Statement of the U.S. Chamber of Commerce

ON: **THE PAYCHECK FAIRNESS ACT (H.R. 1338)**

TO: **THE HOUSE COMMITTEE ON EDUCATION AND LABOR SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

BY: **CAMILLE OLSON**
SEYFARTH SHAW, LLP

DATE: **JULY 11, 2007**

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business— manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

TESTIMONY OF CAMILLE A. OLSON

BEFORE THE HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

THE PAYCHECK FAIRNESS ACT

JULY 11, 2007

Good morning Mr. Chairman and members of the Subcommittee. I am pleased to appear this morning to testify on H.R. 1338, the Paycheck Fairness Act. I am a Partner with the national law firm of Seyfarth Shaw LLP, where I am Chairperson of the Labor and Employment Department's Complex Discrimination Litigation Practice Group. In addition to my private law practice, which has focused on employment discrimination issues involving class, collective, and single plaintiff actions for over twenty years, I also regularly teach employment discrimination to law students at DePaul University and Loyola University in Chicago, Illinois.

I am testifying today on behalf of the United States Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, industry sector, and geographical region. I serve on the Chamber's Labor Relations Committee as well as its subcommittee focused on employment nondiscrimination issues.

Today we are here to discuss the meaning and impact of the Paycheck Fairness Act (the "Act"). If enacted, the Act would amend the Equal Pay Act of 1963[1] ("EPA") in significant substantive and procedural ways, all upon a unsubstantiated, premise that throughout the United States of America, all unexplained wage disparities existing between men and women are necessarily the result of intentional discrimination by employers.[2]

---

[1] 29 U.S.C. § 206(d)(1).

[2] The proponents of the Act have not cited any evidence establishing that the existing wage gap is actually caused by employer discrimination. They essentially propose acceptance of the existence of the gap as definitive proof of employer discrimination. However, this unsubstantiated and faulty syllogism does not withstand scrutiny, or common sense. As labor economists and feminist scholars, alike, have proven and observed, the existing wage gap between men and women is attributable to a number of factors bearing no relationship whatsoever to alleged employer discrimination. *See, e.g.*, Council of Economic Advisers, *Explaining Trends in The Gender Wage Gap* (June 1998); Bureau of Labor Statistics, U.S. Dept. of Labor, Highlights of Women's Earnings (August 2000, Report 952); and Sara L. Zeigler, *Litigating Equality: The Limits of the Equal Pay Act*, 26 Review of Pub. Pers. Admin. 199 (Sept. 2006). Logically, these factors include: personal choice; women's disproportionate responsibilities as caregivers and other family obligations; education; self-selection for promotions and the attendant status and monetary awards; and other "human capital" factors.

On that assumption, the Act would impose harsher, "lottery-type" penalties upon all employers, lower the applicable standards for claims, and make available a more attorney-friendly class action device (among other suggested changes). The Act's proponents contend these changes are necessary to ensure equal pay for women. Nothing could be farther from the truth. In reality, the Act would expand litigation opportunities for class action lawyers seeking millions of dollars from companies without ever having to prove that the companies intentionally discriminated against women.

The proposed changes to the EPA are also contrary to the most fundamental underpinnings of that Act - the requirement of *equal pay for equal work* balanced against the mandate that government not interfere with private companies' valuation of the work performed for them and more generally, the setting of wages. The proposed changes are also inappropriate given the EPA's distinguishing features, relative to other nondiscrimination legislation. Perhaps the most notable difference to note is the lack of any requirement to prove intentional discrimination under the EPA. This feature separates the EPA from Title VII of the Civil Rights Act of 1964, as amended,[3] the Age Discrimination in Employment Act,[4] the Americans with Disabilities Act,[5] as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871.[6] These statutes allow for the imposition of compensatory and punitive damages, but only upon a finding of intentional discrimination by the employer. Unlike these statutes, the EPA currently imposes liability on employers without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency in the EPA as rendering employers "strictly liable" for any pay disparity between women and men for equal work unless the employer meets its burden of proving that the rate differential was due to: a seniority system, a merit system, a system measuring quality or quantity of work, or any other factor other than sex. The irrelevancy of an employer's intent is a defining feature of the EPA, and must be remembered as the significant amendments to the EPA suggested by the Paycheck Fairness Act are debated.

For these reasons, and all of the reasons set forth below, the Chamber strongly opposes the Paycheck Fairness Act. We urge the Subcommittee to carefully consider the issues raised by the Chamber and proceed cautiously in considering the Act.

Current Protections Against Sex-Based Wage Discrimination

[3] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*, as amended by the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071. *See* 42 U.S.C. §§ 12117(a), 1981a(2) ("Title VII").
[4] 29 U.S.C. § 621 *et seq*.
[5] Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq*. Like Title VII, under the ADA, punitive and compensatory damages are only available where intentional disability discrimination is shown. *See* 42 U.S.C. §§ 12117(a), 1981a(2) Similarly, disparate impact claims under Title VII do not subject an employer to punitive or compensatory damage claims.
[6] 42 U.S.C. §§ 1981 and 1983, respectively.

