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Via Electronic Mail  
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Executive Officer  
Office of the Executive Secretariat  
U.S. Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, DC 20507

**Re: EEOC's 2012-2016 "Draft" Strategic Enforcement Plan - Written Submission  
Of Seyfarth Shaw LLP**

Dear Executive Officer:

Seyfarth Shaw LLP appreciates the Equal Employment Opportunity Commission's efforts to open the lines of communication with employers and their counsel through the drafting process of the 2012 – 2016 Strategic Enforcement Plan (the "Plan"). On behalf of Seyfarth Shaw, we respectfully submit these comments in response to the EEOC's September 4, 2012 invitation for written submissions regarding the EEOC's Revised Draft Plan, which we understand will function as the blueprint for the Commission's enforcement activity for the next several years.<sup>1</sup>

Seyfarth applauds any opportunity to provide input into the agency's strategic goals – after all, the agency and employers share a common goal of discrimination-free workplaces and vigorous enforcement of anti-discrimination rights. Based on our near-daily interaction with the agency in some of its largest and most complex matters and the relationships we have formed with EEOC representatives at all levels, Seyfarth Shaw has developed a unique perspective on the problems facing employers seeking to work with the EEOC.

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<sup>1</sup> See *EEOC Seeks Input on Strategic Enforcement Plan*, The U.S. Equal Employment Opportunity Commission (Sept. 4, 2012), <http://www1.eeoc.gov/eeoc/newsroom/release/9-4-12c.cfm?renderforprint=1>.

We have offered our input on the development of this evolving Plan from the earliest stages of the EEOC's drafting process.<sup>2</sup> Briefly: on June 19, 2012, Seyfarth Shaw submitted a series of extensive recommendations to the Commission, suggesting concrete examples of challenges faced by employers working with the EEOC, and ways the agency could address these challenges while still achieving its goals. Seyfarth Shaw was one of only a few private organizations submitting input.<sup>3</sup> Following up on those written submissions, the EEOC held a full-day public meeting on July 18, 2012, seeking additional input on its Plan.<sup>4</sup> On September 4, 2012, the EEOC released a "revamped" Draft Plan, which gave Seyfarth Shaw redirected insight as to the EEOC's goals.<sup>5</sup> Most recently, the EEOC published a press release soliciting input on its Revised Draft Plan.<sup>6</sup> To that end, we respectfully submit this letter with the hope that it will have a meaningful impact on how the EEOC approaches interactions with employers in the years to come.

### About The Authors

Founded in 1945, Seyfarth is recognized as one of the "go to" labor and employment law firms for employers. Attorneys from our Complex Discrimination Litigation Practice Group have litigated against – and, where possible, cooperated with – the EEOC in hundreds of litigation

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<sup>2</sup> This past January, when the EEOC first reported the Plan, one of the EEOC's chief goals was to "combat employment discrimination through strategic law enforcement," including using administrative and litigation mechanisms to identify and attack discriminatory policies and other instances of systemic discrimination. *Strategic Plan For Fiscal Years 2012 – 2016*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, [http://www.eeoc.gov/eeoc/plan/upload/strategic\\_pl\\_an\\_12to16.pdf](http://www.eeoc.gov/eeoc/plan/upload/strategic_pl_an_12to16.pdf) (last visited Sept. 14, 2012); See Christopher DeGroff and Annette Tyman, "Getting The Most Bang For The Buck" - *The EEOC Outlines Its Strategic Plan To Target Systemic Discrimination Claims Over The Next Four Years*, THE WORKPLACE CLASS ACTION BLOG (Jan. 30, 2012), <http://www.workplaceclassaction.com/eeoc-litigation/getting-the-most-bang-for-the-buck---the-eeoc-outlines-its-strategic-plan-to-target-systemic-discrim/>; see also Gerald L. Maatman, Jr. and Christopher DeGroff, *Employers Beware - The EEOC's FY 2011 EEOC Annual Performance And Accountability Report Confirms Its Focus On Systemic Discrimination Litigation*, THE WORKPLACE CLASS ACTION BLOG (Nov. 18, 2011), <http://www.workplaceclassaction.com/eeoc->

<sup>3</sup> Gerald L. Maatman Jr. and Christopher DeGroff, *EEOC's 2012 – 2016 Strategic Enforcement Plan - Written Submission Of Seyfarth Shaw LLP* (June 19, 2012), available at <http://www.workplaceclassaction.com/EEOC61912.pdf>.

