



An Exploratory Evaluation of EEOC's Litigation Activities

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Executive Summary

This report provides the Urban Institute’s findings and recommendations from its brief examination of the Equal Employment Opportunity Commission’s (EEOC) litigation activities. The Office of Inspector General (OIG) asked us to undertake a broad, rather than in-depth, examination of the EEOC’s litigation function. This was an exploratory effort. It was not a program evaluation. Our work focused on issues relating to planning, management and performance. Early in our work, we found that a proper assessment of the EEOC’s litigation work must also examine several aspects of the EEOC’s enforcement activities as they relate to the prioritization and investigation of charges considered strategically significant and which might result in litigation if the charges fail conciliation.

The scope of our work did not include important litigation elements such as: an examination of litigation quality, impact or success; the EEOC’s appellate court activities, or issues relating to the relationship of the EEOC to state and local Fair Employment Practices Agencies.

Our findings are based on two forms of data collection: (1) a review of numerous documents (see appendix A), and (2) interviews with officials at EEOC headquarters and with leadership in the district offices, including regional attorneys and district directors (see appendix B). The study was not intended to provide statistical information but was designed to provide an overview of litigation-related activities that would likely benefit from further EEOC attention.

An overarching finding of our study is that litigation and enforcement activities, while under completely separate organizational offices, are linked closely together—you can’t have one without the other. Our overall recommendation here is to further strengthen the EEOC’s performance partnerships in the districts between the Office of Field Programs (OFP) and the Office of General Counsel (OGC) —members of the same team working toward a common goal. The agency and offices involved recognize the importance of collaboration between OFP and OGC. Indeed, the EEOC’s Strategic Objective I, “combat employment discrimination through strategic law enforcement,” includes “investigation, conciliation, and litigation” as responsible for achieving this objective. All the 2013 District Complement Plans contain a section on “Strategies for Collaboration.”

Our interviews indicated that attorneys often provide advice in many phases of the charge handling process. Similarly, the work of investigators plays a major role in the work of attorneys. Weak investigations can result in the EEOC not being able to pursue litigation or lead to resolutions that are less favorable than could have been achieved with a stronger investigation. A number of our specific recommendations identify actions toward strengthening this partnership.

We group our findings and recommendations under the following topics: (1) priority setting, vital for allocating resources effectively given the number of charges each district receives and to conducting investigations and internal evaluations of cases that have been prioritized for potential litigation if they are not resolved through

conciliation; (2) relationships and collaborations; (3) issues of performance management, performance measurement, and data analysis; and (4) outstanding administrative issues.

The recommendations that follow represent the most compelling results from our evaluation. A full set of recommendations is provided in appendix F.

Priority Setting

Provide all priority charge handling procedures definitions and criteria for classifying charges in one document that also explains the relationship between SA classifications, systemic cases, and Strategic Enforcement Plan (SEP) and District Complement Plan (DCP) priorities. Priority charge handling procedures have been the subject of extensive attention by the EEOC since 1995 and were most recently revised in 2014. They require significant judgment calls from both enforcement and litigation staff. The EEOC has provided considerable guidance on this at many times. However, our interviews indicate some remaining inconsistency in interpretation and confusion over the current standards. We recommend providing one document that defines all the current classifications and the criteria for using them and provides greater clarity about the criteria for prioritizing charges, particularly for strategically significant A (SA) and systemic cases, including identifying the extent to which they overlap. The agency should also clarify criteria for selecting cases for litigation from among the SA priority charges that failed conciliation. These might include, for example, strength of evidence and availability of resources to litigate as well as potential impact. While we recognize that individual judgment will ultimately be needed, further guidance will likely help those making these choices.

Provide more guidance regarding the field attorneys' expected role in the priority charge handling procedures. Such guidance could clarify how attorneys should participate in charge classification, particularly for A, SA, and systemic case classifications, while maintaining some discretion with district leadership based on available attorney resources.

Relationships and Collaboration

Continue to promote flexibility, efficiency and coordination that advance the agency's strategic priorities. Given the EEOC's frozen staffing levels, the agency has to be both creative and nimble with its resources. One way the agency is accomplishing this is through OGC's flexibility to use staff attorneys from across district offices to help during times of intense resource needs in other district offices. The headquarters staff in OGC aid in finding available attorneys in other districts. Interviewees indicated that this process seemed to be well received by the attorneys.

Continue to improve the relationships between attorneys and investigators. District directors and regional attorneys still report some tension between attorneys and investigators. We were told that the extent to which this effects charge handling and litigation varies considerably among offices, and even area and field offices may have different levels of collaboration than the district office. According to respondents the relationships between attorneys and investigators has already been the focus of significant agency efforts and improvements are slowly progressing. Some attorneys, we heard, are not sufficiently respectful of investigators and think some investigators are not producing high-quality investigations that can lead to litigation. High-level officials in both OGC and the Office of Field Programs (OFP) are aware that such tensions sometimes occur. Indeed, they assigned a senior official working in OFP to help address them. Our scope of work did not include examining the extent to which such problems exist.

We provide a number of recommendations, derived from ideas of those we interviewed.

- Continue to emphasize to legal and enforcement staffs that their two functions are a partnership, and that congenial and respectful collaboration is appropriate behavior.
- Survey all attorneys and investigators periodically to identify the nature and extent of any problems in the field. This could serve as a way to track progress in strengthening collaboration between attorneys and investigators. We understand that the EEOC is presently considering undertaking such a survey. Regularly surveying field staff can also be helpful in providing EEOC leadership with feedback from field personnel on other issues as well.
- Continue to identify best practices based on successful attempts by individual offices to improve collaboration.

Assess the roles of OGC and the Office of Research, Information and Planning (ORIP) in litigation activities.

Relations appear to be somewhat uneasy between Research and Analytic Services (RAS), located under OGC, and part of ORIP, specifically the Program Research and Surveys Division that supports the work of the district office enforcement on systemic cases. Some respondents identified issues of timeliness and substance of analysis. Some OGC personnel stated that ORIP's analyses have sometimes been insufficient to support a lawsuit or had to be redone for litigation. While respondents did not indicate that these issues arise frequently, they were still of significant enough consequence that respondents, unprompted, identified them as a weakness of the agencies litigation activities. We understand ORIP's efforts often contribute to significant relief in systemic cases, yet there seems to be an opportunity to further strengthen ORIP's efforts. We make two suggestions:

- Periodically survey the district office enforcement and litigation staff specifically about the services provided by ORIP and RAS. ORIP has already done at least one such survey of its analytic-support customers (field investigators). We recommend expanding the respondents to include OGC staff

including attorneys and regional attorneys in the district offices. This survey could be combined with the survey we recommend above focusing on collaboration between litigation and enforcement staff.

- Investigate options for addressing the separation of the roles of these offices for systemic cases.

Performance Management: Measurement, Analysis, and Data Use

We examined a number of measurement-related elements which could be strengthened.

Develop a process for tracking *compliance* contained in consent decrees. Practical approaches to undertaking compliance reviews, especially for consent decrees, are needed. ORIP reports provide data on numbers of *conciliation* compliance reviews as well as whether or not conciliations were successful. However, the 2015 data indicates that most district offices did not do *compliance reviews*. Nor has OGC been reporting compliance reviews for consent decrees. The regional attorneys we spoke with rely on complaints from charging parties and, for consent decrees, on required written reports from employers.

Develop a process for estimating the *effectiveness* of injunctive relief. The EEOC's Research and Data Plan for 2016-2019 calls for such an effort. According to ORIP and the Office of the Chair, such a study is already underway. A benefit of this effort might be a clearinghouse of evidence-based materials that have indicated success in preventing certain types of discrimination, and which have the potential to be more widely incorporated into consent decrees.

Provide each district office, both regional attorneys and district directors, statistical reports with litigation and enforcement data that combine all the data for that particular office. ORIP already provides tabulations for many performance indicators in reports that provide data together on all field offices. A complement to those reports would be to provide each district office with its *own* statistical report. The report should include both enforcement and litigation data and would report performance data on a particular district office excluding other districts. This would enable managers in each district office to see together the flow of their district's work and the outcomes from intake to final charge disposition. For example, investigators could see the eventual number of charges going into litigation and attorneys could see basic workload information and flow. The report might also include the district's own data on previous years to allow trends to be better identified.

Develop a procedure for reporting the charges that failed conciliation and regularly review these data. These reports could be more useful if the tabulations include breakdowns by types of charges and by reason for not going to litigation for SA charges that failed conciliation but were not chosen for litigation. A review of this nature

could identify problems needing attention in field offices and nationwide. It might also provide evidence for increasing resources if the agency is unable to litigate many good cases due to lack of staff.

Hold regular performance review meetings for headquarters leadership, with the Director of OFP and the General Counsel (and perhaps the Chief Operating Officer) taking turns facilitating the meeting. Meetings would begin with a review of the latest statistics reports prepared by OGC and ORIP, supplemented by other relevant information, which would help gauge progress toward agency goals and identify problem areas. Meetings should identify causes of problems and any actions needed to address those problems. This represents a version of the “data-driven performance reviews” that have been overseen by the Office of Management and Budget in reviewing federal agency national priority goals. A rotating sample of regional attorneys and district directors might be asked to participate remotely in these meetings.

Encourage each district office to hold similar “How Are We Doing?” meetings on their own data. These meetings should include the district director and regional attorney, and at least other supervisory staff. Meetings could be facilitated by either the district director or the regional attorney, with the two possibly alternating in the role.

Pilot test annual district office work plans to update priorities based on current national and local conditions and track progress toward SEP and DCP goals. Both the SEP and DCPs are three-year plans. The plans proposed here would focus on identifying the strategies for the district office for the next year. The plans would examine the existing and projected workloads and other issues facing the district office in the next year. The district might set targets for itself on some of the key measures and track progress during the year towards those targets.

Administrative Issues

Conduct an evaluation of attorney, paralegals, and investigators grade levels. Several respondents raised concerns that experienced field attorneys were leaving the EEOC to earn more money from comparable positions in other federal departments, such as the Department of Justice and Department of Labor. If the EEOC is not already examining the extent to which this is occurring, it should do so. This may require strengthening EEOC’s exit interviewing process. If similar agencies are found to frequently use higher grade levels, and staff are citing this as a reason for leaving the EEOC, this should be a priority concern for the agency. Higher GS levels are likely to be easier to obtain than higher staffing levels.

Consider improved training in statistical analysis, human relations, and management. Respondents reported that good training opportunities are largely available, especially on “substantive content” issues. Three areas where respondents suggested training is likely to be desirable are: (1) understanding and use of basic statistical information, (2) human relations, such as to help attorneys and investigators work better together, and (3)

management training for regional attorneys, many of whom are likely to be more experienced, and interested, in litigation than management.

Continue to identify “best practices” for the EEOC’s litigation work. Identification, documentation, and dissemination of best practices are becoming popular within several federal agencies. Best practice material of this nature already exists within the EEOC. Topics for future emphasis could include: (1) approaches district offices can use to strengthen collaboration between attorneys and investigators and (2) approaches to tracking compliance with consent decree requirements.

Section I: Introduction

In September 2015, the Office of Inspector General (OIG) at the Equal Employment Opportunity Commission (EEOC) funded the Urban Institute to conduct a five-month independent examination of the litigation function of the EEOC, focusing particularly on issues relating to planning, management, and performance. The scope of work focused on a broad examination of the strategic elements of the EEOC's litigation activities.

Scope of the Examination

This report provides the Urban Institute's findings and recommendations from its examination of the EEOC's litigation activities. This was an exploratory effort. It was not a program evaluation. OIG was not seeking a program evaluation, which would rely on quantitative or survey data to evaluate litigation case management, quality, or outcomes. Early in our work, we found that a proper assessment of EEOC's litigation work must also examine several aspects of the EEOC's enforcement activities, as they relate to the prioritization and investigation of charges considered strategically significant and which might result in litigation if the charges fail conciliation.

We did not address litigation elements such as: an examination of litigation quality, impact or success; or issues relating to the relationship of the EEOC to state and local Fair Employment Practices Agencies. Our scope of work also precluded drawing from the experiences of other federal agencies, such as those in the Department of Justice and Department of Labor, to obtain feedback on their collaboration with the EEOC and insight into those agencies' best practices that might be beneficial to share with the EEOC.

This study also excludes the EEOC's appellate court litigation activities, including the filing of amicus briefs. Appellate court litigation represents a discrete subsection of the EEOC's litigation efforts. It has its own unique considerations, including the cases the EEOC selects for appeal and the cases the EEOC must defend on appeal. Evaluating the EEOC's appellate court litigation would stretch the resources of this evaluation at the expense of gathering other vital information about the agency's more broad-based litigation activities.

While our focus is on litigation, we quickly found the agency's enforcement activities play a vital role in the litigation process. Before meritorious charges make it to litigation, they must be processed through procedures and practices carried out by district, field, and area office enforcement staff. The role and importance of these staff in the litigation process, especially investigators, means that litigation success is highly dependent on enforcement staff. In addition, we found that attorneys participate in some elements of the enforcement function, often providing advice at the early stage of categorizing incoming charges. The quality of charge classification and investigation is highly important to litigation. Any evaluation of litigation activities without examining the charge handling process and interaction between enforcement and litigation would fail to adequately address the

environment from which the EEOC’s litigation activities originate.¹ Our work focused on four broad aspects of the agency’s litigation work:

- **Priority Setting.** What are the major issues in the EEOC’s current practices for prioritizing charges and litigation?
- **Relationships and Collaboration.** What is the relationship between the EEOC’s enforcement and litigation activities and how are the relationships working within the Office of General Counsel (OGC)? To what extent do investigators and litigators collaborate? How could communication, coordination, and collaboration be improved?
- **Performance Management, Measurement, Analysis, and Data Use.** How does the EEOC assess success in litigation-related activities? What improvements might be made? How is the EEOC integrating statistical and data analysis into its decision making and management around its litigation activities?
- **Administrative Activities.** What types of additional trainings are needed? Could litigation resource allocation be improved?

Additionally, we have identified areas for possible future research.

Research Methods

This examination relied on two primary methods of data collection: (1) a review of relevant documents and (2) interviews with key staff in the EEOC headquarters and district offices. We reviewed many documents, including the Strategic Enforcement Plan (SEP), 15 District Complement Plans (DCPs), the most recent quarterly statistical enforcement and litigation reports from the Office of Research Information and Planning (ORIP) and OGC, and the Regional Attorneys’ Manual. A list of the principal documents reviewed during the course of our evaluation is presented in appendix A. During our last interview—and then again after we shared a draft report with the OIG to obtain comments from the EEOC leadership—we were provided additional documents primarily addressing priority charge handling procedures.

We conducted 12 interviews with respondents at the EEOC headquarters and district offices. Our interviews at the EEOC headquarters included respondents in the Office of Field Programs (OFP), OGC, and the Office of the

¹ We use the term enforcement activities to indicate the agency’s process that includes the receipt, investigation and resolution of “charges of employment discrimination filed against private sector employers, employment agencies, labor unions and state and local governments including charges of systemic discrimination.” This function is carried out by the Office of Field Programs. “Where the Commission does not resolve these charges through conciliation or other informal methods, the Commission may pursue litigation [...]” (https://www.eeoc.gov/eeoc/enforcement_litigation.cfm)

Chair. The district office interviews included three randomly selected regional attorneys² and two district directors recommended by the Director of OFP. A list of the titles and offices of the respondents we interviewed for this evaluation is presented in appendix B.

The findings from our interviews come from a small number of respondents. We believe the sample was adequate enough to obtain a broad overview of the litigation activities and identify issues that warrant the EEOC's attention. The interviews included targeted coverage of key officials at EEOC headquarters who have significant roles in litigation-related activities plus a small sample of field personnel. We do understand that each district is unique and has its own needs. Our findings are not meant to be exhaustive nor to identify solutions. Rather, they are meant to provide a broad level first-of-its-kind examination of the EEOC's litigation activities and provide tentative recommendations on issues warranting the EEOC's attention.

Background

The EEOC obtained litigation authority to enforce findings of discrimination beginning in 1972. Since that time, the agency has focused increasingly on how to target its litigation efforts, beginning with a National Enforcement Plan in 1995, which one staff member described as a “watershed moment” in the history of the EEOC. In 1995, the Commission also instituted Priority Charge Handling Procedures (PCHP). The Priority Charge Handling Task Force report in 1998 further refined the agency's enforcement efforts. Several years later, the Commission adopted the recommendations of the 2006 Systemic Task Force Report to prioritize the identification, investigation and litigation of systemic discrimination cases. The Task Force Report defined “systemic cases” as “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.”

In February 2012, the Commission adopted a Strategic Plan for Fiscal Years 2012–2016. It required the development of a SEP that would establish the Commission's enforcement priorities and would integrate, among other activities, the EEOC's investigation, conciliation, and litigation responsibilities in the private and public sectors. The Strategic Plan described the EEOC's “systemic initiative” as one that “makes the identification, investigation, and litigation of systemic discrimination cases—pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area—a top priority.”

² The 15 District Offices were entered into a random list generator and randomized. The first three district offices in the list were selected for interviews. Representatives from OGC helped the Urban research team connect with the regional attorneys from the selected districts. Each of the three regional attorneys from the selected districts was available for interview and there was no need to substitute respondents.

In 2012, the Commission adopted the Strategic Enforcement Plan for Fiscal Years 2013–16. The SEP supplanted the 1995 National Enforcement Plan, and highlighted the importance of targeted enforcement efforts on “an identified set of priorities.” It reaffirmed the 1995 PCHP but stated that PCHP must be “thoroughly updated and examined to fully implement the SEP and the Strategic Plan.” Under the SEP, each district office is required to adopt a District Complement Plan (DCP), which enables each district to implement the SEP while identifying additional priorities within its own enforcement area. The Commission intends to review and update its Strategic Enforcement Plan in 2016. Presumably, districts will be asked to update their DCPs as well.

While litigation does not commence until a lawsuit is filed, almost all of the EEOC’s litigation arises from charges filed with the agency. OGC and its attorneys play an important role in prioritizing charges that are filed with the EEOC and in working with investigators on the enforcement side of the agency as those cases are developed and go through conciliation. Because the EEOC files a very small number of cases, the work done by enforcement staff to identify and investigate priority cases is essential to effective litigation. Therefore, we have included the staff attorneys’ roles in those activities in our report.

Remainder of Report

The remainder of our report lays out the findings of our examination and provides recommendations for improving certain aspects of the agency’s litigation efforts. Section II discusses priority setting, including the priority charge handling process, staff attorneys’ work with investigators, and the selection of cases for litigation. Section III explores relationships and collaborations between attorneys and investigators, among district offices, and between legal staff in district offices and headquarters leadership. Section IV focuses on performance management in the district offices and at the EEOC headquarters. This section covers data that is being collected, the agency’s analysis efforts (increasingly important for federal agencies), and the use of performance information in decision making. Section V briefly examines a number of administrative issues, including training for the EEOC’s litigation and enforcement staff and budgeting. We conclude with areas of future study and research that could benefit the agency.

