
Are Rights a Reality?

Evaluating Federal Civil Rights Enforcement

November 2019 Statutory Report



U.S. Commission on Civil Rights
1331 Pennsylvania Avenue, NW
Washington, DC 20425

www.usccr.gov

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.¹

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¹42 U.S.C. §1975a.

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Civil Rights
Enforcement

**2019 Statutory
Enforcement Report**



UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 Pennsylvania Ave., NW • Suite 1150 • Washington, DC 20425

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Letter of Transmittal

November 21, 2019

President Donald J. Trump
Vice President Mike Pence
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement*. The report is also available in full on the Commission’s website at www.usccr.gov.

Congress charges the federal government with enforcing federal civil rights laws providing protection from discrimination on the bases of race, color, religion, national origin, sex, disability, age, and several other protected characteristics in a broad range of areas including employment, housing, voting, education, and public accommodations. Congress and federal agencies established civil rights offices at the agencies to enforce these civil rights and ensure compliance. In this report, the Commission evaluates the most essential elements for effective federal civil rights enforcement, examining thirteen different federal agencies, seeking to evaluate each on the efficacy of the agency’s external federal civil rights enforcement efforts from Fiscal Year 2016 to Fiscal Year 2018. The federal agencies this evaluation reviews are:

- U.S. Department of Justice, Civil Rights Division
- U.S. Department of Education, Office for Civil Rights
- U.S. Department of Labor, Office of Federal Contract Compliance Programs and Civil Rights Center and Civil Rights Center
- U.S. Department of Health and Human Services, Office for Civil Rights
- U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity
- U.S. Equal Employment Opportunity Commission
- U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties
- U.S. Environmental Protection Agency, External Civil Rights Compliance Office
- U.S. Department of Transportation, External Civil Rights Programs Division of the Departmental Office of Civil Rights

- U.S. Department of Veterans Affairs, Office of Resolution Management
- U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights
- U.S. Department of the Treasury, Office of Civil Rights and Diversity
- U.S. Department of the Interior, Office of Civil Rights

The Commission majority approved key findings including the following: the extraordinary volume of complaints filed with federal civil rights agencies and findings and resolutions from these agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Commission heard compelling bipartisan testimony regarding ongoing widespread civil rights harms that underscore the need for strong federal agency enforcement of federal civil rights laws. In evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unredressed.

Key Commission majority recommendations include the following: Congress should continue to prioritize civil rights office capacity through budget appropriations, specifically increasing their staff capacity to fulfill the jurisdictional authorities Congress has given them and in so doing to maximize their capacity to protect civil rights for all Americans. Congress should exercise oversight authority to evaluate baseline staffing necessary for federal agency civil rights offices to be able to fulfill their civil rights enforcement functions. Any determination of the requisite staffing necessary to fulfill an agency's external civil rights enforcement function should include evaluation of the amount of federal funding distributed and the staffing necessary to conduct proactive compliance reviews of those funding recipients. Congress should give civil rights offices that now lack such authority the authority to compel resolution from noncompliant entities within an agency's jurisdiction, to allow for efficient investigation of allegations of civil rights harms.

Cabinet agencies of which civil rights offices are part should ensure that civil rights offices are incorporated into agency policy decision making and grant fund decision making, in addition to civil rights enforcement or watchdog responsibilities. No agency should prioritize enforcement of one civil rights protection over another.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,



Catherine E. Lhamon
Chair

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The Illinois Advisory Committee to the U.S. Commission on Civil Rights collected and provided testimony, findings, and recommendations on related civil rights issues within its jurisdiction.

Executive Summary

Many times over our 62-year existence, the Commission has examined effectiveness of civil rights enforcement among federal agencies.¹ Congress charges the federal government with enforcing civil rights under the U.S. Constitution,² as well as federal civil rights statutes such as the Civil Rights Acts of 1957 and 1964,³ and subsequent civil rights statutes such as the Voting Rights Act,⁴ the Fair Housing Act,⁵ Section 794 of the Rehabilitation Act,⁶ the Americans with Disabilities Act,⁷ Title IX of the Education Amendments Act of 1972,⁸ the Age Discrimination Act,⁹ and many others. These laws provide federal protections from discrimination on the bases of race, color, religion or conscience, national origin, sex, disability, age, and several other protected characteristics in a broad range of areas including employment, housing, voting, education, and public accommodations.¹⁰ Congress and federal agencies established civil rights offices at the agencies to enforce these civil rights and ensure compliance. The specific jurisdiction of federal agencies' civil rights offices varies; but generally their charges include receiving and adjudicating civil rights complaints, monitoring compliance by federally funded and other covered entities and

¹ See, e.g., U.S. Comm'n on Civil Rights, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume One: A Blueprint for Civil Rights Enforcement*, 2002, <http://www2.law.umaryland.edu/marshall/usccr/documents/tenyrcheckupvol1.pdf> [hereinafter USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*]; U.S. Comm'n on Civil Rights, *A Bridge to One America: The Civil Rights Performance of the Clinton Administration*, 2001, <http://www2.law.umaryland.edu/marshall/usccr/documents/clintoncivirt.pdf>; U.S. Comm'n on Civil Rights, *Funding Federal Civil Rights Enforcement*, 1995, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12f96.pdf> [hereinafter USCCR, *Funding for Civil Rights Enforcement 1995*]; U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort: Two Years Later*, 1973, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22973.pdf>; U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort: Seven Months Later*, 1971, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22.pdf>; U.S. Comm'n on Civil Rights, *Federal Civil Rights Enforcement Effort*, 1970, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en2.pdf>. See also U.S. Comm'n on Civil Rights, *Enforcing Title IX*, 1980, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf> (focused on Title IX enforcement by the Department of Health, Education, and Welfare); U.S. Comm'n on Civil Rights, *Federal Enforcement of Equal Employment Requirements*, 1987, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr11093z.pdf> (focused on equal employment enforcement by the Equal Employment Opportunity Comm'n, the Department of Justice Civil Rights Division's Employment Section, and the Department of Labor's Office of Federal Contract Compliance Programs).

² See U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XV, § 1; see also *infra* notes 16-20 (discussing the fundamental protections of these Reconstruction Amendments).

³ Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4.

⁴ Voting Rights Act of 1965, Pub. L. No. 89-110 (codified as amended at 52 U.S.C. § 10101).

⁵ Fair Housing Act, 42 U.S.C. § 3601.

⁶ Rehabilitation Act, 29 U.S.C. § 794.

⁷ Americans with Disabilities Act, 42 U.S.C. § 12101.

⁸ Education Amendments Act of 1972, 20 U.S.C. §§ 1681-88.

⁹ Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07.

¹⁰ See *infra* notes 21-30 (discussing statutes enforced by federal civil rights offices). Because since 1983 the Commission's statute specifically prohibits "the Commission, its advisory committees, or any other person under its supervision or control to study and collect, make appraisals of, or serve as a clearinghouse for any information about the laws and policies of the Federal Government or any other governmental authority in the United States, with respect to abortion," the Commission may not use any of its resources to study this issue.

persons, and other activities ranging from issuing guidance to public reporting to investigating and administratively resolving or litigating in federal court to remedy civil rights violations. Congress has charged the Commission with monitoring these federal civil rights enforcement efforts.¹¹

The last time the Commission reported on federal civil rights enforcement generally, across multiple agencies, was in 2002.¹² In this current report, the Commission draws from methods and conclusions in prior Commission reports for metrics to evaluate the most essential elements for effective civil rights enforcement. For this report, the Commission examines thirteen different federal agencies, seeking to evaluate each on the efficacy of the agency's external federal civil rights enforcement efforts from Fiscal Year 2016 to Fiscal Year 2018. The federal agencies this evaluation reviews are:

- U.S. Department of Justice, Civil Rights Division
- U.S. Department of Education, Office for Civil Rights
- U.S. Department of Labor, Office of Federal Contract Compliance Programs and the Civil Rights Center
- U.S. Department of Health and Human Services, Office for Civil Rights
- U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity
- U.S. Equal Employment Opportunity Commission
- U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties
- U.S. Environmental Protection Agency, External Civil Rights Compliance Office
- U.S. Department of Transportation, Departmental Office of Civil Rights
- U.S. Department of Veterans Affairs, Office of Resolution Management
- U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights
- U.S. Department of the Treasury, Office of Civil Rights and Diversity
- U.S. Department of the Interior, Office of Civil Rights¹³

The Commission bases conclusions in this report on information received through interrogatories and document requests sent to these agencies,¹⁴ independent research, and testimony and public comments received during and following a public briefing the Commission held in November 2018, at which current and former federal agency officials, advocates, legal scholars, and community members testified. Chapter 1 of this report discusses the history of federal civil rights law and the Commission's statutory role in evaluating the effectiveness of federal civil rights enforcement since 1957. Chapter 1 also explains scope and methodology of this report. In reviewing the efficacy of 13 federal agencies' external civil rights enforcement programs, the

¹¹ Civil Rights Comm'n Act, 42 U.S.C. § 1975a(c)(1).

¹² USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 1 (evaluating 10 federal agencies).

¹³ In 2002, the Commission evaluated 11 agencies. Ten of the agencies on the current list were included in 2002; the difference being that the 2002 report did not evaluate the DHS, the VA, or Treasury, and it did evaluate the Small Business Administration. *Ibid.*, 2.

¹⁴ Interrogatories and Document Requests are specific questions and requests for documents that the Commission sent to each of the 13 agencies under the Commission's statutory authority to do so. 42 U.S.C. § 1975a(e).

Commission identified and analyzed three core factors against which to measure federal civil rights offices: (1) the office's legal authority and responsibility, (2) the enforcement tools the office has at its disposal, and (3) its budget and staffing. Furthermore, the Commission reviewed seven essential elements of effective civil rights enforcement programs:

1. Prioritization for Civil Rights Agency-Wide,
2. Strategic Planning and Self-Evaluation,
3. Complaint Processing, Agency-Initiated Charges, and Litigation,
4. Proactive Compliance Evaluation,
5. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity,
6. Interaction and Coordination with External Agencies and Organizations,
7. Research, Data Collection, and Reporting.

Chapter 1 reports general results of the Commission's research. Chapters 2 through 14 examine data from FY 2016 to FY 2018 from each federal agency in depth. The research shows that most of the civil rights office in each of the agencies have sufficient legal authority, fairly clear responsibility, and a range of civil rights enforcement tools. In addition, the Commission received bipartisan testimony supporting the view that civil rights laws should be enforced consistently. The report reflects many highlights of effective civil rights enforcement efforts during each of the fiscal years. However, a variety of factors hinder consistent performance and efficacy of federal civil rights offices. The Commission's research shows trends including insufficient resources, reduced staffing levels, failure to process complaints in a timely manner, vague complaint processing mechanisms, a tapering off of agency-initiated charges and systemic litigation in some key areas, backtracking in affirmative civil rights policy guidance, a lack of coordination in the face of emerging civil rights crises, and a need for more data collection, research, and public reporting.

Key Commission findings and recommendations based on this evidence and analysis include:

Congress has for six decades mandated that the federal government actively enforce federal civil rights laws, expanding this federal role with each major piece of civil rights legislation enacted during that time. Civil rights laws specifically authorize the federal government to take action with respect to discrimination on the bases of race, color, national origin, sex, religion, ability status, age, and other protected characteristics.

As documented in this report, the extraordinary volume of complaints filed with federal civil rights agencies and findings and resolutions from these agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Commission heard compelling bipartisan testimony regarding ongoing widespread civil rights harms that underscore the need for strong federal agency enforcement of federal civil rights laws.

In evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unredressed.

Civil rights offices do not use a standard metric to measure efficacy. Some civil rights offices, including ED OCR and HUD FHEO, use case closure rates, or resolution times, to evaluate employees. Other civil rights offices, including DOL OFCCP, use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed of closure. Some civil rights offices, such as EEOC, include their civil rights enforcement priorities in their employment evaluation metrics.

Civil rights offices should use enforcement where necessary to secure rights violated within their jurisdictions. Civil rights offices should communicate their preparedness to use compulsory enforcement where required voluntary resolution efforts fail.

Congress should exercise oversight authority to evaluate baseline staffing necessary for federal agency civil rights offices to be able to fulfill their civil rights enforcement functions. Any determination of the requisite staffing necessary to fulfill an agency's external civil rights enforcement function should include evaluation of the amount of federal funding distributed, and the staffing necessary to conduct proactive compliance reviews of those funding recipients.

Congress should continue to prioritize civil rights office capacity through budget appropriations, specifically increasing their staff capacity to fulfill the jurisdictional authorities Congress has given them and in so doing to maximize their capacity to protect civil rights for all Americans.

Cabinet agencies of which civil rights offices are part should ensure that civil rights offices are incorporated into agency policy decision making and grant fund decision making, in addition to civil rights enforcement or watchdog responsibilities.

Agencies should review employee performance plans to ensure points evaluated are the points agencies want staff to prioritize for civil rights enforcement. These employee evaluations should use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed of closure and should include civil rights enforcement priorities in evaluation metrics.

Congress should give civil rights offices, including civil rights offices that now lack them, the authority to compel resolution from noncompliant entities within an agency's jurisdiction, to allow for efficient investigation of allegations of civil rights harms.

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Chapter 1: Introductory History, Research Scope and Methodology, and Analysis of Key Factors and Essential Elements for Effective Federal Civil Rights Enforcement

This chapter will first briefly summarize the origins of federal civil rights law and the Commission’s past work evaluating the efficacy of federal civil rights enforcement. It will then summarize the methodology of the current report as well as major factors and elements evaluated, adding information about some of the major research findings.

Origins of Federal Civil Rights Law and Enforcement

Congress established the U.S. Department of Justice in 1870, shortly after the Civil War,¹⁵ with the founding purpose to enforce the Reconstruction Amendments.¹⁶ These Constitutional amendments generally established that every person born or naturalized in the United States is a citizen of the U.S., that every person in the U.S. is entitled to due process of law and equal protection under the law, and that all citizens have the right to vote.¹⁷ Resultant progress was later significantly curtailed during the Jim Crow era beginning in 1877 and lasting through the Civil Rights Movement in the 1950s.¹⁸ During the Jim Crow era, pervasive state laws sought to discourage or prevent black citizens from exercising their right to vote through poll taxes and literacy tests, and they segregated every aspect of public life leaving black people specifically and people of color generally in separate and less equal circumstances.¹⁹ Concern over this regression, as expressed in the burgeoning civil rights movement, supported the need for the federal government to have more authority to protect the civil rights guaranteed by the Reconstruction Amendments.²⁰

The Civil Rights Act of 1957 established the Civil Rights Division of the U.S. Department of Justice, which at the time focused on protecting the right to vote through direct enforcement of

¹⁵ Act to Establish the Department of Justice, ch. 150 § 5, 16 Stat. 162 (1870).

¹⁶ *Id.*

¹⁷ U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XV, § 1. See U.S. Comm’n on Civ. Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report*, 2018 [hereinafter USCCR, *Minority Voting*] (“[I]t was not until 1924, when Congress passed the Indian Citizenship Act, that Native Americans were entitled to U.S. citizenship and voting rights (and that this entitlement did not impair the individual’s right to remain a tribal member).”). See also U.S. CONST. amend. XIX (1919) (extending the right to vote to women).

¹⁸ USCCR, *Minority Voting*, *supra* note 17, at 17-18.

¹⁹ *Ibid.*, 17 n. 39.

²⁰ *Ibid.*, 20-23. See also Patricia M. Wald, “To Feel the Great Forces”: The Times of Burke Marshall, 105 *Yale L.J.* 611, 613-14 (1995); Drew S. Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 *Harv. C.R.-C.L. L. Rev.* 309, *passim* (1984). *But cf. infra* note 549 (former Atty General Sessions’ memo discussing federalism and states’ rights arguments); Joshua Thompson, Senior Attorney, Pacific Legal Foundation, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 3-4 (discussing federalism concerns in relation to voting rights and legacy desegregation cases) [hereinafter Thompson Statement].

federal civil rights laws.²¹ The 1957 Act also provided for the creation of the bipartisan U.S. Commission on Civil Rights (the Commission), charging the Commission to investigate facts as well as federal laws and policies regarding civil rights in the U.S. and to send reports to the President and Congress.²² The 1957 Act also provided the Commission with the authority to hold hearings and receive testimony.²³

The passage of the Civil Rights Act of 1964 (the 1964 Civil Rights Act) then expanded modern federal civil rights enforcement. Title VI of this Act barred discrimination on the bases of race, color, and national origin in all federal funding, and specifically provided for an increased federal role in civil rights enforcement.²⁴ The Act charges all federal agencies that distribute federal funding with ensuring compliance.²⁵ Title VII of this Act prohibits employment discrimination on the bases of race, color, religion, sex, and national origin.²⁶ In 1966, Congress granted the United States Attorney General the authority “to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”²⁷ Successive U.S. Attorneys General have widely used this statute not just to file original lawsuits on behalf of the U.S., but also to file amicus briefs and statements of interest in actions brought by private parties that concern the civil rights interests of the federal government.²⁸ In 1968, Congress passed the Civil Rights Act of 1968, and along with adding civil rights protections for Native Americans,²⁹ Title VIII added comprehensive protections and enforcement mechanisms to protect individuals from housing discrimination on the bases of race, color, religion, and national origin, with subsequent amendments that added sex, familial status, and disability status as protected classes.³⁰

During the 1960s and 1970s, the federal government made significant gains in expanding civil rights enforcement, as Congress also expanded federal protections and enforcement powers.³¹ More agencies became not only required to enforce, but more involved in enforcing civil rights law.³²

In 1970, the Commission attempted to “evaluate for one moment in time the status of the entire Federal civil rights enforcement effort—to determine how effectively the Federal government as

²¹ See *infra* notes 372-442 (discussing the Civil Rights Division and its legal authorities).

²² The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, pt. I, §§ 101 and 104.

²³ *Id.* § 102.

²⁴ 42 U.S.C. § 2000d (1964).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 42 U.S.C. § 2000e (1964).

²⁷ Victor Zapana, Note, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 Harv. C.R.-C.L. L. Rev. 227, 231 n.17 (2017) (quoting U.S.C. § 517 (2014)).

²⁸ *Id.* at 231-234.

²⁹ 25 U.S.C. §§ 1301-1304.

³⁰ 42 U.S.C. §§ 3601-3631.

³¹ See U.S. Comm’n on Civil Rights, *Ten-year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations?*, p. ix, 2002, <https://www.usccr.gov/pubs/archives/10yr02/vol2/vol2.pdf> [hereinafter USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*].

³² *Ibid.*

a whole has geared itself to carrying out civil rights responsibilities pursuant to the various constitutional, congressional, and presidential mandates which govern their activities.”³³ The Commission’s research “disclosed a number of inadequacies common to nearly all Federal departments and agencies—inadequacies in agency recognition of the nature and scope of their civil rights responsibilities, in the methods used to determine civil rights compliance, and in the use of enforcement techniques to eliminate noncompliance.”³⁴

During the 1980s and 1990s, there were more debates about the scope and meaning of federal civil rights protections; however, enforcement continued to expand due to federal government actions as well as those of private litigants. As the Commission summarized in a previous comprehensive report on federal civil rights enforcement (issued in 2002):

Presidential executive orders and congressional actions in the 1970s and 1980s resulted in an array of government programs designed to enforce civil rights laws. For examples, the Voting Rights Act Amendments of 1975 and the Civil Rights Restoration Act of 1987 were enacted. In the 1990s, despite calls proclaiming that equality had been achieved on all fronts, the nation continued to struggle to ensure equal participation for all its citizens. However, legislative action was necessary to protect the civil rights of people with disabilities. Thus, the Americans with Disabilities Act of 1990 was passed into law.³⁵

Today, there are many civil rights laws that the various federal agencies enforce that the Commission has examined in this report, beyond what was mentioned in the brief historical background summarized above. In addition to statutory changes Congress made, federal enforcement of civil rights laws is also subject to changes in presidential administrations and their different priorities, such that civil rights are enforced inconsistently by the executive branch.³⁶ At the Commission’s November 2018 briefing regarding federal civil rights enforcement, the Commission heard testimony indicating that federal civil rights enforcement has changed from the Obama to the Trump Administration, as well as testimony describing what effective federal civil

³³ Letter of Transmittal from Rev. Theodore M. Hesburgh, C.S.C. Chair, with fellow Commissioners and Staff Director, U.S. Comm’n on Civil Rights, to U.S. President and U.S. Congress in *Federal Civil Rights Enforcement Effort: A Report*, 1970, p. ii, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12en2.pdf> [hereinafter USCCR, *Federal Civil Rights Enforcement Effort*].

³⁴ *Ibid.*

³⁵ USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, *supra* note 31, at 23.

³⁶ Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. Rev. 1339, 1360-61 (2012) [hereinafter Johnson, *Beyond the Private Attorney General*]. *See also* Stephen S. Worthington, *Beacon or Bludgeon? Use of Regulatory Guidance by the Office for Civil Rights*, 2017 BYU Educ. & L.J. 161 (2017); *see also* Kate Andrias, *The President’s Enforcement Power*, N.Y.U. L. Rev. 88, 1031-25 (2013).

rights enforcement should look like, untethered to a specific Presidential Administration.³⁷ The Commission's research below will study and evaluate data about how enforcement may have varied during FY 2016, FY 2017, and FY 2018.³⁸ This evaluation also provides a critical look at federal civil rights enforcement in both the Trump and Obama Administrations, with a lens toward providing recommendations regarding effective satisfaction of the relevant Constitutional protections as well as the laws Congress has enacted.

The Importance of the Federal Role

Although civil rights law can at times be enforced by private parties or by state attorneys general, Congress has provided the broadest and most specific authority to enforce civil rights laws to federal agencies.³⁹ In their joint letter submitted for the November 2018 briefing, seventeen State Attorneys General who have been active in civil rights enforcement stated that:

These [civil rights] causes of action, with powerful remedies to redress and prevent violations that affect many people, are reserved to the federal government. If the federal government declines to enforce these laws, the states are not positioned to pick up the slack. These matters were largely committed to federal enforcement authorities by Congress.⁴⁰

The Commission's work to evaluate federal civil rights enforcement has long recognized the value of a strong federal role to ensure adequate protections for Americans across the country.⁴¹

³⁷ See, e.g., Margo Schlanger, Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan Law School, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 1 [hereinafter Schlanger Statement] (recommending structural changes); see also Robert Driscoll, Member, McGlinchey Stafford and former Deputy Assistant Atty General, Civil Rights Division, U.S. Department of Justice, testimony, *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights*, Washington, DC, Nov. 2, 2018, transcript, pp. 115-117 and 119-20 [hereinafter *Federal Civil Rights Enforcement Briefing*] (describing the continuous obligation to enforce civil rights laws).

³⁸ The federal government's Fiscal Year begins on October 1 of the preceding calendar year. Therefore, the time period studied in this report is from October 1, 2015 through September 30, 2018.

³⁹ See, e.g., 42 U.S.C. § 1983-88 (providing for private rights of action but with enhanced authority of the Attorney General); U.S. Dep't of Justice, Title VI Legal Manual (updated Mar. 18, 2019) § III, Department of Justice Role Under Title VI, <https://www.justice.gov/crt/fcs/T6manual> (describing DOJ and other agencies' role in issuing guidance and regulations, review applications for federal funding, monitor compliance, and enforce civil rights laws against recipients) [hereinafter DOJ, Title VI Legal Manual]. See also *Katzenbach v. Morgan*, 384 U.S. 641, 645 (1966) (although the Tenth Amendment permits states to determine voting qualifications, they cannot do so in violation of the Fourteenth Amendment or any other constitutional provision).

⁴⁰ Ellen F. Rosebaum, Oregon Attorney General, joined by State Attorneys General from California, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington State, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 6 [hereinafter State Attys General Statement].

⁴¹ See USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 16, 19-20.

Past Commission Reports on Federal Civil Rights Enforcement

The Commission's authorizing statute requires the Commission to submit at least annual reports that monitor federal civil rights enforcement efforts in the United States.⁴² The Commission has issued various reports analyzing the efficacy of federal civil rights enforcement and offering findings and recommendations for federal agencies to improve their enforcement efforts. These reports include:

- Federal Civil Rights Enforcement Effort: A Report (1970)⁴³
- HEW and Title VI: A Report on the Development of the Organization, Policies, and Compliance Procedures of the Department of Health, Education, and Welfare Under title VI of the Civil Rights Act of 1964 (1970)⁴⁴
- Federal Civil Rights Enforcement Effort: Seven Months Later a Report (1971)⁴⁵
- Federal Civil Rights Enforcement Effort: One Year Later (1971)⁴⁶
- Federal Civil Rights Enforcement Effort: A Report (1971)⁴⁷
- Federal Civil Rights Enforcement Effort: A Reassessment (1973)⁴⁸
- Enforcing Title IX: A Report of the U.S. Commission on Civil Rights (1980)⁴⁹
- Funding Federal Civil Rights Enforcement (1995)⁵⁰
- Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs (1996)⁵¹
- Ten-Year Check-up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume I: A Blueprint for Civil Rights Enforcement (2002)⁵²
- Ten-Year Check-up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume II: An Evaluation of the Departments of Justice, Labor, and Transportation⁵³

⁴² 42 U.S.C. § 1975a(c)(1).

⁴³ USCCR, *Federal Civil Rights Enforcement Effort*, *supra* note 33.

⁴⁴ U.S. Comm'n on Civil Rights, *HEW and Title VI: A report on the Development of the Organization, Policies, and Compliance Procedures of the Department of Health, Education, and Welfare Under title VI of the Civil Rights Act of 1964*, 1970, <https://babel.hathitrust.org/cgi/pt?id=uc1.b3166272;view=1up;seq=11>.

⁴⁵ U.S. Comm'n on Civil Rights, *Federal Civil Rights Enforcement Effort: Seven Months Later a Report*, 1971, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22.pdf>.

⁴⁶ U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort: One Year Later*, 1971.

⁴⁷ *Ibid.*

⁴⁸ U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort: a Reassessment*, 1973, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22973.pdf>.

⁴⁹ U.S. Comm'n on Civil Rights, *Enforcing Title IX: a Report of the U.S. Commission on Civil Rights*, 1980, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en27.pdf>.

⁵⁰ USCCR, *Funding Federal civil Rights Enforcement*, 1995, *supra* note 1.

⁵¹ U.S. Comm'n on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs: A Report of the U.S Commission on Civil Rights*, 1996, <https://babel.hathitrust.org/cgi/pt?id=uc1.31210012722623;view=1up;seq=3> [hereinafter USCCR, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*].

⁵² USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1.

⁵³ USCCR, *Ten-Year Check-up Vol. II: An Evaluation*, *supra* note 31.

- Funding Federal Civil Rights Enforcement: 2000-2003 (2002)⁵⁴
- Funding Federal Civil Rights Enforcement: 2004 (2003)⁵⁵
- Funding Federal Civil Rights Enforcement: The President's 2006 Request (2005)⁵⁶

These reports illustrate ongoing deficiencies in effective civil rights enforcement. What the Commission made clear in the first comprehensive report in 1970 on federal civil rights enforcement bears re-emphasizing:

[T]he inadequacies described herein have deep roots in the past. They did not originate with the current Administration, nor was there any substantial period in the past when civil rights enforcement was uniformly at a high level of effectiveness. Rather, the inadequacies are systemic to the federal bureaucracy and it is only through systemic changes that the great promises of civil rights laws will be realized.⁵⁷

While it is certain that progress has been made since the Commission's 1970 report, the present data the Commission collected from 13 agencies spanning three fiscal years and two administrations show that much work still remains to be done.

Scope and Methodology

This report reviews the efficacy of external (not internal) federal civil rights enforcement by the civil rights offices of 13 federal agencies.⁵⁸ External enforcement encompasses working towards compliance with federal civil rights law in programs and activities administered within the regulated community, as distinct from within the particular federal agency itself. Many civil rights statutes broadly prohibit any recipient or beneficiary of federal financial assistance from discriminating against individuals on the bases of race, color, national origin,⁵⁹ sex,⁶⁰ disability,⁶¹ or age,⁶² in the administration of these programs and activities. Relevant federal laws also prohibit

⁵⁴ U.S. Comm'n on Civil Rights, *Funding Federal Civil Rights Enforcement: 2000-2003*, 2002, <https://www.usccr.gov/pubs/archives/crfund02/report.pdf>.

⁵⁵ U.S. Comm'n on Civil Rights, *Funding Federal Civil Rights Enforcement 2004*, 2003, <https://babel.hathitrust.org/cgi/pt?id=osu.32437122009356;view=1up;seq=5>.

⁵⁶ U.S. Comm'n on Civil Rights, *Funding Federal Civil Rights Enforcement: The President's 2006 Request*, 2005, <https://www.usccr.gov/pubs/archives/crfund06/crfund06.pdf>.

⁵⁷ USCCR, *Federal Civil Rights Enforcement Effort*, *supra* note 33.

⁵⁸ In this context, internal civil rights enforcement refers to personnel matters involving federal government staff.

⁵⁹ 42 U.S.C. §§2000d-2000d-4.

⁶⁰ 20 U.S.C. §§ 1681-88.

⁶¹ 29 U.S.C. § 794.

⁶² 42 U.S.C. §§ 6101-07.

employment discrimination by private employers and state and local government entities.⁶³ In addition, many other civil rights statutes, executive orders, and regulations exist to protect individuals from discrimination in these federally funded programs and activities on various other protected bases.⁶⁴ Furthermore, other civil rights law protections apply to state and local jurisdictions or individuals and entities, including private employers, regardless of whether they receive federal funding.⁶⁵ These protections include most criminal civil rights statutes, but also some other civil rights statutes such as the Americans with Disabilities Act and the Voting Rights Act.⁶⁶ To have meaning, these statutes must be enforced (whether through voluntary or other measures), and as discussed herein, the main enforcement responsibilities pertain to the agencies of the federal government and are primarily enforced through agencies' civil rights offices.⁶⁷

The Commission therefore evaluated the external civil rights enforcement offices of the following 13 agencies:

- U.S. Department of Justice (DOJ), Civil Rights Division (CRT)
- U.S. Department of Education (ED), Office for Civil Rights (ED OCR)
- U.S. Department of Labor (DOL), Office of Federal Contract Compliance Programs (OFCCP) and the Civil Rights Center (CRC)
- U.S. Department of Health and Human Services (HHS), Office for Civil Rights (HHS OCR)
- U.S. Department of Housing and Urban Development (HUD), Office of Fair Housing and Equal Opportunity (FHEO)
- U.S. Equal Employment Opportunity Commission (EEOC)
- U.S. Department of Homeland Security (DHS), Office for Civil Rights and Civil Liberties (CRCL)
- U.S. Environmental Protection Agency (EPA), External Civil Rights Compliance Office (ECRCO)
- U.S. Department of Transportation (DOT), Departmental Office of Civil Rights (DOCR)

⁶³ See, e.g., Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352), 42 U.S.C. § 2000e(a) and (b) (defining “persons” as including state and local governments, and defining employers prohibited from violating civil rights protections as “any person engaged in industry affecting commerce who has fifteen or more employees”); and see U.S. Comm’n on Civil Rights, *In the Name of Hate: Examining the Federal Government’s Role in Responding to Hate Crimes*, November 2019, at 9-14, <https://www.usccr.gov/pubs/2019/11-13-In-the-Name-of-Hate.pdf> (discussing federal criminal civil rights laws applicable to individuals and state and local governments).

⁶⁴ See *infra* Legal Authority and Responsibility sections of each of the following agency chapters.

⁶⁵ See, e.g., 18 U.S.C. §§ 241 (Conspiracy against rights), 242 (Deprivation of rights under color of law), 243 (Exclusion of jurors on account of race or color), 244 (Discrimination against person wearing uniform of armed forces), 245 (Federally protected activities), 246 (Deprivation of relief benefits), 247 (Damage to religious property; obstruction of persons in the free exercise of religious beliefs).

⁶⁶ *Id.* See, e.g., 8 U.S.C. § 1324b (Immigration and Nationality Act’s anti-discrimination provision); 42 U.S.C. § 3604 (Fair Housing Act’s prohibition against discrimination in sale or rental of housing); 42 U.S.C. §§ 10301 to 10702 (Voting Rights Act of 1965); 34 C.F.R. § 104.6 (2000); 28 C.F.R. § 35.149 (2019) (U.S. Dep’t of Education’s enforcement authority under the Americans with Disabilities Act, even for entities that are not recipients of federal financial assistance).

⁶⁷ See *infra* the Legal Authority and Responsibility sections of each of the following agency chapters.

- U.S. Department of Veterans Affairs (VA), Office of Resolution Management (ORM)
- U.S. Department of Agriculture (USDA), Office of the Assistant Secretary for Civil Rights (OASCR)
- U.S. Department of the Treasury (Treasury), Office of Civil Rights and Diversity (OCRD)
- U.S. Department of the Interior (Interior), Office of Civil Rights (DOI OCR)⁶⁸

The Commission sent interrogatories and document requests to each of the 13 federal civil rights offices, for which each agency provided responses and supplementary information about its scope of jurisdiction, organizational structure, budget, staffing, caseload, process of enforcement, policy directives, policy changes, and other relevant information to help measure their efficacy. The Commission reviewed and analyzed information the agencies submitted, conducted independent research, and identified some overarching themes that characterize status of federal civil rights enforcement during the fiscal years in question. For six of the agencies with the largest civil rights offices (DOJ CRT, ED OCR, HHS OCR, HUD FHEO, DOL OFCCP, and EEOC), the Commission conducted a more in-depth review to substantively evaluate the efficacy of those agencies' civil rights enforcement work.

The Commission also took into account information received during a public briefing held on November 2, 2018, when the Commission received testimony from 22 expert witnesses including current and former federal civil rights enforcement officials, academic and legal experts, and advocates. The briefing was followed by a public comment session that included a state Attorney General and a representative from the office of another state Attorney General, representatives of several nonprofit advocacy groups, and members of the public who offered their perspectives on civil rights enforcement effectiveness. The Commission also received 39 written public comments from individuals, community and advocacy groups, as well as state Attorneys General.

The Commission used a consistent set of factors to evaluate each of the 13 civil rights offices. These consist of three core measurement factors:

First, each chapter evaluates the legal authority and responsibilities for civil rights enforcement that the civil rights office has. Second, this report evaluates the enforcement tools that each civil rights office has the authority to use. Third, each chapter examines the relevant budget and staffing levels for the civil rights enforcement offices, while also assessing the workload of each office from FY 2016 to FY 2018.

The Commission then analyzes civil rights enforcement efficacy through the lens of seven components of effective civil rights enforcement, which are described below.

⁶⁸ In 2002, the Commission evaluated 11 agencies. Ten of the agencies on the current list were included in 2002; the difference being that the 2002 report did not evaluate the DHS, the VA or Treasury, and it did evaluate the Small Business Administration. See USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 2.

Analysis of Components of Effective Civil Rights Enforcement Programs and Barriers to Effective Enforcement

The agency chapters that follow present data and information for each of the 13 agencies' civil rights offices that the Commission investigated, covering the period from FY 2016 to FY 2018.

Legal Authority and Responsibility, Budget and Staffing, and Enforcement Tools

The first three sections of each agency chapter present the following information about each agency civil rights office:

- The legal authority and responsibility of each agency civil rights office
- The enforcement tools that each agency civil rights office has the legal authority to use
- Budget and staffing levels of each agency civil rights office

Some of the 13 federal civil rights offices have clear responsibilities with statutes and regulations stating that they “must” or “shall” enforce the law, whereas others have authority to enforce without clear responsibilities; moreover, this level of responsibility can vary depending on the particular statute. For example, a DHS regulation states that all types of discrimination complaints on the basis of disability must be processed with an answer to the individual within 180 days. Title VI regulations require that all covered⁶⁹ agencies “shall” perform periodic compliance reviews.⁷⁰ Title VI regulations are not as clear about the timing for complaint resolutions, and instead only require that agencies try to resolve complaints in 180 days.⁷¹ The Commission’s research shows that agencies generally do not meet this aspirational goal.⁷² Some agencies decreased in their satisfaction of the goal during the time period the Commission reviewed. For example, between FY 2016 and 2018, the number of complaints that the U.S. Department of Transportation was able to close within a 180-day timeframe decreased by approximately 20 percent.⁷³

Most agencies operate under federal civil rights statutes that apply only to recipients of federal funding,⁷⁴ but for example, the U.S. Department of Justice’s Civil Rights Division and the U.S. Equal Employment Opportunity Commission have statutory authority to enforce civil rights laws against state and local jurisdictions, private employers, or individuals, regardless of whether they

⁶⁹ For purposes of this report, all included agencies are “covered” agencies with the exception of EEOC, which is not a covered agency under Title VI. *See generally* 29 C.F.R. § 1691.

⁷⁰ *See infra* note 445. *See also* 28 C.F.R. § 42.407.

⁷¹ *See infra* note 446. *See also* 28 C.F.R. § 42.408.

⁷² *See infra* notes 1368-76 (HHS); 1614-17 (HUD); 2207-9 (EEOC workload); 2472-81 and 2510-16 (DHS); 2715-30 (EPA); 2906-8 (DOT); and 3234-53 (USDA).

⁷³ *See infra* notes 2906-8.

⁷⁴ *See infra* notes 372-442, 1017-1028, 1241-1272, 1447-1475, 1788-1842, 2065-2094, 2299-2326, 2620-2630, 2779-2808, 2943-3004, 3097-3118, 3288-3318, and 3421-3454 (Legal Authority and Responsibility sections of each of the following chapters).

have received federal funding.⁷⁵ Some agencies' civil rights offices, such as DHS CRCL, DOL CRC, and DOT DOCR also have jurisdiction or responsibility to evaluate internal agency policy and actions for compliance with civil rights laws, on behalf of the public.⁷⁶ (For further information, see *Legal Authority and Responsibility* in each of the following chapters.)

Regarding budget and staffing, for each of the agencies herein, the report examines the degree to which current budgets and staffing allow the offices to perform their statutory and regulatory functions. For some agencies, the report also evaluates the management practices in place in the offices to determine whether these practices are sufficient to meet the volume of civil rights issues within the civil rights offices' jurisdiction. (For further information, see Tables 1.2, 1.3 and 1.4 and subsequent analysis in this chapter, as well as the more specific *Budget and Staffing* sections in each of the following chapters.)

Regarding enforcement tools, Congress has charged federal agencies' civil rights offices with receiving and processing civil rights complaints, engaging in compliance monitoring, providing policy guidance and issuing regulations, and other enforcement activities such as coordination with other agencies and litigation in federal court.⁷⁷ University of Michigan Law Professor Margo Schlanger, who is also the former head of DHS CRCL, has written that the power and authority of civil rights offices often differ, as some have enforcement power and some may only provide recommendations.⁷⁸ Civil rights offices have a number of tools available to them that are preventative (i.e., offering advice, training, or technical assistance), responsive (i.e., program/operational review or complaint investigation), or boundary-spanning (i.e., outreach, document generation, or Congressional reporting).⁷⁹

⁷⁵ See, e.g., U.S. Dep't of Justice, Civil Rights Division, Jurisdiction, *infra* notes 372-442. For example, the Voting Rights Act provides for federal enforcement authority with regard to state and local entities, whether or not they receive federal funding, and Section 11(b) provides for jurisdiction over persons who intentionally interfere with the right to vote. 52 U.S.C. § 10301 (jurisdiction over state and local jurisdictions); 52 U.S.C. § 10308 (civil and criminal sanctions against "whoever" deprives or attempts to deprive any person of the right to vote). Another example is that the Department of Education's Office for Civil Rights jointly enforces the Americans with Disabilities Act, regardless of whether the entity in question received federal funds. 34 C.F.R. § 104.6 (2000); 28 C.F.R. § 35.149 (2019); see also, e.g., Equal Employment Opportunity Comm'n, Legal Authority and Responsibility Section at *infra* notes 2067-2094.

⁷⁶ See U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Legal Authority and Responsibility Section at *infra* notes 2299-2326.

⁷⁷ See, e.g. Education Authorization Act (authorizing OCR at ED— Section 203(c)(2) of the Dep't of Educ. Organization Act, 20 U.S.C. § 3413, Pub. L. 96-88, 93 Stat. 668 states: "There shall be in the Department an Office for Civil Rights" and "the Secretary shall delegate to the Assistant Secretary for Civil Rights all functions, other than administrative and support functions, transferred to the Secretary under section 301(a)(3).". See also Arne Duncan, Former Sec'y of Educ., Dep't of Educ., Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 n.5 [hereinafter Duncan Statement]; The Homeland Security Act of 2002, 6 U.S.C. § 345(a)(4), Pub. L. 107-296, § 705(a)(1), 116 Stat. 2135, 2220 (2002).

⁷⁸ Margo Schlanger, Commentary, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 Cardozo L. Rev. 2, 85 (2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322797 [hereinafter Schlanger, *Offices of Goodness*].

⁷⁹ *Id.* at 92-101.

The Commission developed a universal list of existing potentially available federal civil rights enforcement tools, in order to establish a basis for evaluation of each agency. This universal list appears in each agency chapter, with the Commission's research evaluating whether the agency has specific legal authority (based on federal law or regulation or Executive Order) to use each of the tools on this list. This authority may be delegated from the agency head. The universal list evaluates whether the agency civil rights office has specific legal authority for:

- Complaint Resolution – to receive, investigate, and resolve civil rights complaints that allege violations of the civil rights laws that the agency civil rights office enforces.
- Agency-Initiated Charges – to initiate enforcement actions that are not in response to the filing of a complaint.
- Litigation – to pursue litigation as a means of resolving a complaint of discrimination. While some agencies have legal authority to refer complaints to DOJ for litigation, the Commission interpreted this particular enforcement tool to authorize the agency civil rights office the power to litigate in court independently of DOJ or any other agency, outside of the framework of its administrative process of complaint resolution.
- Proactive Compliance Reviews or Evaluations – to initiate compliance reviews for recipients or contractors in order to monitor compliance with the civil rights laws that the agency civil rights office enforces.
- Testing – to conduct undercover testing by sending individuals to apply for services or benefits and gather objective information about an entity's business practices or compliance with the civil rights laws that the agency enforces.
- Observation – to assign staff to observe as a means to assess whether a process has run in compliance with the civil rights laws that the agency civil rights office enforces.
- Issuance of Policy Guidance – to issue and disseminate policy guidance
- Issuance of Regulations – to issue regulations through the formal rulemaking process.
- Technical Assistance – to advise recipients or contractors about how to achieve compliance with the civil rights laws that the agency civil rights office enforces in specific fact circumstances.
- Publicity – to publicize information, including complaint resolutions, litigation, or policy directives.
- Community outreach to stakeholders – to conduct outreach, particularly to educate recipients, contractors, or the general public about their rights and responsibilities under the civil rights laws that the agency civil rights office enforces.
- Research, data collection, and reporting – to conduct civil rights research, collect data, and issue reports to publicize any research and data conducted, relevant to the laws and protections offered under the civil rights laws that it enforces.
- Collaboration with states/local agencies – to collaborate or partner with states or local agencies with regard to enforcing the civil rights laws within its jurisdiction.
- Collaboration with other federal agencies – to collaborate or partner with federal agencies with regard to enforcing the civil rights laws within its jurisdiction.

- Strategic Plan – to issue a strategic plan that outlines specific civil rights enforcement goals and priorities for enforcing the civil rights laws under its jurisdiction.
- Annual reports – to issue an annual report that charts the agency civil rights office’s progress in enforcing the civil rights laws under its jurisdiction.

The Commission notes that the information presented in this section only documents the agency civil rights office’s specific legal authority or obligation to use each of the enforcement tools listed and does not detail whether the agency actively utilizes these particular tools. Moreover, whether or not an agency has specific legal authority, it may still actively utilize some of the tools on this universal list. For example, a civil rights office may not have specific legal authority to send federal observers, but as part of its activities, it may send staff or consultants to observe whether a regulated entity is in compliance. Such further analysis is presented within each of the following chapters.

The agencies’ civil rights offices examined have the following set of specific legal authorities:

Collaboration w/Other Federal Agencies	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Strategic Planning	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Annual Reports	X	X	X	X	X	X	X	X	X	X	X	X	X	X

SOURCE: Commission Staff Research (see citations in each chapter)

Seven Essential Elements of Effective Federal Civil Rights Enforcement

Each agency chapter also includes an analysis of the data presented and research regarding what the Commission has determined to be essential elements of effective federal civil rights enforcement. These are:

1. Prioritization for Civil Rights Agency-Wide
2. Strategic Planning and Self-Evaluation
3. Complaint Processing, Agency-Initiated Charges, and Litigation
4. Proactive Compliance Evaluation
5. Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity
6. Interaction and Coordination with External Agencies and Organizations
7. Research, Data Collection, and Reporting

The Commission identified these components based on the Commission's body of work in this field over six decades, investigating and reporting on federal civil rights enforcement effectiveness. As charged by Congress, the Commission has routinely evaluated federal civil rights enforcement and determined that there are many components to an effective civil rights enforcement program.⁸⁰ As early as 1970, the Commission determined that key components included prioritization of civil rights, effective methods to determine compliance, and effective enforcement techniques.⁸¹

For the current report, the Commission relies mainly on factors identified in a 2002 Commission report, which is the Commission's most recent, before now, comprehensive cross-federal agency evaluation of civil rights enforcement. In that report, the Commission brought together the recommendations from 16 prior Commission reports evaluating 11 different agencies over the course of the previous decade. The Commission thus had a great deal of data based on past reports about the 11 agencies studied, and the Commission used that comprehensive dataset to analyze comparative and overarching factors or elements of effective civil rights performance.⁸² Specifically, the Commission reviewed the over 1,100 recommendations the Commission had made regarding those 11 agencies over time and evaluated whether the agencies had implemented them.⁸³ Drawing on these conclusions from those 11 agency reports, the Commission found that:

Without establishing priority of civil rights and gaining sufficient funding and staffing, federal agencies will struggle to even implement a civil rights enforcement system. However, once the priority of civil rights is recognized and resources are provided, the agency must implement civil

⁸⁰ 42 U.S.C. § 1975a; *see also supra* notes 43-56 (bullet point list of major prior commission reports).

⁸¹ USCCR, *Federal Civil Rights Enforcement Effort*, *supra* note 33.

⁸² USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at iv.

⁸³ *Ibid.* (The agencies were: the Equal Opportunity Employment Commission, the Departments of Justice, Education, Health and Human Services, Housing and Urban Development, Labor, Transportation, Agriculture, and the Interior, the Environmental Protection Agency, and the Small Business Administration.).

rights planning, policy guidance and regulations, technical assistance, education and outreach, a complaint processing system, a compliance review system for federal funding recipients, and staff training.⁸⁴

The Commission recognized that these elements would only provide the “basic components” of a civil rights enforcement office. “Superior” enforcement offices, then, would optimize their efficacy by “integrating [civil rights enforcement] throughout the agency, delegating responsibility, establishing oversight for others performing civil rights responsibilities, coordinating civil rights enforcement activities with other federal agencies, streamlining them, and involving the affected community in their development.”⁸⁵

Against this backdrop, the Commission evaluated federal civil rights enforcement during FY 2016 through FY 2018. Commission research indicates that some civil rights enforcement offices determined that their enforcement tools should be selectively used in order to best solve the precise civil rights problems at hand.⁸⁶ At the Commission’s briefing, Leon Rodriguez, Partner at Seyfarth Shaw and former Director of HHS OCR, affirmed that “[a]fter many years in various prosecutorial and government leadership positions, I came to my role a[t] [HHS] OCR with a hard-earned understanding that compliance is best promoted by use of all the tools at our disposal: enforcement, education, engagement and audit.”⁸⁷ But Curt Decker, who leads National Disability Rights Network, underscored the importance of enforcement: “Enforcement is what ensures that the rights of all people are respected and implemented, especially for those who are disadvantaged and in the minority. Without vigorous oversight and enforcement efforts led by the federal government, alongside private entities, these rights have no value or meaning.”⁸⁸

In 2002, the Commission also developed a Checklist for Evaluating Federal Agencies’ Civil Rights Enforcement.⁸⁹ Many of the items on the checklist continue to be relevant and are included in various parts of the current report below.⁹⁰ The data the Commission collected for the current study—based upon testimony, interrogatories, document requests, and independent research of 13 agencies—is more limited than the data evaluated in 2002, when the Commission had greater

⁸⁴ *Ibid.*, 46.