<sup>4</sup> Seyfarth Shaw attended the meeting, and discussed it in a posting on the Firm's blog. See Rebecca Bjork, Christopher DeGroff, and Gerald L. Maatman, Jr., *EEOC Holds Meeting On Its Strategic Enforcement Plan - But Did It Listen?*, THE WORKPLACE CLASS ACTION BLOG (July 18, 2012), <http://www.workplaceclassaction.com/eeoc-litigation/eeoc-holds-meeting-on-its-strategic-enforcement-plan---but-did-it-listen/>. As is custom, the EEOC issued a press release after its public meeting. See *EEOC Holds Unprecedented Public Meeting to Hear Views on Strategic Enforcement Plan*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 18, 2012), <http://www.eeoc.gov/newsroom/release/7-18-12.cfm>.

<sup>5</sup> *DRAFT for PUBLIC RELEASE, U.S. EEOC Strategic Enforcement Plan*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Sept. 4, 2012), [http://www1.eeoc.gov/eeoc/plan/sep\\_public\\_draft.cfm?renderforprint=1](http://www1.eeoc.gov/eeoc/plan/sep_public_draft.cfm?renderforprint=1). Seyfarth Shaw blogged about the EEOC's revised Draft Plan shortly after its release. See Christopher DeGroff and Gerald L. Maatman, Jr., *The EEOC's Strategic Plan For Fiscal Years 2012-2016 Is Still Under Construction - This Week The Commission Released Another Draft*, THE WORKPLACE CLASS ACTION BLOG (Sept. 5, 2012), <http://www.workplaceclassaction.com/the-eeocs-strategic-plan-for-fiscal-years-2012-2016-is-still-under-construction---this-week-the-comm/>.

<sup>6</sup> *EEOC Seeks Input on Strategic Enforcement Plan*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Sept. 4, 2012), <http://www1.eeoc.gov/eeoc/newsroom/release/9-4-12c.cfm?renderforprint=1>.

matters. Indeed, Seyfarth is currently representing employers in what we understand are the three largest EEOC lawsuits presently pending in the United States.

The co-authors of this submission, Gerald L. Maatman, Jr. and Christopher J. DeGroff, primarily focus on defending employers sued in employment-related class actions and EEOC lawsuits brought in federal and state courts throughout the United States.

Mr. Maatman is a partner in the Chicago and New York offices of Seyfarth Shaw and is the co-chair of the Firm's Complex Discrimination Practice Group. Due to his work on litigation opposite the EEOC in many of its most significant cases, the Government has asked Mr. Maatman to lecture on defense of EEOC litigation at the Commission's annual training symposium for its trial attorneys handling systemic litigation. Mr. Maatman has served as lead defense counsel in some of the largest pattern or practice lawsuits in the Commission's history. A frequent writer and commentator on EEOC litigation subjects, he is also the editor of Seyfarth's Workplace Class Action Report, a comprehensive annual compendium of complex litigation decisions, and the editor of the Firm's Workplace Class Action blog.<sup>7</sup>

Mr. DeGroff is a partner in Seyfarth Shaw's Chicago office and is also co-chair of the Complex Discrimination Practice Group. Mr. DeGroff has extensive experience litigating against the EEOC, both at the early charge stage and in large-scale EEOC pattern or practice litigation. He has developed innovative strategies for addressing wide-ranging governmental request for information and has handled complex regional and national EEOC investigations, often resulting in no action being taken against the employers he represents. Mr. DeGroff has also crafted state-of-the-art tools to track subtle trends in agency change and litigation filings. Mr. DeGroff has written extensively on these trends and cutting edge tactics employed by the EEOC and has been regularly asked to speak on those topics.

