continues to grow as the number of individuals applying for positions online expands by leaps and bounds each year. The internet has provided job seekers the opportunity to apply for numerous positions with just a few key strokes. The UGESP agencies estimated that there were 70,000,000 applications in 2004. 69 FR 10157. The EEOC's estimate now is 1,778,663,387. 73 FR 15755. This is an almost 2500 percent increase over four years. Monster.com's resume bank now contains more than 41 million resumes (http://www.forbes.com/bow/b2c/review.jhtml?id=5567) and is growing by more than 40,000 resumes per day. (http://hiring.monster.com/products/WhyMonster.aspx).

As the UGESP agencies noted in 2004, human resources departments and recruiters are "overwhelmed" with resumes. 69 FR 10154. This is even more true today. Employers need a way to search the voluminous databases for the best candidates without incurring burdensome administrative costs and legal exposure under Title VII and other laws. As the UGESP agencies previously stated, "necessary to the effectiveness of online recruitment . . . is the ability to manage the data that are received." 69 FR 10153.

The current UGESP definition does not allow employers to manage the data effectively. Under the current applicant definition, employers cannot post a position on a job bank or conduct a key-word search in a resume database without incurring

the burden of tracking race and gender information for every individual who responds to the posting or is included in the search results.

III. EEOC's Estimate of the Burden is Unrealistic

The EEOC's estimate of the burden to employers – "13 keystrokes" – dramatically underestimates the time and expense associated with applicant recordkeeping. This estimate fails to incorporate the time and costs associated with soliciting race and gender information from any individual who simply responds to an advertisement or posts his or her resume on a job bank site. It does not account for the cost of developing the HRIS systems necessary to collect and maintain the data in a manner consistent with the current, overly-broad definition. An employer's use of the data to conduct adverse impact analyses on its recruitment process will result in more time and effort. Furthermore, the EEOC estimates a rate of $12.29/hour for individuals needed to enter the data. This is *less* than the $14.75/hour rate cited by the UGESP agencies four years ago. The EEOC's estimate of $182,164,777 per year equals only $215.28 per employer. This paltry figure does not come close to a realistic estimate of the time and expense associated with applicant recordkeeping.

IV. The UGESP Agencies Should Issue Revised UGESP Questions and Answers Clarifying the Definition of Applicant Without Further Delay

The definition of an "applicant" is essential to the effective application and enforcement of EEO laws. Recognizing the importance of this issue, in October 2005, the Office of Federal Contract Compliance Programs ("OFCCP") issued its own "internet applicant" definition. The OFCCP defines an internet applicant as an individual who: (1) submits an expression of interest in employment through the internet or electronic data technologies; (2) is considered for employment in a specific position; (3) possesses the basic qualifications for the position; and (4) does not remove himself from consideration prior to receiving an employment offer. The OFCCP's guidance, though it has its flaws and is not the model of clarity, has provided some much-needed guidance to government contractors. But the OFCCP definition is at odds with the existing UGESP Questions and Answers. As such, employers who are also government contractors or subcontractors are left with the dilemma of choosing whether to, and how to, abide by both definitions.

The EEOC should follow the lead of the OFCCP and work with the other UGESP agencies to reach consensus on an applicant definition. The UGESP agencies should issue revised guidance without further delay.

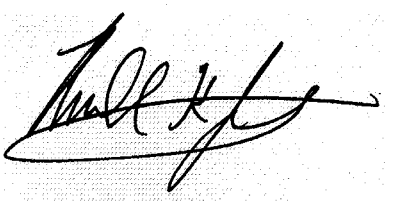
The applicant definition should limit the term to those who meet the established qualifications for the position sought, in accordance with Title VII law. The definition should also limit the term to those individuals an employer actually considers for a specific open position. This would allow an employer to conduct blind key-word searches, with numerical limitations included, of the multitude of resumes it receives to identify individuals best qualified to fill its positions, and limit its recordkeeping obligations to those individuals. Those identified for consideration, rather than the entire database, would be deemed applicants. Finally, the definition should apply to all applicants, not just internet applicants, to ensure employers are not forced to apply two different definitions and maintain two recordkeeping systems.

* * * *

Thank you for the opportunity to submit these comments on behalf of the United States Chamber of Commerce. The Chamber urges the EEOC to consider the issues raised in this submission and to move quickly with the other UGESP agencies to issue revised guidance to clarify the applicant definition.