⁸⁵ *Ibid.*

⁸⁶ See *infra* notes 1534-5 (HUD); 1931-1933 (DOL); and 2479-2487 (DHS).

⁸⁷ Leon Rodriguez, Former Director, U.S. Dep’t of Health and Human Services, Office for Civil Rights, Current Partner, Seyfarth Shaw, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter Rodriguez Statement].

⁸⁸ Curtis L. Decker, Executive Director, National Disability Rights Network, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 1.

⁸⁹ USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 73-78 (Appendix C).

⁹⁰ Some of the items on the checklist are not as relevant to the current study. In this category are factors such as whether Congress has expanded agencies’ civil rights responsibilities (it has typically not since 2002), along with factors that represent the level of detail that was possible considering the 2002 data based on 11 separate agency reports, as well as Commission resources. However, comparing the 2002 checklist, the main categories are included in the Commission’s current analysis below.

resources. Nonetheless, the research herein demonstrates that the seven key factors of effective civil rights enforcement that the Commission identified in 2002 remain applicable today.

In establishing and evaluating these factors, the Commission contributes to a critical evaluation of what effective federal civil rights enforcement entails. Shared consensus around this issue is difficult to maintain, as priorities ebb and flow with the changing political environment. Margo Schlanger, Law Professor at the University of Michigan and former Officer of DHS CRCL testified that the office she formerly led requires structural changes in order to effectively fulfill its congressional mandate.⁹¹ Robert Driscoll, former Deputy Assistant Attorney General, argued that federal civil rights enforcement functions effectively as per its various legal mandates.⁹² Fatima Goss-Graves, President and CEO of the National Women's Law Center, recommended recalling a shared moral consensus in the absence of a shared enforcement consensus:

[O]ne of the things that I think would be really useful right now is to have, either together or separately, the heads of each of the civil rights enforcement agencies communicate very strongly the values around why they're in the business of enforcing our civil rights laws and that the various institutions that they have jurisdiction over, that they have critical obligations that continue no matter the public narrative.⁹³

The Degree to Which the Relevant Agency Prioritizes Civil Rights Agency-Wide

Factors that can indicate an agency's prioritization of civil rights include the placement of the civil rights enforcement office in the agency, the structure of the enforcement office itself, whether the agency conducts strategic planning with civil rights objectives, whether an agency conducts self-evaluations on the expenditures and staffing needed for civil rights responsibilities, how much enforcement authority the office has, and critically, the resources (in funding and staffing) dedicated to civil rights enforcement.⁹⁴

⁹¹ Schlanger Statement, at 1-5.

⁹² Driscoll Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 115-17.

⁹³ Fatima Goss Graves, President and CEO, National Women's Law Center, *Federal Civil Rights Enforcement Briefing*, Testimony, pp. 193-94.

⁹⁴ *Ibid.*, 68-70; *see also* Duncan Statement; Aderson Francois, Professor of Law and Director of Institute for Public Representation, Civil Rights Clinic, at Georgetown University Law Center, testimony, *Federal Civil Rights Enforcement Briefing*, pp. 226-27; Bryan Greene, General Deputy Assistant Secretary of Fair Housing, U.S. Dep't of Hous. and Urban Dev., Written Statement for the Are Rights a Reality? Evaluating *Federal Civil Rights Enforcement Briefing* before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter Greene Statement].

Whether the civil rights enforcement office head has a direct line of communication with the head of the agency can speak to the level of influence that the civil rights enforcement office has over the actions of the agency overall. The Commission, in its 2002 evaluation of federal civil rights enforcement across multiple agencies, found that civil rights offices in several agencies “were often void of clear authority, responsibility, and accountability.”⁹⁵ The evaluation explained:

Whether authority for civil rights activities was centralized in one office or distributed throughout several, civil rights personnel often had no direct line of authority to the Department Secretary or agency head. The organizational placement of the office and staff in charge of civil rights often impaired the staff’s ability to gain the funding and resources needed to carry out the office mission and failed to provide the office the authority to ensure that civil rights concerns were fully integrated into all departmental or agency programs.⁹⁶

The Commission recommended in 2002 that federal agencies “should ensure that civil rights enforcement is given priority through the organizational structure for civil rights, allocation of resources and staffing, and efforts to integrate civil rights into every component of the agency.”⁹⁷ Further, regarding effective organizational structure, the Commission stated that: “The first element to foster civil rights enforcement is a primary civil rights office organizationally placed to ensure primacy within the agency. One way to achieve this primacy is for the civil rights unit to have a direct line of authority to the departmental Secretary or agency head.”⁹⁸

Many agencies place the civil rights enforcement office to report directly to the Secretary of the agency. For instance, HHS OCR reports to the Office of the Secretary of HHS;⁹⁹ similarly, ED OCR reports to the Office of the Secretary¹⁰⁰ and at the U.S. Department of Transportation, the Director of the Departmental Office of Civil Rights acts as the “designated advisor to the Secretary on matters relating to civil rights in the Department of Transportation.”¹⁰¹ This is also true of the Officer of Civil Rights and Civil Liberties of the U.S. Department of Homeland Security.¹⁰² However, other agencies place the enforcement office as one of several subcomponents of a larger office dedicated to equal opportunity, diversity, and inclusion, without a direct line or reporting to the Secretary or agency head. For instance, at Treasury, the External Civil Rights program, led by a Civil Rights Program Manager, is housed within Treasury’s Office of Civil Rights and Diversity.¹⁰³ The Civil Rights Program Manager reports to the Office of Civil Rights and Diversity Director and Deputy Director, who reports to the Assistant Secretary for Management, who reports

⁹⁵ USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 47.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, 13.

⁹⁹ 42 U.S.C. § 3501; 45 C.F.R. § 80.1.

¹⁰⁰ Dep’t of Educ. Organization Act, Section 203(c)(2); *see also* Duncan Statement, at 2.

¹⁰¹ U.S. Dep’t of Transportation, “About DOCR,” <https://www.transportation.gov/civil-rights/about-docr> [hereinafter DOT, “About DOCR”].

¹⁰² *See infra* notes 2350-2353.

¹⁰³ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 4, at 10.

to the Treasury Secretary.¹⁰⁴ And at EPA, ECRCO is located within the office of and reports to the General Counsel of the agency.¹⁰⁵ At DOJ, each of the sections of the Civil Rights Division reports through the Assistant Attorney General for Civil Rights, and the Assistant Attorney General for Civil Rights reports to an Associate Attorney General and not to the Attorney General herself or himself.¹⁰⁶

Former Secretary of Education Arne Duncan testified to the Commission that he included the Assistant Secretary for Civil Rights (the lead civil rights enforcer at ED OCR) as part of his “executive team.”¹⁰⁷ To Duncan, prioritizing civil rights among the agency executive team resulted in the prioritization of civil rights, and civil rights enforcement, as a core mission of the agency, signaling internally and externally how valued the work is.¹⁰⁸ Robert Driscoll testified similarly, stating that it “always pays to have experienced civil rights enforcers in the room when you’re making decisions, even policy decisions, so that they can add that perspective.”¹⁰⁹ However, the DOJ Civil Rights Division does not report directly to the agency head.¹¹⁰ Leon Rodriguez discussed the incorporation of civil rights enforcement with the agency mission: “As [HHS] Director of the Office for Civil Rights, I emphasized the fact that civil rights compliance is part and parcel of the overall mission of the Department that we serve. It is a false choice to ever say that civil rights compliance and the core missions of any department in which we serve, are at odds with one another.”¹¹¹ Rodriguez went on to use the example of language access in health care services as demonstrative of this alignment in mission: “when doctors and patients, when healthcare providers and patients do not communicate effectively, people die, people get inferior healthcare. And so it’s the same thing as the mission of the Department of Health and Human Services’ mission. It is to improve the health status access to social services to all Americans.”¹¹² Critically, particularly given the resource-starved nature of most enforcement offices, Rodriguez testified that he believes that making civil rights a priority is “zero dollars. That’s free. That’s just making a commitment.”¹¹³

Some agency enforcement offices are working towards a higher-level integration of civil rights enforcement. Winona Lake Scott, Acting Deputy Assistant Secretary of USDA OASCR, testified to the Commission that one of the agency priorities at USDA was to “elevat[e] the reporting

¹⁰⁴ Ibid., 10; U.S. Dep’t of the Treasury, “About,” <https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-civil-rights-and-diversity.aspx>.

¹⁰⁵ See U.S. Environmental Protection Agency chapter, *infra* notes 2620-2779; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3.

¹⁰⁶ U.S. Dep’t of Justice, “Organizational Chart,” <https://www.justice.gov/agencies/chart> (accessed May 17, 2016) [hereinafter DOJ, “Organizational Chart”].

¹⁰⁷ Arne Duncan, Former Sec’y of Educ. at the Dep’t of Educ., current Managing Partner of Emerson Collective, testimony, *Federal Civil Rights Enforcement Briefing*, p. 76; see also Duncan Statement, at 1.

¹⁰⁸ Duncan Testimony, *Federal Civil Rights Enforcement Briefing*, p. 75.

¹⁰⁹ Driscoll Testimony, *Federal Civil Rights Enforcement Briefing*, p. 147.

¹¹⁰ See *infra* note 484.

¹¹¹ Leon Rodriguez, Former Director, U.S. Dep’t of Health and Human Services, Office for Civil Rights, Current Partner, Seyfarth Shaw, testimony, *Federal Civil Rights Enforcement*, p. 44.

¹¹² Ibid., 45.

¹¹³ Ibid., 91.

structure of civil rights functions to the mission area level” and “strengthen[] the role of [her] office in providing supervision to the mission area civil rights functions.”¹¹⁴ And as one former HUD official noted, “[T]he enforcement of civil rights law through civil rights divisions of various agencies . . . is only one aspect of protecting or advancing civil rights. It is also critical to look deeply at how agencies enforce and advance civil rights in the implementation of their programs, the programmatic side, not the civil right[s] side.”¹¹⁵

Relatedly, the structure of the civil rights offices studied varies widely across different agencies. Some of the larger offices have a headquarters office focused on policy development and management with some enforcement staff, with regional offices placed around the country to handle enforcement cases in those geographic areas. ED OCR,¹¹⁶ HHS OCR,¹¹⁷ EEOC,¹¹⁸ HUD FHEO,¹¹⁹ and DOL OFCCP¹²⁰ all follow this model, for example. In addition to the enforcement offices supervised by leadership from headquarters, some agencies also fund outside organizations (state and local agencies, or state and local non-governmental organizations) to handle some cases. HUD FHEO¹²¹ and EEOC¹²² both utilize this model. This model offers the benefit of increasing the number of complaints that can be addressed in the subject area jurisdiction of these agencies (housing and employment, respectively), but as both agencies testified to the Commission, outsourcing this work also requires greater coordination for consistent enforcement.¹²³ Establishing coordination amongst these outside entities was one of the top five priority areas HUD FHEO highlighted in its testimony to the Commission.¹²⁴ EPA ECRCO appears to be setting up a similar program in its office, with the Cooperative Federalism initiative, which is a pilot project that will initiate partnerships with EPA Regional Offices to “engage the regional states in building a collaborative relationship that would produce robust and effective civil rights programs that other

¹¹⁴ Winona Lake Scott, Associate Assistant Secretary for Civil Rights, U.S. Dep’t of Agriculture, testimony, *Federal Civil Rights Enforcement Briefing*, p. 106. As discussed in the chapter specific to USDA, this effort to change and strengthen the civil rights office role at USDA appears to be ongoing and still to deviate in practice from the aspiration of the goal.

¹¹⁵ Barbara Sard, Former Senior Advisor on Rental Assistance, U.S. Dep’t of Hous. and Urban Dev., testimony, *The Role of the Federal Government in Protecting Your Civil Rights Panel Hearing at American Univ. Washington College of Law*, Oct. 26, 2018, transcript (submitted as public comment to the Commission), p. 69.

¹¹⁶ U.S. Dep’t of Educ., “About OCR,” <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (accessed May 24, 2019) [hereinafter ED, “About OCR”].

¹¹⁷ U.S. Dep’t of Health and Human Services, “Regional Offices,” <https://www.hhs.gov/about/agencies/iea/regional-offices/index.html> (last accessed May 24, 2019).

¹¹⁸ Equal Employment Opportunity Comm’n, “EEOC Office List and Jurisdictional Map,” (accessed May 24, 2019) <https://www.eeoc.gov/field/>

¹¹⁹ U.S. Dep’t of Hous. and Urban Dev., “Contact FHEO,” https://www.hud.gov/program_offices/fair_housing_equal_opp/contact_fheo (accessed May 24, 2019).

¹²⁰ U.S. Dep’t of Labor, “OFCCP Key Personnel – Regional Offices,” <https://www.dol.gov/ofccp/contacts/regkeyp.htm> (accessed May 24, 2019).

¹²¹ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 3-5.

¹²² Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, pp. 1-3.

¹²³ Bryan Greene, General Deputy Assistant Secretary of Fair Housing, U.S. Dep’t of Hous. and Urban Dev., testimony, *Federal Civil Rights Enforcement Briefing*, p. 74; Carol Miaskoff, Acting Legal Counsel, Office of Legal Counsel, Equal Employment Opportunity Comm’n, testimony, *Federal Civil Rights Enforcement Briefing*, p. 74.

¹²⁴ Greene Statement, at 3.

states could model.”¹²⁵ ECRCO reports that once these programs are in place and effectively implemented at the state level, “many civil rights complaints and concerns that otherwise would be elevated to EPA at the federal level, would be handled by the states through their civil rights programs.”¹²⁶

In 2002, the Commission recommended that “the implementation, compliance and enforcement of external civil rights programs should be directed by an office and staff that are separate from the office responsible for internal (EEO) civil rights functions. Accordingly, these offices and staff should be provided with separate budgets so that each and every civil rights statute is properly enforced without resources being taken from one to enforce another.”¹²⁷ Not all civil rights offices maintain this recommended separation. For example, the current organizational chart of Treasury’s Office of Civil Rights and Diversity shows that external and internal civil rights enforcement have been essentially combined.¹²⁸ Similarly, DOL CRC combines internal and external civil rights enforcement functions into one office.¹²⁹

Another critical factor for assessing an agency’s prioritization of civil rights is the authority the enforcement office exercises over the rest of the agency, any office subcomponents, funding recipients and other persons or entities, or other federal agencies. Some agencies’ civil rights enforcement offices are imbued with independent authority to enforce the civil rights laws under their jurisdiction, while other offices are limited to advisory authority only to influence compliance with civil rights laws. For instance, the Fair Housing Act gives HUD the direct authority to administer and enforce the provisions of that law,¹³⁰ though this authority does not extend to actions by other executive branch agencies.¹³¹ On the other end of the spectrum, DHS CRCL “lacks authority either to prosecute or to discipline” other agency components and therefore their complaint handling is meant to provide a “foundation” for “systematic recommendations.”¹³² This is despite Congress’ providing DHS CRCL with authority to review agency policy before it is implemented.¹³³

Professor Schlanger believes that there are other factors needed to maximize efficacy. In her testimony before the Commission, she stated that civil rights offices need to have both influence within the agency and commitment, both of which depend heavily on external reinforcement, and noted that these offices “exist to bring into their agencies not just a value that is not primary, but one that constrains or even conflicts with the agency’s *raison d’etre*” . . . and these offices face

¹²⁵ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2.

¹²⁶ *Ibid.*

¹²⁷ USCCR, *Ten-Year Check-Up: Volume 1*, *supra* note 1, at 47.

¹²⁸ U.S. Dep’t of the Treasury, Response to USCCR Document Request No. 2, p. 21 (referencing their attachment of this chart).

¹²⁹ *See infra* note 1815.

¹³⁰ 42 U.S.C. § 3608 and supporting regulations, discussed *infra* at Chapter 4.

¹³¹ *See* Authority of Department of Hous. and Urban Dev. to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies, 18 Op. O.L.C. 101 (1994).

¹³² Schlanger, *Offices of Goodness*, *supra* note 78, at 98-99 (also noting that CRCL does have enforcement authority for disability complaints brought under Section 504 of the Rehabilitation Act).

¹³³ *See infra* notes 2360-2366 (discussing purposes of this authority under the Homeland Security Act).

“continual pressure to slide into disempowered irrelevance or to be tamed by capture or assimilation.”¹³⁴ Therefore, these civil rights offices’ tools “must be carefully prepared, and its influence and commitment purposefully produced and maintained.”¹³⁵ She added that, in order to be effective, civil rights offices also need:

- Information
- Right of consultation
- A voice external to the agency
- Adequate resources
- The ability to safeguard their own investigations.¹³⁶

Robert Driscoll asserted in his testimony before the Commission that federal civil rights enforcement should be a law enforcement function, not a partisan endeavor, explaining:

Federal civil rights enforcement is no different than tax, environmental, or federal contracting as a body of law. There is a set of statutes. There is a constitution. There are specific texts that govern what enforcers do. It's not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences or particularize a vision of justice.

...

[I]t is important to recognize that some of the most important work, civil rights work that is done in the country has nothing to do with our political differences but, rather, rule of law that tries to make our intellectual agreements, statutory promises, and constitutional convictions a reality for all of us.¹³⁷

Also during the Commission's briefing, Joshua Thompson, a senior attorney at the Pacific Legal Foundation, asserted what he believes to be “unintended consequences” stemming from the “over-enforcement” of civil rights laws.¹³⁸ He contended that disparate impact regulations under Title VI lead to discrimination against traditionally targeted communities when over-enforced.¹³⁹ In

¹³⁴ Schlanger, *Offices of Goodness*, *supra* note 78, at 103-104.

¹³⁵ *Id.* at 117.

¹³⁶ Margo Schlanger, Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan Law School, testimony, *Federal Civil Rights Enforcement Briefing*, p. 247.

¹³⁷ Driscoll Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 115-17. Driscoll has elsewhere published recommendation that “an affirmative civil-rights agenda, one that is consistent with conservative principles, can and should be pursued . . . for the good of the nation.” Robert N. Driscoll, *This is What a Trump Civil-Rights Agenda Should Look Like*, National Review, Nov. 30, 2016, <https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>. See also John Yang, President and Executive Director, Asian Americans Advancing Justice | AAJC, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 3 (“We expect civil rights enforcement offices to investigate complaints of civil rights violations and act to enforce civil rights laws, not selectively but across the board.”).

¹³⁸ Joshua Thompson, Senior Atty, Pacific Legal Foundation, Testimony, *Federal Civil Rights Enforcement Briefing*, p. 174.

¹³⁹ *Ibid.*, 174-75.

addition, Thompson stated that “continued enforcement of ‘zombie’ desegregation orders comes with significant costs.”¹⁴⁰ He went on to argue that: “As the Commission evaluates the best ways to maximize the benefits of civil rights enforcement, it should be mindful of focusing resources on non-mandated disparate impact regulations under Title VI as well as the decades-old desegregation orders that often work to the detriment of the nation’s most needy children.”¹⁴¹ The Commission notes that Thompson later acknowledged that the federal government is obliged to enforce disparate impact regulations, undermining Thompson’s own description of the law quoted here.¹⁴² However, the Commission’s research also shows that unless agencies have sufficient resources to enforce all civil rights laws over which they have jurisdiction evenly,¹⁴³ then agencies will have incentive to use resources selectively to maximize efficiencies.

The Commission received further testimony from Arne Duncan and Leon Rodriguez on these points. Duncan said in his written testimony that he thinks it is an “impossible task” to prioritize some civil rights issues over others because “picking one or a handful of issues to focus on” communicates inappropriately that the other issues in an agency’s jurisdiction are less important.¹⁴⁴ But Rodriguez testified in writing and orally about leading his staff to prioritize; and written testimony from Bryan Greene, who at the time of his testimony was the General Deputy Assistant Secretary of HUD FHEO, included specific agency priorities. Consistent with that preference for prioritization within HUD, Kim Kendrick, former Assistant Secretary of HUD FHEO, testified that, in retrospect, she wishes she had prioritized systemic remedies over focusing on the number of complaints filed each year.¹⁴⁵

The Commission’s decades of research show that civil rights enforcement offices have been inadequately funded, with negative impacts on their ability to enforce civil rights law. In 2002, the Commission reported that nearly 10 percent of its 1,100 recommendations to agencies between 1992 and 2000 were to increase funding and resources.¹⁴⁶ The Commission also consistently found a need to increase staffing for civil rights enforcement.¹⁴⁷ In 2002, the Commission found that:

Commission reviews of civil rights implementation, compliance, and enforcement at several agencies over the past decade revealed a system that was often unequal

¹⁴⁰ *Ibid.*, 179.

¹⁴¹ *Ibid.*, 179.

¹⁴² In fact, Thompson later stated that the federal government is obliged to enforce disparate impact regulations. *See infra* note 1043 (“In his written statement, Thompson acknowledged that the current DOJ enforcement manual states that disparate impact is a regulatory requirement to be enforced, and that the Bush Administration also reaffirmed commitment to disparate impact as an enforcement tool.”).

¹⁴³ *See infra* notes 1530-4, 1546-58, 1928-33 and 2475-84 (regarding budget limitations forcing agencies to selectively enforce civil rights protections).

¹⁴⁴ Duncan Statement, at 2.

¹⁴⁵ Kim Kendrick, Former Assistant Sec’y for Fair Hous. and Equal Opportunity, U.S. Dep’t of Hous. and Urban Dev., Current Partner, Leftwich LLC, Testimony, *Federal Civil Rights Enforcement Briefing*, p. 238.

¹⁴⁶ USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 11.

¹⁴⁷ *Ibid.*, 11-12.

to the task. The greatest hindrances to fulfilling the civil rights obligations were insufficient funding and inefficient, thus ineffective, use of available funds.¹⁴⁸

The Commission therefore recommended in 2002 that Congress allocate more funding and resources for civil rights enforcement activities.¹⁴⁹

The Commission's current research shows that budgets and staffing of civil rights enforcement offices vary widely among different agencies, and based on the data the Commission reviewed, some are insufficiently resourced. See Tables 1.2, 1.3, and 1.4.

¹⁴⁸ Ibid., 46, Finding 1.1.

¹⁴⁹ Ibid., 46, Recommendation 1.1.

Table 1.2. Requested and Appropriated Budgets Amounts, Number of Employees, and Number of Complaints Received, FY 2016

Agency	Budget Requested	Budget Appropriated	Employees+	Number of complaints received*
DOJ Civil Rights Division	\$175.00	\$148.20	606	N/A
ED OCR	\$130.69	\$107.00	563	16,720
HHS OCR++	\$42.70	\$38.79	243	4,380
HUD FHEO	\$152.10	\$135.52	484	8,460
DOL OFCCP	\$113.68	\$105.47	581	588 1,696*
DOL CRC	\$7.99	\$6.88	13	813
EEOC	\$373.11	\$364.50	2,202	91,503**
DHS CRCL	\$20.95	\$21.80	85	3,067
EPA ECRCO ¹⁵⁰	Not available	\$2.02	11.5	31
DOT DOCR	\$9.67	\$9.67	30	342
VA ORM	\$43.70	\$43.70	296	28
USDA OASCR†	\$24.44	\$24.07	36	413
Treasury OCRD	Not available	\$0.27	2	31
DOI OCR†	\$3.41	\$3.45	3	47
TOTAL	\$1,097.44	\$1,011.34	5,155.5	

SOURCE: documented in subsequent chapters.

NOTE: Dollar amounts in millions.

*OFCCP's primary enforcement mechanism is compliance evaluations, so the numbers reflected in the "number of complaints received" column reflect the number of complaints received (top number) and the number of compliance reviews completed (bottom number) by OFCCP.

**Number represents EEOC's private sector charges only. The number does not include its federal sector enforcement work.

+The Commission requested staffing data from each agency about staffing—specifically about the number of full-time employees, part-time employees, and contractors. The data was reported differently for each agency, so the Commission has categorized these numbers here as "employees." The individual agency chapters provide more specific detail about the staffing levels that are reported here.

†These civil rights offices do not break out their budgets to reflect specific totals for external civil rights enforcement, and instead reported the total budget for their civil rights office, which includes its budget for EEO (internal civil rights) work.

++HHS OCR reported that their total staffing numbers include 142 staff members who work part-time on civil rights enforcement, 8 full-time contractors, and 69 part-time contractors. HHS OCR also noted that at present, there are 24 full-time staff members who work on civil rights enforcement, based at OCR headquarters, and are assigned to CFRD and CRD.

††DOJ staffing information represents the number of FTEs. DOJ did not provide the Commission with information about number of complaints received and only stated that it receives "thousands of complaints each year." Moreover, DOJ CRT primarily uses agency-initiated charges to enforce the civil rights laws under its jurisdiction.

¹⁵⁰ EPA ECRCO was created in 2016, after a restructuring of the former Office of Civil Rights. *See infra* Chapter 9 on EPA; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3.

Table 1.3. Requested and Appropriated Budgets Amounts, Number of Employees, and Number of Complaints Received, FY 2017

Agency	Budget Requested	Budget Appropriated	Employees+	Number of complaints received*
DOJ Civil Rights Division	\$155.60	\$148.00	606	
ED OCR	\$137.70	\$108.50	579	12,837
HHS OCR++	\$42.70	\$38.70	243	6,469
HUD FHEO	\$144.23	\$136.52	496	8,262
DOL OFCCP	\$114.16	\$104.47	563	686 1,142*
DOL CRC	\$8.04	\$6.88	13	733
EEOC	\$376.64	\$364.50	2,082	84,254**
DHS CRCL	\$21.40	\$22.57	86	3,523
EPA ECRCO	Not available	\$2.28	12.5	25
DOT DOCR†	\$9.75	\$9.75	30	288
VA ORM†	\$47.68	\$47.68	296	63
USDA OASCR†	\$24.75	\$24.20	36	403
Treasury OCRD	Not available	\$0.44	3	30
DOI OCR†	\$3.48	Not available	3	24
TOTAL	1,086.13	1,014.49	5,048.5	

SOURCE: documented in subsequent chapters.

NOTE: Dollar amounts in millions.

*OFCCP's primary enforcement mechanism is compliance evaluations, so the number reflected in the "number of complaints received" column reflects the number of compliance reviews received by OFCCP.

**Number represents EEOC's private sector charges only. The number does not include its federal sector enforcement work.

+The Commission requested staffing data from each agency about staffing—specifically about the number of full-time employees, part-time employees, and contractors. The data was reported differently for each agency, so the Commission has categorized these numbers here as "employees." The individual agency chapters provide more specific detail about the staffing levels that are reported here.

†These civil rights offices do not break out their budgets to reflect specific totals for external civil rights enforcement, and instead reported the total budget for their civil rights office, which includes its budget for EEO (internal civil rights) work.

++HHS OCR reported that their total staffing numbers include 142 staff members who work part-time on civil rights enforcement, 8 full-time contractors, and 69 part-time contractors. HHS OCR also noted that at present, there are 24 full-time staff members who work on civil rights enforcement, based at OCR headquarters, and are assigned to CFRD and CRD.

††DOJ staffing information represents the number of FTEs.

Table 1.4. Requested and Appropriated Budgets Amounts, Number of Employees, and Number of Complaints Received, FY 2018

Agency	Budget Requested	Budget Appropriated	Employees+	Number of complaints received*
DOJ Civil Rights Division	\$148.10	\$147.20	593	
ED OCR	\$106.79	\$117.00	529	12,435
HHS OCR++	\$32.53	\$38.79	243	7,692
HUD FHEO	\$135.10	\$134.64	484	7,781
DOL OFCCP	\$88.00	\$103.47	508	1,418 *812
DOL CRC	\$6.86	\$6.88	14	670
EEOC	\$363.80	\$379.50	1,968	76,418**
DHS CRCL	\$21.96	\$23.57	93 (projected)	1,477 (as of April 11, 2018)
EPA ECRCO		\$2.19	12	15
DOT DOCR†	\$9.50	\$9.50	30	332
VA ORM†	\$0.00	\$47.68	296	28
USDA OASCR†	\$23.30	\$24.04	36	405
Treasury OCRD	Not available	\$0.51	3	18 (as of March 9, 2018)
DOI OCR†	Not available	Not available	2	20
TOTAL	\$935.94	\$1,034.87	4,816	

SOURCE: subsequent chapters.

NOTE: Dollar amounts in millions.

*OFCCP's primary enforcement mechanism is compliance evaluations, so the number reflected in the "number of complaints received" column reflects the number of compliance reviews received by OFCCP.

**Number represents EEOC's private sector charges only. The number does not include its federal sector enforcement work.

+The Commission requested staffing data from each agency about staffing—specifically about the number of full-time employees, part-time employees, and contractors. The data was reported differently for each agency, so the Commission has categorized these numbers here as "employees." The individual agency chapters provide more specific detail about the staffing levels that are reported here.

†These civil rights offices do not break out their budgets to reflect specific totals for external civil rights enforcement, and instead reported the total budget for their civil rights office, which includes its budget for EEO (internal civil rights) work.

++HHS OCR reported that their total staffing numbers include 142 staff members who work part-time on civil rights enforcement, 8 full-time contractors, and 69 part-time contractors. HHS OCR also noted that at present, there are 24 full-time staff members who work on civil rights enforcement, based at OCR headquarters, and are assigned to CFRD and CRD.

††DOJ staffing information represents the number of FTEs.

For federal agencies' civil rights offices that the Commission evaluated, for which the Commission was able to obtain complete budget data,¹⁵¹ nine agencies' budget requests for their civil rights offices experienced an overall decrease from FY 2016 to FY 2018.¹⁵² These were: DOJ CRT, ED OCR, HHS OCR, HUD FHEO, DOL OFCCP and CRC, EEOC, DOT DOCR, VA ORM, and USDA OASCR. DHS' Office for Civil Rights and Civil Liberties was the only civil rights office that saw an overall increase in the requested budget amount from FY 2016 to FY 2018. The Commission did not obtain data on the budget requests for EPA ECRCO, Treasury, and DOI OCR for the fiscal years in question.

For federal agencies' civil rights offices that the Commission evaluated, for which the Commission was able to obtain complete budget data, four federal agencies experienced overall decreases in their allocated budgets for their civil rights offices from FY 2016 to FY 2018. These agencies were DOJ CRT, HUD FHEO, DOL OFCCP, and DOT DOCR. Seven agencies' (ED OCR, EEOC, DHS CRCL, EPA ECRCO, VA ORM, USDA OASCR, and Treasury) allocated budgets increased during fiscal years 2016 to 2018. DOL CRCL's and HHS OCR's allocated budgets overall remained relatively constant during that period of time.¹⁵³ The Commission did not obtain data on the budget allocations for DOI OCR.

For federal agencies' civil rights offices for which the Commission was able to obtain complete staffing data, five agencies' civil rights offices experienced overall decreases in staffing levels from FY 2016 to FY 2018.¹⁵⁴ These agencies included DOJ CRT, ED OCR, DOL OFCCP, EEOC, DOI OCR. Four agencies' civil rights offices (DOL CRC, DHS CRCL (projected), EPA ECRCO, and Treasury OCRD) experienced overall increases in staffing levels from FY 2016 to FY 2018.

¹⁵¹ The Commission sent interrogatories to each agency and requested budget data, including the requested and allocated budget amounts for FY 2016, FY 2017, and FY 2018. Some agencies were not able to offer information about their budget requests for the fiscal years in question. The individual agency chapters describe the individual agencies' budgets in greater detail, and in some cases, can provide insight into why this information is unavailable.

¹⁵² Please note that some agencies may have experienced an increase in the requested budget from FY 2016 to FY 2017, or from FY 2017 to FY 2018, but all of these agencies saw an overall decrease when comparing their FY 2016 budget request to their FY 2018 request. *See infra* notes 465-72 (DOJ); Figure 3.1 and notes 1041-51 (ED); 1290-1304 and Figure 4.1 (HHS); notes 1508-23 and Figure 5.3 (HUD); Figure 6.2 and notes 1869-74 (DOL OFCCP); notes 1890-1900 (DOL CRC); 2115-24 (EEOC); 2344-9 (DHS); 2648-51 (EPA); 2822-34 (DOT); 3019-21 and Figure 11.1 (VA); 3137-44 (USDA); 3331-9 (Treasury); and 3472-4 (Interior) (analysis of available budget data for all agencies). Notes regarding methodology: out of 13 agencies evaluated, the Commission was only able to obtain requested budget numbers for 9 agencies. Also, budget data was not obtained in a standardized fashion. When applicable, Commission staff were able to pull budget request data from agency budget justifications for the relevant years. For other agencies, we relied on the agency interrogatory responses.

¹⁵³ Unless a budget increase keeps pace with increased expenses, it functions as a budgetary cut. Note that given the proportion of these budgets allocated to salaries, the cost of which almost always increases annually, that means that for civil rights offices whose budgets remained stagnant, the real value of the budget allocation has likely decreased.

¹⁵⁴ *See infra* notes 462-64, 474-75 (DOJ); 1053-67 and Figure 3.2 (ED); notes 1301-10 (HHS); 1524-8 (HUD); 1877-8 (DOL OFCCP); 1886-9 (DOL CRC); 2125-34 and Figure 7.2 (EEOC); 2347-77 (DHS); 2644-7 (EPA); 2842-8 (DOT); 3022-29 (VA); 3133-6 (USDA); 3340-7 (Treasury); and 3467-81 (Interior) (analysis of available staffing data for all agencies). Notes regarding methodology: staffing data was not obtained in a standardized fashion. When applicable, Commission staff were able to pull budget request data from agency budget justifications for the relevant years. For other agencies, we relied on the agency interrogatory responses.

Five agencies' civil rights offices staffing levels remained constant during that period of time (HHS OCR, HUD FHEO, DOT DOCR, VA ORM, and USDA OASCR).

When comparing requested budget amounts to allocated budget amounts for the fiscal years in question, on average, agency civil rights offices were allocated approximately 93 percent of their total requested budget amounts in FY 2016.¹⁵⁵ In FY 2017, on average, agency civil rights offices were allocated approximately 94 percent of their total requested budget amounts, a slight increase from FY 2016.¹⁵⁶ In FY 2018, on average, agency civil rights offices were allocated approximately 106 percent of their total requested budget amounts, increasing sharply from the previous fiscal years.¹⁵⁷ However, this may be attributed to the fact that the majority of agencies that provided budget request information saw an overall decrease of the total requested budget amounts from FY 2016 to FY 2018. At the same time, the majority of agencies' civil rights offices experienced an increase in their total allocated budgets from FY 2016 to FY 2018.

Federal civil rights agencies have struggled to manage their caseloads. For example, in June 2018, a federal court required EPA's civil rights office to timely process any pending and future race based discrimination complaints submitted by the Plaintiffs and accepted by EPA for investigation, for a period of five years from the date of the Judgment.¹⁵⁸

When fully staffed, ECRCO only had between 11.5 and 12.5 full time equivalent employees during FY 2016-2018 to address all civil rights violations nationwide.¹⁵⁹ In light of the federal court requirement for ECRCO to submit to its oversight and ensure timely complaint processing in the future, ECRCO has further noted that it "received funding to support its budget request," and "has had sufficient staffing to effectively manage its caseload for the fiscal years [2016-2018] in question."¹⁶⁰

Similarly, another federal court recently held that DHS CRCL was not timely processing complaints.¹⁶¹ The pertinent DHS regulation states that all types of discrimination complaints on the basis of disability must be processed with an answer to the individual within 180 days.¹⁶² But a federal district court found that CRCL's 2.75-year delay in processing a civil rights complaint by an individual with disabilities regarding his treatment at the airport by DHS' Transportation Security Agency (TSA) was "unreasonable" where DHS and TSA offered "no justification or

¹⁵⁵ This calculation is only based on agencies for which the Commission had data about both their requested and allocated budgets. Agencies with missing budget information were not included in this calculation.

¹⁵⁶ This calculation is only based on agencies for which the Commission had data about both their requested and allocated budgets. Agencies with missing budget information were not included in this calculation.

¹⁵⁷ This calculation is only based on agencies for which the Commission had data about both their requested and allocated budgets. Agencies with missing budget information were not included in this calculation.

¹⁵⁸ Judgment, *Californians for Renewable Energy v. U.S. Dep't of Environmental Protection*, No. 15-3292, 2 (N.D. Cal. Jun. 13, 2018).

¹⁵⁹ See *infra* notes 2644-2647 (discussing ECRCO's staffing levels from FY 2016-2018).

¹⁶⁰ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 6.

¹⁶¹ *SAI v. Dep't of Homeland Sec.*, 149 F. Supp. 3d 99 (D.D.C. 2015).

¹⁶² 6 C.F.R. § 15.70(g).

explanation.”¹⁶³ Furthermore, during the Commission’s briefing, CRCL reported that they had insufficient resources to process over 3,000 complaints regarding separation of migrant children from their parents or other adult family members at the border, and that they rely on a system of choosing a small number (23 out of over 3,000) of what they consider to be representative complaints to investigate.¹⁶⁴ CRCL’s Deputy Officer also told the Commission that they need more resources to improve complaint processing times.¹⁶⁵

During the course of the Commission’s review, other agency leaders in federal civil rights offices stated that declining or insufficient resources present challenges to maintaining an effective civil rights enforcement program.¹⁶⁶ For example, Bryan Greene noted in his testimony before the Commission that when there are budget constraints, responding to civil rights complaints effectively and pursuing systematic compliance monitoring can be challenging: “FHEO relies entirely on Salaries and Expenses funding for its Fair Housing Act investigations. How many complaints we can investigate [in a given time period] and how fast we can investigate them depends on staff resources[.]”¹⁶⁷ During a briefing of the Illinois Advisory Committee to the Commission in May 2019, focused on fair housing, Sara Pratt, the former Deputy Assistant Secretary for Fair Housing Enforcement and Programs and Senior Advisor to the Assistant Secretary at HUD put it even more starkly: “Today’s staffing levels are so low that it’s easy to believe that understaffing of the civil rights function is a deliberate action designed to undermine effectiveness of work.”¹⁶⁸ Former ED Secretary Arne Duncan asserted in his testimony before the Commission that budgets for civil rights enforcement can speak to the values and priorities of the agency, and “when you cut staff, you’re walking back those commitments” to civil rights.¹⁶⁹ Dexter Brooks, Associate Director of Federal Sector Programs at the Office of Federal Operations, EEOC, testified before the Commission that more funding at the EEOC could enable it to manage data and track trends in real time that could help identify problem areas.¹⁷⁰

Margo Schlanger testified that there is no accepted understanding of how many staff members the civil rights enforcement offices should have to be able to enforce consistent with the jurisdictions afforded to them – and that a sufficient time has passed since Congress enacted Title VI at least to

¹⁶³ 149 F. Supp. 3d at 120.

¹⁶⁴ Veronica Venture, Deputy Officer, Office for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Security, testimony, *Federal Civil Rights Enforcement Briefing*, p. 126.

¹⁶⁵ See *infra* notes 244-285 (testimony of Deputy Officer Venture); and see note 2442 (post-briefing statement of CRCL’s new Deputy Officer for Programs and Compliance Peter Mina, discussing need for more funding).

¹⁶⁶ Greene Statement, at 2; Venture, Testimony, *Federal Civil Rights Enforcement Briefing*, p. 125; Schlanger Testimony, *Federal Civil Rights Enforcement Briefing*, p. 247.

¹⁶⁷ Greene Statement, at 1-3.

¹⁶⁸ Sara Pratt, Counsel at Relman, Dane & Colfax PLLC, testimony, *Fair Housing Briefing before the Illinois Advisory Committee of the U.S. Comm’n on Civil Rights*, May 3, 2019, transcript, p. 37 [hereinafter *Illinois SAC Fair Housing Briefing*].

¹⁶⁹ Duncan Statement, at 77.

¹⁷⁰ Dexter Brooks, Associate Director of Federal Sector Programs, Office of Federal Operations, Equal Employment Opportunity Commission, testimony, *Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing Before the U.S. Comm’n on Civil Rights*, May 9, 2019, transcript, pp. 66-68 [hereinafter *Sexual Harassment in Government Workplaces Briefing*].

be able to set that measure now.¹⁷¹ The Commission’s resources do not currently enable the Commission to help determine that number; however, the research shows that many of the civil rights offices are under-performing due to insufficient resources.

Aderson Francois, Professor of Law at Georgetown Law School, explained in his testimony to the Commission that since the 1980s, he has observed that federal civil rights offices have had the tendency to turn into “ghost agencies” that “cease to function according to their statutes and regulations”¹⁷² under certain conditions. He noted several warning signs, identified below, including a shrinking budget. Professor Francois noted that a few of the civil rights offices that the Commission is examining, namely ED OCR, HHS OCR, and DOL OFCCP, are exhibiting many of these warning signs, experiencing budget and staff reductions.¹⁷³ As discussed herein, the Commission’s research shows that between FY 2016 and FY 2018, ED OCR has asked for less funding but in FY 2018, Congress provided \$10 million more than ED OCR requested (an increase from the prior fiscal year).¹⁷⁴ ED OCR did experience a 6% staff reduction during this time period, notwithstanding the significant Congressional increase in appropriations to the agency. A similar pattern is seen with HHS OCR: in FY 2018 HHS asked for less funding but Congress provided a slight increase to HHS OCR, bringing the funding allocations back to the level of FY 2016.¹⁷⁵ DOL OFCCP did experience a decrease in both requested and allocated budgets, with the requested amount decreasing by \$25.7 million between FY 2016 and FY 2018, and the amount Congress allocated decreasing by \$2 million.¹⁷⁶

¹⁷¹ Schlanger Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 279-81. Harvey Johnson, Director, U.S. Dep’t of Veterans Affairs, Office of Resolution Management, claimed he secured budget increases for VA OCR “based on a sound business case that we built using data science to show here is what I need in order to properly execute a civil rights program, whether it be internal or external.” Harvey Johnson, Director, U.S. Dep’t of Veterans Affairs, Office of Resolution Management, testimony, *Federal Civil Rights Enforcement Briefing*, pp. 126-27. Johnson did not explain the basis of the data science the office used.

¹⁷² Francois Testimony, *Federal Civil Rights Enforcement Briefing*, p. 226.

¹⁷³ *Ibid.*, 229.

¹⁷⁴ See *infra* Figure 3.1 (Requested and Allocated Budget for ED OCR FY 2016 to FY 2018).

¹⁷⁵ See *infra* Figure 4.1 (Requested and Allocated Budget for HHS OCR FY 2016 to FY 2018).

¹⁷⁶ See *infra* Figure 6.2 (Requested and Allocated Budget for OFCCP FY 2016 to FY 2018).

Professor Francois also noted several consequences to agencies becoming “ghost agencies” which include:

- The communities that these agencies are designed to serve are ultimately not getting the justice they deserve.
- There is a loss of institutional memory, and agencies will “forget” how to properly engage in effective civil rights enforcement work.¹⁷⁷
- There is a “loss of deterrence effect,” which disincentivizes certain entities to uphold their responsibilities under the law.
- There is a loss of “doctrinal development,” which is an incredibly important role of civil rights offices to play in their specific area of focus, as courts tend to give them more leeway in the course of litigation than is given to private litigants.¹⁷⁸

In early 2017, the Trump Administration announced a proposal to merge DOL’s OFCCP with EEOC and create a single agency working on employment discrimination, which the Administration cited as a way to promote government efficiency.¹⁷⁹ The proposal also sought to reduce OFCCP’s budget by \$17 million and reduce its staff by approximately 25 percent.¹⁸⁰ The Senate Appropriations Committee rejected the proposal, but the committee did encourage OFCCP to look for ways to become more efficient as its funding would be reduced.¹⁸¹ As discussed in more detail in Chapter 6, OFCCP is aiming to reach a much higher percentage of contractors

¹⁷⁷ The institutional memory loss Professor Francois describes here operates in practice not as actual memory loss but as patterns of engagement that calcify as agency practice, requiring affirmative change to alter. *See, e.g.* Society for History in the Federal Government, “Historical Programs in the Federal Government,” 1992, <http://www.shfg.org/Historical-Programs-Guide> (noting that “Government decision makers unacquainted with the history of their organizations are comparable to amnesia victims who do not remember people, places, and events in their past,” and “[o]ften, these officials’ lack of institutional memory affects their perceptions of the character and mission of their organizations and the past pattern of agency decisions”); *see also, e.g.* Larry Schwartzol, “DOJ’s War on Competence,” *Huffpost*, May 25, 2011, https://www.huffpost.com/entry/dojs-war-on-competence_b_44808?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAANFOPV4tmtP2iaQm1ydW822yqRGD5xJRRfQ3vuNFg1kwx5rBb1el38tKTDWuIXQ7Ey5uZUDSfZS_OfxeZM-wNmJkoZsIWDOqgtES3TKdBp-pzF5ZiY2kFallsz7FEcXLh_MqXFSbczdZEsI3jU5zXa6sckP_6AVg4xWqKrq437tp (discussing how DOJ was “populated [with] key components of DOJ partisan operatives, many of whom lack substantive qualification for their jobs,” who remain “embedded in the government—and shielded by civil service protections against new bosses who want to oust them,” has “resulted in an alarming exodus of career attorneys—the longtime backbone of the [Civil Rights] Division that had historically maintained the institutional knowledge of how to enforce our civil rights laws”); *see also, e.g.* Katherine Barrett & Richard Greene, “Higher the Rank, Higher the Turnover,” *Governing the States and Localities*, Jun. 23, 2016 (discussing how higher-ranking positions often experience the highest rate of turnover in state government, noting that “[s]uch a high turnover is hazardous to a state’s smooth functioning” and “you lose institutional knowledge” which is one key to success).

¹⁷⁸ Francois Testimony, *Federal Civil Rights Enforcement Briefing*, p. 230.

¹⁷⁹ *See infra* notes 1904-1914 and 2122-4 (discussing proposed merger between DOL and EEOC).

¹⁸⁰ Lawrence Z. Lorber, Annette Tyman, and Michael L. Childers, “President Trump’s Budget Includes Proposed Merger of EEOC and OFCCP,” *Seyfarth Shaw LLP*, May 23, 2017, https://www.seyfarth.com/publications/OMM052317-LE#_ftn1.

¹⁸¹ *See* Suzanne Keys, “EEOC and OFCCP Merger Stalled...For Now,” *BALANCEView*, Sep. 26, 2017, <https://www.berkshireassociates.com/balanceview/eoc/ofccp-merger-stalled-for-now>.

through compliance assistance, and compliance verification and incentives.¹⁸² OFCCP is looking for companies to take proactive steps to comply in advance of enforcement, which requires more resources.¹⁸³

Additionally, USDA solicited formal comments on a proposed reorganization of OASCR, in line with Executive Order 13781 which called for reorganization within the executive branch agencies.¹⁸⁴ The agency stated that the reorganization was designed to consolidate civil rights management functions across USDA to improve customer service and maximize efficiency.¹⁸⁵ The plan has raised concern from various civil rights advocates as to the elimination of certain positions that would come with this restructuring. The USDA Office of Inspector General (OIG) itself cautioned USDA to consider “OIG’s unique mission and independence,” when considering realignment, and indicated it would continue to examine “the effectiveness of this realignment as part of our future audit planning process.”¹⁸⁶ The USDA has a documented history of discrimination in past decades in the delivery of programs and the treatment of employees, and during the period from 2001-2008, OASCR only found merit to one complaint of program discrimination out of more than 14,000 complaints filed during that time.¹⁸⁷

Whether and How Effectively the Civil Rights Office Engages in Strategic Planning and Self-Evaluation

In the 2002 review of federal civil rights enforcement, the Commission stressed the importance of clearly communicating prerogatives in order to increase effectiveness, recommending “all federal agencies should include civil rights objectives and goals in their strategic plans.”¹⁸⁸ Leaders of civil rights organizations made clear in their testimony before the Commission that a lack of transparency remains an issue hampering civil rights enforcement on the federal level. At the Commission’s briefing, Fatima Goss Graves noted that in the absence of effective agency communication, “there are sort of basic and longstanding concerns and a real worry that the wrong communication is going out there.”¹⁸⁹ Vanita Gupta, President of Leadership Conference on Civil and Human Rights and former head of the DOJ Civil Rights Division, followed up on this point, stating “it’s really important that the public have access to critical data on civil rights enforcement.”¹⁹⁰ She suggested this transparency would aid agencies in the essential work of articulating “their law enforcement objectives and goals and mandates.”¹⁹¹

¹⁸² U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

¹⁸³ *Ibid.*

¹⁸⁴ *See infra* notes 3151-69 and Figures 12.2 and 12.3.