Overview

Since 1963, even prior to the passage of Title VII, it has been unlawful under the Equal Pay Act for an employer to pay a female employee less than a male employee for equal work. Today, employees enjoy a substantial assortment of protections against wage discrimination. Since 1979, the EPA has been enforced by the Equal Employment Opportunity Commission.[7] In addition to the protections against wage discrimination based on sex afforded by the EPA, sex discrimination in wages is also prohibited by Title VII, many state antidiscrimination statutes, and, for employees of federal contractors and subcontractors, Executive Order 11,246.[8]

Today, the EPA and Title VII provide a woman who prevails on her wage discrimination claim a collection of favorable and effective remedies. Those combined remedies include: back pay; front pay; liquidated damages; attorneys' fees; costs; affirmative injunctive relief in the nature of an increase in wages on a going forward basis; prejudgment interest; up to $300,000 in punitive and compensatory damages; an additional $10,000 in penalties, and the sentencing of an individual willful violator for up to six months in jail. If an employer is a government contractor, as many are, it may also face sanctions (including, for example, the cancellation, termination or suspension of any existing contract or debarment from future contracts) and remedies (such as elimination of practices, seniority relief, monetary and equitable relief to identified class members, and accelerated training). These remedies exceed those available to victims of intentional discrimination under Title VII generally, the ADA, and the ADEA.

Mechanics of the EPA and Title VII

The EPA

The EPA provides that no employer shall pay employees of one sex at a rate less than the rate at which the employer pays employees of the opposite sex for equal work.[9] An employee may assert an EPA claim either by filing a charge of discrimination with EEOC or by proceeding directly to federal court and filing a lawsuit there.

To prevail under the EPA, an employee must make a *prima facie* showing of discrimination by presenting evidence that: (1) different wages were paid to employees of the opposite sex; (2) the employees performed equal work requiring equal skill, effort, and responsibility; and (3) the employees shared similar working conditions.[10] If the employee makes that showing, she has established a presumption of discrimination. The burden of persuasion then shifts to the defendant, who can only avoid liability by proving that the wage differential is pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex.[11]

---

[7] In 1986, the EEOC issued detailed regulations entitled "EEOC's Interpretations of the Equal Pay Act," 29 CFR § 1620, as amended. In 2006, the EEOC issued regulations under the EPA, 29 CFR § 1621, as amended.
[8] Exec. Order No. 11,246, Section 202(1), 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).
[9] 29 U.S.C. § 206(d).
[10] 29 U.S.C. § 206(d)(1); *Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989).
[11] 29 U.S.C. § 206(d)(1).

Critically, there is no requirement for a plaintiff to prove any discriminatory intent or animus on the part of the employer. That element is not present in the liability scheme under the EPA.[12]

The EPA is contained within the Fair Labor Standards Act ("FLSA").[13] Under the FLSA, a successful EPA plaintiff may recover back pay, front pay, prejudgment interest, and attorneys' fees and costs. Where willfulness is shown, a plaintiff may also recover an additional amount of back pay as liquidated damages, and defendant may also be fined up to $10,000 and imprisoned for up to six months.[14]

Title VII

Similarly, under Title VII, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex. . . ."[15] An employee may assert a claim for sex-based pay discrimination by filing a charge of discrimination with EEOC and then, upon receipt of her notice of right to sue (and regardless of whether EEOC finds "cause" for concluding that discrimination occurred), may file a lawsuit in federal court. Further, an employee need not engage an attorney to participate in the EEOC processes, including investigation of their allegations of discrimination under the EPA and Title VII, as well as conciliation and litigation of their claim in federal court (if the EEOC determines to file suit on the employee's behalf).

To establish that similarly-situated males were more favorably compensated, as is necessary to prevail in a disparate treatment pay claim under Title VII, a plaintiff must provide evidence of a *prima facie* case of discrimination. Once she has done so, the employer must articulate a legitimate, non-discriminatory reason for the wage differential. At that juncture, the plaintiff has an opportunity to prove that the proffered reason is a pretext for unlawful employment discrimination. The plaintiff's burden is higher under Title VII in connection with discrimination-based pay claims than under the EPA, where establishment of a disparity in pay for equal work obligates the employer to prove that the disparity is for a reason other than sex to avoid strict liability.

Comparison of EPA and Title VII

Both the EPA and Title VII provide remedies for women who believe they have been subjected to sex discrimination in pay, and we have included examples below demonstrating that both serve as effective mechanisms for women to redress alleged claims of sex-based pay discrimination. From an employee's perspective, the EPA is the more favorable and lenient of the two statutes with respect to both the ease of pursuing a claim against an employer and the relatively low standard for establishing liability. For example:

[12] *See* 29 U.S.C. § 206(d)(1) (making clear only relevant inquiry is whether alleged disparity resulted from "any factor other than sex"); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310-11 (10th Cir. 2006).
[13] 29 U.S.C. 201 *et seq*.
[14] 29 U.S.C. § 216(b).
[15] 42 U.S.C. § 2000e-2(a). *See also* 42 U.S.C. § 2000e-2(h).