Section II: Priority Setting

Classifying Charges and Priority Charge Handling Procedures

Identifying strategic priorities, targeting enforcement efforts, and requiring extensive collaboration between the Enforcement and Legal staffs has been a high priority of the Commission for over 20 years. These issues have been the subject of formal Commission policy, internal agency guidance and directives, and staff training materials. The standards and approaches have evolved over time. During the course of our interviews, we asked all interviewees basic questions about how the EEOC prioritized cases. We heard different – and sometimes inconsistent – descriptions of PCHP and its relationship to the identification and development of systemic cases. We also had difficulty identifying written documentation that clarified the current standards for prioritizing charges. Our draft of this section of the report generated significant comments from multiple reviewers who noted concerns over our description of how the agency’s charge classification system works. We were also provided copies of documents we had not seen previously. These comments and documents have been extremely helpful. We have revised this section of our report to incorporate information from these materials.

Our interviews reflected that there are different understandings of these standards. The issue is not whether we fully understand the standards but whether agency staff understand them and apply them consistently. Our review of the comments to the draft report and the documents provided to us have not changed our finding that confusion exists among at least some staff about the standards for prioritizing charges and the relationship of priority charges to systemic cases. Now that we have had an opportunity to review these documents, we understand why there might be confusion in the field. We thus have retained, although refined, our recommendation that the EEOC consider clarifying in one document all standards and criteria for identifying and classifying charges and that it further clarify the relationship between strategically significant A (SA) charges and systemic cases.

As the Commission stated in the FY 2013-2016 SEP, the goal in identifying national priorities is “to ensure that agency resources are targeted to prevent and remedy discriminatory practices where government enforcement is most likely to achieve broad and lasting impact” (US Equal Employment Opportunity Commission 2012a, 8). In the SEP, the EEOC reaffirmed the approach and principles of the Systemic Task Force Recommendations of 2006, which required “plans and procedures for early identification of systemic cases . . .” (US Equal Employment Opportunity Commission 2012a, 7). The SEP also provided that “[r]igorous implementation of PCHP [Priority Charge Handling Procedures] remains the key tool for reducing our pending inventory of charges, effectively managing new charges, and ensuring that enforcement priorities receive appropriate attention” (US Equal Employment Opportunity Commission 2012a, 11).

The SEP and DCPs identify substantive priority areas of enforcement. Appendix C lists the FY 2013-2016 SEP priority areas. PCHP and the Commission’s initiative to identify, investigate, and litigate systemic discrimination cases establish a procedural framework for staff to implement the Commission’s substantive strategic priorities, while leaving flexibility to pursue charges and litigation that might not fall under one of the SEP or DCP priority issues.

For many years, the EEOC has relied on early classification of charges to help manage the large number of charges filed every year and to identify high-priority cases (Igasaki and Miller 1998; US Equal Employment Opportunity Commission 2012a, 11–13). Each district is responsible for classifying charges that come into its system. The 1995 PCHP identified three broad classifications of charges that are still used by the EEOC today (Equal Employment Opportunity Commission 1995) The Regional Attorneys’ Manual summarizes the PCHP classifications as follows:

- Category A: charges that fall within the national or local enforcement plan and other charges where further investigation will probably result in a cause finding of discrimination.
- Category B: charges “that initially appear to have some merit but will require additional evidence to determine whether continued investigation is likely to result in a cause finding and charges where it is not possible to make a judgment regarding the merits.” Respondents told us that these are cases where there is insufficient information to categorize as A or C; and that B charges constitute the majority of charges that go to mediation.
- Category C: Charges where “the office has sufficient information to conclude that it is not likely that further investigation will result in a cause finding.” Respondents explained that these are charges that do not appear to raise a valid claim (such as a jurisdictional bar).

The Regional Attorneys’ Manual explains that “A charges will receive priority treatment; B charges will be investigated as resources permit; and C charges will be dismissed.” (Equal Employment Opportunity Commission 2005)

The 1998 Priority Charge Handling Task Force Report distinguished between two types of A cases: A-1 cases that the agency would likely litigate and A-2 cases that the agency likely would not litigate. In December 2013, agency leadership sent an operational directive regarding PCHP as part of their implementation of the SEP and DCPs. The December 2013 directive eliminated the A-1 and an AY designation³ and replaced them with a new “SA” classification to identify A charges that are strategically significant. The directive provided criteria for determining

³ We did not see documents or receive information from people we interviewed explaining the difference between the old A-1 and AY designations, but because they have been eliminated, defining and distinguishing them was not relevant to our work.

whether a charge should be designated as SA and required that Enforcement and Legal staff jointly make the SA designation. The directive explained the new SA classification as follows:

“The SEP and DCP priorities form the central core of the agency’s focused law enforcement and outreach, but should not preclude work on other matters where government enforcement is strategically significant. Enforcement and Legal staff will jointly determine which meritorious charges (raising priority or non-priority issues) will be categorized as strategically significant. The forthcoming PCHP guidance will outline a new standard for evaluating cases for potential enforcement and litigation. Enforcement and Legal staff will jointly determine strategic significance based on the following criteria:

- (1) an assessment that cause is likely and
- (2) an assessment that government enforcement or litigation will have strategic significance, meaning it will:
 - a. have a broad deterrent impact (beyond the parties), or
 - b. have an impact on a large number of individuals, or
 - c. have an impact on the development of the law, or
 - d. have an impact from the presence of EEOC enforcement (e.g., geographic presence or as the primary enforcer, such as ADEA enforcement against state entities).”

(Berrian, Lopez & Inzeo 2013, 1)

The December 2013 PCHP directive also addressed the relationship of systemic cases and the SEP and DCP priorities to the new SA classification:

“Systemic enforcement and litigation remain an essential priority of the Commission, as both the Strategic Plan and SEP reiterate. The SEP and DCPs include specific systemic enforcement priorities identified in the plans to maximize the use of our resources and the impact of our systemic efforts. The focus on SEP and DCP priorities for systemic enforcement does not, however, preclude an office from investigating a potential systemic matter raising a non-priority issue that may have a significant impact. The district director and regional attorney will jointly determine whether the systemic matter is strategically significant.

Effective implementation of the SEP and DCPs requires increased coordination among EEOC offices, particularly for systemic matters, to facilitate strategic decisions about which types of charges and cases within the SEP priorities to pursue and where and when to pursue them.”

(Berrian, Lopez & Inzeo 2013, 2)

The directive further emphasized the importance of collaboration between the Enforcement and Legal staff to advance the agency’s goals “of developing priority and systemic cases for litigation and strategic management of

investigations.” (Berrien, Lopez & Inzeo 2013, 2) It also stated that the General Counsel and Director of OFP “will update internal guidance as appropriate to reflect the standard of strategic significance that replaces the A-1 and AY categories and to reiterate specific legal/enforcement interaction procedures that are required of all districts.” (Berrien, Lopez & Inzeo 2013, 2)

The Regional Attorneys’ Manual has not been updated since the SEP was adopted and the SA classification initiated, so it does not provide guidance to staff on the current classification system. We received copies of training materials, however, that further explain the SA classification system and how the classification system relates to the A, B, and C categories.⁴ These materials clarify that the agency’s enforcement priorities reflected in the SEP and DCP may be raised in charges that are categorized as A, B or C depending on the merit and strength of that particular charge. Thus, just because a charge raises a SEP or DCP priority issue does not by itself determine whether it should be classified as an A charge. It also must be evaluated to determine whether cause is likely.

According to the training slides, once a charge receives an SA designation, it should receive significant resources and attention and should not be referred to mediation or dismissed without the agreement of both the district director and the regional attorney. Within SA cases, the training slides indicate that the district director and regional attorney determine how best to allocate resources but that SA cases that involve SEP or DCP priorities “will be accorded the necessary resources for the case development.” The SEP was clearer than the training slides or the directive in explaining that “enforcement plan charges (SEP or DCP) are the highest priority” under PCHP. (Equal Employment Opportunity Commission 2012b)

Although the 2013 directive does not mention A-2 cases, the training materials confirm that there remains an A-2 category for charges where cause is likely but litigation is unlikely. The materials list three examples of A-2 charges: (1) the EEOC does not have litigation authority; (2) the charging party “has competent counsel and EEOC litigation would not be strategically significant” and (3) the “EEOC decides it will not litigate.” The Director of the OFP explained in his comments to our draft report that the A-2 designation is used primarily for charges against state and local governments where the EEOC does not have litigation authority.

The slides also address the relationship between the new SA category and systemic cases, stating that “meritorious systemic charges” are likely to fit one of the criteria for designating a charge strategically significant with the SA classification.

In February, 2015, agency leadership circulated a memorandum regarding the EEOC’s systemic program. In explaining the EEOC’s systemic work, the memorandum identified some of the criteria for systemic cases that are

⁴ The directive stated that OGC and OFP would update internal guidance regarding the new SA standard for strategic significance. It is not clear whether the training slides constitute that updated internal guidance or whether other guidance was provided to the field.

very similar to the criteria used to classify a charge as strategically significant (SA). According to the February 2015 memorandum:

“EEOC’s Strategic Plan defines systemic cases as pattern or practice, policy, or class cases where the alleged discrimination has a broad impact on the industry, occupation, or geographic area.

EEOC’s systemic work can thus take many forms. It can consist of big systemic cases on behalf of a large group of victims, cases that are smaller in scope that have an impact on the development of the law, and cases that involve important changes to employer policies and practices.”(emphasis in original) (Yang, Lopez & Inzeo 2015, 1).

This language describing the type of systemic cases is similar to the wording of the criteria listed in the December 2013 directive for identifying SA cases. The similarities in the descriptions of systemic and SA cases has likely contributed to confusion over the meaning and scope of the new SA classification.

The priority-setting process for charges leaves significant discretion in the districts to both identify the types of cases that should be prioritized and to determine the process for classifying cases. While this seems appropriate to a certain extent, there seems to be some confusion over the SA classification. One respondent told us that SA cases were systemic cases another told us that the SEP priority issues “drive” the classification of SA cases: if it is a SEP priority, that is what it makes it an SA case. It is also unclear, based on our interviews and the written materials we reviewed, if there is consistency across districts in terms of which cases are designated systemic.

Recommendation 1: Provide all PCHP definitions and criteria for classifying charges in one document that also explains the relationship between SA classifications, systemic cases, and SEP/DCP priorities. There are significant judgment calls involved in the agency’s PCHP. Moreover, the PCHP system was developed in 1995 before the Commission launched its systemic case initiative. Agency staff would benefit from greater clarity in defining SA and systemic criteria in the SEP and the regional attorneys’ Manual. Moreover it would be helpful to put all current definitions and criteria used for PCHP in a single document rather than having standards and explanations scattered throughout multiple documents (e.g., the 1995 PCHP, the 2013 directive, and training slides).

The 1995 Priority Charge Handling Procedures were clear that “[l]egal unit attorneys in the district offices should be involved early in the investigation and classification of Category A charges in order to identify and guide the legal development of cases that might result in EEOC litigation” and that offices “should also consider new ways of providing legal advice to investigators working on Category B and C charges.” (Equal Employment Opportunity Commission 1995, 16) The December 2013 directive requires Enforcement and Legal staff to jointly designate charges as SA. Attorney participation in the classification of charges appears to be common.

Respondents also confirmed that charge classifications are assessed and sometimes changed as an investigation proceeds.

A September 16, 2011 memorandum from the General Counsel and Director of OFP to all district directors and regional attorneys set out “operational directives” including the role of attorneys in the charge classification process. We do not believe this has been widely and consistently shared with staff in recent years, and the document still refers to classifications that no longer exist (A-1 and AY cases). We interviewed staff from a three districts, and their responses regarding attorney involvement in charge handling varied, with some reviewing all charges and others only reviewing those that an investigator initially identified as a priority case.

Recommendation 2: Provide more guidance regarding the field attorneys’ expected role in the priority charge handling procedures, including how systemic cases fit into operational directives. Such guidance could clarify how attorneys should participate in charge classification, which is expected for A, SA, and systemic case classifications, while maintaining some discretion with district leadership based on available attorney resources.

Finally, in terms of priority-setting, the SEP includes an open-ended national priority for addressing emerging and developing issues. While this leaves considerable discretion to prioritize many different cases, maintaining such a priority in a multiyear enforcement plan appears to be working well and seems appropriate. It has enabled the agency to respond to new issues and emerging issues without requiring the Commission to revisit the SEP.

Attorneys’ Role in the Investigation and Conciliation Process

Variation exists in the extent to which field attorneys work with investigators on investigations and conciliations. As one OGC leader explained, field attorneys’ involvement with enforcement ebbs and flows based on the primary demands of their litigation responsibilities. This variation is likely related to competing demands on attorneys’ time and is impacted by the level and nature of the collaboration between enforcement and litigation in a particular office.

For systemic cases, and at least some SA cases, field attorneys generally work with investigators during the course of the investigation. Whether this is true for some or all SA cases or for other cases that get stronger as an investigation proceeds is unclear from our interviews. Some larger offices are able to designate investigators to work primarily or exclusively on systemic cases, and attorneys participate in deciding what relief should be pursued during the conciliation process. The extent to which this is the case across all large offices or among the smaller offices was unclear from our interviews. The OFP Director noted in his comments to our draft report that all district offices have a lead systemic investigator.

Deciding Which Cases to Litigate (and Internal Process for Reviewing and Approving Those Decisions)

Following an unsuccessful conciliation, field attorneys must determine whether a case should be pursued through litigation. During the course of our interviews, we identified four criteria that interviewees identified as affecting both charge and litigation priorities, in addition to the SEP and DCP priority areas:

1. Issues involving employers with a past history of discrimination charges
2. The strength of evidence available
3. The likely time and cost of pursuing the litigation based on current workloads and available resources
4. The likelihood that the private bar would effectively take on the case

Those we interviewed emphasized the availability of competent private counsel to represent an individual complainant in deciding whether the EEOC should litigate a case. Workloads clearly also play a significant role. One office, for example, monitors caseloads so that attorneys do not typically have more than a certain number of cases in litigation at any given time.

Regional attorneys and OGC headquarters staff must approve the filing of litigation. In certain cases, the General Counsel will seek authority from the Commissioners to file a lawsuit. The General Counsel has discretion to determine which cases should be brought to the Commissioners for approval. The criteria for seeking Commission approval are: (1) significant cost of the litigation, (2) the case involves a developing area of law, and/or (3) there is a significant matter of public concern raised by the case. (US Equal Employment Opportunity Commission 2012a, 20)

Since adoption of the 1995 National Enforcement Plan, the Commission has delegated decisions regarding which cases to litigate to the General Counsel and the regional attorneys. The criteria for bringing a case to the Commissioners are broad. We did not hear any concerns about how this process is working, except for consistent comments on the challenges offices face with limited resources.

Litigating Cases

The scope of our work did not include assessing the conduct of litigation by trial attorneys. In general, however, one of the strengths identified by the people we interviewed was the quality and commitment of the staff attorneys at the EEOC.

Section III: Relationships and Collaboration

Several categories of relationships were addressed in our exploratory assessment. We asked interviewees about collaboration between headquarters offices (OGC and OFP), headquarters staff in OGC and regional attorneys and other attorneys in the field, legal staff in different district offices, attorneys and enforcement staff in district offices, and ORIP and Research and Analytic Services (RAS). Each is discussed below.

Collaboration between OGC and OFP Headquarters Staff

At the upper levels of the EEOC, our interviews suggest that collaboration between OGC and OFP appears to be working well. Inevitably, this is affected greatly by the relationship among the top officials in these offices. The director of the Office of Field Programs had previously been the acting deputy general counsel in OGC and this was cited as a contributing factor to the productive relationship between the leadership in OGC and OFP.

Collaboration between OGC Headquarters Staff and Legal Staff in the Field

Regional attorneys indicated that collaboration, such as information sharing, on legal matters between headquarters and their field attorneys is working well. Respondents praised OGC for effective communication with field attorneys, such as by providing daily emails that help boost morale and create a sense of community among attorneys scattered throughout the country. This, we heard, is particularly helpful for attorneys in more isolated offices.

Collaboration among Legal Staff in Different District Offices

The Systemic Task Force Report, which was reaffirmed by the SEP, included development of a “national law enforcement” model to help the EEOC pursue systemic litigation. Among other things, the national law enforcement model includes staffing systemic cases based on the needs of the case and assigning legal staff as appropriate, regardless of which district they work in.

Particularly given the EEOC's frozen staffing levels, flexibility is needed to undertake practices such as assigning attorneys located in one district to another that is overloaded or litigating a major systemic case. OGC's Litigation Management Services Office plays an important role in arranging such assignments and was highly praised for being responsive and quick to address needs. Trial attorneys, as indicated by our interviews, are also flexible and responsive to requests to provide assistance in cases in other districts. The practice of sending out attorneys to different district offices was well received, and our respondents noted that it offers attorneys an opportunity to get to know their colleagues and learn new skills and practices in other districts. Combined with strong communication between headquarters and the district legal staff, this approach promotes an integrated legal effort, thereby furthering the EEOC's goal of developing a national law enforcement model among its staff attorneys.

Collaboration between Legal and Enforcement Staff within a District Office

Collaboration between legal and enforcement staff in field offices is an important topic for the EEOC and has been a high priority of the agency for many years. Specifically, the SEP requires that each district's DCP directly address collaboration between enforcement and legal staff within the EEOC. "Having a seamless, integrated effort between the staff who investigate and conciliate charges and staff who litigate cases on behalf of the Commission is paramount" (US Equal Employment Opportunity Commission 2012a, 16). This includes having "regular and meaningful consultation and collaboration between investigative and legal staff throughout investigations and conciliations" (US Equal Employment Opportunity Commission 2012a, 16).

We emphasize that in identifying specific problems identified in our interviews, we do not know whether such occurrences are rare, frequent, or somewhere in between. We are sensitive to the ongoing development of greater collaboration between legal and enforcement staff and are aware that the agency has focused resources on improving collaboration. Still, these relationships play an important role in identifying charges and developing cases for litigation, and some of our respondents identified ongoing tensions in these relationships as a concern. We did not interview any trial attorneys or investigators. Instead we interviewed regional attorneys and district directors, who are in a position as their supervisors to have information on their staff. Recommendation 4, below, provides a potentially low-cost way to estimate the frequency of such problems.

Based on our interviews, it appears that some field offices have worked more collaboratively than others. Collaboration between investigators and staff attorneys has been a challenge historically and it continues to be a focus of both district and national leadership. Differences between investigators and staff attorneys over the handling of charges were one area where legal and enforcement staff sometimes diverge in their approach. For

example, two interviewees reported hearing from investigators that attorneys sometimes refuse to agree to what the investigator believes is a strong settlement, and then when the conciliation fails, no lawsuit is filed. Another example we heard was that some attorneys might not explain to investigators their reasons for not filing a lawsuit after conciliation fails in a case on which an investigator had devoted significant time and effort.