¹⁸⁵ *See* Strengthening Civil Rights Management, 83 Fed. Reg. 10,825 (Mar. 13, 2018).

¹⁸⁶ Phyllis K. Fong, USDA Inspector General, Comments on “Strengthening Civil Rights Management” Request for Information, 83 Fed. Reg. 10825 (Mar. 23, 2018), <https://www.regulations.gov/document?D=USDA-2018-0002-0006> (comment from Amy Lowenthal attaching letter from Inspector General Fong).

¹⁸⁷ *See infra* note 3173.

¹⁸⁸ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 47.

¹⁸⁹ Goss Graves Testimony, *Federal Civil Rights Enforcement Briefing*, p. 194.

¹⁹⁰ Vanita Gupta, President and CEO, Leadership Conference on Civil and Human Rights, Testimony, *Federal Civil Rights Enforcement Briefing*, p. 195.

¹⁹¹ *Ibid.* *See also* Thompson Testimony, *Federal Civil Rights Enforcement Briefing*, pp.197-98.

Strategic plans for civil rights enforcement may be issued at the agency and/or civil rights office level. The agency civil rights offices evaluated herein differ in whether they conduct strategic planning with civil rights objectives. Some of the larger civil rights offices, such as DOJ CRT, EEOC, and ED OCR, issue strategic plans or conduct strategic planning as a part of their budget planning process. These plans have explicit civil rights objectives, though they vary in their specificity. For example, DOJ's CRT has identified combatting hate crimes and sexual harassment, among other goals, in its CRT-specific FY 2018 strategic plan.¹⁹²

Some federal agencies include civil rights objectives in their agency-wide strategic planning. For instance, HUD's Strategic Plan for 2014-2018 included several strategic objectives related to fair housing that addressed the efforts of FHEO as well as integrating principles of fair housing into HUD's other programs.¹⁹³ HUD's *Strategic Plan 2018-2022*, however, does not mention fair housing or civil rights enforcement among its priorities for the next four years.¹⁹⁴ HUD remains focused on its strategic goals of advancing economic opportunity, protecting taxpayer funds, and streamlining operations, but chose not to include any fair housing-related strategic goals or objectives.¹⁹⁵ The omission of fair housing in this most recent strategic plan reflects a change in civil rights prioritization at HUD. Agency strategic plans are shared with the public, and the inclusion of civil rights goals and objectives in agency strategic plans are a transparent way for an agency to demonstrate its commitment to and prioritization of civil rights enforcement. Similarly, the lack of inclusion of civil rights-focused priorities also communicates a particular message to the public.

But Bryan Greene identified FHEO's priorities in his testimony before the Commission. The five identified priorities were: timely, effective investigations; issuance of clear, helpful assistance-animal guidance; combatting of sexual harassment in housing; meaningful, less burdensome implementation of the Fair Housing Act's "affirmatively furthering" equal access to housing

¹⁹² See *infra* note 501.

¹⁹³ U.S. Dep't of Hous. and Urban Dev., *Fiscal Year 2016 Annual Performance Report*, p. 65, https://www.hud.gov/sites/documents/FY_2016_APR.PDF [hereinafter HUD, *2016 Annual Performance Report*].

¹⁹⁴ U.S. Dep't of Hous. and Urban Dev., *Strategic Plan 2018-2022*, February 2018, <https://www.hud.gov/sites/dfiles/SPM/documents/HUDSTRATEGICPLAN2018-2022.pdf> [hereinafter HUD, *FY 2018-2022 Strategic Plan*]; see also U.S. Dep't of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). HUD commented:

HUD has clarified that there is no change in prioritization. The 2018-2022 plan simply takes it as axiomatic that HUD's bedrock mission is fighting discrimination and then uses the strategic goals section to delineate methods of improving operational efficiency. The core language from the 2014-2018 strategic plan on discrimination was not eliminated, rather it was moved to the introductory section articulating HUD's purpose where it is front and center. The first line of the 2018-2022 report reads: "HUD is working to . . . build inclusive and sustainable communities free from discrimination."

Ibid.

¹⁹⁵ HUD, *FY 2018-2022 Strategic Plan*, *supra* note 194, at 2.

mandate; and greater oversight of Fair Housing Assistance Program (FHAP) and Fair Housing Initiatives Program (FHIP) to promote higher quality work.¹⁹⁶

Given the agency-level nature of its civil rights enforcement mission, EEOC has issued a strategic plan for FY 2018-2022 that focuses on goals of combatting and preventing employment discrimination through the strategic application of EEOC's law enforcement authorities; preventing employment discrimination and promoting inclusive workplaces through education and outreach; and achieving organizational excellence.¹⁹⁷ In addition, EEOC noted that it "solicited and received comments from a wide range of stakeholders and the public."¹⁹⁸ EEOC also issued a strategic enforcement plan for FY 2017-2021, which focuses on its enforcement priorities, which include (but are not limited to) protecting vulnerable workers and underserved communities, equal pay, and systemic workplace harassment.¹⁹⁹

The Commission has previously recommended that strategic plans should include "(1) specific short-term goals and long-term objectives, (2) timeframes for meeting goals and objectives and (3) consideration of both available and projected resources and budget constraints."²⁰⁰ However, in researching this report and in the responses to the Commission's interrogatories, staff found an overall dearth of data about agency performance and effectiveness (with a few notable exceptions).²⁰¹ For example, information about DOJ CRT's hundreds of cases was fairly accessible, but Criminal Section cases were not published on the website and there were other major gaps in the data about CRT's activities.²⁰² The Office of Inspector General also critiqued the CRT for lack of transparency about how it handles complaints about police misconduct.²⁰³

Congress explicitly requires some agencies, such as ED OCR, HUD FHEO, USDA OASCR, and DHS CRCL, to report to Congress the work of their civil rights enforcement office and whether these offices have met their statutory responsibilities.²⁰⁴ As of this writing, the last report from ED OCR under this requirement was from 2016, and the last report from HUD FHEO and from DHS

¹⁹⁶ Greene Statement, at 3.

¹⁹⁷ See *infra* notes 2148-2153 (discussing EEOC's FY 2018-2022 strategic plan goals).

¹⁹⁸ U.S. Equal Employment Opportunity Comm'n, *Strategic Plan for Fiscal Years 2018-2022*, p. 1, https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_18-22.pdf [hereinafter EEOC, *FY 2018-2022 Strategic Plan*].

¹⁹⁹ See *infra* notes 2165-2171 (discussing EEOC's FY 2017-2021 strategic enforcement plan goals).

²⁰⁰ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 21.

²⁰¹ See, e.g., *supra* notes 1227-1239 (discussing ED OCR's research and data collection efforts).

²⁰² U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). DOJ noted that "Federal Rule of Criminal Procedure 6 prohibits disclosure of grand jury sensitive information. Moreover, unlike civil cases, criminal cases do not result in public settlements. In any event, the Criminal Section issues press releases about significant developments in criminal cases, such as indictments and convictions, that are available on the DOJ CRT website." *Ibid.*

²⁰³ U.S. Dep't of Justice, Office of the Inspector General, Audit of the Department of Justice's Efforts to Address Patterns or Practices of Police Misconduct and Provide Technical Assistance on Accountability Reform to Police Departments, February 2018, p. 5, <https://oig.justice.gov/reports/2018/a1814.pdf> [hereinafter DOJ, *Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct*]. See also *infra* note 613-614 (regarding some subsequent improvements).

²⁰⁴ See Duncan Statement, at 3 (citing section 203(b)(1) of the Department of Educ. Organization Act; 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1).

CRCL were from 2017, notwithstanding the statutory requirement that these reports be annual.²⁰⁵ When done, such public reporting not only demonstrates that agency civil rights offices are engaging in self-reflection and self-evaluation, but also displays a transparency that informs the public of the civil rights values and practices of the agency. Fatima Goss-Graves stated in her testimony before the Commission that it's important for the heads of civil rights offices to "communicate very strongly the values around why they're in the business of enforcing our civil rights laws and that the various institutions that they have jurisdiction over, that they have critical obligations that continue no matter the public narrative."²⁰⁶

Such reporting or strategic planning can also provide critical information to leadership on how to better train their staff to address any weaknesses in the efficacy of their offices. Enforcement offices differ in whether they evaluate their own efficacy, either as a part of their strategic planning process or otherwise. Some offices also use particular standards or metrics to evaluate the efficacy of their staff on an individual basis. Some agencies use case closure rates as one measure of office success, including ED OCR and HUD FHEO.²⁰⁷

The Commission received testimony identifying additional measures to self-evaluate agency efficacy. Bryan Greene stated that there's been a "sort of a tug-of-war over the issues of volume and getting cases done on a timely basis and achieving the optimal outcomes for individuals in those cases. They are not mutually exclusive."²⁰⁸ Greene said he thinks the key is "having staff resources to go in and do quality assurance."²⁰⁹ Craig Leen, Director of DOL OFCCP, said he has changed OFCCP's measure of success; whereas previous Administrations used a closed case indicator as the metric, now OFCCP is looking at adopting an index that "also rewards more the bigger cases."²¹⁰ Additionally, DOL requires that all staff performance management plans link to the respective agency's operating plan.

Carol Miaskoff, Associate Legal Counsel at EEOC, testified that individual employee evaluations are linked to the strategic and strategic enforcement plans of the agency.²¹¹ These reportedly focus on identifying and resolving systemic discrimination (in addition to individual complaints).²¹² Following EEOC's 2005 adoption of a Systemic Task Force, a 2016 internal report reviewing its systemic enforcement programs discussed the achievements of its systemic program declaring that

²⁰⁵ U.S. Dep't of Educ., "Serial Reports Regarding OCR Activities," <https://www2.ed.gov/about/offices/list/ocr/congress.html> (accessed Oct. 15, 2019) [hereinafter U.S. Dep't of Educ., "Serial Reports Regarding OCR Activities"]; U.S. Dep't of Homeland Security, "CRCL Annual Reports to Congress," <https://www.dhs.gov/publication/crcl-annual-reports>.

²⁰⁶ Fatima Goss-Graves, President and CEO of the National Women's Law Center, Testimony, *Federal Civil Rights Enforcement Briefing*, p. 196.

²⁰⁷ See *infra* notes 1086-1106 (discussing in part the ED OIG inspection report's concern that case closure as metric could incentivize staff to close cases without effective evaluation); see Greene Statement, at 1 (discussing HUD).

²⁰⁸ Greene Testimony, *Federal Civil Rights Enforcement Briefing*, p. 73.

²⁰⁹ *Ibid.*

²¹⁰ Craig Leen, Director of the Office of Federal Contract Compliance Programs, U.S. Dep't of Labor, testimony, *Federal Civil Rights Enforcement Briefing*, p. 72.

²¹¹ Miaskoff Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 70-71.

²¹² See *infra* notes 2169-2171 (discussing EEOC's focus on systemic discrimination).

EEOC had “made considerable progress in achieving a truly nationwide, coordinated, and strategic systemic program.”²¹³ The report also noted that:

- EEOC has built its capacity so that it is able to undertake systemic investigations and litigation in all of its districts, and each district has initiated systemic investigations and lawsuits.
- Coordination of systemic investigations has significantly increased, with increased information sharing and partnership across offices.
- EEOC has bolstered its enforcement staff numbers and training resources for staff, which has ultimately led to a 250 percent increase in systemic investigations since 2011.
- Over 80 percent of systemic resolutions raised identified national priority issues in FY 2015.
- Through the voluntary resolution process, the conciliation success rate has tripled since 2007, from 21 percent in 2007 to 64 percent in 2015.
- The systemic litigation program has achieved a 10-year success rate of 94 percent for systemic lawsuits.
- From 2011 through 2015, EEOC has tripled the amount of monetary relief for victims, compared to the monetary relief recovered in the first five years after the Systemic Task Force Report (2006).²¹⁴

EEOC has also noted that one of its strategic goals is to educate members and covered employers in the public and government sectors of the public about employment discrimination laws, and to achieve more inclusive work environments.²¹⁵

In contrast to this detailed self-evaluation, the Commission’s research shows that DOJ’s Civil Rights Division’s metric centers on the success rate of its cases – it sets a goal of 85 percent of cases being successful, and reports that it has well exceeded that goal in the last three fiscal years.²¹⁶ By focusing on percent, this metric does not take into account the number of enforcement actions or cases resolved, or whether those cases address systemic discrimination, or whether the Division is equally active and effective across all of its component sections. However, the Commission’s research indicates that CRT is currently very effective in some of the areas it has set forth in its strategic plan, particularly in bringing enforcement actions against alleged perpetrators of hate crimes and sexual harassment.²¹⁷ Simultaneously, from FY 2016 to FY 2018, CRT decreased in the number of enforcement actions against law enforcement agencies allegedly

²¹³ U.S. Equal Employment Opportunity Comm’n, *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*, Jul. 7, 2016, p. iv, <https://www.eeoc.gov/eeoc/systemic/review/upload/review.pdf> [hereinafter EEOC, *A Review of the Systemic Program*].

²¹⁴ *Ibid.*, iv-v.

²¹⁵ *See infra* note 2148.

²¹⁶ *See infra* note 492.

²¹⁷ *See infra* notes 508-509 and 529-531.

engaged in patterns or practices of constitutional violations,²¹⁸ and this parallels the fact that those actions which were part of the FY 2017 strategic plan were omitted in subsequent plans.²¹⁹

Effective Use of Enforcement Tools: Complaint Processing, Agency-Initiated Charges, and Litigation

Many civil rights offices have the authority to adjudicate complaints administratively and to bring agency-initiated charges (defined as the authority to investigate self-initiated charges, absent the filing of a specific complaint).²²⁰ Some may take further steps towards litigation, but with the exception of EEOC, agency civil rights offices generally must defer to DOJ's authority to prosecute civil rights violations in federal court.²²¹ EEOC has the authority to bring affirmative litigation for the issues under its jurisdiction.²²² Each of the three steps of this essential enforcement tool are addressed in chronological order below.

In 2002, the Commission found that after reviewing the civil rights complaint processing procedures of several agencies during the prior 10 years, there were ongoing challenges and insufficiencies.²²³ The Commission went on to state that due to these challenges:

The Commission has thus made many recommendations for charge processing and complaint resolution. Generally, the recommendations have focused on ensuring that agencies have a comprehensive process to resolve complaints efficiently and expeditiously to achieve maximum results. Another key theme has been improving customer service by creating systems that are easy to navigate for potential charging parties and publicizing policies and procedures.²²⁴

Current Commission research shows that some civil rights offices process every complaint that passes an initial screening for jurisdiction (e.g., ED OCR, HHS OCR,²²⁵ HUD FHEO),²²⁶ whereas others only process a small portion or have a system to select representative complaints (e.g., DHS CRCL).²²⁷ At EEOC, the agency investigates all charges that are filed.²²⁸

²¹⁸ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section Cases.

²¹⁹ See *infra* notes 501-502 and 530-531.

²²⁰ See *infra* notes 446-448, 1029-31, 1273-75, 1476-80, 1843-45, 1850-52, 2095-7, 2327-9, 2631-3, 2809-11, 3006-8, 3119-21, 3319-21, 3455-7 (referencing the enforcement tools sections in each chapter, specifically to the bullets discussing complaint processing, agency initiated charges, and litigation).

²²¹ See *infra* note 376 (discussing 28 C.F.R. § 0.50(g)) (1969) and notes 954-6 (DOJ and EEOC).

²²² See *infra* note 2097.

²²³ USCCR, *Ten-Year Check-Up: Volume 1*, *supra* note 1, at 34.

²²⁴ *Ibid.*

²²⁵ U.S. Dep't of Health and Human Services, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file) (noting that "HHS OCR processes and investigates every complaint that passes an initial screening for jurisdiction").

²²⁶ 34 C.F.R. §§ 100.7(e), 104.61, 106.71, 108.9, 110.34.

²²⁷ See U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 19. As discussed in the chapters that follow, these agencies lack jurisdictional authority so to prioritize their cases. Nonetheless, in practice the agencies do select and long have selected which cases to investigate.

²²⁸ See *infra* notes 2172-88 (discussion of EEOC procedures and practices under 29 C.F.R. § 1614).

But in evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction that come to them, leaving allegations of civil rights violations unredressed. For example, with rare exceptions, DOJ CRT has no known procedures to process complaints, and has no duty to respond to the “thousands” of complaints it told the Commission it receives each year.²²⁹ Moreover, whereas the Commission has recommended “streamlining the intake process and formalizing intake procedures to ensure consistency across offices,” CRT has no known uniform procedures across its nine sections to inform complainants of the status of any enforcement actions that might be taken in response to their complaints.²³⁰ A recent DOJ OIG report recommended that the Special Litigation Section improve its procedures, and some improvements have been made; however the Commission was not provided with nor could the Commission find any indication that these improvements have been made in all of the other CRT sections.²³¹

Some agency leaders have acknowledged that they have to prioritize, or find alternate ways of working with the limited resources that they have.²³² The *Prioritization* section earlier in this chapter discussed various panelists’ testimonies that explained how agencies have to use their resources selectively to maximize their efficiency, and while some opt to advance agency policy priorities, some believe that prioritization is an “impossible task” due to the importance of all civil rights issues.²³³

The Deputy Director of DHS CRCL testified to the Commission that they use the total number of complaints to gauge how significant a civil rights issue might be, but then only select a representative number to address directly.²³⁴ CRCL told the Commission that it receives over 4,000 complaints per year while only processing a representative sample, and it is not clear how CRCL communicates with the remaining complainants about the status of their claim or how it is resolved.²³⁵

Other agencies decide on a set number of issue-based priorities, and focus on resolving complaints that fall within those designated priorities.²³⁶ The data provided to the Commission shows that Treasury’s civil rights office seems to focus exclusively on complaints about discrimination against individuals with disabilities, although its jurisdiction extends to a broader range of civil rights protections including protections against race, national origin and sex-based discrimination in lending.²³⁷

²²⁹ See *infra* notes 536-7 (regarding thousands of complaints), 538 (Justice Manual generalized processes on how complaints may be investigated) and 602-19 (Special Litigation Section processes, contrasted with other sections).

²³⁰ USCCR, *Ten-Year Check-Up: Volume 1*, *supra* note 1, at 34; see *infra* notes 538 and 602-19.

²³¹ See *infra* notes 602-19.

²³² Venture Testimony, *Federal Civil Rights Enforcement Briefing*, p. 125; Miaskoff Testimony, *Federal Civil Rights Enforcement Briefing*, p. 32.

²³³ See *supra* note 144.

²³⁴ Venture Testimony, *Federal Civil Rights Enforcement Briefing*, p. 125.

²³⁵ See *infra* notes 2472-8.

²³⁶ See *supra* notes 144-145 and 164-165.

²³⁷ See *infra* notes 3377 (discussing that all 31 complaints reportedly received during FY 2016 – 2018 were based on disability).

Whether an agency can initiate charges based on their findings is also critically important. By agency-initiated charges, the Commission means the authority to self-initiate enforcement, absent the filing of a specific complaint.²³⁸

The Commission also found in 2002 that agency-initiated charges are “useful for identifying systemic discrimination.”²³⁹ The Commission’s investigation reflects that this truism still persists today. For example, Treasury’s external civil rights enforcement office only received 30 complaints in FY 2017, and they were all filed under one basis, disability.²⁴⁰ But with billions of federal funding from Treasury going to state, local, and private financial institutions (*see* Table 1.4), there are likely to be other civil rights issues such as racially discriminatory credit practices, which the 30 complaints filed with Treasury do not give the civil rights office the opportunity to address.²⁴¹ Agency-initiated charges and compliance reviews could address such issues not coming in to the agency through complaints.

Whether enforcement actions are developed by individual complaints or agency-initiated charges, agencies’ Title VI, Title IX and Section 504 regulations require an attempt to resolve complaints by informal means whenever possible, prior to taking other enforcement actions.²⁴² DOJ and many other agencies highly rely on settlements, mediation, or other informal means of complaint resolution.²⁴³ For instance, one of DOJ CRT’s FY 2017 resolutions was a partnership that did not include any specific agreement, but instead was documented as a joint effort providing for compliance in the period after a complaint was received and the party agreed to take measures to come into compliance.²⁴⁴ CRT told the Commission that it used this resolution type because Title VI “is explicitly a voluntary compliance statute requiring DOJ and the recipients to work together

²³⁸ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 35. Note that this definition is similar to how ED OCR structures its proactive compliance evaluations, which may not become enforcement actions if ED OCR’s compliance evaluation results in finding no violations.

²³⁹ *Ibid.*

²⁴⁰ *See infra* notes 3382 (although one complaint of the 30 mentioned was filed on the basis of disability and age).

²⁴¹ *See infra* Table 1.5 (\$5-6 billions of dollars issued in FY 2016-18) and notes 3411-21 (Treasury civil rights compliance approaches) and note 978 (DOJ prosecution of discriminatory lending practices).

²⁴² *See, e.g.*, 28 C.F.R. § 42.107 (“If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this subpart, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible”); *see also, e.g.*, 24 C.F.R. § 103.300 (“During the period beginning with the filing of the complaint and ending with the filing of a charge or the dismissal of the complaint by the General Counsel or the Assistant Secretary, the Assistant Secretary will, to the extent feasible, attempt to conciliate the complaint”); 40 C.F.R. § 7.120(d)(2) (“OCR shall attempt to resolve complaints informally whenever possible”); 29 C.F.R. § 1601.24(a) (“Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion”); 49 C.F.R. § 21.11(d)(1) (“If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means whenever possible”).

²⁴³ *See infra* notes 633-41 (DOJ); 1116-25 (ED); 1376 (HHS); 1581 (HUD); and 2188-90 (EEOC).

²⁴⁴ *See* U.S. Dep’t. of Justice, “Press Release: Justice Department and Washington State Courts Partner to Ensure Access to State Court Services for Limited English Proficient Individuals,” Jul. 18, 2017, <https://www.justice.gov/usao-wdwa/pr/justice-department-and-washington-state-courts-partner-ensure-access-state-court> [hereinafter DOJ, “Justice Department and Washington State Courts Partner to Ensure Access to State Court Services for Limited English Proficient Individuals”].

jointly.”²⁴⁵ CRT added that “by its very terms, Title VI is a voluntary compliance statute and was enacted with a view to using procedures that would not burden the courts. Litigation and fund termination are options of last resort under this statutory regime.”²⁴⁶

As another example, a GAO report indicates that when OFCCP finds violations, it will generally resolve them through conciliation agreements, and “between fiscal years 2010 and 2015, OFCCP resolved 99 percent of violations with conciliation agreements—agreements between OFCCP and the contractor—that outline remedial action that contractors agree to take to correct violations.”²⁴⁷

Lilian Dorka, Director of the Environmental Protection Agency’s External Civil Rights Compliance Office (ECRCO) emphasized reliance on informal complaint resolution methods. She testified: “We have refined our skills in crafting Informal Resolution Agreements that produce results and benefits for recipients and communities alike, while effectively resolving the civil rights issues raised through complaints, without the need for formal findings which attribute blame and often require resource intensive and time-consuming investigations.”²⁴⁸ Although settlements are an effective tool, and they allow an agency to increase productivity and decrease backlogs by resolving more cases, deciding to settle rather than pursue litigation or formal administrative finding can in particular instances indicate or reflect civil rights offices’ choice not to use authorities and/or enforcement tools they have.²⁴⁹ The EPA, for example, notably did not ever make a single formal finding of discrimination or Title VI violation until 2016.²⁵⁰ This absence of violation finding was not due to a lack of viable complaints, and environmental justice groups successfully sued the EPA over its lackluster civil rights enforcement in 2015.²⁵¹

If voluntary compliance is not successful, the vast majority of federal agencies examined (except for EEOC) may refer complaints to DOJ to initiate litigation in federal court to enforce Title VI or

²⁴⁵ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). This information was not listed on CRT’s website which was referenced in response to the Commission’s Interrogatories.

²⁴⁶ *Ibid.*

²⁴⁷ U.S. Government Accountability Office, *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*, September 2016, p. 24, <https://www.gao.gov/assets/680/679960.pdf> [hereinafter GAO, *Strengthening Oversight*].

²⁴⁸ Lilian Dorka, Director, External Civil Rights Compliance Office, U.S. Environmental Protection Agency, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 3 [hereinafter Dorka Statement].

²⁴⁹ See USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 38 (explaining how mediation and settlement may fail to resolve underlying or systemic causes of discrimination); *infra* notes 549-61 and 565-84; Ian MacDougall, “Why Jeff Sessions’ Final Act Could Have More Impact Than Expected,” *ProPublica*, Nov. 12, 2018, <https://www.propublica.org/article/why-jeff-sessions-final-act-could-have-more-impact-than-expected>.

²⁵⁰ U.S. Comm’n on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,898*, September 2016, p. 40, https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf [hereinafter, USCCR, *Environmental Justice*].

²⁵¹ *Californians for Renewable Energy v. U.S. Dep’t of Environmental Protection*, No. 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018); Nicholas Iovino, “Judge Rules EPA Improperly Delayed Racial Bias Probes,” *Courthouse News Service*, Apr. 2, 2018, <https://www.courthousenews.com/judge-rules-epa-improperly-delayed-racial-bias-probes/> [hereinafter Iovino, “Judge Rules EPA Improperly Delayed Racial Bias Probes”].

other federal civil rights laws.²⁵² The discretion of whether to prosecute them generally rests with DOJ.²⁵³ Perhaps critically, DOJ focuses more on systemic civil rights litigation under the civil rights statutes it enforces.²⁵⁴ In 2002, the Commission stated that rooting out discrimination is an essential goal of civil rights enforcement, and that litigation is sometimes necessary to meet that goal.²⁵⁵ The Commission commented in 2002 that:

Many agencies consider litigation a last resort for resolving complaints of discrimination. While the Commission recognizes the resource demands in litigating cases, it also recognizes the importance of doing so to develop case law, to obtain appropriate relief, and to send a message to potential violators about the strength of the agency's enforcement program. Thus, many of the Commission's recommendations in this area have centered on stepping up litigation in areas of law that are relatively undeveloped.²⁵⁶

Moreover, the Commission stated that “because few complaints result in litigation, enforcement agencies must have strong litigation strategies. The Commission recommended that litigation be central to an enforcement strategy but advised agencies to seek and litigate cases that set legal precedent and to mediate other cases. The Commission also advised agencies to seek input from stakeholders in developing litigation strategy.”²⁵⁷ Regarding FY 2016 – 2018, community input was rarely documented in the data agencies provided to the Commission.²⁵⁸

Regarding EEOC's litigation efforts, because of resource limitations, it “can only file lawsuits in a very small number of the charges where [EEOC] find[s] reasonable cause to believe that there was discrimination.”²⁵⁹ EEOC explained that:

Recognizing its resource limitations, the [EEOC] has long emphasized that the litigation program should focus on cases that have the potential to impact multiple workplaces or large groups of applicants or employees, emerging issues where the agency's expertise may be especially critical to achieving a successful outcome, and individual cases where broader law enforcement goals can be advanced with the successful resolution of the case. In addition, the litigation program focuses on population groups and geographic locations where private enforcement of anti-discrimination laws is rare, and individuals have minimal access to the legal system to protect their rights.²⁶⁰

²⁵² See, e.g., *infra* notes 1157 (ED), 1386 (HHS), 1584 and 1599 (HUD), 2701 (EPA), 2879 (DOT) and 3047 (VA).

²⁵³ See *infra* notes 371-84, 532-743 (referencing DOJ CRT Legal Authority and Responsibility and Complaint Processing sections).

²⁵⁴ See *infra* notes 541-64.

²⁵⁵ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 38.

²⁵⁶ *Ibid.*, 38.

²⁵⁷ *Ibid.*

²⁵⁸ For documented instances, see *infra* notes 969, 979 and 981 (DOJ); 1223 and 1239-40 (ED); 1738-43 (HUD); 2605-6 (DHS); 2770-4 (EPA); and 3074-7 (VA).

²⁵⁹ Miaskoff Testimony, *Federal Civil Rights Enforcement Briefing*, p. 32.

²⁶⁰ U.S. Equal Employment Opportunity Comm'n, *Fiscal Year 2020 Congressional Budget Justification*, March 2019, p. 40, <https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf> [hereinafter EEOC, *FY 2020 Budget Justification*].

In addition, EEOC has the authority to initiate investigations through Commissioners' charges that can lead to litigation in federal court.²⁶¹ The Commission also heard testimony that, "[o]ne of the most powerful tools the Fair Housing Act provides HUD is the authority to bring cases of its own initiative to address a potentially discriminatory practice where no specific individual has filed a complaint. These Secretary-initiated cases are important in combatting policies or practices that can potentially harm a great number of people."²⁶²

During FY 2016 – FY 2018 DOJ CRT mainly engaged in agency-initiated charges and systemic litigation.²⁶³ It enforces several civil rights statutes that authorize federal enforcement action if state or local jurisdictions engage in a pattern or practice of systemic discrimination.²⁶⁴ Under these statutes, either a policy or a systemic practice that results in discriminatory treatment may be considered as evidence of illegal pattern or practice discrimination.²⁶⁵ In addition, many other DOJ CRT cases seek systemic remedies such as modifying voting practices and procedures to remedy Voting Rights Act violations.²⁶⁶ HUD also noted that "[m]any Fair Housing Act cases initiated by the Civil Rights Division are actually initiated when HUD files an administrative charge of discrimination and one of the parties elects to proceed in federal court. In these circumstances, the Fair Housing Act specifies that DOJ "shall" initiate a lawsuit in federal court."²⁶⁷

Commission research shows that CRT's enforcement actions have generally decreased (by 23.7 percent) between FY 2016 through FY 2018.²⁶⁸ The following chart (Figure 1.1) shows the number of civil rights enforcement actions CRT has resolved per fiscal year:

²⁶¹ See *infra* notes 2096, 2176, 2181-3 (discussing EEOC's authority to issue Commissioners' charges).

²⁶² Greene Statement, at 2; Kendrick Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 273-74; Francois Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 271-72.

²⁶³ See Appendix A and see *infra* notes 541-48 and 564-67 for further analysis.

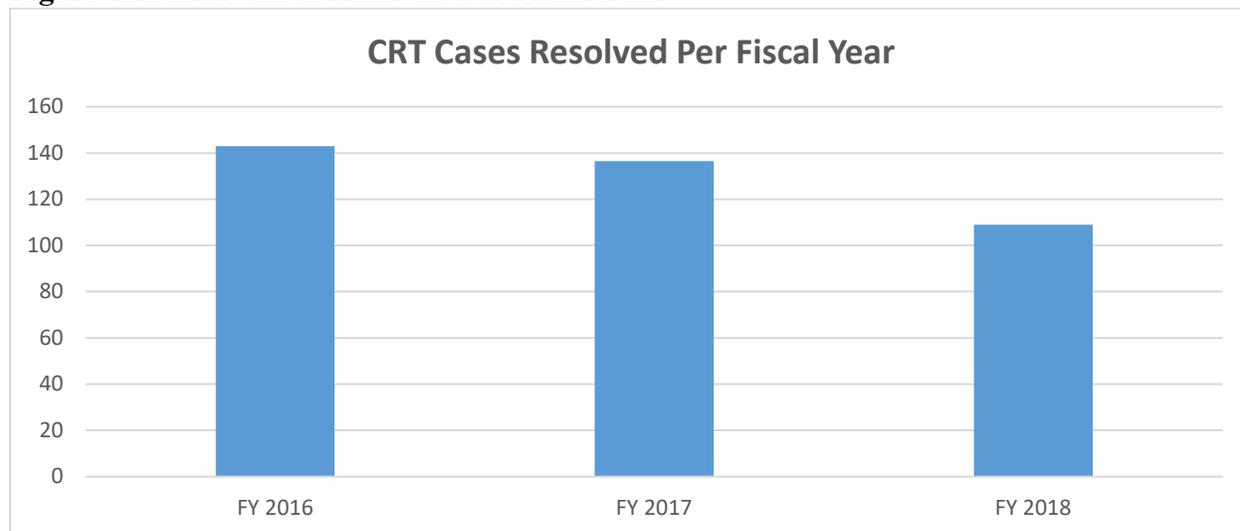
²⁶⁴ See *infra* notes 541-45 (describing DOJ's pattern or practice enforcement authorities).

²⁶⁵ *Ibid.*

²⁶⁶ See *infra* notes 546-61 and 565-7.

²⁶⁷ U.S. Dep't of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

²⁶⁸ See *infra* notes 626-9 and Figure 2.3 (analyzing DOJ CRT cases from Fiscal Years 2016-18). Chapter 2 details the methodology of researching the 388.5 cases resolved by CRT through settlement, consent decree or judicial decisions during FY 2016 – 2018, with data disaggregated by type of case and type of resolution.

Figure 1.1: CRT Cases Resolved Per Fiscal Year

SOURCE: CRT Website; Commission Staff Research

In 2002, the Commission also emphasized that the remedies secured in resolving cases is critically important, stating that “the Commission recognizes that for effective enforcement, remedies must address the root of discrimination.”²⁶⁹ The report warned that “[m]ediation or other settlement agreements, if not performed carefully, may ignore the larger picture in the interest of resolving the complaint at hand.”²⁷⁰ The report went on to explain that in order “[t]o avoid this, the Commission recommended that mediation only be used when it is appropriate to the nature of the complaint, and mediation staff should ensure that settlements include provisions for changes in employer practices or policies that might have a discriminatory effect.”²⁷¹

The Commission’s research for this report shows that DOJ’s current strategy disfavoring resolution of cases by court-ordered consent decrees is likely to have a negative impact on effective enforcement of civil rights.²⁷² Comparing settlements, former Attorney General Sessions stated that out-of-court settlements are different because they require a new lawsuit to enforce them.²⁷³ In contrast, the consent decrees that CRT is able to secure in federal court are more readily enforceable and may include ongoing monitoring with more systemic reform measures that would address the root of discrimination.²⁷⁴ But since former Attorney General Sessions issued a directive memo in November 2018 disfavoring the use of consent decrees to resolve cases, the rate at which

²⁶⁹ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 38.

²⁷⁰ *Ibid.*, 38.

²⁷¹ *Ibid.*

²⁷² *See infra* notes 572-82.

²⁷³ *See infra* note 549 (citing Sessions Memo at n. 2 (defining settlement as “an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract.”)). Compare DOJ’s statement to the Commission that “A settlement agreement is enforceable through court action and is just as ‘enforceable’ as a consent decree.” *See also infra* note 572 (CRT stated: “The Sessions memo represents Department policy binding on CRT.”).

²⁷⁴ *See infra* notes 551-58 and 565-71.

CRT has resolved cases through consent decrees (rather than out-of-court settlements) has plummeted.²⁷⁵

Effective Use of Enforcement Tools: Proactive Compliance Evaluation

In 2002, the Commission noted the importance of monitoring compliance, recommending that federal agencies monitor compliance through pre- and post-award reviews, through data supplied by recipients and other data sources, as well as on-site visits, desk audits, and other methods.²⁷⁶

The impact of civil rights compliance monitoring may be large or small, depending on the efficacy of federal agency monitoring. Trillions of dollars in federal funding supports programs and activities in many sectors of society, which are impacted by how agencies decide to monitor compliance. The following table demonstrates how much federal funding and financial assistance has been awarded to recipients over the fiscal years in question (FY 2016-2018). As noted below, this funding may be awarded to a company, an organization, a government entity (i.e., state, local, tribal, federal, or foreign), or an individual, and this funding may be obligated in the form of a contract, grant, loan, insurance, direct payment, or by other means.²⁷⁷ See Table 1.5.

Table 1.5: Amount of federal funding and financial assistance by federal agency, FY 2016-2018

Agency	Fiscal Year 2016	Fiscal Year 2017	Fiscal Year 2018
DOJ	\$11,877	\$11,691	\$14,245
ED	\$76,758	\$74,663	\$79,573
HUD	\$31,950	\$53,862	\$57,779
HHS	\$1,155,715	\$1,214,140	\$1,231,669
Labor	\$9,690	\$10,446	\$10,020
EEOC	\$48	\$50	\$56
EPA	\$5,283	\$5,181	\$5,688
Transportation	\$69,962	\$68,116	\$74,719
Treasury	\$6,323	\$5,990	\$5,102
DHS	\$26,738	\$28,815	\$44,255
VA	\$198,028	\$203,124	\$192,987
Agriculture	\$134,602	\$122,980	\$121,410
Interior	\$9,890	\$9,683	\$10,455

Source: USASPENDING.gov

Note: Amounts in millions of dollars

Note: All data from [usaspending.gov](https://www.usaspending.gov), using complete category of “Award,” which [usaspending.gov](https://www.usaspending.gov) defines as “Money the federal government has promised to pay a recipient. Funding may be awarded to a company, organization, government entity (i.e., state, local, tribal, federal, or foreign), or individual. It may be obligated (promised) in the form of a contract, grant, loan, insurance, direct payment, etc.”

²⁷⁵ See *infra* notes 574-79, 583, 636-37 and Figure 2.6.

²⁷⁶ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 39-41.

²⁷⁷ USASPENDING.gov, <https://www.usaspending.gov>.

The vast majority of civil rights enforcement offices examined have legal authority as well as responsibility to engage in proactive compliance evaluations. For example, Commission staff research found that the agency’s regulations require DOJ, ED, HHS, HUD, DHS, EPA, DOT, the VA, USDA, Treasury, and DOI to conduct periodic compliance investigations; and in contrast, EEOC’s regulations do not include this requirement.²⁷⁸ The same 11 of the 13 agencies that are required to conduct periodic compliance evaluations have authority under their regulations to enforce based on the findings.²⁷⁹ Regulations require that investigations go through a voluntary compliance process for resolution, but if that is not effective, they can lead to withholding of funds without the need for a complaint from an impacted individual.²⁸⁰

In sum, in most agencies, federal law and regulations provide some basic responsibilities and discretion for agency-initiated monitoring and enforcement. DOJ federal regulatory guidelines summarize the responsibility that comes with this agency discretion as follows:

Primary responsibility for prompt and vigorous enforcement of title VI rests with the head of each department and agency administering programs of Federal financial assistance. Title VI itself and relevant Presidential directives preserve in each agency the authority and the duty to select, from among the available sanctions, the methods best designed to secure compliance in individual cases. The decision to terminate or refuse assistance is to be made by the agency head or his designated representative.²⁸¹

Based on available information, the way the agencies use this discretion varies. For example, DOL OFCCP noted that its “primary enforcement mechanism is neutrally scheduled compliance evaluations (i.e., not prompted by complaints), and OFCCP prioritizes identifying systemic discrimination.”²⁸² Furthermore, “OFCCP’s model is largely proactive, consisting of broad compliance reviews... without the need for a complaint.”²⁸³ DOL OFCCP stated that it is only able to audit about 1 to 2 percent of contractors a year,²⁸⁴ and OFCCP has specifically been focusing on conducting compliance reviews that might result in “big findings.”²⁸⁵ This Trump Administration approach is consistent with the approach taken during the Obama Administration;

²⁷⁸ 6 C.F.R. § 21.11(a) and (c) (DHS); 7 C.F.R. § 15.5(a) (USDA); 24 C.F.R. § 1.7(a) and (c) (HUD); 28 C.F.R. § 42.107(a) and (c) (DOJ); 31 C.F.R. § 22.7 (a) and (c) (Treasury); 34 C.F.R. § 100.7(a) and (c) (Ed); 38 C.F.R. § 18.7(a) and (c) (VA); 40 C.F.R. §§ 7.105, 7.115(a) and (b) (EPA); 43 C.F.R. 17.6(a) and (c) (Interior); 45 C.F.R. § 80.7(a) and (c) (HHS); 49 C.F.R. § 21.11(a) and (c) (DOT). DOL has the authority to conduct compliance evaluations, but is not required to do so by regulation, *see* 41 C.F.R. §§ 60-1.20(a), 60-1.26.

²⁷⁹ *See infra* notes 449 (DOJ), 1031 (ED), 1275 (HHS), 1480 (HUD), 2329 (DHS), 2633 (EPA), 2811 (DOT), 3008 (VA), 3121 (USDA), 3321 (Treasury) and 3457 (DOI). DOL also has this authority. *See infra* notes 1845 and 1952.

²⁸⁰ *See, e.g.* 28 C.F.R. § 42.108(a) (“If there appears to be a failure or threatened failure to comply with this [DOJ Title VI regulation] and if the noncompliance or threatened noncompliance cannot be corrected by informal means, the responsible Department official may suspend or terminate, or refuse to grant or continue, Federal financial assistance, or use any other means authorized by law, to induce compliance with this [DOJ Title VI regulation].”)

²⁸¹ 28 C.F.R. § 50.3(b).

²⁸² U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

²⁸³ *Ibid.*

²⁸⁴ Leen Testimony, *Federal Civil Rights Enforcement Briefing*, p. 24.

²⁸⁵ *Ibid.*, p. 51.

in FY 2016, OFCCP reduced the total number of compliance reviews and focused on big results.²⁸⁶ With several new initiatives, OFCCP has a goal of reaching a much higher percentage of contractors through compliance assistance efforts, compliance verification, and compliance incentives.²⁸⁷ OFCCP is looking for companies to take proactive steps to comply in advance of enforcement, while making compliance reviews and assistance more focused, faster, and less burdensome. OFCCP plans to triple the number of evaluations it schedules in the coming year.²⁸⁸ Although some of the reviews will be abbreviated (focused reviews and compliance checks), the agency will be reminding many more contractors of their EEO obligations.²⁸⁹ Furthermore, OFCCP has recently focused on the establishment of global resolutions and monitoring programs in an effort to expand worker protections to more workplaces. The agency now encourages Early Resolution Procedures to promote early and efficient supply and service compliance.²⁹⁰ The agency is also developing a Voluntary Enterprise-wide Review Program (VERP) that facilitates and confirms enterprise-wide (corporate-wide) compliance by high-performing federal contractors.²⁹¹ The VERP will officially recognize the outstanding efforts of its top-performing contractor participants, and remove VERP participants from the pool of contractors scheduled for compliance evaluations.²⁹²

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

In order to identify what policy guidance materials are, the Commission relies in part on 2015 Government Accountability Office (GAO) testimony to the U.S. Senate regarding *Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Processes*. In her testimony before the relevant Senate subcommittee, GAO's Director of Strategic Issues Michelle Sager explained that:

One of the main purposes of guidance is to explain and help regulated parties comply with agencies' regulations. Even though not legally binding, guidance documents can have a significant effect on regulated entities and the public, both because of agencies' reliance on large volumes of guidance documents and because

²⁸⁶ U.S. Dep't of Labor, *Agency Financial Report Fiscal Year 2016*, pp. 14-15,

https://www.dol.gov/sites/dolgov/files/legacy-files/media_0/Sec/2016annualreport.pdf.

²⁸⁷ U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

²⁸⁸ U.S. Dep't of Labor, "OFCCP has released the FY2019 Supply & Service Scheduling List," <https://www.dol.gov/ofccp/scheduling/index.html> [hereinafter DOL, "OFCCP has released the FY2019 Supply & Service Scheduling List"].

²⁸⁹ See 41 CFR §§ 60-1.20, 60-300.60, and 60-741.60.

²⁹⁰ U.S. Dep't of Labor, OFCCP, Directive 2019-02, Early Resolution Procedures, Nov. 30, 2018, https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_02.html [hereinafter DOL, Early Resolution Procedures].

²⁹¹ U.S. Dep't of Labor, OFCCP, Directive 2019-04, Voluntary Enterprise-wide Review Program (VERP), Feb. 13, 2019, https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_04.html [hereinafter DOL, Voluntary Enterprise-wide Review Program].

²⁹² U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

the guidance can prompt changes in the behavior of regulated parties and the general public.²⁹³

The GAO Strategic Director also explained how guidance fits in the hierarchy of the federal legal system. At the top level are statutes, in which Congress provides authority to agencies; statutes are legally binding. Next, there are federal regulations, which implement statutes and are legally enforceable. Third, guidance may be issued by agencies, through which agencies “may explain how regulations are implemented,” but guidance is not legally binding.²⁹⁴

At the more granular level, civil rights enforcement offices may also use a range of other policy-related tools to assure civil rights protections. In 2002, the Commission considered the following types of policy guidance essential to effective civil rights enforcement: “clear and pertinent policy guidance, including internal procedures, external policy, and current regulations,” as well as technical assistance to help recipients of federal funding “establish policies and procedures that comply with antidiscrimination laws,” and “education and outreach, such as helping victims of discrimination and the public understand their civil rights and how to obtain assistance if discrimination occurs.”²⁹⁵ The Commission also found that effective civil rights enforcement requires promoting a national understanding of discrimination, and that policy was a key component of ensuring this promotion of national understanding.²⁹⁶ In 2002, the Commission took note that over one-third of the 1,100 recommendations the Commission had made in the past ten years concerned policy. Common themes included the need to update regulations, and the Commission also made a specific recommendation on the need for a specialized policy unit in each agency, unencumbered with civil rights enforcement responsibilities. The Commission found that “[t]he lack of updated and clear policy guidance, and the inadequate resources devoted to it, are among the primary reasons for poor civil rights enforcement.”²⁹⁷

The Commission’s 2002 report found that technical assistance may consist of “educational forums, advice, or written policy documents.”²⁹⁸ The Commission encouraged federal agencies responsible for enforcing civil rights laws to implement robust technical assistance programs to assist recipients of federal financial assistance in voluntary compliance with civil rights protections.²⁹⁹

²⁹³ U.S. Gov’t Accountability Office, Statement of Michelle A. Sager, Director, Strategic Issues, Testimony Before the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate, *Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Processes*, GAO-15-834-T, What GAO Found (introductory page), Sept. 23, 2015, <https://www.gao.gov/assets/680/672687.pdf>.

²⁹⁴ *Ibid.*, 6, Figure 1: Hierarchy of Statutory and Regulatory Authority.

²⁹⁵ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 3.

²⁹⁶ *Ibid.*, 1, xi.

²⁹⁷ *Ibid.*, 25.

²⁹⁸ *Ibid.*, 32.

²⁹⁹ *Ibid.*, 32-33.

During the Commission's briefing Robert Driscoll made a distinction between civil rights enforcement and civil rights policy:

I know we currently have a Republican President and a Conservative Attorney General, a situation [with] which I am very familiar, having served under President George W. Bush and Attorney General John Ashcroft and thus, there is controversy and disagreement at a policy level among the civil rights community.

As I have alluded to previously, conservatives, including conservative civil rights lawyers, such as myself, tend to feel bound by statutory and constitutional text. As such, advocacy groups and others that want, in the absence of statutory authority, to advance certain issues . . . are sometimes disappointed. I'm sure there's a member of this panel or members of the group today who are disappointed with some of the current federal civil rights enforcers.

So these disagreements, in my mind, highlight the distinction between civil rights enforcement, the topic of today's panel, and civil rights policy. Federal civil rights enforcers do not write with a free hand.³⁰⁰

In the current evaluation, the Commission observed some trends in policy shifts that have occurred. While the following section does not document every observed trend, it does highlight several noteworthy trends in policy changes that have occurred across these agencies from FY 2016 to FY 2018, to establish a basis for understanding this policy evolution on a macro level. The Commission's analysis is limited to whether policy is being issued, and to changes in policy that would either expand or restrict the effectiveness of civil rights enforcement.

The Commission found that many of the agencies studied in this report are specifically required to issue guidance and technical assistance to recipients of federal financial assistance, which clarifies recipients' obligations under federal civil rights laws.³⁰¹ Moreover, many civil rights offices (e.g., DOJ CRT, ED OCR, DOL OFCCP, HHS OCR, EPA ECRCO) issue guidance documents that may assist recipients of federal funding (such as schools, housing providers, hospitals, etc.) to comply with federal civil rights law.³⁰² Furthermore, in at least one of the relevant statutes, Congress

³⁰⁰ Driscoll, *Federal Civil Rights Enforcement Briefing*, pp. 119-20.