- Under the EPA, an "employer" includes entities and individuals. An employer employing as few as two employees is included within its coverage (whereas Title VII covers employers of 15 or more employees);

- Establishment of the *prima facie* case of pay discrimination under the EPA entitles an employee to a legal presumption of discrimination, with the burden of production and persuasion moving to the employer. In contrast, under Title VII, even where a plaintiff establishes a *prima facie* case of pay discrimination, she at all times retains the burden of persuasion as to discrimination. To avoid the imposition of liability, an employer must prove that the disparity was caused by one of four permissible reasons. As a result, under the EPA, plaintiffs are much more successful in defeating employer's motions for summary judgment and having their claims heard by a jury;[16]

- The EPA provides for strict liability, meaning that a plaintiff need not show discriminatory intent on the part of the employer to prevail, whereas a disparate treatment plaintiff under Title VII must show the existence of discriminatory intent on the part of the employer to prevail;

- There is a much longer limitations period (2 years for a general violation, 3 years for a violation found to be willful) under the EPA as opposed to at most 300 days for the filing of an administrative charge of discrimination with the EEOC under Title VII (which is a prerequisite to suit in federal court); and

- Under the EPA there is no charge filing requirement with an administrative agency.

The EPA also shares many of the advantages accorded to claimants under Title VII, including:

- Plaintiffs may recover attorneys' fees and costs;

- The EEOC may bring public suits to enforce the EPA, including seeking injunctive and other remedies; and

- Plaintiffs may file a charge alleging a violation of the EPA and request the EEOC investigate the violation.

In the aggregate, these overlapping non-discrimination statutes provide employees multiple avenues for pursuing claims of unequal pay for equal work. They also provide employees with multiple forms of redress with respect to alleged pay discrimination, including: a direct right to a jury trial on their own behalf in federal court, the filing of a charge of discrimination with the EEOC, the right to have the EEOC pursue a claim on their behalf in federal court, and the right to bring a collective action or class action on behalf of other similarly-situated employees who choose to participate in an action under the EPA or Title VII,

[16] *See Mickelson*, 460 F.3d at 1311 ("This is not to say that an employer may never be entitled to summary judgment on an EPA claim if the plaintiff establishes a prima facie case. But, because the employer's burden in an EPA claim is one of ultimate persuasion, 'in order to prevail at the summary judgment stage, the employer must prove at least one affirmative defense so clearly that no rational jury could find to the contrary'") (internal citation omitted).

respectively (on their own or by their attorney of choice). It is not uncommon for a worker suing to enforce his or her rights to equal pay under the EPA to also file a charge of discrimination with the Equal Employment Opportunity Commission, file a lawsuit in federal or state court, and, if their employer is a federal contractor, raise a claim under Executive Order 11,246 with the Office of Federal Contract Compliance and Procedure (or do all of the above).

And, of course, notwithstanding the differences between the statutes, claimants may bring parallel claims under the EPA and Title VII to ensure that they receive the fullest protection under the law. Indeed, they may recover under both statutes for the same period of time provided they do not receive a double or duplicative recovery for the same "wrong." As such, a prevailing plaintiff may recover back pay, a front pay adjustment, compensatory damages, punitive damages, liquidated damages, and injunctive relief, among other relief. Put simply, women who believe that they suffer wage discrimination as a result of their sex have available to them federal statutes that provide significant remedies.[17]

Concerns Regarding Proposed Changes to the Equal Pay Act

Inappropriate Expansion of EPA Remedies For Unintentional Wage Discrimination to Include Unlimited Compensatory and Punitive Damages

Critics of the EPA in its current form have observed that it is not a "lottery."[18] Indeed, it is not intended to be. Rather, its remedial provisions are intended to compensate employees for sex-based pay inequities, whether inadvertent (which is sufficient for the imposition of liability) or not. Awarding compensatory and punitive damages where no showing of intent is required would be inappropriate and contrary to the purposes behind the allowance for compensatory and punitive damages in cases of *intentional* discrimination.

In passing the Civil Rights Act of 1991, Congress expanded the forms of relief available to an individual who is the victim of *intentional discrimination* under Title VII so as to include compensatory and punitive damages. Prior to passage of that Act, 42 U.S.C. § 1981 "permitted the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination, but no similar remedy existed in cases of intentional sex, religious, or disability discrimination.[19] As then-Congresswoman Pat Schroeder from Colorado explained in her statement during the Congressional floor debate from August 2, 1990 regarding punitive damages for Civil Rights Act:

> Mrs. SCHROEDER. Mr. Chairman, I want to answer some of the things that we have just heard. We are hearing here that there is something wrong with this bill because there are remedies**….**Let me tell Members one more thing about punitive damages. *You do not get punitive damages unless there was intent. It is all equitable, unless there is intent.* It seems to me in this country that if there is intent to discriminate, then we certainly should be out trying to assess some kind

[17] Barbara Lindemann and Paul Grossman, *Employment Discrimination Law*, Ch. 15 (3d ed. 1996)
[18] Sara L. Zeigler, *Litigating Equality: The Limits of the Equal Pay Act*, 26 Review of Pub. Pers. Admin. 199, 204 (2006).
[19] *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851, 121 S. Ct. 1946 (2001).

of punitive damages. Otherwise, someone just assigns it as a cost of doing business.