We also heard concerns about the role of field attorneys in the statistical development of a case during an investigation. Specifically, we heard that some less-experienced attorneys sometimes draft their own requests for information regarding an employer's data without going through the customary two-step process of first requesting a description of the data maintained by the employer and then requesting the specific data needed to investigate the charge. If so, whether due to inexperience or frustration over the delays in the two-step process, guidance from OGC for its field attorneys could clarify the preferred process.

We were told that investigators sometimes perceive that some attorneys do not provide enough support through the investigative and conciliation process, or are too heavy-handed, not respecting the role and experience of enforcement staff. On the other hand, we were told that attorneys sometimes perceive that some investigators do not work cases effectively, particularly in preparing cases for potential litigation. Interviewees who discussed the difficulties of the legal and enforcement collaboration also usually pointed to examples of strong collaborations, emphasizing that the particular challenges in collaboration vary widely depending on the personnel and perhaps (although this is less clear) the office culture.

We heard several explanations for the collaboration challenges between legal and enforcement staff. Competing work demands on investigators and staff attorneys, particularly in a time of highly limited resources, can degrade the time necessary to build strong collaborative relationships. Investigators, for example, must work a large number of cases that do not have the potential for litigation, while attorneys are primarily responsible for cases in litigation. Another reason, provided by two interviewees, is that grade levels for investigators are too low to attract people best qualified to conduct investigations in high-priority cases.

These disputes are complicated by the organizational structure. Enforcement staff report to OFP while litigation staff report to OGC (the General Counsel is appointed by the President as are the Commissioners).

To the credit of both national and district leadership we spoke with (from both OFP and OGC), collaboration appears to be an important concern and a high priority. Indeed, when significant issues arise, OFP's National Legal Enforcement Executive Advisor in collaboration with OGC staff helps address and follow up on conflicts in the field to build collaborative relationships between investigators and staff attorneys. The National Legal Enforcement Executive Advisor has also been identifying information on best practices relating to collaboration between investigators and staff attorneys. From our interviews, the extent to which these best practices are shared with the field is not clear. Respondents had a high opinion of this office and considered it an important element of the

agency's efforts to improve collaboration between enforcement and litigation. Furthermore, OFP has been working with ORIP to develop a survey of both legal and enforcement staff to help identify relationship issues.

Below are recommendations for strengthening these relationships:

Recommendation 3: Use the term “performance partnership” when referring to the legal and enforcement staff to demonstrate that the legal and enforcement staff are partners and members of the same team. Make a continuing, concerted effort to emphasize to all attorneys and enforcement staff that they are partners in reducing discrimination. This should also be done with new hires. We understand that the EEOC is already considering using the term “partnership with joint accountability.” The EEOC might want to consider whether inclusion of the word “accountability” might make the partnership seem less friendly to attorneys and investigators.

Recommendation 4: Continue to develop and implement the currently planned survey of all attorneys and investigators. Consider administering the survey on a regular basis, perhaps annually, to identify problems and progress in strengthening these relationships. Internal electronic surveys are generally inexpensive. An example of such a survey is ORIP's survey that asks investigators about the quality of assistance provided to them by ORIP analysts assigned to work in district offices. Some of the questions included in the ORIP survey would be a good starting point for questionnaires addressed to investigators and attorneys about the helpfulness of their engagements. Major concerns for such surveys are likely to be how to handle confidentiality and how to make sure the results are used constructively and not punitively.

Recommendation 5: Emphasize the need for attorneys to explain to investigators when decisions are made whether or not to litigate, especially when the investigator had spent considerable time developing the case. Use the survey of attorneys and investigators, discussed above, to help identify how widespread use of this best practice has been made throughout the field offices.

Recommendation 6: Consider further use of shadowing or a variation thereof. Assess the success of this process if this has not been done already. Such an assessment need not be a costly external study but might be done adequately by a small scale qualitative examination by interested staff. We understand that at least one district office has used such a procedure where an investigator follows an attorney in order to learn more about his or her responsibilities, such as attending depositions and trials so they can see what to expect if called as a witness or how witness statements can be impacted by opposing counsel questioning. The Director of OFP reported in his comments that this is true in multiple districts and that, in some instances, attorneys have shadowed investigators. Building upon this practice in all field offices seems to be a logical next step.

Recommendation 7: Continue the work of the OFP’s National Legal Enforcement Executive Advisor in developing best practices that appear effective in encouraging strong collaboration between enforcement and litigation and routinely share such practices with the field. The best practices guide concept can also be expanded to other aspects of litigation and enforcement. The survey discussed in Recommendation 4 can be used to help assess the knowledge and use of this information by attorneys and investigators.

Roles of the Office of Research Information and Planning and Research and Analytic Services in Litigation

An issue raised by OGC staff was the existence of two separate offices that work on statistical and other expert analyses depending on whether a case is in enforcement or in litigation. It is our understanding that because of the way the offices are structured, attorneys may not request statistical analysis from the RAS unit during an investigation since its role is to provide support only for cases in litigation. ORIP is solely responsible for statistical analyses up until the point a case fails conciliation. Enforcement staff rely on ORIP’s Program Research and Surveys Division for statistical analyses needed to investigate and establish cause for charges. Litigation staff rely on RAS as both consulting and testifying experts.

Two concerns were raised during our interviews. First, some respondents thought it is inefficient to have one analyst do the initial statistical analysis of a case and then have another expert work with attorneys when decisions have to be made regarding both whether and how to prosecute a case. ORIP has indicated that it is available to consult on these decisions. Second, respondents raised concerns about the timeliness and substance of the statistical analyses conducted by ORIP. This, of course, might be merely differences in professional judgment. Some OGC personnel stated that ORIP’s analyses have sometimes been insufficient to support a lawsuit or had to be redone for litigation. While respondents did not indicate that these issues arise frequently, they were still of significant enough consequence that respondents, unprompted, identified them as a weakness of the agencies litigation activities. Based on ORIP’s Comments, we understand ORIP’s efforts contribute to significant relief in systemic cases, yet there seems to be an opportunity to further strengthen ORIP’s efforts. This may be because the standard for finding cause is different from the standard which OGC uses to decide whether to litigate a case. Our interviews did not identify a particular cause contributing to these concerns, but the issue arose throughout several interviews suggesting that it is a concern shared by several of our respondents.

In 2006, the Systemic Task Force considered whether to continue to keep the analytic functions of ORIP and RAS separate:

“The Task Force recognizes that in addition to the experts in ORIP, there are also experts working in RAS in OGC. The experts in ORIP provide substantive assistance on investigations, while the

experts in RAS work primarily on cases in litigation. At various times in the past, all of the Commission's experts worked together in one division, but since 1994, the experts have been divided between two headquarters offices.

The Task Force considered whether the Commission should continue to keep the expert functions separate. Employees stated that when the experts all were located in the same department, they spent virtually all of their time on litigation matters, due to the demand for this type of assistance and the court-imposed deadlines, and had little time to assist on investigations. Because of time constraints and strategic advantages to having separate experts for investigations and litigation, the Task Force recommends that the Commission retain the current structure, and continue to have experts devoted primarily to assisting in investigations and others devoted to litigation.”

In addition to serving the need to free up analysts for investigations, as described in the 2006 Systemic Task Force Report, some respondents told us that the separation of ORIP and RAS responsibilities serves a strategic purpose by insulating potential expert witnesses in RAS from the investigative analyses conducted in ORIP. One interviewee noted that, if there was only one department serving both as analysts during the investigative stage and as expert witnesses, and multiple analyses were conducted of a case during the investigation, it is possible the expert could be required to testify about analyses that were not being used for litigation. The division of the two departments serves an important purpose for litigation, distinguishing between consulting experts and testifying experts. This does not, however, negate our other findings on the timeliness or substance of the work produced in ORIP. Both offices should be producing similar work in a timely manner consistent with available resources.

Recommendation 8: Examine whether ORIP and RAS should continue to be siloed in their efforts to provide expert statistical analysis and investigate the reported concerns about the timeliness and, in some cases, the substance of statistical analyses prepared during the investigative process. We did not conduct an evaluation of the quality or efficiency of the work conducted by ORIP or RAS, but we recommend that the EEOC consider those concerns. One source of relevant information would be a survey of OFP and OGC field staff who have been users of RAS or ORIP analysts. The survey of attorneys and investigators suggested above would likely be useful as a starting point. An independent, external analyst might be appropriate to ensure respondent anonymity and analyze and report the findings to OGC and ORIP.

Recommendation 9: Investigate options for addressing the inefficiencies inherent in the rigid separation of ORIP and RAS statistical analytic services. One option would be to bring all statistical and expert analysis of systemic and other high-priority cases with potential for litigation into one office. This is a high-level, complex decision, because RAS reports to OGC and ORIP reports to the Commission. It can be argued that even though ORIP is responsible for handling charges on the enforcement side, trial attorneys are also the “consumers” of this work when conciliation fails and must rely on these statistical analyses to

evaluate whether a lawsuit should be filed and to prove discrimination at trial. If the Commission and OGC maintain their current roles, greater coordination, communication, and joint trainings would help minimize the problems raised by respondents.

Section IV: Performance Management, Measurement, Analysis, and Data Use

The EEOC collects considerable amounts of performance-related data, primarily through its Integrated Mission System (IMS) operated by the Office of Information Technology. The data comes from entries by field personnel who report detailed information on individual charges from origin to final disposition.⁵ Data in IMS can be aggregated in many different ways. The IMS system serves two major functions: (1) tracking charge processing and case progress and (2) tracking agency performance activities. The latter is done through periodic statistical performance reports. Obtaining valid and meaningful measurement of the outcomes of the EEOC's work has been a major concern. Section II.A of the recent EEOC Research and Data Plan for 2016–2019 calls for a detailed review of the data, asking whether the right data are being collected and being used properly.

Data from IMS are used to generate the quarterly Data Summary Reports produced by ORIP. These reports focus on enforcement performance information and break out each statistic by district, area, and field office. These breakouts enable each office to examine its own performance on each statistic, and to compare its own performance data to other offices.

Using data from IMS, OGC can generate its own annual and quarterly EEOC Litigation Statistics reports. These are separate from those created by ORIP for enforcement. These OGC reports provide data on each district office but not individual area or field offices. OGC provides annual but not regular quarterly litigation statistics reports. The respondents we spoke to noted that they can request quarterly litigation data from OGC, but it is not regularly provided to the regional attorneys. These reports enable regional attorneys to examine their offices' own performance and compare performance data to that of other districts. The OGC's litigation statistics report appears to have only limited distribution.

The detailed data included in ORIP's Data Summary Reports and OGC's Litigation Statistic Reports are not posted on the EEOC's website. The ORIP Data Summary Report is marked "administratively restricted," though the OGC statistics report we received was not similarly marked. Some key outcome data from the reports, such as monetary relief obtained from the benefits, are made public, but data are not collected on how much of the required monetary relief actually reached the intended beneficiaries. The ORIP report, we understand, is made available to OFP and the regional attorneys.

Below we address a number of issues relating to the collection, analysis, and use of performance information. Some of the recommendations do not distinguish litigation activities from enforcement activities. As

⁵ For example, see the "IMS Private Business Rules Manual" prepared by OIT.

recommended in previous sections, litigation and enforcement should be considered a partnership. The primary function of performance information should be to learn how to improve, not to establish blame. Litigation and enforcement staff should be considered teams with each member sharing responsibility for the outcomes reported.

Timeliness of Resolution

Given the significance of PCHP and the investigation and development of SA charges to the agency's eventual litigation docket, we investigated the extent to which priority charges are moved through the system. Delay in charge resolution in general (such as whether designated an A charge or not) is a major concern for the EEOC's customers, those who believe they have been discriminated against (US Equal Employment Opportunity Commission 2009, 37). Quick resolution, without sacrificing quality, is desired by charging parties and often by the employers. The summary page of the ORIP Data Summary Reports contains two performance indicators relating to timeliness.

The first is average processing days (296 days for FY 2015). This, we understand, is the number of days from the charge filing day to the date the EEOC issues the cause finding or, for non-cause resolutions, the number of days from filing until the resolution date. This does not include time that attorneys take after failed conciliation to decide next steps and prepare cases for litigation. We did not find data reported on the amount of time conciliations take.

It was also pointed out to us that this overall average provides only highly aggregated information and does not provide sufficiently useful information.

The second timeliness indicator is months of inventory (10.9 for FY 2015), an indicator of backlog that should be of concern to both legal staff as well as enforcement. It was pointed out to us that this overall average by itself does not provide sufficiently useful detailed information.

Recommendation 10: Provide breakout categories for the timeliness measures for the current measures of both processing times and amount of charge inventory. This will help the EEOC determine which types of cases have timeliness-related problems, enabling it to identify where problems appear to exist and encouraging attempts to alleviate the problems. In later reporting periods, such as after corrections have been made, the EEOC will have information as to the extent of progress. Averages, by combining the data on all types of cases, are fine as an overall aggregate measure but do not show key differences among types of cases and make it difficult to monitor trends for SA cases. Representatives from both OFP and OGC should jointly select the breakout categories. Some examples of possible breakout characteristics are activity (e.g., times

for mediations, for conciliations, and the time taken to decide if unsuccessful conciliations will be litigated or not) and charge category (e.g., SA, A, B, and C).

Other measurement variations the EEOC might consider, include: (a) the number and percentage of cases that exceed preselected targets (these are more likely to get people's attention); and (b) the use of medians, which has the advantage that extreme values do not have excessive weight as might occur with averages.

Consent Decree Compliance Reviews

An important concern for assessing the effectiveness of the EEOC's litigation work is the extent to which victims of discrimination are provided sufficient relief as a result of a lawsuit filed by the EEOC. When the EEOC's litigation efforts are successful, consent decrees start the process of obtaining relief for the victims and impose conditions on employers to reduce the likelihood of discrimination in the future. To adequately enforce anti-discrimination laws, it is important to track employer compliance with the consent decrees and determine whether the relief imposed eliminated the discrimination in at least that workplace. Measuring the impact of injunctive relief to remedy discrimination is a need noted in Section III.1 of the EEOC's recent Research and Data Plan for 2016-2019.

Our interviews indicate that a wide variation exists in how field attorneys monitor compliance with consent decrees. There was no common way of monitoring and tracking compliance. Respondents indicated that compliance was not systematically tracked in some districts.

The counts of compliance reviews in the ORIP FY 2015 Data Summary Report primarily cover conciliations. The ORIP report does not include compliance reviews done by OGC's district offices, such as of consent decrees. OGC's litigation statistics report for FY 2015 did not present measures on compliance tracking and monitoring. No standard process to conduct reviews of employer compliance with consent decrees appears to exist.

Regional attorneys in district offices track compliance primarily through complaints from charging parties who did not obtain the promised benefits and from reviews of monitoring reports required under consent decrees. In some districts, administrative staff or paralegals assist in compliance tracking. In others, the responsibility falls to staff attorneys.

The EEOC is beginning to address these issues. The agency's recent Research and Data Plan calls for consideration of ways to identify "effectiveness of practices adopted to remedy discrimination as injunctive relief." The agency is at the early stages of reviewing what works in consent decrees. The Office of the Chair has requested that ORIP begin to analyze consent decrees to determine the terms of the decrees. We do not have details about the scope of that review or requested analysis.

Recommendation 11: Develop a process for tracking compliance with injunctive relief contained in consent decrees. It may be appropriate for some district offices to rely on paralegals while other districts might rely on attorneys. At a minimum, regional attorneys, in conjunction with OGC, should identify who is responsible for reviewing compliance, how frequently staff should monitor compliance, how to track compliance in a practical and valid way, and what procedures to follow if an employer is violating the terms of a consent decree. As a part of compliance tracking, OGC could develop an outcome measure to track the extent to which employers do or do not comply with consent decrees.

Some steps to consider include (1) where feasible, using independent monitors, acceptable to the EEOC, who would provide more credible monitoring reports than those coming from employers; (2) integrating outreach and education efforts into consent decree monitoring, where resources are available, so that workers in affected communities are aware of consent decrees and what recourse they have if employers fail to remedy discrimination; (3) establishing a process that automatically raises an alarm if new charges arise involving employers with past offenses; and (4) identifying and disseminating a set of best practices for compliance reviews obtained from districts that have been able to undertake these reviews.

Beyond monitoring employer compliance, there also appears to be little analysis to monitor the *effectiveness* of the injunctive relief in reducing future discrimination. This is likely a result of both limited resources available to conduct a systematic analysis as well as the challenge of measuring the effectiveness of injunctive relief.

Outside scholars have analyzed some of these issues. (Schlanger and Kim, 2013). The Commission’s Research and Data Plan includes a long-term research project to identify, “as resources allow,” methods to assess the impact of injunctive relief on ensuring nondiscrimination in personnel practices.

Recommendation 12: Prioritize the current effort to develop a process for estimating the effectiveness of particular forms of injunctive relief in preventing future discrimination. The EEOC might, as part of this effort, explore creation of a clearinghouse of evidence-based practices that appear to prevent employment discrimination and could be included in consent decrees. (EEOC might also encourage further academic research on this issue.) As noted above, such a study is called for in the section on “Long-Term Research Projects” of the recently released Research and Data Plan. More recently, we have been advised that this study is already being conducted.

Provision for Data Analysis

Collecting the right data is very important. What staff does with that information is just as important. District directors and regional attorneys (decision makers) should understand and work with the data regularly.

OGC does not regularly report litigation statistics to field offices but has the capacity to run and provide the statistics when requested. Regional attorneys with whom we spoke either did not receive the data or needed to ask headquarters staff for it. Individual district offices have access to regular, at least quarterly, statistical reports from ORIP on enforcement activities that contain data on a wide variety of measurements. The reports we have seen display on each page the data for all 15 district offices and each of their field offices. This enables comparisons across offices. We did not see any regular reports that provided performance reports tailored to their own office.

We also did not see any regularly provided data that would enable district office leadership to examine why cases are not chosen for litigation. Presumably cases that go through conciliation were identified as A cases, including SA and systemic cases. There is a system for considering and approving the filing of lawsuits; however, there are no regular tabulations identifying why the choices not to litigate SA cases were made.

Recommendation 13: Consider combining OGC and OFP statistical performance data into one report. Disseminate, and make easily available, statistical quarterly performance reports to staff at the district office level. This would serve the dual purpose of (1) showing the flow of activities from intake through case closure, making the agency more performance driven and (2) emphasizing the importance of collaboration between litigation and enforcement staff. Each party has an important role that eventually affects most performance indicators in achieving the ultimate goal of reducing discrimination. Information on numbers of case filings, conciliations, settlements, consent decrees reached, and employer compliance could be of interest to each office. It will enable the staff to see the whole picture, including their own part, of this very important process. Because there is so much data, some selectivity would very likely be needed to avoid overwhelming users with numbers.

To make this process considerably more useful, it would be helpful if analysts had time to examine each quarterly report, even if only briefly, and then highlight for both enforcement and legal those performance numbers that likely warrant attention.

