



October 13, 2016

Loretta E. Lynch  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Suite 9000  
Washington, DC 20530

**Re: Docket No. CRT 130; AG Order No. 3726-2016; RIN 1190-AA71**  
***Standards and Procedures for the Enforcement of the Immigration and Nationality Act***

Dear Attorney General Lynch,

United Fresh Produce Association submits the following comments on the Department of Justice's Notice of Proposed Rulemaking – *Standards and Procedures for the Enforcement of the Immigration and Nationality Act*. 81 Fed. Reg. 53965 (Aug. 15, 2016) ("NPRM" or "Proposed Rule"). Since 1904, United Fresh has represented the fresh fruit and vegetable industry and our members include employers who will bear the added burden and uncertainty created by this Notice of Proposed Rulemaking.

The Proposed Rule threatens to impose penalties on employers far beyond what Congress ever intended or how the underlying statute has ever been applied. The current rule, in place for nearly 30 years, requires two things to find a violation and impose penalties against an employer: (1) a discriminatory intent or purpose on the part of an employer; and (2) proof that the charging party was harmed. This is supported by judicial decisions and consistent with established Title VII law. The proposed rule would erase those two requirements and establish a strict liability rule.

For small and seasonal businesses, particularly those in agriculture, landscaping or forestry, workers are hired quickly at the beginning of the growing or working season, and there is high turnover during the season. A small family-owned business might have only a handful of year-round employees but may hire dozens or even hundreds of

seasonal workers during a season to replace those who leave after a few weeks or even a few days. A limited staff, often the owner or a family member, must complete a Form I-9 for each of those workers, in a workforce that is often comprised of non-citizens and workers with little or no proficiency in speaking or reading English. If a lawful permanent resident presents a “green card” to complete the I-9 process but a U.S. citizen provides a driver’s license and Social Security card, without any prompting by the employer and where both are hired and begin work immediately, there is no intent to discriminate, no act of discrimination by the employer, and no harm to either employee. Still, such a situation could trigger sizable penalties under this new rule.

This is a highly technical rule dealing with nuanced arguments about the degree of intent or purpose behind an action, but it carries a very real possibility of injuring small and seasonal employers, particularly those in agriculture. The burden of this rule on the employer community will also be far greater than the estimate provided in the NPRM. The rule, as proposed, represents a costly, dangerous, and radical departure from longstanding substantive and procedural law on this subject and should be changed or abandoned by the Department of Justice.

### **Introduction**

The rule purports to simplify and clarify the decades-old regulations regarding the prohibition against “unfair immigration-related employment practice” and the handling of claims alleging such practices. Instead, the proposed rule offers a dramatic and statutorily unsupported change in the substance of what constitutes an “unfair immigration-related employment practice” and the procedure by which a claim of such a practice is brought under 8 U.S.C. § 1324b. IRCA and subsequent Congressional amendments built definitions and processes for such claims, standing them on the shoulders of existing Title VII practice and jurisprudence. The NPRM would cast aside this history, eliminating the requirement of discriminatory intent, eliminating the burden-shifting mechanism for civil rights claims, and removing any requirement to demonstrate harm from the alleged action. While substantially lowering the bar for proving such claims, the NPRM also expands the time in which such claims might be brought. Moreover, the NPRM fails to meet the requirements of the APA or the Regulatory Flexibility Act, making the rulemaking fatally flawed on both substantive and procedural grounds.

While recognizing the important work of the Office of Special Counsel and Congress’ desire to prevent the employment eligibility verification system of the I-9 process from becoming a basis for actual discrimination, our organization strongly believes that the proposed changes in the NPRM would vastly exceed the original intent behind this system, creating employer liability where it has never existed before. For that reason, we

respectfully urge you to reconsider this proposed rule and address the following comments thereto.

**I. Origins and Interpretation of Intent Required for Prohibited “Unfair Immigration-Related Employment Practices”**

**A. Immigration Reform and Control Act of 1986**

In 1986, Congress passed the Immigration Reform and Control Act (“IRCA”). For purposes of the NPRM, the relevant provisions of IRCA are found in Title I, Part A, which: (1) made it illegal for employers to knowingly hire aliens who are not work authorized; (2) required employers to attest to their newly-hired employees’ work authorization; and (3) prohibited “unfair immigration-related employment practices.”

