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November 9, 2020

**SUBMITTED VIA REGULATIONS.GOV**

The Honorable Janet Dhillon  
Chair  
U.S. Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, DC 20507

**RE: RIN 3046-AB19, "Update of Commission's Conciliation Procedures"**

Dear Chair Dhillon:

We write in response to the October 9, 2020, notice of proposed rulemaking titled "Update of Commission's Conciliation Procedures."<sup>1</sup> Republican Members of the Committee on Education and Labor (Committee) have long been interested in the Equal Employment Opportunity Commission's (EEOC or Commission) implementation of its statutory requirement to attempt to resolve charges through conciliation. We are supportive of EEOC's efforts to enhance the effectiveness of the conciliation process by increasing clarity and transparency, which will result in better and more timely resolutions for workers.

Title VII of the *Civil Rights Act of 1964* requires EEOC, after an investigation determines there is reasonable cause to believe a violation has occurred, to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" before filing a lawsuit against the employer.<sup>2</sup> In 2015, the U.S. Supreme Court ruled in *Mach Mining, LLC v. EEOC* that the Commission's conciliation efforts are subject to judicial review. The Court also held that EEOC's conciliation efforts must meet certain standards, such as communicating to the employer the content of the claim and providing the employer an opportunity to discuss the matter with the Commission.<sup>3</sup>

<sup>1</sup> Update of Commission's Conciliation Procedures, 85 Fed. Reg. 64,079 (proposed Oct. 9, 2020).

<sup>2</sup> 42 U.S.C. § 2000-e5(b).

<sup>3</sup> 575 U.S. 480, 488 (2015).

Since 2014, the Committee has received testimony in four public hearings that EEOC often failed to meet its conciliation obligations. For example, in 2017, Ms. Rae T. Vann, Vice President and General Counsel of the Equal Employment Advisory Council, noted this failure and made recommendations for regulatory changes in testimony before the Subcommittee on Workforce Protections:

The EEOC also should continue to strive to improve the quality of its conciliation efforts. The EEOC's failure to provide sufficient information on which to evaluate a settlement offer, its refusal to explain the basis for a monetary demand or to identify specific victims and/or class size, its insistence on unreasonable deadlines, and/or its unwillingness to engage the respondent in meaningful negotiation of terms all can contribute to unsuccessful conciliation. ...

We believe that the EEOC should revise its procedural regulations consistent with *Mach Mining* to identify specific factors that should be considered in evaluating the sufficiency of agency conciliation efforts. Such a standard would help improve the quality of conciliations by ensuring that employers are provided with a sufficient factual understanding of the agency's findings, as well as a meaningful opportunity for "voluntary compliance" in every instance.<sup>4</sup>

Congress has also expressed concerns with the Commission's approach to conciliation. In the report on the *Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2019*, the House Committee on Appropriations stated "it is concerned with the EEOC's pursuit of litigation absent good faith conciliation efforts. The Committee directs the EEOC to engage in such efforts before undertaking litigation."<sup>5</sup> Similar language was also included in reports on appropriations bills in prior years.<sup>6</sup>

We are pleased that EEOC's proposed rule responds to these concerns in several significant ways. First, the proposed rule requires EEOC to provide the employer a summary of the facts that the agency relied on to find reasonable cause of a violation. Second, EEOC must provide the employer a summary of the agency's legal basis for finding reasonable cause of a violation, which must include an explanation of how the law was applied to the facts and any non-privileged information indicating there was no violation. Third, the Commission must explain the basis for any proposed relief with underlying calculations. Fourth, EEOC must inform the

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<sup>4</sup> *The Need for More Responsible Regulatory and Enforcement Policies at the EEOC: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 115th Cong. 27-28 (2017) (statement of Rae T. Vann, Vice President & Gen. Couns., Equal Emp. Advisory Council); see also H.R. 548, "Certainty in Enforcement Act of 2015", H.R. 549, "Litigation Oversight Act of 2015", H.R. 550, "EEOC Transparency and Accountability Act", and H.R. 1189, "Preserving Wellness Programs Act": *Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 114th Cong. 19-21 (2015) (statement of Paul H. Kehoe, Senior Counsel, Seyfarth Shaw LLP); H.R. 4959, *EEOC Transparency and Accountability Act*, H.R. 5422, *Litigation Oversight Act of 2014*, and H.R. 5423, *Certainty in Enforcement Act of 2014: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 113th Cong. 15-16 (2014) (statement of Lynn A. Clements, Director of Regulatory Affairs, Berkshire Associates, Inc.); *The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 113th Cong. 17-19 (2014) (statement of Camille A. Olson, Partner, Seyfarth Shaw LLP).

<sup>5</sup> H.R. Rep. No. 115-704, at 81 (2018).

<sup>6</sup> See, e.g., H.R. Rep. No. 115-231, at 73 (2017); H.R. Rep. No. 114-130, at 69 (2015).

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employer of any systemic, class, or pattern or practice designation in the case. Fifth, an employer will have at least 14 days to respond to the Commission's conciliation proposal.<sup>7</sup>

These commonsense requirements will increase transparency in the conciliation process and facilitate quicker resolutions of charges as the employer will have more information about the underlying charge, EEOC's position, and the employer's legal obligations. In doing so, workers will obtain in a timely manner the justice they have sought by filing a charge with EEOC alleging an unlawful employment practice. Additionally, the Commission will more effectively carry out Congress' intent favoring the elimination of unlawful employment practices through "informal methods of conference, conciliation, and persuasion."

Conciliation has always been an important, though sometimes neglected, part of EEOC's statutory mandate. We applaud EEOC's efforts to improve the conciliation process with this proposed rule. We encourage EEOC to review and consider carefully the comments of stakeholders and issue a final rule on this matter expeditiously. Thank you for your consideration of our views.

Respectfully submitted,



Rep. Virginia Foxx  
Ranking Member



Rep. Ben Cline  
Ranking Member  
Subcommittee on Civil Rights and Human  
Services

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<sup>7</sup> Update of Commission's Conciliation Procedures, 85 Fed. Reg. 64,079, 64,081.