Recommendation 14: Also provide each district with *its own* statistical quarterly report. This report would provide each district with the latest district's data on each of the performance measures. This new report would not provide data on all the other districts. This, we believe, would make the statistical data easier to use and be more meaningful to each district. A way to improve further the utility of these reports would be to include time trend information (e.g., year-to-year comparisons, own district-to-national or to regional averages, and data on previous quarters).

Recommendation 15: Consider introducing a measure of the number and type of SA cases that were not litigated, preferably broken out by the reasons why. It can be argued that a major national concern is the number of SA cases that failed conciliation and were not litigated even though agency staff had identified

such cases as priorities for potential litigation. For example, it may be that: the strength of the evidence was not deemed sufficient; the case did not fall under one of the SEP priorities; adequate private counsel was available; or the case was meritorious and the regional attorneys might have pursued litigation if they had more resources. Such information, examined over time, can raise important issues regarding resource limitations or other issues.

Use of Performance Information

Basic uses of performance information include identifying problem areas and progress over time. In our interviews, it did not appear that the field staff used the statistical reports to undertake analysis. A variety of meetings are held at the leadership level including the Commission’s quarterly briefings at which leadership of OGC and OFP report on their activities and progress. We were told the district offices also have regular meetings involving both enforcement and legal units. Those we interviewed indicated that these meetings have focused on discussing individual cases, with less attention to the statistical performance reports.

Recommendation 16: If not already being done, consider such options as: (a) using a segment of the existing leadership meetings or (b) holding separate regular leadership meetings on the performance data. In either case these would be “How Are We Doing?” sessions with litigation and enforcement leadership at the EEOC headquarters, sessions with a focus on examining progress on key performance measures. These sessions might be jointly sponsored by the General Counsel, the Chief Operating Officer, and the OFP Director to review, assisted by ORIP, the latest quarterly statistical report. A rotating sample of regional attorneys and district directors might be asked to participate remotely in these meeting to offer their insights from the field. The meetings would address such topics as:

- Where does the data indicate we have problems?
- What actions might be taken to alleviate those problems? By whom? By when?
- Where has the agency succeeded and how might it continue to build on past successes?
- What progress has been made on actions decided on in previous quarterly meetings?

These meetings are similar to the data-driven performance review meetings overseen by the Office of Management and Budget for high-priority agency goals.

Similarly, regional attorneys and district directors in each district office should be encouraged to hold their own similar “How Are We Doing?” meetings using the quarterly data from litigation and

enforcement statistical reports as a starting point. Key staff from enforcement and litigation would also participate.

In the district offices, the DCPs are viewed as long-term priority-setting guidance. The most recent DCPs are from November 2013. The plans supplement the FY 2013–2016 agency SEP that set enforcement and litigation priorities for the agency. We understood from our interviews that neither the regional attorneys nor the district directors prepare shorter term performance plans for the coming year to help with district management. Such documents, used elsewhere in the federal government, could guide each district’s work in the coming year and provide evidence of progress toward each district’s priorities. A reviewer of our draft report indicated that districts do prepare annual operational work plans along with projections of future activities.

Recommendation 17: Pilot annual district office work plans to update priorities based on current national and local conditions and track progress toward SEP and DCP goals. Encourage each regional attorney and district director to annually review the data on the status of pending charges and litigation, the resolution of charges and litigation over the prior year, staff workloads, any expected changing local and national conditions, and develop a district performance plan for the coming year. These efforts would build on current annual workload reviews undertaken by the districts. To reduce the work involved with producing formal plans, this annual review might be treated as an informal exercise. The purpose of the pilot is to assess the usefulness and practicality of such efforts.

This district enforcement-litigation performance plan would address staffing issues, training needs, and changes in strategic priorities consistent with the SEP and DCP and contain strategies for the coming year. The regional attorney and district director can use the district’s data from the quarterly statistical reports provided by OGC and ORIP as one basis for developing the plan. That data would help them identify the current strengths and weaknesses in producing desired outcomes, including addressing the capacity of the district office, given staffing limitations. The review would seek to identify the reasons for the strengths and weaknesses, and then identify desirable actions for the coming year. These reviews should include an examination of the workload held over from previous years and consider the district’s expectations about the forthcoming year’s new workload, based in part on trend data. The availability of staff to address the estimated workload would also be addressed. The district might set targets for itself on some of the performance measures and then during the year track its progress in meeting those targets.

Reviewers of the draft report expressed the reasonable concern about the time and resources needed to prepare these plans, including how well they can operate with respect to the EEOC’s charge-driven system. The time and resources would need to be justified by sufficient usefulness of the work to the district. That is why we have recommended piloting this process, perhaps in two or three districts, preferably ones that volunteered.

Measurement of Success in Reducing Employment Discrimination

The EEOC's Strategic Objective I is "combat employment discrimination through strategic law enforcement." The performance measurements included in both the EEOC's Strategic Plan and its latest Performance and Accountability Report are primarily process and not outcome measures (Hatry, Mark, and Davies 2013). Seven performance measures are reported to the Office of Management and Budget and Congress (FY 2015 Performance Accountability Report, the Congressional Budget Justification, and EEOC's Strategic Plan). Only the measure "Percent of the EEOC's Administrative and legal resolutions that contain targeted relief" can be classified as an outcome indicator. The other measures are more appropriately labeled output (or process) measures.

The EEOC tracks and reports internally and externally the total dollar amount of monetary awards. ORIP's internal quarterly statistics report has been reporting the number and percentage of conciliations that were resolved successfully and unsuccessfully. OGC includes "win" and "lose" numbers in its quarterly statistical report, including data for each district office. Consent decrees are considered to be wins. EEOC Litigation Statistics for FY 2015 Quarter 4 reports that 44 of 50 cases resolved were wins, of which 38 were consent decrees.

The OGC Litigation Statistics report and ORIP Data Summary Report each contain additional outcome measures. Urban Institute's March 2013 report for the EEOC, "Evaluation of EEOC's Performance Measures," suggested the measurements shown in appendix D.

Recommendation 18: Reexamine the EEOC's performance measurements including the additional measures recommended in recommendations 10, 11 and 15 and those included in appendix D. Select some measures for future regular internal and external reporting. Much of the data for tracking many of these measurements already appear to be available.

Section V: Administrative Issues

This section addresses a number of administrative issues, including budgeting, training, codifying best practices, and information technology improvements.

Budget

OGC headquarters officials and the regional attorneys (as well as district directors) do not have any role in direct annual budgeting for their major cost: staffing. Staffing levels are apparently frozen and are established by the EEOC's Office of the Chief Financial Officer. This is a significant limitation on OGC's ability to manage its operations. OGC addresses this problem to some extent by assigning attorneys to different offices as needed.

OGC, however, does prepare a litigation support budget (including costs for depositions, experts, and travel expenses). The regional attorneys submit quarterly reports requesting funds for litigation support and OGC allocates those funds. This system seems to be working well and enables OGC to respond to litigation developments, which are often unpredictable (e.g., the need to conduct a large number of depositions in a short period of time).

We heard concerns that field attorneys were leaving the EEOC because they could earn more money in comparable positions at other federal agencies, such as the Department of Justice and Department of Labor. If the EEOC is not already examining the extent to which this is occurring, it should do so along with a comparison of positions in these other agencies. The grade structure has been studied and OPM has conducted classification audits. However, the particular issues raised in our interviews indicate that the pay-level problem has not been solved. This may be because these studies did not include examining the EEOC exit-review process and findings. If departing professional staff is citing money as a reason for leaving the EEOC, this should be a priority concern for the agency. GS grade and step levels are likely to be easier to change than higher staffing levels. Our findings appear to apply to both litigation and enforcement staff.

Recommendation 19: Examine the EEOC's exit-interview process and the findings from these interviews to better understand reasons for turnover. Survey legal and enforcement supervisory field staff. If the findings indicate that problems exist, a review of GS grade and step levels for attorneys, investigators, and paralegals may be needed to ensure that skills of applicants entering these positions are appropriate and the ability of the agency to retain experienced, skilled staff is maintained. In Section VI ("Future Areas of Study") we recommend the EEOC conduct an in-depth resource review.

Training

Training opportunities for attorneys were generally considered strong, although some suggested having more in-person training opportunities if resources permit. Regular online training addressing specific literature issues, including emerging areas of discrimination, received high marks. Thus far, field staff appear to be comfortable with the current training opportunities available to them.

However, interviewees identified three new or additional areas for training that would be useful: (1) training in understanding data and statistical analysis of discrimination claims, (2) human relations skills, and (3) management skills. Determining whether the views of these respondents reflect a broader agency need is beyond the scope of our work, but they raised important issues.

Recommendation 20: Consider providing more training to attorneys and investigators in three areas:

- Basic understanding and interpretation of data and the nature and use of basic analytical tools and statistics employed in developing cases.
- Human relations and teamwork skills.
- Management skills (suggested by one official), particularly for attorneys who have extensive trial and litigation experience but less experience managing the office of a public agency. This training would likely also be relevant to supervising attorneys (and investigation supervisors).

Lessons Learned—Best Practices

Identification, documentation, and dissemination of successful best practices are becoming popular across federal agencies like the Department of Education and Department of Justice, particularly practices backed by supporting evidence. We understand that OGC has developed a system to address lessons learned following the conclusion of a case.

Recommendation 21: Expand efforts to identify and share best practices in areas such as: (1) ways to strengthen collaboration between attorneys and investigators (as recommended in Recommendation 7); (2) ways for attorneys and investigators to analyze performance measurement data; (3) ways to follow up on compliance with consent decrees and conciliations (as recommended in Recommendation 11); and (4) ways to make reasonably accurate projections of workload for the forthcoming year.

Information Technology

We did not examine information technology as it relates to litigation. Our interviews did not identify any major information technology issues. However, one regional attorney shared with us a list of technology needs that she and her staff had assembled. This list is presented in appendix E.

Section VI: Future Litigation-Related Evaluation

The Office of the Inspector General requested suggestions for future evaluations, Below are our suggestions.

- **Evaluate the EEOC's appellate activities, including the filing of amicus briefs in cases where the EEOC is not a party.** An examination of the EEOC's appellate activities could include addressing the agency's processes and criteria for deciding when to file an appeal, data surrounding employers who appeal, the outcomes of those cases, and the results of cases where the EEOC has filed amicus briefs.
- **Examine the management of systemic cases across districts.** An evaluation of systemic cases might focus on how well the processes and systems established by the Systemic Task Force Report in 2006 are working and whether identification and development of systemic cases is performed consistently across the agency, as well as any improvements needed. Our evaluation focused on overall litigation activities and was not able to examine how the agency handles systemic cases. However, some of our interviews suggest that districts might approach the identification, prioritization, and staffing of systemic cases during their development on the enforcement side in different ways. Even if they constitute a minority of charges and cases filed, systemic cases are a huge part of what OGC and OFP district offices do and impact the overall handling of charges. Further, evaluating systemic cases could help clarify the role of collaboration between ORIP and RAS, as well as the litigation and enforcement relationship and the ability of the EEOC to meet its strategic priorities.
- **Conduct an in-depth staff resource review of the legal and enforcement staffs in the field offices.** Throughout our interviews concerns were raised about inadequate field staffing, problems with staff retention, and outdated resources that could impact the agency's effectiveness. A review of the agency's resources might include: possible information technology upgrades; a review of staff turnover and reasons for departures (such as by strengthening exit interviews); examining GS grade and step levels for field staffs; and comparing these with other comparable federal agency positions. While some of the findings will likely be outside the agency's control, the EEOC should look for improvements that it can make (including both monetary and non-monetary options).
- **Design and test annual work plans in up to three district offices.** These work plans might include information on projected workload for the next year (based in part on local trends) and performance information from the past year that identifies areas that did not meet expectations and require attention.

Appendix A: List of Reviewed EEOC Documents

Charge Processing Procedures Adopted by EEOC and Task Force Recommendations to Be Implemented by Chairman, EEOC, April 19, 1995

Congressional Budget Justification, FY2015

Data Summary Reports, Fourth Quarters FY 2011 and FY 2015

District Complement Plans for all 15 Districts, November 2013

District Directors Quarterly Report – First Quarter FY2016

District Directors Quarterly Report – Fourth Quarter FY2015

Evaluation of EEOC’s Performance Measures, Report for OIG, Urban Institute, March 2013

Evaluation of Intake and End-of-Fiscal-Year Closures of EEOC Private Sector Charge Process, Development Services Group, November 2006

IMS Screens: Charge Prioritize and Assess Selections

Integrated Mission System (IMS) Private Business Rules Manual, 2014

Interim Adjustments to the Strategic Plan, 2014

Letter for the March 24, 2015 Hearing Record, U. S. House of Representatives Subcommittee on Workforce Protections

Legal-Enforcement Interaction Best Practices List

Litigation Database Code Book, 2013

Litigation Statistics Fourth Quarter FY 2015 and First Quarter FY2016

Memorandum from Chair, General Counsel and Director of Office of Field Programs, “PCHP Operational Directive for Implementation of Strategic Enforcement Plan and District Complement Plans,” December 2, 2013

Memorandum from Chair, General Counsel and Director of Office of Field Programs, “Systemic Program,” February 5, 2015

National Enforcement Plan, 1998

Office Of General Counsel Fiscal Year 2013 Annual Report

ORIP Analyst-Investigator Survey Questionnaire, 2016

ORIP Data Summary Reports for various quarters

PCHP Operational Directives, Memo to All District Directors and All Regional Attorneys, September 16, 2011

PCHP Assessment Form (template).

Performance And Accountability Reports, FY 2014 and 2015

Priority Charge Handling and Litigation Task Force Report, March 1998

Priority Charge Handling Procedures, EEOC June 1995

Quality Practices for Effective Investigations and Conciliations, September 30, 2015

Regional Attorneys' Manual, Latest Posted Edition

Research And Data Plan for FY 2016–2019

Review of Evaluations: IMPAQ Final Report for OIG, April 9, 2013

SEP Priorities and PCHP Updates – Examples of Training PowerPoints (2014-2015)

Strategic Enforcement Plan FY 2013–2016

Strategic Plan For Fiscal Years 2012–2016

Systemic Task Force Report, 2006

Appendix B: Interview Respondents

Interview Respondents by Title and Office

Title	Office
Director	Office of Field Programs
National Legal Enforcement Executive Advisor	Office of Field Programs
Associate Counsel	Office of General Counsel
Deputy General Counsel	Office of General Counsel
General Counsel	Office of General Counsel
Assistant General Counsel	Office of General Counsel, Research and Analytic Services
Director	Office of Research Information & Planning
Program Research and Surveys Division	Office of Research Information & Planning
Senior Counsel to the Chair	Office of the Chair
Chief Operating Officer	Office of the Chair
Regional Attorney	Philadelphia District Office
Regional Attorney	Phoenix District Office
Regional Attorney	St. Louis District Office
District Director	Birmingham District Office
District Director	New York District Office

Appendix C: The EEOC's Strategic Enforcement Plan Priorities

1. **Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.
2. **Protecting Immigrant, Migrant, and Other Vulnerable Workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws or reluctant or unable to exercise them.
3. **Addressing Emerging and Developing Issues.** The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions, and administrative interpretations.
4. **Enforcing Equal Pay Laws.** The EEOC will target compensation systems and practices that discriminate based on gender.
5. **Preserving Access to the Legal System.** The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts.
6. **Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.

The national priorities of the SEP will be complemented by district and federal sector priorities, recognizing that particular issues most salient to these communities also demand focused attention.

Appendix D: Suggested Measures from the Urban Institute’s “Evaluation of EEOC’s Performance Measures”

STRATEGIC OBJECTIVE I: COMBAT EMPLOYMENT DISCRIMINATION THROUGH STRATEGIC LAW ENFORCEMENT

- 1. Percent of EEOC’s administrative and legal resolutions that contain targeted non-monetary, equitable relief.** This is Measure 6 in the Strategic Plan for Fiscal Years 2012-2016. The measure would be based on definitions developed to determine whether resolutions met the targeted, equitable relief criteria as articulated in the new Quality Control Plan. Breakouts should be provided for systemic and non-systemic cases.⁶

Because of the importance of systemic cases, EEOC might consider including “percent of systemic cases resolved successfully” as a separate, distinct, measure and not only as a breakout of this measure. (Some EEOC staff and officials were concerned, legitimately so, that this measure can have the unintended effect of encouraging selection of the easiest cases. This is a standard problem with outcome measurements expressed as percentages, including EEOC’s new Strategic Plan Measures #6 and #7.) Despite the potential perverse incentive, achieving successful resolutions in systemic, as well as in non-systemic cases, has to be a major concern for EEOC.

To alleviate this problem, outcomes can be grouped by case difficulty. Our interviews with EEOC officials indicated that EEOC management routinely considers case difficulty (as well as available resources) in case selection. EEOC management already has the responsibility of achieving a balance between “easy” and “difficult” cases. In addition, management can play an important role (and already seems to do so) in encouraging staff to see performance measures as management tools rather than as ways to criticize staff.

Providing clear, well-anchored definitions for each of the terms “targeted,” “equitable,” and “relief” will be important for assuring that the data are reasonably reliable. It is also important to make this clear throughout the agency and to the outside world. For example, the current strategic plan states clearly that this relief must include non-monetary relief in order to be considered “equitable.” However, our interviews indicated that this exclusion of monetary-only relief is not universally known by EEOC staffs—and not likely to be understood by persons outside EEOC who do not have a legal background. Thus, and as recommended by the General Counsel, the word non-monetary is added above, and in Measures **2** and **3**, to assure that this meaning is clear.

⁶ The current strategic plan defines systemic cases as “pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area.”

