



SYSTEMIC TASK FORCE REPORT

**TO THE CHAIR OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

LESLIE E. SILVERMAN
Commissioner

Elizabeth Cadle
Barbara Dougherty
Ronald Edwards
Sandra Hobson
Anthony Kaminski
Gabrielle Martin
Peggy Mastroianni

Mary Jo O'Neill
Cynthia Pierre
Jack Rowe
Jerome Scanlan
Sharyn Tejani
Rosa Viramontes
Mindy Weinstein

March 2006

SYSTEMIC TASK FORCE REPORT

EXECUTIVE SUMMARY

The Systemic Task Force was established in 2005 under the leadership of Commissioner Leslie E. Silverman. Chair Cari M. Dominguez charged the Task Force with responsibility for examining the Commission's systemic program and recommending new strategies for combating systemic discrimination. The findings and recommendations of the Task Force are presented in this Report.

The Task Force embarked on its work with the recognition that the Commission cannot effectively combat discrimination without a strong nationwide systemic program. Through interviews, focus groups and surveys of EEOC staff and external stakeholders, the Task Force gathered information and ideas regarding the Commission's current efforts at addressing systemic discrimination, the obstacles the agency faces, and the ways in which the agency more effectively could combat systemic discrimination.

The Task Force concluded that EEOC has successfully investigated, conciliated and litigated numerous systemic cases. For example, in recent years, the agency has addressed systemic sex discrimination at a large manufacturing facility and at a major Wall Street firm. It also has successfully challenged race discrimination in meat processing plants and a nationwide chain of clothing stores, as well as systemic disability discrimination at a major airline.

The Task Force, however, also found many opportunities for improvement. For example, we found that EEOC does not consistently and proactively identify systemic discrimination. Instead, the agency typically focuses on individual allegations raised in charges. There are few incentives for working on systemic cases, and the Commission's systemic efforts are neither coordinated nor consistent throughout the country. In addition, the Commission's technology framework does not support a nationwide systemic practice.

The Task Force developed numerous recommendations in order to address these and other findings. The recommendations build on the agency's past successes, capitalize on existing strengths, and maximize the effectiveness of EEOC's tools and resources. They are designed to ensure that the Commission has a coordinated, strategic and nationwide systemic program.

Section I of this Report discusses EEOC's unique role in combating systemic discrimination, the work of the Task Force, the business case for change and the principles that should guide the EEOC's systemic program in the future. Section II addresses the identification and development of systemic charges, Section III addresses the investigation of systemic charges and Section IV addresses systemic litigation. Finally, Section V lists the Task Force's recommendations.

The Task Force believes that combating systemic discrimination should be a top priority at EEOC and an intrinsic, ongoing part of the agency's daily work. Some of the Task Force's

most important recommendations include:

- **Systemic Investigations.** Districts should develop and submit to headquarters Systemic Plans that specify the steps each district will take to identify and investigate systemic discrimination and that describe how this work will be accomplished. Districts with significant systemic experience should partner with other districts, and staff with significant systemic experience should serve as team leaders, team members or mentors on systemic charges in other offices. Together, the Systemic Plans should ensure a coordinated, national approach to combating systemic discrimination.
- **Systemic Litigation.** EEOC should staff systemic lawsuits based on the needs of the case, rather than based on the office where the case arose. EEOC should determine the expertise needed in a particular case (*e.g.*, expertise in large case management, statistics, relevant substantive areas and/or the industry at issue) and assign staff who have the necessary knowledge and experience.
- **Field and Headquarters Roles.** The investigation and litigation of systemic cases should be performed solely in the field. Headquarters should support the field's systemic program through assistance with partnering, coordination, and legal and data analysis. Headquarters also should provide litigation support services.
- **Incentives.** EEOC should create incentives through performance plans and other means to encourage the field to: successfully identify, investigate and litigate systemic cases; partner with other offices and staff on systemic cases; and develop systemic expertise among staff. To enable districts to devote the resources necessary for systemic investigations, the Commission should modify office goals and transfer charges where appropriate.
- **Staffing.** EEOC should address staffing needs to ensure the success of a nationwide systemic program, including creating a number of GS-13 Lead Systemic Investigator and GS-12 Systemic Litigation Analyst positions in the field and filling expert positions within the Office of Research, Information and Planning (ORIP) and Research and Analytic Services (RAS) to support the field's systemic program. Some ORIP experts should work in field offices.
- **Technology.** EEOC should ensure that its technology infrastructure supports a seamless nationwide systemic practice. The agency should link its charge data to EEO-1 Survey data, provide staff with the software and hardware necessary to litigate complex systemic cases and ensure that staff in different offices who work together on systemic cases can communicate and share information effectively.
- **Enhancing Expertise.** EEOC should enhance systemic expertise among staff through a variety of means, including partnering opportunities with other staff, formal and informal training, partnerships with other agencies and organizations, the formation of an internal systemic website that has materials relevant to systemic case development, and the creation of an electronic bulletin board or listserv to facilitate communication among staff working on systemic cases.

- ***Advisory Committee.*** EEOC should create an internal Advisory Committee to help ensure that the systemic investigation program is effective nationwide. This Committee should not serve a management function but rather should assess the agency's overall effectiveness in combating systemic discrimination and serve as a resource on systemic matters.
- ***Proactive Prevention.*** In support of its efforts to prevent discrimination and educate employers and employees about their rights and responsibilities under the federal anti-discrimination laws, EEOC should educate the public about systemic trends, issues and cases.

TABLE OF CONTENTS

- I. INTRODUCTION1**
 - A. EEOC Is Uniquely Equipped to Combat Systemic Discrimination1**
 - B. The Work of the Systemic Task Force2**
 - C. The Business Case: Why Change Is Needed4**
 - D. Principles That Must Guide EEOC’s Systemic Program5**
- II. IDENTIFYING SYSTEMIC DISCRIMINATION8**
 - A. Background8**
 - B. Findings 9**
 - 1. Access to, and Usefulness of, Existing Data 9**
 - 2. Efforts to Obtain Additional Data10**
 - 3. Internal Expertise and Support10**
 - 4. Incentives10**
 - C. Recommendations11**
 - 1. The Commission Should Link, Track and Distribute Data More Effectively11**
 - a. EEOC Must Link Charge Data to EEO Survey Data11**
 - b. EEOC Should Enhance the IMS System11**
 - c. EEOC Should Enhance the Delivery of EEO-1 Data and EEO-1 Desktop Reports12**
 - d. EEOC Should Expand Access to the Data it Collects12**
 - 2. EEOC Should Engage Its Stakeholders and Federal, State and Local Partners in Efforts to Identify Systemic Discrimination12**
 - 3. ORIP Should Take a Primary Role in Analyzing Data13**
 - 4. The Commission Must Effectively Utilize the Information Gathered and Alert Staff to Possible Systemic Discrimination13**
 - a. ORIP Should Prepare User-Friendly Reports13**
 - b. The Commission Should “Flag” Matters of Interest in IMS14**
 - c. Districts Should Identify Priority Issues14**
 - 5. The Commission Should Encourage Collaboration Among Offices14**

6.	Districts Should Develop Systemic Plans	14
7.	The Commission Should Enhance Expertise Among Staff and Provide Useful Guides and Other Materials	14
8.	The Commission Should Encourage Efforts at Addressing Systemic Discrimination Through Expanded Charge Investigations Where Appropriate	15
9.	The Commission Should Encourage Efforts at Addressing Systemic Discrimination Through Commissioner Charges and Directed Investigations Where Appropriate	15
	a. Commissioner Charges	15
	b. Directed Investigations	16
III.	INVESTIGATING SYSTEMIC CHARGES	17
A.	Background	17
B.	Findings	17
	1. The Commission’s Approach to Systemic Investigations	18
	2. Consistency of Efforts to Investigate Systemic Discrimination	18
	3. Priorities and Incentives	18
	4. Staffing	19
	5. Enhancing Expertise	19
	6. Expert Services	19
	7. The Headquarters Systemic Investigations Program	20
	8. Ensuring the Success of the Commission’s Systemic Program	20
C.	Recommendations	20
	1. All Districts in the Field Should Investigate Systemic Cases	20
	2. Districts Should Develop Systemic Plans	21
	a. The Systemic Plan Should Address How the District Will Identify and Investigate Systemic Discrimination	21
	b. Headquarters Should Assist the Field in Developing Systemic Plans	22
	c. OFP and OGC Should Negotiate and Ultimately Approve Systemic Plans for Each District	22
	3. The Commission Should Ensure Adequate Staffing on Systemic Cases and Create a Lead Systemic Investigator Position	22
	4. The Commission Must Create Incentives for Developing Systemic Cases	23
	5. EEOC Should Enhance Systemic Expertise Among Staff	23

6.	EEOC Should Create an Internal Website and Post Materials Related to Systemic Case Development	25
7.	Headquarters Should Not Have a Dedicated Systemic Investigations Unit	25
8.	Experts in ORIP Should Take a Primary Role in Providing Substantive Assistance to the Field on Systemic Investigations	25
	a. The Commission Should Devote Additional Resources to Expert Services for Systemic Investigations, Create a Distinct Unit, and Place Some Experts in the Field	25
	b. Experts for Investigation and Litigation Should Remain In Separate Departments	26
9.	OGC and OLC Should Provide Substantive Assistance to the Field	26
10.	Headquarters Staff Should Support the Field in Partnering and Coordination and Provide Other Assistance as Needed	26
11.	The Commission Should Increase Coordination with its Sister Agencies and FEPA Partners to Address Systemic Discrimination	27
12.	The Commission Should Create an Advisory Committee to Help Ensure that the Agency’s Systemic Practice is Effective	28
13.	The Commission Should Educate the Public On Systemic Trends, Issues and Cases As Part of Its Effort to Proactively Prevent Discrimination	29
IV. LITIGATING SYSTEMIC CASES		30
A.	Background	30
B.	Findings	30
	1. Attorney Staffing on Systemic Cases	30
	2. The Headquarters Systemic Litigation Program	31
	3. Headquarters Assistance to the Field	32
	4. Incentives	32
	5. Enhancing Expertise	32
	6. Paralegal Staffing	33
	7. Prefiling Issues	33
C.	Recommendations	33
	1. The Commission Should Staff Systemic Suits Based on the Needs of the Case	34
	2. Headquarters Should Not Have a Dedicated Systemic Litigation Unit	34

3.	OGC Should Provide Enhanced Support to the Field’s Systemic Litigation Program	34
a.	OGC Should Identify Attorneys with Expertise and Continue to Assist in the Coordination of Litigation Between Offices	34
b.	OGC Should Provide Advice and Assistance to the Field	35
c.	The Commission Should Ensure Adequate Staffing in RAS	36
d.	The Commission Should Provide Resources for Prefiling Activities	36
4.	The Commission Should Enhance Incentives for Systemic Litigation	36
5.	The Commission Should Enhance Expertise Among Staff	36
6.	The Commission Must Ensure Adequate Paralegal Staffing for Systemic Cases and Should Create a GS-12 Systemic Litigation Analyst Position	37
7.	The Commission Should Enhance Technology in Support of Systemic Litigation	37
8.	The Commission Should Broadly Publicize Information About Systemic Cases As Part of Its Effort to Proactively Prevent Discrimination	38
V.	LIST OF RECOMMENDED ACTION ITEMS	39
A.	General Principles	39
B.	Operational Reforms	39
	Identifying Systemic Discrimination: Outreach	39
	Identifying Systemic Discrimination: Office Roles	40
	Identifying Systemic Discrimination: Expanding Charges	40
	Identifying Systemic Discrimination: Commissioner Charges and Directed Investigations	41
	Investigating Systemic Discrimination: Office Roles	41
	Investigating Systemic Discrimination: Systemic Plans	43
	Litigating Systemic Cases: National Law Firm Model	43
C.	Enhancing Expertise	45
D.	Creating Incentives	45
E.	Improving Technology	46
	Changes to Existing Software and Programs	46

Plan For and Invest in Additional Software and Hardware	48
Expand Access to Software and Programs	48
F. Staffing	49
G. Additional Investments	50
APPENDIX A: SPECIAL THANKS TO SYSTEMIC TASK FORCE MEMBERS FROM COMMISSIONER SILVERMAN	51
APPENDIX B: INPUT TO THE TASK FORCE	52
EEOC Staff	52
Sister Agencies	54
Stakeholders	55
APPENDIX C: HISTORICAL BACKGROUND: EEOC’S SYSTEMIC EFFORTS	57
ENDNOTES	61

I. INTRODUCTION

Congress created the Equal Employment Opportunity Commission in 1964, charging it with the mission of eradicating discrimination in the workplace. When the Commission received litigation authority in 1972, a new era of enforcement began, with a strong focus on identifying, investigating, and litigating cases of systemic discrimination. In the ensuing years, EEOC, while under increasing pressure to manage individual cases more efficiently, has continued its efforts to address systemic discrimination.

The Commission's Systemic Task Force was established in 2005, forty years after the Commission first opened its doors. The Task Force was charged by Chair Cari M. Dominguez with responsibility for reassessing how the Commission addresses systemic discrimination, and for recommending new strategies for enhancing the Commission's systemic program.

The Task Force, led by Commissioner Leslie E. Silverman, is comprised of fourteen additional EEOC employees from the field and headquarters including management and a bargaining unit representative.¹ The Task Force convened in headquarters for two days in April and three days in August, 2005, and conducted many other subgroup meetings and teleconferences. As a result of those meetings and of numerous interviews and other fact-gathering efforts that are described below in section B, the Task Force developed recommendations that are intended to enhance and refocus the Commission's systemic efforts so that systemic work becomes a pervasive and integrated enforcement and litigation practice throughout the agency.

The Task Force has 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." This section of the Report provides an overview of (1) EEOC's unique role in combating systemic discrimination; (2) the work of the Task Force; (3) the business case for why change is needed; and (4) a description of the principles that must guide the Commission's new systemic program. Section II of the Report addresses the identification of systemic discrimination; Section III discusses the investigation of systemic discrimination; Section IV focuses on systemic litigation; and Section V lists the Task Force's recommendations.

A. EEOC Is Uniquely Equipped to Combat Systemic Discrimination

When Congress passed Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, making it illegal for employers to discriminate based on race, color, sex, national origin or religion, it authorized EEOC to investigate charges of discrimination, including classwide discrimination.² Title VII also gave EEOC Commissioners the authority to issue charges on their own initiative ("Commissioner Charges").³

Congress greatly expanded the agency's ability to address systemic discrimination when it amended Title VII in 1972.⁴ These amendments relaxed the standards for issuing Commissioner Charges,⁵ gave EEOC authority to file suit when conciliation efforts failed,⁶ and gave EEOC the authority to pursue pattern or practice cases.⁷ Congress subsequently granted

EEOC authority to enforce the Age Discrimination in Employment Act of 1967 (ADEA),⁸ the Equal Pay Act of 1963 (EPA),⁹ and the Americans with Disabilities Act of 1990 (ADA).¹⁰ With that increased authority came increased responsibility for investigating and litigating systemic discrimination.

As Congress recognized, employment discrimination cannot be eradicated without a focus on its systemic manifestations.¹¹ Thus, to effect workplace change, the Commission must have a nationwide systemic practice that proactively and strategically recognizes and addresses patterns of discrimination that have a broad impact.

Each year EEOC receives approximately 80,000 charges of discrimination. Some contain allegations of systemic discrimination against a class of applicants or employees and, in other instances, EEOC expands the scope of the investigation of individual charges to address systemic discrimination. Title VII, the ADEA, and the ADA each provide that an individual must file a charge with EEOC as a prerequisite to filing suit under the statute. Thus, EEOC serves as the national repository for virtually all formal allegations of employment discrimination brought under federal law. Congress conferred broad authority on EEOC to investigate these allegations, subpoena evidence, and seek classwide relief, all of which enable this agency to uncover, combat and eradicate systemic discrimination.

In addition to having this unique role and responsibility in combating systemic discrimination, EEOC has a unique ability to identify potential systemic cases. The agency has access to substantial data, including information on employment trends and demographic changes, that can help identify possible systemic discrimination. This data gives EEOC particular insight into areas such as hiring discrimination, where victims of discrimination often are not aware that they may have been denied employment based on unlawful criteria. Such information, combined with the Commission's ability to use either a Commissioner Charge (under Title VII or the ADA) or a Directed Investigation (under the ADEA or the EPA) where a possible victim of discrimination has not filed a charge, provides EEOC with the crucial tools needed to uncover systemic employment discrimination.¹²

For several reasons, EEOC is also uniquely positioned to litigate systemic cases. First, unlike private litigants, EEOC need not meet the stringent requirements of Rule 23 of the Federal Rules of Civil Procedure in order to maintain a class suit in federal court. Second, as a practical matter, EEOC may be able to bring certain systemic cases that the private bar is not likely to handle, for example, where the monetary relief might be limited, the focus is on injunctive relief, or the victims are in underserved communities. EEOC also can file ADEA suits against state entities and obtain monetary relief, whereas private litigants are limited by sovereign immunity to obtaining only injunctive relief in such cases.¹³ Finally, the Task Force believes that EEOC's nationwide presence permits it to act as a large yet highly specialized law firm with a unique role in civil rights enforcement.

B. The Work of the Systemic Task Force

As noted above, the Task Force set out to determine how the Commission could do systemic work more effectively. Pursuant to the Chair's directive, the Task Force focused on the

establishment and delivery of a meaningful systemic practice rather than on the sources or amount of funding that would be required, because the Task Force cannot predict what the agency's budget will be over the next several fiscal years and is not in a position to assess the needs of other Commission programs. The Task Force did, however, aim to be prudent and practical in each of its recommendations so as to make its proposed program realistic and deliverable.

In order to accomplish its mission, the Task Force:

- (1) examined the current methods that EEOC uses – both in headquarters and the field – to seek out, investigate and litigate cases of systemic discrimination;
- (2) evaluated whether any changes should be made with respect to the current methods or structure of systemic efforts, both in headquarters and the field; and
- (3) sought to recommend ways in which the Commission can improve its methods and/or revamp its systemic efforts so that the agency can more efficiently and effectively combat systemic discrimination.