Respectfully submitted,

U.S. CHAMBER OF COMMERCE



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TAB 1

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1001 Pennsylvania Avenue, NW, Washington, DC 20004-2595 ▪ p202 624-2500 ▪ f202 628-5116

May 3, 2004

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BY HAND

Ms. Frances M. Hart
Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
10th Floor
1801 L Street, N.W.
Washington DC 20507

Dear Ms. Hart:

The United States Chamber of Commerce ("the Chamber") submits the following comments in response to the Request for Comments issued by the Equal Employment Opportunity Commission ("EEOC"), the Office of Federal Contract Compliance Programs ("OFCCP"), the Department of Justice ("DOJ") and the Office of Personnel Management ("OPM") (collectively, the "UGESP Agencies") on March 4, 2004, regarding the Proposed Interagency Guidance on Applicant Definition Under Uniform Guidelines on Employee Selection Procedures ("the Proposed Guidance").

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. The Chamber's mission is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility. An important function of the Chamber is to represent the interests of its members in employment matters before the courts, Congress, the Executive Branch, and independent federal agencies.

INTRODUCTION

The Chamber recognizes that the UGESP Agencies faced a difficult task in crafting a definition of "applicant" that would meet the needs of the enforcement agencies while still recognizing the business realities that employers of all sizes face each day. The Chamber's diverse membership knows well that creating a precise and prescriptive definition of "applicant," to which all employers with fifteen or more employees would be held (regardless of their particularized recruitment and hiring processes and differing business needs in this internet age), is a daunting task. Thus, the Chamber applauds the UGESP Agencies' efforts to provide some guideposts to the employer community.

With some qualifications, the Chamber generally endorses the UGESP Agencies' Proposed Guidance. First, based on the questions and answers and the examples provided by the UGESP Agencies, the Proposed Guidance appears to recognize that employers are free to establish basic qualifications for a position that will be filled and that only candidates who possess such qualifications may be considered "applicants." Any definition of "applicant" that fails to incorporate the notion of minimal qualifications would fail to comport with controlling precedent under Title VII of the Civil Rights Act of 1964 ("Title VII").

Second, the Chamber is concerned that limiting the definition to those candidates who submit expressions of interest through the internet – or whose expressions of interest are processed electronically – only creates confusion and additional burden for employers. Unless the principles articulated in the Proposed Guidance are expanded to all applicants, regardless of the manner of application and the manner in which the employer processes them, the problems inherent in the applicant definition set forth in the Questions and Answers accompanying the Uniform Guidelines on Employee Selection Procedures ("1979 UGESP Questions and Answers") will remain for non-internet applicants. Further, if the guideposts established by the UGESP Agencies are not incorporated into the definition of non-internet applicants, employers will be required to apply two different definitions based *only* upon *how* an individual chooses to express interest in a position or *how* the employer processes that expression of interest. As such, the Chamber urges the UGESP Agencies to affirmatively state that the principles set forth in the Proposed Guidance apply equally to all applicants, regardless of the method by which the candidate expresses interest and the manner in which the employer processes the expression of interest.

I. HISTORICAL CONTEXT FOR PROPOSED GUIDANCE

A. Controlling Federal Case Law

For decades, federal courts – including the Supreme Court – have recognized that to be considered an "applicant" for purposes of Title VII of the Civil Rights Act of 1964, an individual must possess at least minimal qualifications for the position sought.

The Supreme Court directly addressed the issue of job-related qualifications in the applicant context in McDonnell Douglas v. Green, 411 U.S. 792 (1973). In McDonnell Douglas, the Court established the elements of a prima facie case of discriminatory hiring, stating that the plaintiff must first prove that she or he is qualified for the position sought in order to maintain a claim of discrimination in hiring. See also, Griggs v. Duke Power Co., 401 U.S. 424, 434-35 (1971) (noting the legislative history of Title VII, which indicates that Title VII "'expressly protects the employer's right to insist that any prospective applicant . . . must meet the applicable job qualifications'" and stating that "nothing in the Act prohibits employers from requiring that applicants be fit for the job"); Ward's Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) (Court rejected the applicant pool proposed by plaintiff because it included persons who were not qualified for the jobs).