As evidenced by the above, compensatory and punitive damages serve distinct and specific purposes. Compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[20] Punitive damages are "intended to punish the defendant and to deter future wrongdoing."[21] Under Title VII, "[A] finding of liability does not of itself entitle a plaintiff to an award of punitive damages."[22] "The purpose of awarding punitive damages is to 'punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct.'").[23] "Such an award must be supported by the record, and may not constitute merely a windfall for the plaintiff.[24] It strains logic and flouts the entire body of federal anti-discrimination law to suggest – or, as the Act would do, to mandate – that damages conceived and intended to punish and deter wrongful conduct should apply to claims of inadvertent, unintentional conduct that has the effect of violating the EPA.

In sum, it is inappropriate here to amend the EPA, a strict liability statute that requires no showing of discriminatory intent, to facilitate the imposition of unlimited punitive and compensatory damages. It would serve no legitimate purpose, and it would serve the illegitimate purposes of both turning the EPA into a lottery for plaintiffs willing to roll the dice to capitalize on likely legitimate wage differentials and to unjustly enrich plaintiffs' attorneys.

De Facto Elimination of the "Factor Other Than Sex" Affirmative Defense

One of the most significant substantive revisions to the EPA contemplated by the Paycheck Fairness Act is found in its re-writing of the "factor other than sex" affirmative defense. Quite simply, if enacted, it would be nearly impossible for an employer to defend against a claim that a wage differential existed by explaining that the differential was based upon a factor other than sex. As such, the affirmative defense of "factor other than sex" would be essentially gutted, and judges and juries would be placed into the human resources offices of all American businesses to determine whether the sex-neutral factor was an appropriate consideration – and was appropriately considered – in an employer's decision-making.

The "factor other than sex" affirmative defense forms the crux of the EPA. It provides that, where a wage differential exists, the employer has not engaged in sex discrimination under the EPA if the reason for the wage differential is a gender-neutral factor other than sex.[25] This affirmative defense enables employers to consider a wide range of permissible, *i.e.*, non-

---

[20] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 432, 121 S. Ct. 1678, 1683 (2001).
[21] *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence") and *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 554, 111 S. Ct. 1032, 1062 (U.S. 1991) (O'CONNOR, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").
[22] *Yarbrough v. Tower Oldsmobile, Inc.,* 789 F.2d 508, 514 (7th Cir. 1986).
[23] *Id.* (internal citations omitted).
[24] *Id.* (internal citations omitted).
[25] *See*, *e.g.*, *Fallon v. State of Illinois,* 882 F.2d 1206, 1211-212 (7th Cir. 1989) (ruling that the district court prematurely rejected the State's asserted affirmative defense that Veterans Service Officers' requisite war-time veteran status was a factor other than sex justifying the pay differential).

discriminatory, factors in setting salaries. For example, employers may consider an applicant's or employee's education, experience, special skills, seniority, and expertise, as well as other external factors such as marketplace conditions, in setting salaries. Although some circuit courts have attempted to read a "business justification" or "business necessity" element into this affirmative defense,[26] the Supreme Court, quite prudently, has never endorsed such a reading and has made clear that the affirmative defense means what it says – any factor other than sex .[27]

The factor other than sex affirmative defense was explained by the EPA's primary sponsor in the House of Representatives, Representative Charles E. Goodell, back in 1963, as follows: "We want the private enterprise system, employer and employees and a union . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it. . . . Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction."[28] So, clearly, just as important to the EPA's sponsors of the legislation as the goal of eliminating sex-based pay differentials was the bedrock of free enterprise. Given how critical that concept is to the EPA – and the fundamental importance of the factor other than sex affirmative defense in achieving it – it is clear that this Act would not actually "amend" the EPA. Instead, what the Paycheck Fairness Act seeks to do is require employers to justify individualized pay decisions on a case-by-case basis based on vague, but clearly onerous, standards.

Section 3(a) of the Act would alter the "factor other than sex" affirmative defense – and, by extension, the EPA – beyond recognition. This provision would impose an extremely heavy burden upon employers asserting the defense. Employers would be required to *prove*, in order to counter the presumption of wage discrimination, that the factor responsible for a wage differential not only is something other than sex, but also meets a higher standard of "job relatedness" or "legitimate business purpose." Furthermore, employers would be required to show that the factor other than sex was "used reasonably." What those standards actually mean is left undefined (and would likely be the subject of significant litigation) – but one alarming implication of their adoption could not be any more clear: The court system, including judges and juries, would invade the province of the free market system, with near unfettered authority and discretion over how American businesses are run, what decisions do and do not make sense, and what wages individual American employees should receive.

