May 27, 2008

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 UGESPs 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 UGESPs Agencies Should Issue Revised UGESPs 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 UGESPs 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 UGESPs agencies to reach consensus on an applicant definition. The UGESPs 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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