When President Reagan signed IRCA into law, on November 6, 1986, he set forth the administration’s understanding of the unfair immigration-related employment practices provisions in the law. Statement on Signing the Immigration Reform and Control Act of 1986, <https://www.reaganlibrary.archives.gov/archives/speeches/1986/110686b.htm>. That understanding governed the Office of Special Counsel’s (OSC) interpretation of Section 274B (8 U.S.C. § 1324b) for many years after the enactment of IRCA. Specifically, President Reagan stated that:

The major purpose of section 274B is to reduce the possibility that employer sanctions will result in increased national origin and alienage discrimination and to provide a remedy if employer sanctions enforcement does have this result.

...

I understand section 274B to require a “discriminatory intent” standard of proof: The party bringing the action must show that in the decisionmaking process the defendant’s action was motivated by one of the prohibited criteria. Thus, it would be improper to use the “disparate impact” theory of recovery, which was developed under paragraph (2) of section 703(a) of title VII, in a line of Supreme Court cases over the last 15 years. This paragraph of title VII does not have a counterpart in section 274B. Section 274B tracks only the language of paragraph (1) of section 703(a),

the basis of the “disparate treatment” (discriminatory intent) theory of recovery under title VII. Moreover, paragraph (d)(2) refers to “knowing and intentional discrimination” and “a pattern or practice of discriminatory activity.” The meaning of the former phrase is self-evident, while the latter is taken from the Supreme Court’s disparate treatment jurisprudence and thus includes the requirement of a discriminatory intent.

Thus, a facially neutral employee selection practice that is employed without discriminatory intent will be permissible under the provisions of section 274B. ... Indeed, unless the plaintiff presents evidence that the employer has intentionally discriminated on proscribed grounds, the employer need not offer any explanation for his employee selection procedures.

*Id.* This offers additional context for how OSC understood Congress’ intent at the time of enactment, particularly with respect to the discriminatory intent by the employer that would be required to constitute a violation of Section 1324b. The regulations issued by OSC at the time – and in place since that time – reflect this requirement.

In discerning Congress’ intent behind prohibiting immigration-related employment practices in IRCA, it is instructive to consider contemporaneous discussions of these provisions, including those from the worker-advocate community. In its 1986 pamphlet, *Immigration Reform Act: Employer Sanctions and Discrimination Prohibitions, A Guide for Workers, Employers and their Advocates*, the American Civil Liberties Union characterized the intent of the primary sponsor of the employment practices provision, Rep. Barney Frank of Massachusetts, with respect to the test for discrimination, as assuming “that the criteria would be the same as those used in employment discrimination cases brought under Title VII.” *Id.* at 13.

In a 1986 law review article from an attorney with California Rural Legal Assistance, Mr. Sackman concluded that “It is likely that the substantive law and burdens of proof from Title VII would be applied to the IRCA provisions.” J. David Sackman, *National Origin and Alien Status Discrimination After the Immigration Reform and Control Act of 1986*, 5 Cal. Labor & Employment Law Quarterly No. 5, at 22, 23 (Spring 1987). While OSC and the worker-advocate community were not in full agreement as to the interpretation of all of the provisions of IRCA regarding unfair immigration-related employment practices, there was consensus that the criteria, burdens of proof, and general framework that had been developed during the preceding two decades of Title VII jurisprudence would extend to this arena.

## **B. Congressional Amendments to IRCA**

In Section 421 of the Immigration Act of 1990, Congress added subsection (a)(6) to 8 U.S.C. § 1324b, prohibiting certain unfair documentary practices during the employment eligibility verification process. After the “documentary practices” provision was added to Section 1324b, OSC under the Clinton Administration pursued claims against employers for violating that new prohibition, where no specific allegation of discriminatory intent was included under a “strict liability” theory, contrary to President Reagan’s signing statement of 1986.

Based on concern that OSC was applying Section 1324b(a)(6) as a strict liability provision, Congress acted again in 1996 to clarify the intent requirement for “documentary practices” in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). In IIRIRA, Congress added the following language to Section 1324b(a)(6), to clarify that the practices in question would trigger liability only “if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).” Thus, Congress brought together the original IRCA requirements and the 1986 signing statement, to make clear that a specific “purpose or ... intent of discriminating” was required.