Moreover, under this provision, even if non-discriminating employers could still meet these heightened burdens, employees would still prevail if they could show that there is an "alternative employment practice" not implemented by the employer that would serve the same business purpose the employer intended to achieve through reliance upon the factor other than sex without producing the same wage differential. This provision not only unduly and unreasonably stacks the decks against employers under the strict liability model of the EPA, but also would lead to endless second-guessing of the individualized decisions made by employers. Again, American companies and their managers would no longer make business decisions regarding relevant factors used in the setting of starting wages as well as incremental increases to those wages, without fear of being second-guessed. As such, the Paycheck Fairness Act would

[26] *See*, *e.g.*, *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520, 525 (2d Cir. 1992); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).
[27] *See Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005).
[28] 109 CONG. REC. 9198 (1963).

interfere with an employer's business discretion, and more broadly, the free-market system. If implemented, it would also lead to an inefficient, cumbersome, and costly salary-setting process (administered by the federal judicial branch).

For example, under this replacement for the factor other than sex affirmative defense, an employer who wishes to pay a higher wage to an employee who has five years more experience than another employee may not be able to do so because a court finds that the differential in experience could be overcome by in-house training over an extended period of time. That is a judgment that employers should have an ability to retain in order to have an effective, efficient workforce and in order to achieve their own specific business objectives and priorities.

Involvement by Government in Setting Wages -- Excluding Consideration of Marketplace Demands – and *De Facto* Incorporation of the Consistently-Rejected and Ill-Founded Comparable Worth Theory

As explained above, at its core, the Equal Pay Act requires *equal pay for equal work. That is why the EPA was enacted and what it requires.* As the Seventh Circuit explained recently: "The proper domain of the Equal Pay Act consists of standardized jobs in which a man is paid significantly more than a woman (or anything more, if the jobs are truly identical) and there are no skill differences."[29] And, until now, aside from prohibiting sex-based wage differentials, the EPA has left the determination of the value brought to a particular employer by the performance of a particular position and its duties to the employer, the employee, and the market. Section 7 of the Act, however, calls upon the Department of Labor to issue "Guidelines" to compare wages for "different jobs" in order to determine if the pay scales are "adequate" and "fair" – based on an outsider looking in. Also problematic is that these Guidelines would effectively preclude consideration of many of the factors that quite legitimately and necessarily drive salary decisions, including, most notably, marketplace factors. The "Guidelines" would be accorded the same deference as other guidelines promulgated by administrative agencies in the employment context, from great deference to, in effect, the law.[30]

In short, the Paycheck Fairness Act's Section 7, like Section 3 discussed above, would directly involve the Department of Labor in the wage-setting process of employers, and, just as problematic, inject the widely-rejected theory of "comparable worth" into that process. And in deciding what jobs are worth to individual employers, the Government would apparently exclude consideration of some of the factors most relevant to that highly individualized determination, such as: marketplace value and supply and demand; the nature of a position *vis-à-vis* whether it involves physical labor; a company's position in the marketplace; employers' varying business needs and priorities; employees' educational backgrounds; employees' experience, both qualitatively and quantitatively; and regional differences.

Proponents of the "comparable worth" theory, and, it appears, proponents of the Paycheck Fairness Act, attempt to expand the EPA (as well as Title VII) to redress wage disparities where employees of one sex receive lower wages for performing jobs and work different from and not equal to the jobs and work performed by the opposite sex but, are

[29] S*ims-Fingers v. City of Indianapolis*, No. 06-2198, 2007 U.S. App. LEXIS 15253, at *7 (7th Cir. 2007).
[30] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 884-885 (1971).

arguably and theoretically, "comparable in value." Courts and, in fact, this legislative body, have repeatedly rejected application of this theory, largely because they view the valuation of the relative worth of one job as compared to another to be within the province of the employer offering the opportunities to workers.[31] For instance, the Sixth Circuit rejected this theory stating, "Title VII is not a substitute for the free market, which historically determines labor rates."[32] Likewise, the Ninth Circuit rejected the theory on the grounds that it found "nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such the laws of supply and demand or to prevent employers from competing in the labor market."[33] As the Seventh Circuit aptly observed just a couple of weeks ago with respect to questions of relative job valuation, "Our society leaves such decisions to the market, to the forces of supply and demand, because there are no good answers to the normative question, or at least no good answers that are within the competence of judges to give."[34]

---

[31] In the 1960s, the Kennedy Administration proposed a ban on sex discrimination in wages "for work of comparable character on jobs the performance of which requires comparable skills," with the assumption that job evaluation systems were available to evaluate the comparative worth of different jobs. *Equal Pay Act of 1963: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 88th Cong., 1st Sess. 2 (1963) (quoting S. 882, 88th Cong., 1st Sess., 109 CONG. REC. 2770 (1963) and S. 910. 88th Cong., 1st Sess., 109 CONG. REC. 2886 (1963)). Congress resisted the proposal for the simple reason that it did not want the government or judges to invade the workplace and tell employers what to pay their employees.