Given Seyfarth Shaw's depth and breadth of experience with the agency, we are in a unique position to provide useful insight on the Plan.

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<sup>7</sup> See generally Gerald L. Maatman, Jr. and Laura Maehtlen, *Peeking Behind The Curtain - The "Next" Workplace Class Action Report For 2013*, THE WORKPLACE CLASS ACTION BLOG (June 7, 2012), <http://www.workplaceclassaction.com/class-action/peeking-behind-the-curtain---the-next-workplace-class-action-report-for-2013/> (discussing the *Annual Workplace Class Action Litigation Report, 2013 Edition*); see also Bob Bregman, *Seyfarth Shaw's Annual Workplace Class Action Litigation Report: The State-of-the-Art Word on Employment-Related Class Actions*, EPLiC - EMPLOYMENT PRACTICES LIABILITY CONSULTANT, available at <http://www.workplaceclassaction.com/EPLiC%20Spring%202012%20Seyfarth%20Shaw%20class%20action%20litigation%20report.pdf> (recognizing the Annual Workplace Class Action Litigation Report as a Report that "stands alone as the definitive source of information on employment class action litigation" and that "no practitioner who deals with employment claims . . . should be without it.").

## **I. The EEOC's September 4, 2012 Release Of Its Draft Plan**

The Revised Draft Plan properly notes that the nation “has made great strides towards equal employment opportunity for all” – a laudable accomplishment to be sure.<sup>8</sup> But, this progress is properly attributed not only to government law enforcement, but also in large part to the ongoing and vigorous efforts by employers to effect these changes.<sup>9</sup> Employer contributions and commitment to EEO issues are critical to the success of the EEOC's agenda, and thus employer input to the agency's programs is key.

Although some of the concrete suggestions in Seyfarth's original written submission to the EEOC were conspicuously absent from the Revised Draft Plan, we applaud the Commission for taking into account at least certain segments of our commentary.<sup>10</sup> For example, in our submission, we noted that the Commission has lost some sense of its core mission when it shifted its emphasis to combating large-scale, high-impact and high-profile investigations and cases. With alarming and increasing frequency, the EEOC's shift in focus has meant that the Commission drifted from its statutory mandate that it may pursue civil action against a respondent employer *only after* it has satisfied its statutory duty to “eliminate [the] alleged unlawful employment practice through informal methods of conference, conciliation and persuasion” as a precondition to filing an action.<sup>11</sup> In what appears to be an effort to address this concern, the Revised Draft Plan has retreated from its “all in” systemic litigation focus, to a more narrowly defined sub-set of systemic cases involving hiring practices. In fact, the EEOC staked a claim and identified its top priorities for investigations and case selection, which include: (1) eliminating systemic barriers in recruitment and hiring; (2) addressing emerging issues including ADA Amendment Act issues, LGBT coverage under Title VII sex discrimination provisions, and accommodating pregnancy when women have been forced onto unpaid leave after being denied accommodations routinely provided to similarly situated employees; (3) preserving access to the legal system, and (4) combating harassment.<sup>12</sup> Thus, the

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<sup>8</sup> *DRAFT for PUBLIC RELEASE, U.S. EEOC Strategic Enforcement Plan, supra*, note 5, at 2.

<sup>9</sup> *See EEOC's 2012 – 2016 Strategic Enforcement Plan – Witten Submission Of Seyfarth Shaw LLP, supra*, note 3.