2. **Percent of resolutions by FEPAs that contain targeted non-monetary, equitable relief.** This is Measure 7 in the Strategic Plan for Fiscal Years 2012-2016. This measure would be based on definitions developed to determine whether resolutions met the targeted, equitable relief criteria. As noted above, providing well-anchored definitions for each of the terms “targeted,” “equitable,” and “relief” will be vital for assuring that the data are reasonably reliable.
3. **Percent of federal sector hearing and appeal resolutions in which there has been a finding of discrimination or a settlement that contains targeted non-monetary, equitable relief.** Like the two previous measures, this measure needs to be based on clear and detailed definitions to determine whether resolutions met the targeted, equitable relief criteria.
4. **Number of discrimination victims awarded monetary benefits.** The information would come from the EEOC database. This measure does not include the many other cases where discrimination has occurred but has not been reported or has not led to monetary relief. Its advantage is that the data are already available to EEOC.
5. **Amount of monetary benefits (financial relief) awarded to discrimination victims.** The information should be available in the EEOC database (and was reported on the EEOC website for fiscal 2011). This measure has been regularly reported by EEOC. Its drawbacks are that this measure does not include non-monetary relief and can be greatly affected by a very small number of very large awards.
6. **Number of direct recipients of monetary and non-monetary (equitable) relief, by type of relief.** This metric helps the EEOC quantify the number of victims of employment discrimination who have been compensated by work conducted by the EEOC. These data are available from the EEOC database. This measure does not capture other employees who indirectly benefited.
7. **Number and percent of charges that resulted in either: (a) a settlement (through ADR/mediation); or, among those classified as meriting relief, (b) a satisfactory settlement through conciliation (after a determination by investigators that discrimination had occurred), or (c) a litigated award.** The denominator would include all charges other than those charges that were neither sent to mediation nor classified as meriting relief. This measure would use the relief definitions identified in the new Quality Control Plan called for in the Strategic Plan for Fiscal Years 2012-2016 and EEOC’s Integrated Mission System (IMS). Breakouts should be provided for systemic and non-systemic cases.
8. **Percent of litigated cases that ended favorably to the EEOC position.** This key measure addresses the important work of the office of the General Counsel and its litigation attorneys. OGC has regularly tracked the “success rate” for all litigation.
9. **Number of employers found to have violated employee discrimination laws that have a charge filed against them within, three years of the resolution of the first charge and that resulted in a cause finding.** This measure would help EEOC assess “recidivism” of employers for whom charges have been litigated successfully in the past. In theory, a lower recidivism rate over time should indicate success in preventing new incidents of discrimination.
10. **Number and percent of charges reviewed by expert reviewers that meet EEOC quality standards and that have been properly assigned to EEOC level categories (e.g., A, B, and C).** This measure is similar to Measure 2 in the current strategic plan. The measure would use the criteria and rating procedures identified by the new Quality Control Plan. A key to the credibility of this measure is the extent to which quality control procedures are applied to the measurement procedure so that “peer review” ratings are reliable.

Notes

1. Much of the information needed for the above measures would come from existing sources and is available through the EEOC's Integrated Mission System (IMS). The measures should be collected and reported using clearly stated and easy-to-locate definitions. Changes in defining terms such as "targeted, equitable relief" may later preclude comparisons over time with future-year values based on definitions derived from the emerging Quality Control Plan.
2. Not included in this list are measures such as "number of charges resolved." EEOC uses this indicator and should continue to do so. However, the information from this measure does not indicate how many of these charges were resolved successfully.⁷ If significant numbers of resolved charges were resolved in ways not desired by EEOC, this would flag a potentially serious problem that EEOC would likely want to address.

⁷ For example, resolutions include settlements, withdrawals with benefits, no cause findings, and both successful and unsuccessful conciliations. In the case of mediation, this number would only indicate that the case was settled between the parties, not anything about the nature of the settlement.

Appendix E: List of Technology Needs Assembled by the Phoenix Regional Attorney

1. We suggest adding a feature we believe most federal agencies use, which is typically Citrix or a program like Citrix. This program would allow us to access the shared drive from home. We could also see our work desktop while at home too (with some exceptions). It is highly secure and many agencies and large firms use Citrix, at least in DC.
2. Faster/newer/lightweight laptops for all staff (we only have nine, causing morale issues).
3. Updated Windows OS or a switch to Mac OS.
4. Local access to Concordance (licenses in the field); ability to load, configure, and manage our own Concordance databases, if we are keeping Concordance.
5. Discontinue Concordance; we would suggest replacing it with Relativity or eDiscovery Point.
6. Discontinue GroupWise; use Outlook instead of GroupWise.
7. Return of the Chrome.
8. Bring Your Own Laptop compatibility.
9. Backup memory would be nice. Little external memory drives that can store huge amounts of data for when we are on the road. It's hard to access the shared drives, etc., when you are on the road remotely, and life might be easier if we had backup copies that were more easily accessible while we are working in hotels.
10. It would be good to have some kind of attachable CD drive that we could plug in when we need to get documents off of a disk that Defendant sent us with discovery documents.
11. Flash drives for every lawyer and paralegal so we don't have to buy our own.
12. Much more space on our shared drives. We only have 120GB right now and getting the stuff on one of the drives is becoming an issue.
13. Increased VPN capability/Independent internet access within each District.
14. More bandwidth for all offices, but especially the smaller offices.
15. More external CDs (Lenovos don't have ability to read/hear CDs)
16. RAS should get bigger, faster computers—as they can describe.
17. Ability to hook up to non-network printers.
18. Portable scanners/printers for trial.
19. More and better scanners/printers, including color printers for legal units.

20. We would also recommend exploring the use of Microsoft's OneDrive (<https://onedrive.live.com/about/en-us/>). We haven't used it, but conceptually it sounds great. We can all simultaneously edit and store docs without confusing which version is the most recent.
21. Way more email storage.
22. A real docketing/calendaring program (e.g., TimeMatters or Amicus or Abacus Law Amicus Attorney or Compulaw).
23. The ability to better use casemap across offices. It's very difficult to use it now if we're on the same case but across state lines.
24. There is excellent deposition software (<http://legalsolutions.thomsonreuters.com/law-products/solutions/livenote-stream>).
25. 30" computer monitors (lawyers are buying their own).
26. Software that allows us to build interfaces like Jeff Bannon—SQL Light and Delphi or Microsoft SQL Server and Visual Studio (which uses C Sharp language).
27. Ability to use Dropbox.

Appendix F: List of Recommendations

Priority Setting

Recommendation 1: Provide all PCHP definitions and criteria for classifying charges in one document that also explains the relationship between SA classifications, systemic cases, and SEP/DCP priorities. There are significant judgment calls involved in the agency’s PCHP. Moreover, the PCHP system was developed in 1995 before the Commission launched its systemic case initiative. Agency staff would benefit from greater clarity in defining SA and systemic criteria in the SEP and the regional attorneys’ Manual. Moreover it would be helpful to put all current definitions and criteria used for PCHP in a single document rather than having standards and explanations scattered throughout multiple documents (e.g., the 1995 PCHP, the 2013 directive, and training slides).

Recommendation 2: Provide more guidance regarding the field attorneys’ expected role in the priority charge handling procedures, including how systemic cases fit into operational directives. Such guidance could clarify how attorneys should participate in charge classification, which is expected for A, SA, and systemic case classifications, while maintaining some discretion with district leadership based on available attorney resources.

Relationships and Collaboration

Recommendation 3: Use the term “performance partnership” when referring to the legal and enforcement staff to demonstrate that the legal and enforcement staff are partners and members of the same team. Make a continuing, concerted effort to emphasize to all attorneys and enforcement staff that they are partners in reducing discrimination. This should also be done with new hires. We understand that the EEOC is already considering using the term “partnership with joint accountability.” The EEOC might want to consider whether inclusion of the word “accountability” might make the partnership seem less friendly to attorneys and investigators.

Recommendation 4: Continue to develop and implement the currently planned survey of all attorneys and investigators. Consider administering the survey on a regular basis, perhaps annually, to identify problems and progress in strengthening these relationships. Internal electronic surveys are generally inexpensive. An example of such a survey is ORIP’s survey that asks investigators about the quality of assistance provided to them by ORIP analysts assigned to work in district offices. Some of the questions included in the ORIP survey would be a good starting point for questionnaires addressed to investigators and attorneys about the helpfulness of their

engagements. Major concerns for such surveys are likely to be how to handle confidentiality and how to make sure the results are used constructively and not punitively.

Recommendation 5: Emphasize the need for attorneys to explain to investigators when decisions are made whether or not to litigate, especially when the investigator had spent considerable time developing the case. Use the survey of attorneys and investigators, discussed above, to help identify how widespread use of this best practice has been made throughout the field offices.

Recommendation 6: Consider further use of shadowing or a variation thereof. Assess the success of this process if this has not been done already. Such an assessment need not be a costly external study but might be done adequately by a small scale qualitative examination by interested staff. We understand that at least one district office has used such a procedure where an investigator follows an attorney in order to learn more about his or her responsibilities, such as attending depositions and trials so they can see what to expect if called as a witness or how witness statements can be impacted by opposing counsel questioning. The Director of OFP reported in his comments that this is true in multiple districts and that, in some instances, attorneys have shadowed investigators. Building upon this practice in all field offices seems to be a logical next step.

Recommendation 7: Continue the work of the OFP's National Legal Enforcement Executive Advisor in developing best practices that appear effective in encouraging strong collaboration between enforcement and litigation and routinely share such practices with the field. The best practices guide concept can also be expanded to other aspects of litigation and enforcement. The survey discussed in Recommendation 4 can be used to help assess the knowledge and use of this information by attorneys and investigators.

Recommendation 8: Examine whether ORIP and RAS should continue to be siloed in their efforts to provide expert statistical analysis and investigate the reported concerns about the timeliness and, in some cases, the substance of statistical analyses prepared during the investigative process. We did not conduct an evaluation of the quality or efficiency of the work conducted by ORIP or RAS, but we recommend that the EEOC consider those concerns. One source of relevant information would be a survey of OFP and OGC field staff who have been users of RAS or ORIP analysts. The survey of attorneys and investigators suggested above would likely be useful as a starting point. An independent, external analyst might be appropriate to ensure respondent anonymity and analyze and report the findings to OGC and ORIP.

Recommendation 9: Investigate options for addressing the inefficiencies inherent in the rigid separation of ORIP and RAS statistical analytic services. One option would be to bring all statistical and expert analysis of systemic and other high-priority cases with potential for litigation into one office. This is a high-level, complex decision, because RAS reports to OGC and ORIP reports to the Commission. It can be argued that even though ORIP is responsible for handling charges on the enforcement side, trial attorneys are also the "consumers" of this work when conciliation fails and must rely on these statistical analyses to evaluate whether a lawsuit should be filed and to prove

discrimination at trial. If the Commission and OGC maintain their current roles, greater coordination, communication, and joint trainings would help minimize the problems raised by respondents.

Performance Management, Measurement, Analysis, and Data Use

Recommendation 10: Provide breakout categories for the timeliness measures for the current measures of both processing times and amount of charge inventory. This will help the EEOC determine which types of cases have timeliness-related problems, enabling it to identify where problems appear to exist and encouraging attempts to alleviate the problems. In later reporting periods, such as after corrections have been made, the EEOC will have information as to the extent of progress. Averages, by combining the data on all types of cases, are fine as an overall aggregate measure but do not show key differences among types of cases and make it difficult to monitor trends for SA cases. Representatives from both OFP and OGC should jointly select the breakout categories. Some examples of possible breakout characteristics are activity (e.g., times for mediations, for conciliations, and the time taken to decide if unsuccessful conciliations will be litigated or not) and charge category (e.g., SA, A, B, and C).

Other measurement variations the EEOC might consider, include: (a) the number and percentage of cases that exceed preselected targets (these are more likely to get people's attention); and (b) the use of medians, which has the advantage that extreme values do not have excessive weight as might occur with averages.

Recommendation 11: Develop a process for tracking compliance with injunctive relief contained in consent decrees. It may be appropriate for some district offices to rely on paralegals while other districts might rely on attorneys. At a minimum, regional attorneys, in conjunction with OGC, should identify who is responsible for reviewing compliance, how frequently staff should monitor compliance, how to track compliance in a practical and valid way, and what procedures to follow if an employer is violating the terms of a consent decree. As a part of compliance tracking, OGC could develop an outcome measure to track the extent to which employers do or do not comply with consent decrees.

Some steps to consider include (1) where feasible, using independent monitors, acceptable to the EEOC, who would provide more credible monitoring reports than those coming from employers; (2) integrating outreach and education efforts into consent decree monitoring, where resources are available, so that workers in affected communities are aware of consent decrees and what recourse they have if employers fail to remedy discrimination; (3) establishing a process that automatically raises an alarm if new charges arise involving employers with past offenses; and (4) identifying and disseminating a set of best practices for compliance reviews obtained from districts that have been able to undertake these reviews.

Recommendation 12: Prioritize the current effort to develop a process for estimating the effectiveness of particular forms of injunctive relief in preventing future discrimination. The EEOC might, as part of this effort, explore creation of a clearinghouse of evidence-based practices that appear to prevent employment discrimination and could be included in consent decrees. (EEOC might also encourage further academic research on this issue.) As noted above, such a study is called for in the section on “Long-Term Research Projects” of the recently released Research and Data Plan. More recently, we have been advised that this study is already being conducted.

Recommendation 13: Consider combining OGC and OFP statistical performance data into one report. Disseminate, and make easily available, statistical quarterly performance reports to staff at the district office level. This would serve the dual purpose of (1) showing the flow of activities from intake through case closure, making the agency more performance driven and (2) emphasizing the importance of collaboration between litigation and enforcement staff. Each party has an important role that eventually affects most performance indicators in achieving the ultimate goal of reducing discrimination. Information on numbers of case filings, conciliations, settlements, consent decrees reached, and employer compliance could be of interest to each office. It will enable the staff to see the whole picture, including their own part, of this very important process. Because there is so much data, some selectivity would very likely be needed to avoid overwhelming users with numbers.

To make this process considerably more useful, it would be helpful if analysts had time to examine each quarterly report, even if only briefly, and then highlight for both enforcement and legal those performance numbers that likely warrant attention.

Recommendation 14: Also provide each district with *its own* statistical quarterly report. This report would provide each district with the latest district’s data on each of the performance measures. This new report would not provide data on all the other districts. This, we believe, would make the statistical data easier to use and be more meaningful to each district. A way to improve further the utility of these reports would be to include time trend information (e.g., year-to-year comparisons, own district-to-national or to regional averages, and data on previous quarters).

Recommendation 15: Consider introducing a measure of the number and type of SA cases that were not litigated, preferably broken out by the reasons why. It can be argued that a major national concern is the number of SA cases that failed conciliation and were not litigated even though agency staff had identified such cases as priorities for potential litigation. For example, it may be that: the strength of the evidence was not deemed sufficient; the case did not fall under one of the SEP priorities; adequate private counsel was available; or the case was meritorious and the regional attorneys might have pursued litigation if they had more resources. Such information, examined over time, can raise important issues regarding resource limitations or other issues.

Recommendation 16: If not already being done, consider such options as: (a) using a segment of the existing leadership meetings or (b) holding separate regular leadership meetings on the performance data. In either case

these would be “How Are We Doing?” sessions with litigation and enforcement leadership at the EEOC headquarters, sessions with a focus on examining progress on key performance measures. These sessions might be jointly sponsored by the General Counsel, the Chief Operating Officer, and the OFP Director to review, assisted by ORIP, the latest quarterly statistical report. A rotating sample of regional attorneys and district directors might be asked to participate remotely in these meeting to offer their insights from the field. The meetings would address such topics as:

- Where does the data indicate we have problems?
- What actions might be taken to alleviate those problems? By whom? By when?
- Where has the agency succeeded and how might it continue to build on past successes?
- What progress has been made on actions decided on in previous quarterly meetings?

These meetings are similar to the data-driven performance review meetings overseen by the Office of Management and Budget for high-priority agency goals.

Similarly, regional attorneys and district directors in each district office should be encouraged to hold their own similar “How Are We Doing?” meetings using the quarterly data from litigation and enforcement statistical reports as a starting point. Key staff from enforcement and litigation would also participate.

Recommendation 17: Pilot annual district office work plans to update priorities based on current national and local conditions and track progress toward SEP and DCP goals. Encourage each regional attorney and district director to annually review the data on the status of pending charges and litigation, the resolution of charges and litigation over the prior year, staff workloads, any expected changing local and national conditions, and develop a district performance plan for the coming year. These efforts would build on current annual workload reviews undertaken by the districts. To reduce the work involved with producing formal plans, this annual review might be treated as an informal exercise. The purpose of the pilot is to assess the usefulness and practicality of such efforts.

This district enforcement-litigation performance plan would address staffing issues, training needs, and changes in strategic priorities consistent with the SEP and DCP and contain strategies for the coming year. The regional attorney and district director can use the district’s data from the quarterly statistical reports provided by OGC and ORIP as one basis for developing the plan. That data would help them identify the current strengths and weaknesses in producing desired outcomes, including addressing the capacity of the district office, given staffing limitations. The review would seek to identify the reasons for the strengths and weaknesses, and then identify desirable actions for the coming year. These reviews should include an examination of the workload held over from previous years and consider the district’s expectations about the forthcoming year’s new workload, based in part on trend data. The availability of staff to address the estimated workload would also be addressed. The

district might set targets for itself on some of the performance measures and then during the year track its progress in meeting those targets.

Reviewers of the draft report expressed the reasonable concern about the time and resources needed to prepare these plans, including how well they can operate with respect to the EEOC's charge-driven system. The time and resources would need to be justified by sufficient usefulness of the work to the district. That is why we have recommended piloting this process, perhaps in two or three districts, preferably ones that volunteered.

Recommendation 18: Reexamine the EEOC's performance measurements including the additional measures recommended in recommendations 10, 11 and 15 and those included in appendix D. Select some measures for future regular internal and external reporting. Much of the data for tracking many of these measurements already appear to be available.

Administrative Issues

Recommendation 19: Examine the EEOC's exit-interview process and the findings from these interviews to better understand reasons for turnover. Survey legal and enforcement supervisory field staff. If the findings indicate that problems exist, a review of GS grade and step levels for attorneys, investigators, and paralegals may be needed to ensure that skills of applicants entering these positions are appropriate and the ability of the agency to retain experienced, skilled staff is maintained. In Section VI ("Future Areas of Study") we recommend the EEOC conduct an in-depth resource review.

Recommendation 20: Consider providing more training to attorneys and investigators in three areas:

- Basic understanding and interpretation of data and the nature and use of basic analytical tools and statistics employed in developing cases.
- Human relations and teamwork skills.
- Management skills (suggested by one official), particularly for attorneys who have extensive trial and litigation experience but less experience managing the office of a public agency. This training would likely also be relevant to supervising attorneys (and investigation supervisors).

Recommendation 21: Expand efforts to identify and share best practices in areas such as: (1) ways to strengthen collaboration between attorneys and investigators (as recommended in Recommendation 7); (2) ways for attorneys and investigators to analyze performance measurement data; (3) ways to follow up on compliance with consent decrees and conciliations (as recommended in Recommendation 11); and (4) ways to make reasonably accurate projections of workload for the forthcoming year.

Appendix G: Agency Comments on Urban Institute Draft Report



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

MEMORANDUM

TO: Milton A. Mayo, Jr.
Inspector General

FROM: P. David Lopez
General Counsel *P. David Lopez*

SUBJECT: Comments on draft Report for Evaluation of Litigation Program

DATE: May 5, 2016

Thank you for the tremendous work devoted to this project and your ongoing effort to enlist our feedback and comments. The Office of General Counsel agrees with many of the recommendations in the Draft Evaluation of the EEOC's Litigation Activities prepared by the Urban Institute. Several of the recommendations are on point and could be adopted. Below are our general comments on the draft, followed by more specific comments.

General Comments

As a general matter, we believe that the usefulness of some of the recommendations needs to be balanced against the resources implementing them would require, and that implementation decisions must take into account the reasons for differing office practices in some areas. (See examples in the next two paragraphs.) Also, data is necessarily important to effective decision-making, but is not an end in itself; time considerations in generating it aside, it is the relevance of the data not the amount that counts.