The Task Force engaged in extensive efforts to gather relevant information, including the following:

Survey to EEOC District Directors and Regional Attorneys – The Task Force began its work by developing and disseminating a survey to the District Directors and Regional Attorneys in each of the Commission's district offices.¹⁴ Through this effort, the Task Force was able to gather information about a variety of matters, including each district's efforts at addressing systemic discrimination, the type of assistance each has received from headquarters staff in the past, and the resources and assistance needed to develop and process systemic cases.

EEOC Focus Groups – The Task Force conducted numerous focus groups with field and headquarters staff who have systemic experience, including investigators, enforcement supervisors, managers, directors, and attorneys.

External Stakeholder Meetings – The Task Force conducted meetings with external stakeholders, including a broad spectrum of plaintiff and defense attorneys specializing in EEO class action litigation, civil rights advocates, representatives of the business community, and former EEOC Commissioners.

Meetings with Academic Researchers – The Task Force conducted a focus group with academic researchers from several universities who are authorized to work with the Commission's charge or EEO-1 data¹⁵ to conduct academic research pursuant to the Inter-Governmental Personnel Act of 1970.

Input From Other Government Agencies – The Task Force reached out to EEOC's federal, state and local partners. It conducted meetings with career and political officials at the Department of Justice and the Department of Labor. In addition, the Task Force surveyed and conducted a focus group with EEOC's state and local fair employment practice partners.

Open Forum for EEOC Employees – The Task Force solicited input from the entire EEOC staff via an email from Commissioner Silverman inviting their comments on how the Commission could best combat systemic discrimination.

A list of the many individuals and organizations that provided input to the Task Force is set forth in Appendix B.

C. **The Business Case: Why Change Is Needed**

The Task Force determined that there are compelling business reasons to change the agency's current systemic program and practices based on the past successes, best practices and shortcomings the Task Force identified. In particular, the Task Force believes the following findings compel change:

- *Insufficient and Imbalanced Utilization of Existing Strengths* – The Task Force discovered pockets of systemic expertise in the field and in headquarters that are not being utilized to their full potential, mostly because of inadequate staffing, lack of properly directed resources and lack of incentives. Strengths found include individuals with expertise in matters such as management of large investigations, statistical analyses and applications, database construction, expert selection, electronic discovery and litigating large class cases.

Because these abilities are scattered throughout the field and headquarters, field strengths are utilized only on an *ad hoc* basis, and some field offices do not take advantage of available headquarters resources, EEOC needs to shore up its strengths and improve coordination. The new systemic program, as described in the following sections of this Report, will seek to use these existing strengths to the agency's strongest advantage.

- *Lack of Proactive, Consistent Efforts at Identifying Systemic Discrimination* – The Task Force found that over the past decade, there has been a significant decrease in proactive efforts to identify systemic discrimination through research and analysis. Moreover, no office or unit is responsible for looking at the “big picture” nationwide – *e.g.*, proactively reviewing charge data, survey data submitted by employers or other information in order to identify possible instances of systemic discrimination.
- *Dearth of Commissioner Charges* – As a result of decreased efforts to identify systemic discrimination in a proactive way, there has been a precipitous decline in the number of Commissioner Charges, from an average of nearly 40 per year in the 1990s to only several in the past few years. The decline in Commissioner Charges followed, and possibly was an unintended consequence of, the Commission's 1995 adoption of the Priority Charge Handling Procedures (PCHP).¹⁶
- *Lack of Incentives* – The Task Force concluded that there is a lack of incentives for devoting resources to systemic cases. In fact, many employees in the field perceive a disincentive to working on systemic cases due to the emphasis on inventory management. District Directors' performance plans and office goals no longer address systemic discrimination, office goals are not adjusted adequately to account for systemic charge development, and

many employees in the field perceive that the development of systemic cases is not a Commission priority.

- *Lack of a National Perspective* – The Task Force concluded that the Commission does not operate as a cohesive entity attempting to address systemic discrimination wherever it exists. Although the Commission has offices throughout the country, the agency does not utilize all available resources nationwide in determining how best to address systemic discrimination. Moreover, the current system does not encourage offices to collaborate to achieve the most effective results.
- *Lack of Training/Expertise Development* – The Task Force found that there are skill gaps among enforcement and legal staff. Also, there has not been sufficient training on how to identify or develop systemic charges and not enough attention paid to developing staff expertise in systemic work.
- *Insufficient Data* – The Task Force believes that the Commission is hampered in its efforts to identify systemic discrimination by certain insufficiencies in the data the agency collects and by limitations in the manner in which the data can be utilized by staff.

In light of the breadth and scope of these findings, the Task Force determined that the Commission's current approach for dealing with systemic discrimination is in need of fundamental change. A new systemic program also is integral to effectuating EEOC's Five-Point Plan, which Chair Dominguez adopted in 2001, and the agency's Strategic Plan, which the Commission approved, that sets forth the strategy for accomplishing the goals of the Five-Point Plan.¹⁷ The Five-Point Plan requires EEOC to use available tools and deploy resources strategically in order to have a meaningful impact on discrimination in today's workplaces. It also calls for EEOC to examine emerging workplace trends and issues and to conduct annual reviews of economic indicators, demographic trends, employer practices, and industry literature, in order to make calculated decisions about which issues merit the agency's attention. Similarly, the Strategic Plan requires that EEOC engage in high impact litigation and publicity efforts that change the workforce status of affected groups and/or improve employment policies, practices, or procedures in affected workplaces.

D. Principles That Must Guide EEOC's Systemic Program

The Task Force determined that in order to be effective, the Commission's new systemic program should be guided by the following principles:

- *The Commission Must Make Systemic Work A Top Priority* – It is imperative that the Commission make the identification, investigation, and litigation of systemic discrimination a top priority. EEOC's highest management must recognize that addressing systemic discrimination is a critical, intrinsic, and ongoing part of the Commission's work. It should not be seen as simply a special agency project or initiative: it must be the Commission's ongoing practice. The Commission should expect EEOC employees at all levels to contribute to combating systemic discrimination. As such, the Commission must take all steps necessary to foster a culture that finds systemic work important, challenging and

rewarding, and that supports systemic work with clear incentives, including modified performance plans and appropriate adjustments to goals and incentives.

- *The Commission Must Redeploy Resources and Cultivate and Support a Nationwide Systemic Practice* – It is critical that the Commission provide staff, training, technology, financial resources and incentives to the systemic program.
- *The Commission Must Improve Methods of Identifying and Investigating Systemic Discrimination* – The Commission has considerable resources and tools to assist in efforts to identify and combat systemic discrimination, but must ensure they are used effectively. For example, with respect to staff resources, the agency must identify the persons who have particular expertise and rely on them to identify and investigate systemic cases and to share their expertise. With respect to technology, the agency must better utilize the tools it has to identify possible discrimination, seek ways to make those tools even more useful in identifying and investigating systemic discrimination, and develop additional tools to assist staff in identifying and combating systemic discrimination.
- *The Investigation and Litigation of Systemic Cases Should Be Performed in the Field, with Headquarters Support* – As presently constituted, the agency’s only dedicated systemic program is housed in headquarters. The agency’s systemic program has undergone numerous changes and reorganizations since it first was established in 1972. *See Appendix C (Historical Background: EEOC’s Systemic Efforts)*. The Task Force believes that investigation and litigation should be performed in the field, and not in headquarters, for a number of reasons. As a practical matter, almost all of EEOC’s investigations and litigation, including systemic cases, are conducted in the field. The field can investigate and litigate on a regional or national basis as effectively as a headquarters systemic unit, especially because field offices have a natural pipeline of charges and are not restricted by jurisdictional lines in addressing discrimination beyond an office’s borders. The Task Force believes that instead of investigating and litigating cases, headquarters should have a different, equally critical, role to play: supporting the field systemic program by providing technical guidance, analysis, assistance and support and by helping promote cooperation and collaboration between offices.
- *The Commission’s Efforts at Combating Systemic Discrimination Must Be Nationwide* – The Commission’s systemic program must address systemic discrimination throughout the country, regardless of where EEOC offices, or EEOC employees with the most systemic expertise, are located. EEOC should have a “big picture” perspective on where the problems are and address them accordingly, by using Commission resources available nationwide. The systemic program must cover a wide range of issues and bases. In addition, the effort should be coordinated throughout the country, so that offices are not duplicating work or competing with each other but rather are collaborating, partnering, mentoring and supporting one another.
- *Every Office Must Make Efforts to Combat Systemic Discrimination* – The Commission’s systemic program must be a critical part of the work – the standard practice – in each district. The Task Force rejects the idea that systemic work should be conducted in only a small

number of select offices that have particular systemic expertise. Because identifying, investigating and litigating systemic cases is an integral part of the agency's mission, it should be done in all EEOC offices. Moreover, isolating this task in certain offices would discourage the identification of systemic discrimination nationwide, discourage expanding the investigation of individual charges to address systemic allegations where appropriate, and interfere with the goal of expanding expertise.

- *The Systemic Program Must Encourage Collaboration* – In light of the Commission's limited resources, the reality that certain offices and certain employees have particular expertise and experience in systemic cases, and the need to marshal the resources and expertise that the agency has in order to be as effective as possible, the systemic program must encourage collaboration among offices and districts. By creating incentives to share credit and resources, the program can also encourage strong collaboration between the field and headquarters and between different offices in headquarters. Moreover, increased collaboration will serve to broaden the Commission's expertise in systemic cases.
- *The Field Should Be Encouraged to Process Systemic Cases as Appropriate* – Some employees expressed a reluctance to initiate or investigate systemic cases due to a concern that it would be extremely difficult to close the case even if the evidence did not suggest discrimination. Districts should exercise proper judgment and close systemic cases whenever it is appropriate, such as when a review of the information on hand indicates that further investigation is not likely to uncover evidence substantiating the allegations. Similarly, if it appears that a systemic investigation should be narrower than originally anticipated (geographically, or by basis or issue), the district should exercise appropriate judgment and narrow the scope of the investigation.

With these principles in mind, the Task Force made findings and developed recommendations related to the three critical steps involved in combating systemic discrimination: identifying, investigating and litigating systemic cases.

II. IDENTIFYING SYSTEMIC DISCRIMINATION

A. Background

The Task Force believes that the first critical step in strengthening and expanding the Commission's systemic program is improving the agency's ability to identify systemic discrimination. Based on that tenet, the Task Force sought to identify the methods and tools the agency currently has to identify systemic discrimination and to analyze their use and effectiveness. This section of the Report identifies the existing methods and tools; sets forth the deficiencies the Task Force found related to identifying systemic discrimination; and concludes by setting forth the Task Force's recommendations for improvement.

The primary tools and methods the agency presently has to identify and develop systemic discrimination charges are:

Charges filed by members of the public – Virtually all of EEOC's approximately 80,000 charges each year come from members of the public who visit or write to an office and allege employment discrimination. Most charges allege individual and not classwide discrimination. During Intake, or while a charge is under investigation, agency employees may consider whether it would be appropriate to address possible systemic discrimination as well.

IMS – The Commission's Information Management System (IMS) is an informational database that tracks all charges filed with EEOC and all litigation to which EEOC is a party. The IMS application itself allows users to run reports on charge and litigation data. Some field and headquarters staff also can run more sophisticated, *ad hoc* reports using a software tool called BRIO/Hyperion ("BRIO").

EEO Surveys – EEOC annually collects from private employers with 100 or more employees, and most federal contractors with 50 or more employees, information by job category on their employees' race, sex and national origin on the EEO-1 form. On a biennial basis, EEOC collects similar data from referral unions, which file an EEO-3 form; state and local governments, which file an EEO-4 form; elementary and secondary level school districts, which file an EEO-5 form; and institutions of higher education, which file an IPEDS report with the Department of Education that serves as the Commission's EEO-6 report.

EEO-1 Desktop – The Commission's EEO-1 Desktop program gives agency employees access to EEO-1 data submitted since 1995 and allows employees to aggregate the data by industry and geography and to run comparative analyses of establishments.

Office of Research, Information and Planning, and Research and Analytic Services – The Office of Research, Information and Planning (ORIP) staff includes social science analysts with extensive experience in using statistical and social science techniques to support investigations and analyze workforce data, including the EEO-1. Upon request from the field, ORIP analyzes data to assist offices in identifying systemic discrimination. ORIP also conducts studies on selected industries or professions. Also, ORIP has developed an internal website called the Integrated Statistical Information Site (ISIS) that provides certain reports based on IMS data,

including charge trends and reports by office or industry. The field currently does not have access to ISIS. In addition to ORIP, Research and Analytic Services (RAS) in the Office of General Counsel (OGC) also has experts who assist in identifying systemic discrimination, although they primarily work on litigation.

OGCNet – OGCNet is an internal threaded email system whereby OGC attorneys in the field and headquarters can pose questions and issues about their cases and exchange information with attorneys in other offices.

Input from stakeholders, members of the public and sister agencies – An important part of any office’s enforcement efforts is outreach to stakeholders and other members of the community. As part of these outreach sessions, agency employees may become aware of potentially important issues involving discrimination in their communities. EEOC can also obtain important information from other agencies, such as the Office of Federal Contract Compliance (OFCCP) at the U.S. Department of Labor and state and local Fair Employment Practice Agencies (FEPAs).

Review of publicly available information – EEOC employees learn of employment discrimination trends or issues from newspapers or other publicly-available information. This information can be used to expand the investigation of individual charges or can form the basis of a Commissioner Charge or Directed Investigation.

Commissioner Charges and Directed Investigations – Section 706(b) of Title VII, incorporated by reference by § 107(a) of the ADA, empowers Commissioners to file charges to permit investigation of employers or other covered entities identified as possible violators even where no individual has filed a charge.¹⁸ Under the ADEA and EPA, EEOC may conduct a Directed Investigation even where no individual has filed a charge. (See endnote 12.)

B. Findings

The Task Force discovered that agency employees are not aware of – and therefore not utilizing – all tools available to them to identify systemic discrimination. We also found that most of the agency’s existing methods of identifying possible systemic discrimination are not used in an organized, consistent or calculated manner. As such, the Task Force believes that there is great room for improvement with respect to the accessibility and usefulness of existing data, efforts to obtain additional data, internal expertise and support, and incentives for identifying and developing systemic cases.

1. Access to, and Usefulness of, Existing Data

The Task Force found that the basic data available to the Commission – including charge data, EEO-1 data and U.S. Census data – is not linked, which interferes with the Commission’s ability to identify possible systemic discrimination effectively. We learned that IMS data is often less accurate than EEO-1 data with respect to the proper name, location and industry of employers, because charging parties, rather than employers, provide the IMS information. The Task Force also found that most investigators cannot access nationwide IMS data from their

desktops, which would be useful in determining whether there are multiple charges on the same issue and basis against a particular respondent. Also, IMS does not track certain information that may be useful in identifying systemic cases. We also found that the EEO-1 information available to investigators is not consistently current and does not allow for more sophisticated, user-friendly analyses.

When the Commission does obtain useful systemic data, it is not consistently or reliably shared between headquarters and the field or among field offices. In addition, the information that serves as the basis for EEOC's public reports on workplace trends is not shared with the field for purposes of identifying systemic discrimination.

2. Efforts to Obtain Additional Data

The Task Force found that efforts to obtain workforce data beyond the existing systems are uneven. There is no strategic effort to obtain trend information through outreach to community organizations or academics. Also, there is no plan to identify proactively important economic indicators such as the growth and decline of particular segments of the workforce. Instead, those Commission field offices that have an interest in systemic discrimination drive the Commission's identification of systemic discrimination by reaching out to obtain data.

3. Internal Expertise and Support

The Task Force determined that there is a wide range of expertise among Commission staff, including investigators and attorneys, with respect to identifying and developing systemic charges. There is little if any user-friendly, easily accessible guidance on the Commission's website or elsewhere providing information about how to identify or develop systemic charges. There is no network for field investigators conducting systemic work to pose questions or share information.

There are too few expert labor economists and statisticians in ORIP and RAS to conduct analyses of data proactively and in response to field requests. The experts in ORIP who provide support for systemic investigations are not in a distinct division or organizational unit within ORIP. There are no headquarters employees in OGC or the Office of Field Programs (OFP) designated to provide assistance or support related to the development of systemic charges.

4. Incentives

Currently, Commission investigators are not encouraged through performance standards or other means to use existing data, including EEO-1 data, as part of the development of systemic charges. As discussed in Section III.B.3., many employees believe there are disincentives to identifying and developing potential systemic cases.

The Task Force found that there is little incentive to expand individual charge investigations. Several plaintiffs' attorneys informed the Task Force that some EEOC field offices sometimes discourage or even refuse to accept allegations of class discrimination in charges.

There is also little incentive to develop Commissioner Charges or Directed Investigations, which we believe are important tools in the effort to combat systemic discrimination, as many victims of discrimination do not come to EEOC because they fear retaliation, do not know about their rights, or are unaware of the discrimination (particularly where the issue is hiring). Some staff in the field mistakenly believe that proposed Commissioner Charges are subject to multiple layers of headquarters review and some believe that Commissioners are reluctant to sign proposed Commissioner Charges.