<sup>10</sup> Conspicuously absent from the Plan is any concrete response to the myriad of criticism of numerous federal judges who have sanctioned the EEOC and dismissed its cases over the past 24 months over “shoot first, aim later” tactics. We discussed those cases and their implications in our June 19, 2012 written submission to the EEOC and have blogged about the issue on multiple occasions. *See e.g., Id.* at 4-5; *EEOC v. Cintas Corp.*, 2011 U.S. Dist. LEXIS 86228 (E.D. Mich. Aug. 4, 2011) (ordering the EEOC to pay defendant \$2,638,443.93 in attorneys' fees and costs); *EEOC v. Tricore Ref. Labs.*, 2011 U.S. Dist. LEXIS 151417 (D N.M. Oct. 26, 2011) (ordering the EEOC to pay defendant \$140,571.62 in attorneys' fees); *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010) (ordering the EEOC to pay defendant \$4,467,442.90 in attorneys' fees), *rev'd*, 679 F.3d 657 (8th Cir. Iowa 2010); Christopher DeGroff and Brian Wong, *Court Awards Over \$140,000 In Defense Fees For The EEOC's Pursuit Of Frivolous Lawsuit*, THE WORKPLACE CLASS ACTION BLOG (Nov. 7, 2011), <http://www.workplaceclassaction.com/eec-litigation/court-awards-over-14000-in-defense-fees-for-the-eec-pursuit-of-frivolous-lawsuit/>; Christopher DeGroff and Gerald L. Maatman, Jr., *Court Sanctions The EEOC For \$2.6 Million In Fees And Costs*, THE WORKPLACE CLASS ACTION BLOG (Aug. 10, 2011), <http://www.workplaceclassaction.com/eec-litigation/court-sanctions-the-eec-for-26-million-in-fees-and-costs/>.

<sup>11</sup> 42 U.S.C. § 2000e-5(b).

<sup>12</sup> *DRAFT for PUBLIC RELEASE, U.S. EEOC Strategic Enforcement Plan, supra*, note 5, at 4-5.

EEOC appears to have mixed the old with the new - making good on its promise to litigate systemic practices, and simultaneously conceding that its previous “all in” litigation strategy has outstripped its manpower and budget, and that its litigation agenda was too ambitious.

In Seyfarth’s submission to the EEOC, we also discussed the fact that the EEOC’s district-centric structure makes dealing with the EEOC like working with dozens of different, highly idiosyncratic firms.<sup>13</sup> It is no secret that one District Office can work to resolve or litigate a case in one manner, while another District Office works in an entirely different way. Often we hear the refrain “it doesn’t matter what another District office did in similar circumstances or agreed to - we do it our own way...” The EEOC’s Revised Draft Plan appears to work on this shortcoming by instructing that “each District Office Director and Regional Attorney, in consultation with Field, Local, and Area Directors in their district, shall develop a District Complement Plan to the SEP by March 29, 2013” that will identify how the office will implement the Plan’s priorities and highlight local enforcement priorities and strategies for addressing them.<sup>14</sup> Although the EEOC has stated time and time again that the agency operates its investigation and enforcement philosophies through a “national law firm model,” the Revised Draft Plan at least acknowledges our suggestion that simply saying the EEOC is a cohesive team does not always make it so. There are still significant concerns raised by the decentralized functions that the EEOC articulated in the Revised Draft Plan, but we nevertheless expect employers will be pleased that the agency has acknowledged that a problem exists.

Ultimately, while we are congratulatory of the progress we see in the Revised Draft Plan, there remain significant concerns and opportunities for advancement throughout the EEOC’s submission. The following is a non-exhaustive discussion of some of the reoccurring issues that we see in the EEOC’s practices, as they relate to the Revised Draft Plan. Our discussion is anchored in the EEOC’s own articulation of its mission: an agency that was “designed to encourage voluntary compliance with the anti-discrimination laws and to assist employers, employees and stakeholder groups to understand and prevent discrimination.”<sup>15</sup> We respectfully submit that the Plan can be enhanced and improved by taking account of these issues of concern to employers.

## **II. Transparency Will Advance The EEOC’s Goals**

We are unaware of a single employer that does not share the EEOC’s goal of a discrimination-free and harassment-free workplaces. Rather, we often disagree as to *how* we can collaborate to get to the common goal — a point where a joint effort with the EEOC seems to all-to-often stumble. Respectfully, the final Plan ought to acknowledge that employers want to know if

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<sup>13</sup> *EEOC’s 2012 – 2016 Strategic Enforcement Plan – Witten Submission Of Seyfarth Shaw LLP*, *supra*, note 3, at 10.

<sup>14</sup> *DRAFT for PUBLIC RELEASE, U.S. EEOC Strategic Enforcement Plan*, *supra*, note 5, at 6.