With respect to balancing value against resources, although the annual work plans (Rec. No. 17) appear unobjectionable on the surface – naturally, the time invested in planning often saves much more time in future practices, and should enhance quality – in a charge-driven agency like EEOC, there is not a lot of opportunity to change processes and priorities based on matters like “current [or changing] local and national conditions” (whatever conditions are considered relevant to processing employment discrimination charges). And we believe staffing issues and training needs can be adequately addressed without a formal plan.

Regarding differing practices among offices, providing guidance on field attorneys' participation in charge classification (Rec. No. 2) might seem a good (maybe obvious) way to increase the effectiveness of that participation, but the kind and degree of attorney participation differs among offices for a variety of reasons (e.g., historical, staffing) particular to each office. Indeed, the

purpose of the September 2011 guidance was to establish minimum requirements for effective attorney/investigator interaction; the guidance did not address methods of initial charge classification. In some offices, attorneys review all charges; in others, only charges that have been given certain designations by enforcement unit staff. What is important is that the district director and regional attorney give adequate consideration to each unit's needs and interests in determining how charge classification should work in their office.

Regarding general characterizations about operations in the field, OGC believes the Evaluation should be cautious -- particularly in view of the few field legal staff interviewed by the Institute - in citing as evidence of general problems incidents that may have made a strong impression on the agency employee interviewed, but in practice are either unusual or readily explainable. In the second paragraph of the Legal and Enforcement Collaboration section (p. 10), the Evaluation mentions reports from two interviewees that attorneys sometimes refuse to agree to what an investigator believes is a strong conciliation settlement and the legal unit then fails to file suit. Although OGC cannot say this has never occurred (we are aware of one such incident that happened many years ago), to say this would be a rare event is an understatement. Investigators and attorneys often disagree on whether a case merits litigation, but where the attorney thinks it does not, he or she has a very strong interest in seeing the case resolved in the administrative process. In the same paragraph, the Evaluation refers to concerns that less experienced attorneys sometimes draft their own information requests without first requesting a description of the respondent's data. Again, mistakes can happen, but independent of an attorney's experience, there will be disagreements (and in our view, those disagreements are more likely between the legal unit and ORIP than between an attorney and investigator) regarding the most efficient manner in which to request data. Such decisions must be made on a case-by-case basis in the context of the facts of the case and the resources of the offices, and OGC believes it would be difficult for headquarters to provide guidance that would eliminate disagreements over the decisions. Indeed, it is often through efforts to discuss differing perspectives that the agency arrives at the most optimal course.

Similarly, we are also concerned with the report's assertion that "attorneys" complained about the "quality" of some investigators (p.10 -11). No trial attorneys were interviewed so this statement in the report is simply not accurate. Only three Regional Attorneys were interviewed and to the extent they may have shared concerns about investigations, those concerns focus on the skill level required by investigators to complete complex investigations and the agency's ability to attract the best qualified staff to do so. Likewise, the draft states that "investigators" perceive that some attorneys do not provide enough support to them (p. 11). However, no investigators were interviewed. We would urge OIG to refrain from making such generalized statements given the very few field staff interviewed for this evaluation.

Last, OGC agrees that better coordination between the analysts in ORIP providing support in class and systemic investigations and field attorneys assisting in those investigations (Rec. Nos.

8-9) is necessary. One approach would be to move the ORIP analysts supporting investigations into the Office of Field Programs, the agency office responsible for the investigations. Because field attorneys and investigators normally work together effectively, making the ORIP analysts part of the investigative team, as opposed to an outside third party managed by a different Commission office, would avoid the complications that arise, particularly regarding statistical analyses, when a case moves to the legal unit following a conciliation failure. In addition, placing the analysts under OFP should help resolve, or at least reduce, the timeliness issues that now exist with ORIP's work, as OFP management would be in a position both to oversee the analysts' work on investigations (including determining what work should or shouldn't be done in a particular case and the scope of any analysis), and prioritize the work among and within offices. Assuming a structural change is not feasible, at a minimum, we agree there should be better communication between attorneys and ORIP, and between ORIP and RAS. It is not efficient for litigation experts to start from scratch in requesting data when ORIP has already done this.

Specific Comments

Although it may seem like a minor matter, the use of the word "loan" in the Evaluation's discussion of collaboration among legal staff in different district offices (p. 9) gives the misimpression that attorneys belong to a particular district rather than being part of a single national legal program. Much of the effectiveness of the collaboration among legal staff recognized in this section of the Evaluation is a consequence of OGC's view that every suit is an agency action, rather than the property of the particular office that happened to file it.

OGC agrees with the recommendation (No. 5) that the legal unit should explain why a case that has been investigated as a litigation vehicle is not litigated following a conciliation failure. The explanation should be made by the regional attorney to the enforcement unit manager(s) involved, and the regional attorney should ensure that it is communicated to the relevant investigator. Not only are such explanations important to the legal/enforcement relationship, they also will help address what the Evaluation believes are a lack of criteria for classifying charges and making litigation decisions (Rec. Nos. 1 & 15).

OGC however, has some reservations about the recommendation (No. 15) that tabulations be developed showing the reasons why failed conciliations are not litigated. EEOC litigates only a small percentage of conciliation failures (less than 10% in recent years), and there are many reasons for this (some of which, such as strength of the evidence (probably the most common), presence of private counsel, and potential impact, are mentioned in the Evaluation) independent of staffing constraints. Most cases in which conciliation fails were never considered for litigation (and some cases that are considered fall out prior to the reasonable cause stage, making the focus on conciliation failures somewhat artificial). As indicated above, OGC believes that when cases the legal unit has expressed an interest in litigating are not litigated following a

conciliation failure, it is important that the enforcement unit be told why. But we think it is a more difficult question as to whether there is value in devoting resources to recording reasons that are well understood by both legal and enforcement staff early in the investigative process.

In the section on Consent Decree Compliance Reviews (p. 16), the draft states that “consent decrees often start the process of obtaining relief for the victims...” Consent decrees always, not “often” start the process, and always “impose conditions on employers to reduce the likelihood of discrimination in the future.” The use of the word “often” makes it sound like this is occasional when in fact it is required.

OGC agrees it would be useful to provide breakout categories for timeliness measures (Rec. No.10), and we can assist in developing these categories.

OGC agrees it is important that compliance with injunctive relief in consent decrees be tracked (Rec. No. 11). A formal monitoring process exists within OGC, including instructions on procedures to follow when the terms of a decree are violated (see Part 3, section IV.E. of the Regional Attorneys’ Manual). OGC will be reviewing with the regional attorneys the importance of monitoring decree compliance, but we do not believe it is necessary to create compliance review plans. OGC also agrees that depending on the claims resolved in the decree, it may be important to obtain decree provisions requiring independent monitors, the integration of outreach and education efforts, and automatic notification of new charges against the defendant. Except for possibly the last, however, EEOC’s ability to obtain such monitoring mechanisms would require agreement of the defendant, and thus will depend on the agency’s bargaining power in a particular case. Further, while defendants sometimes agree to relief beyond what is likely to be secured in court, the ability to secure specific non-monetary relief frequently is limited by whether courts have been willing in analogous cases to order such relief.

OGC also agrees with the recommendation (No. 12) that the agency explore methods of measuring the effectiveness of injunctive relief, although unfortunately, the review of EEO-1 data, although readily available, will be of little help in that effort. EEO-1 data will show year-to-year differences in the workforce representation (by broad job category) of different protected groups, but in cases involving underrepresentation of a particular group – usually hiring cases – EEOC’s relief typically will include placement of rejected individuals and, where necessary, goals, both of which directly address the only aspects of relief effectiveness that would be indicated on an EEO-1 form.

OGC agrees with the recommendation (No. 19) that GS staffing levels be reviewed to ensure that the agency can attract and retain skilled staff.

Finally, we wanted to raise a question about recommendation No. 21. The first recommended practice regarding collaboration between investigators and attorneys is redundant of recommendation No. 7. The suggestions of the establishment of practices to help attorneys and

investigators analyze performance management data appears to be a management concern and not a task for frontline field staff. The recommendation to establish best practices for following up on compliance with consent decrees appears to be addressed in recommendation No. 11.

Please feel free to contact me or my Senior Attorney Advisor, Leslie Annexstein, if you have any questions.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of the Chair

May 12, 2016

Memorandum

To: Milton A Mayo, Jr.
Inspector General

From: Cathy Ventrell-Monsees
Senior Counsel

Subject: Comments on Draft: Evaluation of the EEOC's Litigation Activities (OIG Report No. 2015-01-LIT) prepared by the Urban Institute

This is in response to your request to Chair Jenny R. Yang for review of the draft report on an "Evaluation of the EEOC's Litigation Activities." The comments are from Cynthia Pierre, Chief Operating Officer, and I, who were interviewed by the Urban Institute in the preparation of its report.

Focus of the Draft

We agree that the enforcement and litigation arms of EEOC must operate as partners to effectively enforce our civil rights laws and that partnering and collaboration during the investigation of SA and systemic cases is critical for EEOC's enforcement and litigation efforts. We also agree that quality investigations are the foundation of strong and successful litigation.

However, much of the draft is focused on the prioritization and investigation of charges under the Priority Charge Handling Procedures (PCHP), which has a different context than the selection of cases for litigation. Attorneys determine how many lawsuits will be filed and can control that number based on capacity and resources. Investigators must handle all the inquiries and potential charges that come in from the public. Enforcement staff prioritize the extent of the investigation a specific charge receives based on the whether a determination that reasonable cause to believe discrimination occurred is likely and the potential impact from EEOC's resolution of the charge. Priorities for both are set, but under different circumstances. The report does not appear to fully acknowledge this important distinction.

The report seems incomplete as it does not examine the selection of cases for litigation, the quality of the litigation effort, time attorneys spend after a failed conciliation in preparing a case for litigation, or the impact of the litigation program.

It also appears that the drafters did not review two key documents, specifically the Priority Charge Handling Procedures adopted by the Commission in 1995, and the SEP Operational

Directive issued December 2013, which are not included in Appendix A and are attached to the email transmitting these comments.

Specific Comments:

Section II Priority Setting

The discussion in this section does not appear to clearly understand how PCHP and the Strategic Enforcement Plan of 2012 (SEP) work together in the prioritization of charges. The six issues identified by the Commission in the SEP direct EEOC staff to focus on these issues as priorities. For PCHP, these issues are given weight in the assessment of whether a charge that has potential merit should receive additional attention and investigation. For litigation decisions, the SEP issues are also given additional weight in selecting among the cases to be filed (after a cause determination and the failure of conciliation).

PP. 5-6

This section contains some incorrect statements that could be due to a lack of information. The report notes that the researchers could not “find any document that describes what SA cases refer to.” (p.6). An Operational Directive from the Chair, General Counsel and OFP Director (December 2013) provides the definition and guidelines for the SA category (attached).

The five "general criteria for determining priorities" were those used by the Commission to select the substantive SEP issues as national priorities and essentially focus on the level of impact of government enforcement. Although some of these criteria are similar to those used to determine which charges are investigated as SA charges, they are not identical. The criteria that staff use to identify SA charges are set forth in the December 2013 Operational Directive.

The next four criteria on page 5 focus on the merits of the charge or case and the extent of resources that should be applied by EEOC.

The statement that the A-2 category is no longer used is incorrect. It continues to be used. The statement that the SA code is only for those "cases that fit within the agency's current SEP and DCP priorities" is incorrect. Any charge that raises an issue that has strong evidence and could have significant impact may be designated as an SA. The December 2013 directive also makes clear that systemic investigations may be designated as SA whether they raise SEP issues or other issues.

With respect to the definition of systemic cases, the 2006 Systemic Task Force Report, unanimously adopted by the Commission in April 2006 sets forth the definition to be used for investigations and litigation. The Commission reiterated this definition in the 2012 Strategic Plan and SEP, making clear that investigations or lawsuits challenging policies are systemic cases. The designation of whether a lawsuit is “systemic” is made by the headquarters unit in OGC, which ensures consistency.

Comments on Recommendations

A number of the recommendations involve work that is already underway.

Priority Setting

The implementation of the Commission approved plan for [Quality Practices for Effective Investigations and Conciliations](#) includes rigorous application of PCHP. The agency is undertaking focused attention, training and assessment for more consistent and concerted application of PCHP.

The December 2013 Operational Directive recognizes the partnering role that investigators and attorneys have in identifying cases for potential litigation. If there is a lack of clarity on the implementation of that guidance, OFP and OGC should discuss how best to ensure there is a clear understanding in each office.

Relationships and Collaboration

Recommendation 4 - A survey is in development and will be conducted this year.

Recommendations 8 and 9 – The Office of the Chair will take these suggestions under advisement. However, they appear to assume a lack of quality or efficiency, without have examined either the quality or efficiency of the work product of ORIP or RAS.

Performance Management

Recommendation 10 – The report does not explain the relevance of break-out categories for the charge inventory to improving litigation activities.

Recommendation 11 – We agree that tracking compliance with injunctive relief is critical to effective enforcement. The Office of the Chair will be working with the program offices to explore potential tracking systems and the sharing of best practices.

Recommendation 12 - Pursuant to the Commission approved [Research and Data Plan](#), an effort is already underway by ORIP, OFP, and the Chair's office to examine the effectiveness of forms of injunctive relief. This will be examined more thoroughly by key staff during two conferences this June.

Recommendations 13-14 – These reports are already provided to District Directors and Regional Attorneys. Quarterly reports on enforcement and litigation data are provided to District Directors and Regional Attorneys.

Recommendation 15 - We do not believe that a reporting procedure on charges that failed conciliation would be an efficient use of the agency's limited resources, as the time entailed in such reporting would likely outweigh the benefits. The agency finds cause and conciliates thousands of charges each year based solely on the merits of the charges, without regard to whether the Commission would likely litigate those cases.

Recommendation 16 - The Commission currently holds quarterly briefings for Commissioners at which the leadership of OGC and OFP report on their activities and the progress in their

programs. The Chair also regularly meets with the General Counsel and the Chief Operating Officer meets weekly with the Director of OFP.

District offices routinely hold quarterly meetings between the leaders of their enforcement and legal units, and some meet more frequently. District offices also have annual operational work plans with projections for the year's activities.

Administrative Issues:

Recommendation 19 - The grade-level structure has been studied and OPM has conducted classification audits in the past. The work being done supports the grade structure we currently have.

Recommendation 20 – We appreciate the recommendations about training and will consult with our Office of the Chief Human Capital Officer.

Thank you for the opportunity to comment on the draft report.

List of Attachments:

1. Priority Charge Handling Procedures (1995)
2. Operational Directive implementing the Strategic Enforcement Plan (2013)

cc: Cynthia Pierre
Mona Papillon



Office of
Field Programs

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

May 2, 2016

MEMORANDUM

TO: Milton A. Mayo, Jr.
Inspector General

FROM: Nicholas M. Inzeo, Director
Office of Field Programs

SUBJECT: Comments on Draft Report, "Evaluation of the EEOC's Litigation Activities" (OIG Report Number 2015-01-LIT), prepared by the Urban Institute

This is in response to your request for review of the draft report, "Evaluation of the EEOC's Litigation Activities." We have completed our review and offer the following comments:

Focus Areas of Report – Overall Comments

Generally, we agree with many of the report's findings and recommendations regarding EEOC's litigation and enforcement activities. In fact, we have already been implementing a number of the measures that the report suggests we adopt. As the Institute indicates, the evaluation is a quick overview of litigation-related activities that could benefit from further attention. The Executive Summary states that "an overarching finding of [the] study is that litigation and enforcement activities, while under completely separate organizational offices, are linked closely together... [and the] overall recommendation is to strengthen the EEOC's partnerships between OFP and OGC - members of the same team working toward a common goal" (page E-1). This is an objective that we have long embraced and continue to support as a top priority.

As stated in Section 1, Introduction, this report was commissioned by the OIG to evaluate the litigation function of the EEOC, focusing particularly on issues relating to the "planning, management, and performance" of litigation work by the EEOC. The report's four broad areas of focus are stated as: priority setting; relationships and collaboration; performance management, measurement, analysis and data use; and administrative activities (page 1). While we agree that an assessment of EEOC's litigation work must also examine aspects of EEOC's enforcement activities, our overall reaction is that the report seems incomplete. The report examines pre-litigation case development activities to the exclusion of devoting any real consideration to the litigation program itself. The report's focus seems to have shifted away from the subject area for which it was commissioned. Of the 21 recommendations in the report, only two deal exclusively or substantially with litigation.

We had expected that an evaluation of the litigation program would have looked at matters related to the success and impact of the litigation program in furthering EEOC's mission. Such an evaluation could also examine, for example, the content and balance of the litigation docket or the scope and effectiveness of the program in enforcing all of the statutes within EEOC's authority. The report, however, evaluates only one significant substantive aspect of litigation -- consent decrees -- and much of that discussion is also devoted to conciliation agreements. We agree with the report on the importance of measuring and ensuring the effectiveness of consent decrees (and conciliation agreements) but the report seems to bypass any evaluation of earlier phases in the litigation of EEOC's cases.

As an evaluation of enforcement activities, the report contains some useful recommendations that should be implemented, or in many cases, already are being implemented. Some of the recommended measures are well-established activities of our legal-enforcement collaboration program. For example, the report recommends that we clarify the criteria for assessing charges under the Priority Charge Handling Procedures and the role of attorneys in making certain designations. Such clarification was provided in FY 2013 and in regular training thereafter. It also recommends that we consider adopting the concept of identification of best practices. In fact we have been collecting and sharing best practices for legal-enforcement collaboration for several years. We continue to emphasize and develop best practices on a regular basis. This has been a key part of our program.

As the report recognizes, enforcement and litigation activities are interdependent in critical ways, and we should always strive to improve the relationships that make these activities possible in each district office. We believe that collaboration between legal and enforcement staff is essential to achieving EEOC's mission, which is to stop and remedy discrimination. We have been working diligently to support and strengthen collaboration in all of our offices, and we note below some of the many steps we have taken and continue to take in order to foster this joint partnership between enforcement and legal.

The report does provide useful recommendations for enhancing the administrative support of the litigation program through better technology. It also suggests ways to analyze and use data in planning and evaluating litigation and enforcement activities. We think that these recommendations are worthwhile avenues to pursue.

Section II, Priority Setting

This section of the report recommends: (1) clarification of the criteria for classifying charges, in particular providing greater clarity in defining SA cases and systemic case criteria; and (2) more guidance on the role of field attorneys in the PCHP charge classification process, including for A, SA, and systemic cases.

We agree that it is important to have clearly focused priorities for enforcement and litigation. Following the Commission's adoption of the Strategic Enforcement Plan in 2012, we have devoted considerable time and attention to implementation of the SEP priorities, including through agency-wide staff training. This training emphasizes how the SEP priorities interact with the Priority Charge Handling Procedures (PCHP). The quarterly SEP briefings to the

Commission provide a regular opportunity for OGC, OFP, OLC, ORIP, and field leadership to discuss progress in pursuing the priorities through enforcement and litigation cases, including systemic cases. These efforts also have enabled us to fine tune and clarify staff understanding of the priorities. District Directors and Regional Attorneys from selected offices participate in these briefings. Offices report on particular cases, including cause findings, conciliations, and litigation. Thus, promoting clear and consistent understanding of priorities has been an ongoing endeavor.