C. Recommendations

1. The Commission Should Link, Track and Distribute Data More Effectively

In order to better identify possible systemic discrimination, EEOC must begin by utilizing the data it routinely collects in a more comprehensive and strategic way, particularly with respect to charge data in EEOC's IMS system and data from EEO-1 Surveys.

a. EEOC Must Link Charge Data to EEO Survey Data

The Task Force believes it imperative that the agency link the charge data in IMS with the employment data in the EEO-1 and other EEO Surveys so that the data in EEO-1 reports can easily and automatically be imported into IMS.¹⁹ If IMS is linked with the unique employer identifiers used in the EEO-1 form, EEOC can improve the accuracy of the data in the IMS system, decrease the amount of time necessary to enter data into IMS and more easily track and retrieve data about charges filed, particularly with respect to data on multiple charges on the same basis filed against the same employer. Recognizing the importance of this recommendation, members of the Task Force have met with staff in the Office of Information Technology (OIT) and developed system requirements for the necessary modification to IMS. (These are addressed in Section V.E. and endnote 37, *infra*).

b. EEOC Should Enhance the IMS System

The Task Force recommends that the Commission modify the informational categories in IMS, which track matters such as the type of discrimination and issues alleged in each charge. This will allow the agency to designate and track systemic investigations more accurately and collect data on issues that are of particular interest to the Commission, but not currently tracked in IMS (*e.g.*, identifying job categories at issue). The agency should also improve the report-writing capabilities of IMS.²⁰ In addition, the Task Force recommends that the agency enhance the IMS reports that are planned for the ISIS and BRIO applications; these applications should be expanded to include more reports relevant to detecting possible systemic discrimination, such as reports that more closely identify trends. EEOC employees should be able to produce *ad hoc* reports based on their analytical needs.

c. EEOC Should Enhance the Delivery of EEO-1 Data and EEO-1 Desktop Reports

The Task Force has several recommendations related to the EEO-1 Surveys. While we recognize that EEO-1 data alone is of limited use in revealing systemic discrimination, we believe there are ways to make the data more useful to the Commission. First, the Task Force recommends that the Commission integrate U.S. Census data into the EEO-1 Desktop, which will allow staff to construct Census-based availability estimates.

Second, the Commission should improve the internal processing of the EEO-1 Surveys by making the data available to EEOC staff on an internal website. (Currently, each office must separately update and maintain the software and data sets.)

Third, the Task Force believes that it takes too long to make EEO-1 data available to staff. The Task Force recommends that the Commission expedite the delivery of this data so as to make it available to staff by the end of each calendar year.

Fourth, we recommend enhancements to the reports generated by the EEO-1 Desktop. This application allows employees to easily retrieve EEO-1 Surveys submitted by employers and to run certain analyses of EEO-1 data. The Task Force found that the EEO-1 Desktop is a very useful tool; however, the Task Force recommends enhancements with respect to the system's analytic capabilities and the reports it generates.

Fifth, the Task Force suggests incorporating a geographical information system (GIS) component into the EEO-1 Desktop. This would allow users who want to compare establishments or populations in a certain geographic area to select the desired area using a map rather than merely a list of counties. The Task Force learned that the Department of Justice has access to a GIS system and finds it user friendly and valuable in helping to identify possible discrimination.

d. EEOC Should Expand Access to the Data It Collects

The Task Force believes that the Commission should give field staff greater access to relevant data, and additional tools with which to analyze the data, in order to increase their effectiveness at identifying systemic discrimination. We therefore recommend that the Commission give relevant staff in the field greater direct access to IMS data and report-writing software (including BRIO and ISIS) so that they can search and generate reports using nationwide charge data. In addition, the Task Force recommends that investigators and attorneys experienced in working with EEO-1 data (and relevant supervisors and managers) be given access to SAS, a statistical software package, and SAS-based EEO-1 data sets to allow them to conduct more sophisticated analyses of data.

2. EEOC Should Engage Its Stakeholders and Federal, State and Local Partners in Efforts to Identify Systemic Discrimination

The Task Force believes that field offices and headquarters staff should use outreach

opportunities with national and local community based organizations, workers, academic researchers, and the plaintiffs' bar to identify possible systemic discrimination. The Task Force also recommends that the field collaborate with their FEPA partners to identify possible systemic discrimination via joint outreach endeavors, efforts to encourage FEPAs to inform EEOC about possible systemic discrimination they become aware of, and other appropriate means. The Task Force further encourages coordination between the Commission and its sister agencies at the federal level, particularly the Department of Justice, the Office of the Solicitor at the Department of Labor, and OFCCP.

3. ORIP Should Take a Primary Role in Analyzing Data

The Task Force recommends that ORIP enhance its efforts at analyzing data for the purpose of identifying systemic discrimination. ORIP should focus on the "big picture" from national and regional perspectives. Among other things, ORIP should examine nationwide and regional charge data, EEO-1 data, Census data and other data sources.

In addition, ORIP should work closely with the field to learn about local issues and concerns and to obtain information about particular charges of interest. ORIP also should identify local academicians who periodically are willing to discuss research on local economic trends with field offices. To facilitate collaboration between ORIP and the field, the Task Force recommends that each district designate a person who can serve as the primary point of contact for ORIP on issues related to the identification of systemic discrimination.

The Task Force further recommends that ORIP gear formal studies towards identifying systemic discrimination for possible enforcement action. In order to determine relevant topics for these studies, ORIP staff should consult with the field, appropriate headquarters offices and stakeholders.

As discussed more fully in Section III.C.8., the Task Force believes that the Commission will need to hire additional staff to enable ORIP to meet the needs of the Commission's new systemic program. We recommend that some of the new staff should be placed in the field.

We further believe that performance standards for the ORIP employees who support the field's systemic program should reflect these responsibilities.

4. The Commission Must Effectively Utilize the Information Gathered and Alert Staff to Possible Systemic Discrimination

The Task Force believes that it is crucial that the Commission provide pertinent information about possible systemic discrimination to field employees. Thus, the Task Force makes the following recommendations:

a. ORIP Should Prepare User-Friendly Reports

Information collected and analyzed about possible systemic discrimination is useful only if it is shared with front line staff in a user-friendly format. To that end, the Task Force

recommends that ORIP prepare succinct reports tailored for particular districts or regions. These reports, which should be used for enforcement purposes, should include data on economic trends, demographic shifts, and nationwide themes and patterns. ORIP should also identify bases, issues, industries or employers of interest.

b. The Commission Should “Flag” Matters of Interest in IMS

The Task Force believes that some of the issues, bases, industries and/or employers of interest ORIP identifies, in consultation with OFP and OGC, should be flagged in the IMS system, so that investigators and other field staff can be alerted as early as the Intake stage and follow up as appropriate.

c. Districts Should Identify Priority Issues

The Commission should encourage each district to designate its own priority systemic issues.²¹ This will allow investigators and other Intake staff to identify certain types of issues at the earliest stage. Because these are likely to be regional or local concerns, the Task Force believes it would be beneficial for districts to share these priorities with their FEPA partners.

5. The Commission Should Encourage Collaboration Among Offices

The Task Force believes that EEOC should focus on systemic discrimination wherever it occurs. This national approach will require greater coordination and cooperation between offices in the field, between the field and headquarters, and among offices within headquarters. In particular, because systemic discrimination frequently crosses the jurisdictional boundaries of the EEOC’s districts, the districts should share information and ideas related to identifying systemic discrimination, including their systemic priority issues lists, with other districts and with headquarters. Each district should identify an employee responsible for coordinating with ORIP, OFP and OGC on identifying systemic discrimination. The Task Force recognizes that this recommendation puts added responsibility on the field at every level – from Intake personnel to the District Directors – and, as such, that implementing it will require resources, support and encouragement from all of headquarters.

6. Districts Should Develop Systemic Plans

As discussed more fully in Section III, the Task Force recommends that each district develop a Systemic Plan which outlines the district’s strategy for identifying and investigating systemic discrimination.

7. The Commission Should Enhance Expertise Among Staff and Provide Useful Guides and Other Materials

The Task Force recommends that the Commission develop expertise among staff in identifying systemic discrimination. We further believe that the Commission should create an internal website that includes materials related to the identification and development of systemic charges, such as guidelines and sample documents, and create an electronic bulletin board or

listserv to foster communication. (See fuller discussion of these issues in Sections III.C.5., 6.)

8. The Commission Should Encourage Efforts at Addressing Systemic Discrimination Through Expanded Charge Investigations Where Appropriate

The Task Force recommends that the Commission reaffirm its policy that individuals may allege class discrimination in charges and ensure that staff are aware of this position. While districts have the responsibility to determine when to expand an investigation to address class issues, individuals (and third parties) have the right to file class charges if they so desire.

The Task Force further recommends that management in headquarters and the field encourage expanding the investigation of individual charges and investigating class allegations in charges, where appropriate.

Because most potential systemic cases are (or should be) designated as A-1 charges, the Commission should reaffirm the principle that A-1 cases should not be sent to the mediation program without the concurrence of the Regional Attorney.

9. The Commission Should Encourage Efforts at Addressing Systemic Discrimination Through Commissioner Charges and Directed Investigations Where Appropriate

In order to be proactive in identifying systemic discrimination, the Task Force believes that EEOC also should use the data it collects through IMS and EEO-1 Surveys and the data it reviews from the U.S. Census and other sources to pursue possible discrimination via Commissioner Charges and Directed Investigations where there is no appropriate charge with which to pursue the issue. The development of Commissioner Charges and Directed Investigations ordinarily should be based on the thorough consideration of factors such as current economic conditions, demographic data, relevant labor markets, industry data, underserved areas or populations and charge data. We believe that Commissioner Charges and Directed Investigations should be a regular part of EEOC's systemic enforcement efforts.

a. Commissioner Charges

The Task Force recommends that the Commission issue a memorandum explaining the procedures for initiating and investigating Commissioner Charges, as set forth in PCHP.²² The Task Force also suggests that the Commission clarify the type of evidence and information that should be included in a Commissioner Charge proposal. The Task Force believes that the following information should be included in each proposal:

- The respondent's size and type of work it performs;
- The reason a Commissioner Charge should be issued; and
- A description of the information or preliminary evidence supporting the

allegations that discrimination may have occurred (this can be based on a variety of sources, including news reports, ads, statistics, or anecdotal information).

Further, the Task Force recommends that OGC legal staff and employees in ORIP and OFP be designated to serve as contact people for field offices developing Commissioner Charges. These employees should be available if a field office wishes to seek headquarters assistance or guidance in researching or preparing a proposal (this should involve assisting the field, not performing oversight).²³ They also should facilitate communication between Commissioners and the field, if requested.

In addition, the Task Force recommends that when new Commissioners arrive, the agency educate them on the Commissioner Charge process. Commissioners should be encouraged to work closely with a field office when they have an idea for a Commissioner Charge that they would like the field to pursue (to ensure that the field office supports the proposed investigation) and when they are reviewing a field proposal.²⁴ Commissioners also should be encouraged to have realistic expectations regarding the amount of evidence available for a Commissioner Charge²⁵ and to recognize that early closure of an investigation may be appropriate where the evidence does not support the allegations.

Because the Task Force found that the Commissioner Charge approval process has been hampered by delays in recent years, we believe that Commissioners' Offices should be urged to respond to proposed Commissioner Charges in a timely manner, and that the Office of the Executive Secretariat should ensure that the Commissioners follow the review process.

Finally, to encourage offices to propose Commissioner Charges aimed at routing out systemic discrimination, the Task Force recommends that, for an initial two-year period, the Commission provide incentives to District Directors and Regional Attorneys for submitting systemic Commissioner Charges that are approved by a Commissioner.²⁶ The issue of incentives for addressing systemic discrimination is addressed more fully in Section III.C.4.

b. Directed Investigations

The Task Force recommends that the Commission encourage District Directors and their designees to initiate Directed Investigations when they have sufficient indication of systemic discrimination under the ADEA or the EPA. The Task Force recommends that the Commission promote the use of Directed Investigations as part of the agency's overall effort at combating systemic discrimination and issue a memorandum explaining the procedures for initiating a Directed Investigation.

In addition, the Task Force suggests that the employees designated in OGC, OFP and ORIP to assist field staff in preparing or investigating Commissioner Charges also be available to the field for questions or assistance regarding Directed Investigations in systemic cases.

III. INVESTIGATING SYSTEMIC CHARGES

A. Background

The Task Force reviewed the history of the agency's efforts at combating discrimination through the investigation of systemic charges. As discussed in Appendix C, beginning in about 1979, each district office had a separate systemic unit comprised of approximately four to six systemic investigators who were responsible for developing, investigating and conciliating Commissioner Charges in their districts. OFP had extensive oversight over the field's systemic program. The systemic units were phased out in the mid to late 1990s, following the Commission's adoption of PCHP.

Since that time, districts have investigated systemic discrimination using a variety of organizational approaches. For example, in some offices, one or two experienced systemic investigators typically investigate all of the systemic charges. Other offices pull together a team of investigators to investigate each systemic case; in some offices, attorneys are also assigned to the investigative team. Some offices treat systemic charges in the same manner as other charges.

As discussed in Appendix C, there is also a small complement of systemic investigators working with attorneys in OGC's Systemic Litigation Services (see also endnote 35).

This Section addresses the Task Force's findings regarding what has worked and what has not worked in EEOC's investigation of systemic charges and recommends reforms to the process to maximize the efficient use of resources and improve effectiveness.

B. Findings

The Task Force found some instances of successful systemic investigations, most of which involved close coordination between the enforcement and legal staff. Many of these successful systemic investigations resulted in significant litigation (see Section IV.B. of this Report). We also found a few instances in which systemic investigations culminated in conciliation agreements that the Respondents agreed to publicize. For example, the Commission conciliated a case against a nationwide chain of hair salons involving alleged race discrimination in hiring, promotion and termination; the case settled for \$3.5 million, and the company agreed to put in place several measures designed to prevent discrimination in the future. The Commission also publicly conciliated a Commissioner's Charge involving a high-end restaurant chain's alleged failure to recruit and hire women for food server positions; the employer agreed to pay \$500,000 in relief and voluntarily implemented changes in its employment practices, which included mandatory hiring discrimination training and more effective applicant tracking and record-keeping systems.

The Task Force learned that, although there have been a few instances in which districts have partnered with one another to conduct a systemic investigation, this is a rare occurrence. (One recent example of successful partnering occurred in the investigation of Abercrombie & Fitch, where two districts worked together to investigate and settle (through a consent decree)

allegations of discrimination against Black, Hispanic, Asian and female applicants and employees.)

The Systemic Task Force identified the following areas for improvement with respect to the Commission's efforts to investigate systemic discrimination.

1. The Commission's Approach to Systemic Investigations

The Task Force found that the Commission does not have a strategic, coordinated approach to investigating systemic discrimination nationwide. Also, EEOC districts rarely collaborate with each other on systemic investigations. In addition, the Task Force found that in cases where there are indications of class or broad systemic discrimination, many EEOC employees are reluctant to expand an investigation beyond the individual charging party, the named facility and/or the particular EEOC office's geographical boundaries, for a variety of reasons.

2. Consistency of Efforts to Investigate Systemic Discrimination

The Task Force found that the Commission does not investigate systemic discrimination consistently throughout the country. While some districts pursue these cases vigorously, other offices focus on different priorities, and some offices simply lack the necessary staff, expertise or experience to pursue systemic investigations.

3. Priorities and Incentives

The Task Force learned that many employees believe that investigating systemic discrimination is not a Commission priority. District Directors have not had goals related to addressing systemic discrimination since approximately 1994. Many people reported that efforts to achieve office goals in other areas, such as outreach and inventory management, make it difficult to devote necessary resources to systemic cases. In response to the Task Force's survey to District Directors and Regional Attorneys, over 90% of the district offices stated that workload constraints prevented their district from devoting staff time to systemic cases. One hundred percent stated that an adjustment to office goals would be helpful in assisting their districts in pursuing systemic investigations.

Similarly, many employees told the Task Force that there are not adequate incentives for developing or investigating systemic cases. In fact, many employees felt that there are disincentives for doing this type of work, because it interferes with achieving inventory management goals. Eighty-five percent of the District Directors and Regional Attorneys who responded to the Task Force's survey identified "lack of incentives" as an obstacle in developing large systemic cases. The vast majority of the Commission employees with whom the Task Force conferred expressed the desire to perform more work on systemic cases, but indicated they believe the Commission's current priorities and incentives discourage such work.

4. Staffing

Many employees advised the Task Force that in order to carry out a vigorous systemic program, the field would need additional staff, particularly investigators (especially those with systemic expertise). In addition, the Task Force learned that some of the Commission's best systemic investigators have moved to management or mediation positions in order to obtain a promotion beyond the GS-12 level, thereby further depleting the number of seasoned systemic investigators.

5. Enhancing Expertise

While the Commission has many employees throughout the country who have strong skills and broad experience in developing and working on systemic cases, a significant portion of the agency's workforce does not have the requisite expertise. The Task Force learned that many employees do not know how to use the primary tools and resources that are critically important in systemic cases, including EEO-1 Desktop, EEOSTAT, EXCEL, and Census data. Very few employees have access to or know how to use BRIO (software that analyzes charge data from IMS) or SAS (software that conducts sophisticated analyses of data). Investigators who work on systemic cases do not have access to, or training in, CaseSoft, which is litigation management software that attorneys sometimes use in class cases.

Many employees lack expertise in substantive matters including: identifying possible systemic discrimination (at Intake, during an investigation or based on data analysis); determining what evidence is needed in a systemic case; analyzing statistical data (including how and when to seek expert assistance); and applying the correct legal standards. Many employees need to develop skills in practical areas such as: working with electronic information; managing the multitude of documents or computerized records that are typically needed in systemic cases; tracking and communicating with large numbers of witnesses or aggrieved persons; and conciliating large systemic cases.

Many individuals advised the Task Force that not every investigator is particularly suited for, or interested in, working on systemic cases, and that it would be best to develop expertise in staff who have strong analytical and organizational skills, an aptitude for statistics, and an interest in working on systemic cases.

The Task Force also found that the agency does not have user-friendly, easily accessible tools and guides for helping employees develop or investigate systemic charges. There is little if any information related to systemic work on the Commission's internal website (InSite). Moreover, finding information on that website can be difficult. The Task Force found that staff working on systemic cases want the opportunity to communicate electronically with one another using a bulletin board or listserv.

6. Expert Services

The Task Force found that there are too few research and technical experts in headquarters to provide sufficient guidance and support for the field's systemic investigations

(there are currently three experts in ORIP who perform this function), and the need for this type of assistance will expand greatly if the Commission adopts the Task Force's recommendations. Moreover, the experts do not have the requisite access to necessary journals, subscription services, studies and technological tools.