<sup>15</sup> *EEOC Investigations - What An Employer Should Know*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://archive.eeoc.gov/employers/investigations.html> (last visited June 12, 2012); *see* 42 U.S.C. §§ 2000e-5(b)-(c) (recognizing the importance of voluntary compliance by employers); 42 U.S.C. §§ 2000e-5(d) (explaining that the federal government has ultimate enforcement responsibility).

there are problems in their facilities *at the earliest point possible*, and if the Commission engages in an open forum and in a transparent manner while conducting its procedures and initiatives, it will further both the EEOC and employers' interests.

The EEOC's Revised Draft Plan notes that "[c]lear and accessible information and legal guidance are crucial aspects of preventing discrimination and furthering enforcement."<sup>16</sup> A common concern, however, is that the EEOC's lack of transparency often causes confusion and outright suspicion of the EEOC's motives and agenda. During the course of an investigation, and indeed even during conciliation, information and guidance are rarely "clear" or "accessible" for employers. This is a significant problem. Simply put, the more employers that understand what the EEOC is doing and why, the more likely employers will meet the EEOC's goals.

The Revised Draft Plan notes that the EEOC is "charged with providing education and technical assistance to those with rights and responsibilities" under the anti-discrimination laws it enforces, ostensibly including employers.<sup>17</sup> The EEOC's Revised Draft Plan also outlines a number of proposed procedures and initiatives. We are encouraged by the Commission's efforts in this regard, but respectfully submit that the EEOC ought to go one step further — the EEOC should advance the procedures and initiatives discussed in the Plan *openly* for employers to see. Employers should understand the EEOC's initiatives and how it intends to pursue them. This is in keeping with the EEOC's responsibility to employers to provide the proper education and assistance to comply with the EEOC's dictates. Transparency is essentially cost free for the Commission, and would obviate the guesswork currently involved in understanding the EEOC's agenda.

An example of a possible growth area for the EEOC transparency is highlighted in the section of the Revised Draft Plan titled "Targeted Approach" to enforcement.<sup>18</sup> When the EEOC's Systemic Initiative was first launched in 2005-2006, the Initiative called for the various districts to develop targeted practices and industries in those specific regions that would be the focus of those districts' efforts. Yet, to this day, the EEOC refuses to share those district-specific areas of focus. To employers, this smacks of "enforcement by ambush" tactics, where the EEOC is relegated to the state trooper hiding behind a billboard waiting to "catch" the next speeder.

Similarly, the Revised Draft Plan calls for the same goal-setting in its discussion of "Implementation of Priorities in Administrative and Legal Enforcement" and the "District Complements to the SEP."<sup>19</sup> Seyfarth submits that the EEOC's goals would be better served if the agency shared these district focus areas. Certainly, counsel would be far better equipped to get the attention of employers if we could identify those practice and industries. Sharing these priorities would not compromise the EEOC's enforcement efforts, but instead would allow it to partner with

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<sup>16</sup> DRAFT for PUBLIC RELEASE, U.S. EEOC Strategic Enforcement Plan, *supra*, note 5, at 8.

<sup>17</sup> *Id.* at 1-2.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.* at 5-6.

employers to focus on the same target areas and ultimately move toward everyone's goal of creating discrimination free workplaces. It is also keeping with the "Integrated Approach" discussed at length in the Revised Draft Plan, as transparency is an important goal for any governmental agency.<sup>20</sup>

This is just one example of where transparency would benefit both the EEOC and employers. Implementing a Plan that encourages the EEOC to "show its work" would benefit all stages of investigation and litigation, including the "Priority Charge Handling Procedures" and "Consultation between Administrative and Legal Enforcement Staff"<sup>21</sup> sections of the Revised Draft Plan. Perhaps most pressing, the Commission would be well served to inform the public of its "procedures" and "processes" that it mentions almost in passing in the section titled "Consistent Practice, Procedures, and Processes."<sup>22</sup>