> As Representative Goodell stated during the hearings:
>
> Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. . . .
>
> [W]e want the private enterprise system . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

109 CONG. REC. 9197-98 (1963).

Congress enacted the EPA which, of course, requires equal pay for "equal work." *See* Section 206(d). When Title VII went to the Senate, concern arose that a Title VII plaintiff could bring a pay discrimination claim without the need to show "equal pay for equal work" as required by the EPA. To prevent erosion of that well-conceived standard, Congress enacted the Bennett Amendment, which incorporated the EPA's four affirmative defenses into Title VII. The Bennett Amendment stated that it would not be a violation of Title VII "to differentiate upon the basis of sex in . . . the wages or compensation paid . . . if such differentiation is authorized by the provisions of [the Equal Pay Act.]." Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h).

Relying on the Bennett Amendment, courts have consistently rejected claims of comparable worth by construing Title VII to parallel the EPA standard. In rejecting comparable worth claims, courts have reiterated Congress's fear of having the government and judges dictate what employers have to pay their employee – rather than letting the market decide.

[32] *Int'l Union v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989).

[33] *AFSCME v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985)

[34] *Sims-Fingers*, 2007 U.S. App. LEXIS 15253, at *7.

And, indeed, given the robust, living menu of federal and state remedial schemes discussed earlier, there is no justification for interjecting the Government into the unprecedented role of establishing the appropriate rate of pay for employees of private companies. To do so in the form of these "Guidelines" would amount to social and economic engineering under the imprudent and unsubstantiated guise of "curing" employer discrimination in the setting of wages.[35] If implemented, the legislature, the DOL, and the Courts would necessarily invade, in fact, permanently reside in, the setting of wages and salaries of employees throughout the United States – a dangerous development that should be prevented by rejection of the Paycheck Fairness Act.

The EPA's Collective Action Mechanism in Section 216(b) Should Not be Amended to Incorporate Fed. R. Civ. P. 23

Like multi-plaintiff actions under the FLSA and the ADEA, EPA actions brought by women on behalf of themselves and others similarly situated under the collective action mechanism of Section 216(b) require interested parties to file with the court a consent that they wish to "opt-in" to the case before becoming part of the action, including before becoming affirmatively bound by any adverse rulings against the employees' interests adjudicated in the case. FLSA, ADEA, and EPA collective actions, as they are known under Section 216(b), provide employees with a generally more lenient standard with respect to a plaintiff's initial showing of being similarly situated to fellow employees than that required under Federal Rule of Civil Procedure 23(a), which is applicable to class actions sought under Title VII, and proposed by the proponents of the Paycheck Fairness Act as the applicable new class action mechanism to apply to EPA claims. The Chamber submits that the Act's proponents have not articulated a compelling reason for any change in the current collective action mechanism available to plaintiffs under the EPA.

Under Rule 23, to bring a class action a plaintiff must first meet all of the "strict requirements" of Rule 23(a) and at least one of the alternative requirements of Rule 23(b). Under Rule 23(a) a plaintiff must show: the class is too numerous to join all members; there exist common questions of law or fact; the claims or defenses of representative parties are typical of those of the class members; and the representative parties will fairly and adequately represent the class. Once these requirements are satisfied, a plaintiff must also satisfy one of the subsections of Rule 23(b). Rule 23(b) requires that a plaintiff show either: that prosecution of individual actions would result in inconsistent holdings or that adjudications would be dispositive of the interests of those not named in the lawsuit, that the party opposing the class has acted on grounds applicable to the entire class making relief appropriate for the class as a whole, or that questions of law or fact common to the members of the class predominate over questions affecting only the individual members of the class and that certification is superior to other available methods for fairness and efficiency purposes. When conducting the required analysis

[35] That is especially so given that, as labor economists have well established and documented, the average disparity is in fact the result of a myriad of societal and individualized factors – and not discrimination. *See* n. 2.

under Rule 23, courts must perform a "rigorous analysis" of plaintiff's ability to meet each of Rule 23's requirements.[36]

Conversely, under Section 216(b), while some courts use the Rule 23 approach to the extent those elements do not conflict with Section 216 (such as numerosity, commonality, typicality and adequacy of representation), many courts use a less stringent standard, requiring plaintiff to show only that she is similarly situated to other employees.[37] The similarly situated requirement is met through allegations and evidence of class wide discrimination. Courts generally apply a lenient standard to conditional certification of an EPA claim. A person is considered a member of a collective action under Section 216(b) and is bound by and will benefit from any court judgment upon merely filing a written consent with the court and affirmatively "opting into" the suit. This requirement was added to collective actions under Section 216(b) to ensure that a defendant would not be surprised by their testimony or evidence at trial.[38]