B. 1978 Uniform Guidelines on Employee Selection Procedures

The UGESP Agencies first addressed the definition of an applicant six years after McDonnell Douglas, in the 1979 UGESP Questions and Answers. Despite the clear language of McDonnell Douglas, the applicant definition crafted by the UGESP Agencies did not incorporate the concept of minimal qualifications. Rather, the 1979 UGESP Questions and Answers broadly define an "applicant" as "a person who has indicated interest in being considered for hiring, promotion or other employment opportunities."

This overly-inclusive guidance fails to expressly incorporate job-related qualifications into the applicant definition and, as such, is inconsistent with established Title VII case law (see McDonnell Douglas, Griggs, Ward's Cove). This definition is also at odds with established employer practices, and imposes a tremendous burden on employers charged with gathering race and gender data on all applicants.

Although the Uniform Guidelines were not issued pursuant to formal notice and comment rule-making (as the UGESP Agencies acknowledge in the current

Proposed Guidance), enforcement agencies have repeatedly relied upon the definition set forth in the Uniform Guidelines and, at times, insisted that employers accept the 1979 definition. See 165 Fed. Reg. 68023 (November 13, 2000). For nearly three decades now, employers have routinely requested that the 1979 definition be modified to reflect existing Title VII precedent.

C. Impact of the Internet on the Recruiting/Hiring Process

As the UGESP Agencies recognize in the proposed Guidance, the emergence of the internet has dramatically altered recruiting and selection processes in recent years. These changes have only highlighted – and in many ways exacerbated – the practical problems that flow from the overly broad definition of "applicant" set forth in the 1979 UGESP Questions and Answers.

Employers now receive hundreds or even thousands of resumes for a position for which they may have previously received only a dozen. Indeed, thousands of employers and Chamber members could tell the same story as the Pennsylvania employer identified in the Proposed Guidance who "reported that it received 6,000 to 8,000 resumes a year before going online, but began receiving about 24,000 resumes a year since it went online." Job seekers post resumes on national job banks and send their resumes to numerous employers with the click of a few buttons.

Not surprisingly, and as the UGESP Agencies recognize in the preamble to the Proposed Guidance, employers have been correspondingly inundated with resumes and other expressions of interest, resulting in heightened recordkeeping burdens. With the advent of computerized databases, employers have gained the ability to reliably – and blindly – canvass thousands of resumes at one time, literally with the click of a button, to better find the qualified candidates for a position.

In short, employers have a critical business need – and many have the technological ability – to rapidly sift through the overwhelming amount of information they receive on a daily basis to identify and hire the best candidates for their jobs. Maintaining the ability to identify the top talent from stacks of resumes is essential for American companies to compete in the worldwide market. Employers simply must be given the latitude to manage their selection processes consistent with the policies and principles of non-discrimination and affirmative action, without incurring an overwhelming administrative burden. For these reasons, it is essential that the UGESP Agencies' applicant definition address an employer's need to find the *best* candidates from the mountain of resumes, without incurring huge administrative costs and burdens in the process.

D. Current Inter-Agency Initiative

In 2000, the Office of Management and Budget ("OMB") instructed the EEOC to consult with other UGESP Agencies to "evaluate the need for changes to the questions and answers accompanying the Uniform Guidelines necessitated by the growth of the Internet as a job search mechanism." Four years later, the UGESP Agencies have published the Proposed Guidance for notice and comment, in the form of additional Questions and Answers to be included in the UGESP.

The Proposed Guidance consists of five interrelated "Questions and Answers" – Questions 94-98 – and three illustrative examples, embedded within the Questions and Answers. The Proposed Guidance, and Question 95 in particular, maintains the critical distinction between "recruitment" and "selection." The Chamber supports the UGESP Agencies' express statement reiterating this distinction, as recruitment activities and selection decisions are quite distinct, both in purpose and practice.

At the core of the Proposed Guidance is a definition of the term "applicant." Question 96 of the Proposed Guidance, which limits the definition to expressions of interest made "in the context of the internet and related electronic data processing technologies," outlines a three-prong definition of the term:

i. The employer has acted to fill a particular position;
ii. The individual has followed the employer's standard procedures for submitting applications; and
iii. The individual has indicated an interest in the particular position.

A series of examples that follow Questions 96 and 97 provide further guidance regarding the intended application of this three-prong test.

II. THE CHAMBER, WITH CERTAIN QUALIFICATIONS, ENDORSES THE ADDITIONAL CLARITY PROVIDED BY THE PROPOSED GUIDANCE

A. The Proposed Three-Prong Test Expressly Addresses and Resolves Certain Ambiguities

The Chamber believes that the proposed definition of "applicant" contains several positive elements that will assist employers in navigating the recruitment and selection waters and in fulfilling their data collection and reporting obligations.