³⁰¹ See, e.g., 28 C.F.R. § 41, Exec. Order 12,250 (1980); 7 C.F.R. § 15.5(a) (requiring USDA to issue guidance and technical assistance); 24 C.F.R. § 1.6(a) (requiring HUD to issue guidance and technical assistance); 29 C.F.R. § 31.5(a) (requiring DOL CRC to issue guidance and technical assistance); 31 C.F.R. § 22.6(a) (requiring Treasury to issue guidance and technical assistance); 34 C.F.R. § 100.6(a) (requiring ED to issue guidance and technical assistance); 40 C.F.R. § 7.20(b) (requiring EPA to issue guidance and technical assistance); 43 C.F.R. § 17.5(a) (requiring DOI to issue guidance and technical assistance); 45 C.F.R. § 80.6(a) (requiring HHS to issue guidance and technical assistance).

³⁰² See, e.g., *infra* notes 803-27, 831, 835-40, 843, 845-859 (relevant DOJ guidance); 1996-1218 (ED); 1393-1422 (HHS); 2006-43 (DOL); and 2754-7 (EPA).

intended to increase effective civil rights enforcement by providing the civil rights office (DHS CRCL) with authority to review agency policy before it is implemented.³⁰³

In its 2003 annual report, ED OCR highlighted the importance of issuing policy guidance, stating: “OCR strives to communicate clearly how the civil rights laws apply in particular situations to help people understand their rights and education institutions understand their obligations. Clearly articulated standards enable OCR staff to make consistent compliance determinations that are legally supportable and based on a fair and thorough analysis of information.”³⁰⁴ However, during FY 2017 and 2018, ED OCR rescinded more policy guidance than it issued.³⁰⁵

Executive Order 12,250, issued in 1980 and later codified in federal regulations, requires DOJ to “coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions” in Title VI, Title IX, Section 504 and any provision of federal law prohibiting discrimination on the basis of race, national origin, disability, religion or sex.³⁰⁶ According to DOJ’s Title VI Legal Manual, if two federal agencies issue conflicting policy guidance or regulations, DOJ is authorized to determine the final government-wide position on the matter.³⁰⁷ DOJ is also required to issue model Title VI and other civil rights regulations and provide policy guidance to other agencies.³⁰⁸ In addition to its coordination role, DOJ has also issued a number of policy guidance materials and directives regarding civil rights, which are discussed in Chapter 2 of this report.³⁰⁹

The Heritage Foundation has reported that during the first 22 months in office, the Trump Administration initiated approximately half as many significant regulatory actions as were initiated under the George W. Bush Administration, and approximately a third as many as were initiated under the Obama Administration.³¹⁰ Some champion these efforts, citing that deregulation can lead to economic growth and “improvements to quality of life from access to innovative products

³⁰³ See *infra* notes 2360-4 (discussing purposes of this authority under the Homeland Security Act).

³⁰⁴ U.S. Dep’t of Educ., *Office for Civil Rights Annual Report to Congress FY 2003*, p. 19, <https://www2.ed.gov/about/offices/list/ocr/annrpt2003/index.html>.

³⁰⁵ See *infra* notes 1200-06.

³⁰⁶ Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980), § 1-201 Coordination of Nondiscrimination Provisions, <https://www.justice.gov/crt/executive-order-12250>; 29 C.F.R. § 0.51(b).

³⁰⁷ DOJ, Title VI Legal Manual, *supra* note 39, at 4.

³⁰⁸ See *infra* notes 787-9.

³⁰⁹ See *infra* notes 806-14 (DOJ Title VI guidance) and 821-57 (other DOJ civil rights guidance documents issued FY 2016-2018).

³¹⁰ Diane Katz, “Here’s How Much Red Tape Trump Has Cut,” *The Heritage Foundation*, Oct. 17, 2018, <https://www.heritage.org/government-regulation/commentary/heres-how-much-red-tape-trump-has-cut>. This article notes that as per guidance from the White House, only “significant” regulatory actions count towards this cap; see also Memorandum Re: Guidance Implementing Executive Order 13,771, Titled “Reducing Regulation and Controlling Regulatory Costs” (Apr. 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf> (that provides specific guidelines for what constitutes a “significant guidance document” for the purposes of EO 13771).

and services.”³¹¹ However, many have criticized this deregulatory agenda, arguing that these rollbacks remove standards for protecting the important public needs, such as civil rights.³¹²

In January 2017, President Trump signed Executive Order (EO) 13771, *Reducing Regulation and Controlling Regulatory Costs*.³¹³ This order highlighted the new Administration’s focus on “financial responsibility” in the management of public funds, public spending, and the budgeting process, noting that “it is essential to manage the costs associated with the governmental imposition on private expenditures required to comply with Federal regulations.”³¹⁴ Specifically, for every one new regulation issued, it called for the identification of at least two prior regulations for elimination to offset any incremental costs associated with the implementation of the new regulations.³¹⁵ At the end of FY 2017, the Administration reported that for every “significant” regulation passed, twelve they deemed “outdated, unnecessary, or duplicative” regulations were eliminated,³¹⁶ exceeding the two-for-one order.

In testimony submitted to the Commission, YWCA strongly denounced these policy changes, stating that:

These and other recent actions exacerbate systemic barriers, reinforce gender and racial stereotypes, and send a clear message that the federal government will no longer fulfill its critical role of protecting and vindicating civil rights. And the true irony is that these rollbacks are occurring at a time when women have heightened

³¹¹ Neomi Rao, “The Trump administration’s deregulation efforts are saving billions of dollars,” *The Washington Post*, Oct. 17, 2018, https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fceed2ab1_story.html?noredirect=on&utm_term=.a24d532ab006; Thomas A. Firey, “Dire Fears of Trump Deregulation,” *Cato at Liberty*, Mar. 13, 2017, <https://www.cato.org/blog/dire-fears-trump-deregulation>; Thomas A. Hemphill, “Manufacturing Benefits from Trump’s Deregulation Agenda,” *The Heartland Institute*, Feb. 13, 2019, <https://www.heartland.org/news-opinion/news/manufacturing-benefits-from-trumps-deregulation-agenda>; “Trump’s Deregulation Binge is Lightening The Economy’s Load,” *Investor’s Business Daily*, Dec. 15, 2017, <https://www.investors.com/politics/editorials/trumps-deregulation-binge/>.

³¹² Julie Appleby, “High Stakes, Entrenched Interests And The Trump Rollback Of Environmental Regs,” *Kaiser Health News*, Nov. 12, 2018, <https://khn.org/news/high-stakes-entrenched-interests-and-the-trump-rollback-of-environmental-reg/>; Scott Sumner, “Opinion: Why free-market economists aren’t impressed with Trump’s deregulation efforts,” *Market Watch*, Dec. 19, 2018, <https://www.marketwatch.com/story/why-free-market-economists-arent-impressed-with-trumps-deregulation-efforts-2018-12-19>; Laura Meckler and Devlin Barrett, “Trump administration considers rollback of anti-discrimination rules,” *The Washington Post*, Jan. 3, 2019, https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?utm_term=.7d48ff8e6a74 [hereinafter Meckler et al., “Trump administration considers rollback of anti-discrimination rules”].

³¹³ Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ The White House, “Regulatory Relief Efforts Deliver \$23 Billion In Regulatory Cost Savings,” Oct. 17, 2018, <https://www.whitehouse.gov/briefings-statements/regulatory-relief-efforts-deliver-23-billion-regulatory-cost-savings/>.

concerns about discrimination, safety and economic security [as documented in recent survey data YWCA submitted to the Commission].³¹⁷

The Commission received significant testimony about the negative impacts on effective civil rights enforcement of recent policies restricting civil rights. It also received some testimony favoring a tightening of civil rights policies. According to community leaders and civil rights experts who testified and submitted comments to the Commission, the Trump Administration's restrictive civil rights policy positions are part and parcel of a climate that has fostered increasing discrimination in the form of hate crimes and other civil rights violations.³¹⁸ This is despite ongoing prosecution of hate crimes by CRT in the Trump Administration.³¹⁹

Some also contend that Trump Administration regulatory and guidance changes in civil rights areas have made impacted persons fearful of approaching the federal government to protect them against violations.³²⁰ Anthony Varona, Professor of Law at American University, Washington College of Law, distilled this view: “[k]ey federal agencies now are aggressively undermining the recognition and protection of the civil rights of millions of Americans that depend on them.”³²¹ Seventeen State Attorneys General submitted comments critiquing the Trump Administration's policy changes regarding federal civil rights, and summarized their view as follows:

³¹⁷ YWCA, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 2.

³¹⁸ John Yang, President and Executive Director, Asian Americans Advancing Justice | AAJC, testimony, *Federal Civil Rights Enforcement Briefing*, pp. 182-88.

³¹⁹ See *supra* note 217 (discussing research findings), citing *infra* notes 508-09.

³²⁰ Asian and Pacific Islander American Health Forum, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 1-2 (discussing how various rollbacks in civil rights protections for limited-English proficient and communities of color chill participation and deter access to federal health care programs); Center for American Progress, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 5 (discussing need to build community trust with law enforcement); End Rape on Campus, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 2 (discussing “the Department of Education’s recent and impending decision-making to rescind previous guidance on Title IX enforcement and replacing it with a dangerous regulation that will chill reporting and prevent students everywhere from accessing their civil rights under Title IX”); South Asian Americans Leading Together, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 1-2 (regarding fear of reporting hate crimes); NAACP Legal Defense and Educational Fund, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 8, notes 27-28 (regarding fear of Census participation); National Urban League, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 5 (rollbacks in civil rights to protect against police violence “places our communities and their civil rights at further risk”); Partnership for Inclusive Disaster Strategies, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Dec. 17, 2018, at 4 (discussing issues chilling access, stating that: “We are much less concerned with which federal entity is responsible for enforcement, and far more concerned with who we can look to for enforcement of civil rights obligations currently harming children and adults with disabilities and those who will be harmed as soon as the next disaster.”).

³²¹ Anthony Varona, Professor of Law, American University Washington College of Law, testimony, *Federal Civil Rights Enforcement Briefing*, pp. 254-55.

As the chief law officers of our states, we urge this commission to report with impartiality the tangible threat to civil rights enforcement in America today. We stand ready to take action when and wherever we are needed to protect the rights of the people in our states from assaults on their freedoms and civil rights. But without the genuine partnership of the federal government, the tools we have to conduct that enforcement are limited. To put an even finer point on it: The federal government should partner with us in protecting civil rights, rather than posing a constant and dangerous threat to them.³²²

Burth Lopez, Senior Attorney at the Mexican American Legal Defense and Educational Fund (MALDEF), also contended that “under the [Trump] administration it has become clear that executive priorities have shifted away from the enforcement of civil rights in areas that are critical to Latinos, workers, students and voters.”³²³

Kristen Clarke, president and executive director of the Lawyers’ Committee for Civil Rights Under Law, testified before the House Committee on the Judiciary that:

By abandoning full enforcement of our federal civil rights laws, this Justice Department has also sent a dangerous message that the rights of vulnerable communities simply do not matter.³²⁴

The National LGBTQ Task Force also expressed concern about policy changes impacting the communities they represent, in the areas of immigrant rights, rights to asylum, equal access health care, protections against sexual assault during detention, access to HIV treatment in the justice systems, protections against law enforcement abuses, and protections against sexual assault and discrimination based on gender identity in educational settings, and protections against employment discrimination and discrimination in public housing—documenting a relevant Trump Administration policy change leading to each of these concerns.³²⁵ The Task Force concluded that:

There has been an unprecedented rollback and lack of enforcement of civil rights protections in the past two years, with many of them directly impacting LBGTO people and families. LBGTO people need to know that the law protects them, and does so regardless of our race, national origin, or immigration status.

³²² State Attys General Statement, at 8.

³²³ Burth Lopez, Senior Atty at the Mexican American Legal Defense and Educational Fund, testimony, *Federal Civil Rights Enforcement Briefing*, p. 187.

³²⁴ *Hate Crimes and the Rise of White Nationalism: Hearing Before the H. Comm. on the Judiciary*, 11th Cong. (2019) (statement of Kristen Clarke, President and Executive Director, Lawyers’ Committee for Civil Rights Under Law at 2-3), <https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>.

³²⁵ National LGBTQ Task Force, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018 [hereinafter National LGBTQ Task Force Statement] (*passim*).

In addition to these well-documented civil rights enforcement issues, there has been a lack of transparency, consistency, process, and collaboration across agencies and with the public. The most vulnerable people in our communities have been the most impacted by these actions. With more input through Notice and Comment Rulemaking or regular listening sessions, the most impacted people can be heard.³²⁶

The Commission also studied how agencies use publicity to promote their policy priorities and educate the public about protections granted by civil rights laws. The U.S. Department of Transportation, for example, established a Civil Rights Learning Center, a collaboration between all of DOT's civil rights offices to "foster continuous learning of the highest quality for DOT employees, recipients of DOT financial assistance, contractors, and stakeholders."³²⁷ Additionally, DOT DOCR's website makes a number of learning resources available to the public explaining external civil rights, including podcasts, videos, learning hubs, online training modules, and guidance for funding recipients from DOT and its OAs.³²⁸ Further details about how other agency's civil rights offices use these tools are discussed in the relevant section of each of the following chapters.

Effectiveness of Interaction and Coordination with External Agencies and Organizations

Agency civil rights enforcement offices also differ in the extent to which they coordinate with other federal agencies, and other stakeholders of the enforcement work, including the individuals who are subject to the offices' oversight, regulated entities, and the general public.

Some agencies with subject-matter expertise and legal authority under federal statutes or regulations are required to coordinate with each other. For example, according to the EEOC:

Approximately 30 Federal departments and agencies provide Federal financial assistance. These agencies are responsible for ensuring that recipients of Federal financial assistance comply with: Section 504 of the Rehabilitation Act on the basis of disability, Title VI of the Civil Rights Act of 1964 on the bases of race, color, and national origin, and Title IX of the Education Amendments of 1972 on the basis of sex.

EEOC regulations at 29 C.F.R. Part 1640 (issued jointly with the Department of Justice, 28 C.F.R. Part 37) address how EEOC will handle charges/complaints of disability discrimination that also may be covered under Section 504; 29 C.F.R. Part 1691 (also issued jointly with Justice, 28 C.F.R. Part 42) addresses Titles VI and IX. In addition, EEOC Management Directive 1002 addresses coordination of

³²⁶ National LGBTQ Task Force Statement, at 15.

³²⁷ U.S. Dep't of Transportation, "Civil Rights Learning Center (CRLC)," <https://www.transportation.gov/civil-rights/training-preparedness/civil-rights-learning-center-clc> [hereinafter DOT, "Civil Rights Learning Center"].

³²⁸ U.S. Dep't of Transportation, "Learning Resources," <https://www.transportation.gov/civil-rights/civil-rights-learning-center/learning-resources> [hereinafter DOT, "Learning Resources"].

complaints/charges against recipients of Federal financial assistance. DOJ's Coordination and Review Section, Civil Rights Division, works with EEOC to coordinate enforcement of these laws.

Employers that are Federal government contractors or subcontractors also may be covered by Executive Order 11246, which prohibits discrimination on the basis of race, color, national origin, religion, and sex, and section 503 of the Rehabilitation Act, which prohibits disability discrimination. The Department of Labor, Office of Federal Contract Compliance Programs, administers and enforces these workplace prohibitions.³²⁹

There are other examples of coordination that are not mandatory. Based on a presidential directive, DOJ, DHS, HHS, HUD and DOT issued joint agency guidance to recipients of federal financial assistance on the nondiscrimination protections of Title VI in emergency and disaster preparedness, response, and recovery. The guidance provides an overview of the application of Title VI in emergency and disaster management and examples of promising practices that recipients of federal financial assistance can take in advance of emergencies and disasters, to ensure Title VI compliance.³³⁰

Then in September 2016, the U.S. Department of Homeland Security's Office for Civil Rights and Civil Liberties, in collaboration with the Federal Emergency Management Agency's Office of Equal Rights and the Office of Disability Integration and Coordination, issued a notice about this guidance and protections under Section 504 of the Rehabilitation Act to U.S. Department of Homeland Security recipients on their obligations to ensure nondiscrimination in the provision of federally assisted services to disaster survivors.³³¹

Likewise, in the Obama Administration ED and DOJ entered a formal memorandum of understanding regarding how the agencies would coordinate Title IX enforcement activities to better ensure effective enforcement.³³²

Among all the agencies, DOJ has the most significant mandatory role in coordination of federal civil rights law enforcement. This is also a role that the Commission has encouraged in the past,

³²⁹ U.S. Equal Opportunity Employment Comm'n, "How Other Federal Agencies Address Civil Rights Issues," <https://www.eeoc.gov/federal/whatothersdo.cfm> (accessed May 20, 2019).

³³⁰ See U.S. Dep't of Justice, Civil Rights Division, Federal Coordination and Compliance Section, Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964, Aug. 16, 2016, <https://www.justice.gov/crt/fcs/EmergenciesGuidance>; see also *infra* notes 803-04 (discussing joint agency collaboration and release date).

³³¹ *Ibid.*

³³² White House Task Force to Protect Students From Sexual Assault, *Not Alone*, April 2014, p. 20, <https://www.justice.gov/archives/ovw/page/file/905942/download> [hereinafter White House Task Force to Protect Students From Sexual Assault, *Not Alone*]; U.S. Dep't of Education, Office for Civil Rights, Memorandum of Understanding Between the United States Department of Education, Office for Civil rights, and the United States Department of Justice, Civil Rights Division, Apr. 29, 2014, http://www.justice.gov/crt/about/cor/ED_DOJ_MOU_TitleIX-04-29-2014.pdf.

to improve coordination and enforcement of antidiscrimination laws governing recipients of federal funding.³³³ Executive Order 12,250, “Leadership and Coordination of Nondiscrimination Laws,” which defines DOJ’s role, is codified within DOJ’s Title VI regulations. These regulations provide that the Assistant Attorney General for Civil Rights “shall” coordinate the federal enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, as amended, and all other statutes that prohibit discrimination on the bases of race, color, national origin, handicap, religion, or sex under any program or activity receiving federal financial assistance.³³⁴ Coordination regulations also require that agencies must notify DOJ if they are unable to resolve findings of noncompliance.³³⁵ DOJ asserts that: “DOJ is the federal government’s litigator,” and that “[a]gencies should submit Title VI and other civil rights matters for litigation if they cannot be resolved administratively (that is, when the agency determines that informal resolution or fund termination is not a viable solution).”³³⁶

Several witnesses at the Commission’s briefing spoke to the need for coordination among federal agencies, to ensure consistent results across the federal government. Some agencies have more formal systems set up for this engagement.

Carol Miaskoff testified to the Commission that EEOC’s Office of Legal Counsel has a Coordination Division which is responsible for working with other federal agencies to see what their workplace regulations are and whether they “clash” with civil rights laws.³³⁷ Leon Rodriguez spoke to the Commission about the Civil Rights Investigator Academy, which was an effort to provide skills and training to civil rights staff across different agencies, and ensure consistent approaches and results across the federal government.³³⁸

As Brian Greene stated, “[M]ost of our coordination is directly with the Department of Justice, in part, because the Department of Justice shares civil rights enforcement authority under the Fair Housing Act. We handle individual complaints. They have pattern [or] practice authority.”³³⁹

³³³ See *infra* notes 940-4 (discussing USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, *supra* note 31, at 6-8 and U.S. Comm’n on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, 1996, at 132-34).

³³⁴ Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995; 29 C.F.R. § 0.51 (b). The only exception is that: “Nothing in this Order shall vest the Attorney General with the authority to coordinate the implementation and enforcement by Executive agencies of statutory provisions relating to equal employment.” *Id.* § 1 – 503; 29 C.F.R. § 0.51 (a). Rodriguez Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 83-84.

³³⁵ 28 C.F.R. § 42.411(a).

³³⁶ DOJ, Title VI Legal Manual, *supra* note 39, at § III.B.

³³⁷ *Id.* at 82.

³³⁸ *Id.* at 83-84.

³³⁹ Greene Statement, at 80-81.

Use of Research, Data Collection, and Reporting

Some civil rights enforcement offices have statutory responsibility to collect data. In 2002, the Commission found that having sufficient data to identify civil rights violations and determine whether there is compliance with federal civil rights laws is important.³⁴⁰ Since then, the Commission has repeatedly found that data collection and reporting are essential to effective civil rights enforcement, and that a lack of effective civil rights data collection is problematic.

For example, the Commission reported in 2018 that there is currently no system in place to collect or report victimization and crime data in Indian Country and that many tribes lack computerized systems for collecting such data.³⁴¹ The Commission also found that tribal nations need accurate data in order to plan and evaluate their law enforcement and judicial programs. Although federal law enforcement agencies are required to report crime data to the Uniform Crime Reporting Program, participation of tribal law enforcement is merely voluntary. As a result, Native American crime statistics likely are underreported, which creates challenges in fully understanding crime and law enforcement issues in Indian Country.³⁴²

The Commission's report also discussed a lack of data about Native Americans in general, with regard to health, education, and other federal civil rights issues. The Commission majority also found that the collection of data was essential for the federal government's fulfillment of its treaty obligations: "The federal government has also failed to keep accurate, consistent, and comprehensive records of federal spending on Native American programs, making monitoring of federal spending to meet its trust responsibility difficult."³⁴³ The Commission recommended that:

Congress should provide funding to establish an interagency working group to share expertise and develop and improve systems and methodologies that federal government agencies could replicate for the collection of accurate and disaggregated data on small and hard to count populations such as the Native American and Native Hawaiian or Other Pacific Islander racial groups.³⁴⁴

Also in 2018, the Commission found that accurate and comprehensive data regarding police uses of force is generally not available to police departments or the American public. No comprehensive national database capturing rates of police use of force exists, creating a void in effective civil rights enforcement.³⁴⁵

³⁴⁰ USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 41.

³⁴¹ U.S. Comm'n on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* (2018) at 56, <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf> [hereinafter USCCR, *Broken Promises*].

³⁴² *Ibid.*, 57.

³⁴³ *Ibid.*, 2.

³⁴⁴ *Ibid.*

³⁴⁵ U.S. Comm'n on Civil Rights, *Police Use of Force: An Examination of Modern Policing*, 2018, p. 137, <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf> [hereinafter USCCR, *Police Use of Force*].

Therefore, the Commission recommended that:

Congress should condition cities' receipt of federal law enforcement funds on the cities' collection and reporting of data regarding police use of force practices to the Department of Justice in a format that is aggregable and comparable nationally.

[and that]

Congress should require the Department of Justice to release to the public twice each year the names of departments and jurisdictions that fail to report use of force information in the manner in requires.³⁴⁶

These are just two examples of recent reports in which the Commission has considered the need for data collection to be paramount.³⁴⁷ The Commission also notes that some civil rights statutes require data collection because Congress considered this collection important to advance the agency civil rights enforcement offices' overall mission of effective civil rights enforcement.³⁴⁸ For example, the 2013 Death in Custody Reporting Act includes enforcement mechanisms, similar to those of the 2003 Prison Rape Elimination Act. DOJ does collect PREA data.³⁴⁹ Regarding the Death in Custody Act, states' DOJ Safe Streets funding would be reduced by 10 percent if states fail to report deaths in custody.³⁵⁰ The DOJ Office of Inspector General reports that DOJ has not yet begun collecting data but plans to do so in 2020.³⁵¹

More broadly, the Commission heard testimony of continuing disparities and discrimination within the purview of OCRs from a variety of stakeholders, emphasizing the need for accurate data collection and reporting. Bryan Greene at HUD noted: "Ongoing segregation in America, regular reports of sexual harassment in housing, and newly constructed properties inaccessible to people with disabilities, are just some examples that underscore that we have not yet conquered housing discrimination."³⁵² A former Deputy Assistant Attorney General testified that complaints of sexual

³⁴⁶ *Ibid.*, 139.

³⁴⁷ USCCR, *Broken Promises*, *supra* note 341, at 6 (data on Native American and Native Hawaiians and Other Pacific Islander racial groups are often incomplete, inaccurate, old, or not tracked by the federal government... there is a critical need for more accurate and current data collection for these communities), p. 11 (the Commission has emphasized the importance of data collection and has recommended increased data collection efforts).

³⁴⁸ *See e.g. infra* notes 983-8 (discussing DOJ's reporting requirements under the Equal Credit Opportunity Act, the Civil Rights of Institutionalized Persons Act, Title VI, and former reporting requirements of state and local jurisdictions under Section 5 of the Voting Rights Act).

³⁴⁹ *See, e.g.* Ramona R. Rantala, *Sexual Victimization Reported by Adult Correctional Authorities, 2012-15*, Bureau of Justice Statistics, July 2018, <https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>.

³⁵⁰ 34 U.S.C. 60105.

³⁵¹ U.S. Dep't of Justice, Office of the Inspector General, Review of the Department of Justice's Implementation of the Death in Custody Act of 2013, Dec. 2018, p. i, <https://oig.justice.gov/reports/2018/e1901.pdf> ("We found that, despite the DCRA requirement to collect and report state arrest-related death data by fiscal year (FY) 2016, the Department does not expect to begin its collection of this data until the beginning of FY 2020. This is largely due to the Department having considered, and abandoned, three different data collection proposals since 2016.").

³⁵² Greene Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 21-22.

harassment against landlords increased significantly in response to HUD outreach on the issue, citing the increase in complaints as a positive step in civil rights enforcement because the increase reflects greater public awareness of the issue.³⁵³ Arne Duncan specifically mentioned the importance of collecting “A massive amount of data. A treasure trove of data telling us all kinds of things.”³⁵⁴ He noted this data’s importance came not only in confirming educational discrimination the department already suspected, but in identifying inequalities previously unperceived.³⁵⁵

The Commission’s research showed that few agencies engage in the type of public data collection, research and reporting needed to inform effective civil rights enforcement work. Congress charged ED OCR with data collection and analysis;³⁵⁶ ED OCR’s Civil Rights Data Collection exists to fulfill this purpose. DHS CRCL also has the statutory authority to perform data collection and public reporting.³⁵⁷ Additionally, Dexter Brooks testified to the Commission about research from EEOC social scientists on topics such as harassment in the workplace and achieving cultural change, stating that EEOC considers these types of reports an important enforcement tool.³⁵⁸ U.S. Department of Transportation’s DOCR, for instance, requests disaggregated data from its funding recipients, when available (for items including public transportation ridership, driver licensing program transactions, and others), and utilizes disaggregated data to determine the extent to which certain racial and ethnic populations may access programs/projects conducted by its funding recipients, and the extent to which a DOT-funded program/project may have a disparate impact upon certain racial/ethnic populations.³⁵⁹

Furthermore, some agencies have broad powers to collect data (within the limits of privacy law) and publish research results and have published civil rights studies.³⁶⁰ For example, the VA published a research study it had funded on the prevalence of harassment of women veterans at VA medical centers, examining the impacts of delayed or missed care.³⁶¹ The study found a high level of harassment, and that “[w]omen who reported harassment in the current study were more likely to feel unwelcome at VA, a measure that has been associated in prior research with unmet health care need.”³⁶²

³⁵³ Driscoll Testimony, *Federal Civil Rights Enforcement Briefing*, p. 118.

³⁵⁴ Duncan Testimony, *Federal Civil Rights Enforcement Briefing*, p. 36.

³⁵⁵ *Ibid.*, 35-40.

³⁵⁶ 20 U.S.C. 3413(c).

³⁵⁷ *See* 6 U.S.C. § 345(a)(2) and 6 U.S.C. § 345(b).

³⁵⁸ Brooks Testimony, *Sexual Harassment in Government Workplaces Briefing*, pp. 66-68.

³⁵⁹ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 11, at 13.

³⁶⁰ *See supra* Table 1.1, Publicity.

³⁶¹ Ruth Klap, PhD, Jill E. Darling, MSHS, Alison B. Hamilton, PhD, MPH, Danielle E. Rose, PhD, MPH, Karen Dyer, PhD, MPH, Ismelda Canelo, MPA, Sally Haskell, MD, Elizabeth M. Yano, PhD, MSPH, *Prevalence of Stranger Harassment of Women Veterans at Veterans Affairs Medical Centers and Impacts on Delayed and Missed Care*, Women’s Health Issues 29-2 (2019), pp. 107-15, [https://www.whijournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whijournal.com/article/S1049-3867(18)30194-4/pdf).

³⁶² *Ibid.*, 113.

Over the past few years, the Trump Administration also made a concerted effort to roll back data collection from LGBT communities. Federal agencies across the Trump Administration have deleted proposed or existing survey questions relating to LGBT population numbers,³⁶³ older adults,³⁶⁴ foster youth and parents,³⁶⁵ crime victimization,³⁶⁶ and disease prevention.³⁶⁷

The following chapters will explore the above three key factors and seven essential elements of effective civil rights enforcement in greater detail with regard to each of the 13 agencies studied, and will delve into a thorough examination of the efficacy of current federal civil rights enforcement efforts of each of these thirteen agencies, based on agency provided data and testimony the Commission received as well as Commission staff's independent research of hundreds of cases, enforcement data and trends, policy changes, and other relevant factors (in FY 2016, 2017, and 2018). Additionally, the final chapter of this report will provide a series of Commission findings and recommendations for the examined agencies.

³⁶³ Hansi Lo Wang, "Census Bureau Caught in Political Mess over LGBT Data," *National Public Radio*, Jul. 18, 2017, <https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>.

³⁶⁴ Sejal Singh, Laura E. Durso, and Aaron Tax, "The Trump Administration Is Rolling Back Data Collection on LGBT Older Adults," *Center for American Progress*, Mar. 20, 2017, <https://www.americanprogress.org/issues/lgbt/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/>

³⁶⁵ Julie Moreau, "Health Department Proposes Nixing Data Collection on LGBTQ Foster Youth," *NBC News*, Apr. 18, 2019, <https://www.nbcnews.com/feature/nbc-out/health-department-proposes-nixing-data-collection-lgbtq-foster-youth-n996066>.

³⁶⁶ In this case, the administration stopped directing the survey to youth under 18 (rather than eliminating an LGBTQ-related question), but activists argue that this disproportionately affects minor victims of crime who identify as LGBTQ. "Trump Administration Continues Erasing LGBTQ People in Data Collection," *Anti-Violence Project Action Brief*, Apr. 13, 2018, <https://avp.org/words-matter-2/>.

³⁶⁷ Chris Johnson, "Trump's CDC to Roll Back LGBT Data Collection: Report," *Washington Blade*, May 18, 2018, <https://www.washingtonblade.com/2018/05/18/trumps-cdc-to-rollback-lgbt-health-data-collection-report/>.

Chapter 2: U.S. Department of Justice, Civil Rights Division

This chapter analyzes the U.S. Department of Justice (DOJ) Civil Rights Division’s (CRT) activities in enforcing civil rights in the period of FY 2016 to FY 2018. As the chapters that follow do for other agencies, the chapter summarizes CRT’s jurisdiction, enforcement tools, and resources. It then analyzes data collected about CRT based upon the seven key elements of effective civil rights enforcement identified in Chapter 1.

The former head of CRT Vanita Gupta, who served in the Obama Administration, testified extensively about CRT before the Commission, emphasizing that the Civil Rights Division is “charged with upholding the civil and constitutional rights of all people in America.”³⁶⁸ Former Deputy Assistant Attorney General and CRT Chief of Staff Robert Driscoll, who served in the George W. Bush Administration, similarly stated that: “[F]ederal civil rights enforcement is not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences;”³⁶⁹ instead they must “well and faithfully discharge the duties of the office.”³⁷⁰

Publicly available data shows that CRT (in the Disability Rights, Employment Litigation, Educational Opportunities, Housing and Civil Enforcement, Immigrant and Employee Rights, Special Litigation, and Voting sections) resolved 388.5 civil rights cases during FY 2016-2018, primarily through court-ordered consent decrees and out-of-court settlement agreements, although some cases went to trial.³⁷¹ A chart of these cases is in Appendix A, and the litigation section of this chapter below includes other charts and graphs showing data patterns over time. A description of the relevant methodology is also found in the litigation section of this chapter.

Legal Authority and Responsibility

In summarizing CRT’s legal authority and responsibility, the Commission emphasized in 2002 that:

It is mainly through its Civil Rights Division (Division) that DOJ protects the civil rights of all citizens in areas such as housing, education, employment, immigration, disabilities, law enforcement, and voting. The Division also carries out the Department’s coordination and oversight responsibilities with respect to other federal agencies’ civil rights enforcement responsibilities, including the implementation of Title VI.³⁷²

³⁶⁸ Gupta Testimony, *Federal Civil Rights Enforcement Briefing*, p. 170.

³⁶⁹ Driscoll Testimony, *Federal Civil Rights Enforcement Briefing*, p. 116.

³⁷⁰ 5 U.S.C. § 3331 (Oath of office); *see also* U.S. Dep’t of Justice, Justice Manual (March 2018), § 1 – 4.010, <https://www.justice.gov/jm/jm-8-1000-civil-rights-division> [hereinafter DOJ Justice Manual] (“Government ethics rules implement this common value: public service is a public trust, meaning that the decisions and actions that federal employees take must be made in the best interests of the American people.”).

³⁷¹ *See* Appendix A, Chart of CRT Cases Resolved, FY 2016-2018; *and see infra* notes 621-744 (discussing the specific data).

³⁷² USSCR, *Ten-Year Check-Up Vol. II: An Evaluation*, *supra* note 31, at 5.

The Commission's current research shows that this structure of CRT's legal authority and responsibilities is largely unchanged. Much of this authority comes directly from federal civil rights statutes and regulations. The Civil Rights Act of 1957 established CRT to enforce the civil and constitutional rights that prohibit discrimination.³⁷³ DOJ CRT is the nation's oldest federal civil rights enforcement agency. DOJ CRT has considerable power and influence; not only does it enforce many civil rights statutes, but under Executive Order 12,250 (1980), the Attorney General also coordinates across the federal government the enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and all other statutes that prohibit discrimination against protected classes by federal agencies and federal fund recipients.³⁷⁴ DOJ codified the provisions of this Executive Order in federal regulations.³⁷⁵ Its power is also established by its statutory ability to litigate to enforce civil rights statutes (including those also enforced by other agencies) in federal court.³⁷⁶

Pursuant to the Civil Rights Act of 1957, an order of then-Attorney General William Rogers in December 1957 established the CRT within DOJ. That order provided that CRT shall be headed by an Assistant Attorney General, and under the Assistant Attorney General's "general supervision and direction," be charged with:

- (a) Enforcement of all Federal statutes affecting civil rights, and authorization of such enforcement, including criminal prosecutions, and civil actions and proceedings on behalf of the Government; and appellate proceedings in all such cases.
- (b) Requesting, directing and reviewing of investigations arising from reports or complaints of public officials or private citizens with respect to matters involving civil rights.
- (c) Conferring with individuals and groups who call upon the Department in connection with civil rights matters, advising such individuals and groups thereon, and initiating appropriate action.
- (d) Coordination within the Department of Justice on all matters affecting civil rights.
- (e) Research on civil rights matters, and the making of recommendations to the Attorney General as to proposed policies and legislation therefor.
- (f) Upon their request, assisting the Commission on Civil Rights and other similar Federal bodies in carrying out research and formulating recommendations.³⁷⁷

³⁷³ U.S. Dep't of Justice, Civil Rights Division, "About Division Overview," <https://www.justice.gov/crt/about-division-overview> (accessed Jun. 21, 2018). The full list of civil and criminal civil rights statutes enforced by CRT is available in Title 8 of the DOJ Justice Manual, *supra* note 370.

³⁷⁴ Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995. The only exception is that: "Nothing in this Order shall vest the Attorney General with the authority to coordinate the implementation and enforcement by Executive agencies of statutory provisions relating to equal employment." *Id.* §1 – 503; *see also* Rodriguez Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 83-84; and further discussion of Executive Order 11250 at *infra* notes 940-43.

³⁷⁵ 28 C.F.R. § 0.51.

³⁷⁶ *Id.* § 0.50(a).

³⁷⁷ U.S. Dep't. of Justice, Office of the Atty General, Establishment of the Civil Rights Division in the Department of Justice, Order No. 155-57 (Dec. 9, 1957), <https://www.justice.gov/crt/creation-and-role-civil-rights-division> (accessed Mar. 11, 2019).

DOJ also codified these duties as federal regulations that clearly list these same activities as functions that “*shall* be conducted, handled, or supervised by” the Assistant Attorney General for CRT.³⁷⁸ DOJ regulations have since expanded the list of civil rights statutes under the enforcement authority of CRT in item (a) above, and added the following additional duties:

- Consultation with and assistance to other Federal departments and agencies and State and local agencies on matters affecting civil rights.
- Representation of Federal officials in private litigation arising under 42 U.S.C. 2000d or under other statutes pertaining to civil rights.
- Administration of sections 3(c) and 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973a(c), 1973c).
- Administration of section 105 of the Civil Liberties Act of 1988 (50 U.S.C. App. 1989b).
- Certifications under 18 U.S.C. 245.
- Enforcement and administration of the Americans with Disabilities Act of 1990, Public Law 101-336.
- Community education, enforcement, and investigatory activities under section 102 of the Immigration Reform and Control Act of 1986, as amended.
- Certifications under 18 U.S.C. 249, relating to hate crimes.³⁷⁹

DOJ CRT presently enforces the following civil rights statutes:

- A. CIVIL STATUTES.** 8 U.S.C. § 1324b (Immigration and Nationality Act’s anti-discrimination provision); 15 U.S.C. §§ 1691 to 1691f (Equal Credit Opportunity Act); 18 U.S.C. § 248 [redacted]; 20 U.S.C. §§ 1681 to 1688 (Title IX of the Educational Amendments of 1972), 1706 to 1710 (Equal Educational Opportunities Act of 1974); 29 U.S.C. §§ 794 to 794g (Section 504 of the Rehabilitation Act of 1973); 34 U.S.C. § 12601 (Pattern or Practice of Unlawful Conduct by Law Enforcement or in the Administration of Juvenile Justice), 10228 (Safe Streets Act); 38 U.S.C. §§ 708(c) and 4301 to 4335 (USERRA); 42 U.S.C. §§ 1997 to 1997j (Civil Rights of Institutionalized Persons Act), 2000a to 2000a-6 (Title II of the Civil Rights Act of 1964), 2000b to 2000b-3 (Title III of the Civil Rights Act of 1964), 2000c to 2000c-9 (Title IV of the Civil Rights Act of 1964), 2000d to 2000d-7 (Title VI of the Civil Rights Act of 1964), 2000e to 2000e-7 (Title VII of the Civil Rights Act of 1964), 2000h-2 (Title IX of the Civil Rights Act of 1964), 2000cc to 2000cc-5 (Religious Land Use and Institutionalized Persons Act), 2000ff to 2000ff-11 (Genetic Information Nondiscrimination Act), 3601 to 3619 (Fair Housing Act), 12101 to 12213 (Americans with Disabilities Act); 50 U.S.C. §§ 3901 to 4043 (Servicemembers Civil Relief Act), 52 U.S.C. §§ 10101 (Civil Rights Act of 1957), 10301 to 10702 (Voting Rights Act of 1965); 20101 to 20107 (Voting Accessibility for the Elderly and Handicapped Act of 1984), 20301 to 20311 (Uniformed and Overseas Citizens Absentee

³⁷⁸ 28 C.F.R. §0.50 (emphasis added).

³⁷⁹ *Id.* §0.50(e), (g), (h) and (j) – (l).

Voting Act of 1986), 20501 to 20511 (National Voter Registration Act of 1993), 20701 to 20706 (Civil Rights Act of 1960), 21081 to 21085, 21111 (Help America Vote Act of 2002).

B. CRIMINAL STATUTES. 18 U.S.C. §§ 241 (Conspiracy against rights), 242 (Deprivation of rights under color of law), 243 (Exclusion of jurors on account of race or color), 244 (Discrimination against person wearing uniform of armed forces), 245 (Federally protected activities), 246 (Deprivation of relief benefits), 247 (Damage to religious property; obstruction of persons in the free exercise of religious beliefs), 248 [redacted], 249 (Hate crime acts), 594 (Intimidation of voters), 875 (Interstate communications), 876 (Mailing threatening communications), 1351 (Fraud in foreign labor contracting), 1504 (Influencing juror by writing), 1508 (Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting), 1510 (Obstruction of criminal investigations), 1519 (Destruction, alteration, or falsification of records in federal investigations and bankruptcy), 1531 [redacted], 1581 (Peonage), 1582 (Vessels for slave trade), 1583 (Enticement into slavery), 1584 (Involuntary servitude), 1585 (Seizure, detention, transportation or sale of slaves), 1586 (Service on vessels in slave trade), 1587 (Possession of slaves aboard vessel), 1588 (Transportation of slaves from United States), 1589 (Forced labor), 1590 (trafficking with respect to servitude), 1592 (Document servitude), 1593 (Restitution), 1593A (Benefitting financially from trafficking), 1594 (General provisions, including attempts and conspiracies), 1597 (Unlawful conduct with respect to immigration documents), 1621-1623 (Perjury), 2421 (Transportation for purposes of prostitution); 42 U.S.C. §§ 300a-8 [redacted], 2000e-8 and e-10 (Certain wrongdoing by EEOC), 3631 (Criminal provisions of Fair Housing Act); 52 U.S.C.A. § 10307 (Refusal of person, acting under color of law, to permit vote of qualified voter), 10308, 10501-10503, 10505 (Relating to voting), 10701 (Enforcement of 26th Amendment), 20701 and 20702 (Related to record keeping in elections).³⁸⁰

It also enforces the following Executive Orders and federal regulations:

C. EXECUTIVE ORDERS. 12,250 (Leadership and Coordination of Nondiscrimination Laws), 13,160 (Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs), and 13,166 (Improving Access to Services for Persons with Limited English Proficiency).

D. CODE OF FEDERAL REGULATIONS. 28 C.F.R. §§ 35.101 to 35.190 (Title II of the Americans with Disabilities Act); 28 C.F.R. §§ 36.101 to 36.608 (Title III of the Americans with Disabilities Act); 28 C.F.R. §§ 42.101 to 42.112 (Department of Justice Title VI implementing regulations); 28 C.F.R. §§ 42.201 to 42.215 (Safe Streets Act implementing regulations); 28 C.F.R. §§ 44.100 to 44.305 (regulations implementing Immigration and Nationality Act's anti-discrimination provision); 28 C.F.R. §§ 54.100 to 54.605

³⁸⁰ DOJ Justice Manual, *supra* note 370, at § 8 – 1.100.

(Department of Justice Title IX implementing regulations); 28 C.F.R. §§ 51.1 to 51.67 (Procedures for the Administration of Section 5 of the Voting Rights Act); 28 C.F.R. §§ 55.1 to 55.24 (Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups); 38 C.F.R. §§ 4301 to 4323 (USERRA Enforcement).³⁸¹

This authority may be co-extensive with other agencies that may enforce the same statutes, such as Title VI or the Fair Housing Act or the Americans with Disabilities Act.³⁸² (Interaction with other federal agencies is discussed in the section on *Interaction and Coordination with External Agencies and Organizations* below.³⁸³)

In the modern era, sections of CRT have carried out these duties.³⁸⁴

DOJ created the **Appellate Section (APP)** as a separate component of CRT in 1974. APP works cooperatively with other CRT sections in representing the U.S. in matters before federal courts of appeals.³⁸⁵ According to the Justice Manual as reissued in March 2018, CRT “has a strong interest in ensuring that the Department of Justice presents consistent arguments nationwide on civil rights issues.”³⁸⁶

The **Criminal Section (CRM)** prosecutes criminal matters, while the other sections focus on civil matters. It works closely with the Federal Bureau of Investigation (FBI), which conducts most of its investigations.³⁸⁷ The Criminal Section enforces the United States Constitution and over 25

³⁸¹ Ibid., corrected by U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

³⁸² See *infra* notes 395-9 and 419-26.

³⁸³ See *infra* notes 929-77.

³⁸⁴ See, e.g., DOJ Justice Manual, *supra* note 370, at §§ 8 – 2.000 – 2.601, Enforcement of Civil Rights Statutes (describing the duties and authorities of each of these CRT sections).

³⁸⁵ U.S. Dep’t. of Justice, Civil Rights Division, “Appellate Section,” <https://www.justice.gov/crt/appellate-section> (accessed Mar. 11, 2019) [hereinafter DOJ CRT, “Appellate Section”].

³⁸⁶ DOJ Justice Manual, *supra* note 370, at § 8 – 2.150. A local U.S. Attorney’s Office may also handle an appeal that occurs in the jurisdiction, but DOJ practice is that the decision of whether it will be handled locally or by the Appellate Section of CRT must be made by the Assistant Attorney General for CRT “or his or her designee, usually the Section Chief of the Appellate Section.” DOJ Justice Manual, *supra* note 370, at § 8-2.150. Even then, if a U.S. Attorney’s Office takes on a federal civil rights case, DOJ practice is that the Appellate Section must approve all substantive appellate pleadings. Ibid. The Appellate Section also “works with the Solicitor General in developing the government’s position in Supreme Court cases involving civil rights issues,” and “provides legal counsel to other components of the Division regarding civil rights issues.” DOJ CRT, “Appellate Section,” *supra* note 385.

³⁸⁷ See DOJ Justice Manual, *supra* note 370, at § 8 – 3.150 (“The United States Attorneys’ Offices may decline cases by orally advising the FBI or other lead federal investigative agency of the declination. The declination should then be reflected in the investigative report submitted by the FBI or other lead federal investigative agency.”); and § 8 – 3.190 (procedures for closing an investigation after the final FBI report).

federal statutes related to protecting civil rights.³⁸⁸ These include civil rights protections against hate crimes,³⁸⁹ criminal damage to religious property,³⁹⁰ human trafficking,³⁹¹ criminal interference with housing or other civil rights,³⁹² civil rights conspiracy,³⁹³ and deprivation of rights under color of law.³⁹⁴

The **Disability Rights Section (DRS)** administers and enforces the Americans with Disabilities Act (ADA),³⁹⁵ coordinates the implementation and enforcement of Section 504 of the Rehabilitation Act of 1973,³⁹⁶ and enforces the Genetic Information Nondiscrimination Act.³⁹⁷ The Special Litigation and Educational Opportunities Sections of the Civil Rights Division also enforce Title II of the Americans with Disabilities Act under certain circumstances.³⁹⁸ DRS promulgates regulations under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (which prohibits disability discrimination in federally conducted programs or activities, as well as programs or activities receiving federal financial assistance). DRS also coordinates implementation of these laws by federal agencies. The Section's coordination authority under Section 504, established by Executive Order 12,250, includes review and approval of federal agencies' regulations and policy guidance regarding Section 504. DRS also coordinates and provides technical assistance to covered entities and people with disabilities on the requirements of the ADA.³⁹⁹

According to its website, the **Employment Litigation Section (ELS)** enforces two main laws and an Executive Order:⁴⁰⁰ Title VII of the Civil Rights Act of 1964 (barring workplace discrimination on the basis of sex, race, color, national origin, or religion),⁴⁰¹ the Uniformed Services Employment and Reemployment Rights Act (USERRA) (barring workplace discrimination on the

³⁸⁸ These are: 8 U.S.C. § 1324 (Bringing and harboring certain aliens); 8 U.S.C. § 1328 (Importation of aliens for immoral purpose); 18 U.S.C. §§ 241-242 (Infringement of rights); 18 U.S.C. § 245(b)(2) (Federally protected activities); 18 U.S.C. § 247 (Damage to religious real property); 18 U.S.C. § 248 (Freedom of access to clinics); 18 U.S.C. § 249 (Hate crimes prevention); 18 U.S.C. § 1351 (Fraud in foreign labor contracting); 18 U.S.C. § 1546 (Visa fraud); 18 U.S.C. § 1581 (Peonage); 18 U.S.C. § 1584 (Involuntary servitude); 18 U.S.C. §§ 1589-1594 (Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); 18 U.S.C. §§ 1596, 3271 (Extra-territorial jurisdiction); 18 U.S.C. §§ 2421-2422 (Interstate transportation of persons related to prostitution); 42 U.S.C. § 3631 (Criminal interference with right to fair housing).