### **III. Procedural Issues Are Critical From The Employer Perspective**

#### **A. The Strategic Enforcement Plan Must Address The Inconsistency Between And Within The EEOC's District Offices**

We understand that the EEOC has a long-standing policy of delegating key authority to the various District Offices. Delegating authority that permits District Offices to pursue particular substantive topics is arguably appropriate, and we see the wisdom of that approach. The types of EEO issues that may prove challenging in one part of the country may not exist in another, and focusing on region-specific concerns has logical appeal. In effect, the Plan's requirement that each District Office identify local enforcement priorities will give some discretion to those with "boots on the ground" to particular substantive topics. Thus, the question of what initiatives should be pursued is perhaps correctly a local decision. We agree with the Revised Draft Plan's call for local enforcement efforts, which the Commission refers to as "District Complements to the SEP."<sup>23</sup>

The Revised Draft Plan's implicit decentralization of *how* the agency investigates, conciliates, and ultimately litigates these substantive issues, however, is another problem altogether. As Seyfarth highlighted in its June 19, 2012 written submission, widely differing EEOC processes and procedures frequently confound employers.<sup>24</sup> These procedural issues vary dramatically from district to district, and even from investigator to investigator. This is further compounded by the

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<sup>20</sup> *Id.* at 2-3.

<sup>21</sup> *Id.* at 5, 7.

<sup>22</sup> *See id.* at 9-10.

<sup>23</sup> *Id.* at 6.

<sup>24</sup> An article published by the Society for Human Resource Management addressed the EEOC's inconsistencies, and acknowledged that although the offices serve different employees and employers all over the country, there is still "reason to suspect that, whether you're a claimant or an employer, the EEOC is not as effective at preventing and resolving discrimination claims as it suggests-and that inconsistency across the regions is a major reason." Robert J. Grossman, *Constant inconsistency; How will you be treated by the EEOC? That may depend on three factors: location, location, location*, 48 HRMAGAZINE 12, Dec. 1, 2003, available at 2003 WLNR 17582883.

fact that procedures within a particular district then change over time. Employers are left with a bewildering patchwork of practices and procedures, depending on where their operations are located, the EEOC representative with whom they are dealing, and when they have these conversations. As the title of a recent article in HRMagazine puts it, how employers and claimants are treated by the EEOC “depend[s] on three factors: location, location, location.”<sup>25</sup> The Commission’s district-centric structure is a far cry from the Revised Draft Plan’s assurance that “systemic enforcement must be strategic, nationwide, coordinated and adequately resourced.”<sup>26</sup>

The issue of procedural inconsistency within the EEOC’s different offices calls for a straightforward change to the EEOC’s Draft Plan. We recommend that the EEOC strike the language under heading titled “District Complements to the SEP” that permits District Offices to craft “how [they] will implement the SEP priorities and Strategic Enforcement Teams’ strategies.”<sup>27</sup> Rather, the EEOC’s Plan must call for consistent - and, critically, public - development of enforcement procedures that are applied consistently, regardless of the location of the EEOC’s office, or the investigator. Indeed, the EEOC conceded in its Revised Draft Plan that:

[p]ublic input received by the Commission into the development of the Strategic Enforcement Plan criticized the agency for inconsistent practices and procedures in field offices, and for delays and lack of quality in private sector investigations and federal sector investigations, hearings and appeals. Many stakeholders stressed the importance of consistency, quality and timeliness in agency operations as critical to the agency having a credible and effective enforcement program.<sup>28</sup>

Disappointingly, this acknowledgment of the problem is practically *all* the Commission includes in its Revised Draft Plan in terms of “Consistent Practice, Procedures, and Processes.”<sup>29</sup> The Commission did not offer any way of implementing consistent procedures and processes throughout the agency’s enforcement programs. Clearly, the EEOC’s Plan must provide more direction. We respectfully suggest that a strong emphasis on consistent enforcement with a specific plan on how to achieve that consistency is critical to a workable Plan that has credibility with employers.