First, by limiting the universe of "applicants" to candidates who are considered when an employer affirmatively "acts to fill a position," the Proposed Guidance remedies one of the primary shortcomings of the 1979 definition. Read literally, the 1979 definition would require an employer to treat as "applicants" even those individuals who send unsolicited resumes to an employer who has no open positions and is not actively seeking to fill a position. The first component of the Proposed Guidance – that an employer has "acted to fill a position" – appropriately frees employers from tracking unsolicited expressions of interest when no open positions exist or when an employer fails to take steps that move beyond "recruitment" to actual "selection" of candidates for hire.

Second, the proposed applicant definition properly permits employers to impose uniformity on the application process by requiring "applicants" to follow the employer's standard procedures. Moreover, the Proposed Guidance permits employers to define their "standard procedures." This element is essential, given an employer's need to obtain information in a manner that will allow it readily to select the best candidates for a position.

Third, requiring that "applicants" express interest in a particular position permits employers to filter out individuals who express only a generalized interest in employment with the company, but fail to identify a particular job opening. Moreover, this requirement obviates any potential argument that a candidate becomes an "applicant" for any and all open positions, simply by submitting a generalized expression of interest. Each of these three elements, therefore, provide additional clarity and guideposts to the employer community.

B. Examples Supporting the Questions and Answers Demonstrate that Employers May Consider Job Qualifications in Defining the Applicant Pool

Example C, contained in the response to Question 97 of the proposed Guidance, indicates that employers may consider job-related qualifications in determining who is an applicant. In this example, an employer is seeking to hire three new printers at one of its plants. The Human Resources department searches its database for individuals with two years of printing experience. This search identifies 120 individuals, of whom 50 express an interest in the positions and follow the correct application process. According to the Guidance, "[t]hese 50 people are UGESP applicants." The remaining individuals in the database, whose resumes

do not reflect this basic job-related qualification, are excluded from the pool of "applicants."[1]

The Chamber supports the UGESP Agencies' position on qualifications as reflected in Example C. This Example reflects the business realities that employers face in searching for the best-qualified candidates, and provides employers a method by which to narrow the overwhelming field of job seekers to "applicants" that the employer should consider for a position. This "blind" resume review for job-related qualifications is not prone to the subjectivity that can impact any manual review of resumes and, from a non-discrimination standpoint, should be preferable to a manual review of resumes. Said differently, an employer should not be required to seek race and gender data from every person who submitted a resume that was then placed into this database, simply because the employer runs key-word searches in the database to identify the qualified candidates. The 1979 definition of "applicant," read literally, would require such a senseless exercise.

Only this interpretation of the Proposed Guidance – i.e., that employers are permitted to incorporate job-related qualifications into their process of identifying applicants – comports with federal case law and the existing definition of "applicant." See e.g., McDonnell Douglas. In addition, any other reading of Example C and the Proposed Guidance would be at odds with Executive Order 11246 ("E.O. 11246"), which expressly applies only to "qualified applicants." See Section 202(2) of E.O. 11246 ("The contractor will, in all solicitations or advancements for employees placed by on or behalf of the contractor, state that *all qualified applicants* will receive consideration for employment without regard to race, color, religion sex or national origin") (emphasis added). E.O. 11246 imposes no obligation to track or consider those who are not qualified.[2]

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1 Example A, contained in response to Question 96, also evinces recognition that employers must be able to use job-related qualifications to define an applicant pool. In this example, the company acts to fill two Customer Service Representative vacancies in its Greater New York Service Center. The employer searches its database for individuals who have indicated that they are available to work in the New York area – a specific, job-related criteria. Only individuals who meet this criteria are then asked whether they are interested in the position. According to the example, only those who respond affirmatively are deemed "applicants." Again, the other individuals whose resumes are in the database, but who are not available to work in the New York area, are not "applicants."

2 To the extent that Example B suggests a result contrary to the Guidance provided by the other examples, the Chamber submits that the UGESP Agencies should clarify Example B. In Example B, candidates who express an interest in positions as park rangers at a Game Park are instructed to complete a detailed questionnaire that seeks information about certain job-related qualifications. The Example suggests that any individual who follows the instructions for completing the form should be treated as an "applicant." To the extent this

(continued...)