³⁸⁹ 18 U.S.C. § 245(b)(2); 18 U.S.C. § 249.

³⁹⁰ 18 U.S.C. § 247.

³⁹¹ 8 U.S.C. §§ 1324, 1328; 18 U.S.C. §§ 1351, 1546, 1581, 1584, 1589-1594, 1596, 2421-2422, 3271

³⁹² 42 U.S.C. § 3631 (criminal provisions of Fair Housing Act); 18 U.S.C. §§ 245(b)(2), (b)(4), & (b)(5) (interference with other federally-protected activities such as in federally-funded programs and activities, and voting).

³⁹³ 18 U.S.C. § 241.

³⁹⁴ *Id.* § 242.

³⁹⁵ 42 U.S.C. §§ 12101 *et seq.*

³⁹⁶ 29 U.S.C. § 794(a).

³⁹⁷ 42 U.S.C. §§ 2000ff *et seq.*

³⁹⁸ See DOJ Justice Manual, *supra* note 370, at § 8-2.400 (Disability Rights Section).

³⁹⁹ *Ibid.*

⁴⁰⁰ U.S. Dep't of Justice, Civil Rights Division, "Laws Enforced by the Employment Litigation Section," <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> (accessed Oct. 25, 2017).

⁴⁰¹ 42 U.S.C. § 2000e *et seq.*

basis of military service or status as a veteran),⁴⁰² and Executive Order 11,246 (barring federal contractors from engaging in workplace discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin).⁴⁰³ ELS also works with the U.S. Department of Labor’s Civil Rights Center and Office for Federal Contract Compliance Programs, which may refer complaints to CRT for possible enforcement.⁴⁰⁴

The **Educational Opportunities Section (EOS)** enforces federal statutes and court decisions that prohibit discrimination against students on the bases of race, color, sex, national origin, language, religion, and disabilities in elementary and secondary schools and higher education institutions. The statutes it enforces include Title IV of the Civil Rights Act of 1964 (covering discrimination on the bases of race, color, national origin, sex, and religion in public schools),⁴⁰⁵ Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race, color, and national origin by recipients of federal financial assistance); Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex in education programs and activities receiving federal financial assistance); the Equal Education Opportunities Act of 1974 (requiring, among other things, that state and local educational agencies take appropriate action to overcome the language barriers of English Language Learner students),⁴⁰⁶ the Individuals with Disabilities in Education Act,⁴⁰⁷ Section 504 of the Rehabilitation Act of 1973,⁴⁰⁸ and Titles II and III of the Americans with Disabilities Act of 1990.⁴⁰⁹ EOS also has the ability to intervene in private suits involving alleged violations of certain anti-discrimination statutes and the 14th Amendment.⁴¹⁰

DOJ established the **Federal Coordination and Compliance Section (FCS)** in 1970. Formerly called the Federal Programs Section, DOJ renamed the section with its current title in 2010, “in part to more accurately capture the Section’s administrative enforcement role with respect to both DOJ-funded entities and other agencies’ dockets.”⁴¹¹ As of March 2018, DOJ reissued the Justice Manual stating that FCS has principal responsibilities for: (1) “coordinating and ensuring consistent and effective enforcement by all executive agencies of laws that prohibit discrimination on the basis of race, color, national origin, sex, or religion by recipients of federal financial assistance,” as well as by the federal government; and (2) investigating “allegations of discrimination based on race, color, national origin (including limited English proficiency), sex,

⁴⁰² 38 U.S.C. § 4301 *et seq.*

⁴⁰³ Exec. Order No. 11,246, Nondiscrimination in Government Employment, 30 Fed. Reg. 12,319 (Sep. 28, 1965). DOJ notes that these provisions have been incorporated into federal legislation. DOJ Justice Manual, *supra* note 370, at § 8 – 2.212 (“The text of Executive Order 11246, as amended, is set forth immediately following Section 2000e of Title 42 of the United States Code.”).

⁴⁰⁴ See *infra* notes 1954-5 and 2053-6 (discussing DOL’s jurisdiction and ability to refer).

⁴⁰⁵ 20 U.S.C. § 1681 *et seq.*

⁴⁰⁶ *Id.* § 6301 *et seq.*

⁴⁰⁷ *Id.* § 1400 *et seq.*

⁴⁰⁸ 29 U.S.C. § 701 *et seq.*

⁴⁰⁹ 42 U.S.C. § 12131 *et seq.*

⁴¹⁰ U.S. Dep’t of Justice, Civil Rights Division, “Educational Opportunities Section Overview,” <https://www.justice.gov/crt/educational-opportunities-section-overview> (accessed Jul. 28, 2017).

⁴¹¹ *Ibid.*

or religion against recipients receiving financial assistance from the Department of Justice.”⁴¹² These duties also stem from Executive Order 12,250 of 1980, and are codified in federal regulations.⁴¹³ FCS performs these duties by investigating agency referrals to CRT and complaints.⁴¹⁴ FCS also “plays a central role in coordinating compliance with Executive Order 13,166, which relates to access by limited English proficiency (LEP) individuals to federal government services, and Executive Order 13,160, which prohibits discrimination on a number of bases in federally conducted education and training programs.”⁴¹⁵ The Justice Manual clarifies that neither of these Executive Orders confers a private right of action against the federal government.⁴¹⁶ “Executive Order 13,160 does, however, provide for administrative enforcement by individual agencies receiving complaints alleging discrimination in agency-conducted education and training programs.”⁴¹⁷ When those complaints involve DOJ-funded activities, FCS undertakes Title VI compliance review. In his written statement to the Commission, Leon Rodriguez, Former Director of HHS OCR, stated that during his tenure, FCS also facilitated “creating a unified professional community among the Offices for Civil Rights.”⁴¹⁸

The **Housing and Civil Enforcement Section (HCE)** prosecutes discrimination in housing under the Fair Housing Act,⁴¹⁹ and in public accommodations under Title II of the Civil Rights Act.⁴²⁰ The Section also enforces the Equal Credit Opportunity Act,⁴²¹ and the Servicemembers Civil Relief Act, which provides for temporary suspension of judicial and administrative proceedings in housing, credit and taxes for military personnel while they are on active duty.⁴²² Finally, the Section enforces the Religious Land Use and Institutionalized Persons Act (RLUIPA), which prohibits local governments from adopting land use provisions that burden religious practice.⁴²³

CRT can file a complaint under the Fair Housing Act (FHA) when there is evidence that a person or entity has displayed a “pattern or practice” of civil rights violations or has discriminated against a group that raises an issue of “general public importance.”⁴²⁴ The Attorney General has the discretion to decide what “general public importance” entails and courts generally defer to the Attorney General’s decision.⁴²⁵ As then HUD FHEO General Deputy Assistant Secretary Bryan Greene testified to the Commission, HUD FHEO splits authority for enforcement of the Fair

⁴¹² DOJ Justice Manual, *supra* note 370, at § 8 – 2.240.

⁴¹³ 28 C.F.R. § 0.51 (codifying the provisions of Executive Order 12,250).

⁴¹⁴ DOJ Justice Manual, *supra* note 370, at § 8 – 2.241.

⁴¹⁵ *Ibid.* at § 8 – 2.242.

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.*

⁴¹⁸ Rodriguez Statement, at 2.

⁴¹⁹ 42 U.S.C. § 3601 *et seq.*

⁴²⁰ *Id.* §2000a *et seq.*

⁴²¹ 15 U.S.C. § 1691 *et seq.*

⁴²² 50 U.S.C. § 3901 *et seq.*

⁴²³ 42 U.S.C. § 2000cc, *et seq.*

⁴²⁴ U.S. Dep’t of Justice, Civil Rights Division, “A Pattern or Practice of Discrimination,” <https://www.justice.gov/crt/pattern-or-practice-discrimination> (accessed Aug. 6, 2015).

⁴²⁵ *Ibid.*

Housing Act, with HUD FHEO generally handling individual complaints and DOJ handling systemic cases, although the FHA provides that HUD may initiate and refer systemic cases.⁴²⁶

The **Immigrant and Employee Rights (IER) Section** enforces the anti-discrimination provisions of the Immigration and Nationality Act (INA), which prohibit discrimination in hiring, firing, or recruiting on the basis of citizenship status and national origin, unfair documentary practices, and retaliation or intimidation.⁴²⁷ The INA's antidiscrimination provisions specifically prohibit discrimination based on citizenship or national origin in hiring, firing or referral for a fee, unfair documentary practices during the employment eligibility process, and retaliation or intimidation for engaging in protected activity, such as contesting a perceived violation, filing a charge of discrimination with the IER, or cooperating with an investigation.⁴²⁸

The **Special Litigation (SPL) Section** enforces several major statutes protecting the rights of institutionalized persons, including the Civil Rights of Institutionalized Persons Act (CRIPA) which protects the civil rights of people in institutional facilities.⁴²⁹ SPL also enforces the Omnibus Crime and Safe Streets Act, which prohibits discrimination by any law enforcement agency receiving federal funds,⁴³⁰ and the Violent Crime and Law Enforcement Act of 1994 (VCLEA), which prohibits "pattern or practice" violations in which law enforcement, or officials of government agencies involved with juvenile justice, deprive individuals of their constitutional rights.⁴³¹ The Supreme Court has held that a pattern or practice exists where violations are repeated and not isolated.⁴³² SPL also enforces the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires state and local governments or persons acting under color of law to not place impermissible restrictions on religious practice.⁴³³ This jurisdiction is shared with HCE.⁴³⁴ The SPL Section may also enforce other federal statutes, such as Title VI of the Civil Rights Act, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, the Developmentally Disabled Assistance and Bill of Rights Act and Protection and Advocacy for Individuals with Mental Illness,⁴³⁵ and enforce these statutes in collaboration with the Disability Rights Section.

⁴²⁶ Greene Testimony, *Federal Civil Rights Enforcement Briefing*, p. 80-81; *see also infra* notes 1598-1608 (discussion of statutory and regulations governing this split jurisdiction) (in HUD Chapter).

⁴²⁷ 8 U.S.C. § 1324b.

⁴²⁸ U.S. Dep't of Justice, Civil Rights Division, "Immigrant and Employee Rights Section," <https://www.justice.gov/crt/immigrant-and-employee-rights-section> [hereinafter DOJ CRT, "Immigrant and Employee Rights Section"].

⁴²⁹ 42 U.S.C. § 1997 *et seq.*

⁴³⁰ 34 U.S.C. § 10701.

⁴³¹ *Id.* § 12601.

⁴³² A pattern or practice exists where violations are repeated rather than isolated. *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977) (noting that the phrase "pattern or practice" "was not intended as a term of art," but should be interpreted according to its usual meaning "consistent with the understanding of the identical words" used in other federal civil rights statutes).

⁴³³ 42 U.S.C. § 2000cc, *et seq.*

⁴³⁴ *See* Appendix A (listing cases jointly prosecuted by HCE and SPL).

⁴³⁵ *See* U.S. Dep't. of Justice, Statement of Interest, *Disability Rights Idaho v. Sonnenberg*, No. 1:14-cv-369 (D. Id. July 20, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/07/30/idaho_soi_7-20-15.pdf.

The **Voting Section (VOT)** enforces the Voting Rights Act of 1965 (VRA),⁴³⁶ the National Voter Registration Act of 1993 (NVRA),⁴³⁷ and the Help America Vote Act of 2002 (HAVA).⁴³⁸ It also enforces the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),⁴³⁹ Voting Accessibility for the Elderly and Handicapped Act of 1985,⁴⁴⁰ as well as pertinent sections of the Civil Rights Acts of 1957 and 1964.⁴⁴¹

CRT also includes a **Policy & Strategy Section**, whose work this chapter describes in the Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity section.⁴⁴²

Enforcement Tools

Under the broad mandate set forth in Executive Order 12,250, as codified in federal regulations, CRT “shall” issue policy guidance, provide technical assistance, conduct research, provide educational materials to the public as well as impacted entities, consult with other agencies (federal, state and local), and investigate compliance with federal civil rights laws.⁴⁴³ Federal statutes also provide DOJ CRT with significant litigation authority, and federal regulations state that it “shall” enforce civil rights laws.⁴⁴⁴ Each of these CRT enforcement tools—which are duties that “shall” be done⁴⁴⁵—is listed below, then analyzed as relevant in the subsections of this chapter below assessing the efficacy of CRT’s work.

⁴³⁶ 52 U.S.C. § 10301 *et seq.*

⁴³⁷ *Id.* § 20501 *et seq.*

⁴³⁸ *Id.* § 20901 *et seq.*

⁴³⁹ *Id.* § 20301 *et seq.*

⁴⁴⁰ *Id.* § 20101 *et seq.*

⁴⁴¹ *Id.* §§ 10101, 20701.

⁴⁴² *See infra* notes 784-928.

⁴⁴³ 28 C.F.R. § 0.50.

⁴⁴⁴ *See supra* notes 377-379; and *see* 28 C.F.R. §§ 0.50(a) and (g).

⁴⁴⁵ 28 C.F.R. § 0.50; *see also supra* notes 377-79 (discussing that the regulatory language of “shall” and the language of Exec. Order No. 12,250 illustrate that these are obligations).

The Commission has identified which agency enforcement tools DOJ CRT has specific legal authority to use. Among all agencies reviewed, it is the only civil rights office that has specified legal authority to use all of the enforcement tools that the Commission reviewed. These are:

- Complaint Resolution⁴⁴⁶
- Agency-Initiated Charges⁴⁴⁷
- Litigation⁴⁴⁸
- Proactive Compliance Reviews or Evaluations⁴⁴⁹
- Testing⁴⁵⁰
- Observation⁴⁵¹
- Issuance of Policy Guidance⁴⁵²
- Issuance of Regulations⁴⁵³
- Technical Assistance⁴⁵⁴
- Publicity⁴⁵⁵
- Community Outreach to Stakeholders⁴⁵⁶
- Research, Data Collection, and Reporting⁴⁵⁷
- Collaboration with States/Local Agencies⁴⁵⁸
- Collaboration with other Federal Agencies⁴⁵⁹

⁴⁴⁶ 28 C.F.R. § 0.50(b) (“The following functions are assigned to and shall be conducted, handled or supervised by the Assistant Attorney General, Civil Rights Division... (b) requesting and reviewing investigations arising from reports or complaints of public officials or private citizens with respect to matters affecting civil rights”); *see also* 28 C.F.R. § 35.171 (obligating CRT to review all ADA complaints it receives); DOJ Justice Manual, *supra* note 370, at §§ 8-1.20-8-2.130 (outlining CRT’s complaint and investigation procedures).

⁴⁴⁷ 28 C.F.R. § 0.50(a) (Assistant Atty General “shall” “conduct” “Enforcement of all Federal statutes affecting civil rights,” except for certain criminal statutes); and *see, e.g.*, 34 U.S.C. § 12601; 42 U.S.C. § 12101 *et. seq.* (examples of authority to enforce federal civil rights statutes under its jurisdiction).

⁴⁴⁸ 28 C.F.R. § 0.50(a).

⁴⁴⁹ *Id.* § 50.3; *see also* 28 C.F.R. §§ 0.50(b) and 36.502.

⁴⁵⁰ U.S. Dep’t of Justice, Civil Rights Division, “Fair Housing Testing Program,” <https://www.justice.gov/crt/fair-housing-testing-program-1> (accessed Aug. 19, 2019).

⁴⁵¹ 52 U.S.C. § 10305.

⁴⁵² 28 C.F.R. § 0.50(a).

⁴⁵³ 42 U.S.C. § 2000d-1; Exec. Order No. 12,250 §§ 1-1 and 1-202 -207, 28 C.F.R. app. A §1-303 (DOJ CRT’s authority to coordinate, ensure consistency and review Title VI, Title IX and Section 504 regulations of other agencies); but *see* 5 U.S.C. § 301 (only heads of agencies may prescribe regulations); but *see* 28 C.F.R. § 0.50(f) (Assistant Atty General of CRT “shall” “conduct” “Research on civil rights matters, and the making of recommendations to the Attorney General as to proposed policies and legislation relating thereto.”).

⁴⁵⁴ *See, e.g.*, DOJ Justice Manual, *supra* note 370, at § 8-2.240.

⁴⁵⁵ 28 C.F.R. § 42.405.

⁴⁵⁶ *Id.* §§ 0.50(c) and 0.53(b)(5).

⁴⁵⁷ *Id.* § 0.50(f) (research on civil rights matters).

⁴⁵⁸ *Id.* § 0.50(e) (Assistant Atty General “shall” “handle” “Consultation with and assistance to ... State and local agencies on matters affecting civil rights”).

⁴⁵⁹ Exec. Order No. 12,250, 28 C.F.R. app. A §1-207; 28 C.F.R. § 0.50(e)(Assistant Atty General “shall” “handle” “Consultation with and assistance to other Federal departments and agencies and State and local agencies on matters affecting civil rights”) and (i) (“Upon request, assisting, as appropriate, the Commission on Civil Rights or other similar Federal bodies in carrying out research and formulating recommendations.”).

- Strategic Plan⁴⁶⁰
- Annual Reports⁴⁶¹

Staffing and Budget

As per its FY 2019 budget request, CRT currently employs 566 full time equivalent persons, 422 of whom are attorneys.⁴⁶² CRT staffing has declined each year since 2016, although its funding has been relatively at the same level.⁴⁶³ CRT noted that it was subject to a department-wide hiring freeze from February 2017 through early 2019.⁴⁶⁴ See Figure 2.1.

Figure 2.1



SOURCE: Reproduced from U.S. Dep't of Justice, Civil Rights Division, *FY 2019 Budget Request at a Glance*, at 1.

CRT told the Commission that in its FY 2017 Budget Request, it requested \$3.1 million as “‘adjustments to base,’ meaning an increase to keep current with ongoing expenses. In addition, the Division requested \$4.2 million in budget enhancements to expand specific enforcement areas.”⁴⁶⁵ The Budget Request stated the increase would have included \$2.7 million designated for program changes to policing and criminal justice work “to investigate and prosecute discriminatory and unconstitutional conduct, increase community confidence in the police, and improve public safety.”⁴⁶⁶ Congress not only denied CRT this increase, but also decreased its budget.⁴⁶⁷ The President’s budget request for CRT also asked for an increase of \$893,000 for FY 2018,⁴⁶⁸ which Congress denied. The President’s budget request did not request any increase in CRT funding for FY 2019.⁴⁶⁹

⁴⁶⁰ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. §1115(b).

⁴⁶¹ 28 U.S.C. § 529.

⁴⁶² U.S. Dep’t of Justice, Civil Rights Division, *FY 2019 Budget Request at a Glance*, p. 1, <https://www.justice.gov/jmd/page/file/1033091/download> [hereinafter DOJ CRT, *FY 2019 Budget Request at a Glance*].

⁴⁶³ Ibid.

⁴⁶⁴ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

⁴⁶⁷ U.S. Dep’t of Justice, Civil Rights Division, *FY 2018 Budget Request at a Glance*, <https://www.justice.gov/jmd/page/file/968381/download>.

⁴⁶⁸ Ibid.

⁴⁶⁹ DOJ CRT, *FY 2019 Budget Request at a Glance*, *supra* note 462.

Congress decreased CRT's budget by \$200,000 in FY 2017, and by \$800,000 in FY 2018.⁴⁷⁰ In addition, there were no proposed "Program Changes" in CRT's FY 2018 and 2019 Budget Requests, which has only happened one other time since FY 2009.⁴⁷¹ CRT told the Commission that it does not budget section-by-section, so the amount of funding per section is not available.⁴⁷² Moreover, DOJ argued that: "CRT's work is not comparable to the other civil rights offices analyzed in this report because it is not an agency OCR; the Office of Civil Rights within the Office of Justice Programs [OJP] is DOJ's OCR. CRT has responsibility for government-wide coordination of federal funding nondiscrimination statutes under EO [Executive Order] 12,250, and shares a relatively smaller portion of the responsibility of the administration enforcement for those statutes as to DOJ recipients, with OJP OCR."⁴⁷³

CRT's public records indicated that in 2016, there were 80 positions (57 attorneys) responsible for "policing and Criminal justice," but it is unclear which of those were assigned to the Criminal Section or to SPL.⁴⁷⁴ According to a DOJ Office of Inspector General report, as of April 2016, there were 33 full-time employees in the Special Litigation Section assigned to its Police Practice Group, which expended \$6.7 million (46% of the Section's budget for 2016).⁴⁷⁵

A January 4, 2017 report CRT issued, *The Civil Rights Division's Pattern and Practice Police Reform Work*, indicated that CRT did not then have enough resources to open investigations for all law enforcement entities that meet the basic criteria for a pattern or practice investigation, so it reportedly has had to prioritize.⁴⁷⁶ A February 2018 DOJ OIG report found that 17 law enforcement misconduct investigations were undertaken between 2011-2016, and that attorneys worked an average of 6,354 hours per case.⁴⁷⁷ From 2011 to 2016, the CRT's systems logged 8,605 referrals or complaints received by the SPL that related to state or local law enforcement agencies.⁴⁷⁸

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁴⁷³ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Oct. 1, 2019) (on file).

⁴⁷⁴ U.S. Dep't of Justice, Civil Rights Division, *FY 2017 Budget and Performance Summary*, <https://www.justice.gov/jmd/file/822036/download>.

⁴⁷⁵ DOJ, *Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct*, *supra* note 203, at 5.

⁴⁷⁶ U.S. Dep't of Justice, Civil Rights Division, *The Civil Rights Division's Pattern and Practice Police Reform Work*, January 2017, pp. 6-7, <https://www.justice.gov/crt/file/922421/download> [hereinafter DOJ CRT, *CRT's Pattern and Practice Police Reform Work*]. The two factors for whether a pattern or practice investigation are appropriate are: 1) "Would the allegations, if proven, establish a violation of the Constitution or federal laws?" and 2) "Would the allegations, if proven, constitute a pattern or practice, as opposed to sporadic or isolated violations of the Constitution or federal laws?" *Id.* at 5. See U.S. Dep't of Justice, "Press Release: Justice Department Releases Report on Civil Rights Division's Pattern and Practice Police Reform Work," Jan. 4, 2017, <https://www.justice.gov/opa/pr/justice-department-releases-report-civil-rights-division-s-pattern-and-practice-police-reform>.

⁴⁷⁷ DOJ, *Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct*, *supra* note 203, at 8.

⁴⁷⁸ *Ibid.*, 9-10.

Assessment

Prioritization for Civil Rights Agency-wide

Considering that CRT's statutory authority and responsibilities to enforce federal civil rights laws have not significantly changed during the fiscal years studied, the above-described budget challenges are critical,⁴⁷⁹ as they may be linked to decreases in the number of cases brought and precedents set.⁴⁸⁰ CRT's primary mission is external enforcement against state and local governments or private actors who are required to comply with federal civil rights law, and it may also exercise its authority to defend other federal agencies and actors who have been accused of civil rights violations. One way that it can prioritize civil rights is to influence the scope and interpretation of federal civil rights laws through litigation that results in federal courts setting legal precedents. If CRT is active in convincing federal courts to set broad precedents, its work develops broader mandates for compliance and greater efficacy by developing the law and sending a message to potential violators.⁴⁸¹ If CRT's position results in federal courts setting narrow precedents, it would limit the scope of civil rights protections and may result in lesser efficacy,⁴⁸² possibly creating a chilling effect.⁴⁸³

CRT does not have a direct line of authority to the head of the agency, the Attorney General. The Assistant Attorney General for Civil Rights (AAG for CRT) does not report directly to the Attorney General (who is the head of the agency), but instead reports to an Associate Attorney General.⁴⁸⁴ CRT noted that, "CRT has the same organizational position and reporting structure as every other civil litigating component in DOJ, such as Civil, Antitrust, Tax, or ENRD."⁴⁸⁵ In addition to civil rights enforcement authority, including the authority to litigate in federal court, the AAG for CRT may make recommendations to the Attorney General regarding proposed policies and legislation,⁴⁸⁶ coordinates in the DOJ "all matters affecting civil rights,"⁴⁸⁷ and is delegated "Leadership and Coordination of Nondiscrimination laws" within the federal

⁴⁷⁹ In 2002, the Commission found that increasing statutory authority without increasing the budget and staffing of agency civil rights offices was problematic. USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 46-47. Similarly, keeping the same authority but decreasing budget and staffing could be problematic.

⁴⁸⁰ See *infra* notes 622-9 (decrease in number of cases brought) and 630-7 (decrease in consent decrees and increase in out-of-court settlements).

⁴⁸¹ See *infra* notes 562-64 (discussing the Commission's 2002 assessment of efficacies in litigation and comparing them to various current CRT litigation practices).

⁴⁸² If setting a broad precedent through systemic litigation increases efficacy, then logically setting a limiting or very narrow precedent would decrease efficacy. See also Francois Testimony, *Federal Civil Rights Enforcement Briefing*, p. 231 (discussing a "loss of doctrinal development" because "each of these agencies have a tremendously important role to play in the way that doctrine in their particular area develops, because courts tend to give them far more leeway in the course of litigation. And the moment that they step out from enforcing, that role cannot be fully fulfilled by private litigants, so we lose, if you will, the way the doctrine itself develops.").

⁴⁸³ See Yang Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 182-88.

⁴⁸⁴ See, e.g., DOJ, "Organizational Chart," *supra* note 106; see also 28 C.F.R. § 0.1.

⁴⁸⁵ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁴⁸⁶ 28 C.F.R. § 0.50(f).

⁴⁸⁷ *Id.* § 0.50(d).

government.⁴⁸⁸ However, this delegation of authority for leadership and coordination of nondiscrimination laws is limited to issuing regulations, and specifically does not include “approving agency rules, regulations, and orders of general applicability issued under the Civil Rights Act of 1964 and section 902 of the Education Amendments of 1972.”⁴⁸⁹ Only the Attorney General may approve such regulations; however this regulation still provides significant authority to CRT to issue federal regulations under the Civil Rights Act of 1964,⁴⁹⁰ and section 902 of the Education Amendments of 1972.⁴⁹¹

Strategic Planning and Self-Evaluation

The agency has developed a strategic plan to accomplish civil rights activities with measures of performance, performance goals, and assessments of the accomplishments; however, its metrics are broad. According to this broad metrics set, the agency has met its strategic goals.

According to the DOJ-wide Annual Performance Report and Performance Plan for FY 2016-2017, the only stated civil rights performance measure was to “favorably resolve” 85 percent of both civil and criminal civil rights cases, and CRT achieved this goal in 2016 and 2017.⁴⁹² DOJ’s Annual Performance Report for FY 2018 reported an additional CRT performance measure under the objective to “[e]nsure an immigration system that respects the rule of law, protects the safety of U.S. Citizens and legal aliens, and serves the national interest.” The performance measure for this objective sets a target of successfully resolving 75 percent of INA Section 274B Protecting U.S. Workers Initiative discriminatory or unlawful hiring practice enforcement actions.⁴⁹³ DOJ’s FY 2018 performance report also adds a new strategic objective to “Defend First Amendment rights to exercise religion and free speech,” tasking CRT to increase the number of statements of interest involving the First Amendment or religious liberty, and to increase the number of RLUIPA matters opened.⁴⁹⁴

⁴⁸⁸ *Id.* § 0.51(a).

⁴⁸⁹ *Id.* (citing Executive Order 12,250’s specific delegation of those authorities to the Atty General).

⁴⁹⁰ *Id.* (citing Executive Order 12,250 and 28 C.F.R. § 0.180, requiring such regulations to be issued by the Attorney General).

⁴⁹¹ CRT commented to the Commission that: “Under Title VI and Title IX, each federal agency department and agency is “authorized and directed” to issue implementing rule, regulations, and orders of general applicability to effectuate the provisions of these statutes. The Coordination Regulations state that each federal agency that issues or amends its regulation implementing Title VI or Title IX is required to submit the proposed regulation or amendment and receive approval by the AAG. 28 C.F.R. 42.403. The Atty General has the delegated authority of the President, pursuant to EO 12,250, to approve them.” U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁴⁹² U.S. Dep’t of Justice, Office of the Atty General, *FY 2016 Annual Performance Report and FY 2018 Annual Performance Plan*, May 2017, <https://www.justice.gov/doj/page/file/968516/download>; [hereinafter DOJ CRT, *FY 2016 Annual Performance Report*]; U.S. Dep’t of Justice, Office of the Atty General, *FY 2017 Annual Performance Report and FY 2019 Annual Performance Plan*, February 2018, p. 27, <https://www.justice.gov/doj/page/file/1033761/download> [hereinafter DOJ CRT, *FY 2017 Annual Performance Report*].

⁴⁹³ U.S. Dep’t of Justice, Office of the Atty General, *FY 2018 Annual Performance Report and FY 2020 Annual Performance Plan*, <https://www.justice.gov/doj/page/file/1148176/download>.

⁴⁹⁴ *Ibid.*, 51.

CRT also set an internal goal of reaching a certain amount of trainings on human trafficking for law enforcement partners, but its performance reports include incomplete and inconsistent information.⁴⁹⁵ DOJ defined the term “favorably resolve” to “include those cases that resulted in court judgments favorable to the government, as well as settlements.”⁴⁹⁶ DOJ’s reported results for civil rights cases are below (see Table 2.1):

Table 2.1

Strategic Measure	FY 2016	FY 2017	FY 2018
“Percent of civil rights cases favorably resolved: criminal cases”	85%	98%	N/A
“Percent of civil rights cases favorably resolved: civil cases”	100%	98%	N/A

SOURCE: DOJ Annual Performance Reports

CRT itself releases an annual “Performance Budget” report that outlines the division’s mission, its performance in the last year in reaching set measures in line with strategic goals, a strategic plan for achieving the next year’s performance benchmarks, and justifications for any requested budget increases. The budget requests for CRT also include specific focus areas. According to the FY 2019 Budget Request, CRT’s strategy from FY 2017 to 2019 shared several focus areas over the three years.⁴⁹⁷ The language and overall summary of these areas were largely consistent. However, in FY 2017, the budget requests included “ensuring constitutional policing and advancing criminal justice reform,” and in FY 2018 and 2019, the budget requests omitted these focus areas.⁴⁹⁸ Other changed language included removing priorities to protect the rights of people with disabilities, and to protect LGBT individuals from discrimination, harassment, and violence.⁴⁹⁹

⁴⁹⁵ See DOJ CRT, *FY 2019 Performance Budget Congressional Justification*, p. 32, <https://www.justice.gov/file/1034196/download> [hereinafter DOJ CRT, *FY 2019 Performance Budget Justification*]; U.S. Dep’t of Justice, Civil Rights Division, *FY 2018 Performance Budget Congressional Justification*, pp. 3-4, <https://www.justice.gov/file/968731/download> [hereinafter DOJ CRT, *FY 2018 Performance Budget Justification*]; U.S. Dep’t of Justice, Civil Rights Division, *FY 2017 Performance Budget Congressional Justification*, pp. 35-36, <https://www.justice.gov/jmd/file/820981/download> [hereinafter DOJ CRT, *FY 2017 Performance Budget Justification*].

⁴⁹⁶ DOJ CRT, *FY 2017 Annual Performance Report*, *supra* note 492, at 30.

⁴⁹⁷ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 32; DOJ CRT, *FY 2018 Performance Budget Justification*, *supra* note 495, at 25-26; DOJ CRT, *FY 2017 Performance Budget Justification*, *supra* note 495, at 35-36.

⁴⁹⁸ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495; DOJ CRT, *FY 2018 Performance Budget Justification*, *supra* note 495; DOJ CRT, *FY 2017 Performance Budget Justification*, *supra* note 495.

⁴⁹⁹ *Ibid.*

FY 2018's report added a strategic area to "promote equal education opportunities," which was not included in the prior or subsequent years. Also, in its FY 2019 and 2018 Performance Budget Reports, CRT stated that one of its strategic focus areas is IER's prioritization of the anti-discrimination provision of the INA, "to ensure that companies do not discriminate against U.S. workers in favor of foreign visa holders."⁵⁰⁰ To illustrate the process further, below are what CRT listed as key enforcement areas listed under CRT's FY 2020 Strategy:

- **Prosecute Hate Crimes.** CRT will prioritize hate crimes enforcement to ensure that individuals and communities are protected from crimes that are motivated by racial, religious, or other bias.
- **Prosecute Human Trafficking.** CRT will continue its highly successful human trafficking program. Prosecuting human trafficking presents unique challenges.
- **Protect the Rights of U.S. Workers.** CRT will continue to combat workplace discrimination. In FY 2020, CRT will prioritize enforcement of the Immigration and Nationality Act to ensure that companies do not discriminate against U.S. workers in favor of foreign visa holders.
- **Protect Religious Freedom.** The Division will continue to combat religious discrimination under the Religious Land Use & Institutionalized Persons Act (RLUIPA). In the last year, the Division filed a record number of eight RLUIPA lawsuits and initiated a record number of 31 RLUIPA investigations, resulting in a 30 percent increase in the number of cases, and a 50 percent increase in the number of investigations initiated over FY 2017.
- **Ensure the Rights of Military Servicemembers.** Servicemembers make tremendous sacrifices for our nation. When their duties call them far away from home, the Division stands ready to protect their rights, specifically with regard to employment, voting, and fair lending. CRT will build on its successes as it continues these efforts on behalf of the nation's military service men and women, and veterans. Safeguard Voting Rights for All Americans. CRT will continue to protect voting rights through efforts to detect and investigate voting practices that violate federal laws and through affirmative litigation to enjoin such practices.
- **Combat Sexual Harassment in Housing.** CRT will continue pursuing sexual harassment in housing through its Sexual Harassment Initiative introduced in FY 2018. The Division has recently filed and settled a number of path-breaking cases providing significant compensation and relief to thousands of victims of discrimination.
- **Combat Discrimination Motivated by Race and National Origin.** In FY 2020, the Division will dedicate additional resources to civil investigations and suits involving allegations that individuals suffered discrimination because of their race or national origin.

⁵⁰⁰ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 32; DOJ CRT, *FY 2018 Performance Budget Justification*, *supra* note 495, at 25.

The Division enforces several statutes that it can use to address such discrimination in employment, housing, education, and other areas.⁵⁰¹

Each of the above “key enforcement areas,” except the last, was included in the FY 2019 Strategy,⁵⁰² in which no program changes were requested. In the interim, as DOJ has decided to reorganize the Community Relations Services by transferring its most important outreach duties, CRT’s FY 2020 budget request includes “absorbing the functions of the Community Relations Service (CRS) with 15 positions, including 2 attorneys.”⁵⁰³ Under its strategic plan for FY 2018-2022, CRT’s only reported performance measure is “successful disposition of 90 percent of Immigration and Nationality Act (INA) Section 274B Protecting U.S. Workers Initiative discriminatory or unlawful hiring practice enforcement actions.”⁵⁰⁴ This measure is a part of the DOJ’s broader goal to “[e]nsure an immigration system that respects the rule of law, protects the safety of U.S. Citizens and legal aliens and serves the national interest.”⁵⁰⁵ As described above, in 2019, DOJ added CRT-specific performance measures for future years, tasking CRT to increase the number of statements of interest involving the First Amendment or religious liberty, and to increase the number of RLUIPA matters opened.⁵⁰⁶

Beyond filing “a record 161 cases” in 2017, CRT summarized its criminal enforcement efforts over FY 2016 and FY 2017 in its FY 2019 Performance Budget report as follows:

In FY 2016 and FY 2017, the Division exceeded its performance goals. During those two years, the Division, in conjunction with United States Attorneys’ Offices: charged 681 defendants with criminal civil rights violations; filed 322 criminal civil rights cases, the highest number compared with any other two-year period since counting began in 1993; filed 200 human trafficking cases, the highest number in any two-year period since counting began in 1993.⁵⁰⁷

These statistics reflect a broad range of enforcement of criminal civil rights protections. CRT’s stated goal in connection with hate crimes in its FY 19 Performance Budget report was to ensure that “individuals and communities are protected from crimes that are motivated by racial, religious or other bias.”⁵⁰⁸ As of February 2018, CRT had charged 16 defendants and obtained 15 hate crimes convictions since 2016.⁵⁰⁹

⁵⁰¹ U.S. Dep’t of Justice, Civil Rights Division, *FY 2020 Budget Request at a Glance*, <https://www.justice.gov/jmd/page/file/1142376/download>. [hereinafter DOJ CRT, *FY 2020 Budget Request at a Glance*].

⁵⁰² DOJ CRT, *FY 2019 Budget Request at a Glance*, *supra* note 462.

⁵⁰³ DOJ CRT, *FY 2020 Budget Request at a Glance*, *supra* note 501. (The budget also requests a 3.2% funding increase and 15 new positions.)

⁵⁰⁴ U.S. Dep’t of Justice, *Department of Justice Strategic Plan for 2018 – 2022*, pp. 28-29, <https://www.justice.gov/jmd/page/file/1071066/download>.

⁵⁰⁵ *Ibid.*, 14.

⁵⁰⁶ *Ibid.*, 51.

⁵⁰⁷ DOJ CRT, *FY 2019 Budget Request at a Glance*, *supra* note 462, at 18.

⁵⁰⁸ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 32.

⁵⁰⁹ *Ibid.*, at 5 (This statistic was reported in 2019 Performance Budget report released in March 2018).

According to DOJ's FY 2016 Annual Report to Congress, in 2016, CRT announced a pilot Servicemembers and Veterans Initiative to support its enforcement efforts and related military member protections.⁵¹⁰ It provided funding through the end of 2018 to increase the number of attorneys and support staff tasked with enforcing the SCRA and to appoint Initiative Liaisons to work with local military members.⁵¹¹

In each of its last three performance reports, CRT has acknowledged the difficulty and intensive nature of investigating and prosecuting human trafficking, which it planned to counter by dedicating "time, resources, and specialized skill in jurisdictions across the country."⁵¹² In 2012, DOJ was one of three co-chair agencies releasing a Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013–2017, which set forth "a 5-year path for further strengthening coordination, collaboration, and capacity across governmental and nongovernmental entities dedicated to providing support to the victims of human trafficking."⁵¹³ CRT's FY 2019 Performance Budget states that its focus on combatting human trafficking has led to an increase in charges and convictions. In conjunction with U.S. Attorneys' Offices, CRT filed 200 human trafficking cases in 2016-2017, the highest two-year total since counting began in 1993 and close to the 5-year total of 235 from 2008-2012.⁵¹⁴ According to CRT's 2019 Performance Budget, CRT also surpassed its projection of human trafficking complaints reviewed, by over 60 percent.⁵¹⁵

In its FY 2018 Performance Budget report, one of CRT's new stated "Strategic Focus Areas" was a general goal to "promote equal educational opportunities."⁵¹⁶ CRT was more specific in its FY 2019 Performance Budget report, and stated three key areas of focus for EOS moving forward: (1) enforcing *Brown v. Board of Education* through school desegregation cases; (2) combatting religious discrimination; (3) confronting harassment and hate incidents in school settings.⁵¹⁷

In FY 2014 and 2015, EOS resolved 19 cases, opened 26 investigations of alleged discrimination, negotiated eight settlements for English Learner (ELL) student protections and continued to enforce about 180 desegregation cases.⁵¹⁸ In FY 2015 and 2016 EOS resolved 25 cases, opened 28 investigations of alleged discrimination, negotiated 9 agreements related to ELL students, and

⁵¹⁰ U.S. Dep't of Justice, Civil Rights Division, *Attorney General's 2016 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976*, <https://www.justice.gov/crt/page/file/996791/download>, at 7.

⁵¹¹ *Ibid.*

⁵¹² DOJ CRT, *FY 2017 Performance Budget Justification*, *supra* note 495, at 35; DOJ CRT, *FY 2018 Performance Budget Justification*, *supra* note 495, at 25; DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 32.

⁵¹³ Coordination, Collaboration, Capacity: Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013-2017, <https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>.

⁵¹⁴ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 4-5, 18.

⁵¹⁵ *Ibid.*, 14.

⁵¹⁶ DOJ CRT, *FY 2018 Performance Budget Justification*, *supra* note 495, at 25-26.

⁵¹⁷ *Ibid.*

⁵¹⁸ DOJ CRT, *FY 2017 Performance Budget Justification*, *supra* note 495, at 29.

continuously monitored 163 school desegregation cases.⁵¹⁹ Similar information was not available in CRT's 2019 Performance Budget, although it noted EOS continued to monitor and enforce the approximately 170 longstanding desegregation cases.⁵²⁰ In CRT's recent Performance Budget reports, it emphasized an effort to focus on the enforcement of the USERRA to bring about the re-employment of veterans and promotional opportunities.⁵²¹ Notably, there is no other mention of the Employment Litigation Section in its focus areas or larger Division strategic goals.⁵²²

In its FY 2019 Performance Budget Request, CRT stated its intention to increase resources for Crisis Intervention Team (CIT) officers that are trained to respond to calls of people with substance abuse or mental health issues who are in crisis.⁵²³ CRT reported that because they are often not sufficiently trained, police officers responding to calls involving individuals in crisis can often lead to injuries to police or police using excessive force.⁵²⁴ In FY 2017, CRT enforced agreements in seven jurisdictions to increase CIT training.⁵²⁵

One of CRT's stated focus areas for 2017 in its Performance Budget Report was to "Promote Fair Lending and Fair Housing," in part because housing access influences an individual's and family's access to education, transportation and job opportunities and its close correlation with credit accessibility.⁵²⁶ Promoting fair housing was also listed as a goal in the FY 2018 Performance Budget Report's focus areas, though not fair lending.⁵²⁷ Its FY 2019 performance budget clarified that to "Combat Sexual Harassment in Housing" was a goal that CRT is aggressively pursuing.⁵²⁸ The data below shows that CRT's Housing Section has been productive and effective in this area.⁵²⁹

CRT's focus on protecting the rights of children and adults in institutions, as stated in its FY 2019 Performance Budget Report involves two main goals: (1) redressing sexual abuse of those in institutions by using the Prison Rape Elimination Act as a framework for CRIPA investigations and settlements; and (2) protecting the rights of children with disabilities by ensuring they receive adequate services in the most integrated setting that is appropriate.⁵³⁰ This is a shift away from its 2017 report where it emphasized the Special Litigation Section's increased efforts "to ensure effective, constitutional, and accountable policing."⁵³¹

⁵¹⁹ DOJ CRT, *FY 2018 Performance Budget Justification*, *supra* note 495, at 20.

⁵²⁰ See DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 24.

⁵²¹ *Ibid.*, 22.

⁵²² *Ibid.*

⁵²³ *Ibid.*, 30.

⁵²⁴ *Ibid.*

⁵²⁵ *Ibid.*

⁵²⁶ DOJ CRT, *FY 2017 Performance Budget Justification*, *supra* note 495, at 35.

⁵²⁷ DOJ CRT, *FY 2018 Performance Budget Justification*, *supra* note 495, at 25.

⁵²⁸ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495; *see also* Cases Involving Sexual Harassment in Housing Resolved by CRT's Housing and Civil Enforcement Section (FY 2016-2018), *infra* notes 679-91.

⁵²⁹ *See infra* notes 679-91.

⁵³⁰ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 20.

⁵³¹ DOJ CRT, *FY 2017 Performance Budget Justification*, *supra* note 495, at 28.

Complaint Processing, Agency-Initiated Charges, and Litigation

First, this section describes the results of the Commission's research about CRT's overall complaint, investigation, and litigation processes. Second, this section analyzes data about CRT's litigation. CRT's main enforcement tool is litigation;⁵³² therefore with regard to CRT, the Commission mainly evaluates the 388.5⁵³³ cases acted upon and resolved by certain sections of CRT during Fiscal Years 2016-2018,⁵³⁴ as well as the cases litigated by the Appellate and Criminal Sections. It then analyzes data and trends showing the scope and impacts of this main tool among DOJ's civil rights enforcement efforts.

With the exception of ADA complaints, CRT is not under any obligation to investigate each complaint it receives.⁵³⁵ There is little available information on CRT's specific complaint and investigation process, and in response to the Commission's interrogatories, Acting Attorney Gore referred the Commission to its website.⁵³⁶ The website states that:

There are many ways that the Division learns about potential civil rights violations. Each year, it receives thousands of letters, emails and phone calls from individuals, public officials and organizations about potential civil rights violations. In addition, other government agencies such as the Federal Bureau of Investigation (FBI), Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL), Department of Housing and Urban Development (HUD) and the Navajo Nation Human Rights Commission send the Division information about potential civil rights violations. The Division also uses publicly available information from newspapers, television and other media to learn about potential civil rights violations.⁵³⁷

⁵³² 28 C.F.R. § 0.50(a).

⁵³³ One of the cases is counted as half of a case resolution, because a January 13, 2017 agreement in principle to enter into a consent decree with Chicago regarding police practices, was later opposed on October 12, 2018 in DOJ's Statement of Interest Opposing Proposed Consent Decree. *See* Agreement in Principle Between the United States Department of Justice and the City of Chicago, Regarding the Chicago Police Department (Jan. 13, 2017), <https://www.justice.gov/opa/file/925901/download>; and *see* United States Statement of Interest Opposing Proposed Consent Decree, *State of Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Oct. 12, 2018).

⁵³⁴ *See* Appendix A, Chart of CRT Cases Resolved, FY 2016-18 (analyzing enforcement actions from CRT's Disability Rights, Employment Litigation, Educational Opportunities, Housing and Civil Enforcement, Immigrant and Employee Rights, Special Litigation, and Voting sections).

⁵³⁵ *See* 28 C.F.R. 35.171 (discussion of DOJ obligations regarding ADA complaints received).

⁵³⁶ Letter from Acting Attorney General John M. Gore (Mar. 26, 2018) (responding to the Commission's February 9 Interrogatories and Document Requests)[hereinafter CRT Response to USCCR Interrogatories].

⁵³⁷ U.S. Dep't. of Justice, Civil Rights Division, "How Does the Division Find Out About Possible Civil Rights Violations," <https://www.justice.gov/crt/how-does-division-find-out-about-possible-civil-rights-violations> (accessed Mar. 8, 2019).

The Justice Manual states that:

Information that may indicate an investigation under a federal civil rights statute is appropriate may come to the Civil Rights Division or a United States Attorney's Office through a variety of channels, including referrals or complaints from other federal agencies, victims or community organizations, private attorneys, media coverage, and other sources. Upon receiving such information, the Civil Rights Division or the United States Attorney's Office may engage in a pre-investigation review to determine whether an investigation is appropriate. Pre-investigation review includes taking actions such as speaking to and reviewing materials received from a complainant and reviewing publicly available information.⁵³⁸

The U.S. Department of Justice's 93 U.S. Attorneys⁵³⁹ may also enforce civil rights protections, but the Justice Manual (applicable to all DOJ attorneys including those in U.S. Attorney's Offices) clarifies that major decisions, such as whether to bring a complaint or settle a civil rights case, must be authorized by the Assistant Attorney General.⁵⁴⁰ In this report, the Commission reviews the work of the CRT and not that of U.S. Attorneys.

Sometimes the agency's litigation is systemic. Similar to the Fair Housing Act, under the Equal Credit Opportunity Act (ECOA), CRT can file a lawsuit against a lender that has displayed a "pattern or practice" of discrimination.⁵⁴¹ CRT may also bring pattern or practice cases under the Violent Crime and Law Enforcement Act of 1994, to address systemic problems that have led to patterns or practices of civil rights violations by law enforcement agencies or in the incarceration of juveniles or administration of juvenile justice or the Civil Rights of Institutionalized Persons Act, to address allegations that state or local governments subject people confined in residential institutions to unlawful conditions pursuant to a "pattern or practice."⁵⁴² In January 2017, CRT reported that it prioritizes pattern or practice cases involving police based upon whether the issue involves core issues common to many similar law enforcement agencies (unlawful use of force,

⁵³⁸ DOJ Justice Manual, *supra* note 370, at § 8-2.110 (CRT AAG reserves right to determine when a civil rights investigation should be opened), § 8-2.120 ("In most instances, the Assistant Attorney General for the Civil Rights Division shall authorize the filing of a complaint in civil rights cases, and in most cases the complaint must be signed by the Assistant Attorney General for the Civil Rights Division. Some civil rights statutes also require the complaint to be signed by the Attorney General."), § 8 – 2.130 ("As described in greater detail in other sections of this Title of the United States Attorney's Manual, the Civil Rights Division will work cooperatively with United States Attorney's Offices to determine the most appropriate assignment of responsibilities for the preparation of pleadings and other legal documents in connection with the litigation and trial of civil rights cases. Unless specifically delegated, ultimate responsibility for the conduct and resolution of civil rights cases remains with the Assistant Attorney General for the Civil Rights Division.").