7. The Headquarters Systemic Investigations Program

Since approximately 1997, the headquarters systemic investigations unit has been part of OGC (see Appendix C). For a number of years, the unit has focused on cases designed to develop the law rather than large class cases. Members of the public do not file charges with headquarters, so there is no stream of charges from which the unit can develop systemic investigations.

Although most of the individuals who spoke with the Task Force about the headquarters systemic unit focused on whether there should be a headquarters litigation unit (see discussion in Section IV.B.2. of this Report), some people specifically addressed the investigations function. Some spoke in favor of having an investigations unit in headquarters. However, most people advocated eliminating the investigation function from headquarters. Many suggested that a separate national systemic investigative office was not necessary because the field can perform this work as well, or better. Several commented on the difficulty of developing investigations from headquarters because only the field is connected to the pipeline of charges. Some felt that systemic work should be done in the field because field employees are more knowledgeable about local trends and issues, have closer ties to local community groups, and have more opportunity to learn about discrimination through Intake and the investigation of other charges.

8. Ensuring the Success of the Commission's Systemic Program

The Commission does not have an entity at headquarters or elsewhere specifically responsible for reviewing the agency's effectiveness in identifying or investigating systemic cases. Both the field and headquarters have important roles to play in maintaining an effective systemic practice, and within headquarters, there are multiple offices that must contribute to the success of the program (particularly ORIP, OFP and OGC). No one office currently has responsibility for looking at the totality of the program and evaluating its effectiveness. Past headquarters efforts at overseeing the systemic program in the field were criticized widely as ineffective and highly burdensome.

C. Recommendations

1. All Districts in the Field Should Investigate Systemic Cases

The Task Force believes that all EEOC districts throughout the country should investigate systemic cases, because combating systemic discrimination is such an essential part of the Commission's responsibilities. We considered but rejected the suggestion that systemic investigations be conducted by only a few select offices that have been particularly successful in this area. We believe that combating systemic discrimination must be every district's practice.

Systemic discrimination occurs nationwide and the Commission should be investigating it nationwide.

However, the Task Force recognizes that not every office currently has the staff, expertise or experience to investigate systemic cases successfully on its own. Therefore, as discussed more fully below, we recommend that the Commission strongly encourage partnering and mentoring in order to ensure that systemic cases are investigated effectively throughout the country, and to promote the development of expertise.

2. Districts Should Develop Systemic Plans

In order to ensure a coordinated, strategic, effective agency-wide approach to identifying and investigating systemic discrimination, the Task Force recommends that each district develop a Systemic Plan. The District Director and the Regional Attorney for each district should jointly prepare the Plan and update it annually (or more often, if necessary). As discussed more fully below, districts should submit Plans to OFP and OGC who should review the Plans and ultimately negotiate an annual Plan with each district.

Together, the plans should reflect a coordinated, national approach to combating systemic discrimination. As discussed below, this will require coordination between districts and sharing of resources between offices. Thus, while the Task Force envisions a Systemic Plan for each district, the Plans should be interdependent.

a. The Systemic Plan Should Address How the District Will Identify and Investigate Systemic Discrimination

The Task Force believes that the Systemic Plan should address two critical issues. First, it should describe the specific steps that each district will take to identify and investigate systemic discrimination. The Plan may address the investigation of existing charges and/or the development of Commissioner Charges or Directed Investigations. While the Plan should be as detailed and specific as possible, it should also be flexible enough to allow a district to change course if necessary. For example, if, after investigating a charge in accordance with a Systemic Plan, an office determines that it is unlikely that the respondent violated the law, the office should exercise appropriate judgment and dismiss the charge and then, in consultation with OFP and OGC, promptly modify the Plan to address other possible systemic discrimination.

Second, the Plan should describe how the identification and investigation of systemic discrimination will be accomplished, taking into consideration the district's strengths and resources. As indicated above, the Task Force believes that some districts can perform systemic work on their own with current staff, while others cannot because they lack resources or staff with the necessary skills and expertise. In light of this, and in order to ensure that the Commission is effectively addressing systemic discrimination nationwide, the Task Force recommends that the Commission encourage districts to collaborate with other offices and/or with particular staff members in other districts who have systemic expertise. In constructing approaches to accomplishing this work, the Task Force foresees a variety of possibilities, including offices with significant systemic experience partnering with other offices to jointly

identify and investigate systemic discrimination,²⁷ or select staff (investigators, attorneys, supervisors, etc.) who have specific expertise working on systemic charges with another office (e.g., as a team member, team leader, or mentor).²⁸ In determining which approach to adopt, the Task Force recommends that districts take advantage of their existing resources and strengths district-wide (including all offices that are a part of that district) and address gaps. We make no recommendation as to how staff working on systemic cases within a particular district should be structured (*i.e.*, whether there should be designated systemic teams or units, dedicated systemic investigators or hybrid teams, etc.); we believe that districts should determine the structure that will work best for them, in accordance with their Systemic Plan.

Regardless of the approach adopted, the Task Force believes that there must be close coordination between legal and enforcement staff throughout the identification and investigation of systemic cases.

b. Headquarters Should Assist the Field in Developing Systemic Plans

The Task Force recommends that OFP, OGC and ORIP assist districts in formulating their Systemic Plans by identifying potential partner offices and specific field or headquarters employees with relevant expertise. As discussed in Section II, headquarters staff should also work with districts to identify possible systemic discrimination to be addressed as part of the Systemic Plan.

c. OFP and OGC Should Negotiate and Ultimately Approve Systemic Plans for Each District

Once proposed Plans are submitted, OFP and OGC should consult with ORIP and the advisory committee discussed in subsection C.12. below. In reviewing the Plans, OFP and OGC should ensure that each Plan is appropriate for the particular district, and that the Commission as a whole is addressing systemic discrimination in an effective and strategic way (this includes, among other things, ensuring that the systemic program addresses discrimination nationwide, and addresses diverse bases and issues).

Ultimately, OFP, OGC and each district should negotiate a Systemic Plan that is tailored for that district and contributes to the Commission's overall efforts to combat systemic discrimination nationwide. The final plans should be reviewed and approved by the Director of the Office of Field Programs and the General Counsel (or the General Counsel's designee). The Task Force believes that the Plans must require results, and that they may require adjustments to other office goals (see Section III.C.4. below). We recommend that District Directors and Regional Attorneys be evaluated on their success in effectively identifying, investigating and conciliating systemic cases, consistent with their Systemic Plan (see endnote 30, *infra*).

3. The Commission Should Ensure Adequate Staffing on Systemic Cases and Create a Lead Systemic Investigator Position

Having a sufficient number of staff with the necessary expertise is critical to the success of the systemic program. We believe that it is especially important to ensure that the offices that

partner with less experienced offices have sufficient staff to continue to perform their own systemic work.

In addition, the Task Force recommends that the Commission create and fill at least five GS-13 lead systemic investigator positions.²⁹ To accomplish this, we recommend that offices that believe they have qualified employees submit justification memoranda requesting the position for their offices, and that OFP select from among district applicants. We believe that these positions should be filled with incumbent staff, who, based on their demonstrated expertise and quality work on systemic cases, could serve as mentors and team leaders on systemic investigations both within and outside of their districts. Creation of this position will allow the Commission to retain highly skilled staff in a critical role and will enhance a culture of excellence at the Commission.

4. The Commission Must Create Incentives for Developing Systemic Cases

The Task Force recommends that the Commission create incentives through evaluations and other means to encourage the field to successfully identify and investigate systemic cases, in accordance with the district's Systemic Plan.³⁰ Thus, the effective development and investigation of systemic cases should be included as one of the expected results in the leadership element of the District Directors' performance plans.³¹ In addition, the Task Force recommends that the Commission create incentives to encourage the field to successfully contribute to the Commission's national program of combating systemic discrimination, through partnering, mentoring or other methods and to develop expertise among staff in the identification and investigation of systemic discrimination.

In order to make it possible for districts to devote the resources necessary for systemic case investigations, the Task Force believes that the Commission may need to make adjustments in some offices, such as reducing a district's outreach or production goals, "backing out" a certain percentage of staff time (such as 10% or 15%) or transferring cases from one district to another if additional staff resources are not available or expected. These adjustments also should be offered to offices that are willing to partner with, or provide staff resources to, other offices. The Task Force recommends that the districts and OFP address these types of adjustments during the negotiation of each office's Systemic Plan. (See Section IV.C.4. regarding incentives for systemic litigation.)

Finally, the Task Force believes that effective work on systemic cases, including effective partnering and mentoring, should be recognized as part of the Commission's awards programs and any incentive pay plans.

5. EEOC Should Enhance Systemic Expertise Among Staff

The Task Force believes that the Commission should continue to enhance systemic expertise among staff, including expertise in technological, substantive and practical matters as discussed in Section III.B.5. *supra*, using a variety of approaches. EEOC should use partnering and mentoring opportunities to pair employees who have performed high quality work on systemic cases with less experienced staff to work together on specific systemic investigations as

a training and development tool. Although there are numerous employees at the Commission who are very skilled at identifying or investigating systemic cases, their skills are often underutilized. Employees with less expertise – especially those with strong analytical and organizational skills, an aptitude for statistics, and a strong interest in this area – could benefit greatly by working on systemic cases with their more experienced peers.

EEOC should develop systemic expertise through formal training sessions, such as the training program on class case development and litigation that the Commission conducted successfully several years ago. Staff with practical experience in developing and litigating systemic cases should serve as trainers.

EEOC should use informal, case-based training in field offices. This would be particularly useful once an office begins working on a particular systemic case.

EEOC should promote the development of expertise through self-education and e-learning. The Commission should make available articles, books, videos and other materials that employees can use to develop their own knowledge and skills. (*See also* Section III.C.6. below, regarding the development and posting of materials.) Also, the Commission should improve its internal website (InSite), particularly the search function, to make it easier to find relevant materials.

EEOC should provide training on CaseSoft, the litigation support software used by Commission attorneys, to some field investigators and other enforcement staff working on systemic charges, and make the software available on their desktops.

EEOC should form strategic partnerships with outside agencies and groups to increase training opportunities and maximize Commission resources, such as possible joint training initiatives with the Department of Justice, the Department of Labor, OFCCP and FEPAs related to systemic discrimination. The Commission should also partner with private organizations, such as the American Bar Association, the National Employment Lawyers Association and the Impact Fund, to provide joint training or to make arrangements for EEOC employees to attend their class discrimination training programs. (The Task Force believes that outside training and conferences can be very valuable not only because they provide formal training, but also because they can allow employees who already have expertise to network with others who perform the same kind of work and share experiences, which helps bolster confidence and morale.)

To facilitate the sharing of expertise among staff, EEOC should create an electronic bulletin board or listserv which would allow investigators and attorneys working on systemic charges to communicate with their peers regarding systemic cases and generate awareness of and interest in systemic cases for new and inexperienced investigators and attorneys.

The Task Force believes that in addition to providing training and development opportunities to field staff, EEOC should also offer such opportunities to the headquarters staff who focus on systemic discrimination issues, including the experts in ORIP and OGC.

6. EEOC Should Create an Internal Website and Post Materials Related to Systemic Case Development

The Task Force recommends that EEOC collect and create materials related to combating systemic discrimination, and post them on an internal website devoted to systemic issues. Such materials should include:

- a systemic manual;
- interview guides;
- checklists;
- questionnaires;
- sample documents used in systemic investigations;
- conciliation guides;
- information about offices' best practices (for example, on Intake, case management, and outreach related to systemic discrimination);
- case studies;
- approved Commissioner Charges (including brief descriptions of the issues and bases, and the evidence presented in the proposal); and
- a list of contact people for follow-up discussions.

7. Headquarters Should Not Have a Dedicated Systemic Investigations Unit

The Task Force recommends that the Commission eliminate the headquarters systemic investigation function.³² We believe EEOC should conduct systemic investigations in the field, not in headquarters.

8. Experts in ORIP Should Take a Primary Role in Providing Substantive Assistance to the Field on Systemic Investigations

Upon request from the field, or consistent with Systemic Plans, headquarters employees should provide substantive assistance and guidance during systemic investigations, particularly with respect to reviewing and analyzing evidence and conducting statistical analyses. Headquarters employees should also help with investigative planning and strategy, drafting requests for information and case management. We believe that the research and technical experts in ORIP should be primarily responsible for providing this type of assistance during the systemic identification and investigation stages.

a. The Commission Should Devote Additional Resources to Expert Services for Systemic Investigations, Create a Distinct Unit, and Place Some Experts in the Field

In order to provide substantive assistance on systemic investigations and help the field in identifying systemic discrimination through analyses of data and other methods (see Section II, *supra*), the Task Force believes that the Commission will need to hire several additional experts in ORIP. The most immediate needs are for two labor economists, two social scientists, one industrial psychologist and one research assistant. We further believe that at least some of this

additional staff should be located in the field, not in headquarters, so that they can work more closely with field staff. In addition, we recommend that ORIP create a distinct division containing all of the systemic support functions.

The Task Force also recommends that other resources be provided to ORIP (and RAS), including greater access to necessary journals and online subscriptions and enhanced technological tools, including the latest version of the SAS software (SAS-9) as well as periodic appropriate upgrades and updates of these tools. (We recommend that the agency provide access to many of these resources, including access to subscriptions such as Hoovers.com, to field staff as well.)

b. Experts for Investigation and Litigation Should Remain In Separate Departments

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.³³ 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.

9. OGC and OLC Also Should Provide Substantive Assistance to the Field

Appropriate OGC and Office of Legal Counsel (OLC) headquarters staff also should provide assistance to the field during systemic investigations, upon request or as part of a district's Systemic Plan. OGC headquarters attorneys are available to provide substantive guidance to field attorneys regarding systemic investigations. In addition, OLC attorneys are available to provide substantive guidance to field investigators and attorneys regarding legal issues during the development of systemic charges.

10. Headquarters Staff Should Support the Field in Partnering and Coordination and Provide Other Assistance as Needed

The Task Force believes that headquarters staff in OFP, OGC and ORIP should assist the field in partnering, coordination, and other operational and logistical matters related to systemic charges. Support of the field's systemic program should be a vital part of the activities of these offices.

Headquarters staff in OFP and OGC should assist the field in establishing partnerships among offices and should identify employees in the field and headquarters who have expertise in relevant areas and can assist districts on particular systemic investigations.

Headquarters staff also should help with inter-office coordination on systemic claims. For example, when a district intends to investigate discrimination outside of its geographic boundaries, headquarters staff should work with the office to ensure coordination and avoid duplication of effort by multiple districts. OFP and ORIP also should work together to identify instances when more than one office is investigating similar claims against the same respondent and communicate this information to the field. Where appropriate, OFP should assist the field in coordinating the investigations or facilitate the transfer of related charges from one office to another in order to maximize efficiency.

The staff in RAS and ORIP should assist the field in identifying outside vendors and experts when necessary for investigations, including vendors able to perform data entry or database management, or persons with expertise beyond that available in-house.

Headquarters library staff should continue to assist the field in conducting research, particularly with respect to locating individuals and finding information about businesses or industries. This may require redeploying other headquarters staff to the library.

Finally, headquarters staff should assist the field by enhancing technology in support of systemic investigations; facilitating the creation of materials, such as systemic manuals and guides for investigators; posting systemic materials on an internal website; facilitating communication between employees working on systemic investigations; and providing, or coordinating, training to field staff designed to enhance expertise in systemic cases.

11. The Commission Should Increase Coordination with its Sister Agencies and FEPA Partners to Address Systemic Discrimination

The Task Force recommends that the Commission work more closely with its sister agencies to combat systemic discrimination. The Task Force met with high level officials in the Civil Rights Division of the Department of Justice, and in the Solicitor's Office and OFCCP at the Department of Labor, all of whom expressed interest in working together to address systemic discrimination.

Where it appears that a state or local government has engaged in systemic discrimination in violation of Title VII or the ADA, the Task Force recommends that the Commission make an increased effort to communicate and coordinate with the Department of Justice. We also suggest that OGC and/or OFP designate an employee responsible for coordinating with the Department of Justice on an ongoing basis, particularly with respect to systemic cases.

The Task Force recommends that the Commission also coordinate more closely with the Solicitor's Office and OFCCP at the Department of Labor. We understand that the Commission and OFCCP are working collaboratively on at least one systemic investigation at the present time, and we believe that both agencies will benefit from this cooperative approach.

The Task Force also recommends that the Commission expand efforts to partner with FEPAs on systemic investigations. In many instances, it will be beneficial to share information or conduct joint investigations in systemic cases.

12. The Commission Should Create an Advisory Committee to Help Ensure that the Agency’s Systemic Practice is Effective

The Task Force believes that it is critical that the Commission create a Committee of Advisors for Systemic Enforcement (“CASE”) responsible for helping to ensure that the agency combats systemic discrimination effectively. CASE should not perform an oversight function or create an additional layer of approval or management for the field. Rather, CASE should be a useful source of assistance and support. Specifically, CASE should be responsible for:

- reviewing the agency’s systemic efforts to see if they are nationwide and strategic and include a diversity of issues and bases and emerging areas of discrimination;
- evaluating the program’s success from a national perspective and submitting semi-annual reports to the Commissioners and to the field that address:
 - current systemic enforcement efforts including identification, investigations, and litigation;
 - an assessment of the issues, bases, geographic regions, industries, and/or emerging types of discrimination that the Commission should address more effectively; and
 - strategies for addressing the identified potential areas of enforcement
- assisting the field in identifying and pursuing systemic discrimination;
- serving as a resource on systemic matters, including providing guidance and advice on:
 - the field’s Systemic Plans, upon request;
 - the content of the systemic enforcement website;
 - the systemic enforcement manual; and
 - other tools and training developed to assist the field on systemic cases, and
- assisting the agency on systemic enforcement issues and strategies.