This section of the report, however, reflects many misunderstandings of the EEOC's priorities. It presents an incomplete picture of how the Strategic Enforcement Plan, the Priority Charge Handling Procedures, and the Systemic Program have been implemented. To clarify and correct this section of the report, we have attached several documents that may provide a fuller picture of what we have done. We believe this section of the report needs to be fundamentally rewritten and the recommendations reconsidered as they appear to be based on incomplete information.

There are three main areas requiring clarification in this section of the report:

(1) Definition of SEP Priorities: The report misstates the priorities adopted by the Commission in the 2012 Strategic Enforcement Plan. The Commission adopted six substantive priorities, with one of the six (Emerging and Developing Issues) having three subcategories. Although the report's Appendix D correctly lists these six substantive priorities, the report itself does not mention these six priorities (page 5), but instead quotes from the section of the SEP in which the Commission discussed the types of considerations it had in mind when deciding upon the specific priorities. In other words, the report mistakes the Commission's explanation of its deliberative process for the actual results of that process, which are the six priorities as listed in the Appendix.

The report lists "five general criteria for determining priorities" from the SEP and then states that whether a case meets the five SEP criteria "appears highly subjective (possibly accounting for some of the differences of opinion between investigators and attorneys)" (page 6). In fact, the actual SEP categories that apply on a case-by-case basis as charges are evaluated at intake are those listed in Appendix D. These SEP priorities are not subjective, but clearly defined and focused on certain enforcement issues. These definitions have been reinforced through training.

(2) Definition of PCHP Categories: Further, the report makes a number of mistakes in describing the Priority Charge Handling Procedures, which were adopted in 1995. The report cites only the 1998 follow-up Commission task force report, rather than the original 1995 PCHP report itself. The 1995 report's recommendations were adopted by the Commission and Chairman and established the charge categorization process we use to this day. It is the 1995 PCHP document that defines the prioritization categories for charges. On page 6 of the report, the definitions of the PCHP categories for A, B, and C charges are paraphrased somewhat inaccurately. The report does not reflect the PCHP definitions that EEOC staff consistently use in assessing the merits of a charge, at intake and at key points during the investigation.

The PCHP definitions are based on an evaluation of the likely merit of a charge, beginning at the intake interview:

Category A – Charges where it appears more likely than not that discrimination occurred.

Category B – Charges that initially appear to have some merit but require additional evidence to determine whether it is more likely than not that a violation has occurred.

Category C – Charges that initially appear to lack merit and it is not likely that further investigation will result in a cause finding. Category C charges are suitable for immediate dismissal.

The report also erroneously states that there is no definition of the SA category. The report recommends that guidance be given on how the SA category is selected by legal and enforcement staff. In fact, the SA category, which was introduced with the SEP implementation in 2013, has been clearly defined. It is a subcategory of A charges and designates those cases that have strategic significance for enforcement and/or litigation. The criteria for this category are set forth in the assessment process that investigators must follow for each charge at intake and thereafter. As the report notes, enforcement and legal staff must jointly make the determination of strategic significance.

The definition of SA cases and the process for designation of such cases are set forth in the attached memorandum, dated December 2, 2013, from the Chair, General Counsel, and Director of Field Programs, to District Directors and Regional Attorneys, entitled “PCHP Operational Directive for Implementation of Strategic Enforcement Plan and District Complement Plans.” Following issuance of this directive, OFP and OGC provided training to all legal and enforcement managers and staff, on an office-by-office basis, over a series of weeks. The training focused both on the definition and application of the SEP’s issue-based priorities and reemphasized the PCHP framework for assessing charges based on likely merit. It also addressed the identification of systemic cases.

The 2013 updating of the PCHP criteria introduced the SA category as a replacement for previously used categories of A-1 and AY, which designated charges for potential litigation but were subject to varying interpretations and criteria in the field. Thus, the SA category brings greater clarity and consistency. To be assessed as SA, a charge must initially appear to have likely merit, in other words, to be an A charge. Then, there are four specific criteria for determining whether strategic significance exists, an assessment made jointly by enforcement and legal staff that “government enforcement or litigation will have strategic significance, meaning it will: (a) have a broad deterrent impact (beyond the parties), or (b) have an impact on a large number of individuals, or (c) have an impact on the development of the law, or (d) have an impact from the presence of EEOC enforcement (e.g., geographic presence or as the primary enforcer).”

The SA designation additionally underscores that systemic enforcement and litigation are an essential priority of the EEOC and an important focus of the SEP and District Complement Plans.

In the updating of PCHP to include the SA category definition, OFP and OGC emphasized to field staff that for the Commission to perform its law enforcement mission effectively,

enforcement and legal staff must consult, not only initially at the identification of cases, but throughout the development of A and SA charges.

Finally, the report mistakenly states that the A-2 category is no longer used in PCHP. The report should be corrected to note that the A-2 designation (litigation unlikely) remains unchanged. It is defined as charges where it is likely that discrimination has occurred, but the office has determined it will not or cannot litigate. It is used primarily for charges against state and local government respondents under Title VII and the ADA, where the Department of Justice has sole litigation authority. For such charges, all district offices have special procedures in place to collaborate with DOJ attorneys, who are assigned to each office, on the identification of priority cases for DOJ litigation.

For more information about the charge prioritization process, we attach a copy of the PCHP Assessment Form that field staff use to conduct the assessment of charges for both PCHP categorization and identification of SEP priorities, including coordination with legal on the decision that a charge is an SA case. As you will note, this form states the criteria for each PCHP category. It also emphasizes the need for legal concurrence on SA cases. The form includes a space for legal review. In all cases, the results of the assessment are recorded and documented in IMS via the charge “prioritize and categorize” screen, a copy of which is also attached. The IMS charge file would also reflect consultations and decisions made with the legal unit both as to initial charge categorization for A and SA cases, and at subsequent stages of the investigation. In addition, frequent and open dialogue should occur between legal and enforcement staff on the development of A and SA investigations.

(3) Definition of Systemic: We do not understand the report’s assertion that there is a lack of clarity regarding how systemic cases are defined.

At the outset of the Systemic Initiative in 2006, the Commission adopted a clear and specific definition of what it meant by a “systemic case.” The Commission reiterated this same definition in its Strategic Plan for Fiscal Years 2012 – 2016 and then in its Strategic Enforcement Plan, both of which were approved by Commission vote. We have applied it consistently in enforcement and litigation for the past ten years. As stated in the SEP, “The Commission defines systemic cases as pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area. While systemic cases typically involve a class of individuals, they may also originate from a single charging party alleging that a policy is discriminatory, for example.”

In training and guidance to the field, OFP has continued to focus on this definition. We use it in the quarterly reviews of each district office’s systemic investigations and litigation, which we conduct jointly with the Office of General Counsel. We highlighted the definition in a directive to the field issued by the Chair, the General Counsel, and the Director of Field Programs, requiring the reevaluation of each district’s infrastructure for investigating systemic cases. This February 25, 2015 memorandum to District Directors and Regional Attorneys stated:

EEOC’s Strategic Plan defines systemic cases as pattern or practice, policy, or class cases where the alleged discrimination has a broad impact on the industry, occupation, or

geographic area. EEOC's systemic work can thus take many forms. It can consist of big systemic cases on behalf of a large group of victims, cases that are smaller in scope that have an impact on the development of the law, and cases that involve important changes to employer policies and practices. Each District's systemic work and its mix of cases will necessarily depend on a number of factors - the nature of the industry and employers in the area, the particular systemic issues that arise most frequently, staffing resources, and the priorities in the District Complement Plan.

We have attached a copy of this memorandum and ask that the report be revised to reflect that EEOC's leadership provides consistent and clear guidelines on systemic cases.

For the discussion of "Attorneys' Role in the Investigation and Conciliation Process" (page 8), we offer several clarifications. The report states that "Some larger offices are able to designate investigators to work primarily or exclusively on systemic cases, and attorneys participate in deciding what relief should be pursued during the conciliation process." We would clarify this sentence to reflect that all Districts have a lead systemic investigator working exclusively on systemic cases. Attorneys in all Districts participate in deciding what should be pursued in conciliation. This is true for all systemic cases in the District, including those cases that may have originated in a District's smaller field, area, or local offices.

The final sentence in this paragraph states that it is "unclear . . . if there is consistency across districts in terms of which cases are designated systemic." We disagree, and believe there is consistency. All Districts operate using the definition set forth above. On a quarterly basis, OGC and OFP leadership, including OFP's National Systemic Coordinator, meet with each District's legal and enforcement leadership to go over the District's systemic cases. These meetings review both newly identified systemic cases and those in investigation and conciliation. We work closely with each District to ensure consistency and a strategic, nationwide approach to addressing and remedying systemic discrimination.

Section III: Relationships and Collaboration

In the discussion of "Collaboration between Legal and Enforcement Staff within a District," the acknowledgment that we must continue to improve the relationships between attorneys and investigators is key. We agree that attention must be given to addressing concerns that respectful collaboration should exist in all offices. Addressing that concern has been an ongoing and constant part of the agenda of OFP's National Legal Enforcement Executive Advisor, working with District Offices to emphasize that legal and enforcement must be a team and a partnership in case development. While tensions and conflicts will occasionally occur, particularly regarding what may be acceptable or non-acceptable to conciliate an SA case, whether a case proceeds to litigation after a major investment of investigator time, or even whether a case should be priority, that is to be expected. OFP and OGC have been diligently working to address this concern.

This subsection of the report offers five recommendations:

Recommendation number 3 suggests using the term "performance partnership" when referring to the collaboration between legal and enforcement staff to emphasize that they are partners and

members of the same team. We believe there may be a more suitable term in light of our recent leadership conference and the Chair's vision of teamwork and creating a culture of greater accountability. The proposed term, which may be more workable in our law enforcement environment, is "partnership with joint accountability." In the context of legal-enforcement interaction, the term connotes that enforcement and legal staff partner in strategic case development with joint accountability for targeted, equitable relief, litigation filings, and results achieved.

Recommendation number 4 suggests conducting a survey to identify problems and progress in strengthening these relationships. ORIP has been working with OFP's Legal Enforcement Executive to develop a survey for field legal and enforcement staff. The overall objective is to learn how we can best achieve effective legal-enforcement collaboration. Specifically, the survey will explore how to get all field enforcement and legal units working as a team, with coordination, full cooperation, consultation and collaboration to achieve our mission. As stated in the SEP, it is our goal to "stop and remedy discrimination through effective enforcement and legal interaction."

Recommendation number 5 suggests that attorneys should be encouraged to explain to investigators the reasoning behind decisions against litigation, especially when investigators have spent considerable time developing a case. Again, this concept of communicating with the investigator about litigation decisions, has in fact, been implemented as a best practice in several

Recommendation number 6 suggests shadowing or a variation thereof, where investigators shadow attorneys to learn more about their responsibilities, such as depositions and trials. This concept too has been implemented as a best practice in several. It is also noteworthy that a few offices have allowed attorneys to shadow investigators, rounding through intake, observing interviews, onsites, and fact finding conferences, to gain an appreciation for investigator responsibilities.

Recommendation number 7 suggests developing best practices to encourage strong collaboration between enforcement and legal. It is agreed that best practices are very helpful to establish stronger relationships. This concept has not only been implemented in many of our offices, it is ongoing and constantly being built upon. Best practices are shared and used in every office. A list of best practices was shared with the Urban Institute. We have included a copy in the attachments to our comments.

Although many of the recommendations are currently incorporated in our daily work (best practices) or in the process of being implemented (survey of staff), the report's evaluation and many of its recommendations regarding collaboration are encouraging. It confirms the utility of the approaches we are pursuing.

Section IV: Performance Management, Measurement, Analysis, and Data Use

In this section, the report offers a number of suggestions to collect and share data from IMS to generate more valid and meaningful measurement of the outcomes of EEOC's enforcement and

litigation. These recommendations are consistent with the focus of the EEOC's Research and Data Plan for 2016 – 2019. We agree that collecting the right data is important and that District Directors and Regional Attorneys should understand and work with the data regularly (page 17). The report focuses primarily on ORIP's Data Summary Report. The report's recommendations number 13 and 14 suggest disseminating or making easily available national statistical quarterly reports to all Districts and providing each District with its own statistical quarterly report.

In fact, such reports are provided. ORIP prepares and OFP and OGC disseminate the "District Directors Quarterly Report" to all District Directors and Regional Attorneys. It is a summary of nationwide data, broken down by District, on key indicators for field enforcement activities, workload, Commissioner charges, ADR, hearings, FEPA activities, and preliminary litigation figures. It provides district-to-district comparisons as well as trends and cumulative data. Among other things it includes data on: pending charges, at the beginning and end of the quarter; charge receipts and resolutions; issues alleged in the charges; staffing levels; settlements, cause findings, successful conciliations, mediated resolutions, and monetary benefits; and lawsuits filed and pending. Finally, an essential and more frequently disseminated data summary is available weekly for each District. Directors have access to this Hyperion-based report in a dashboard format. These reports give District Directors the most currently available information on charge receipts, categorization, resolutions, workload, and other key indicators.

With regard to tracking compliance with conciliation agreements, we agree that more attention should be given to examining what practices are most effective at stopping and remedying discrimination. The report states that for the fourth quarter of FY 2015, the ORIP Data Summary Report reflects that only 3 of 15 district offices had conducted an appreciable number of reviews of compliance agreements. This data may be misleading. Some conciliation agreements do not require ongoing monitoring. Others provide for review by an outside monitor, as we have found that use of outside monitors can be a very effective tool in ensuring compliance. A meaningful number would compare the number of agreements requiring ongoing monitoring by the EEOC and the number of such agreements actually being monitored.

Recommendation number 17 suggests that District Directors and Regional Attorneys annually review the status of pending charges and litigation, their resolution, staff workloads, and local and national trends, to develop a plan for the coming year. We believe that District Offices generally do this already, through a variety of ways including annual management meetings. For the systemic program, quarterly meetings are held with OGC and OFP leadership in order to review each District's systemic docket and to coordinate and plan case development activities for the future.

In the subsection on "Measurement of Success in Reducing Employment Discrimination," recommendation number 18 suggests that the EEOC reexamine its performance measures and add or continue those recommended in the Appendix. We agree with the measurement of targeted equitable relief as an outcome measure, as is provided in our current Strategic Plan, and we think that some of the other measures are worth considering when that Plan is updated. The report in some places, however, characterizes EEOC's overall mission as "reducing national employment discrimination levels." We believe this mischaracterizes the mission in a way that could produce perverse results. The Strategic Plan states our mission is "to stop and remedy

unlawful employment discrimination.” This statement of mission suggests the dynamic activity that must occur for EEOC to perform well. The Urban Institute’s statement would encourage many to measure success by measuring fewer charges being filed or fewer findings of reasonable cause being made (for example, the recommended measure number 9, which would measure “recidivism” by looking to the level of subsequent charges and cause findings against employers that have previously been found to have violated the law). When the agency would be rewarded for taking fewer charges or making fewer findings, regardless of the true merits of taking a charge or making a finding, we continue to believe that this statement of mission is not workable for EEOC.

The report recommends that OGC and the Chair’s office should review cases that failed conciliation but were not chosen for litigation, suggesting that such a review could identify problems and provide evidence for increasing resources. This recommendation is based on the faulty assumption that all cases which fail conciliation are potential litigation vehicles. Many cases which may fail conciliation were never considered to be appropriate for litigation. If such a review occurs, it should be based on all charges which fail conciliation that are not chosen for litigation, but would have been good litigation vehicles. Further, since this would in essence involve a review of the enforcement process, OFP should also be involved in this review.

Thank you for the opportunity to comment on the draft report.

List of Attachments:

1. Memorandum from Chair, General Counsel, and Director of Office of Field Programs, “PCHP Operational Directive for Implementation of Strategic Enforcement Plan and District Complement Plans,” December 2, 2013
2. PCHP Assessment Form (template)
3. IMS Screens: Charge Prioritize and Assess Selections
4. SEP Priorities and PCHP Updates – Examples of Training Powerpoints (2014 -2015)
5. Memorandum from Chair, General Counsel, and Director of Office of Field Programs, “Systemic Program,” February 5, 2015
6. Legal-Enforcement Interaction Best Practices List
7. Example of District Directors Quarterly Report (ORIP) – First Quarter of FY 2016 and Fourth Quarter of FY 2015



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of Research,
Information and Planning

MEMORANDUM

DATE: May 6, 2016

TO: Milton A. Mayo, Jr
Inspector General

FROM: Deidre M. Flippen Director
Office of Research, Information and Planning

SUBJECT: ORIP Comments on Draft Report for Evaluation of Litigation Program
(OIG Report Number 2015-01-LIT)

Attached are our comments on the subject draft report. Thank you for the opportunity to provide comments.

Attachment

In 1974, the Urban Institute produced a classic guide for program evaluation, *Measuring the Effectiveness of Basic Municipal Services*. The document stressed the importance of developing carefully defined objectives and performance measures in order to evaluate a program. Apparently, the Urban Institute no longer believe in that guidance and instead use simple hearsay to make program recommendations for change regardless of whether the program is successful or not. To make matters even worse, apparently if you are evaluating a program, litigation in this case, you do not have to look at the program you can focus on any number of other programs, instead.

Specific comments follow.

Page E-3: "Investigate options for correcting the rigid separation of the efforts of these offices [ORIP] and [RAS], if only for systemic cases. An obstacle is that these offices have different chains of command". It is somewhat surprising that the study fails to (1) show the need for the offices to be separated and (2) document that the separation causes any problems.

Page E-3: "Relations are somewhat strained between Research and Analytic Service (RAS) and the Office of Research, Information and Planning (ORIP) specifically the division that supports the work of the district office enforcement on systemic cases." It is unclear why the study concludes that the relations are strained. What are the bases for that? How is it measured? The fact that the authors of this study did not even bother to find out the name of the "Division" (Program Research and Surveys Division) reflects a lax approach to their study. In that same paragraph they refer to ORIP with two different names. Finally, in ORIP's interview with the researchers, our position was there was no strain between our offices. Yet, they reported that there was one.

"Establish a task force or other work group to develop a process for estimating the effectiveness of particular forms of injunctive relief". Task forces are a very ineffective and fleeting process for measuring and analyzing data. There should be a recommendation regarding accountability for doing this not the establishment of a "task force". ORIP is the obvious source of staff for doing this. When you create a task force, like any re-organization, it is a political recommendation not one based on efficiency and effectiveness. The purpose of an evaluation should be measurement not politics.

Page E-4: "The Office of General Counsel (OGC) and the Office of the Chair should regularly review statistics on cases that failed conciliation but were not chosen for litigation." Why is the Office of Field Programs excluded from this?