⁵³⁹ U.S. Attorneys are appointed by the president to "ensure that the laws are faithfully executed" in each federal district. See U.S. Dep't. of Justice, "U.S. Attorneys," <https://www.justice.gov/usao/about-offices-united-states-attorneys> (accessed Mar. 13, 2019). "The United States Attorney is the chief federal law enforcement officers in their districts, and is also involved in civil litigation where the United States is a party." *Ibid.*

⁵⁴⁰ DOJ Justice Manual, *supra* note 370, at § 8-2.100.

⁵⁴¹ U.S. Dep't of Justice, Civil Rights Division, "The Equal Credit Opportunity Act," <https://www.justice.gov/crt/equal-credit-opportunity-act-3> (accessed Nov. 8, 2017).

⁵⁴² 42 U.S.C. § 14141.

racial profiling, etc.), whether “allegations represent an emerging or developing issue,” and whether or not other federal intervention is available.⁵⁴³ “A high-profile incident—such as a shooting death, a use of excessive force, or a false arrest—standing alone never warrants opening a pattern-or-practice investigation . . . the focus of a pattern or practice case is on systemic reform of widespread police practices and institutional change.”⁵⁴⁴ CRT also told the Commission that these cases involve “institutional reform” and therefore take much longer to develop, prosecute, and monitor for subsequent compliance than some other cases.⁵⁴⁵

Even among cases that are not “pattern or practice” cases, due to the nature of the statutes it enforces against state or local governments or private entities that allegedly discriminate against protected classes, CRT’s cases are generally systemic. Only a small fraction of the hundreds of cases resolved by CRT during Fiscal Years 2016-2018 involved remedies that were only applicable to an individual. These include all hate crimes cases, which are always prosecuted against an individual.⁵⁴⁶ But typically, CRT’s litigation involved systemic remedies requiring state or local jurisdictions to make changes in their policies and procedures.⁵⁴⁷ Even cases of discrimination brought against private businesses have required systemic remedies.⁵⁴⁸

The relief CRT procures through its cases may be ordered by a judge through a court opinion or entry of a consent decree, or it may be agreed upon by the parties in an out-of-court settlement, or in some cases, through a letter agreement—and the efficacy of each of these tools varies in levels of enforceability and impact in setting precedent and sending a message to potential violators. Judicial opinions are more effective in developing civil rights law as they set binding precedent on subsequent decisions in the same jurisdiction (and offer persuasive authority to similar cases in other jurisdictions). Out-of-court settlements are at the other end of the spectrum because they are not always enforceable in court.⁵⁴⁹ Consent decrees are in the middle as they provide enforceability because they are federal court orders.⁵⁵⁰

The criteria for and value of consent decrees as a form of civil rights enforcement may also depend on the particular federal civil rights statute’s requirements and the circumstances of the case at

⁵⁴³ DOJ CRT, *CRT’s Pattern and Practice Police Reform Work*, *supra* note 476, at 6-7.

⁵⁴⁴ *Ibid.*, 8.

⁵⁴⁵ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁵⁴⁶ *See, e.g.*, Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Hate Crimes Cases.

⁵⁴⁷ *See, e.g.*, Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section and Voting Section Cases.

⁵⁴⁸ *See, e.g.*, Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigrant and Employee Rights Cases.

⁵⁴⁹ U.S. Dep’t of Justice, Office of the Atty General, Memorandum from Attorney General Sessions to Heads of Civil Litigating Components and U.S. Attorneys, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities (Nov. 7, 2018), n. 2, <https://www.justice.gov/opa/press-release/file/1109621/download> [hereinafter Sessions Memo] (defining settlement as “an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract”).

⁵⁵⁰ *See, e.g.*, USCCR, *Minority Voting*, *supra* note 17, at 239, 258-59, and 268.

hand. For example, under current interpretation from the Attorney General,⁵⁵¹ federal election observers may only be ordered by a court and “as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment,” and not if the violations are few in number, have been eliminated, or are not likely to be repeated.⁵⁵² Therefore, this tool is only available if CRT is able to demonstrate serious VRA violations and procure a consent decree or judicial decision, rather than an out-of-court settlement.⁵⁵³ If there are conflicts with state or local law (such as zoning laws or practices that may violate the Fair Housing Act⁵⁵⁴ or the RLUIPA, which “protects religious institutions from unduly burdensome or discriminatory land use regulations”⁵⁵⁵), a court order might be needed for the state or local jurisdiction to be fully empowered to follow federal civil rights law, without violating state law.⁵⁵⁶ During a recent briefing on *Women in Prison: Seeking Justice Behind Bars*, the Commission received testimony from a state correction official that even without a conflict of law, consent decrees may be needed to give local officials the court-ordered authority to procure the resources and support of the state to reform their institutions to come into compliance with federal civil rights law.⁵⁵⁷ There are other

⁵⁵¹ The language of the Voting Rights Act authorizes federal observers to “(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.” 52 U.S.C. § 10305(d). For further analysis of the statute and DOJ’s interpretation of their authority under it, see USCCR, *Minority Voting*, *supra* note 17, at 269.

⁵⁵² 52 U.S.C. § 12302(a) (“Federal observers may be ordered by a federal court as appropriate to enforce the 14th and 15th amendment: “(1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: Provided, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.”). For further discussion of DOJ’s ability to send federal observers, see ⁵⁵³ *Id.* (observers may only be ordered by federal judges and based on the above criteria); and see *supra* note 549 citing Sessions’ Memo at 2 (defining settlement as requiring a lawsuit to enforce it).

⁵⁵⁴ See, e.g., U.S. Dept. of Justice, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*, Nov. 16, 2016, <https://www.justice.gov/opa/file/912366/download> [hereinafter DOJ, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*] (including various examples of local land use and zoning laws that may conflict with the Fair Housing Act).

⁵⁵⁵ U.S. Dep’t of Justice, Civil Rights Division, *Federal Religious Land Use Protections*, <https://www.justice.gov/crt/page/file/1070736/download> [hereinafter DOJ, *Federal Land Use Protections*].

⁵⁵⁶ See, e.g., Memorandum Order Denying Motion to Dismiss, *United States v. Bensalem Township, PA*, No. 16-3938 (E.D.P.A. Nov. 14, 2016), <https://www.justice.gov/crt/case-document/file/912191/download> (preceding a settlement requiring that The Township “amend its Zoning Ordinance in a way that, to the satisfaction of the United States, will assure that the Zoning Ordinance is in compliance” with the RLUIPA, and if the Township wishes, “taking into consideration the decision of the United States District Court for the Eastern District of Pennsylvania in *First Korean Church of New York, Inc. v. Cheltenham Township*, No. 05-6389, 2012 WL 645986 (Feb. 29, 2012), *aff’d* 2013 WL 362819 (3d Cir. Jan. 24, 2013).” Settlement Agreement, ¶ 8.a

⁵⁵⁷ At the Commission’s February 2019 briefing on the status of women in prison, Wendy Williams, Alabama Department of Correction’s Deputy Commissioner of Women’s Services, testified that without the consent decree, Tutwiler would not have been able to secure funds from the state in order to make the systemic changes needed to come into compliance with the Prison Rape Elimination Act. Wendy Williams, Alabama Department of Correction’s Deputy Commissioner of Women’s Services, testimony, *Women in Prison: Seeking Justice Behind Bars Briefing Before the U.S. Comm’n on Civil Rights*, Washington, D.C., Feb. 22, 2019, transcript, pp. 240-41.

factors, such as the need to ensure both immediate and long-term enforceability in federal court, that argue for consent decrees.⁵⁵⁸ These factors all depend on the circumstances of the case, and in other cases, settlements may be more effective in terms of procuring a quicker and less resource-intensive remedy, if the jurisdiction is willing to come into compliance.⁵⁵⁹ In 2002, the Commission recognized the value of settlements, but also warned against their over-use as “some concerns about the implementation of these methods have prompted a series of recommendations.”⁵⁶⁰ Concerns included addressing the root causes of discrimination found in policies and practices with disparate impact, and recommendations included that settlements “should only be seen and used as one of the strategies” to eliminate unfair practices.⁵⁶¹

With regard to litigation, in 2002, while the Commission recognized the resource demands involved, the Commission also recognized litigation’s importance in developing case law, among other factors; “[t]hus, many of the Commission’s recommendations in this area have centered on stepping up litigation in areas of law that are relatively undeveloped.”⁵⁶² The importance of litigation to developing case law is in part due to the nature of the U.S. legal system in which the law is developed through precedents set by judges; impact in efficacy can be magnified if CRT resolves a case through a judicial decision or opinion. Moreover, these precedents have further impact if, through the work of the Appellate Section, they are upheld by the judiciary at the federal Courts of Appeals and Supreme Court levels.⁵⁶³ The data below shows that CRT resolves its cases

⁵⁵⁸ See, e.g., American Univ. Washington College of Law, *The Role of the Federal Government in Protecting Your Civil Rights*, Transcript of Panel Hearing Conducted on Oct. 26, 2018 (submitted as public comment to the Commission), Testimony of Chiraag Bains (Legal Director, Demos, and former senior DOJ CRT attorney) (critiquing the recent decrease in enforcement actions against police departments and the attempts to pull out of consent decrees in Baltimore and Chicago, and noting that during the Obama Administration: “There were 19 agreements reached and 15 of those were consent decrees, court-ordered agreements with a monitor and the power of sanctions to be brought if the defendant didn’t complete the requirements of the consent decree.”) at 57, 60; see also *infra* note 642 (testimony of Vanita Gupta).

⁵⁵⁹ See, e.g., USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 38.

⁵⁶⁰ *Ibid.*, 38.

⁵⁶¹ *Ibid.*, 38, n. 268; see also *infra* notes 655-63 (discussing mediation under the ADA).

⁵⁶² *Ibid.*, 38.

⁵⁶³ See USCCR, *Minority Voting*, *supra* note 17, at 255 n. 1425.

through judicial decisions much less often than through other methods, but some cases do go to trial and CRT has had a highly effective record of winning nearly all of its cases both at the trial court level and after any appeals.⁵⁶⁴

One important feature of CRT consent decrees and federal judicial decisions is that they typically require ongoing monitoring by the federal government or a court-ordered monitor to ensure that the state or local jurisdiction come into compliance.⁵⁶⁵ This is also a feature of some out-of-court settlement agreements, but as former Attorney General Sessions has made clear, settlements require filing a lawsuit in order to be enforced.⁵⁶⁶ CRT told the Commission that it also expends resources monitoring compliance after cases are resolved by settlement, consent decree or judicial decision, emphasizing that:

The compliance side of CRT's work is substantial in institutional reform cases involving law enforcement agencies, correctional facilities, and governmental agencies that serve people with disabilities. Cases involving a pattern or practice of law enforcement misconduct, for example, come to an end only after the law enforcement agency has fully complied with the consent decree or settlement, which typically requires the agency to revamp its policies, training, supervision, and accountability systems, and demonstrate real improvement in outcomes like uses or force and stops, searches, and arrests. These reforms take years.

By excluding this work and treating institutional reform settlements the same as settlements with individual actors, this metric [of cases resolution] understates the

Hon. John M. Walker, Jr., Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit, "The Role of Precedent in the United States," *Stanford Law School China Guiding Cases Project, Commentary*, Nov. 15, 2016. ("A prior case must meet two requirements to be considered binding precedent. First, as compared with the present matter before the judge, the prior case must address the same legal questions as applied to similar facts. The higher the degree of factual similarity, the more weight the judge gives the prior case when deciding the present matter. The degree of similarity of a prior case is therefore often a point of contention between parties to a litigation. Litigants compare and contrast prior cases with their own in briefs submitted to the court. The judge reviews and weighs these arguments but also may conduct his own research into, and analysis of, prior cases. The second requirement for a case to be considered binding precedent is that it must have been decided by the same court or a superior court within the hierarchy to which the court considering the case belongs. The American federal court system has three tiers: the district courts, the courts of appeals (divided into "circuits" with distinct geographic boundaries), and the U.S. Supreme Court. Each state also has a multi-tiered court system and, if certain jurisdictional requirements are met, the U.S. Supreme Court may review the decisions of the highest court in each state. Each district court thus follows precedents handed down by the Supreme Court and by the court of appeals in the circuit encompassing the district court. Each court of appeals follows its own precedents and precedents handed down by the Supreme Court, but it need not adhere to decisions of courts of appeals in other circuits. A court may consider decisions by other, non-superior courts to be persuasive precedent, however, and follow them if they are well-reasoned and if there is no binding precedent that conflicts.").

⁵⁶⁴ See, e.g., *supra* notes 492-93 (reporting that CRT has had over 85% rate of "successful" cases).

⁵⁶⁵ See, e.g., USCCR, *Police Use of Force*, *supra* note 345, at 4 (recommending use of consent decrees) and 86-96 (researching efficacy of consent decrees in CRT law enforcement cases).

⁵⁶⁶ Sessions Memo, *supra* note 549, at n. 2 (defining settlement as "an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract.").

investment that CRT has made in enforcing civil rights laws and the work of the Special Litigation Section in particular.⁵⁶⁷

One major shift during the period of this report was a November 2018 DOJ-wide memorandum that creates a new presumption against using consent decrees and creates new rules for review of proposed consent decrees and out-of-court settlements.⁵⁶⁸ This new memo originated with then Attorney General Sessions' concerns about CRT consent decrees in cases involving patterns or practices of civil rights violations by state or local law enforcement.⁵⁶⁹ Former Attorney General Sessions had previously called for a department-wide review of all consent decrees already in place to ensure that they follow the administration's principles regarding federalism, and to ensure that their terms are reasonable.⁵⁷⁰ At that time, the Commission issued a statement urging DOJ to continue to use all mechanisms, including consent decrees, to ensure constitutional policing.⁵⁷¹

Attorney General Sessions' subsequent November 2018 memo (which sets forth department policy binding on CRT)⁵⁷² did not rule out all consent decrees, but it did create a new requirement that all CRT lawyers as well as all federal attorneys in U.S. Attorney's Offices must memorialize the reasons that a consent decree is needed and procure approval of the Assistant Attorney General based on a showing of factors regarding federalism concerns.⁵⁷³ This requirement strongly signaled that DOJ now disfavors use of consent decrees. The Commission's research shows that of the 388.5 cases CRT resolved during FY 2016-2018, 26.8 percent (104) of the cases CRT brought were resolved by consent decrees,⁵⁷⁴ indicating that the impact of the memo is substantial. Moreover, since the November 8, 2018 Sessions memo, CRT has entered into only a few consent

⁵⁶⁷ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁵⁶⁸ Jessica Huseman & Annie Waldman, "Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government," *ProPublica*, Jun. 15, 2017, <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>.

⁵⁶⁹ Sessions Memo, *supra* note 549.

⁵⁷⁰ *Ibid.*; see U.S. Dep't of Justice, Memorandum for Heads of Department Components and United States Attorneys, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/download>.

⁵⁷¹ U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Urges Department of Justice to Use All Available Tools to Work with Police Departments To Ensure Constitutional Policing (Apr. 24, 2017), https://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf.

⁵⁷² U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file) ("The Sessions memo represents Department policy binding on CRT[.]")

⁵⁷³ Sessions Memo, *supra* note 549, at 1-2.

⁵⁷⁴ See *infra* notes 631-4.

decrees (as of June 17, 2019).⁵⁷⁵ CRT told the Commission that it has entered into one new consent decree, conducted a “final filing” of one consent decree, and proposed to the federal court another consent decree, since the issuance of the memo.⁵⁷⁶ Counting each of these consent decrees, even one that is only a final entry of a prior consent decree approved by a federal court, and one that is currently only proposed to a federal court,⁵⁷⁷ at the current rate, CRT is on track to have resolved 5-6 cases by consent decree in 12 months since the Sessions memo. In comparison, data from the last three fiscal years shows that CRT resolved an average of 34.6 cases/year by consent decree.⁵⁷⁸ Moreover, between FY 2016 and FY 2018, there have been significantly fewer consent decrees procured per year, and particularly through the work of CRT in certain sections.⁵⁷⁹

Sessions’ memo states that it:

requires that the Department provide state and local governmental entities an adequate opportunity to respond to any allegations of legal violations; requires special caution before using a consent decree to resolve disputes with state or local governmental entities; provides guidance on the limited circumstances in which such a consent decree may be appropriate; limits the terms for consent decrees and settlement agreements with state and local governmental entities, including terms requiring the use of monitors; and amends the process for the approval of these mechanisms in cases in which they are permissible.⁵⁸⁰

The Sessions memo also issued rules about when CRT can enter into out-of-court settlements. According to that memo, in contrast to a consent decree, “[t]he term ‘settlement agreement’ means an out-of-court resolution that requires performance by the defendant, enforcement of which requires filing a lawsuit for breach of contract.”⁵⁸¹ The memo clarified that CRT leadership must approve every settlement of every federal civil rights case that would:

- (1) place the Department or another federal agency in a long-term position of monitoring compliance by a state or local governmental entity; (2) create long-term

⁵⁷⁵ In June 2019, CRT stated that it entered into Consent Order, *United States v. 3rd Generation, Inc. & California Auto Finance*, No. 8:18-cv-00523 (C.D. Cal. Mar. 12, 2019), <https://www.justice.gov/crt/case-document/file/1142566/download>, which the Commission verified. CRT also told the Commission that the Voting Section has proposed a consent decree to the court in one of its cases, but that consent decree is not yet accepted by the court. See Complaint, *United States v. Eastpointe*, No. 2:17-cv-10079 (E.D. Mich. Jan. 10, 2017), <https://www.justice.gov/crt/case-document/file/1149711/download>; and that its prior consent decree with the City of Jacksonville has been recently filed in final form with the court. U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ 104/3 = 34.6.

⁵⁷⁹ See *infra* notes 635-7 and Figure 2.8 (declining use of consent decrees in Housing Section), and notes 637-8 and Figure 2.9 (declining use in the Special Litigation Section).

⁵⁸⁰ Sessions Memo, *supra* note 549, at 1 and n. 1 (noting that: “As used in this memorandum, the term “state and local governmental entities” also includes territorial and tribal entities, as federal consent decrees and settlements with such entities raise many of the same concerns regarding democratic autonomy and accountability.”).

⁵⁸¹ *Ibid.*, n. 2.

structural or programmatic obligations, or long-term, indeterminate financial obligations, for a state or local governmental entity; or (3) otherwise raise novel questions of law or policy that merit review by senior Department leadership. The Office of the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department, must be notified and consulted before any such agreement is finalized.⁵⁸²

The impact of this new policy is substantial, as 266.5 (68.6%) of the 388.5 CRT cases resolved during FY 2016-2018 were resolved by out-of-court settlements.⁵⁸³ Added to its impact on consent decrees, this data shows that the memo's impact is relevant to over 95 percent of all CRT cases.⁵⁸⁴

Federal law also authorizes DOJ to file Statements of Interest or amicus briefs in federal court cases in which the U.S. has an interest.⁵⁸⁵ Statements of Interest may be filed by the Appellate Section, by U.S. Attorneys, or by the substantive law sections of CRT, with the approval of the Appellate Section.⁵⁸⁶ CRT told the Commission that Statements of Interest are usually filed at the federal district court level by the trial litigation sections, and that amicus briefs are usually filed in courts of appeals or the Supreme Court by the Appellate Section, although the Appellate Section may sometimes also file or assist with Statements of Interest in district courts.⁵⁸⁷ Through these briefs, CRT may choose to act in cases brought by other parties that “involve developing or problematic areas of civil rights law or that may significantly affect the Division’s enforcement responsibilities.”⁵⁸⁸ These cases have also been identified through the Appellate Section’s monitoring of civil rights litigation throughout the nation.⁵⁸⁹ CRT has made wide use of Statements of Interest or amicus briefs as a method to explain the government’s position on civil rights issues and to help courts and the American people understand rights and obligations under civil rights laws.⁵⁹⁰ The Appellate Section may also act through an intervention that, if approved by the court, leads to the DOJ becoming a third party participating in another federal civil rights case not brought by DOJ, but of interest to CRT.⁵⁹¹ Several civil rights statutes specifically allow the CRT to intervene in a private case.⁵⁹² Federal Rules of Civil Procedure also provide for intervention by government officers or agencies that administer or enforce the statutes and regulations at issue in

⁵⁸² Ibid., 6.

⁵⁸³ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Grand Totals.

⁵⁸⁴ 68.6% (settlements) + 26.8% (consent decrees) = 95.4%.

⁵⁸⁵ 28 U.S.C. § 517; see also Fed. R. App. Proc. § 29 (a)(2) (“The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing[.]”).

⁵⁸⁶ DOJ Justice Manual, *supra* note 370, at § 8 – 2.170.

⁵⁸⁷ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁵⁸⁸ DOJ CRT, “Appellate Section,” *supra* note 385.

⁵⁸⁹ Ibid.

⁵⁹⁰ See Victor Zapana, Note, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 Harv. C.R.-C.L. L. Rev. 227, 228, 237 (2017).

⁵⁹¹ See, e.g., U.S. Dep’t. of Justice, Civil Rights Division, Appellate Section, “Third Party Intervention in Civil Rights Cases,” <https://www.justice.gov/crt/appellate-briefs-and-opinions-5> (accessed Mar. 19, 2019).

⁵⁹² 28 U.S.C. §§ 517, 2403(a).

a private case.⁵⁹³ In an intervention, DOJ may become part of the ongoing litigation.⁵⁹⁴ However, Statements of Interest or amicus briefs are more common.⁵⁹⁵ CRT told the Commission that “the Appellate Section usually only intervenes on appeal in the first instance (and then files an “intervenor brief”) when the constitutionality of a statute is being challenged, consistent with the Department’s authority under 28 U.S.C. § 2403(a).”⁵⁹⁶

CRT may also defend federal agencies in constitutional challenges to federal civil rights statutes and agency programs. For example, CRT reported that during the fiscal years studied, “the Appellate and Employment Litigation Sections have done work to defend federal agency affirmative action programs.”⁵⁹⁷ Commission staff research confirmed that when the U.S. was sued by a contractor challenging the U.S. Department of Transportation’s affirmative action procedures, the Appellate Section defended the policies during both the Obama and Trump Administrations.⁵⁹⁸

⁵⁹³ F.C.R.P. § 24(b)(2)(a) and (b).

⁵⁹⁴ See F.C.R.P. Title IV (Parties), § 24(a)(Intervention of Right if statute so provides) and § 24(b)(2)(B)(Permissive Intervention by a Government Officer or Agency).

⁵⁹⁵ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Section.

⁵⁹⁶ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report; citing authority of the United States to intervene in cases involving constitutional questions, under 28 U.S.C. § 2403(a)) (on file).

⁵⁹⁷ *Ibid.*; see also DOJ Justice Manual, *supra* note 370, at § 8 – 2.214 (“The Employment Litigation Section defends suits in which a federal contractor, subcontractor or grantee sues the relevant federal agency to enjoin the actual or threatened termination or suspension of federal contracts or funds under Executive Order 11246. The Employment Litigation Section also defends actions that challenge the constitutionality of congressionally authorized preference programs under the Small Business Administration’s 8(a) program, 15 U.S.C. § 637(a), and other minority and disadvantaged business enterprise programs.”).

⁵⁹⁸ See Brief for the United States as Appellee, *Midwest Fence Corp. v. United States Department of Transportation*, No. 15-1827, 5, 14-16 (8th Cir. Oct. 26, 2015) (CRT Obama Administration brief arguing that DOT’s regulatory requirements with an aspirational goal at least 10% of federal highway funds be awarded to small businesses “owned and controlled by socially and economically disadvantaged individuals” and related regulations are narrowly tailored to meet a compelling government interest and therefore constitutional); and see Brief for the Federal Respondents (Brief in Opposition to Petition for Certiorari), *Midwest Fence Corp. v. United States Department of Transportation*, No. 16-975, 12 (S.Ct. May 23, 2017) (CRT Trump Administration brief arguing that, “The decision below rejecting petitioner’s facial and as-applied equal-protection challenges to the federal DBE regulations does not warrant further review. In this Court, petitioner does not challenge the court of appeals’ holding that the regulations on their face are narrowly tailored to a compelling governmental interest. That holding accords with decisions of every other court of appeals to address the issue.”). The Supreme Court declined to review the case on September 26, 2017 (reported at 137 S. Ct. 2292).

CRT lacks uniformity and transparency in how it decides to investigate and enforce civil rights protections. All available information indicates that CRT sections have no known specific intake, investigatory or decision-making procedures about whether and how to prosecute.⁵⁹⁹ Moreover, as Leon Rodriguez has discussed, a federal court once had to compel CRT to enforce *Brown v. Board of Education*'s nationwide mandate to desegregate schools, resulting in an order requiring CRT to adjudicate every related complaint in a timely fashion.⁶⁰⁰ He also commented that President Nixon forced out former CRT Director Leon Panetta after Panetta took a stance in favor of enforcing the law requiring schools to desegregate, but that it is important to enforce civil rights law, and added that:

So even in times when you think you are behind the eight ball, you are in fact very likely creating conditions that down the line will actually strengthen the ability of a law enforcement agency to do its job.⁶⁰¹

A February 2018 report by DOJ's Office of Inspector General (OIG) concluded that CRT's Special Litigation Section could "enhance its case selection procedures to better memorialize decisions to move or not with investigations" and "refine its established strategic work-planning process to ensure it can identify both pressing priorities and long-standing concerns."⁶⁰² The OIG tied SPL's case selection process with overall efficacy issues, and stated that "[c]onsidering CRT's mission, we believe it is important that it refine its established strategic work-planning process to ensure it can identify both pressing priorities and long-standing concerns" in its decisions about investigations.⁶⁰³ "Although CRT has increased the transparency of how it selects jurisdictions to investigate for police misconduct practices, the OIG found that SPL's case selection systems and procedures could be enhanced."⁶⁰⁴

The OIG found that CRT leadership did not always document decisions to open pattern or practice investigations and did not maintain draft memoranda prepared by CRT attorneys in a central depository.⁶⁰⁵ At the time of the audit, CRT's Police Practice Group (PPG) had not established written policies to guide its attorneys, who did not use CRT tracking systems, on how to initially assess complaints and referrals in the process of beginning investigations of potential patterns or practices of police misconduct.⁶⁰⁶ CRT utilized factors requiring objective information to select cases, but its attorneys subjectively weighed the importance of each factor in deciding the merits

⁵⁹⁹ U.S. Dep't of Justice, Response to USCCR Interrogatories, at 3-4 (referring the Commission to the CRT website).

⁶⁰⁰ Leon Rodriguez, Hearing before American University, Washington College of Law, pp. 67-68.

⁶⁰¹ *Ibid.*, 68.

⁶⁰² DOJ, *Audit of DOJ's Efforts to Address Patterns or Practices of Police Misconduct*, *supra* note 203, at ii.

("Moreover, the CRT did not maintain these draft memoranda in a central depository. An archive of deferred or declined draft justification memoranda, along with the general reasons why the CRT leadership deferred or declined to open an investigation, would improve the CRT's institutional memory and help its attorneys identify potentially at-risk agencies for future consideration.")

⁶⁰³ *Ibid.*

⁶⁰⁴ *Ibid.*, 5.

⁶⁰⁵ *Ibid.*, 5.

⁶⁰⁶ *Ibid.*, 10.

of a case.⁶⁰⁷ Although CRT-approved justification memoranda (J-memos) on the matter consistently applied the facts of allegations to statutory requirements, they did not clearly delineate or analyze other decision factors consistently.⁶⁰⁸ Moreover, CRT SPL did not track or maintain J-memos that were not approved by CRT leadership.⁶⁰⁹ OIG recommended that CRT SPL establish a depository of J-memos regarding police for use on subsequent matters and adopt a procedure requiring the documentation of denials and deferrals of such J-memos, as well as the management level of review at which such decisions were made.⁶¹⁰ OIG also found that although some improvements had been made in by the Special Litigation Section, CRT should improve its case selection procedures to better memorialize decisions to move forward or not with investigations.⁶¹¹ CRT noted to the Commission that the audit only reviewed how SPL initiated investigations of law enforcement agencies under 34 U.S.C. § 12601, and not how SPL or CRT initiated any other kind of investigation;⁶¹² however, based on the dearth of information about the processes of other sections, the Commission cannot determine whether their processes are effective.

During the audit, the Special Litigation Section reported in early January, 2017 that it would standardize and document (or log) referrals and complaints about alleged police misconduct, and process them through a uniform system that could result in a J-memo recommending investigation and potential enforcement action.⁶¹³ In June 2019, CRT reported to the Commission that since the OIG report, “SPL has now implemented all of OIG’s recommendations, including:

- Establishing priorities for enforcing the law enforcement misconduct provisions of 34 U.S.C. § 12601, and reviewing those priorities on an annual basis;
- Establishing guidelines for evaluating whether to initiate a preliminary inquiry;
- Establishing requirements for law enforcement misconduct investigation justification memoranda (“j memos”);

⁶⁰⁷ Ibid., 13.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid., 14.

⁶¹⁰ Ibid., 15.

⁶¹¹ Ibid., ii.

⁶¹² U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 17, 2016) (attaching comments on draft report) (on file).

⁶¹³ DOJ, *Audit of DOJ’s Efforts to Address Patterns or Practices of Police Misconduct*, *supra* note 203, at 9-10:

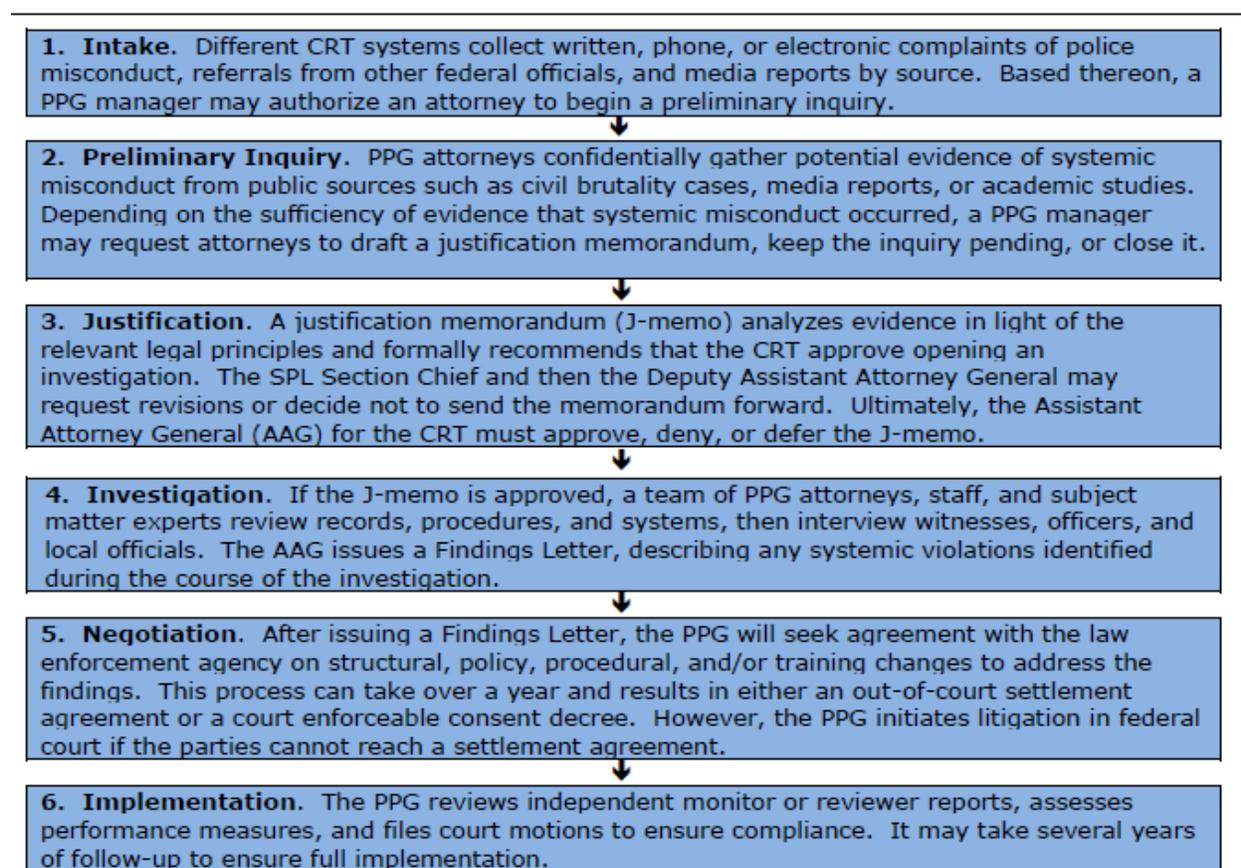
CRT developed separate processes and procedures to receive, catalog, and assess complaints and referrals of police misconduct that are largely dependent on the source and fall into one of two categories, controlled or non-controlled. CRT specially designates complaints or investigation requests from elected federal, state, and local officials, as well as any communication addressed to the Attorney General, as controlled correspondence. CRT tracks such controlled correspondence in the Intranet Quorum system, maintained by the Justice Management Division’s Departmental Executive Secretariat. Correspondence from the public addressed directly to the CRT or its personnel, as well as referrals from local advocacy groups, federal law enforcement agencies, Assistant U.S. Attorneys, research groups, litigators, and whistleblowers within state and local police departments, are designated as non-controlled. CRT staff scan and log non-controlled correspondence into the Correspondence Tracking System (CTS) database. Additionally, the CRT uses investigative journalism reports and media coverage of significant police misconduct as a source of potential allegations. However, CRT does not specifically track such news stories.

- Establishing a repository of previous J-memos;
- Establishing a policy for making referrals of law enforcement misconduct;
- Establishing a process for retaining documentation of decisions to deny or defer recommendations to open law enforcement investigations under 34 U.S.C. § 12601.”⁶¹⁴

It is not clear if SPL has implemented OIG’s additional recommendations to “adopt a procedure requiring the documentation of denials and deferrals of such J-memos, as well as the management level of review at which such decisions were made,”⁶¹⁵ or if CRT implemented any of these recommendations in other sections of CRT outside of SPL, even though the OIG’s review was limited to SPL.

CRT clarified to the OIG that complaints about police would go through the below process (see Figure 2.2).⁶¹⁶

Figure 2.2



Source: U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁶¹⁴ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁶¹⁵ DOJ, *Audit of DOJ’s Efforts to Address Patterns or Practices of Police Misconduct*, *supra* note 203, at 15.

⁶¹⁶ *Ibid.*, 9.

In addition to complaints or agency-initiated investigations to enforce the civil rights statutes under its jurisdiction, under Title VI, “DOJ also serves as the federal government’s litigator. Title VI authorizes DOJ to enforce Title VI through the filing of civil actions. DOJ, on behalf of Executive agencies, may seek injunctive relief, specific performance, or other remedies when agencies have referred determinations or recipients’ noncompliance to DOJ for judicial enforcement.”⁶¹⁷ DOJ has interpreted this charge expansively, asserting in its Title VI manual that:

In this regard, the Coordination Regulations direct agencies to advise DOJ if they are unable to achieve voluntary compliance and to request that DOJ assist in seeking resolution of the matter. *Id.* § 42.411(a). Agencies should submit Title VI and other civil rights matters for litigation if they cannot be resolved administratively (that is, when the agency determines that informal resolution or fund termination is not a viable solution). FCS provides assistance to agencies in making determinations of noncompliance, including providing pre-enforcement legal counsel when it appears it may be difficult to obtain a voluntary resolution.⁶¹⁸

There are not any known comparable written procedures for any other sections of CRT, but there are specific procedures for requesting a CRT amicus brief. Through the CRT Appellate Section’s Amicus Curiae Program, amicus briefs may be requested by a private party and are more likely to be undertaken by the section if the case presents “one or more important legal questions involving the interpretation or application of a statute that the Civil Rights Division enforces.”⁶¹⁹ The guidelines for accepting an amicus state that “Amicus participation by the Civil Rights Division generally should be limited to cases:

- in which a court requests participation by the Civil Rights Division;
- which challenge the constitutionality of a federal civil rights statute (*cf.* 28 U.S.C. § 2403(a));
- which involve the interpretation of a civil rights statute, Executive Order, or regulation that the Department of Justice promulgated or that the Department of Justice (or another federal agency) is empowered to enforce;
- which raise issues whose resolution will likely affect the scope of the Civil Rights Division’s enforcement jurisdiction (e.g., cases involving the concept of state action under the Fourteenth Amendment);
- which raise constitutional challenges of public importance under the First or Fourteenth Amendment of the U.S. Constitution;
- which raise issues that could significantly affect private enforcement of the statutes the Civil Rights Division enforces; or

⁶¹⁷ DOJ, Title VI Legal Manual, *supra* note 39, at III.B, Department of Justice Role Under Title VI.

⁶¹⁸ *Id.*

⁶¹⁹ U.S. Dep’t. of Justice, Civil Rights Division, Appellate Section, “Amicus Curiae Program,” <https://www.justice.gov/crt/appellate-section> (accessed Mar. 11, 2019).

- in which a special federal interest is clear and is not likely to be well-served by private litigants.⁶²⁰

Data Regarding CRT Cases

The following sections evaluate the efficacy of CRT enforcement through analyzing publicly available data about its litigation efforts as well as further information CRT provided to the Commission.⁶²¹ This chapter analyzes comprehensive data about the hundreds of cases CRT resolved during Fiscal Years 2016-2018. The chapter also analyzes data from the various sections of CRT to demonstrate trends in the level and focus of enforcement activities.

Cases Resolved

To evaluate the efficacy of CRT's litigation, the Commission looked to cases resolved from FY 2016 – 2018, as resolved cases represent actual remedies agreed to or ordered to redress civil rights violations. Commission staff identified 388.5 cases resolved among seven CRT sections that bring civil actions to enforce the nation's civil rights laws during FY 2016-2018.⁶²² This number did not include Appellate or Criminal Section cases, as these cases are resolved differently,⁶²³ nor did it count the compliance agreements generated by the work of the Federal Coordination & Compliance Section, as that section's work is discussed in the *Proactive Compliance Evaluation* part of this chapter, below. Moreover, the Commission did not have sufficient information to evaluate the Criminal Section cases; however, limited information about those cases are discussed in further detail below.⁶²⁴ On the other hand, the enforcement actions resolved by the seven other sections can be identified by cases resolved through out-of-court settlements, consent decrees, or judicial opinions at the district court level. Moreover, due to resource limitations, CRT's post-agreement or post-judgment monitoring was not counted in this category.

The great majority of these cases had some positive results in which defendants agreed or were compelled to take measures to come into compliance with civil rights law.⁶²⁵ Based on reviewing the civil cases CRT resolved at the non-appellate level during FY 2016-2018, the Commission was able to measure some trends in the quantity and impact of civil rights enforcement, as discussed below.

⁶²⁰ DOJ Justice Manual, *supra* note 370, at § 8-2.170.

⁶²¹ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report, including information about cases not provided in response to the Commission's Interrogatories and not available on the CRT website) (on file).

⁶²² See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

⁶²³ See *supra* note 202 (DOJ comments that Criminal Section cases are not comparably resolved) and *infra* notes 585-96 (explanation of how Appellate cases are different as many involve filing Statements of Interest in private cases rather than direct DOJ enforcement actions).

⁶²⁴ See *infra* notes 722-32 (Appellate Section cases) and 732-44 (Criminal Section cases).

⁶²⁵ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

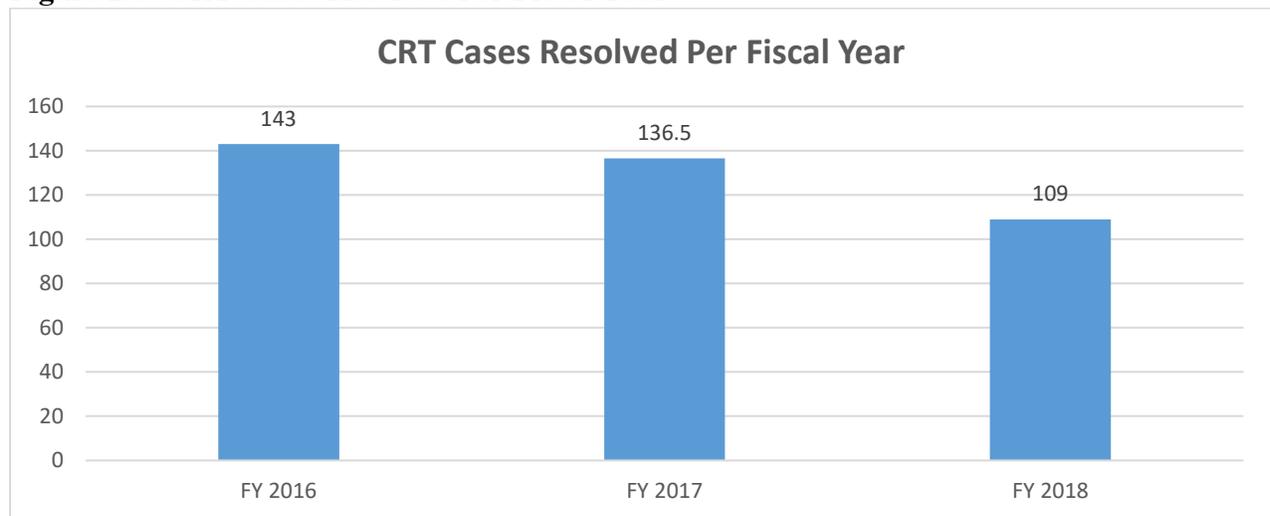
The Commission's review of these cases shows that the total number of cases resolved dropped during FY 2018, although some sections have resolved more cases. Each of the cases is listed and categorized in Appendix A of this report. Table 2.2 shows the number of cases resolved per section per fiscal year. The Commission notes that the work of some sections, such as the Special Litigation Section, is often more complex than others as pattern or practice or other more systemic cases can entail more complex investigation and enforcement actions.⁶²⁶

Table 2.2: CRT Cases Resolved Per Section, FY 2016-18

CRT SECTION	DRS	EOS	ELS	IER	HCE	SPL	VOT	TOTAL by FY
2016	16	8	6	61	41	8	3	143
2017	8	14	3	57	46	4.5	4	136.5
2018	14	5	5	49	28	3	5	109
TOTAL	38	27	14	167	115	15.5	12	388.5

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters with further information received from U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis. Chart of CRT Cases Resolved FY 2016-2018. On the chart above, CRT SEC = CRT Section; APP = Appellate Section; CRIM = Criminal Section; DRS = Disability Rights Section; ED = Educational Opportunities Section; EMP = Employment Rights Section; IER = Immigrant & Employee Rights Section; HCE = Housing & Civil Section; SPL = Special Litigation Section; VOT = Voting Section.

Figure 2.3: CRT Cases Resolved Per Fiscal Year

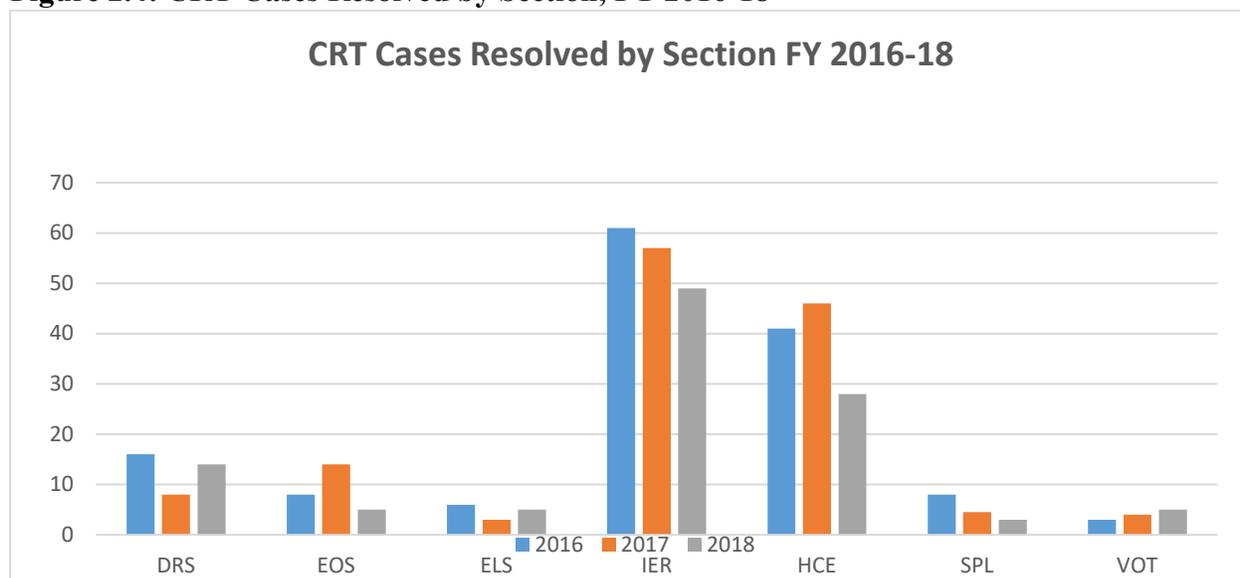


SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

This represents a decrease of 23.8 percent from Fiscal Year 2016 to Fiscal Year 2018.⁶²⁷

⁶²⁶ See *supra* notes 567; see also *infra* notes 637-46 and 709-18 (Special Litigation Section cases).

⁶²⁷ $143 - 109 = 34$ and $34/143 = 23.8\%$.

Figure 2.4: CRT Cases Resolved by Section, FY 2016-18

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

As the data illustrated above shows, the Special Litigation Section had a decrease in the number of cases resolved from FY 2016 to FY 2018.⁶²⁸ Other sections, such as the Educational Opportunities, Housing, and Immigrant and Employee Rights Sections, had an increase from FY 2016 to FY 2017, with a decrease in FY 2018.⁶²⁹ Although the Voting Section had fewer cases resolved than other sections, it also showed a slight increase in FY 2018. Some cases and trends are discussed in further detail below.

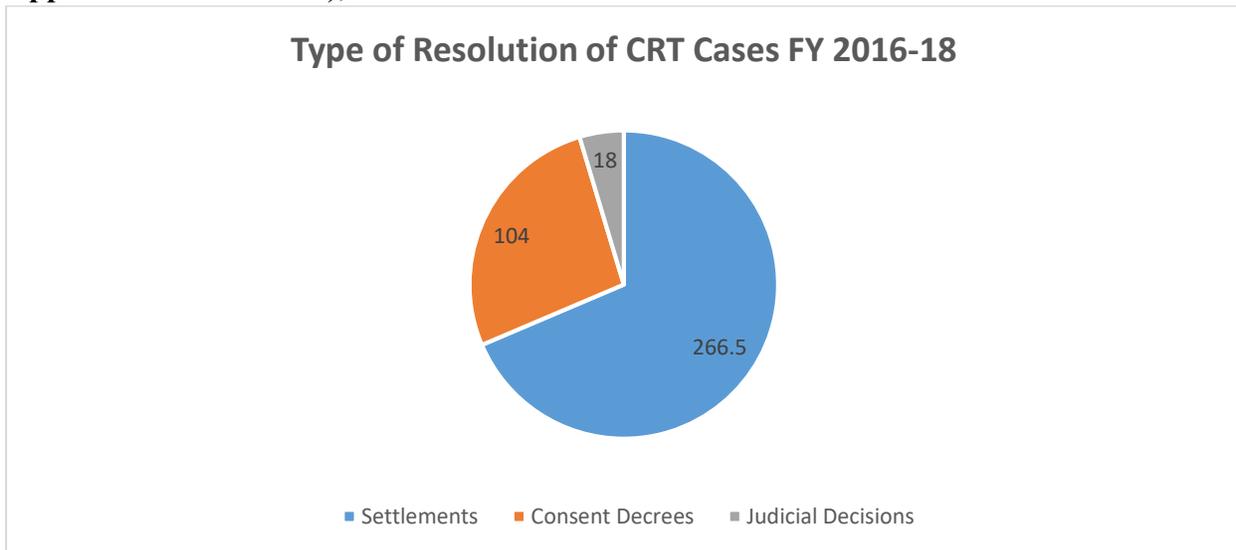
Data Regarding Type of Resolution of CRT Cases

The following pie chart and table show the percentage of cases resolved by consent decree, settlement, or judicial decision, by CRT section.