**B. Access – The Strategic Enforcement Plan Must Require The EEOC To Show What’s Behind The Agency’s Curtain**

Next, we turn to the EEOC’s discussion of its “Integrated Approach” of involving legal staff in agency investigations.<sup>30</sup> This problem is propagated by the EEOC’s Revised Draft Plan, which

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<sup>25</sup> *Id.*

<sup>26</sup> *DRAFT for PUBLIC RELEASE, U.S. EEOC Strategic Enforcement Plan, supra*, note 5, at 3.

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 9-10.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 3



explicitly states that the EEOC's integrated "approach also envisions collaboration and coordination among staff, offices, and program areas and promotes the sharing of information and strategies."<sup>31</sup> As Seyfarth highlighted in our original submission, this practice is troubling both in theory and practice.<sup>32</sup> The Commission seeks to continue its longstanding practice of assigning one EEOC investigator and one EEOC attorney to a case, and permitting the two to be closely involved with all phases of the investigation, including intake of charge and the investigation process. These are the same lawyers who will have a hand in litigating future lawsuits against these employers. This practice of tag-teaming between legal and investigatory staff compromises the EEOC's requirement to implement "impartial investigations." Yet, the Revised Draft Plan suggests that the EEOC litigators involved in the investigation can somehow take off their advocacy hats while involved in the investigation, and then put them back on in enforcement.<sup>33</sup> Employers have significant and legitimate doubts that the EEOC actually operates as it suggests. Anecdotally, we have seen instances where the EEOC uses an investigation as a pre-litigation vehicle to discovery; the scope of which would not otherwise be allowed by any federal action governed by Fed. R. Civ. P. 26 and 37. This calls into question the EEOC's assurances of impartiality, to say the least.

If the EEOC nevertheless insists upon pursuing the "integrated" approach, we recommend that it allow employers and their counsel at least some access to the players who are directing the matter behind the scenes. All too often, we are dealing with an investigator who says his or her supervisor or the "legal department" is calling the shots, but when we ask to speak to that supervisor, we are thwarted, citing "administrative protocol." The Revised Draft Plan highlights a spirit of "access" to employees and potential claimants – but the EEOC has a responsibility of access that is owed to employers as well. Such responsibility is supported by the EEOC's own articulation of "cooperation" discussed in the Revised Draft Plan, which states: "Headquarters and each district, field, area and local office must view their relationship with individuals, employers, and their legal representatives or advocates as cooperative. With regard to all charges, the EEOC's staff must share, to the greatest extent permitted under the law, information they have collected regarding the charge with charging parties, respondents, and their attorneys."<sup>34</sup>

The issues with the motivation of litigation staff directing "impartial" investigations paired with a lack of access to those individuals who are directing that investigation creates the cynicism that is the enemy to the advancement of the EEOC's goals. We are confident the EEOC will see this inherent problem and will address it in the final Plan.

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<sup>31</sup> *Id.*

<sup>32</sup> *EEOC's 2012 – 2016 Strategic Enforcement Plan – Witten Submission Of Seyfarth Shaw LLP, supra, note 3, at 9.*

<sup>33</sup> The EEOC is dedicated "to maintaining an objective, neutral stance as it investigates charges. . . EEOC attorneys assume their advocacy role only after the agency has found reasonable cause to believe that discrimination occurred, and has attempted conciliation and failed." *DRAFT for PUBLIC RELEASE, U.S. EEOC Strategic Enforcement Plan, supra, note 5, at 7.*

<sup>34</sup> *DRAFT for PUBLIC RELEASE, U.S. EEOC Strategic Enforcement Plan, supra, note 5, at 9.*

#### **IV. Substantive Issues Require Refinement**

As noted in the discussion above, the EEOC's delegation of focused substantive areas to its district offices appears logically sound. The Revised Draft Plan, however, also provides national focus areas. Although employers are unlikely to take issue with the importance of any of these areas, we note that the EEOC's Revised Draft Plan attempts to assume jurisdiction over issues that arguably exceed the Commission's limited scope of authority.