Page E-4: The study proposes quarterly performance review meetings. The purpose of the meeting needs to be defined along with clear objectives. It is not at all clear that the meeting would somehow improve litigation outcomes.

Page E-4: The section recommends a few other "meetings" under the category of "Performance Management, Analysis and Data Use" but this section does not really establish the nexus between these proposed meetings and litigation issues. This will cause of movement from **work** on investigations and

litigation to **talking** about investigations and litigation. There is no analysis that this transfer of funds would be beneficial to the litigation program.

Page E-4 & 5: The study suggests that EEOC conduct a study to see if EEOC attorneys are leaving the agency to go to other agencies. It seems as if this study should have determined if there is a turnover in attorneys and measure how it impacts litigation. That's a pretty simple analysis.

Page 1: The goals of the study are not clearly established, "... evaluation of the litigation function". No objectives of the litigation function are established. It is not surprising then that no performance measures are established. With no objectives established or measures established, the report established a scope of the evaluation that also fails to examine objectives and measures. It does not really establish why the items included in the scope are important to litigation. Even a minor consideration of the objectives of EEOC's litigation program would generate the multiple objectives relevant to litigation. This study seems to fail as an evaluation and simply suggests that there are some undefined problems with the way that OGC is managing litigation.

Page 2: It is striking that the contractor makes the claim that, "The finding from our interviews come from a very small number of respondents. We believe that the sample was adequate enough to obtain a broad overview of the litigation activities and identify issues that warrant EEOC's attention." There is no attempt to indicate why it is adequate. Further, it's disappointing that the standard used by the contractor was "adequate enough". There are ways to systemically conduct a pre-evaluation, see Wholey's work on evaluability assessment. Additionally when relying extensively on interviews it is critical to use structured interviews so that specific numeric values can be derived. Hypothetically, one of three trial attorneys report that investigators lack experience rather than trial attorneys report that investigators lack experience. Certainly a key goal of such an assessment would have been movement towards the definition of meaningful objectives. Instead they just present a number of unsubstantiated observations like there is a strained relationship between OGC and ORIP. This approach ends up resembling biased hearsay more than research. Further, the heavy reliance on interviews necessitates a carefully documented explanation of how these officials were selected and to document that it was done in an unbiased manner. It is critical that this section be added prior to any further distribution of the report. If the contractors cannot establish that there was an unbiased selection of officials interviewed the report should not be released.

Page 5-7: While ORIP is not expert or involved in PCHP, the description here especially with respect to lack of guidance seems inaccurate. The nexus between this whole discussion and evaluating litigation is strained. Do the author's believe that good litigation vehicles are related to PCHP? Then that hypothesis needs to be stated and empirically tested. A nexus between OFP guidance and some confusion about how to classify charges is not even established. This whole section is speculation and is disrespectful to OFP staff and other Commission employees who have worked hard to develop and implement guidance over the years.

Page 8: Although not a critical statement the following statement is typical of the report's pure speculation rather than scientific measurement. "Cases identified as SA or systemic receive the most

attention from field attorneys during the investigative phase and during conciliation.” This might be someone’s idea about what should happen but there is no evidence that it actually occurs or for that matter whether it is or even would be beneficial.

Page 8: Logically one would assume that deciding which cases to litigate is a critical choice in the evaluation of EEOC’s Litigation Activities. Yet this evaluation just repeats the process and speculates that the availability of private counsel to represent an individual complainant is one significant factor in deciding which cases to litigate. What are the other factors? This finding about the importance of private counsel is apparently based on interviews with a few offices. There is no evaluation of whether this is an effective decision. There is no discussion of how this is done, is it some secretive group of attorneys? There is no measurement of the impact of that approach on EEOC’s litigation program if indeed it does happen. For example do cases that EEOC “refers to private counsel” have different results than EEOC’s cases? Rather than a loose description of how litigation decisions **might** be made, it would be much better to determine the impact of these decisions.

Page 9: Here is the finding regarding collaboration between the OGC and OFP Staff. “At the upper levels of the EEOC, our limited examination found that collaboration between the OGC and OFP appears to be working well. Inevitably, this is affected greatly by the relationship among the top officials in these offices.” This might be considered an important element. It is not clear as the study does not explain what it means, why it is important and most importantly how they reach this conclusion. How did the study measure collaboration? Why are we to believe that “inevitably, this is affected greatly by the relationship among the top officials in these offices.” What kind of relationship are the authors talking about lines of communication? It is not clear at all, how will we replicate this in the future?

Similarly, in the next paragraph “OGC receives high marks for effective communication with field attorneys . . .” High marks from what? Was there a test, a survey? If there was some measurement -- how high were the marks? Were they significantly different from low marks?

Page 9-10: The study here again makes similar conclusions based on similar methods. The study seems to limit the concept of a national law firm to sharing attorneys and ignores the concepts of shared expertise and experiences with the Respondent and industry. The following statement is rather meaningless, “Trial attorneys are also quick to volunteer to help with litigation in other districts provided they have the time”. Does “they have the time” mean workload? Was it workload due to the scheduling of their cases, for example, entering the trial period or heavy depositions versus simply having too many cases. It seems like an evaluation would examine if the litigation was adequately staffed and if not was it due to the inability of other attorneys to be able to help. The study at the very least could have counted the number of instances where an attorney from another office had to turn down a request for assistance.

Page 10: In discussing the request for a firm’s human resource information system, the study concludes that “clear guidance from OGC for its field attorneys could clarify the preferred process”. The recommendation is not clear but seriously impacts the how OFP and ORIP are able to do their jobs. The

guidance certainly needs to be coordinated and consensus reached among the offices. It is very important that this section be re-written.

Page 12: The section concerning ORIP statistical support for investigations contains unsubstantiated claims, inaccuracies and a lack of understanding for the division of responsibilities.

- “[I]t is inefficient to have one analyst that does the initial statistical analysis of a case and then have different experts working with attorneys when decisions have to be made regarding both whether and how to prosecute a case”. This is simply a false statement of ORIP’s policy. ORIP analysts are always available to discuss a case with an attorney especially in the context of deciding whether and how to prosecute a case”. In fact we encourage it. Due to the type of information that the ORIP analyst is privy to it might be wise to make attempts to prevent the ORIP analyst from being deposed.
- “Perhaps of greater concerns are complaints we heard about the timeliness and, in some cases, the quality of the statistical analyses conducted by ORIP in systemic cases. “ This is a damning criticism of ORIP with no substantiation about accuracy of such comments. ORIP is not adverse to constructive criticism but this conclusion is professionally insulting. ORIP takes a number of steps to insure high quality reports, the reports are peer reviewed and reviewed by management, they are shared with clients both investigators and attorneys and where appropriate re-drafted or expanded to make certain they meet the clients’ needs. With respect to timeliness, ORIP management reports frequently show that a major cause of the delays is waiting for the correct data. When the investigator and ORIP are not involved in data requests as the study reports in a prior section, it may be necessary to request additional data. Respondents also recognize early on that the case is systemic and a well-known defense technique is to delay the process often by not providing data in a timely manner. The process here is not like the discovery process with more rigid time frames for the defendant to produce materials. Finally, the analyses during the investigative process are much broader in scope thus, time periods, jobs and organizational units covered and even statistical techniques used are much broader. Many of these decisions to expand the scope or use different techniques are made by the clients. The observation about problems in the quality of ORIP reports as noted above run counter to our client surveys, the fact that in fiscal year 2015 ORIP analyses contributed to 88 resolutions of systemic investigations that gained \$29,987,335 in remedial relief and that of the five nonfederal cases featured on our website (EEOC.gov), ORIP provided extensive support in four of the cases. ORIP provided support but limited in the fifth.
- The claim that having two separate offices that work on statistical and other expert services depending on whether a case is in enforcement or in litigation is inefficient fails to recognize the difference in the two types of analytic reports. The analysis completed for an investigation as discussed above, is much larger in scope as the allegations often remain broad and the statistical analyses at this stage seeks to bring a greater focus. In litigation, the analyses must be focused on issues identified in these initial analyses and be geared to the issues of the litigation not the investigation. Further the expert’s report in litigation is subject to attack in deposition including allegations that the expert was swayed by the attorney. Thus, the communication between

investigator, attorney and ORIP analyst prevalent in the investigation stage is more nuanced during litigation.

- The study fails to recognize that prior to ORIP taking on responsibilities for providing statistical support for investigations, there was very limited support for investigations provided by RAS. This was simply because litigation by necessity had tighter court dates so support for litigation had to be prioritized.
- The study also fails to recognize that a key component in the placement of RAS in the OGC was to be able to use RAS staff as testifying experts. It is not clear how many RAS analysts continue to fulfill that role. Given the cost of hiring outside experts, use of internal experts provides significant savings. The study should clearly address that element, including how many RAS analysts have testified in the past year.
- The claim that if there are “multiple analyses conducted of a case but only one supported discrimination, it is possible the expert could be required to testify to the other analyses” seems completely made up. No instances of this are cited and the work of ORIP is an investigative work product. The study’s speculation in this area needs to be removed. Its absurd.
- The study also fails to recognize that the development of the procedures used in ORIP with respect to RAS and OGC were developed by ORIP staff who at one time worked in RAS and were aware of the importance of protecting investigative work products.

Page 16: In the context of monitoring consent decrees, the study makes a recommendation including, “It may be appropriate for some district offices to rely on paralegals while other districts might rely on attorneys.” It seems like parallel language might be useful in discussing conciliations on this page. It seems that it would be useful to include measurable goals related to employment and that ORIP would be valuable in developing those requirements and in measuring success.

Page 17: Recommendation 12 should be deleted as the study is already being conducted.

Page 23: The study makes recommendations for training without any type of training needs assessments that would compare job requirements to existing knowledge, skills and abilities. One recommendation includes this statement, “Management skills (suggested by one official). . . “. So the EEOC is supposed to invest perhaps thousands of dollars based on the recommendation of **one** official. This is problematic. The entire report needs to be reviewed so that no observation or recommendation is based on one individual’s point of view. Certainly a much larger number of observations would be necessary before it could be considered reliable enough to include in the report.

Page 24: The study provides a series of recommendations for future-litigation-related evaluation. This seems very inappropriate given the quality (i.e., lack of evidence to support findings and recommendations) of this study and in the four recommended studies that have no objectives or relevant performance measures. Basically the study just says, we should study “stuff”.

In conclusion, “We usually do better when we’re on the side of facts and evidence and science. Just as a general rule, that’s proved to be our strength as American’s – President Obama, “Remarks by the President to the Business Roundtable” September 16, 2015. OMB’s website states, “the credible use of evidence in decision-making requires an understanding of what conclusions can and, equally important, cannot be drawn from information”. Consequently, we do not believe many of the recommendations in this study are completely valid without further examination which may be resource prohibitive.

Appendix H: Author's Response to Comments

We appreciate the time given by reviewers and their obvious interest in our examination of litigation-related activities at the EEOC. We have made numerous modifications to the draft report based on the comments and suggestions made by each of the four reviewing offices. Below we address certain additional issues and some overall themes raised by reviewers.

We first address two issues that multiple reviewers identified and then address particular issues from each office's review.

1. A concern expressed by most reviewers was the lack of coverage of a number of important aspects of the EEOC's litigation-related activities, such as the quality of the litigation work, and the inclusion of issues relating to enforcement activities at the agency. As we have emphasized in this final report, this was a limited engagement; it was not a program evaluation. The Office of the Inspector General (OIG) asked us to undertake a broad, rather than in-depth examination of the EEOC's litigation activities.

Through the course of our work it became clear, as is well understood by the EEOC, that enforcement activities are integrally connected to the agency's litigation activities and that certain aspects of enforcement activities needed to be included in our work. We found no evidence that litigation quality was a significant concern. Instead, we focused on those issues that emerged from our interviews and review of available materials.

2. All the reviewers raised concerns about how we described priority charge handling at the EEOC and our recommendations about how charges are prioritized early in the enforcement process as potential candidates for litigation. The EEOC has indeed made many good attempts to define charge categories, but we had not found written documentation of the criteria used to classify A charges that are considered strategically significant (SA) even though these are the cases that would be candidates for litigation if they fail conciliation. Reviewers provided us a number of additional documents relating to these definitions and we have accordingly revised that section of the report. Nevertheless, our interviews indicated inconsistent understandings regarding the meaning of the SA classification, including the distinction between SA and systemic cases. In addition, it is clear that classifying charges still requires judgment calls. We therefore have suggested that the EEOC continue to look for ways to provide added guidance on definitions and the criteria used to classify charges, particularly SA charges. We have revised our report to reflect the information we were provided on the priority charge handling process, and related

procedures. However, our updated review confirmed our recommendation that steps be made to clarify – in one document – the current definitions and criteria to be used for all priority charge classifications, including the relationship of the classifications to systemic cases.

Response to Comments from the Office of General Counsel

1. OGC correctly noted in its review of the draft of our report that no trial attorneys or investigators, and only a few regional attorneys and (we add) district directors were interviewed. This was consistent with the limited scope of our engagement. OGC expressed concern that we not make definitive statements based on the small number of interviews. ORIP has expressed similar comments. We concur with the need to avoid making definitive statements from the limited evidence. We note that our recommendations only point out potential issues for EEOC to consider and suggest ways information might be obtained on the extent to which these issues are present. We felt it important to report what we heard and attempted to avoid over-generalizing. To make this clearer, where we felt appropriate we have modified the wording to further emphasize that this effort was an exploratory assessment and that we were not intending to make definitive findings. One of our recommendations is that EEOC regularly survey field attorneys and investigators to provide evidence of the extent problems exist and to elicit suggestions on ways to improve these activities.
2. OGC was concerned with the cost of implementing some of our recommendations. Many of the recommendations call for internal actions with little added monetary cost to EEOC. For example, our recommendation to regularly administer an internal survey of all field attorneys and investigators (recommendations 4 and 8) could be completed for a low cost and would be quite valuable to EEOC management, especially now that electronically administered surveys have become quite practical. As noted in the report, ORIP has already undertaken such a small internal survey and has already begun planning for an expanded larger version.

A small number of recommendations could involve more substantial efforts and require some additional funding, for example, developing a process for tracking compliance with consent decrees (recommendation 11) or developing a process for estimating the effectiveness of injunctive relief in preventing future discrimination (recommendation 12). However, as noted in our report, a version of recommendation 12 is already called for in EEOC's 2016-2019 "Research and Data Plan," and work, we have been told, has begun.

Added training (recommendation 20) might also require a small investment.

Response to Comments from the Office of the Chair

1. **Recommendation 14:** The comments stated that the statistical report we recommended was already being provided. This was also raised by OFP. Our report suggests an added report that is tailored to each district. This report would contain *only the data on that district*. We did not find any such regularly issued reports. Each district would be provided its own report tailored to that district. (An advanced version might also include for each performance measure the average, or median, for all the districts or for all the districts of the same size range.) None of the regularly prepared reports we have seen have these characteristics. Such a report could be a highly useful statistical report for the managers in each district. We have attempted to clarify this part of our report.
2. **Recommendation 16:** This concern was also raised by OFP. We have understood that numerous meetings are held on a regular basis among the EEOC's leadership team. Our understanding of these meetings is that they generally focus on reviewing cases and administrative matters. We are recommending that leadership also consider addressing the latest statistical data reports provided by ORIP and OGC at regular meetings. The proposed meetings would be data-driven. The discussion should draw on data to identify problems, monitor progress, and track improvements.
3. **Recommendation 19:** We are suggesting the EEOC examine such information as exit interviews and findings from a survey of supervisory staff on their views of turnover to assess whether a problem exists. EEOC has undertaken grade-level studies and classification audits. However, the particular issues raised in our interviews indicate that the pay-level problem has not been solved. Based on what we heard from those we interviewed, it would appear that such an internal look would not need to be very costly but could be helpful to the agency. If unusual turnover due to higher pay for similar work in other federal agencies is found, the EEOC will at least have evidence to help it seek needed adjustments.

Response to Comments from the Office of Field Programs

1. OFP's detailed comments and documents relating to the EEOC's priority charge handling procedures were very helpful and led us to substantially revise that section of the report.
2. Recommendation 14: OFP raised similar concerns as the Office of the Chair that the statistical report we recommended was already being provided. We addressed this concern above in our response to comments from the Office of the Chair.

3. OFP expressed concerns in the section “Measurement of Success in Reducing Employment Discrimination,” over recommendation 18’s inclusion of measure 9 (listed in appendix D). OFP correctly points out that using number of charges as an outcome measure can lead to perverse agency behavior since the agency could look better by taking fewer charges or making fewer findings. Nevertheless, many outcome measures have the potential for perverse actions (such as the Veterans Administration’s recent problems with waiting-time measures). This does not mean that such measures should be dropped but that attention to the quality of the performance information is needed. We note that the number of charges is reported by EEOC to indicate progress in reducing employment discrimination.

Response to Comments from the Office of Research, Information and Planning

1. ORIP’s review is highly critical of our report. We reviewed each of its comments (as well as those of the other EEOC reviewers) and have made a number of modifications as appropriate.

ORIP’s comments, however, appear to be based on a major misunderstanding of the scope and nature of our engagement and the purpose of the study. ORIP throughout its comments complains that our findings were not based on quantitative data, such as those called for in formal program evaluations. It also contends that we should not have based recommendations on what we learned from a small number of interviews. Our work, as we have tried to emphasize in this final report, is an exploratory assessment. OIG, the study sponsor, did not request a program evaluation. Nor are large samples required for such exploratory studies. The objective of this study was to “identify key areas of EEOC’s litigation planning, management, and related activities” and to “summarize litigation program efforts, recommending areas for further study that could lead to gains in efficiency and effectiveness for the litigation program.” The OIG scope of work, the funds and time provided for the study did not permit the type of quantitative work that ORIP criticized us for not having done.

OIG reviewed and approved Urban’s work plan with the goal of identifying issues for further examination and attention. That work plan involved review of relevant EEOC documents and interviews with a small number of key stakeholders within the agency. OIG monitored our progress throughout the course of this study and is fully aware of the scope of our work. As the work plan explained, the scope of work for this project was “to conduct a broad examination of strategic elements of EEOC’s Litigation program.”

2. ORIP appears to be primarily concerned that we reported on concerns we heard about the timeliness and, in some cases, the adequacy of some of the statistical analysis performed to support investigations of

certain high priority charges by ORIP's Program Research and Surveys division. We did not criticize ORIP but only reported on what we heard. We explicitly stated in recommendation 8 that "We are not in a position to evaluate the quality of work conducted by ORIP or RAS." We further stated as part of the recommendation that "One source of relevant information would be a survey of OFP and OGC field staff..." We hope when we do studies such as these that the offices involved would see the identification of concerns like these as opportunities to subsequently address the extent to which a problem exists and, as appropriate, make improvements.

Nevertheless, we have reviewed the wording and agree with ORIP that at least a quick reading of the wording could be misinterpreted. We therefore have made revisions in the wording of this final report. However, we are professionally obligated to report on important issues that emerged from our examination.

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