We recommend that CASE be comprised of a cross-section of no more than nine staff members from both the field and headquarters including: a District Director, a Regional Attorney, a Mentor or Lead Investigator, a Trial Attorney, and personnel from ORIP, OGC, and OFP. The composition of the committee could change over time.³⁴ We recommend that CASE select a leader and determine how it will assign tasks among its members.

CASE members should be selected based upon their systemic enforcement experience and expertise. In performing their work, they should consult with Commissioners and their staffs, field offices, headquarters offices, stakeholders, academics and FEPA leadership, as

appropriate. Headquarters offices (e.g., OFP, ORIP, OGC, OIT) and field offices should provide information to the group as needed.

13. The Commission Should Educate The Public On Systemic Trends, Issues and Cases As Part of Its Effort to Proactively Prevent Discrimination

The Task Force believes that as a complement to its enforcement efforts, the Commission should use outreach opportunities to educate employers and other members of the public about systemic discrimination, including trends and issues the agency has identified. This could include outreach focused on a particular geographic region, industry or size of employer. (See related discussion in Section IV.C.8. of this Report.)

IV. LITIGATING SYSTEMIC CASES

A. Background

Virtually all of the Commission's systemic litigation is initiated and prosecuted by attorneys in field offices. Litigation is almost always handled by the office in which the underlying charge arose. Some offices have more systemic expertise and experience than others.

In addition to the systemic activity in the field, in headquarters OGC houses a small unit called Systemic Litigation Services (SLS), which has both investigative and legal staff.³⁵ (The agency's past headquarters systemic efforts and organizational structure are discussed in Appendix C of this Report). SLS changed its focus in approximately the late 1990s from litigating systemic cases to searching for issue-oriented cases for possible development from the charge stage forward.

This section addresses the Task Force's findings related to the agency's systemic litigation efforts and recommends changes to enhance the agency's effectiveness and use of resources.

B. Findings

The Task Force found numerous instances of successful systemic litigation. Systemic cases resolved by the field legal units during the past few years include: *Carl Buddig & Co.* (discrimination against African Americans in hiring and women in assignment at a meat processor with four plants); *Rent-A-Center, Inc.* (sex discrimination against women in hire, discharge, and terms and conditions of employment at the nation's largest rent-to-own business); *Dial Corporation* (sexual harassment of female employees at an Illinois production facility of a major manufacturer of soap products); *Northwest Airlines, Inc.* (disability discrimination action challenging airline's policy of excluding individuals with insulin-dependent diabetes and those taking anti-seizure medications from equipment service employee and aircraft cleaner positions); and *Morgan Stanley & Co., Inc.* (sex discrimination against female professional employees of a global financial services firm in promotion opportunities, compensation, and terms, conditions, and privileges of employment). In addition, legal units have worked together effectively on a number of systemic as well as other cases. For example, offices partnered effectively on litigation against Wal-Mart Stores, Inc. (coordinated resolution of 13 pending ADA lawsuits).

With respect to the Commission's systemic litigation practice, the Task Force found areas for improvement with respect to: how attorneys are assigned to systemic lawsuits; the role of headquarters; incentives; enhancing expertise; paralegal staffing; and prefiling issues.

1. Attorney Staffing on Systemic Cases

The Task Force found that in staffing systemic cases, the Commission does not sufficiently capitalize on the strengths and expertise of its staff nationwide but rather tends to have the staff in the office where the charge originated handle the litigation. Participation by staff with relevant expertise from other offices has been on an *ad hoc* rather than formalized

basis. EEOC staff and outside attorneys, including some of the leading employment discrimination attorneys in the country, recommended to the Task Force that the Commission staff systemic cases based on experience, skills and interest. They suggested that as Commission attorneys develop expertise in a substantive or technical area, the Commission should turn to those attorneys to assist in, or even lead, the prosecution of other cases that require similar expertise, regardless of the geographic location of their offices. Some defense attorneys from national law firms noted that, based on their experience in litigating cases against the Commission, the Commission often was disadvantaged by its failure to staff cases with attorneys who have specialized experience.

Defense attorneys explained to the Task Force that when it comes to staffing large cases, their firms no longer simply turn to the originating office and the originating partner. Instead, staffing is determined by the needs of the case. Representatives from one firm stated that they have a national assignment partner who is responsible for staffing the firm's large class cases.

The lawyers we spoke with stated that their firms typically staff large cases with, for example, an attorney who has substantive expertise in the relevant area of law, an attorney with expertise on the particular industry, an attorney with extensive experience in statistics and database management, and several less experienced attorneys (in addition to paralegals). Although the attorneys often will be located in different cities, these law firms found that the expertise they bring to the case more than makes up for the physical distance and that current technology allows them to work together very effectively. Attorneys we spoke with stressed that the move to staff large suits based on the needs of the case did not happen overnight, but required significant changes in their firms' culture, expectations and incentives.

2. The Headquarters Systemic Litigation Program

The Task Force considered whether the Commission should maintain the headquarters systemic unit (SLS) or eliminate it. In considering this question, the Task Force looked at the history of the systemic program particularly in headquarters and considered input from a variety of sources, including staff in headquarters and the field as well as external stakeholders.

Several individuals advised the Task Force that headquarters has played and should continue to play an important role in litigating cases, and several recommended that additional resources be provided to the unit. Some suggested that the unit continue to focus primarily on issue-oriented "law reform" cases and leave most of the large class cases to the field.

However, the vast majority of individuals who provided input to the Task Force felt that there was not a need for a headquarters systemic litigation unit and that the work should be performed in the field. There were a variety of reasons given, including the following:

- almost all systemic litigation is handled in the field;
- a number of field offices have substantial experience and expertise in developing and litigating large class cases, and the field is better equipped than the headquarters unit to do this kind of work;
- headquarters does not have a pipeline of charges from which to develop possible

litigation vehicles (this also can result in conflicts between headquarters and the field and duplication of effort);

- field offices already investigate and litigate regional and national cases, and therefore there is no unique role for a headquarters program;
- there is no logistical advantage to litigating regional and national cases from the headquarters office;
- given the recent advances in technology, there is no distinct advantage to housing a dedicated team of systemic attorneys in the same building as Commission experts, appellate staff and other headquarters attorneys with relevant experience;
- field staff are more familiar with local trends, issues, attorneys and courts; and
- field offices also bring cases designed to develop the law and can do this as effectively as a unit focused only on such cases.

3. Headquarters Assistance to the Field

The Task Force found that headquarters staff in OGC provide support to the field systemic litigation program in several ways. For example, OGC reviews recommendations to file suit in most systemic cases. Upon request, OGC staff also provide substantive and technical advice on systemic cases. In addition, OGC helps facilitate coordination and partnering among offices. However, the Task Force found that particularly with respect to technology-related issues, the field is not necessarily aware of the level of assistance that OGC is willing and able to provide.

Upon request, and to the extent that limited resources allow, experts in OGC's RAS serve as consulting or testifying experts in systemic suits and assist Commission attorneys in identifying and working with external experts. The Task Force believes that particularly in their role as consulting experts on cases in litigation, RAS staff are an invaluable resource because they often provide faster and more objective advice than outside experts. In addition, use of RAS staff saves the agency hundreds of thousands of dollars each year in expert services costs. Current and past RAS staff have degrees in psychology, statistics and economics, which have been the major areas of expertise needed in Commission suits. However, RAS has lost over half its staff since the early 1990s and is severely understaffed.

4. Incentives

The vast majority of comments we received regarding incentives focused on the need to encourage the identification and investigation of systemic cases. We generally found that OGC values and encourages systemic litigation, and that legal units endeavor to develop these types of cases. However, while we found that some offices have sought out partnerships with other offices in litigating systemic cases, there are no specific incentives designed to encourage this, and to some extent, the current system – which tracks the number of suits filed per office – may actually discourage collaboration between offices.

5. Enhancing Expertise

The Task Force found that although there are many attorneys and paralegals who have

significant systemic expertise and experience, many others do not. We believe that many employees on the Commission's legal staff need training and development in the areas addressed in Section III.B.5. of this Report, as well as in areas particularly useful in systemic litigation (including electronic discovery, expert issues, and large case management). We also found a need for development with respect to technology. We learned that some attorneys and paralegals do not have experience using CaseSoft (litigation management software that may be very useful in class cases), and are not familiar with the other types of litigation support software that may be critical in large systemic cases.

The Task Force believes that OGCNet, the shared email account for attorneys, is a very valuable tool in allowing attorneys in OGC, including trial attorneys in the field, to share information and expertise. We found that it would be more useful if users could search for information more easily.

6. Paralegal Staffing

The Task Force found that because systemic suits involve voluminous documentation that must be organized and analyzed as well as large numbers of potential claimants who must be identified and interviewed, skilled paralegals can do much of the work as effectively as attorneys. The Task Force learned that some plaintiffs' firms that litigate employment discrimination class actions employ twice as many paralegals as attorneys. However, the Commission's legal units average only one paralegal for every 3-4 attorneys, and many of these paralegals spend the bulk of their time (some almost all of their time) preparing responses to Freedom of Information Act requests. As a consequence, EEOC attorneys working on systemic cases spend a great deal of time doing tasks that skilled paralegals could perform. Moreover, legal units may be losing paralegals in the field because they cannot progress past the GS-11 level, which is lower than the top grade for investigators and mediators.

7. Prefiling Issues

The Task Force found that because of the large amount of work involved in preparing a systemic case for trial, plaintiffs' attorneys can improve their litigation position substantially by doing as much of this work as possible prior to filing suit and the consequent imposition of court deadlines. This can include matters such as company and industry research, identifying and contacting potential claimants, and retaining experts to assist in the evaluation of statistical and other evidence. Leading plaintiffs' attorneys explained to the Task Force that they ordinarily engage in substantial prefiling work, including the retention of experts, in order to be fully prepared to proceed expeditiously with discovery and expert work once a lawsuit is filed.

C. Recommendations

The Task Force considered the input provided regarding the Commission's systemic litigation efforts and has the following recommendations:

1. The Commission Should Staff Systemic Suits Based on the Needs of the Case

The Task Force believes that the Commission should staff systemic cases more like a national law firm. Specifically, we believe that the Commission should follow the lead of the private sector and routinely staff systemic suits based on the needs of the suit, independent of the office where the case was developed. Thus, in preparing to file a systemic lawsuit, the Commission should evaluate the types of expertise needed on the case and choose individual staff members to assign to the case accordingly. Therefore a particular case could have a lead counsel from one office and be staffed primarily by attorneys from other offices. (Although the Task Force recommends this needs-based approach, we anticipate that for both practical and cost reasons, some attorneys from the office that developed a systemic suit will likely have significant roles in the litigation.) This strategy will allow the litigation program to capitalize on the individual experiences and expertise of Commission attorneys; facilitate greater collaboration and communication among the legal units, as well as between OGC headquarters staff and the field; and enhance the expertise of Commission attorneys nationwide.

2. Headquarters Should Not Have a Dedicated Systemic Litigation Unit

The Task Force recommends that the Commission eliminate the headquarters systemic litigation function. We believe that systemic litigation should be conducted solely by the legal units in the field, with support from headquarters.³⁶

3. OGC Should Provide Enhanced Support to the Field's Systemic Litigation Program

As discussed above, OGC already provides support to the field's systemic litigation program in several ways. The Task Force recommends that OGC continue to provide this support and enhance its assistance as discussed below:

a. OGC Should Identify Attorneys with Expertise and Continue to Assist in the Coordination of Litigation Between Offices

OGC headquarters staff should encourage and facilitate communication among offices developing or litigating systemic cases involving related industries or jobs; similar legal, discovery, proof or procedural issues; or other matters in which offices may benefit from an exchange of information.

To help facilitate the staffing of systemic cases based on expertise, OGC headquarters staff should have primary responsibility for identifying EEOC attorneys and paralegals who have systemic or other specialized expertise. In particular, we recommend that OGC identify attorneys who have experience litigating large or systemic cases; attorneys and paralegals with experience in statistics, electronic discovery, database creation and use, and document management; and attorneys with experience in "niche" substantive areas such as ADEA benefits or BFOQ issues, ADA coverage issues, EPA proof issues, and testing. Where appropriate in a particular case, OGC also should identify attorneys or paralegals with knowledge about the relevant industry, employer or jobs. OGC then will be able to work with the field to identify

particular attorneys or paralegals who can be on the litigation team for a given systemic case (including which attorney can take a lead role), as well as additional attorneys who could provide guidance on discrete legal or technical issues. Through discussions with legal unit management in the developing office and the offices where such other employees are assigned, decisions can be made on how systemic cases should be staffed.

OGC also should share information with the field on an ongoing basis regarding systemic cases in litigation. We suggest that OGC track all systemic cases from filing through resolution and provide regular (at least quarterly) written reports to all district offices and appropriate headquarters offices on the issues involved in these cases and their status, so that other employees can be aware of the pending systemic cases and contact particular offices for additional information if necessary.

b. OGC Should Provide Advice and Assistance to the Field

As noted above, OGC already has staff available to provide substantive advice on systemic cases in litigation (or investigation) upon request from the field. OGC should continue to provide this assistance and, where appropriate, should enhance its assistance by identifying other staff members in headquarters or the field who can give additional or specialized advice.

OGC also should assist the field on matters such as identifying, selecting and working with consulting and testifying experts; coordinating with RAS staff, including assisting in obtaining litigation support services through EEOC's interagency agreement with the Department of Justice; and processing procurement requests requiring headquarters approval.

In addition, upon request, OGC headquarters staff should provide assistance and advice on discovery and trial matters involving electronic information, and the use of computers and other technology in litigation. To the extent resources allow, this headquarters assistance should include performing direct litigation support services for the field. Again, much of this assistance is already provided or available. However, the Task Force would like to see this headquarters capability enhanced and publicized to OGC field staff. OGC staff should be available to work with the field to:

- manage electronic documents -- in appropriate circumstances, this could include scanning and indexing documents in headquarters;
- obtain information about other organizations' computer systems;
- obtain personnel and other organizational data in electronic form (both requesting such data and extracting and converting data from electronic storage devices and media);
- obtain and utilize electronic data such as emails and word processing files;
- use litigation support software such as CaseSoft, Summation and Concordance;
- develop document depositories;
- take videotape depositions and prepare them for use at trial;
- present electronic information at trial; and
- identify, select, contract with and work with outside vendors where tasks cannot be performed internally.

c. The Commission Should Ensure Adequate Staffing in RAS

The Task Force recommends that RAS be authorized to hire a labor economist or statistician and a research assistant. (We understand that RAS already is in the process of hiring an industrial psychologist with expertise to analyze employer tests; this position recently became vacant and filling this position is crucial.) As more systemic suits are filed, this unit should be given authority to fill additional positions, including labor economists and statisticians, and an individual with a strong accounting or actuarial background and expertise in business valuation.

d. The Commission Should Provide Resources for Prefiling Activities

While the Commission gathers considerable information during investigations, we believe that there are occasions when additional work can and should be done after conciliation failure and the final decision to litigate, but before suit is filed. Necessary litigation support funds should be provided as appropriate.

4. The Commission Should Enhance Incentives for Systemic Litigation

The Task Force believes that the Commission must encourage its employees to invest in finding, investigating, conciliating and litigating systemic cases. To that end, the Task Force recommends that the effective development and litigation of systemic cases be included as one of the expected results in the operational efficiency and effectiveness element of the Regional Attorneys' performance plans. The Commission must also encourage legal units to contribute to the agency's national program of combating systemic discrimination through partnering, mentoring and other methods.

The Task Force notes that OGC and the Commission may need to modify expectations regarding the number of suits filed each year. Given the Commission's limited resources, the establishment of an agency-wide systemic program is likely to result in an increase in the number of large lawsuits filed by the Commission and a consequent decrease in the number of lawsuits filed overall. However, we believe that shifting some resources away from individual or small class cases to larger systemic cases will allow the Commission to become more strategic and more effective at accomplishing its mission, while using its limited resources more efficiently.

Finally, the Task Force recommends that effective work on systemic cases, including effective partnering and mentoring, be recognized as part of the Commission's awards programs and any incentive pay plans.

5. The Commission Should Enhance Expertise Among Staff

We believe that attorney and paralegal expertise in systemic cases should be enhanced in many of the same areas that are relevant to identifying and investigating systemic discrimination, which are addressed in Section III.B.5. of this Report. The Commission should also enhance expertise in areas unique to litigation, including technology-related matters (*e.g.*, CaseSoft

software, electronic discovery, electronic trials) and complex litigation issues. As discussed in Section III.B.5., we believe that training and development opportunities should be pursued in a variety of ways, including opportunities for staff to partner with others who have more expertise, formal and informal training sessions, self-education, and partnerships with outside agencies and groups (such as the Department of Justice, the Office of the Solicitor at the Department of Labor, the National Employment Lawyers Association and the Impact Fund).

6. The Commission Must Ensure Adequate Paralegal Staffing for Systemic Cases and Should Create a GS-12 Systemic Litigation Analyst Position

The Task Force believes that the Commission must increase the number of paralegals it employs and move toward a more efficient paralegal to attorney ratio. Therefore, we recommend hiring additional staff for paralegal positions. We also recommend that the Commission explore other options, such as intra-office details, reassignments and “hybrid” paralegal positions. In addition, the Commission should provide funds to contract for temporary paralegal (and clerical) assistance as needed.

The Task Force also recommends that the Commission create a new GS-12 systemic litigation analyst position in a number of our field legal units. We believe that these positions should be filled with individuals who, based on their demonstrated expertise and quality work on systemic cases, will perform high level litigation support work on systemic cases both within and outside of their districts. Creation of this position will allow the Commission to retain highly skilled staff in a critical role and will enhance a culture of excellence at the Commission.