### **C. Judicial Interpretation Since the 1996 Amendment**

Following the enactment of IIRIA, the Ninth Circuit was called upon to address the very question of whether an employer must act with discriminatory intent with respect to document practices in order to be liable under Section 1324b(a)(6). *See Robison Fruit Ranch, Inc. v. United States*, 147 F.3d 798, 799 (9<sup>th</sup> Cir. 1998). The *Robison* court first noted that the unfair immigration-related employment practices provision “constitutes a key protection against unfairness in the administration of the IRCA’s requirement that employers verify that job applicants are either citizens or aliens authorized to work.” *Id.*

On the particular question of whether OSC needed to establish discriminatory intent on the part of the charged employer under Section 1324b(a)(6), the Ninth Circuit specifically and unambiguously rejected the Special Counsel’s argument underlying the current NPRM.

In OSC’s view, it was irrelevant that [the employer] did not intend to discriminate, but rather treated aliens and citizens the same. It was also irrelevant that [the employer’s] practices did not in fact make it any more difficult for aliens to fill out the forms. It appears that the practice for which the government has prosecuted [the employer] is nondiscriminatory and expeditious treatment of job seekers.

...

The statute's remedy and penalty provisions confirm that a violation of § 1324b was to be premised on a finding of discrimination. Sections 1324b(d)(1) and (2) stated that OSC investigations into unfair employment practices were to be premised on allegations of knowing and intentional discriminatory activity. ... Thus, no penalty may be imposed absent a finding of discrimination. Presumably, had Congress not intended violations to turn on the presence of discrimination, it would not have included the reference to discrimination both in this subsection [Section 1324b(a)(6)] and in § 1324b(a)(1).

...

The government contends that § 1324b(a)(6) does not require a showing of discrimination or harm. Rather, in the government's view, any specific document request can subject an employer to liability. For example, if the employer requests a driver's license and a social security card, the employer has requested both more and different documents than may be required. The employee could have shown only a U.S. Passport. Similarly, two different documents, such as a military identification and a birth certificate, could be produced to satisfy the requirement. The government's interpretation would mechanically subject employers to liability for naming documents when in fact the employer was attempting to assist the applicant in satisfying the requirements of Form I-9.

We hold that Congress intended a discrimination requirement in the 1990 statute and merely clarified the statute to state that intent in its 1996 amendment. The evidence unquestionably shows that the employment practices in this case did not create additional burdens to any class of applicants or constitute differential treatment of authorized aliens and citizens. There could have been no discrimination, and the petition for review must be granted.

147 F.3d at 800-02. The OCAHO case upon which the NPRM primarily relies for the contrary proposition, decided years after *Robison*, makes no mention of *Robison* and no effort to distinguish or reconcile *Robison*. See *United States v. Life Generations Healthcare, LLC d/b/a Generations Healthcare*, 11 OCAHO no. 1227 (2014). More alarming than that, the NPRM itself makes no such effort, citing *dicta* from *Robison* for the proposition that a violation may exist even where an individual was able to comply with the request for additional documents. The NPRM does not acknowledge, however,

that the *Robison* court did not need to reach that issue because it had already rejected OSC's argument from the current NPRM and concluded that discriminatory intent was an essential element of a Section 1324b(a)(6) violation.

Subsequent Article III court decisions considering the question have been consistent with *Robison*'s understanding of the intent requirement behind Section 1324b(a)(6). *See, e.g., Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 769 (8th Cir. 2010) (“[A] business must act with the specific intent to discriminate to be liable under federal law, § 1324b(a)(6).”); *Zamora v. Elite Logistics, Inc.*, 449 F.3d 1106 (10th Cir. 2006); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

The NPRM relies almost exclusively on the Department of Justice's own internal interpretation of Section 1324b(a)(6), including OSC's litigation positions and OCAHO decisions in which the ALJ agreed with that interpretation. Thus, the rationale behind the current NPRM is purely internal to DOJ, with scarce acknowledgment of the other two branches of government – neither Congress' intent in issuing IRCA or clarifying its intent through IIRIRA nor the judiciary's interpretation of those provisions.