C. The Elements Contained in the Proposed Guidance Should Be Equally Applicable to Candidates Who Express Interest Other Than Through the Internet

Question 96 states that the proposed definition of applicant applies only "in the context of the internet and related electronic data processing technologies." As such, employers who accept resumes or applications other than through the internet and/or do not utilize "electronic data processing technologies" as to all expressions of interest will be required to apply two different definitions of applicant: (1) the proposed definition set forth in Question 96 (as to internet applicants or those whose resumes are processed using electronic technologies), and (2) the definition from the 1979 UGESP Questions and Answers (for all other expressions of interest). This approach is untenable because the 1979 definition is contrary to federal case law and because the use of two (or three) definitions will only result in greater confusion and burden for employers. Thus, the Chamber urges the UGESP Agencies to expressly expand the principles set forth in the Proposed Guidance to all applicants.

1. The 1979 Applicant Definition Does Not Comport with Controlling Law

The 1979 UGESP Questions and Answers define an applicant as "a person who has indicated interest in being considered for hiring, promotion or other employment opportunities." This overly broad definition would require an employer to collect, track, and analyze data regarding candidates regardless of whether the candidate possesses even the most basic qualifications for the job and regardless of whether the employer is actively filling positions. As an example, based upon the 1979 definition, if a person without a J.D. applied for a position as an attorney, the employer would be required to treat him or her as an "applicant," even though he or she is clearly not minimally qualified and would never be considered for the position. As such, the 1979 definition conflicts with established case law for all the reasons explained above.

Further, the 1979 definition does not even limit the definition of an applicant to individuals who express interest in a particular position that the employer is

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(...continued)

example indicates that even candidates who fail to possess any of the qualifications for the job should be counted as "applicants," the Chamber submits that this example should be clarified to be consistent with Examples C and A.

seeking to fill. As such, this definition would require employers to track unsolicited expressions of interest from candidates, regardless of whether the employer has an open position. This places a tremendous burden upon employers. Read literally, the 1979 definition would require an employer who is in the midst of company-wide layoffs and has no open positions at any of its facilities to consider as "applicants" anyone who submits unsolicited resumes.

Finally, the Uniform Guidelines on Employee Selection Procedures were not issued pursuant to formal notice and comment rule-making and, therefore, are not legally binding under the Administrative Procedure Act. See, e.g., Anderson v. Douglas & Lomason Co., Inc. 26 F.3d 1277, 1287 (5th Cir. 1994). Thus, if the proposed definition remains applicable to only internet applicants, employers remain without any valid definition of a "traditional" applicant.

2. The Use of Two Different Applicant Definitions Will Place a Tremendous Burden on Employers and Will Result in Inconsistent Data

The use of two different applicant definitions, triggered only by *how* the employer receives the expression of interest and *how* it processes the expression of interest, will place a tremendous burden on employers and will result in inconsistent data for analytical purposes. Consider a situation in which two individuals submit unsolicited resumes to a company that has no open positions. The individual who sent her resume via the Internet is not considered an applicant because the employer has not acted to fill a position; the individual who sent her resume by mail is considered an "applicant" under a strict reading of the 1979 UGESP Questions and Answers. The employer would be forced to seek race and gender data from this individual and maintain the information even though the individual was never considered for a position with the company because there were no open positions to be filled.

Maintaining different standards will only result in confusion and inaccurate data collection. Human Resources departments would be required to implement two systems for seeking voluntary race and gender self-identification from applicants. Human Resources professionals would also be required to conduct extensive training to explain the multiple definitions and resulting data collection systems to the individuals responsible for collecting and analyzing the data. Errors will undoubtedly result as companies try to implement and maintain two different data collection processes based solely on the *method* by which the candidate expresses interest and/or the *method* by which the employer processes that expression of interest. Further adding to the confusion, federal contractors may be compelled to apply yet a *third* definition, based on the OFCCP's proposed definition

of "internet applicant." The UGESP Agencies can remedy this concern by extending the principles of its proposed definition to all applicants.

III. OTHER CONCERNS REGARDING THE PROPOSED GUIDANCE

A. The UGESP Agencies' Burden Estimate is Unrealistic

In calculating the potential burden associated with the Proposed Guidance, the UGESP Agencies acknowledge that they lack "any systematic data to accurately quantify the burdens associated with how employers were attempting to address applicant recordkeeping in the Internet context" prior to the Proposed Guidance.