7. The Commission Should Enhance Technology in Support of Systemic Litigation

EEOC should ensure that the agency’s technology supports a nationwide systemic litigation practice. The Task Force believes that the Commission must invest in certain technological enhancements in support of the national law firm approach, including software and hardware that will allow attorneys in multiple offices to communicate, collaborate and share information effectively. In particular, this requires ensuring that attorneys in different offices who work together on a case have access to a common share drive. Similarly, the agency should ensure that litigation support software can be used by attorneys in multiple offices. Because the CaseSoft software that the Commission currently has cannot be used effectively across offices, we recommend that the Commission either invest in the hardware necessary to allow this functionality (*i.e.*, Citrix servers), or purchase different, browser-based litigation support software that could serve this purpose more effectively. The Task Force recommends that in making these types of decisions, OIT consider all options and consult fully with affected staff.

EEOC should promote and expand access to the Virtual Private Network (VPN), which will further support inter-office work and allow employees to access the network from remote locations, while providing the necessary level of security.

In addition, EEOC should consider purchasing additional software for large litigation cases, such as Concordance, Summation or Ringtail, to enhance information-sharing and effectiveness.

We recommend that OGCNet be enhanced further to allow information to be stored and retrieved by topic. We also recommend that the system be enhanced to allow for emails with daily digests and indexes of new emails.

8. The Commission Should Broadly Publicize Information About Systemic Cases As Part of Its Effort to Proactively Prevent Discrimination

The Task Force believes that information about significant cases in litigation can help deter future discrimination and help educate employers and employees about their rights and responsibilities under the laws enforced by the Commission. Several management-side attorneys and organizations indicated that articles in trade magazines and similar media outlets are far more likely to inform and influence employers than articles in the mainstream media. Therefore, the Task Force recommends that in addition to issuing press releases to mainstream media regarding the resolution of systemic cases, as EEOC routinely does, the agency also should target the trade press where appropriate. In addition, the Task Force recommends that the Commission educate employers about systemic cases through Technical Assistance Programs throughout the country. We also recommend that the Commission conduct outreach to employees and advocacy groups and provide information about the Commission's systemic litigation cases.

V. LIST OF RECOMMENDED ACTION ITEMS

Set forth below is a comprehensive list of the Systemic Task Force’s recommendations that are addressed in Sections II, III and IV of this Report. This list also includes a more detailed description of the recommended technological changes. To the extent that recommendations relate to specific sections of the Report, the recommendations include a reference to the appropriate sections.

A. General Principles

1. The Commission should promote a culture that supports the identification, investigation and litigation of systemic cases at all levels of the agency.
2. To support a nationwide systemic practice, the Commission should enhance incentives, provide additional opportunities for training and the development of expertise related to systemic discrimination, improve technology, address staffing issues and provide necessary resources.
3. EEOC should create a Committee of Advisors for Systemic Enforcement (“CASE”) to help guide the systemic program and ensure its success. (§ III.C.12.)
4. The Commission should encourage efforts at addressing systemic discrimination through expanded charge investigations, Commissioner Charges and Directed Investigations where appropriate. (§§ II.C.8, 9.)
5. The Commission should engage in outreach and education efforts regarding systemic trends and issues, as well as the filing and resolution of systemic suits as part of its effort to proactively prevent discrimination and educate the public. (§§ III.C.13., IV.C.8.)

B. Operational Reforms

Identifying Systemic Discrimination: Outreach

6. The field and headquarters should use outreach efforts aimed at national and local community organizations, workers, academic researchers and the plaintiffs’ bar to proactively identify possible systemic discrimination. (§ II.C.2.)
7. The field and headquarters should collaborate with FEPA partners to identify possible systemic discrimination and share information about priority issues with FEPAs as appropriate. (§§ II.C.2., II.C.4.c.)
8. The field and headquarters should coordinate with other federal agencies, particularly the U.S. Department of Justice and the U.S. Department of Labor, to identify possible systemic discrimination. (§ II.C.2.)

Identifying Systemic Discrimination: Office Roles

9. Districts should coordinate and should share information and ideas related to identifying systemic discrimination. (This may require a mechanism for coordination). (§ II.C.5.)
10. Districts should identify priority issues. (§ II.C.4.c.)
11. ORIP should analyze data, including charge data, EEO-1 data and Census data, from national and regional perspectives to identify possible systemic discrimination. (§ II.C.3.)
12. ORIP should work with the field to identify local issues and obtain information about particular charges. (§ II.C.3.)
13. ORIP should identify local academicians who will periodically discuss local economic trends with field offices. (§ II.C.3.)
14. Each district should identify a primary point person responsible for working with ORIP, OFP and OGC to identify systemic discrimination. (§§ II.C.3., 5.)
15. ORIP should prepare user-friendly reports, tailored for districts or regional areas, analyzing relevant data and also identify bases, issues, industries or employers of interest. (§ II.C.4.a.)
16. ORIP should gear its formal studies toward identifying systemic discrimination and should consult with the field, appropriate headquarters offices and stakeholders to determine topics for studies. The Commission should use information obtained from ORIP's studies for possible enforcement purposes. (§ II.C.3.)
17. ORIP should be held accountable for its enhanced role in supporting the field, through means such as performance standards. (§ II.C.3.)

Identifying Systemic Discrimination: Expanded Charge Investigations

18. Management in the field and headquarters should encourage expanding the investigation of charges to address class issues and the investigation of class allegations in charges whenever appropriate. (§ II.C.8.)
19. The Commission should reaffirm its position that individuals who wish to allege class discrimination in charges may do so and ensure that staff are aware of this position. (§ II.C.8.)
20. The Commission should reaffirm its position that A-1 charges should not be sent to the mediation program without the concurrence of the Regional Attorney. (§ II.C.8.)

Identifying Systemic Discrimination: Commissioner Charges and Directed Investigations

21. EEOC should use the data it collects through IMS and the EEO Surveys and the data and information it obtains from the U.S. Census and other sources to pursue possible discrimination via Commissioner Charges and Directed Investigations where there is no appropriate charge with which to pursue the issues. (§ II.C.9.)
22. The Commission should issue a memorandum explaining the procedures for initiating and investigating Commissioner Charges, as set forth in PCHP, and clarifying the type of evidence and information that should be included in a Commissioner Charge proposal. (§ II.C.9.a.)
23. The Commission should educate new Commissioners about the Commissioner Charge process and the amount of evidence available at the proposal stage. Commissioners should be encouraged to consult with the relevant field offices about field proposals and respond to proposals in a timely manner. Commissioners also should be encouraged to consult with the field when they want to pursue a possible Commissioner Charge on their own initiative (to ensure that the field offices support the proposed investigations) and when they are reviewing a field proposal. (§ II.C.9.a.)
24. The Office of the Executive Secretariat should ensure that Commissioners follow the Commissioner Charge review process in a timely manner. (§ II.C.9.a.)
25. District Directors and their designees should initiate Directed Investigations when they have sufficient indication of systemic discrimination under the ADEA or the EPA. (§ II.C.9.b.)
26. EEOC should issue a memorandum explaining the procedures for initiating a Directed Investigation. (§ II.C.9.b.)
27. The Commission should designate employees in ORIP, OFP and OGC to serve as contact people if field offices developing Commissioner Charges wish to seek headquarters assistance in the preparation of a Commissioner Charge and to facilitate communication between Commissioners and the field, if requested. (§ II.C.9.a.)
28. The employees designated in OGC, OFP and ORIP to assist field staff in preparing or investigating Commissioner Charges also should be available to the field for questions or assistance regarding Directed Investigations in systemic cases. (§ II.C.9.b.)

Investigating Systemic Discrimination: Office Roles

29. The headquarters systemic investigation function should be eliminated. Systemic investigations should be conducted in the field, not headquarters. (§ III.C.7.)

30. All districts should investigate systemic cases. (§ III.C.1.)
31. There must be close coordination between legal and enforcement staff throughout the identification and investigation of systemic cases. (§ III.C.2.a.)
32. Experts in ORIP should take a primary role in providing substantive assistance to the field on systemic investigations. This includes assistance, upon request, with reviewing and analyzing evidence; conducting statistical analyses; developing investigative plans and strategies; drafting requests for information; and case management. (§ III.C.8.)
33. OGC and OLC headquarters staff should provide assistance to the field during systemic investigations, upon request or as part of a district's Systemic Plan. (§ III.C.9.)
34. OFP, OGC and ORIP should assist the field in partnering, coordinating, and other operational and logistical matters related to investigating systemic charges, including identifying employees in the field and headquarters who have expertise in relevant areas and can assist districts on particular systemic investigations. Headquarters staff should also assist the field by enhancing technology in support of systemic investigations; facilitating the creation of materials, such as systemic manuals and guides for investigators; posting systemic materials on an internal website; and providing, or facilitating, training to field staff designed to enhance expertise in systemic cases. (§ III.C.10.)
35. OFP and ORIP should work together to identify instances when more than one office is investigating similar claims against the same respondent and communicate this information to the field. Where appropriate, OFP should assist the field in coordinating the investigations or facilitate the transfer of related charges from one office to another in order to maximize efficiency. (§ III.C.10.)
36. Headquarters library staff should assist the field in conducting research related to systemic cases. (§ III.C.10.)
37. RAS and ORIP should assist the field in identifying outside vendors and experts when necessary for investigations. (§ III.C.10.)
38. The expert support services for investigations should remain in a separate headquarters department from the expert support services for litigation. (§ III.C.8.b.)
39. EEOC should partner and coordinate with federal, state and local sister agencies on systemic cases, where appropriate. To assist in coordination with the Department of Justice, OGC and/or OFP should designate an employee responsible for facilitating such coordination. (§ III.C.11.)

Investigating Systemic Discrimination: Systemic Plans

40. Districts should develop Systemic Plans in order to ensure that the Commission is identifying and investigating systemic discrimination in a coordinated, strategic, effective agency-wide manner. (§§ II.C.6., III.C.2.)
41. Systemic Plans should describe the specific steps that each district will take to identify and investigate systemic discrimination. The Plans may address the investigation of existing charges and/or the development of Commissioner Charges or Directed Investigations. They should describe how the work will be accomplished, taking into consideration the district's current strengths and resources as well as partnering and mentoring opportunities. The Plans should be submitted jointly from the District Director and Regional Attorney in each district to OFP and OGC. (III.C.2.a.)
42. OFP and OGC should consult with ORIP and CASE regarding the proposed Systemic Plans and ensure that the Commission as a whole is addressing systemic discrimination in an effective and strategic way (this includes, among other things, ensuring that the systemic program addresses discrimination nationwide, and addresses a diversity of bases and issues). Headquarters should assist districts in formulating their Systemic Plans by identifying potential office and staff partners and by helping identify possible systemic discrimination that should be addressed. Ultimately OFP, OGC and each district should negotiate a Systemic Plan that is tailored for the district and contributes to the Commission's overall efforts to combat systemic discrimination nationwide. The Plans should be reviewed and approved by the Director of OFP and the General Counsel (or the General Counsel's designee.) (§ III.C.2.b., c.)
43. The Systemic Plans must require results, and may require adjustments to other office goals. (§§ III.C.2.c., III.C.4.)
44. The Commission should evaluate District Directors and Regional Attorneys on their success in addressing systemic discrimination consistent with their Systemic Plan. (§ III.C.2.c.)

Litigating Systemic Cases: National Law Firm Model

45. The litigation function in headquarters should be eliminated. Systemic litigation should be conducted by the legal units in the field, not in headquarters. (§ IV.C.2.)
46. OGC should staff systemic cases based on the needs of the case. The expertise required should be determined in each case, and staff with the necessary expertise should be assigned, regardless of where they are located and where the case arose. This may involve a cross-section of staff from more than one district working together to litigate a systemic case. (§ IV.C.1.)

47. To assist in ensuring that systemic cases are staffed appropriately, OGC should help identify attorneys and paralegals with expertise who can participate in prosecuting systemic cases, including employees with expertise in: litigating large or systemic cases; statistics, electronic discovery, database creation and use, and document management; “niche” substantive areas such as ADEA benefits or BFOQ issues, ADA coverage issues, EPA proof issues, and testing; and particular industries, employers, or jobs. (§ IV.C.3.a.)
48. In addition to knowledgeable field staff assigned to a case, OGC headquarters staff should be designated to provide assistance and advice to the field regarding discovery and trial matters involving electronic information and the use of computers and other technology in litigation. They also should be available to provide related litigation support services, including working with the field to:
- manage electronic documents, including, in appropriate circumstances, scanning and indexing documents in headquarters;
 - obtain information about other organizations’ computer systems;
 - obtain personnel and other organizational data in electronic form (both requesting such data and extracting and converting data from electronic storage devices and media);
 - obtain and utilize electronic data such as emails and word processing files;
 - use litigation support software such as CaseSoft, Summation and Concordance;
 - develop document depositories;
 - take videotape depositions and prepare them for use at trial;
 - present electronic information at trial; and
 - identify and work with outside vendors where particular tasks cannot be performed internally.
- (§ IV.C.3.b.)
49. OGC should continue to provide substantive advice on systemic cases in litigation. (§ IV.C.3.b.)
50. OGC should assist the field in identifying, selecting and working with experts; coordinating with RAS; and processing procurement requests requiring headquarters approval. (§ IV.C.3.b.)
51. OGC should provide quarterly reports to the field and appropriate headquarters offices on the status of systemic cases. (§ IV.C.3.a.)
52. OGC should assist in the coordination of litigation between offices on systemic cases involving related industries or jobs; similar legal, discovery, proof, or procedural issues; or other matters in which offices may benefit from an exchange of information. (§ IV.C.3.a.)

53. EEOC should provide resources for litigation-related work to be completed following conciliation failure and the final decision to litigate, where appropriate. (§ IV.C.3.d.)

C. Enhancing Expertise

54. EEOC should increase the breadth of its expertise among Commission employees in areas such as EEO-1 Desktop, EEOSTAT, BRIO, EXCEL; and SAS; retrieval and use of Census data; identifying possible systemic discrimination; determining what evidence is needed in a systemic case; analyzing statistical data (including how and when to seek expert assistance); applying the correct legal standards; working with electronic information; managing multitudes of documents or computerized records; tracking and communicating with large numbers of witnesses or aggrieved persons; and conciliating systemic cases. (§§ III.B.5., III.C.5., IV.C.5.)
55. EEOC should pair employees who have performed high quality work on systemic cases with less experienced staff to work together on specific systemic investigations and litigation as a training and development tool. (§ III.C.5.)
56. EEOC should develop systemic expertise through formal training sessions conducted by staff with practical systemic experience. (§ III.C.5.)
57. EEOC should create an internal website devoted to systemic issues and post materials related to combating systemic discrimination on the website, including a systemic manual, guides, and sample documents. (§§ II.C.7., III.C.6.)
58. EEOC should use informal, case-based training in field offices. (§ III.C.5.)
59. EEOC should promote the development of expertise through self-education and e-learning, by making articles, books, videos and other materials available. (§ III.C.5.)
60. In addition to providing training and development opportunities to field staff, EEOC should offer these types of opportunities to the headquarters staff who focus on systemic discrimination issues, including the experts in ORIP and OGC. (§ III.C.5.)
61. EEOC should form strategic partnerships with outside agencies (such as the Department of Labor, Department of Justice and FEPAs) and groups (such as the American Bar Association, the National Employment Lawyers Association and the Impact Fund) to increase training opportunities and maximize Commission resources. (§§ III.C.5., IV.C.5.)

D. Creating Incentives

62. The Commission should provide incentives for identifying systemic discrimination. For two years, the Commission should provide incentives to District Directors and Regional

Attorneys for submitting systemic Commissioner Charges that are approved by a Commissioner. (§ II.C.9.a.)

63. The Commission should create incentives through evaluations and other means to encourage the field to successfully identify and investigate systemic cases, in accordance with the district's Systemic Plan. The effective development and investigation of systemic cases should be included as one of the expected results in the leadership element of the District Directors' performance plans. Appreciating that not all investigations will yield findings of systemic discrimination, the quality of charges developed should be sufficient to result in a vigorous systemic litigation program. The Commission should also create incentives to encourage the field to successfully contribute to the Commission's national program of combating systemic discrimination, through partnering, mentoring or other methods and to develop expertise among staff in the identification and investigation of systemic discrimination. The Commission may need to make adjustments in some offices, such as reducing a district's outreach or production goals, "backing out" a certain percentage of staff time (such as 10% or 15%) in a particular district, or transferring cases from one district to another if additional staff resources are not available or expected. These types of adjustments should be addressed during the negotiation of each office's Systemic Plan. (§ III.C.4.)
64. The Commission should enhance incentives for systemic litigation and should evaluate Regional Attorneys on their success in developing and litigating systemic cases. The Commission must also encourage legal units to contribute to the agency's national program of combating systemic discrimination through partnering, mentoring and other methods. The agency should recognize that devotion of additional resources to systemic cases may result in a decrease in the number of overall suits filed. (§ IV.C.4.)
65. EEOC's awards programs and incentive pay plans should recognize effective work on developing, investigating and litigating systemic cases, including effective partnering and mentoring. (§§ III.C.4., IV.C.4.)

E. Improving Technology

Changes to Existing Software and Programs

66. EEOC should link IMS data with the data from the EEO-1 Surveys (and the other EEO Surveys), which will allow the Commission to have more accurate data, track data more effectively, and decrease the amount of time necessary to enter data.³⁷ (§ II.C.1.a.)
67. EEOC should create "flags" in IMS to identify issues, bases, industries and/or employers of interest. (§ II.C.4.b.)
68. EEOC should integrate Census data into the EEO-1 Desktop, which would allow staff to construct Census-based availability estimates. (§ II.C.1.c.)