The judicial decisions referenced by OSC in the NPRM address this issue only obliquely. For example, *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (cited at 81 Fed. Reg. 53967), is a Title VII case offered for the unremarkable proposition that “explicit facial discrimination” violates the Civil Rights act even in the “absence of a malevolent motive.” The issue is not penalizing “explicit facial discrimination” but a new OSC effort to punish innocent differences in outcome.

Not a single non-DOJ source is cited for the proposition that no intent to discriminate is required under Section 1324b. Instead, DOJ proposes a radical departure from Congressional intent and judicial interpretation based solely on its own internal conclusions about the law.

## **II. Changes Proposed in the NPRM**

The NPRM insists that it is not making any significant changes to the substance or procedures for allegations of unfair immigration-related employment practices but, rather, offering minor tweaks to align the existing regulations with the original statute. In fact, however, the changes proposed in the NPRM mark a radical shift in the fundamental nature of the prohibition and violation and further put a finger on the scale by expanding the ability to make claims against employers.

### **A. Who may file a claim?**

The statutory text clearly defines who may (and who may not) file a charge alleging an unfair immigration-related employment practice: “any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice (or a person on that person’s behalf).” 8 U.S.C. § 1324b(b)(1). Built into that limitation is the requirement of an allegation that the individual “is adversely affected directly” by the alleged unfair practice. The NPRM proposes to abandon this requirement of direct adverse effect.<sup>1</sup>

First, the NPRM would replace the word “individual” in the definition of “charging party” with “injured party” in Section 44.101(i) of the Proposed Rule. “Injured party” is defined as “an individual who claims to be adversely affected directly by an unfair immigration-related employment practice.” 81 Fed. Reg. 53976. Thus, while the definition follows the letter of the statutory text, no reason is offered for attaching the presumptuous label of “injured party” before any injury or adverse effect has been shown beyond claiming “to simplify the regulatory text.” 81 Fed. Reg. 53966.

Although the NPRM acknowledges that IRCA was modeled on Title VII (81 Fed. Reg. 53967), no other civil rights statute or regulations use terms other than charging party or claimant. Referring to an individual making an allegation as “injured” before any proof has been offered or judgment rendered essentially presumes that which must be proven, suggesting an effort to write out of the statute the requirement to prove “adverse affect” and moving to a “strict liability” standard. A party should be a “charging party” or an “individual” until they have proven that they are “injured.” Leaving the language in Section 44.101(b)’s definition of “charging party” as “an individual who files a charge with the Special Counsel” is no less simple, is more accurate, and is consistent with other forms of civil rights complainants.

## **B. What constitutes a violation?**

More critical and less subtle than prematurely attaching the label “injured party,” the NPRM attempts to overturn the clear statutory language of Section 1324b, Title VII jurisprudence, and years of practice. OSC proposes to redefine the term “discriminate” for purposes of Section 1324B as “the act of intentionally treating an individual differently from other individuals, *regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility.*” Proposed Section 44.101(e), 81 Fed. Reg. 53976 (emphasis added).

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<sup>1</sup> See, Proposed Section 44.200(a)(3)(ii), 81 Fed. Reg. 53976, defining “unfair documentary practices” to include those “regardless of whether such documentary practice is a condition of employment or causes economic harm to the individual.”

Continuing this change, the NPRM further seeks to define “an act done ‘for the purpose or with the intent of discriminating against an individual in violation of paragraph (1),’” the language added by Congress in 1996 to clarify that discriminatory intent was required for a violation to have occurred, as “an act of intentionally treating an individual differently based on national origin or citizenship status in violation of 8 U.S.C. 1324b(a)(1), *regardless of whether such treatment is because of animus or hostility.*” Proposed Section 44.101(g), 81 Fed. Reg. 53976 (emphasis added).

Furthermore, the NPRM would change “document abuse” to “documentary practice,” further blurring the line of intent required. OSC would define “unfair documentary practice” as an improper request or refusal “with the intent of discriminating against any individual” but, again, “*regardless of whether such documentary practice is a condition of employment or causes economic harm to the individual.*” Proposed Section 44.200(a)(3), 81 Fed. Reg. 53976 (emphasis added). The march toward strict liability continues throughout the NPRM.

By slipping in these parentheticals and changes in phrasing, OSC is writing out of the statute and Title VII and 1324b jurisprudence the employer’s ability to offer any explanation of non-discriminatory action for the conduct in question and the requirement that the claimant and/or OSC show harm to or even burden on the claimant.