⁶²⁸ See, e.g., *infra* notes 637-46 and 709-18 (for more information on Special Litigation cases); and notes 719-22 (for more information on Voting Section cases).

⁶²⁹ See, e.g., *infra* notes 663-68 (for more information on Educational Opportunities and Housing Section cases); and 635-7 and 678-700 (for more information on Housing and Civil Enforcement Section cases).

Figure 2.5: Consent Decrees, Settlements and Judicial Decisions by CRT Sections (Excluding Appellate and Criminal), FY 2016-18⁶³⁰



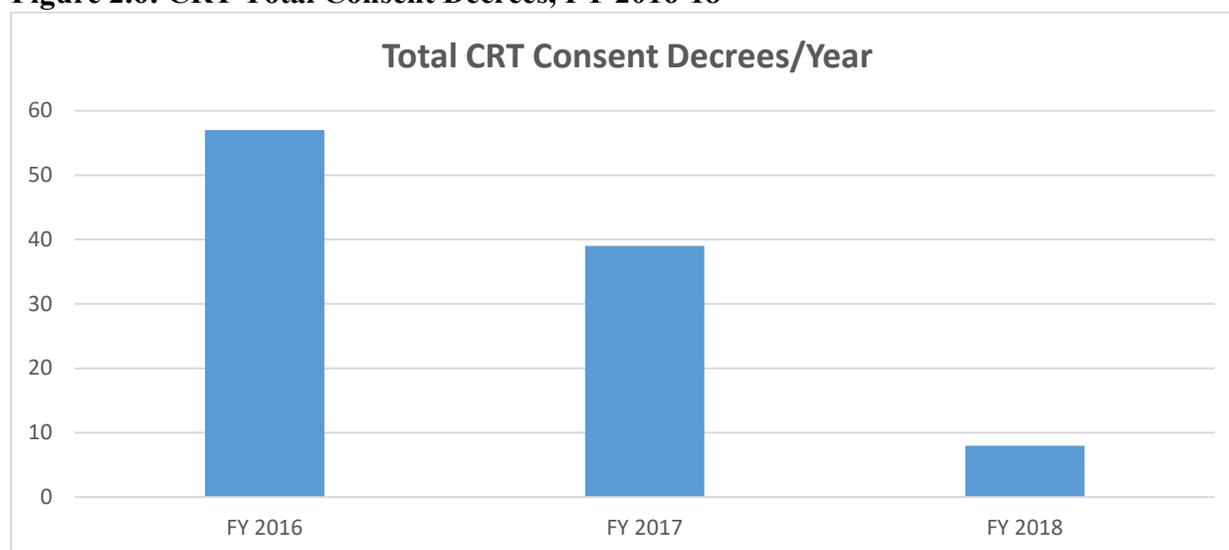
SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters,," U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; *See* Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

Further, the data also shows that the amount of consent decrees per year has decreased over time. The number of consent decrees has incrementally decreased over the fiscal years in question.⁶³¹ In FY 2016, CRT sections entered into a total of 57 decrees, 39 consent decrees in FY 2017, and 8 consent decrees in FY 2018.⁶³²

⁶³⁰ One settlement is only counted as half (0.5), because the Obama Administration's agreement in principle to enter into a consent decree regarding Chicago police practices was later changed by the Trump Administration. *See infra* notes 710-13.

⁶³¹ *See infra* notes 633-8 (documenting that FY 2016, CRT sections entered into a total of 57 decrees, 39 consent decrees in FY 2017, and 8 consent decrees in FY 2018, and documenting number of consent decrees per section per fiscal year.).

⁶³² U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters [hereinafter DOJ CRT, "Search Cases and Matters"]; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; *See* Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

Figure 2.6: CRT Total Consent Decrees, FY 2016-18

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

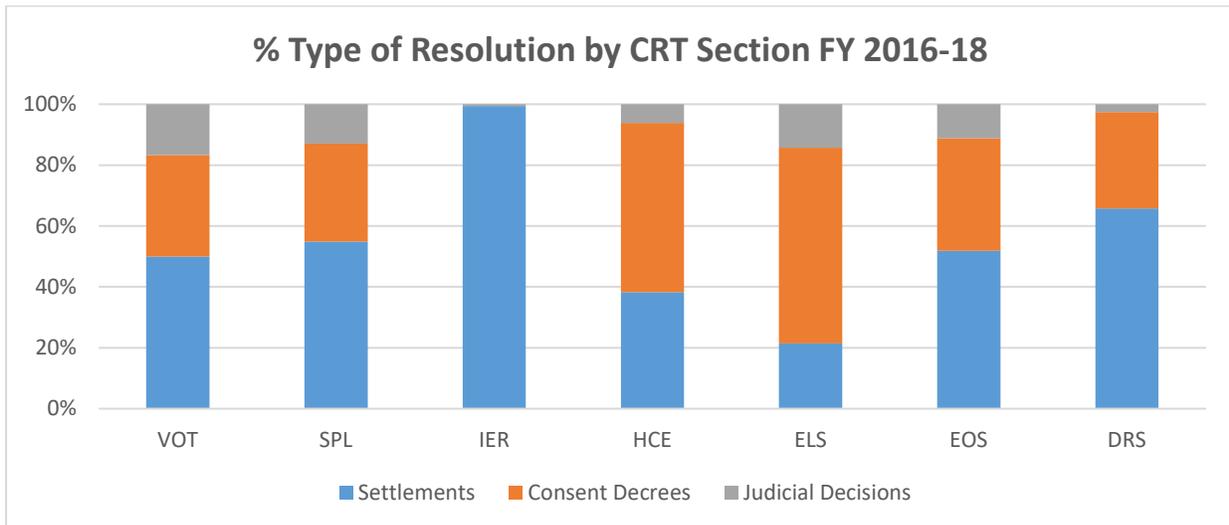
Of the 104 consent decrees entered into in federal court by CRT from FY 2016-2018, 57 (54.8%) were in FY 2016, 39 (37.5%) were in FY 2017, and 8 (7.7%) were in FY 2018.⁶³³

These data also illustrate that some sections have used consent decrees more than others, and some sections used settlements more than others. For example, IER resolved all but one of their 166 cases by out-of-court settlements (including Letters of Resolution), and the one that was resolved in court was through a judicial decision (not a consent decree). They had zero consent decrees. The Disability Rights Section resolved more than twice as many cases by settlement (12 cases by consent decree, and 25 by settlement).⁶³⁴

⁶³³ Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

⁶³⁴ Ibid.

Figure 2.7: Percent Consent Decrees, Settlements and Judicial Decisions by CRT Section, FY 2016-18

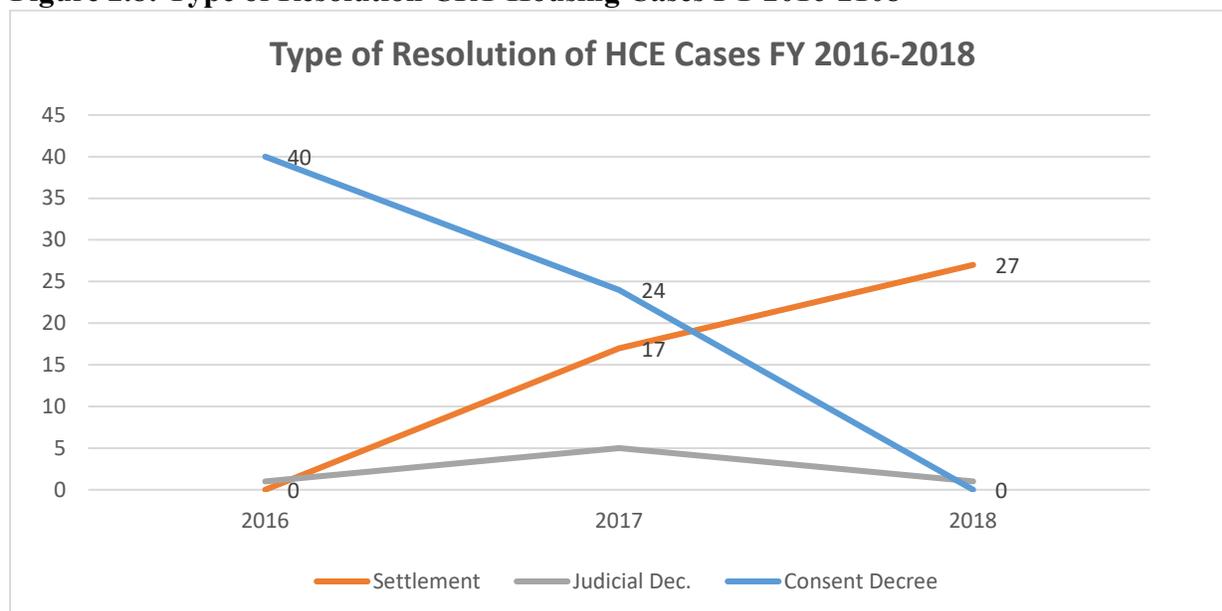


SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

The Housing, Education and Employment Sections resolved relatively more cases by consent decree, with the Housing Section resolving the most (64 cases, 55.6%) by consent decree, but with zero consent decrees in FY 2018.⁶³⁵ Seven of the 115 HCE cases were resolved by judicial decisions, while 64 were resolved by consent decrees and 44 by settlements. The last consent decree entered into by HCE was in an FHA sex discrimination case resolved by a federal court ordering the decree in July 2017.⁶³⁶ The following data illustrates how this section's use of consent decrees has diminished, going from 40 in FY 2016 to zero in FY 2018, while settlements went from zero to 27 in the same time period.

⁶³⁵ Ibid.

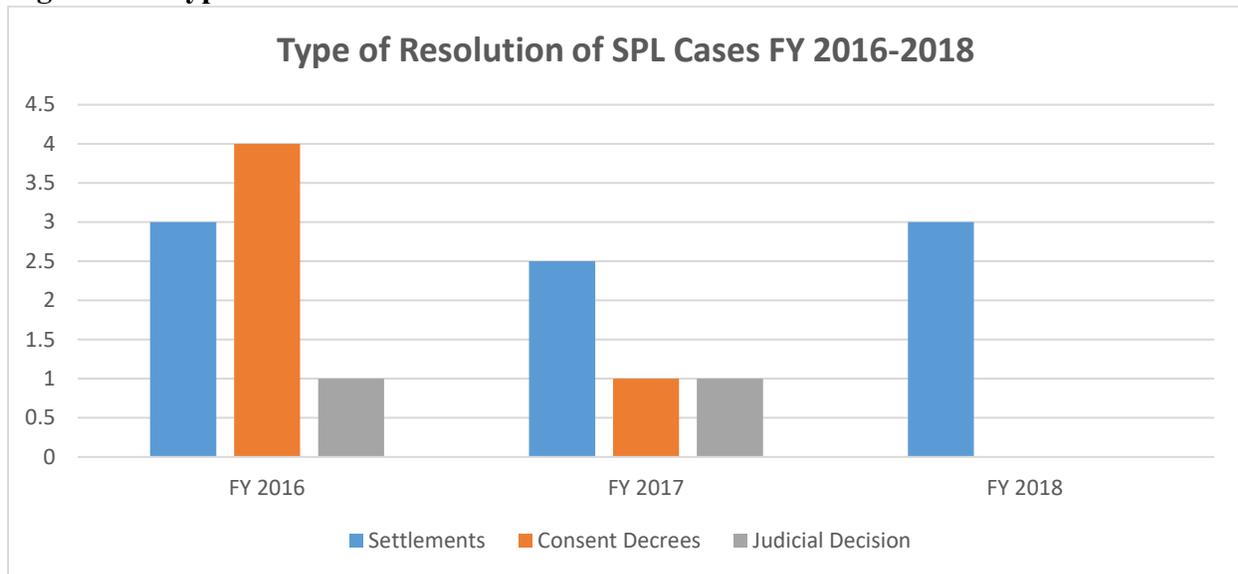
⁶³⁶ See Consent Decree, *United States v. Walden*, No. 1:16-cv-00042 (N.D.W.V. July 10, 2017); Cf. Appendix A, Chart of CRT Cases Resolved, Housing Section Cases (FY 2016 – 18).

Figure 2.8: Type of Resolution CRT Housing Cases FY 2016-2108

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Housing and Civil Enforcement Cases.

The Special Litigation Section entered into a total of five consent decrees during FY 2016-2018; four were in FY 2016, one was in FY 2017, and there were none in FY 2018.⁶³⁷ Data for the current report, from FY 2016-2018, shows that SPL has decreased its use of consent decrees, consistent with DOJ leadership direction. The following graph shows the types of resolution of cases, including all types of SPL cases resolved. The Commission considers that 8.5 cases resolved during this time period were resolved through settlement, two were resolved through judicial decisions, and four were resolved by consent decrees.

⁶³⁷ Appendix A, Chart of CRT Cases Resolved FY 2016-2018.

Figure 2.9: Type of Resolution of SPL Cases FY 2016-18

SOURCE: U.S. Dep’t of Justice, Civil Rights Division, “Search Cases and Matters,” www.justice.gov/crt/search-cases-and-matters; U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section Cases.

The Commission’s November 2018 report on *Police Use of Force: An Examination of Modern Policing Practices* discussed that SPL has brought law enforcement misconduct “pattern or practice” cases since they gained jurisdiction through the VCCLEA in 1994, and documented that the Bush II administration tended to resolve these cases through settlements, while the Obama administration not only investigated more cases,⁶³⁸ but also preferred to resolve them through court-ordered consent decrees.⁶³⁹ The Commission’s research also showed several positive impacts of consent decrees, although it also showed that DOJ didn’t have the capacity to effectively monitor and measure the results of consent decrees.⁶⁴⁰ The Commission recommended that DOJ “should return to vigorous enforcement of constitutional policing, including pursuant to 42 U.S.C. § 14141 and use of consent decrees as necessary where constitutional policing standards are not being upheld.”⁶⁴¹

Former CRT head Vanita Gupta testified at the Commission’s briefing that consent decrees are key to civil rights enforcement because they provide for court oversight “regardless of political winds.”⁶⁴² Professor Sam Bagenstos, who served as a CRT career attorney from 1994-1997 and then later as a Deputy Assistant Attorney General in the Obama Administration has written that,

⁶³⁸ U.S. Comm’n on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, (2018), <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>, at n. 529 (“According to a January 13, 2017 statement on the DOJ website: ‘Since 2009, the Special Litigation Section of the Justice Department has opened 25 investigations into law enforcement agencies. The section is enforcing 20 agreements with law enforcement agencies, including 15 consent decrees and one post-judgment order.’”).

⁶³⁹ *Ibid.*, 87.

⁶⁴⁰ *Ibid.*, 86-95.

⁶⁴¹ *Ibid.*, 4.

⁶⁴² Gupta Testimony, *Federal Civil Rights Enforcement Briefing*, p. 170.

overall, CRT's authority to bring pattern or practice cases "lay largely dormant" during the Bush administration.⁶⁴³ That changed, with more transformative consent decrees, as follows:

The Obama Administration, by contrast, aggressively used the pattern-and-practice statute to reform police departments[.] The [Civil Rights] Division initiated investigations that were unprecedented in their number and scope; it entered into consent decrees to transform law enforcement in major cities such as New Orleans, Seattle, Cleveland, and Ferguson, Missouri, and it filed contested litigation in Maricopa County, Arizona. Those decrees addressed issues such as use of excessive force, racial profiling, and the failure to protect victims of gender-based and LGBT-based violence.⁶⁴⁴

Also at the Commission's briefing, former CRT Chief of Staff during the Bush Administration Robert Driscoll testified that there have been mixed results with consent decrees, stating that "they've been expensive and you've ended up with increased crime and they even increased civil rights violations," but "in some places it's worked well where . . . there has been a more collaborative approach."⁶⁴⁵ Driscoll recommends that a study be done to determine which approaches are most effective.⁶⁴⁶

Other Sample Data Trends from CRT Cases

CRT's legal authority and responsibility to litigate disparate impact claims is documented in a later section of this chapter.⁶⁴⁷ At the Commission's briefing, Georgetown Law Professor Aderson François stated that: "[U]nless government agencies play an active role in civil rights enforcement, the law is never going to develop the way it was originally intended."⁶⁴⁸ In addition to its built-in credibility as the nation's civil rights prosecutor, DOJ CRT has specific jurisdiction to enforce disparate impact that private parties and State Attorney Generals lack,⁶⁴⁹ further bolstering its importance as a backstop against harm Americans otherwise suffer from a form of discrimination DOJ's longstanding regulatory authority has recognized and continues to recognize as pernicious and in need of federal enforcement.

Data the Commission reviewed yielded examples of civil rights enforcement trends specific to the individual CRT sections, discussed section by section below.

⁶⁴³ See, e.g. Samuel R. Bagenstos, "Civil Rights Déjà Vu, Only Worse," *American Prospect*, Dec. 12, 2016, <https://prospect.org/article/civil-rights-déjà-vu-only-worse>.

⁶⁴⁴ Ibid. (adding that: "In the past couple of years [as of Dec. 2016], the division has expanded its work to target practices that entrench economic inequality in the criminal justice system.").

⁶⁴⁵ Driscoll Testimony, *Federal Civil Rights Enforcement Briefing*, p. 131.

⁶⁴⁶ Ibid.

⁶⁴⁷ See *infra* notes 870-900 (analyzing CRT Title VI Manual and disparate impact law, including Supreme Court and other federal legal precedents).

⁶⁴⁸ François Testimony, *Federal Civil Rights Enforcement Briefing*, p. 279.

⁶⁴⁹ See *infra* note 885 (discussing the *Sandoval* case); and see State Attys General Statement, at 1, 8.

During FY2016 - 2018, CRT's **Disability Rights Section** (DRS) was active in protecting the rights of individuals with disabilities. DRS resolved 25 cases through settlement, another 12 through consent decrees, and 1 by judicial decision.⁶⁵⁰

In litigation in Florida, DRS collaborated with the Special Litigation Section (SPL) to defend on appeal the agency's authority to enforce the ADA against state and local entities.⁶⁵¹ This was similar to litigation conducted by the SPL in a multi-week trial in Texas to defend the rights of individuals with disabilities to receive services in integrated, home- and community-based settings rather than institutions.⁶⁵² Additionally, DRS prevailed on a motion to enforce a 2012 settlement agreement in North Carolina addressing the unnecessary institutionalization of adults with serious mental illness,⁶⁵³ and negotiated a supplemental agreement in New York to resolve ambiguities in a 2013 agreement about the unnecessary segregation of adults with serious mental illness.⁶⁵⁴ DRS also entered into a new, five-year settlement agreement in Louisiana, to resolve allegations of unnecessary segregation of adults and children with serious mental health conditions.⁶⁵⁵

In enacting the ADA, Congress specifically encouraged the use of alternative means of dispute resolution, including mediation, to resolve ADA disputes. For example, DOJ's ADA Mediation Program seeks to resolve Title II and Title III ADA complaints through funding mediation, which is intended to decrease the time and cost of reaching a resolution.⁶⁵⁶ If CRT believes a complaint is appropriate for mediation and the complainant agrees, it will refer the issue to trained mediators across the country.⁶⁵⁷ In 2002, the Commission's federal civil rights enforcement report noted that mediation may be useful to increase efficiencies, but also warned that "mediation may ignore the larger picture in interest of resolving the complaint at hand."⁶⁵⁸ In order to be effective at the essential goal of rooting out discrimination, the Commission recommended that "mediation only be used when it is appropriate as to the nature of the complaint, and mediation staff should ensure that settlement agreements include provisions for changes in... practices and policies that might

⁶⁵⁰ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Disability Rights Cases. In the case resolved by judicial decision, CRT lost at the trial level in November 2016, and on behalf of the United States, filed a notice of appeal to the Fourth Circuit January 18, 2017. Memorandum Opinion, *United States v. Sheriff Woody & City of Richmond*, No. 3:16-cv-127 (E.D. Va., Nov. 11, 2016); Notice of Appeal, *United States v. Sheriff Woody & City of Richmond*, No. 3:16-cv-127 (E.D. Va., Jan. 18, 2017) (signed by DRS Chief, Deputy Chief, and CRT leadership). But after the change in administration, the federal government filed a motion to voluntarily dismiss the complaint, and the court dismissed the appeal, leaving the negative decision to stand. Order, *United States v. Sheriff Woody & City of Richmond*, No. 3:16-cv-127 (4th Cir., Jul. 28, 2017).

⁶⁵¹ *A.R. v. Secretary, Florida Agency for Health Care Admin.*, No. 17-13595-BB (11th Cir. Oct. 18, 2017).

⁶⁵² Guillermo Contreras, "Trial wraps up in lawsuit against the state by developmentally disabled Texans" *My San Antonio*, Nov. 15, 2018, <https://www.mysanantonio.com/news/local/article/Trial-wraps-up-in-lawsuit-against-the-state-by-13396913.php>.

⁶⁵³ Order, *United States v. North Carolina*, No. 5:12-cv-557-D (E.D.N.C. Sep. 21, 2017).

⁶⁵⁴ *United States v. New York*, No. 1:13-cv-04165 (E.D.N.Y. Mar. 12, 2018).

⁶⁵⁵ Settlement Agreement, *United States v. State of Louisiana*, No. 3:18-cv-00608 (M.D. La. June 6, 2018), <https://www.justice.gov/crt/case-document/file/1072816/download>.

⁶⁵⁶ U.S. Dep't of Justice, Civil Rights Division, *Resolving ADA Complaints Through Mediation: An Overview*, September 2016, https://www.ada.gov/mediation_docs/mediation-brochure.pdf.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 38.

have a discriminatory effect.”⁶⁵⁹ As discussed above, these recommendations also apply to settlements of cases.⁶⁶⁰ According to the 2019 CRT Performance Budget, in 2016, the ADA Mediation Program referred 353 matters, completed 291 matters and successfully resolved 79 percent of the completed matters.⁶⁶¹ In 2017, the Program referred 195 matters, completed 143 matters and successfully resolved 83 percent of completed cases.⁶⁶² CRT told the Commission, “The ADA mediation program has successfully resolved thousands of ADA disputes resulting in increased access for people with disabilities.”⁶⁶³

In contrast, the **Educational Opportunities Section** (EOS) resolved relatively more cases with consent decrees; however, they were all entered into in legacy desegregation cases. During this time period, 10 EOS cases were resolved by consent decrees, of which all were legacy desegregation cases, 14 were resolved by out-of-court settlements, and relatively few cases (4) went to trial and were resolved by judicial decisions.⁶⁶⁴ The data additionally show that the types of cases brought to resolution also varied a bit. For example, race and national origin claims were resolved in all three fiscal years, but no claims based on sex or status of individuals with disabilities were resolved in FY 2018. The Commission notes that in FY 2017, there were two cases resolving dual claims of race or national origin discrimination, with claims involving allegations of discrimination against persons with disabilities.⁶⁶⁵

⁶⁵⁹ Ibid.

⁶⁶⁰ See *supra* note 249 (regarding settlements and consent decrees and citing the Commission’s 2002 report at page 38).

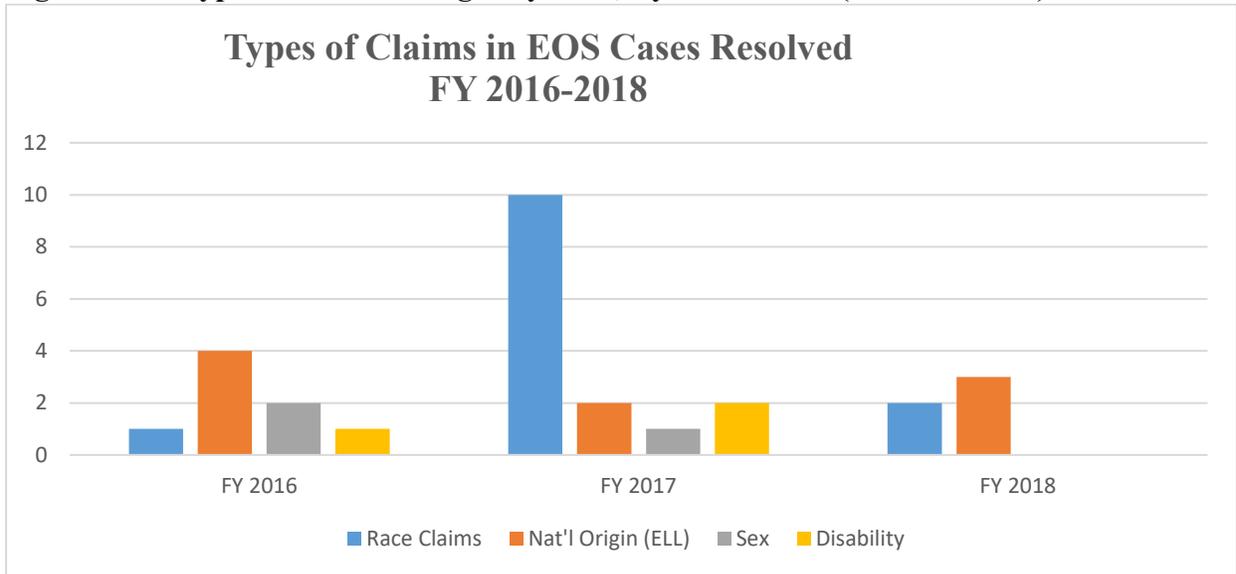
⁶⁶¹ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 23-24.

⁶⁶² Ibid., 30.

⁶⁶³ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁶⁶⁴ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases. Of the four judicial decisions, after the issuance of a judicial opinion in FY 2016, one of the cases was thereafter resolved by consent decree in FY 2017, and since each case may only be counted once, it is coded as being resolved by consent decree. See Opinion and Order, *Cowan and United States (as Intervenor-Plaintiff) v. Bolivar County, MS*, No. 2:65-cv-31 (N.D. Miss. May 13, 2016), <https://www.justice.gov/crt/case-document/file/1002091/download>; and see Modification Order for Consent Decree, *Cowan and United States v. Bolivar County, MS*, No. 2:65-cv-31 (N.D. Miss. Mar. 13, 2017), <https://www.justice.gov/crt/case-document/file/1002106/download>. See also Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases (*United States v. School Dist. of Philadelphia; United States v. Kansas State Univ.*).

⁶⁶⁵ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases (*T.R., et. al. v. School Dist. of Philadelphia*, No. 2:15-cv-04782 (E.D. Pa. Nov. 30, 2016) (regarding race/national origin and disability); Settlement Agreement between *United States and Wicomico County, Maryland Public Schools* (Jan. 23, 2017), <https://www.justice.gov/crt/case-document/wicomico-county-public-school-district-settlement-agreement> (Settlement Agreement regarding race/national origin and disability).

Figure 2.10: Types of Cases Brought by EOS, By Fiscal Year (FY 2016-2018)

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases.

Most (11 out of 13) of EOS' racial discrimination cases were legacy school desegregation cases. Of these, 10 were resolved by ongoing consent decrees, which may explain the high number of consent decrees for this CRT section.⁶⁶⁶ DOJ initiated these cases after the Supreme Court's decision in *Brown v. Board of Education* in 1954.⁶⁶⁷ The legacy cases generally began in the late 1960s and throughout the 1970s and are cases in which the United States is a party. EOS is responsible for their ongoing litigation with regard to the rights to equal access to educational opportunities and programs until vestiges of segregation no longer remain.⁶⁶⁸

The **Employment Litigation Section (ELS)** also resolved the majority of its cases with consent decrees. The section resolved 6 cases in FY 2016, 3 in FY 2017, and 5 in FY 2018.⁶⁶⁹ Of these 14

⁶⁶⁶ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Educational Opportunities Cases (*United States v. Monroe City* (LA); *United States v. St. Martin Parish* (LA); *United States v. Cotton Plant S.D. #1* (AR); *United States v. Bd. of Educ. of Hendry Cty.* (FL); *United States v. St. James Parish* (LA); *United States v. School Bd. of the City of Suffolk* (VA); *United States v. Bolivar Cty. Bd. of Educ.* (MS); *United States v. State of Georgia, McDuffie S.D.* (GA); *United States v. Jackson Cty. S.B.* (FL); *United States v. South Bend Community School Corp.* (IN)).

⁶⁶⁷ *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954) (striking down state laws that segregated public schools because they violated the 14th Amendment); *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 349 U.S. 294, 300-01 (1955) ("*Brown II*"); see also *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430, 436-37 (1968) (discussing need to effectively remove obstacles to a unity, nonracial public education system); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 17-18 (1971); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 197-209 (1973).

⁶⁶⁸ But see Nikole Hannah Jones, "Lack of Order: The Erosion of a Once-Great Force for Integration," *ProPublica*, May 1, 2014, <https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration> (detailing the inaccuracy of the Justice Department's list of active desegregation orders and failure to respond to questions about "how it monitors, enforces, and litigates desegregation cases").

⁶⁶⁹ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Employment Litigation Section.

total cases, it resolved 3 (21.4%) with settlements, 9 (62.3%) with consent decrees, and 2 (14.3%) were resolved by judicial decisions.⁶⁷⁰

Eleven of these 14 cases (78.6%) were brought to enforce Title VII of the 1964 Civil Rights Act and other federal law protections that prohibit employment practices that discriminate on the grounds of race, sex (including pregnancy), religion, and national origin.⁶⁷¹ Eight were brought to enforce protections against sex discrimination; of these one prosecuted pregnancy discrimination and another prosecuted sexual harassment, and another was a case prosecuting both sex and ethnicity/race discrimination.⁶⁷² They resulted in nine cities, counties, and state governments, as well as the Commonwealth of Puerto Rico and the University of Baltimore, agreeing to enter into settlements or court-supervised consent decrees that require changing their practices to come into compliance with Title VII.⁶⁷³

The **Federal Coordination and Compliance** (FCS) focused on Statements of Interests and settlements or other resolutions of Title VI and Title IX cases. In FY 2016, FCS was involved in submitting a Statement of Interest in four Title VI cases,⁶⁷⁴ and one in a Title IX case.⁶⁷⁵ There is no indication that FCS has been involved in submitting Statements of Interest or amicus briefs in similar cases in FY 2017 or FY 2018.⁶⁷⁶ FCS was also active in several language access in courts matters to enforce Title VI's protections against national origin discrimination with regard to DOJ funding recipients, which are discussed in the *Proactive Compliance Evaluation* section of this chapter.⁶⁷⁷

In terms of the number of cases resolved, the **Housing and Civil Enforcement** section (HCE) was one of the most productive sections of CRT in FY 2016 and FY 2017, though some of its productivity dropped off in FY 2018.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

⁶⁷² Ibid.

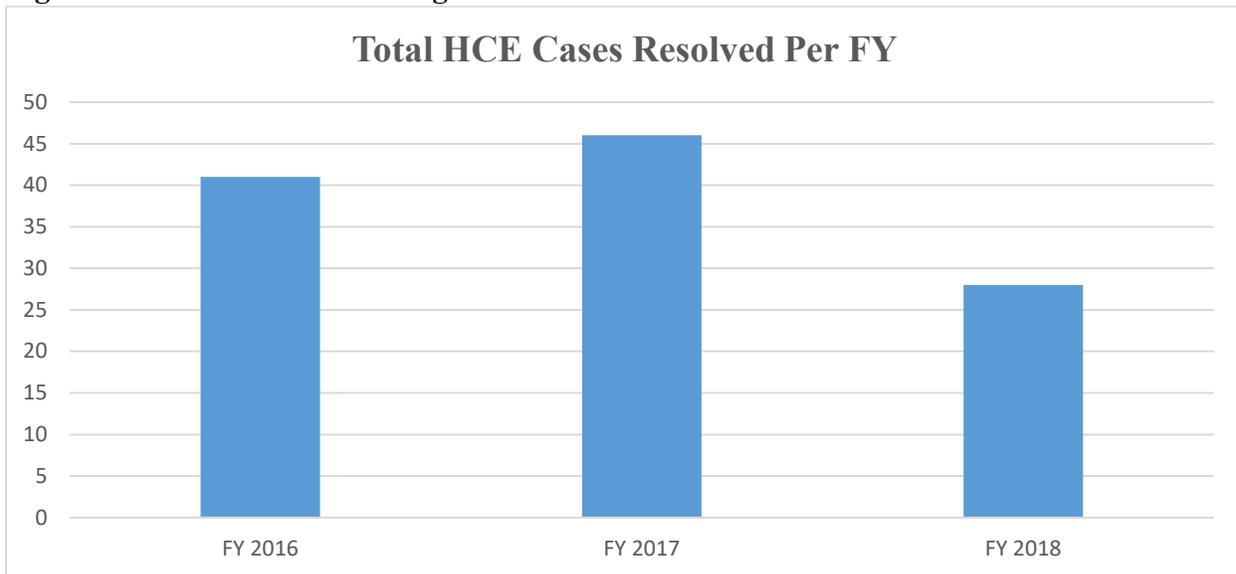
⁶⁷³ Ibid.

⁶⁷⁴ U.S. Dep't of Justice, Civil Rights Division, "Department of Justice Title VI Briefs," <https://www.justice.gov/crt/fcs/Title-VI-Briefs>.

⁶⁷⁵ U.S. Dep't of Justice, Civil Rights Division, "Title IX of the Education Amendments of 1972," <https://www.justice.gov/crt/fcs/TitleIX-SexDiscrimination>.

⁶⁷⁶ Ibid.

⁶⁷⁷ See *infra* notes 753-65. FCS is also significantly involved in policy dissemination and coordination with other federal agencies, and so its work is also discussed in those sections of this chapter. See *infra* notes 800-12 (regarding policy dissemination) and 929-45 (regarding coordination).

Figure 2.11: Total CRT Housing Cases Resolved FY 2016-2018

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Housing and Civil Enforcement Cases.

As discussed above, in FY 2018, CRT spearheaded a Sexual Harassment Initiative with the goal of enforcing rights to freedom from harassment in housing, and reported that it has already procured relief for impacted persons.⁶⁷⁸ The following cases involving allegations of sexual harassment in housing were resolved by HCE during FY 2016-2018:

Cases Involving Sexual Harassment in Housing Resolved by CRT's Housing and Civil Enforcement Section, FY 2016-2018 (With Amount of Civil Penalties and Compensatory Damages)

Fiscal Year 2016:

- Consent Decree between the United States and Pendencygraft (\$5,000 in damages)⁶⁷⁹
- Consent Decree between the United States and Encore Management Company, Inc. (\$110,000 in damages and \$10,000 in civil penalty)⁶⁸⁰

Fiscal Year 2017:

- Consent Decree between the United States and Wygul (\$15,000 in damages)⁶⁸¹
- Judicial Decision (Default Judgement) *United States v. Encore Management Company, Inc.* (\$55,000 in civil penalty against Defendant Anthony James, \$30,000 in civil penalty)

⁶⁷⁸ See *supra* notes 501 and 528.

⁶⁷⁹ Consent Decree, *United States v. Pendencygraft*, No. 5:15-cv-00293-JMH (E.D. Ky. 2016).

⁶⁸⁰ Consent Decree, *United States v. Encore Management Co.*, No. 2:14-cv-28101 (S.D. W. Va. 2016).

⁶⁸¹ Consent Decree, *United States v. Wygul*, No. 1:14-cv-2880-JDB-egb (W.D. Tenn. 2016).

against Defendant Christopher Terrill James, and \$5,000 in civil penalty against Defendant Kisha James⁶⁸²

- Consent Decree between the United States and Walden (\$500,000 in damages and \$100,000 in civil penalty)⁶⁸³
- Settlement Agreement between the United States and Housing Authority of the City of Anderson, Indiana (\$70,000 in damages)⁶⁸⁴
- Settlement Agreement between the United States and Kansas City, Kansas City Housing Authority(\$360,000 in damages and \$5,000 in civil penalty)⁶⁸⁵

Fiscal Year 2018:

- Settlement Agreement between the United States and Tjoelker (\$140,000 in damages and \$10,000 in civil penalty)⁶⁸⁶
- Settlement Agreement between the United States and Webb (\$600,000 in damages and \$25,000 in civil penalty)⁶⁸⁷
- Consent Decree between the United States and Webb (\$27,500.00)⁶⁸⁸

These cases illustrate the impact of utilizing strategic planning to meet the Commission's recommendations to use litigation to "develop case law, to obtain appropriate relief and to send a message to potential violators about the strength of an agency's enforcement program."⁶⁸⁹ Although the above cases have not resulted in judicial decisions that would develop case law, HCE's ongoing investigations and resulting litigation may do so.⁶⁹⁰ Furthermore, the settlements and consent decrees include monetary compensation for victims, and otherwise meet the goal of sending a message to potential violators about the strength of the agency's enforcement program. HCE's other cases also resulted in compensatory damages and civil penalties.⁶⁹¹

HCE also utilizes unique testing programs as part of its litigation strategies. HCE developed the Fair Housing Testing Program in 1992, to uncover hidden discriminatory practices as a part of its enforcement efforts of the FHA.⁶⁹² This program tests whether housing providers are complying with fair housing laws by sending individuals to properties to pose as prospective renters or buyers

⁶⁸² *United States v. Encore Management Co.*, No. 2:14-cv-28101 (S.D. W. Va. 2017).

⁶⁸³ Consent Decree, *United States v. Walden*, No. 1:16-cv-42 (N.D. W. Va. 2017).

⁶⁸⁴ Settlement Agreement, *United States v. Housing Authority of the City of Anderson, Indiana* (S.D. Ind. 2017).

⁶⁸⁵ Settlement Agreement, *United States v. Kansas City, Kansas City Housing Authority* (D. Kan. 2017).

⁶⁸⁶ Settlement Agreement, *United States v. Tjoelker*, (W.D. Mich. 2017).

⁶⁸⁷ Settlement Agreement, *United States v. Webb* (E.D. Mo. 2018).

⁶⁸⁸ Settlement Agreement, *United States v. Webb*, No. 4:16-cv-01400-SNLJ (E.D. Mo. 2018).

⁶⁸⁹ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 38.

⁶⁹⁰ *See supra* notes 501 and 528.

⁶⁹¹ *See, e.g.*, Complaint, *United States v. Trump Village*, No. 15-CV-7306 (E.D.N.Y. Dec. 23, 2015); Settlement Agreement, *United States v. Trump Village*, No. 15-CV-7306 (E.D.N.Y. July 18, 2017) (including \$10,000 in civil penalties and \$40,000 in compensatory damages for complaints, in case resolving allegations of discrimination against persons with disabilities through policies prohibiting support animals).

⁶⁹² U.S. Dep't of Justice, Civil Rights Division, "Fair Housing Testing Program," <https://www.justice.gov/crt/fair-housing-testing-program-1> (accessed Aug. 19, 2016).

and gather information.⁶⁹³ The most recent case brought after housing testing was *United States v. Goss*, resolved in late 2016 through a court-ordered consent decree with a Florida landlord to prohibit discrimination against black applicants.⁶⁹⁴ CRT's FY 2019 Performance Budget stated that HCE will extend the testing tools and methods of the Fair Housing Testing Program into the lending context.⁶⁹⁵

In 2016, HCE filed a Statement of Interest challenging Sandcastle Towers, a New York landlord that did not provide housing for persons with criminal convictions. CRT's amicus brief in this private case against a federally-funded affordable housing provider, stated that, "The United States thus has a strong interest in ensuring the correct interpretation and application of the FHA in this case [about disparate impact law], thereby promoting the dismantling of unlawful barriers to housing for formerly incarcerated individuals."⁶⁹⁶ In 2016, CRT argued that "FHA bars criminal records bans that have a disparate impact on applicants based on race or national origin unless they are supported by a legally sufficient justification."⁶⁹⁷ However, since then, CRT has not been involved in that case, and no further substantive filings have been made.⁶⁹⁸ This may be because of the reported desire of the current administration to shift positions on disparate impact.⁶⁹⁹

The Housing Section's recent Statements of Interest have focused more on Religious Land Use Rights. CRT attorneys filed a brief supporting the Catholic Church's application to expand their buildings in Kansas, and another in support of the religious land use rights of the Jagannath Organization for Global Awareness to build a temple in Howard County, Maryland on land that was already zoned for religious uses.⁷⁰⁰

The **Immigrant and Employee Rights (IER)** section was highly productive, but resolved the great majority of its cases using out-of-court settlements and letter agreements, although it did win one important judicial order. In addition to 116 Letters of Resolution,⁷⁰¹ from FY 2016-2018, IER

⁶⁹³ Ibid.

⁶⁹⁴ See Consent Order, *United States v. Goss*, 8:16-cv-02802 (M.D. Fla. Dec. 12, 2016).

⁶⁹⁵ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 29.

⁶⁹⁶ Ibid., 8.

⁶⁹⁷ Ibid., 12.

⁶⁹⁸ See U.S. Dist. Ct. E.D.N.Y. (Brooklyn), Civil Docket for Case No. 1:14-cv-06410, *The Fortune Society v. Sandcastle Towers Housing Development Fund Corp. et. al.*, https://ecf.nyed.uscourts.gov/cgi-bin/DktRpt.pl?662439665493568-L_1_0-1 (accessed Mar. 16, 2019) (on file). The United States continues to be listed as Interested Party represented by an Assistant U.S. Attorney from the Eastern District of New York. *Id.*

⁶⁹⁹ See *infra* notes 870-900 (Disparate Impact Policy).

⁷⁰⁰ Statement of Interest of the United States, *Roman Catholic Archdiocese of Kansas City in Kansas v. The City of Mission Woods, Kansas*, 337 F.Supp.3d 1122 (D. Kan. 2018) (CRT supported St. Rose Catholic Church's suit under RLUIPA arguing their religious exercise was substantially burdened by City of Mission Woods after being denied a land use permit to convert a residential house adjacent to the Church's property into meeting house to allow for additional programming and meeting space.) Statement of Interest of the United States, *Jagannath Organization for Global Awareness Inc. v. Howard County, Maryland*, 1:17-cv-02436 (D. Md. 2018) (CRT supported plaintiff's suit under RLUIPA alleging Howard County's complete denial of JOGA's land use application and petition to build a temple in a zone where religious use is permitted was arbitrary and imposed a substantial burden on JOGA's ability to practice their religion. At the time the suit was filed, there was no Jagannath temple anywhere in the State of Maryland.)

⁷⁰¹ These Letters of Resolution are considered in the Commission's calculations as a form of settlement.

resolved 50 cases, with 49 (98%) of those resolved through out-of-court settlements. Another feature of this section's enforcement work is that its settlements (but not its Letters of Resolution) typically included civil fines to be paid to the federal government, and for those brought on behalf of individuals, back pay for the persons who lost wages due to the alleged discrimination.⁷⁰² During FY 2016-2018, of the 50 out-of-court settlements, 49 IER enforcement actions resulted in agreements to pay \$3,302,622.65 in civil penalties.⁷⁰³ According to the Commission's review of the settlement agreements on the CRT IER Section's website, there was only one case in which no civil penalties were awarded. Furthermore, in FY 2018, in litigation before the Executive Office of Immigration Review (which adjudicates cases under the INA), CRT won a judicial order finding pattern or practice violations and ordering further proceedings to determine sanctions.⁷⁰⁴ Based upon the FY 2018 order establishing the violations and calling for sanctions, in December 2018, CRT won "high civil penalties" in the amount of \$757,868 to be paid by the defendant companies for "knowing, pervasive and, continuing" discriminatory document practices, including asking hundreds of U.S. citizens and Lawful Permanent Residents, as well as asylees and refugees, for unnecessary documentation, discriminating based on citizenship status, as well as "flagrant bad-faith and callous disregard of responsibility."⁷⁰⁵ The final order also included injunctive relief that the companies cease and desist their discriminatory practices and take remedial measures including training their staff and being subjected to federal monitoring and reporting requirements.⁷⁰⁶

Table 2.3: IER Cases Resolved FY 2016-2018

Fiscal Year	Number of Cases Resolved	Settlements	Other
FY 2016	20	20	
FY 2017	13	13	
FY 2018	18	17	1 judicial order
TOTAL	51	50	1

SOURCE: CRT Website; DOJ Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigration and Employment Rights Cases.

⁷⁰² See, e.g., Settlement Agreement, *United States and J.E.T. Holding Co., Inc.* (Jan. 17, 2017) (settlement of \$12,000 to U.S. Government and establishment of \$40,000 back pay fund for citizenship status discrimination); Settlement Agreement, *United States and 1st Class Staffing, L.L.C.* (Dec. 13, 2016) (civil penalty of \$17,600 and \$720 payment to charging party, for document discrimination; employer required more or different documents from noncitizens compared to citizens).

⁷⁰³ See Appendix A, Chart of CRT Cases Resolved, FY 2016 – 18, Immigrant and Employee Rights.

⁷⁰⁴ *United States v. Technical Marine Maintenance Texas, LLC, & GulfCoast Workforce, LLC*, 13 OCAHO No. 1312, at 11 (2018).

⁷⁰⁵ *United States v. Technical Marine Maintenance and Gulf Coast Workforce*, OCAHO No. 17B00089, 4-5, 7-9 (EOIR, Dec. 10, 2018).

⁷⁰⁶ *Id.*

Most of the IER cases brought from FY 2016-FY 2018 were about unfair documentary practices, in which employers ask workers for more documentation than what is specified under the relevant federal statute, limit the types of documentation a worker can show, or reject valid documentation, based on a worker's citizenship status or national origin. This was the basis for CRT prosecution in 35 out of the 50 (70.0%) cases resolved. There were also 12 (24.0%) cases about citizenship status discrimination, in which employers unjustifiably limited persons they would hire to citizens, or conversely, to non-citizens.⁷⁰⁷

Additionally, IER issues letters of resolution to employers who voluntarily reach an agreement with the aggrieved party resolving discrimination charges or to conclude independent investigations where the employer has voluntarily corrected its practices and no victims were identified.⁷⁰⁸ Like settlement agreements, these letters often require the employer's high-level officials' participation in an IER webinar, its commitment to comply with the laws and regulations of the INA moving forward and, in some cases, include back pay to the aggrieved party.⁷⁰⁹ However, unlike settlement agreements, the letters are not published on the website and do not include any indication of findings of violations or claims that were resolved. See Table 2.4.

Table 2.4: IER Letters of Resolution

Fiscal Year	IER Letters of Resolution
FY 2016	41
FY 2017	44
FY 2018	31

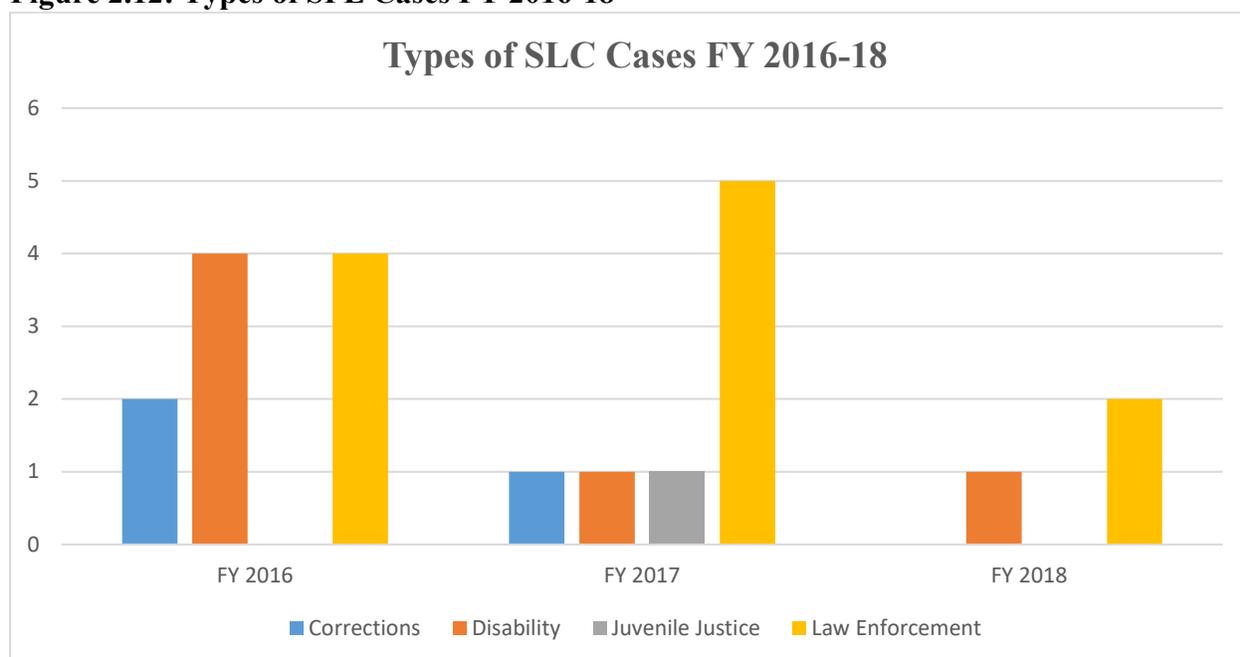
SOURCE: CRT Website; DOJ Agency Review; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigration and Employment Rights Cases.