69. EEOC should create an internal bulletin board or listserv which would allow attorneys and investigators to communicate with their peers regarding systemic cases, including through posting messages that are catalogued by topic and easily searchable. (§ III.C.5.)
70. EEOC should improve reports in IMS (which may require the purchase of report-writing software). This should include developing sample BRIO reports (with templates) that will be useful to field staff in identifying systemic discrimination. (§ II.C.1.b.)
71. EEOC should deliver EEO-1 Survey data using the web. (§ II.C.1.c.)
72. EEOC should ensure that EEO-1 Survey data is available to staff by the end of each calendar year. (§II.C.1.c.)
73. EEOC should enhance the EEO-1 Desktop to allow for more sophisticated analyses of data. (§ II.C.1.c.)
74. EEOC should enhance the reports available on the EEO-1 Desktop to make them more user-friendly (in particular, the Task Force recommends that the reports generated by the EEO-1 Desktop include labels for printed values). (§ II.C.1.c.)
75. EEOC should modify IMS to allow more than one office to receive “credit” for charges or lawsuits without counting the case more than once. (§ III.C.2.a.)
76. EEOC should incorporate a GIS (“geographical information system”) component into the EEO-1 Desktop to improve the effectiveness of the EEO-1 Desktop, and make it more user-friendly. (§ II.C.1.c.)
77. EEOC should modify and expand the reports planned for the ISIS application, to include more reports relevant to detecting systemic discrimination, such as reports that more closely identify trends, and to allow employees to create *ad hoc* reports as needed. (§ II.C.1.b.)
78. EEOC should enhance OGCNet, the shared email account for attorneys, by, for example, allowing valuable information to be stored by topic and sending emails with daily digests and indexes of new emails. (§ IV.C.7.)
79. EEOC should modify the categories in IMS so that the Commission can designate and track systemic investigations more accurately, and collect data on issues which are of particular interest to the Commission but are not currently tracked in IMS. (§ II.C.1.b.)
80. EEOC should redesign the Commission’s internal website (InSite) and improve the search function to make it easier to find information, to enhance the usefulness of its resources (forms, documents, etc.), and to help promote communication and the sharing of information. (§ III.C.5.)

Plan For and Invest in Additional Software and Hardware

81. EEOC should ensure that litigation support software can be used by attorneys in multiple offices. Because the CaseSoft software that the Commission currently has cannot be used effectively across offices, we recommend that the Commission either invest in the hardware necessary to allow this functionality (*i.e.*, Citrix servers), or purchase different, browser-based litigation support software that could serve this purpose more effectively (such as Ringtail). The Task Force recommends that in making these types of decisions, OIT consider all options and consult fully with affected staff. (§ IV.C.7.)
82. EEOC should consider purchasing additional software for large litigation cases, such as Concordance, Summation or Ringtail. (§ IV.C.7.)
83. EEOC should upgrade from SAS-8 to SAS-9, so that the Commission can more effectively read and evaluate data. The latest version of SAS will also allow for greater compatibility with Windows XP or subsequent Microsoft releases of Windows. SAS-9 could also provide enhanced report-writing software for IMS.
84. EEOC should upgrade and update tools in the future, as necessary to support the systemic program.
85. EEOC should plan for, and purchase adequate hardware, such as additional servers (possibly Citrix servers for some software), additional bandwidth, and additional RAM for desktops, to support increased access to IMS and ISIS (servers/bandwidth/memory are needed to ensure that the speed of the computer systems is maintained or improved) and to otherwise support the technology needs of the systemic program.
86. EEOC should plan for additional disk storage space to handle increasing amounts of evidence in electronic format.

Expand Access to Software and Programs

87. EEOC should ensure that staff in different offices working together on particular systemic cases or projects can have shared drives for data. These shared drives could be temporary or permanent, depending on the needs of the offices. (§§ III.C.10, IV.C.1, IV.C.7.)
88. EEOC should allow additional investigators to have access to nationwide IMS charge data. (§ II.C.1.d.)
89. EEOC should allow relevant staff in the field, such as investigators and attorneys working on the identification and investigation of systemic discrimination (and their supervisors and managers), to access BRIO and ISIS. (§ II.C.1.d.)

90. EEOC should allow investigators and attorneys with the necessary skills and experience in utilizing EEO-1 data (and their supervisors and managers) to use SAS and SAS-based EEO-1 data sets. (§ II.C.1.d.)
91. EEOC should encourage investigators working on systemic cases to use CaseSoft, the litigation management software currently available to trial attorneys. (§ III.C.5.)
92. EEOC should promote and expand access to the Virtual Private Network (VPN), which will further support inter-office work and allow employees to access the network from remote locations, while providing the necessary level of security. (§ IV.C.7.)

F. Staffing

93. EEOC should ensure that field offices have adequate staff to investigate systemic issues, with particular priority given to those that assist other offices. (§ III.C.3.)
94. EEOC should hire the following additional staff for ORIP: two labor economists, two social scientists, an industrial psychologist and a research assistant (with the expectation that additional research and technical staff will be hired later). Some of these individuals should be placed in field offices. ORIP should create a distinct division containing the systemic support functions. EEOC may need to redeploy some headquarters staff to the library so that the library can continue to assist the field in conducting research, including locating individuals and finding information about businesses or industries. (§§ II.C.3., III.C.8.a., III.C.10.)
95. EEOC should create and fill at least five new GS-13 positions for systemic investigators who will take a lead role in identifying and investigating systemic charges, and serve as mentors and partners with less experienced staff in districts throughout the country. The positions should be filled with incumbent staff who have demonstrated expertise and quality work on systemic cases. (§ III.C.3.)
96. EEOC should add additional paralegal positions (possibly including “hybrid” paralegal positions), and consider filling these positions through new hires, details and reassignments. Funding should be provided for temporary paralegals and clericals as needed. (§ IV.C.6.)
97. EEOC should hire the following additional staff for RAS: a labor economist or statistician and a support person, and plan to hire additional staff for RAS once the systemic program further matures and the Commission has a larger docket of systemic cases that need litigation support. (§ IV.C.3.c.)
98. EEOC should create a new GS-12 systemic litigation analyst position to support the litigation of systemic cases. (§ IV.C.6.)

G. Additional Investments

99. EEOC should provide access to subscription services, including Hoovers.com, to the experts in ORIP and RAS and to selected field staff. (§ III.C.8.a.)
100. EEOC should provide funds for the experts in ORIP and RAS to purchase necessary journal articles. (§ III.C.8.a.)

APPENDIX A: SPECIAL THANKS TO SYSTEMIC TASK FORCE MEMBERS FROM COMMISSIONER SILVERMAN

Commissioner Leslie E. Silverman would like to thank all of the members of the Systemic Task Force for their dedication, enthusiasm and hard work. The members are:

Elizabeth Cadle, Area Director, Buffalo Area Office

Barbara Dougherty, Assistant General Counsel, Systemic Litigation Services, Office of General Counsel

Ronald Edwards, Social Science Research Specialist, Office of Research Information and Planning

Sandra Hobson, Special Assistant, Office of the Chair

Anthony Kaminski, Chief of Staff, Office of the Vice Chair

Gabrielle Martin, Trial Attorney, Denver Field Office and President, National Council of EEOC Locals, No. 216, American Federation of Government Employees (AFL-CIO)

Peggy Mastroianni, Associate Legal Counsel, Office of Legal Counsel

Mary Jo O'Neill, Regional Attorney, Phoenix District Office

Cynthia Pierre, Director, Field Management Programs, Office of Field Programs

Jack Rowe, District Director, Chicago District Office

Jerome Scanlan, Assistant General Counsel, Litigation Management Services, Office of General Counsel

Sharyn Tejani, Special Assistant, Office of Commissioner Ishimaru

Rosa Viramontes, Deputy District Director, Los Angeles District Office

Mindy Weinstein, Special Assistant, Office of Commissioner Silverman

These individuals eagerly agreed to take on a challenging task, and through their extraordinary efforts, our Task Force was able to develop a comprehensive and innovative set of recommendations.

In particular, Commissioner Silverman must gratefully acknowledge Mindy Weinstein's incredible contribution and unflagging devotion to this project.

APPENDIX B: INPUT TO THE TASK FORCE

The Systemic Task Force gratefully acknowledges the input and assistance we received from many individuals, including EEOC staff; sister agencies at the federal, state and local level; and external stakeholders, including attorneys, advocacy organizations, management associations, and academics.

EEOC Staff

The Task Force sent a survey to each District Director and Regional Attorney at the Commission, soliciting their input and ideas on the Commission's systemic program. Each district submitted a response to the survey, and we are grateful to each of the District Directors, Regional Attorneys and other staff who participated in completing the survey responses.

The following current and former EEOC employees provided additional input to the Task Force (these individuals are listed according to the current name of their offices):

Eddie Abdulhaqq (Birmingham District Office)
Jerry Anderson (Minneapolis Area Office)
Nicholas Atwine (Houston District Office)
Jeffrey Bannon (Office of General Counsel)
Shannon Breen (Denver Field Office)
Lucius Brown (Office of Research, Information and Planning)
Michelle Caiola (New York District Office)
Jen Carlo (Buffalo Local Office)
Bliss Cartwright (Office of Research, Information and Planning)
Javier Chacon (Houston District Office)
Dan Chang (Office of Information Technology)
Thomas Colclough (Greensboro Local Office)
Michael Conley (Kansas City Area Office)
Nora Curtin (New York District Office)
Joseph de Leon (Houston District Office)
Joseph Donovan (Office of General Counsel)
Eric Dreiband (Office of General Counsel)
Malcolm Drinkwater (Office of Field Programs)
Erania Ebron (New Orleans Field Office)
Marie Fitzgerald (Office of Federal Operations)
Deidre Flippen (Office of Research, Information and Planning)
Jay Friedman (Office of Research, Information and Planning)
Gregory Gochanour (Chicago District Office)
Edward Gomez (Office of Field Programs)
Charles Guerrier (Birmingham District Office)
Donna Harper (St. Louis District Office)
Danny Harter (Indianapolis District Office)
Travis Hicks (San Antonio Field Office)
Alvin Hines (Indianapolis District Office)

Beverly Hinton (Birmingham District Office)
Dana Hutter (Washington Field Office)
Nicholas Inzeo (Office of Field Programs)
James Israel (Office of the Chief Financial Officer and Administrative Services)
Rheta Kasmer (Office of Field Programs)
Raymond (Jack) Kearns (Office of General Counsel)
Barbara Kramer (Cleveland Field Office)
William Lai (New York District Office)
James Lee (Office of General Counsel)
John Lee (Seattle Field Office)
Gerald Letwin (Office of General Counsel)
Spencer Lewis (New York District Office)
Calvin Loving (Office of Information Technology)
Benita Lucy (Office of Research, Information and Planning)
Cheryl Mabry-Thomas (Office of Field Programs)
Karen McDonough (Philadelphia District Office)
Brian Nelson (Los Angeles District Office)
David Offen-Brown (San Francisco District Office)
Ronald Phillips (Baltimore Field Office)
Randy Pointer (Indianapolis District Office)
Vickie Pryor (Cleveland Field Office)
Charlie Rahill (Phoenix District Office)
Gwendolyn Young Reams (Office of General Counsel)
Sheila Ward Reyes (San Antonio Field Office)
Shirley Richardson (Memphis District Office)
Marc Rosenblum (Office of General Counsel)
Linda Sankovitch (Detroit Field Office)
John Schmelzer (Office of Field Programs)
Rachel Shonfield (Miami District Office)
Wilma Scott (Baltimore Field Office)
Lisa Sirkin (New York District Office)
Elvira Sisolak (Office of General Counsel)
Clinton Smith (Atlanta District Office)
Philip Sklover (Office of General Counsel)
Ralph Soto (Office of Field Programs)
Marla Stern (San Diego Local Office)
Laurie Vasichek (Minneapolis Area Office)
Michael Whitlow (Charlotte District Office)
Terri Wilke (Kansas City Area Office)
Francis Zamarripa (Houston District Office)

We also wish to acknowledge that several employees communicated with Commissioner Silverman but wanted to remain anonymous.

In addition to EEOC staff who provided input to the Task Force, we also wish to thank the numerous additional individuals who assisted the Task Force in completing its work,

including Michael Dougherty, Jeanne Goldberg, Crystal Grant, Peter Gray, Robin Gregory, Colleen Hampton, Lyn McDermott, Kathleen Oram, Joyce Randle, Richard Roscio, Tom Schlageter and former EEOC interns Katherine Goodwin, Jordan Eichenberg, and Nina Paul.

Sister Agencies

Representatives of the following sister agencies provided valuable input to the Task Force:

U.S. Department of Justice -- Civil Rights Division/Employment Litigation Section

U.S. Department of Labor -- Office of the Solicitor General and Office of Federal Contract Compliance Programs

Fair Employment Practice Agencies:

Alaska State Commission for Human Rights
Anchorage (Alaska) Equal Rights Commission
City of Austin (Texas) Equal Employment /Fair Housing Office
District of Columbia Office of Human Rights
Fairfax County (Virginia) Human Rights Commission
Iowa Civil Rights Commission
Kansas City, Missouri Human Relations Department
Louisville (Kentucky) Metro Human Relations Commission
Maryland Commission on Human Relations
Missouri Commission on Human Rights
New Hanover (North Carolina) Human Relations Commission
New Mexico Human Rights Division
New Jersey Division on Civil Rights, Bureau of Enforcement
Ohio Civil Rights Commission
Oklahoma Human Rights Commission
City of St. Petersburg (Florida), Community Affairs Department
Pinellas County (Florida) Office of Human Rights
Prince William County (Virginia) Human Rights Commission
South Bend (Indiana) Human Rights Commission
South Carolina Human Affairs Commission
South Dakota Labor Department, Division of Labor and Management
Tampa (Florida) Department of Community Affairs, Office of Human Rights
Wyoming Fair Employment Program

Stakeholders

The Task Force also thanks the following individuals for their valuable input:

Fred Alvarez, Wilson Sonsini Goodrich & Rosati
Morris Baller, Goldstein, Demchak, Baller, Borgen & Dardarian
Mark Bendick, Bendick and Egan Economic Consultants, Inc.
Caroline Bettinger-Lopez, ACLU Women's Rights Project
Tess Blair, Morgan Lewis
Barbara Berish Brown, Paul, Hastings, Janofsky & Walker LLP
William Brown III, Schnader Harrison Segal & Lewis LLP
Claudia Center, Legal Aid Society-Employment Law Center (San Francisco)
Deborah Chalfie, National Women's Law Center
Major Coleman, Pennsylvania State University
David Copus, Jones Day
Terry Demchak, Goldstein, Demchak, Baller, Borgen & Dardarian
Mark Dichter, Morgan Lewis
Hope Eastman, Paley, Rothman, Goldstein, Rosenberg, Eig & Cooper
Lynn Feiger, Lohf Shaiman Jacobs Hyman & Feiger PC
James Finberg, Lieff Cabraser Heimann & Bernstein, LLP
Michael Foreman, Lawyer's Committee for Civil Rights
Jocelyn Frye, National Partnership for Women and Families
Michael T. Gaitley, Legal Aid Society-Employment Law Center (San Francisco)
Susana Gomez, American Federation of Labor and Congress of Industrial Organizations
Mary Graham, Clarkson University
Shelley A. Gregory, Legal Aid Society-Employment Law Center (San Francisco)
Ericka Guthrie, American Federation of Government Employees
Barry Hartstein, Morgan Lewis
Janet Hill, Hill & Beasley, LLP
Elizabeth Hirsh, University of Washington
Christopher Ho, Legal Aid Society-Employment Law Center (San Francisco)
Andrew Imparato, American Association of People with Disabilities
Melissa Josephs, Women Employed
Adam Klein, Outten & Golden, LLP
Elizabeth Kristen, Legal Aid Society-Employment Law Center (San Francisco)
Jocelyn Larkin, The Impact Fund
Jennifer Marston, National Partnership for Women and Families
Justin McCrary, University of Michigan
Brain McMahon, Virginia Commonwealth University
William C. McNeill III, Legal Aid Society-Employment Law Center (San Francisco)
Cyrus Mehri, Mehri & Skalet, PLLC
Sue Meisinger, Society of Human Resources Management
John E. Mosby, Attorney at Law
Mary O'Melveny, AFL-CIO
Wayne Outten, Outten & Golden, LLP
Ann Reesman, Equal Employment Advisory Council

Barbara Reskin, University of Washington
David Rose, Neuberger Rose LLP
Jahan C. Sagafi, Leiff Cabraser Heimann & Bernstein, LLP
Joseph Sellers, Cohen, Milstein, Hausfeld & Toll, PLLC
Richard Seymour, Richard T. Seymour, PLLC
Patricia A. Shiu, Legal Aid Society-Employment Law Center (San Francisco)
Paul Sprenger, Sprenger & Lang
Roberta Steele, Goldstein, Demchak, Baller, Borgen & Dardarian
Paul Strauss, Miner, Barnhill & Galland, PC
Donald Tomaskovic-Devey, University of Massachusetts, Amherst
Richard Ugelow, American University, Washington College of Law

APPENDIX C: HISTORICAL BACKGROUND: EEOC'S SYSTEMIC EFFORTS

Initial Authority

EEOC began combating systemic discrimination as early as 1965, when the agency first opened its doors. Under Title VII of the Civil Rights Act of 1964, the Commission had authority to investigate and resolve class allegations through charges filed by members of the public or through Commissioner Charges. However, as originally enacted, Title VII did not grant the Commission the authority to file suits; rather, the Commission could only refer cases to the Department of Justice, which had authority to intervene in private suits and to file pattern or practice suits. Also, the initial standard for filing a Commissioner Charge was high: a Commissioner first had to have “reasonable cause to believe a violation of [Title VII] ha[d] occurred.”³⁸

1972-1977

In 1972, Congress amended Title VII and granted the Commission enhanced enforcement authority. The 1972 amendments made it easier for Commissioners to file Commissioner Charges, gave the agency litigation authority, and transferred the authority to pursue “pattern or practice” cases under Section 707 of Title VII from the Department of Justice to EEOC. In 1973, the Commission created task forces in headquarters to conduct nationwide systemic investigations of four of the country’s largest employers – General Electric, General Motors, Ford and Sears.³⁹ These task forces operated under the auspices of the National Programs Division within the Office of General Counsel.

The following year, the Commission created the first systemic program in the field when it established “707 units” in Regional Litigation Centers. These units were responsible for addressing “pattern or practice” discrimination under Section 707 of Title VII through the development of Commissioner’s Charges, the expansion of individual charges to address systemic issues, the investigation of class charges, and litigation. Most of the cases involved facilities located within each Litigation Center’s geographical region, but many involved regional or nationwide cases against employers that had headquarters offices within the region.