Particularly, the Revised Draft Plan notes that the EEOC will place a greater emphasis on targeting alleged "human trafficking" matters.<sup>35</sup> This is problematic as the EEOC is potentially overstepping its bounds by using Title VII as a vehicle to remedy the alleged violations of other laws. The EEOC would be well served to consider the decision in *EEOC v. Global Horizons, Inc.* when reviewing the Plan.<sup>36</sup> In *EEOC v. Global Horizons*, the EEOC attempted to force a square peg into a round hole by transforming headline grabbing allegations of human trafficking into a Title VII pattern or practice case. The EEOC alleged that Global Horizons, with the help of the agricultural companies and farms with which it contracted, engaged in a litany of unlawful and potentially criminal acts - including human trafficking, confiscation of passports, the provision of substandard housing, and wage and hour violations. In its motion to dismiss, Global Horizons argued that the EEOC failed to plead facts sufficient to support a cognizable theory of liability under Title VII and exceeded its bounds by stretching Title VII's definition of an "unlawful employment practice" beyond its plain statutory meaning to remedy the alleged violations of other laws and statutes. The U.S. District Court for the District of Hawaii agreed, and dismissed the case because the EEOC failed to state a claim under Title VII. Notably, the Court determined that the EEOC had ". . . not even alleged a formulaic recitation of [Title VII] elements of a cause of action, *though even if it had, that would also be insufficient.*"<sup>37</sup> Thus, *EEOC v. Global Horizons* should be a required reading by the authors of the Plan, as it casts doubt on the Commission's ability to use its enforcement powers to combat alleged human trafficking. Not insignificantly, pursuing substantive areas beyond the agency's purview is particularly puzzling given the EEOC's vigorous and repeated complaints that it does not have the resources it needs to fully realize its strategic goals.

#### **V. Employer Involvement In The Strategic Enforcement Plan Is Crucial**

The ideas and concerns articulated in this submission reflect the perception by practitioners and employers alike that significant changes in the way the EEOC pursues its goals is not just preferable, it is necessary. One theme that emerges is that the EEOC, employers, and employees alike would all benefit by increased employer involvement in all facets of the EEOC process.

The more that employers are involved in developing policies, procedures, and areas of focus for the Commission, the more likely we will see cooperation and, more importantly, voluntary

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<sup>35</sup> *Id.* at 4.

<sup>36</sup> *EEOC v. Global Horizons, Inc.*, 2011 U.S. Dist. Lexis 127734 (D. Haw. Nov. 2, 2011).

<sup>37</sup> *Id.* at \*38-39 (emphasis added).

compliance. Keeping employers in the loop throughout the policy-generating process is an essential element. For example, open forums like the discussions the EEOC hosted on July 18, 2012 are instrumental to creating a Plan that fosters both the EEOC and employers interests. Concrete examples of how the employer perspective is incorporated into the final product (be it at a policy or procedure level) is also necessary. If employers are left in the dark during the strategic development process, or if their voices are ignored, the Commission will be left with a feedback loop of considering only to its own options.

For example, in addition to continued open forum meetings, Seyfarth submits that the EEOC would be well served to implement a voluntary post-conciliation, post-consent decree, post-litigation “360 review” process used by businesses across the country. Using this model, after the close of an investigation or piece of litigation, an independent body within the Commission could obtain feedback on how the matter was handled, what worked, what did not work, and ways the process could be more productive in the future. Practitioners and employers would likely welcome a chance to discuss this concept of “process improvement” - an innovation that Seyfarth uses to a great benefit in all aspects of its operations and client relationships. Naturally, the EEOC would not be bound by those evaluations, but could actually learn how to be far more effective. An opportunity to discuss these issues after-the-fact would go a long way to engender a sense of cooperation between the agency and employers. It is difficult to conceive of a reason why that sort of relationship-building and information exchange would *not* be useful.

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Although we have voiced some of the ideas and concerns in our previous submission, there is at least a perception the EEOC is simply not listening to these issues, and thus they bear repeating. We look forward to an EEOC Strategic Enforcement Plan that meaningfully addresses these problems. Seyfarth appreciates the opportunity to comment in the development of the Plan for the EEOC's national priorities for Fiscal Years 2012 - 2016. We are available for further discussion on these and other issues as the EEOC develops the Plan. Thank you for your consideration of these issues.

Respectfully submitted,

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