### **1. Title VII Burden Shifting**

Even the ACLU and California Rural Legal Assistance understood that the “substantive law and burdens of proof from Title VII would be applied to the IRCA provisions.” *See Sackman, supra.* Under Title VII, there are two forms of discrimination claims, “disparate treatment” and “disparate impact.” The former typically involves an individual while the latter usually involves a widespread practice and a class of claimants. For disparate treatment claims, the Supreme Court has set forth the burden-shifting process as follows:

- The charging party must first establish a prima facie case by showing:
  - They are within a protected class;
  - They were qualified for the job;
  - Despite those qualifications, they were rejected or terminated; and
  - The position was open to someone with the same qualifications who was not in the protected class.
- Once the claimant has established their prima facie case, the burden shifts to the employer to offer evidence to rebut that prima facie case by offering a legitimate nondiscriminatory reason for its actions.

- If the employer is able to offer such rebuttal evidence, the burden of persuasion shifts back to the claimant to show that the employer's proffered reason was a pretext for discrimination.

*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

This new definition of “discriminate” as “regardless of the explanation for the differential treatment” steamrolls over the substance and procedure of well-established Title VII law. There is no burden shifting, nor any possibility for an employer to offer a defense. The mere proffer of a prima facie case becomes sufficient to establish liability. While this clearly redounds to the benefit of the OSC and plaintiffs’ bar, it flies in the face of Congress’ clear purpose in creating Section 1324b, as clarified in 1996, as well as in the face of Title VII.

## 2. Disparate Impact Discrimination

Disparate impact discrimination generally involves a practice or policy that happens to “adversely affect” a protected group. A facially neutral policy may be shown to discriminate based on statistical or direct evidence that a protected group is actually hired at a lower rate or discouraged from applying for a job. *See Griggs v. Duke Power*, 401 U.S. 424 (1971). In the Title VII context, even where a particular policy or practice might be found discriminatory, the claimants would still need to make a showing that they would have applied for a job or retained a job, but for the policy or practice – in this context, the document abuse. *See, e.g., Teamsters v. U.S.*, 431 U.S. 324 (1977).<sup>2</sup>

The Ninth Circuit reviewed what was essentially a “disparate impact” claim in the document practices context in *Robison, supra*. Under the facts of *Robison*, the Ninth Circuit found that the employer had simply tried to assist its non-English-speaking hires by giving examples of the documents that would satisfy Form I-9 employment eligibility review. The Court found that, although citizens and work-authorized aliens provided

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<sup>2</sup> The NPRM relies on *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148 (2012) for OSC’s argument that no injury is required to show document abuse. 81 Fed. Reg. 53968. That opinion involves a motion to dismiss, in which context the ALJ was compelled to take all allegations as true and no make findings of fact. The ALJ made reference to the *McDonnell Douglas* and *Teamsters* cases discussed herein, with respect to the Title VII pleading requirements. Thus, the NPRM’s reliance on *Mar-Jac* in this context for the proposition that no harm or “adverse effect” is required is patently misplaced.

different documents or specific documents at a different rate, there was no discriminatory intent on the part of the employer and OSC's assessment of penalties was overturned.

The "helpful employer" scenario in *Robison* is particularly troubling for our member employers, many with seasonal workforces that complete a significant number of I-9s for newly-hired employees for whom English is not their primary language or who do not speak English at all. Moreover, these employers – based on the industry in which they operate – employ a greater mix of U.S. citizens, lawful permanent residents and, often, work-authorized aliens through the H-2 temporary nonimmigrant visa programs. Thus, changes that increase employer liability in the NPRM expose them at a far higher rate than the average U.S. employer.

Even beyond the *Robison* scenario, where an employer attempts to assist specific individual employees in a manner that is potentially discriminatory (regardless of the lack of discriminatory intent), there is a clear and present danger of employer liability even where the employer offers no guidance to new employees on completing the Form I-9 and accepts precisely the documents volunteered by the employees. For reasons entirely related to demographics and not because of any improper employer document practices, one would expect that a high percentage of lawful permanent resident (LPR) employees would produce their LPR card in completing the I-9 process. The LPR card functions as a "List A" document to establish both identity and work authorization. U.S. citizens have no similar document that is universally or even commonly held. Very few U.S. citizen seasonal employees hold a passport. Instead, most complete the I-9 process by providing a driver's license or state-issued non-driver ID and Social Security card or birth certificate.