Courts regularly face and grant requests to certify both Federal Rule of Civil Procedure 23(a) class actions alleging wage disparity based on sex, as well as Rule 216(b) collective actions under the EPA.[39] When faced by facts presenting a close call as to whether a purported class of workers is similarly situated under the EPA's Section 216(b) and Title VII's Rule 23 mechanisms, and otherwise appropriate for mass action treatment, it is generally the EPA collective claim that survives opposition to a motion to certify a class alleging sex discrimination in pay.[40] The reason is clear -- Section 216(b) contains a more lenient standard for a plaintiff who is attempting to bring a claim on behalf of herself and other similarly-situated women for unequal pay. Specifically, it is viewed by many courts as encompassing a more liberal standard for conditional certification relative to Rule 23. For all of these reasons, the Chambers submits that this collective action mechanism should not be amended to conform to Rule 23 requirements as proposed by the Paycheck Fairness Act.

OFCCP Initiatives

Under the innocuous title "Reinstatement of pay equity programs and pay equity data collection," section 10 of the bill directs the OFCCP, in a convoluted manner, to make several unjustifiable changes to the manner in which it examines and assesses compensation discrimination. Much of section 10's language is hard to decipher, for example, since it attempts

---

[36] *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 671 (N.D. Ga. 2003).

[37] *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001) (at the notice stage, the court makes a decision using a fairly lenient standard that typically results in "conditional certification" of a collective or representative action); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996); *Garza v. Chicago Transit Auth.,* No. 00 C 0438, 2001 U.S. Dist. LEXIS 6132, at *5 (N.D. Ill. 2001), citing *Woods v. New York Life Ins. Co.,* 686 F.2d 578 (7th Cir. 1982).

[38] Portal-to-Portal Pay Act, 29 U.S.C. §256(b); *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1134 (5th Cir. 1984).

[39] *See*, *e.g.*, *Jarvaise v. Rand Corp*., No.96-2680 (RWR), 2002 U.S. Dist. LEXIS 6096, at *5 (D.C.C. Feb. 19, 2002) (class certification granted under EPA and Title VII to all female employees in exempt positions who did not make compensation decisions); *Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418, 422-24 (M.D. Ala. 1991) (EPA collective action motion granted on behalf of female medical sales representatives).

[40] *See*, *e.g.*, *Rochlin v. Cincinnati Insurance Co.*, No. IP 00-1898-C H/K, 2003 U.S. Dist. LEXIS 13759, at *49-51, 64 (S.D. Ind. July 8, 2003) (Rule 23 class certification of sex discrimination in pay claim denied, but Section 16(b) collection action claim allowed to proceed as a class action as the standard is more lenient under the EPA).

to relate to no-longer extant sections of regulations,[41] but for the purposes of this testimony, two provisions are worth particular note: the provisions relating to the agency's analysis of systemic compensation discrimination and the provisions targeted toward surveying the federal contractor community.[42]

Section 10 of the bill appears to be designed to reverse or modify several provisions of the OFCCP's guidelines on systemic compensation discrimination, which were adopted on June 16, 2006. In particular, section 10(b)(1)(A) appears to require the re-imposition of pay grade methodology and the abandonment of multiple regression analysis, among other things. The OFCCP, however, largely abandoned pay grade analysis as a method for proving that systemic compensation discrimination exists for one very simple reason: it doesn't work. Assuming individuals in the same pay "band" are similarly situated is simply too crude a statistical tool. Multiple regression analysis, on the other hand, is the widely accepted method by which plaintiffs and defendants make their case. Robust statistical tools like this are necessary to analyze the many factors that determine compensation and determine whether pay differentials are due to discrimination or some other factor. Statistical techniques will result in the OFCCP alleging discrimination more frequently, without adequate proof, forcing employers to unnecessarily incur legal costs and wasting OFCCP's resources. One perverse result of making such a change will be that employers that choose to settle with OFCCP based on such an inadequate statistical analysis would open themselves up to charges of reverse discrimination under Title VII or state law.[43]

Proposed section 10(b)(1)(C) appears to be designed to re-impose the long-discredited OFCCP equal opportunity survey. It should be noted that the OFCCP's survey, which was intended to help identify federal contractors that should be audited by OFCCP, was substantively flawed, failed to serve as a useful enforcement tool for the agency, and placed a significant, unnecessary burden on contractors. A neutral study of the survey was conducted by Abt Associates as part of the OFCCP's review of the survey. The study conclusively demonstrated that the survey provided no useful data. One example is particularly telling: the study found that of the establishments classified by the survey as suspected of having systemic discrimination, 93 percent would be false positives. Nevertheless, the OFCCP estimated the study cost contractors almost $6 million per year (a very conservative estimate, based on reports from Chamber

[41] *See* section 10(b)(1)(C), referencing 41 C.F.R. section 60-2.18, which was repealed on September 8, 2006 (see 71 Fed. Reg. 53,032).