The National Programs Division and the Regional Litigation Centers were staffed by attorneys, investigators, and in some instances individuals skilled in the use of computers and statistical analysis. The Commission initiated a large number of systemic investigations under both programs, and ultimately there were not sufficient resources to handle this work. By the mid- to late-1970s, there was a backlog of Commissioner Charges and other “707” cases under investigation and many felt that the Commission should give greater consideration to the scope of these cases, the required resources, and the expected processing times.

1977-1995

In 1977, the Commission created a new systemic program as part of a major agency reorganization led by Chairwoman Eleanor Holmes Norton. The changes went into effect

between 1977 and 1979. In the field, the Commission began by creating three “model offices,” each of which included a dedicated systemic unit responsible for investigating pattern or practice charges. By 1979, the agency implemented a permanent restructuring in the field and designated twenty-two offices as district offices with investigation units, a systemic investigation unit and a legal unit. The systemic units, which typically were staffed with four to five investigators, focused on developing and investigating new Commissioner Charges within the geographic boundary of the district office. In addition to Commissioner Charges, field offices continued to conduct class investigations outside of the systemic units, through the expansion of individual charges and the investigation of class charges. The district office legal units litigated charges within their district’s jurisdiction, including systemic cases, where conciliation efforts failed.

As part of the 1977 reorganization, the Commission also created a new headquarters unit focusing on systemic issues, the Office of Systemic Programs (OSP). OSP consisted of a field contact unit and three divisions -- Investigation, Litigation Enforcement, and Technical Services. The field contact unit was responsible for overseeing the work performed by the field systemic units, including: reviewing charge proposals, investigative reports, decisions and settlement agreements; providing assistance and training to the field units; and overseeing the quantity and quality of the field’s systemic work and the systemic budget. OSP’s Investigation division developed and investigated Commissioner Charges, focusing on large regional or national cases, and they also completed the investigation of almost all of the pending “707” charges and Commissioners Charges that had not been resolved by the Regional Litigation Centers. The Litigation division in OSP prosecuted cases developed by the Investigations unit. The Technical Services division provided analytical and technical assistance to the field and headquarters, including data analysis and assistance with identifying possible systemic discrimination.

OSP oversaw all field and headquarters Commissioner Charge systemic investigations. The Director of OSP, who gained the additional title of Associate General Counsel in 1980, reported to the Executive Director of the Commission regarding administrative management matters and to the General Counsel regarding litigation.

In 1982, the Commission abolished the Office of Systemic Programs and transferred the majority of its functions to the Office of Program Operations (OPO), which was a precursor to the current Office of Field Programs. OPO maintained Investigations and Litigation divisions and the field contact and oversight unit, which was renamed the Field Contact and Legal Standards Division (FCLSD). OSP’s Technical Services division was transferred to a newly-created Office of Program Research where it was renamed the Research and Analytic Services Division.

Change came again in 1985, when the Commission shifted the Litigation Division from OPO to the Office of General Counsel and renamed the unit Systemic Litigation Services. In 1986, the Research and Analytic Services Division was transferred from the Office of Program Research to the Office of General Counsel (where it dropped the reference to “Division” and became known as Research and Analytic Services, or RAS).

The Investigations Division and the Field Contact and Legal Standards Division remained in OPO and merged with a third division there, called Special Services Staff/Program

Development and Coordination Division; together, they became part of a new organization called Systemic Investigation and Individual Compliance Program (SIICP), in OPO. The SIICP staff continued to develop and investigate Commissioner Charges and review and approve field proposed Commissioner Charges, decisions, and settlements. They also reviewed and edited quarterly reports on all Commissioner Charges.

In approximately 1994, SIICP was pared down from three divisions to two divisions – Investigations and the Field Contact and Legal Standards Division (FCLSD) –and was renamed the Systemic Investigation and Review Program (SIRP). As in the past, the Investigations Division was responsible for developing and investigating Commissioner Charges, particularly cases that were regional or national in scope, and cases that were complex, novel or sensitive. FCLSD consisted of attorneys and program analysts who oversaw the systemic program in district offices; their function was to ensure consistency and high quality in the Commission’s processing of systemic charges and to coordinate between the field and Commissioners with respect to Commissioner Charges.

Beginning at around the same time, some experts in RAS moved to OPO’s Program Research and Surveys Division to support investigations. This portion of OPO was subsequently moved into what is now called the Office of Research, Information and Planning, and the unit was formally charged with responsibility for providing expert assistance in investigations.

Meanwhile, throughout this period, the field offices continued to maintain their own systemic investigative units, and District Directors were evaluated on their efforts at identifying and investigating Commissioner Charges.

1995 to Present

The systemic program changed substantially again in the mid-1990s, in accordance with the recommendations of an agency task force that reviewed the Commission’s charge processing procedures. In April 1995, Chairman Gilbert Casellas issued a directive that eliminated headquarters oversight of the field’s systemic program. He further announced that field offices could submit requests for Commissioner Charges directly to the Commission and should investigate Commissioner Charges as they do other charges. Two months later, the Commission adopted the Priority Charge Handling Procedures (PCHP), which, among other things, codified new guidelines for initiating and processing Commissioner Charges. PCHP affirmed the principles in the April 1995 directives, clarified that field offices should determine the scope and limitations of recommended Commissioner Charges, and set forth guidelines regarding the content of Commissioner Charge proposals.

In accordance with these changes, the Commission eliminated the Field Contact and Legal Standards Division in the Office of Field Programs. In 1997, the Commission formally transferred the Investigations division to the Office of General Counsel.

Following the adoption of PCHP, headquarters stopped evaluating District Directors on the effectiveness of their district’s systemic program. Over time, district offices eliminated the specialized systemic units in the field. Nonetheless, the field has continued to develop systemic

cases, usually by investigating class charges or expanding individual charges to address systemic issues. However, the number of Commissioner Charges submitted by the field has declined drastically.

The Office of General Counsel continues to have a systemic unit composed of attorneys from Systemic Litigation Services (SLS), as well as a small complement of investigators from the former SIRP, paralegals and support staff. There has been virtually no hiring since the early 1990s. Beginning in approximately the late 1990s, the focus of the unit shifted from large class systemic cases to attempting to cultivate cases that could develop the law in particular areas. In 2001, the remaining systemic investigators physically moved into the Office of General Counsel and began working closely with the SLS attorneys, under the supervision of Assistant General Counsels. The unit's primary work has involved investigating charges filed by individuals or third parties, and recently, the unit intervened in a large class suit.

Conclusion

As demonstrated above, since EEOC first opened its doors, the agency's systemic program has taken many forms.

ENDNOTES

¹ The members of the Task Force are listed on the front cover of this Report and in Appendix A. The Task Force originally also included Bobby Simpson, a trial attorney in the Louisville Area Office, who left the Commission in July 2005.

² Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259 (1964) (current version at 42 U.S.C. § 2000e-5(b)). *See also, Parliament House Motor Hotel v. EEOC*, 444 F.2d 1335, 1339 (5th Cir. 1971) (allowing EEOC to focus its investigation on Respondent’s entire facility, although the charge in question alleged discrimination in only one department); *Georgia Power Co. v. EEOC*, 412 F.2d 462, 468 (5th Cir. 1969) (allowing EEOC to obtain data regarding all persons hired in particular departments and rejecting employer’s argument that EEOC should be restricted to information regarding charging party and the person selected); *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969) (permitting EEOC to investigate an employer’s “pattern of action” to determine whether employer engaged in race discrimination, noting that “[d]iscrimination on the basis of race is by definition class discrimination”).

³ Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259 (1964) (current version at 42 U.S.C. § 2000e-5(b)).

⁴ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103-13 (current version at 42 U.S.C. §§ 2000e *et seq.*).

⁵ As originally enacted, Title VII provided that Commissioners could file charges only when they had “reasonable cause to believe a violation of [Title VII] has occurred.” Pub. L. No. 88-352, §706(a), 78 Stat. 241, 259 (1964). Under the 1972 amendments, which remain in effect today, the “reasonable cause” requirement was eliminated, and a Commissioner Charge must meet the same requirements as a charge filed by a member of the public. 42 U.S.C. § 2000e-5(b).

⁶ 42 U.S.C. § 2000e-5.

⁷ 42 U.S.C. § 2000e-6.

⁸ 29 U.S.C. § 621 *et seq.* (1967).

⁹ 29 U.S.C. § 206(d) (1963).

¹⁰ 42 U.S.C. §12101 *et seq.* (1990).

¹¹ *See, e.g.,* H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2149-50 (“Unrelenting broad-scale action against patterns or practices of discrimination is . . . critical in combating employment discrimination. The Committee believes these powers should be exercised by the Commission as an integral and coordinated part of the overall enforcement effort.”).

¹² As discussed above, Commissioners have the authority to issue a Commissioner's Charge under Title VII. 42 U.S.C. § 2000e-5(b). The Commission has the same authority to pursue systemic discrimination under the ADA as it does under Title VII, because the ADA incorporates the powers, remedies and procedures set forth in Title VII. 42 U.S.C. § 12117(a). The Commission also has authority to pursue class cases under the ADEA and the EPA. Under these statutes, the Commission has authority to investigate charges filed by members of the public, initiate investigations into possible unlawful employment practices ("Directed Investigations") and conduct litigation. *See* 29 U.S.C. § 626 (ADEA); 29 U.S.C. §§ 209, 211 (Fair Labor Standards Act provisions authorizing investigations and enforcement under the Equal Pay Act). *See also* 29 C.F.R. §§ 1626.4, 1626.15 (ADEA regulations); 29 C.F.R. § 1620.30 (EPA regulations).

¹³ In *Kimel v. Florida Board of Regents*, 528 U.S. 52 (2000), the Supreme Court ruled that state governments have sovereign immunity under the Eleventh Amendment from private ADEA lawsuits for monetary relief. *Kimel* does not affect EEOC's ability to bring such lawsuits.

¹⁴ At the time of the survey, the Commission had twenty-three districts, and the survey was sent to the Directors and Regional Attorneys in each district. The Commission subsequently underwent a repositioning and as of January, 2006, there are fifteen districts.

¹⁵ Certain employers must submit EEO-1 survey data to the Commission annually. The EEO-1 forms contain information regarding the make-up of the employers' workforces by gender, race, national origin and job category. *See* § II.A.

¹⁶ PCHP established new charge processing procedures that were designed to reduce the mounting workload of charges and give priority to charges based upon the likelihood that discrimination occurred. PCHP positively impacted the systemic program in two major ways: it (1) eliminated headquarters oversight of the field systemic program; and (2) streamlined the process for submitting and processing Commissioner Charges. However, around the time that PCHP was adopted, OFP stopped evaluating District Directors on the effectiveness of their district's systemic program, and systemic units were phased out of district offices. Many employees believe that the removal of performance standards and specialized field units caused the drop in Commissioner Charges. Others employees, unaware that PCHP eliminated the headquarters oversight and review process, believe that the field is reluctant to bring Commissioner Charges because headquarters continues to have too much oversight. Finally, some employees believe that the field is reluctant to submit Commissioner Charges because Commissioners are unlikely to sign them and have unrealistically high expectations about the amount and type of evidence necessary to support the issuance of a Commissioner Charge.

¹⁷ The Five-Point Plan identifies five key elements for accomplishing the agency's mission: Proactive Prevention, Proficient Resolution, Promote and Expand Mediation/Alternative Dispute Resolution (ADR), Strategic Enforcement and Litigation, and EEOC as a Model Workplace. *See* EEOC, *Strategic Plan for Fiscal Years 2004-2009*, at http://www.eeoc.gov/abouteeoc/plan/strategic_plan_04to06.html.

¹⁸ A Commissioner Charge must meet the requirements of Section 706(b) of Title VII, which

states that charges filed by persons claiming to be aggrieved or a Commissioner must be in writing under oath or affirmation and must meet the standards set out by the Commission. 42 U.S.C. § 2000e-5(b). *See also* 29 C.F.R. § 1601.12(a) (describing the requirements of a charge). In *EEOC v. Shell Oil Co.*, 466 U.S. 54, 73 (1984), the Supreme Court stated that in a pattern or practice case, a Commissioner should, “[i]nsofar as he is able, ... identify the groups of persons that he has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been practiced.”

¹⁹ Although the discussion in this report focuses on linking IMS data with EEO-1 surveys, the Task Force recommends linkage on all of the EEO surveys (EEO-3, EEO-4, EEO-5 and EEO-6).

²⁰ This may require purchasing report writing software, such as SAS-9, or providing training in BRIO, so that field personnel can use BRIO to prepare the necessary reports.

²¹ The Task Force is aware that some districts currently do this and believes that all districts would benefit from this practice.

²² Commissioner Charges can be generated by a Commissioner or a field office. A field office that generates a potential Commissioner Charge must send the proposal to the Office of the Executive Secretariat, where it is assigned to a Commissioner’s Office on a rotating basis. The Commissioner can choose to sign the Charge as presented, work with the field office to modify the Charge, or decline to sign the Charge. If the Commissioner declines to sign the Charge, the proposal is sent to the other Commissioners’ Offices in turn. Officially, Commissioners have 10 workdays (and one possible 5-day extension) to sign or decline to sign the Charge; however, if a Commissioner is working with the field office to modify the charge, that deadline is not observed. No office in headquarters, other than the Commissioner’s Office to which the proposal is sent, reviews the Charge package sent from the field office. Under PCHP, once a Commissioner Charge is signed, the charge generally should be processed in the same manner as any other charge:

Field Offices should investigate Commissioner Charges in the same manner as individually filed charges, without headquarters supervision. Field offices can settle, decide and conciliate these charges in the same manner as other cases. Prior to a determination as to reasonable cause, the Commissioner who filed the charge may withdraw the charge with the consent of the Commission. Commissioners should be notified of the resolution of charges they have filed.

PCHP § III.C.4.c.

²³ Of course, as in the past, there may also be instances when management in OFP or OGC believes that a particular district could benefit from headquarters assistance.

²⁴ This would include, for example, encouraging informal dialogue with, and feedback to, the

submitting field office.

²⁵ Commissioners should be informed that at this stage they should not expect evidence sufficient for a reasonable cause finding or a litigation decision.

²⁶ Offices should also be given credit for developing written Commissioner Charge recommendations based upon a Commissioner's suggestion.

²⁷ In order to accurately track which offices and staff are working on cases that are investigated by more than one office, and to give appropriate "credit" for work completed, the agency should also modify the charge tracking system, IMS, to allow more than one office to be given credit for charges without counting the charge more than once.

²⁸ Regardless of the approach, each office can obtain guidance and support from headquarters staff, including assistance with identifying potential systemic discrimination and analyzing data, as addressed elsewhere in this Report.

²⁹ While we recommend five GS-13 positions as a starting point, we hope that the Commission will continue to review this as the systemic program grows.

³⁰ The Task Force believes that "success" in investigating systemic cases should be measured with respect to effort, quality and results, with a focus on whether appropriate judgment was exercised. For example, in some cases, "success" may mean that an office appropriately investigated a case and obtained relief that changed employment practices and provided monetary recovery for a large class of aggrieved persons; in other cases, it may mean that an office appropriately developed a Commissioner Charge and then dismissed the case promptly after the evidence obtained during an investigation indicated that the employer had not violated the law. The Task Force is not recommending numerical goals.

³¹ Appreciating that not all investigations will yield findings of systemic discrimination, the quality of charges developed should be sufficient to result in a vigorous systemic litigation program, in accordance with the district's Systemic Plan.

³² In recommending the elimination of this headquarters function, the Task Force is in no way recommending that the employees who perform these functions be subjected to a Reduction in Force or otherwise terminated from the Commission. We believe that as appropriate, the Commission should attempt to capture the expertise of the people affected by these changes.

³³ To the extent that resources are available, RAS also occasionally performs work on investigations; however, due to resource limitations, RAS experts spend the great majority of their time on litigation.

³⁴ To the extent that bargaining unit employees participate on CASE, the Commission should, where appropriate, give the employees recognition or credit for their work on CASE.

³⁵ At the time the Task Force began its work, SLS consisted of an Associate General Counsel, an Assistant General Counsel, five staff attorneys (one of whom is a local union president who devotes the majority of his time to those activities), three investigators, three paralegals and clerical support staff. The management staff has remained the same; however, as of the time of this Report, there are only four staff attorneys (including the union president), two investigators and two paralegals in SLS.

³⁶ In recommending the elimination of the headquarters systemic litigation function, the Task Force is in no way recommending that the employees who perform these functions be subjected to a Reduction in Force or otherwise terminated from the Commission. We believe that as appropriate, the Commission should attempt to capture the expertise of the people affected by these changes.

³⁷ Specifically, the Task Force recommends that Commission link the IMS data to the data from employer surveys (the EEO-1, the EEO-3, the EEO-4 and the EEO-5 forms) to allow for the following:

- a. the use of standardized employer names;
- b. a link between identified employers and a reliable assignment of a unique employer identification number that recognizes facilities with the same parent firm, international union or government entity;
- c. the ability of the system to populate relevant fields (using survey data) once the user selects the relevant employer (fields should include, for example: address, county, metropolitan area and industry);
- d. the ability of the system to generate automatically an employer's survey form, such as the EEO-1 form and, upon request, generate reports that compare the respondent to firms making up the relevant labor market;
- e. a convenient and quick method to search the survey databases and select the relevant respondent based on name and/or address combinations;
- f. the ability to conduct searches based on the relevant facility, rather than the parent; and
- g. the capacity to generate a parent company's consolidated report.

Also, the Task Force suggests developing a system for capturing a respondent's name and supplying a pseudo unit and/or parent number and an industry classification. This system should be structured in a manner that allows it to be utilized to update the list of employers receiving the EEO-1.

³⁸ Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259 (1964).

³⁹ The task forces were modeled on a task force established in 1970, which investigated allegations of race, sex and national origin discrimination against a large employer.