Thus, with no intent to treat the groups differently (much less hostile motive or animus), an OSC review of that employer's completed I-9s would show that the overwhelming majority of non-citizens had provided a List A document (their LPR card), whereas the overwhelming majority of U.S. citizens had provided a List B and a List C document.<sup>3</sup> Under the "reversing the groups" test set forth in the *Life Generations* case, *supra*, and now advanced in the NPRM, this could lead OSC and OCAHO to find discriminatory intent by the employer, triggering sanctions. This is a preposterous result, but one that the NPRM's proposed lowering of the bar regarding intent would create, exposing many of our member employers to penalties where they had done everything right to avoid discrimination.

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<sup>3</sup> It goes without saying that the employer could not "steer" employees in either group to produce different documents to balance out this pattern, leaving the employer entirely at the mercy of each employee's individual preference for meeting the I-9 requirements.

**C. When can a claim be filed?**

Beyond the alarming increase in potential employer liability for nondiscriminatory conduct, the NPRM proposes to significantly expand the time frame in which claims might be brought and the scope of time that might be covered by OCAHO complaints.

The Proposed Rule, in Section 44.304(b), would permit the Special Counsel to file a complaint with OCAHO alleging “that an unfair immigration-related employment practice has occurred no more than 180 days prior to the date on which the Special Counsel opened an investigation of that practice.” Unlike the process for handling charges filed by individuals, their representatives, or a DHS employee, there is no equivalent limitation on the time for the Special Counsel to conclude an investigation or to bring a complaint. The five-year limitation under 28 U.S.C. § 2462 referenced in the NPRM (81 Fed. Reg. 53970) is more than five times longer than the period that Congress prescribed for complaints arising from a filed charge. *See* 8 U.S.C. § 1324b(d)(1) and (3) (Special Counsel must act on charge within 120 days of receipt of charge, and complaint may only relate to practice occurring within 180 days of filing of the charge).

This marks a significant departure from the current Section 44.304(b), which provides that “The Special Counsel may file a complaint with an administrative law judge where there is reasonable cause to believe that an unfair immigration-related employment practice has occurred within 180 days from the date of the filing of the complaint.” Under the current rules, only those practices within 180 days of the filing of the complaint – a clearly defined universe – would be subject to review by OCAHO. The proposed revision creates an open-ended liability that would grow with the Special Counsel’s unlimited investigation period.

Congress clearly intended a time limitation, as set forth in Section 1324b(d)(3). The Special Counsel’s time to bring a complaint and the scope of that complaint should be consistent with Congress’ clear directive in Section 1324b(d)(3). If Congress believed that 120 days was ample time for the Special Counsel to investigate a claim fully and bring a complaint, then what possible basis does the Special Counsel now assert for filing a complaint that looks back up to five and a half years (the 5 years referenced in Section 2462 plus the 180-day pre-investigation period in 44.304(b)).

Likewise, the 45-day grace period for improperly submitted claims finds no support in the statutory text. Here, where it now suits the Special Counsel, the NPRM relies heavily on Title VII practice for a looser time limitation, looking generously to “equitable limits” and a catch-all 5-year limitations period. 81 Fed. Reg. 53969-70. The statutory origin of this entire area of law, however, includes specific and relatively strict filing deadlines. *See* 8 U.S.C. § 1324b(b)(1) (10 days to serve notice of charge), (d)(1) (120 days for

“reasonable cause” determination), (d)(2) (90 days after determination to file private action), and (d)(3) (complaints within 180 days of filing charge). No statutory provision exists to provide authority to waive these deadlines nor to expand them when it suits the Office.

### **III. The NPRM Does Not Satisfy the Requirements of the Regulatory Flexibility Act and Dramatically Underestimates the Impact on Employers**

The Regulatory Flexibility Act (RFA) requires agencies to prepare a regulatory flexibility analysis of the anticipated impact of a regulation on small entities<sup>4</sup>. Additionally, under Executive Order 12866 any rulemaking that has an economic impact greater in excess of \$100 million requires further review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB)<sup>5</sup>. Utilizing the same flawed economic analysis OSC made the determination that their regulatory action would not have a significant impact on small entities under the RFA nor would economically “significant” as that term is defined under Executive Order 12866.