[42] A full discussion of these issues is beyond the scope of this testimony. For more information about the OFCCP's repeal of the EO Survey, see the agency's comments at 71 Fed. Reg. 53,032 (Sept. 8, 2007). For more information about the OFCCP's guidelines on systemic compensation discrimination, see the agency's comments at 71 Fed. Reg. 35,124 (June 16, 2006). Extensive comment by the Chamber on both issues is available on the Chamber's web site at: www.uschamber.com.

[43] *See Maitland v. Univ. of Minn.,* 155 F.3d 1013, 1016-18 (8th Cir. 1998) (reversing district court's grant of summary judgment to employer on reverse discrimination claim and ruling that "the fact that the affirmative action salary plan was implemented pursuant to a consent decree does not bolster the District Court's conclusion at the summary judgment stage of this case that there was a manifest imbalance in faculty salaries."); *see also Rudebusch v. Hughes*, 313 F.3d 506, 515-16 (9th Cir. 2002)(reverse discrimination case based on allegedly insufficient multiple regression analysis, ultimately resulted in a ruling requiring the employer to pay male faculty members $1.4 million); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676-77 (4th Cir. 1996) (reverse discrimination claim based on inadequate multiple regression analysis).

members).[44] Re-imposing this burden, which has been proven to do nothing to help identify or eradicate discrimination, on the federal contractor community cannot be justified.

Other Concerns

In addition to the concerns discussed above, the Paycheck Fairness Act raises other serious concerns. Some of those concerns are noted below:

Permitted Inquiries About Wages

The Paycheck Fairness Act appears to provide an unprecedented broad new right to employees under the EPA. Employees would have the right to "inquire about wages of the employee or another employee…" without fear of any adverse action by an employer. The new right does not appear to be narrowed in any way by relevancy to the employee's pay or by confidentiality concerns of an employer. This language goes far beyond any rights enjoyed by non-unionized and unionized employees under the National Labor Relations Act ("NLRA").

For example, under the NLRA, non-unionized employees have the right to discuss their own wages with other employees, but do not otherwise have the right to obtain written documentation about the wages of any other employees. Although unionized employees, as part of an employer's duty to bargain in good faith, have the right to inquire about wage information for bargaining purposes, this right is not without boundaries and not without safeguards. In *International Business Machines Corp. and Hudson*, 265 NLRB 638 (1982), the National Labor Relations Board ("NLRB") held that employees could discuss their own wages with each other, but could not access or distribute company-compiled information as the company had a valid business justification for its rule against distribution of wage data compiled and classified as confidential. Instead, the NLRB explained that the employer had a valid business justification for discharging an employee who disclosed wage information in violation of the company's rule. In contrast, here, the Paycheck Fairness Act provides an open door for an employee's inquiries in the wages of all employees, without any balancing of an employer's need for confidentiality and other legitimate concerns.

New Definition of "Establishment"

The Paycheck Fairness Act appears to redefine and expand the definition of equal work, by amending the EPA to allow an employee to raise a claim of denial of equal pay for equal work if the inequality between men and women pay exists between men and women who work at different physical places of business within the company. Currently, in keeping with the EPA's prohibition against denying employees equal pay for equal work because of their sex, the EPA requires an employee to compare their wages earned against other employees within the physical place of business in which they work. According to the Regulations issued by EEOC to construe the EPA, "establishment" "refers to a distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business. Accordingly,

[44] *See* 71 Fed. Reg. 3,378 (Jan. 20, 2006).

each physically separate place of business is ordinarily considered a separate establishment." 29 C.F.R. §1620.9(a). We urge the Committee to consider the difficulty and impropriety of comparing jobs across locations and geographical regions in determining whether equal pay is being paid for equal work, and reject the unworkable proposal contained within the Paycheck Fairness Act.

Conclusion

In conclusion, the Chamber has serious concerns with, and opposes, the Paycheck Fairness Act. Mr. Chairman and members of the Committee, we thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division, if we can be of further assistance in this matter.

Committee on Education and Labor

Witness Disclosure Requirement – "Truth in Testimony"

Required by House Rule XI, Clause 2(g)

1. Your Name (Please Print): Camille A. Olson		
2. Will you be representing a federal, State, or local government entity? (If the answer is yes please contact the Committee).	Yes	No X
3. Please list any federal grants or contracts (including subgrants or subcontracts) which you have received since October 1, 2004:		
None		
4. Will you be representing an entity other than a government entity?	Yes X	No
5. Other than yourself, please list what entity or entities you will be representing:		
The United States Chamber of Commerce		
6. Please list any offices or elected positions held and/or briefly describe your representational capacity with each of the entities you listed in response to question 5:		
Member of the Chamber's Labor Relations Committee, as well as its subcommittee that focuses on employment non-discrimination issues		
7. If case list any federal grants or contracts (including subgrants or subcontracts) received by the entities you listed in response to question 5 since October 1, 2004, including the source and amount of each grant or contract:		
None		
8. Are there parent organizations, subsidiaries, or partnerships to the entities you disclosed in response to question number 5 that you will not be representing? If so, please list:	Yes	No X

Signature: Camille A. Olson Date: 7/16/07

Please attach this form to your written testimony.