To derive a burden estimate in connection with the Proposed Guidance, the Agencies assume that:

a. Each of the 865,962 "covered employers" will maintain "one record per employee;"
b. Individuals seeking employment submit, on average, five applications to the universe of covered employers;
c. The current cost per hour of personnel for UGESP recordkeeping is $14.75; and
d. The "basis for the estimate of the cost per record has not changed since the initial burden calculations in 1979."

Based on these assumptions, the Agencies calculate a "total recordkeeping cost" of approximately $37.5 million. Dividing the total cost by the "per hour" cost of $14.75, the Agencies estimate the total recordkeeping burden (in terms of number of hours) to be approximately 2,548,000 hours.

The Chamber believes these figures underestimate the actual recordkeeping cost and hourly burden associated with the Proposed Guidance. First, it is unlikely that employers will maintain only "one record per employee" or only one record per applicant. Employers who capture resumes and other expressions of interest in a computerized database that will be searched repeatedly for qualified candidates will surely create more than a single record per applicant. Each time a candidate is identified in connection with a database search, the employer will create a new electronic record. Employers will create even more electronic records as they conduct adverse impact analyses of their selection processes.

Second, as the UGESP Agencies recognize, the Internet and other electronic technologies permit job seekers to flood employers with expressions of interest in

employment. Thus, the assumption that each job seeker will send only five resumes to the universe of covered employers is unrealistic.

Finally, the estimate of the total number of recordkeeping hours – 2,548,000 – is likely too low. Assuming, as the UGESP Agencies do, that there are 865,962 covered employers, the hourly recordkeeping burden as calculated by the Agencies is less than three hours per covered employer. The Chamber believes this estimate is unrealistic, given the breadth of the recordkeeping requirements imposed on employers by the Proposed Guidance.

B. Vendors Are Not Necessarily Covered by E.O. 11246

The proposed Response to Question 94 states that "Executive Order 11246, as amended, which covers federal government contractors, their subcontractors, *and their vendors*, also prohibits employment discrimination because of race, color religion, sex or national origin." (Emphasis added.) This statement is inaccurate.

"Vendors" are covered by E.O. 11246 only to the extent they satisfy the definition of "subcontractor" set forth at 41 C.F.R. § 60-1.3. Thus, only vendors who provide "personal property or non-personal services" that are "necessary to the performance" of a government contract are covered by E.O. 11246. While a vendor to a federal contractor may well be a "subcontractor," not all vendors are subcontractors and, thus, not all vendors to a federal contractor are subject to E.O. 11246. The UGESP Agencies should revise the response to Question 94 to simply state as follows: "Executive Order 11246, as amended, which covers federal government contractors and subcontractors, also prohibits employment discrimination because of race, color, religion, sex or national origin."

C. Definition of "Disparate Impact" Should Be Clarified

The Preamble to the Proposed Guidance defines "disparate impact" as "when an employer uses a practice or standard, like a hiring or promotion requirement, or an employment test, that has a statistically significant disproportionate negative effect on a protected group, even though the standard or test is not intentionally discriminatory."

The Chamber believes that, to the extent the UGESP Agencies retain a discussion of the disparate impact theory of discrimination in the Preamble, the text should be revised to more closely track the test for disparate impact, and the burdens associated with the disparate impact theory of discrimination. See, e.g., Griggs, 401 U.S. at 430 ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate

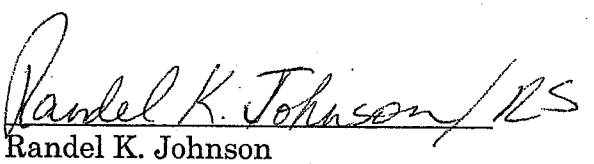
to 'freeze' the status quo of prior discriminatory employment practices"); 42 U.S.C. § 2000e-2(k) ("An unlawful employment practice based on disparate impact is established only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity").

* * * *

Thank you for the opportunity to submit these comments on behalf of the United States Chamber of Commerce. The Chamber urges the EEOC to consider the issues raised by this submission and to revise the Guidance accordingly.

Respectfully submitted,

U.S. CHAMBER OF COMMERCE



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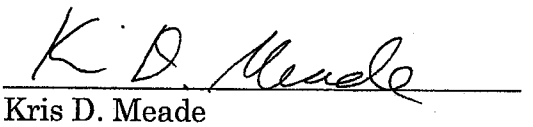

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