To come to this erroneous conclusion, OSC’s analysis identified three components of the initial year cost:

1. Initial familiarization cost, which OSC computed to total \$4,448,548;
2. Time to review and revise existing Employment Eligibility Verification Policies, which OSC calculated to total \$7,840,566; and
3. Training of employers and employees, which OSC estimated at \$28,282.

The NPRM clearly states that it “covers all employers with four or more employees.” 81 Fed. Reg. 53972. To attempt to calculate the amount of employers that would be affected, OSC assumes that only organizational members of two trade associations, the Council for Global Immigration (CGI) and the Society for Human Resource Management (SHRM) would be affected by the provisions in the NPRM - totaling a mere 56,685 firms. OSC does not provide adequate justification for making such an assumption, which greatly limits the scope of the NPRM. Instead, we argue OSC should have used readily available data from the U.S. Census of Business.

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<sup>4</sup> 5 U.S.C. 603(a)

<sup>5</sup>Executive Order 12866, 3(f)(1), (Oct. 4, 1993)

Using the more accurate data from the U.S. Census of Business, compiled by the Office of Advocacy of the U.S. Small Business Administration, shows that in 2012, the most recent year for which this data is available, there were a total of 5,726,160 firms of all employment sizes and of these employers, 2,182,169 of which had more than 4 employees.<sup>6</sup>

Applying OSC's own time and hourly labor cost parameters, which are understated themselves, but utilizing the more accurate SBA data demonstrates that the OSC estimated impact is woefully low. First, OSC considers the familiarization cost component of the NPRM. This first component alone, when applied to the 2,182,169 firms, will total \$171,256,623.12. This is not only significantly more than the OSC's cost estimate of \$4,448,548, but it is almost twice the threshold amount to classify the proposed rule as economically significant. Second, OSC considers the cost of reviewing and revising written policies. OSC assumes that only 2.5 percent of affected employers are sophisticated enough to have written policies to review and revise totaling \$7,840,566. Using the SBA's data of employers that would fall under the purview of the rule, even at 2.5 percent, the impact rises to \$301,839,798.25. A similar story holds true in regard to training costs. OSC estimates only \$28,282 for training compliance costs. If only one employee for each of the 2,182,169 affected employers requires the one hour of training that is assumed by the OSC methodology, the training cost component would total \$171,256,623.12. This also assumes no turn over or future training costs. Each component of the OSC analysis is fatally flawed by the assumption that only members of CGI and SHRM would be affected

Utilizing the SBA data, a much more realistic approach than simply two association membership totals, the costs could be as low as \$431,315,328.24 or as high as \$922,485,458.17. Even at the low end, the cost impact is, at least, anywhere from 4 to 9 times greater than the threshold for determining a regulatory action to be economically significant; therefore, triggering additional analysis and review.

## **CONCLUSION**

As outlined above, a fundamental problem with this proposed rule is that it seeks to eliminate the knowledge and intent requirements included in the statute, lowering the bar for Special Counsel prosecutions and abandoning longstanding Title VII jurisprudence. This flies in the face of Congressional intent and three decades of practice and

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<sup>6</sup> In actuality, the SBA's data includes fewer firms than will be affected, since the SBA's data identifies all firms with more than 4 employees, whereas the OSC proposal will affect all firms with 4 or more employees.

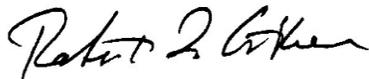
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interpretation. Additionally, the NPRM has a significant impact as defined by the RFA and Executive Order 12866. We oppose the regulation as proposed and urge its withdrawal. We appreciate your consideration of our comments.

## **CONCLUSION**

As outlined above, a fundamental problem with this proposed rule is that it seeks to eliminate the knowledge and intent requirements included in the statute, lowering the bar for Special Counsel prosecutions and abandoning longstanding Title VII jurisprudence. This flies in the face of Congressional intent and three decades of practice and interpretation. Additionally, the NPRM has a significant impact as defined by the RFA and Executive Order 12866. We oppose the regulation as proposed and urge its withdrawal. We appreciate your consideration of our comments.

Thank you for your time and attention.



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