The **Special Litigation (SPL)** section enforces one of the often complex types of civil rights law, and the section resolved eight cases in FY 2016, 4.5 in FY 2017, and three in FY 2018. The majority of cases have been "pattern or practice" cases regarding systemic law enforcement misconduct.

⁷⁰⁷ See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Immigrant and Employee Rights.

⁷⁰⁸ U.S. Dep't of Justice, Civil Rights Division, "IER Letters of Resolution FY 2018," <https://www.justice.gov/crt/ier-letters-resolution-fy-2018> (accessed Jul. 13, 2019).

⁷⁰⁹ Ibid.

Figure 2.12: Types of SPL Cases FY 2016-18

SOURCE: CRT Website; DOJ Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Special Litigation Section Cases.

The Commission notes that one FY 2017 settlement agreement, regarding Chicago police, was only an Agreement in Principle to enter into a consent decree.⁷¹⁰ That agreement in principle was later opposed by former Attorney General Sessions and dropped by DOJ,⁷¹¹ although private litigation resulted in a consent decree.⁷¹² The DOJ agreement to enter into a consent decree that was dropped is coded as 0.5 or half of a settlement agreement in the Commission’s research. The other SPL consent decrees during this time frame were with the Cities of Ferguson and Newark regarding policing (both in April 2016), Baltimore police (in April 2017), and Georgia state hospitals (in May 2016).⁷¹³

SPL was also active in filing Statements of Interest in cases related to law enforcement practices. For example, in October 2015, it filed a Statement of Interest in a case brought by the parents of students with disabilities against School Resource Officers, stating that “children – particularly children with disabilities – risk experiencing lasting and severe consequences if SROs unnecessarily criminalize school-related misbehavior by taking a disproportionate law

⁷¹⁰ Agreement in Principle Between The United States Department of Justice and the City of Chicago Regarding the Chicago Police Department (Jan. 13, 2017), <https://www.justice.gov/crt/case-document/file/925921/download> (signed by former Principal Deputy Atty General Vanita Gupta and SPL career attorneys).

⁷¹¹ See United States Statement of Interest Opposing Proposed Consent Decree, *State of Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Oct. 12, 2018).

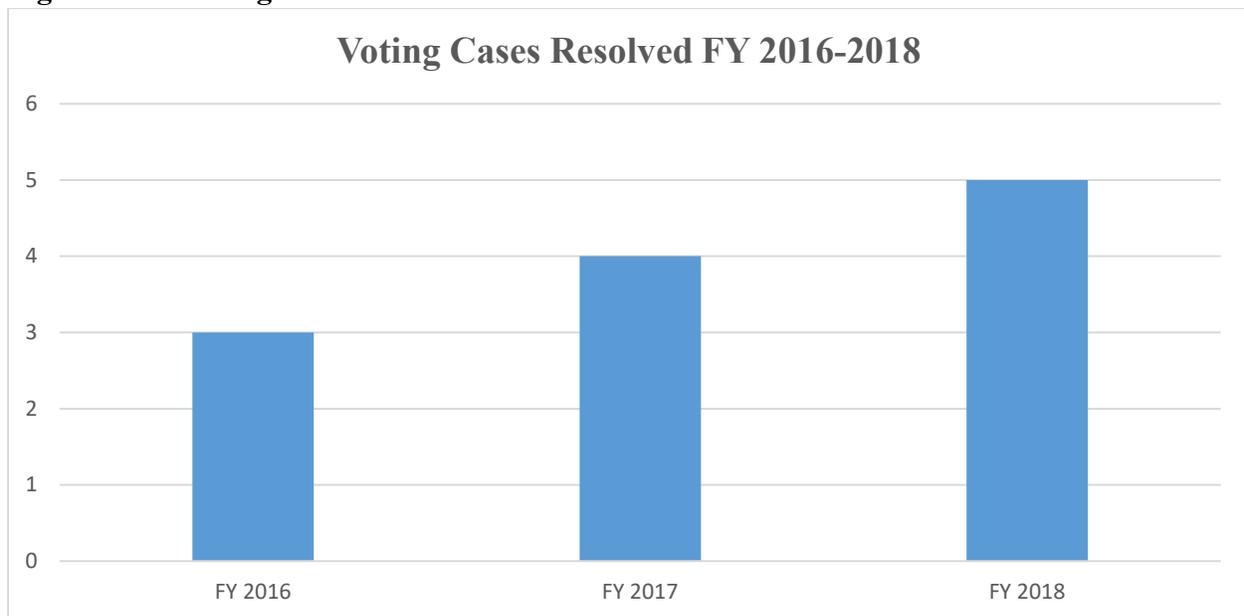
⁷¹² Consent Decree, *State of Illinois v. City of Chicago*, 1:17-cv-06260 (N.D. Ill. Jan. 31, 2019), <https://www.justice.gov/opa/press-release/file/1100631/download>.

⁷¹³ Consent Decree, *United States v. City of Ferguson*, No. 4:16-cv-000180 (E.D. Mo. April 19, 2015); Consent Decree, *United States v. City of Newark*, No. 2:16-cv-01731 (D.N.J. May 5, 2016).

enforcement response to minor disciplinary infractions.”⁷¹⁴ SPL argued that such unnecessary responses including handcuffing the children above the elbows posed the risk of “last and severe consequences” for children, “particularly children with disabilities,”⁷¹⁵ and told the court that the ADA applies to interactions between school resource officers and children with disabilities, and that law enforcement agencies must make reasonable modifications when necessary to avoid disability-based discrimination.⁷¹⁶ SPL and Disability Rights Section attorneys signed the brief telling the court that the case implicated DOJ’s civil rights enforcement efforts and that: “The Defendant Sheriff’s Office also had a duty to create policies and administer those policies in a way that does not have the effect of discriminating against children with disabilities; the Court should reject Defendants’ attempt to avoid that duty.”⁷¹⁷ The Division also filed, together with DOJ’s Access to Justice office, a Statement of Interest in *Stinnie v. Holcomb*, a case challenging Virginia’s practice of suspending a person’s license for failure to pay court fines and fees.⁷¹⁸

During the fiscal years studied, the **Voting Section** resolved 12 cases, fewer cases than other civil CRT sections. The following graph shows the number of cases resolved per fiscal year.

Figure 2.13: Voting Cases Resolved FY 2016-18



SOURCE: CRT Website; DOJ Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases.

The data also shows that the Voting Section’s cases were mostly resolved through settlements (6), and though an additional four were resolved through consent decrees and two by judicial

⁷¹⁴ Statement of Interest of the United States, *S.R. & L.G. v. Kenton County*, No. 252:15-cv-143, 1 (E.D. Ky. Oct. 2, 2015), <https://www.justice.gov/crt/file/780706/download>.

⁷¹⁵ *Id.*

⁷¹⁶ *Id.* at 2.

⁷¹⁷ *Id.*

⁷¹⁸ Statement of Interest of the United States, *Stinnie v. Holcomb*, No. 13-cv-00044 (W.D. Va. Nov. 7, 2016), <https://www.justice.gov/crt/case-document/file/917681/download>.

decisions.⁷¹⁹ The Voting Section also filed eight (8) Statements of Interest during this time period, and some cases included a change in position.⁷²⁰

The type of Voting Section cases also varied, with one VRA case and two NVRA cases brought in each of the three fiscal years, one HAVA case brought in FY 2017, and three UOCAVA cases brought in FY 2018.⁷²¹ The Voting Section also filed eight Statements of Interest during FY 2016-2018.⁷²²

Appellate Section activities were not included in the total measure of CRT cases resolved (by judicial decision, consent decree or out-of-court settlement), because their nature is different. First, the date of a final judicial decision is not the best measure of this section's enforcement efforts in any particular year, as these cases often take many years, and second, the section files Statements of Interests in private cases in which the impact is difficult to measure as it may be that the court cites the DOJ's brief, or it may be that the court takes it into account and takes a position somewhat, but not entirely, consistent with the DOJ's brief. At the same time, CRT's appellate litigation work is impactful as these cases set a higher level of precedent than those resolved at the lower (federal district) court level.⁷²³ At the federal level, they can set precedents in the nation's 13 courts of appeals that generally govern the 94 district courts in various states, or they may assist in setting a Supreme Court precedent.⁷²⁴

The Commission based its assessment of this section's work during FY 2016-2018 on the date of briefs filed, which the Appellate Section filed in the Supreme Court, courts of appeals, district

⁷¹⁹ DOJ CRT, "Search Cases and Matters," *supra* note 632; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; *See* Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases.

⁷²⁰ *See also* USCCR, *Minority Voting*, *supra* note 17, at 239-275 (Ch. 5) (discussing Voting Section's declining number of cases brought to enforce the provisions of the Voting Rights Act in recent years, despite documented increase in discrimination in voting and VRA cases brought by private parties having quadrupled during the five years since the Supreme Court's 2013 decision in *Shelby County v. Holder*).

⁷²¹ DOJ CRT, "Search Cases and Matters," *supra* note 632; U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review; Commission Staff Analysis; *see* Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases.

⁷²² *See* Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Voting Section Cases.

⁷²³ *See* USCCR, *Minority Voting*, *supra* note 17, at 64 n. 340:

For a description of federal courts of appeals, *see* United States Courts, "Court Role and Structure," <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (accessed Jul. 26, 2018) ("There are 13 appellate courts that sit below the U.S. Supreme Court, and they are called the U.S. Courts of Appeals. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals. The appellate court's task is to determine whether or not the law was applied correctly in the trial court."); *see also* U.S. Courts, How Appellate Courts are Different from Trial Courts, <http://www.uscourts.gov/about-federalcourts/court-role-and-structure/about-us-courts-appeals> (accessed Jul. 26, 2018). ("At a trial in a U.S. District Court, witnesses give testimony and a judge or jury decides who is guilty or not guilty—or who is liable or not liable. The appellate courts do not retry cases or hear new evidence. They do not hear witnesses testify. There is no jury. Appellate courts review the procedures and the decision in the trial court to make sure that the proceedings were fair and that the proper law was applied correctly.")

⁷²⁴ *Ibid.*

courts and state courts.⁷²⁵ CRT referred the Commission to its website for that information.⁷²⁶ Among the cases published on the CRT website, based on the date of filing of the briefs, the Appellate Section filed 33 cases in FY 2016, 39 in FY 2017, and 38 in FY 2018, with a total of 110 of these briefs filed during the fiscal years studied. Of those 110 briefs, 44 (40%) were in cases involving federal civil rights law in representation of the U.S. upon appeal.⁷²⁷ But also during FY 2016-18, 66 (60%) of the Appellate Section’s enforcement actions were based on Statements of Interest in cases brought by other parties—either amicus briefs or briefs in intervention.⁷²⁸

Supreme Court decisions were issued in ten of these cases.⁷²⁹ Of these, four involved voting rights, two involved the rights of individuals with disabilities, two involved employment rights, one involved education and one involved housing.⁷³⁰

DOJ later reported to the Commission that “according to the Appellate Section’s internal data, the Appellate Section filed 50 briefs and other papers of substance in FY16, 50 in FY17, and 47 in FY18. The total number of filings for these three years is 147.”⁷³¹ Based on information from the Appellate Section’s website, the Commission verified there were 110 briefs filed during FY 2016 – 2018, however, information about the 37 additional cases from the Appellate Section’s internal data was not provided.⁷³²

Criminal Section cases were extensive, but difficult to evaluate, in large part because DOJ does not publish the legal documents from these cases on its website.⁷³³ Unlike other CRT sections, the Criminal Section does not provide public links to the major legal filings and decisions in their cases and these cases can only be located through paid legal databases (e.g., Westlaw and

⁷²⁵ This methodology is also consistent with that suggested by the DOJ CRT in its agency review of the draft report. Email from DOJ CRT to USCCR (June 17, 2016) (attaching comments on draft report) (on file).

⁷²⁶ U.S. Dep’t of Justice, Response to USCCR Interrogatories, at 2.

⁷²⁷ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Briefs by Date of Filing.

⁷²⁸ Ibid.

⁷²⁹ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Cases by Date of Decision.

⁷³⁰ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Appellate Cases by Date of Decision: *Green v. Brennan*, Postmaster General, 136 S. Ct. 1769 (2016); *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016); *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016); *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016); *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2016); *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788 (2016); *Bank of America v. Miami*; *Wells Fargo v. Miami*, 137 S. Ct. 1296 (2017); *Cooper (McCrary) v. Harris*, 137 S. Ct. 1455 (2017); *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017).

⁷³¹ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁷³² CRT commented that “according to the Appellate Section’s internal data, the Appellate Section filed 50 briefs and other papers of substance in FY16, 50 in FY17, and 47 in FY18. The total number of filings for these three years is 147. They include filings in the Supreme Court, courts of appeals, district courts, and state courts.” Email from DOJ CRT to USCCR (June 17, 2016) (attaching comments on draft report) (on file). Some cases were provided to the Commission, but among those, various were not filed during Fiscal Years 2016-2018. On July 18, Commission staff requested information about cases that were not on the Appellate Section’s website that may have also fallen within these fiscal years. (On file.) These cases were not received from CRT and therefore the Commission has no information about them to analyze.

⁷³³ See U.S. Dep’t of Justice, Civil Rights Division, “Criminal Section,” <https://www.justice.gov/crt/criminal-section> (accessed Jul. 18, 2019) [hereinafter DOJ CRT, “Criminal Section”].

PACER).⁷³⁴ It does issue press releases but they typically do not include links to the legal documents, and during a 2018 briefing on hate crimes, the Commission and a coalition of civil rights groups urged CRT to provide more information regarding its hate crimes litigation.⁷³⁵ Lack of transparency regarding federal efforts to combat hate crimes can hinder public awareness about these crimes. At the hate crimes briefing, Former Deputy Assistant Attorney General Roy Austin testified that “you can’t understate the importance of public awareness over hate crimes. The condemnation, the shame that goes with that. And how that impacts whether or not someone is going to commit one in the future.”⁷³⁶ Criminal prosecution of hate crimes may also send a message to the targeted communities that law enforcement care.⁷³⁷

The Commission was able to procure information about hate crimes cases from CRT (including case numbers so that Commission staff could review legal documents), through which they provided information about 57 hate crimes cases (20 in FY 2016, 16 in FY 2017, and 21 in FY 2018).⁷³⁸ In FY 2016, there were 6 charges, 3 plea agreements, and 16 convictions.⁷³⁹ In FY 2017, there were 9 charges, 3 plea agreements, and 15 convictions.⁷⁴⁰ In FY 2018, there were 15 charges, 1 plea agreement, 10 convictions, 1 court decision of not guilty, and 1 charged resolved by the court ordering residential treatment.⁷⁴¹ This is an area of civil rights performance where there was a high level of impact in the number of convictions in FY 2016 and FY 2017, with a drop (by 1/3) in FY 2018. However, as DOJ provided the Commission with information about charges, it is notable that the number of charges in hate crimes cases has increased each fiscal year.

⁷³⁴ U.S. Dep’t of Justice, Civil Rights Division, “Press Releases,” <https://www.justice.gov/crt/press-releases>; see also <https://www.justice.gov/crt/search-cases-and-matters> (displaying links to cases from other sections, but not the Criminal section) (accessed Jul. 10, 2019).

⁷³⁵ See Lena Masri, National Litigation Director, Council on American-Islamic Relations, testimony, *In the Name of Hate: Examining the Federal Government’s Role in Responding to Hate Crimes Briefing before the U.S. Commission on Civil Rights*, Washington, D.C., May 11, 2018, transcript, p. 220 [hereinafter *Hate Crimes Briefing*]; Hate Crimes Coalition, “Post-Charlottesville Hate Crimes Summit Coalition Recommendations to the Department of Justice,” *The Leadership Conference on Civil & Human Rights*, Sep. 15, 2017, <http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>; and see Muslim Public Affairs Council, Public Statement to U.S. Commission on Civil Rights, Jun. 25, 2018, at 2, <https://www.mpac.org/assets/docs/2018/MPAC-Comments-to-the-US-Commission-on-Civil-Rights.pdf>.

⁷³⁶ Roy Austin, partner at Harris, Wiltshire & Grannis, LLP and former Deputy Assistant Atty General of the Civil Rights Division, U.S. Dep’t of Justice, testimony, *Hate Crimes Briefing*, p. 281.

⁷³⁷ *Ibid.*, 280.

⁷³⁸ This information was not received in response to the Commission’s Interrogatories, which only referred the Commission to the CRT website. The website only provides incomplete information about its cases in the DOJ’s press releases. The Criminal Section website also does not include the federal case number, nor links to plea agreements or judicial decisions, which could only be found on PACER (a paid service to procure non-privileged information about federal court filings) with a case number. After receiving the draft report, CRT provided information about some, but not all, of its Criminal Section cases. Email from DOJ CRT to USCCR (June 17, 2016) (attaching comments on draft report) (on file); see also Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Criminal Section (hate crimes cases).

⁷³⁹ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Criminal Section (hate crimes cases).

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.*

The Commission also received from DOJ information about 70 “color of law” cases brought against officials (mainly state and local law enforcement)⁷⁴² accused of intentionally violating civil rights while acting under the color of law, during FY 2016-2018.⁷⁴³ This information was only provided through press releases. The Criminal Section’s press releases show that there were 25 convictions in color of law cases in FY 2016, 19 in FY 2017, and 23 in FY 2018. However, the lack of publication of the underlying legal documents hindered the Commission’s ability to research these cases further. Also according to their press releases, the Criminal Section has also been active in actions brought to enforce protections against human trafficking and forced labor. The Criminal Section’s press releases show that there were 7 convictions in human trafficking and forced labor cases in FY 2016, 13 in FY 2017, and 13 in FY 2018. As with the color of law cases, CRT’s lack of publication of the underlying legal documents hindered the Commission’s ability to research these cases further. The concerns raised about lack of transparency in hate crimes cases are equally applicable to color of law and trafficking cases.

Proactive Compliance Evaluation

The Civil Rights Division has some duties with regard to external enforcement of Title VI, Title IX and Section 504. The Office of Justice Programs distributes DOJ funding, and its Civil Rights Office provides technical assistance and conducts compliance monitoring for most grantees.⁷⁴⁴ For this report, the Commission concentrated the current evaluation on CRT.⁷⁴⁵ CRT’s duties with regard to compliance evaluation include: coordinating compliance under Executive Order 12,250 (which is also discussed in the *Interaction and Coordination* section of this chapter); investigating allegations of discrimination based on race, color, national origin (including limited English proficiency), sex, or religion against recipients receiving financial assistance from the U.S. Department of Justice;⁷⁴⁶ monitoring compliance with the requirements of Executive Order 13,166 requiring meaningful access for persons with limited-English proficiency (LEP) in state and local court systems; maintaining the LEP.gov website to assist other agencies in monitoring compliance; and providing advice and assistance to other agencies in how to comply with Title VI, Title IX and Section 504. These duties are primarily performed by the Federal Coordination & Compliance Section (FCS). In addition, CRT receives referrals for litigation to ensure compliance with the relevant statutes from other agencies; defends the constitutionality of relevant statutes when agencies are sued; and litigates enforcement actions on behalf of other agencies and the DOJ itself. CRT’s election monitoring may be another form of monitoring for compliance, similar to CRT’s

⁷⁴² In its agency review, CRT noted that “CRT CRM *prosecutes* federal officials alleged to have committed criminal civil rights violations.” Email from DOJ CRT to USCCR (Jun. 17, 2016) (attaching comments on draft report) (on file).

⁷⁴³ See Appendix A, Chart of CRT Cases Resolved, FY 2016-18, Criminal Section (color of law cases)

⁷⁴⁴ See U.S. Dep’t of Justice, Office of Justice Programs, Civil Rights Requirements Associated with OJP Awards, <https://ojp.gov/funding/Explore/SolicitationRequirements/CivilRightsRequirements.htm> (accessed Jul. 23, 2019).

⁷⁴⁵ See Letter from U.S. Comm’n on Civil Rights to Acting Assistant Atty General John Gore (Feb. 9, 2018), attaching Interrogatories and Document Requests regarding the Civil Rights Division (on file). No similar letter was sent to the Office of Justice Programs.

⁷⁴⁶ DOJ Justice Manual, *supra* note 370, at § 8.2.240 (Federal Coordination & Compliance Section).

monitoring of compliance with the terms of cases resolved through settlements, consent decrees, and judicial decisions. This latter set of duties is mostly performed by the specific litigating section.

FCS Proactive Compliance Evaluation Activities

CRT told the Commission that monitoring compliance with civil rights statutes was the responsibility of the Office of Justice Programs, but OJP was not the subject of evaluation in this report.⁷⁴⁷ With regard to investigations, the Federal Coordination and Compliance Sections has five Title VI Letters of Findings on its website, and none are within FY 2016-2018.⁷⁴⁸

Executive Order 12,250 charges DOJ with coordinating compliance with Title VI and other federal statutes requiring nondiscrimination by recipients of federal funding. DOJ has issued policy guidelines, codified in federal regulations, indicating that agencies should take the lead on compliance for federal funding recipients.⁷⁴⁹ But DOJ's regulations also state that:

While primary responsibility for enforcement of title VI rests directly with the head of each agency, in order to assure coordination of title VI enforcement and consistency among agencies, the Department of Justice should be notified in advance of applications on which action is to be deferred, hearings to be scheduled, and refusals and terminations of assistance or other enforcement actions or procedures to be undertaken. The Department also should be kept advised of the progress and results of hearings and other enforcement actions.⁷⁵⁰

The Commission was unable to evaluate this activity.⁷⁵¹ However, the Commission notes that assisting other agencies in compliance monitoring is an important function of DOJ, as noted in the Commission's 2002 report,⁷⁵² and that some information about how this function is performed should be made public. For example, it would be helpful to know how often FCS is consulted by which agencies, and if and generally how it responds, whether it performs outreach, and whether its advice is based on any best practices.

Regarding LEP compliance monitoring, the FCS's website indicates that it reached three settlement agreements with state courts to remove language barriers or otherwise provide for equal access for LEP individuals in FY 2016.⁷⁵³ It also issued a Letter of Resolution a month after its settlement with Kentucky state courts, telling the jurisdictions that the investigation was closed as

⁷⁴⁷ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁷⁴⁸ U.S. Dep't of Justice, Civil Rights Division, Federal Coordination and Compliance Section, "Department of Justice Title VI Letters of Finding: Investigations," <https://www.justice.gov/crt/fcs/TitleVI-LOF>.

⁷⁴⁹ 28 C.F.R. § 50.3.

⁷⁵⁰ 28 C.F.R. § 50.3(c)(V).

⁷⁵¹ This was due to lack of publicly available information. See U.S. Dep't of Justice, Civil Rights Division, "Federal Coordination and Compliance Section," <https://www.justice.gov/crt/fcs> (accessed Oct. 21, 2019).

⁷⁵² USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, *supra* note 31, at 6-7.

⁷⁵³ U.S. Dep't of Justice, Civil Rights Division, "Federal Coordination and Compliance Section News," <https://www.justice.gov/crt/federal-coordination-and-compliance-section-news>.

it had taken affirmative steps to address the complaint allegations and come into compliance.⁷⁵⁴ The FCS asked that the jurisdiction provide quarterly updates for a period of two years.⁷⁵⁵

FCS reached two further agreements in FY 2017, and one other in FY 2018.⁷⁵⁶ One of the FY 2017 agreements was a partnership that did not include any specific agreement, but instead was documented as a joint effort providing for compliance in the period after a complaint was received and the party agreed to take measures to come into compliance.⁷⁵⁷ After that, FCS and Washington State Courts developed a model LEP plan through their partnership, which includes ongoing technical assistance.⁷⁵⁸ CRT told the Commission that it used this resolution type because Title VI “is explicitly a voluntary compliance statute requiring DOJ and the recipients to work together jointly.”⁷⁵⁹ CRT added that “by its very terms, Title VI is a voluntary compliance statute and was enacted with a view to using procedures that would not burden the courts. Litigation and fund termination are options of last resort under this statutory regime.”⁷⁶⁰

⁷⁵⁴ See Letter to Director of Kentucky Administrative Office of the Court, Acting Chief of FCS Christine Stoneman (Jun. 22, 2016), <https://www.justice.gov/crt/file/871056/download>. Also, a prior Memorandum of Understanding with the state courts of Colorado was closed by letter in FY 2016, as FCS determined that the jurisdiction had come into compliance. Letter to Colorado State Court Administrator, Acting Chief of FCS Christine Stoneman (Jun. 21, 2016), <https://www.justice.gov/opa/file/868651/download>.

⁷⁵⁵ Ibid.

⁷⁵⁶ Ibid.

⁷⁵⁷ See DOJ, “Justice Department and Washington State Courts Partner to Ensure Access to State Court Services for Limited English Proficient Individuals,” *supra* note 244.

⁷⁵⁸ Ibid.

⁷⁵⁹ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file). This information was not listed on CRT’s website which was referenced in response to the Commission’s Interrogatories.

⁷⁶⁰ Ibid.

Table 2.5: FCS Resolved Cases FY 2016-2018

Party	Type of Resolution	Date of Resolution	Basis
FY 2016			
Washington State DOL (by DOJ & DOL)	Settlement	10/1/2015	LEP (workers)
Los Angeles Superior Court	Settlement	9/20/2016	LEP (public users)
Kentucky Courts	Settlement	6/22/2016	LEP (public users)
FY 2017			
Washington State Courts	Partnership	7/18/2017	LEP (public users)
Pennsylvania State Courts	Settlement (MOU)	4/20/2017	LEP (public users)
FY 2018			
Eau Claire County, WI, Circuit Court	Settlement	6/13/2018	LEP (public users)

SOURCE: U.S. Dep't of Justice, Civil Rights Division, "Search Cases and Matters," www.justice.gov/crt/search-cases-and-matters; U.S. Dep't of Justice, Civil Rights Division, Response to USSCR Affected Agency Review; Commission Staff Analysis; See Appendix A, Chart of CRT Cases Resolved FY 2016-2018, Federal Compliance & Coordination.

CRT told the Commission FCS uses a variety of resolution methods and has undertaken other compliance reviews and discussions to help entities come into voluntary compliance with these obligations.⁷⁶¹ One example is a Voluntary Resolution Agreement entered into April 2014 (prior to the Fiscal Years studied in this report),⁷⁶² which was closed in April 2016.⁷⁶³ The Commission notes that during the two years of this agreement, FCS worked closely with the Rhode Island state courts to help them come into compliance with their obligations to provide meaningful access to LEP persons,⁷⁶⁴ as required under Title VI.⁷⁶⁵

The FCS website states that FCS reviews and approves each federal agency's internal and external LEP guidelines, which are implementation plans designed to ensure LEP persons have access to that agency's programs—as well as the programs of an agency's recipient of federal funds.⁷⁶⁶

⁷⁶¹ Ibid.

⁷⁶² Voluntary Resolution Agreement Between the United States and the Rhode Island Judiciary, Dep't of Justice No. 171-66-2 (Mar. 28, 2014), https://www.lep.gov/resources/MOA_RI_040914_signed.pdf.

⁷⁶³ Letter from Acting Chief of Federal Coordination & Compliance Section to the Chief Justice of the Supreme Courts of Rhode Island (Apr. 21, 2016), https://www.lep.gov/resources/RI_Jud_Closure_42116.pdf.

⁷⁶⁴ Ibid.

⁷⁶⁵ See, e.g., *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

⁷⁶⁶ See, e.g., U.S. Dep't of Justice, Office of the Atty General, Memorandum of the Attorney General to Heads of Federal Agencies, General Counsels and Civil Rights Heads, Federal Government's Commitment to Language Access Under Executive Order 13166 (Feb. 17, 2011), p. 2, https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf [hereinafter DOJ, Memorandum: Federal Government's Commitment to Language Access].

Proactive Compliance Monitoring by Other CRT Sections

Another compliance-based enforcement tool is on-the-ground monitoring for potential civil rights violations. In the case of federal election monitoring to observe compliance with federal voting rights laws, such monitoring can have a calming effect on discriminatory activity, or it can lead to further CRT investigation that may result in new or additional enforcement action.⁷⁶⁷ The Voting Rights Act provides for federal observers, certified by the Attorney General through CRT and recruited through the Office of Personnel Management (OPM) government-wide, to enter polling places and monitor elections according to specific standards.⁷⁶⁸ But as the Commission reported last year: “Although the *Shelby County* [2013 Supreme Court] decision did not directly address the issue of federal observers, DOJ has interpreted *Shelby County* to mean that DOJ could no longer deploy federal observers to the jurisdictions formerly covered under Section 5 [of the VRA], except under the limited circumstances of a court order.”⁷⁶⁹ CRT may still send federal observers if they are ordered by a federal judge, in cases where there is a significant need to protect against constitutional violations.⁷⁷⁰ Additionally, CRT still sends its own staff to monitor elections on a regular basis, although they do not have a statutory right to observe elections from inside the polling places.⁷⁷¹ Prior to *Shelby County*, the Attorney General certified and sent federal observers to 153 jurisdictions in 11 states.⁷⁷² In a 2018 report, *An Assessment of Access to Minority Voting Rights*, the Commission found that the *Shelby County* decision had a negative impact on CRT’s ability to observe elections and collect information about possible unlawful voting practices or procedures.⁷⁷³ Current data shows similar patterns:

- In FY 2016, DOJ sent 211 federal observers and 93 staff election monitors to observe elections. In comparison, in FY 2012, DOJ sent 460 OPM federal observers and 123 staff election monitors.⁷⁷⁴ This amounts to fewer than half the number of observers and 75.6 percent of staff election monitors present in FY 2016, compared with FY 2012.
- In FY 2017 (which included the 2016 November general election) it sent 143 OPM federal observers and 452 staff election monitors to over 76 jurisdictions in 29 states. In comparison in FY 2013 (which included the 2012 November general election) DOJ sent

⁷⁶⁷ See, e.g., USCCR, *Minority Voting*, *supra* note 17, at 30, 58, 138 n. 809, 176-77, and 191 (and testimony and data therein).

⁷⁶⁸ 52 U.S.C. § 10305(a)(2) and (b) – (e).

⁷⁶⁹ USCCR, *Minority Voting*, *supra* note 17, at 256.

⁷⁷⁰ *Ibid.* (also includes analysis of the scope of the Attorney General’s authority to order federal observers and the observers’ own authorities and duties, under Section 8 of the Voting Rights Act); see also *supra* notes 551-53 (discussing 52 U.S.C. § 12302(a), under which federal observers may be ordered by a federal court as appropriate to enforce the 14th and 15th amendment).

⁷⁷¹ USCCR, *Minority Voting*, *supra* note 17, at 254-60.

⁷⁷² U.S. Dep’t of Justice, Civil Rights Division, Voting Section, “Federal Observers,” <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (accessed Mar. 15, 2017).

⁷⁷³ USCCR, *Minority Voting*, *supra* note 17, at 254.

⁷⁷⁴ *Ibid.*, 258; updated by U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

780 federal observers and 259 staff election monitors to 78 jurisdictions in 23 states.⁷⁷⁵ Even though the number of jurisdictions covered was comparable (76 and 78, respectively), the number of persons monitoring compliance on the ground decreased significantly between the 2012 and 2016 general elections, amounting to DOJ sending only 18.3 percent (143/780 x 100) of the number of observers and 57.3 percent (259/452 x 100) the number of staff monitors during the 2016 elections, compared with 2012.

This updated data shows that there was an ongoing overall decrease in CRT's election monitoring activities, even in the use of CRT staff monitoring, which is a less-resource intensive form of election monitoring.⁷⁷⁶

Civil rights compliance also is performed by CRT in most other civil cases, after they are resolved through settlement, consent decree or judicial decision, in the hundreds of cases CRT resolves each year. Post-resolution monitoring by CRT, or a court-appointed monitor, helps ensure that entities come fully into compliance with the terms of the case resolution, before the monitoring is ended and the case can be closed.⁷⁷⁷ This is especially important in what CRT terms "institutional reform" cases.⁷⁷⁸

In addition to its compliance monitoring through DOJ's Office of Civil Rights of the Office of Justice Programs, which distributes DOJ funding,⁷⁷⁹ CRT effectuates compliance with Title VI, Title IX and Section 504 by acting on matters referred to DOJ for litigation on behalf of other agencies,⁷⁸⁰ or to enforce these civil rights laws against recipients of DOJ funding.⁷⁸¹ These cases are part of CRT's active litigation docket discussed in the *Complaints Processing, Agency-Initiated Charges, and Litigation* section of this chapter.

⁷⁷⁵ USCCR, *Minority Voting*, *supra* note 17, at 258; updated by U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁷⁷⁶ USCCR, *Minority Voting*, *supra* note 17, at 259.

⁷⁷⁷ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁷⁷⁸ See *supra* note 567 (discussing Special Litigation Section "pattern or practice" cases).

⁷⁷⁹ U.S. Dep't of Justice, Response to USCCR Interrogatories.

⁷⁸⁰ See, e.g., Complaint, *United States v. Housing Authority of the City of Bridgeport*, No. 3:17-cv-1922 (D. Conn., Nov. 15, 2017)(ADA/504 referral from HUD, civil action filed by CRT); <https://www.justice.gov/crt/case-document/file/1011841/download>.

⁷⁸¹ See, e.g., Complaint, *United States v. Maricopa County, AZ, Maricopa County Sheriff's Office, and Sheriff Joseph M. Arpaio*, No. 2:10-cv-01878, ¶2 (D. Ariz. Sept. 2, 2010) ("Accountability for taxpayer funds is a fundamental element of Title VI, its implementing regulations, and the contractual assurance agreements that all recipients sign as a condition of receiving federal financial assistance. As recipients of federal financial assistance, Defendants are required by law, regulation, and contract to provide the United States with access to documents, other sources of information, and facilities in connection with Title VI investigations or compliance reviews."). This Title VI compliance enforcement action also included pattern or practice statutory and constitutional claims regarding racial profiling of Latino drivers, and it reached the Ninth Circuit Court of Appeals, which held that Sheriff Arpaio was liable under Title VI. *United States v. Maricopa County*, 889 F. 3d 648, 653 (9th Cir. 2018); *cert. denied sub nom. Maricopa Cty., Ariz. v. United States*, 139 S. Ct. 1373 (2019).

In addition, if other federal agencies are challenged in their authority to ensure compliance with federal civil rights laws, CRT will defend them,⁷⁸² and may also defend federal civil rights laws (including compliance rules and enforcement actions) if they are challenged.⁷⁸³

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity

Regulations

CRT has an important coordinating role under federal law, particularly under Title VI and other civil rights laws applicable to recipients of federal funding.⁷⁸⁴ This tool is designed to standardize enforcement and share information about how to comply with the regulated community.⁷⁸⁵ According to the Title VI Manual issued by CRT, it has an important role and authority in compliance for federal funding recipients, to “ensure consistent and effective enforcement across the federal government.”⁷⁸⁶ First, it must approve and has clearance authority over other agencies’ Title VI regulations.⁷⁸⁷ CRT has broadly interpreted this Title VI regulatory requirement to mean CRT must approve “comprehensive regulations that govern, in part, a federal agency’s Title VI implementation or enforcement,” and:

In addition, federal implementing directives (whether in the nature of regulations or implementing guidance) that agencies issue under any of the laws covered by Executive Order 12,250 are “subject to the approval of the Attorney General, who may require that some or all of them be submitted for approval before taking effect.” *Id.* § 1-402. These documents include regulations issued to effectuate statutes that “provide in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” *Id.* § 1-201(d). The authority to review such guidance documents has been delegated to the Assistant Attorney General for Civil Rights. 28 C.F.R. § 0.51(a) (“The Assistant Attorney General in charge of the Civil Rights Division shall, except as reserved herein, exercise the authority vested in and perform the functions assigned to the Attorney General by Executive Order 12,250 (‘Leadership and Coordination of Nondiscrimination Laws’’”).⁷⁸⁸

⁷⁸² See, e.g., Motion to Dismiss, *Su v. United States Dep’t of Educ., Office for Civil Rights, Region XV*, No. 13-3093 (6th Cir. Apr. 12, 2012) (CRT brief).

⁷⁸³ See, e.g., *King v. Marion County Circuit Court*, No. 16-3726 (11th Cir. Feb. 17, 2017) (CRT Brief as Intervenor defending Title II of the ADA).

⁷⁸⁴ See *infra* notes 940-45.

⁷⁸⁵ See *supra* notes 306-08.

⁷⁸⁶ DOJ, Title VI Legal Manual, *supra* note 39, at III.A, Department of Justice Role Under Title VI.

⁷⁸⁷ *Ibid.*

⁷⁸⁸ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file), citing Exec. Order No. 12,250 at §1-402.

CRT has also clarified that while it must review and approve certain federal agency regulations, it only “may require that policy guidance issued under any of the laws covered by EO 12,250 [Title VI, Title IX, Section 504 and Related Nondiscrimination Regulations] be “submitted for approval before taking effect.””⁷⁸⁹

Policy Guidance

In 2002, the Commission clearly found that guidance is needed for effective civil rights enforcement,⁷⁹⁰ and the DOJ Title VI Legal Manual affirms this conclusion by finding that DOJ CRT is at the very least required to issue Title VI guidance.⁷⁹¹ Former Deputy Assistant Attorney General Eve Hill supports the use of affirmative guidance as a tool for effective civil rights enforcement. Ms. Hill stated that “technical assistance [through DOJ guidance] around the ADA is vital for everyone involved,” and that “when people don't understand that law, access to services can be threatened, and the courts become the only recourse.”⁷⁹² And after DOJ withdrew a relevant guidance, Disability Rights Counsel Susan Mizner of the ACLU commented that:

Withdrawing this guidance does not change the legal responsibilities of state and local governments. States must still comply with the ADA, and must still promote integrated employment for people with disabilities. If the Justice Department won't do its job, the disability rights community will. The ACLU will continue to remind employers of the law, states of their obligations, and people with disabilities that we are all worthy of being part of our country and our workforce.⁷⁹³

⁷⁸⁹ Ibid.

⁷⁹⁰ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 25.

⁷⁹¹ DOJ, Title VI Legal Manual, *supra* note 39, at III.A, Department of Justice Role Under Title VI.

⁷⁹² David M. Perry, “Companies that Exploit Disabled People Have a Friend in Jeff Sessions,” *Pacific Standard*, Jan. 4, 2018, <https://psmag.com/economics/jeff-sessions-roll-back-disability-rights> [hereinafter Perry, “Companies that Exploit Disabled People Have a Friend in Jeff Sessions”] (Also commenting that: “The Americans With Disabilities Act was never meant to be run by lawsuits. Instead, since 1992, the Department of Justice (DOJ) has been releasing technical assistance documents in order to explain disability-related civil rights obligations in plain language. The goal is to preemptively answer questions, but also to provide a model for consistency across the country.”)

⁷⁹³ “ACLU Statement on DOJ Withdrawal of Disabilities Guidance,” ACLU, Dec. 22, 2017, <https://www.aclu.org/news/aclu-statement-doj-withdrawal-disabilities-guidance> [hereinafter “ACLU Statement on DOJ Withdrawal of Disabilities Guidance”].

As discussed in Chapter 1, federal policy guidance can be an impactful tool for civil rights enforcement.⁷⁹⁴ The Commission considers it as among the “essential elements for effective civil rights enforcement.”⁷⁹⁵ In 1996 and 2002 reports,⁷⁹⁶ the Commission focused on Title VI and the need for CRT to issue updated policy guidance and regulations regarding recipients of federal funding by other agencies:

Since the Commission’s 1996 report, CORS [now called FCS] has issued a policy guidance titled “The Enforcement of Title VI of the Civil Rights Act and Related Statutes in Block-Grant Type Programs.” CORS attributes its development to recommendations made by the Commission and other advisory groups.⁷⁹⁷

In 2002, the Commission found that CRT did not provide updated policy guidance, and it did not have a formal Title VI technical assistance program,⁷⁹⁸ and recommended that it improve these functions.⁷⁹⁹ Under federal law, DOJ is charged with developing “formal and informal guidance regarding implementation of Title VI, including legal interpretations of the statute and regulations,” and this work is done mainly through FCS.⁸⁰⁰ Federal courts give special deference to DOJ’s Title VI guidance documents.⁸⁰¹ DOJ also acts as a federal agency coordinator and clearinghouse of information, and provides oversight and coordination of Title VI implementation, mainly through FCS.⁸⁰²

FCS released several guidance documents in FY 2016 that covered guidance on language access in state courts, and emergency preparedness, response and recovery.⁸⁰³ In the past, CRT’s guidance on language access policies had been expansive and FCS offered technical assistance, which it may still be providing.⁸⁰⁴ In FY 2017, FCS released guidance on Title VI requirements with regard to child welfare systems.⁸⁰⁵ Prior to the fiscal years studied in this report, in August 2016, FCS led

⁷⁹⁴ See *supra* notes 178 and 321 (discussing testimony of Professors Anthony Varona and Aderson Francios).

⁷⁹⁵ USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, *supra* note 31, at 2.

⁷⁹⁶ USCCR, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, *supra* note 51, at 141-144; USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, *supra* note 31, at 15.

⁷⁹⁷ USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, *supra* note 31, at 15.

⁷⁹⁸ *Ibid.*, 7.

⁷⁹⁹ *Ibid.*, 8.

⁸⁰⁰ See DOJ, Title VI Legal Manual, *supra* note 39, at III.A.2.

⁸⁰¹ *Ibid.*, III.A.2, citing “*See, e.g., United States v. Maricopa Cty.*, 915 F. Supp. 2d 1073, 1080 (D. Ariz. 2012) (citing *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979)).”

⁸⁰² DOJ, Title VI Legal Manual, *supra* note 39, at III.A.3 and 4.

⁸⁰³ U.S. Dep’t of Justice, “Press Release: Federal Agencies Issue Joint Guidance to Help Emergency Preparedness, Response and Recovery Providers Comply with Title VI of the Civil Rights Act,” Aug. 16, 2016, <https://www.justice.gov/opa/pr/federal-agencies-issue-joint-guidance-help-emergency-preparedness-response-and-recovery>.

⁸⁰⁴ CRT told the Commission that this information was privileged. U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁸⁰⁵ U.S. Dep’t of Justice, “Press Release: Departments of Justice and Health and Human Services Issue Joint Guidance for Child Welfare Systems,” Oct. 19, 2016, <https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-issue-joint-guidance-child-welfare-systems>.

federal agencies in releasing a joint guidance regarding the need to provide language access during emergencies. DOJ together with Homeland Security (DHS), Housing and Urban Development (HUD), Health and Human Services (HHS), and Transportation (DOT), issued the guidance to “ensure” that persons “affected by disasters do not face unlawful discrimination on the basis of race, color, or national origin (including limited English proficiency) in violation of Title VI of the Civil Rights Act of 1964 (Title VI).”⁸⁰⁶ It concluded by emphasizing that:

Hurricane Katrina and subsequent emergencies and disasters highlight a recurring lesson: we need to take proactive measures to ensure that all members of our communities are appropriately incorporated into emergency management activities. We invite you to contact the civil rights office of your federal funding agency or DOJ’s Federal Coordination and Compliance Section in the Civil Rights Division for additional technical assistance on compliance with Title VI and other federal civil rights laws.⁸⁰⁷

Another important function of FCS is maintaining the LEP.gov website, which provides extensive guidance on the implementation of Executive Order 13,166, which requires federal agencies to ensure LEP persons have meaningful access to their services, and that the agencies work to ensure that recipients of federal funding provide meaningful access to persons who are limited-English proficient.⁸⁰⁸ In 2019, the federal government’s LEP.gov website says that FCS has “taken the lead in coordinating and implementing this Executive Order,” but that agencies and recipients of federal funding do not necessarily have to submit an LEP plan to FCS.⁸⁰⁹ Specifically, the current language states that:

Q. Do recipients of federal funds have to submit written language access plans to the Department of Justice or to their federal funding agency each year?

A. No. While planning is an important part of ensuring that reasonable steps are taken to provide meaningful access to LEP individuals seeking services, benefits, information, or assertion of rights, there is no blanket requirement that the plans themselves be submitted to federal agencies providing federal financial assistance. In certain circumstances, such as in complaint investigations or compliance

⁸⁰⁶ DOJ, DHS, HUD, HHS and DOT, Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964, 1 (Aug. 16, 2015), <https://www.justice.gov/crt/file/885401/download>.

⁸⁰⁷ *Ibid.*, 16.

⁸⁰⁸ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 17, 2016) (attaching comments on draft report) (on file); see also Exec. Order No. 13,166, Improving Access to Service for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000), <https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf>; and *see, e.g., Lau v. Nichols*, 414 U.S. 563, 568 (1974) (regarding meaningful access).

⁸⁰⁹ “Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals,” Limited English Proficient (LEP), LEP.gov, A Federal Interagency Website, <https://www.lep.gov/faqs/faqs.html#OneQ7> (accessed Jul. 21, 2019) [hereinafter “Commonly Asked Questions,” LEP.gov].

reviews, recipients may be required to provide to federal agencies a copy of any plan created by the recipient.⁸¹⁰

In 2011, as compliance with Title VI's protections against national origin discrimination was spotty, Attorney General Holder specifically requested that each federal agency submit an LEP compliance plan to the FCS, and that agencies that issued federal assistance require their grantees to submit LEP compliance plans, among other steps.⁸¹¹ But currently, the website does not display a required submission of a plan, although it does provide information about why it is important to have such a plan and why it should be continuously updated, and it states that "agencies that conduct activities overseas must still submit a plan for making their domestic activities accessible to people who are limited English proficient."⁸¹²

In addition to those issued by FCS, policy guidance may sometimes be issued by other CRT sections. The Educational Opportunities Section has only published one new guidance document during FY 2016-2018.⁸¹³ Comparatively, between 2014 and 2016, EOS and ED OCR released at least eight such documents, related to Asian American and Pacific Islander student rights, ELL students' equal access to education, and non-discriminatory school discipline.⁸¹⁴

Other types of guidance and technical assistance and its dissemination through publicity are discussed in this chapter's section on *Interaction and Coordination with External Agencies and Stakeholders*, as they have resulted from interaction with other agencies as well as stakeholders. For example, after several roundtables on religious discrimination in schools, with a Dear Colleague letter from former CRT head Vanita Gupta, DOJ released its final report on *Combating Religious Discrimination Today*, which included recommendations and increased resources and guidance, for agencies, schools, and community leaders.⁸¹⁵

DOJ has also issued policy guidance impacting civil rights. As discussed below, the major policy changes in the Obama Administration took expansive views of civil rights protections, and the Trump Administration's focus has been restrictive and may be less effective for impacted communities.⁸¹⁶

⁸¹⁰ Ibid., Question 8.

⁸¹¹ DOJ, Memorandum: Federal Government's Commitment to Language Access, *supra* note 766, at 2.

⁸¹² "Commonly Asked Questions," *LEP.gov*, *supra* note 810, at Question 12 (agencies with overseas activities), D (why it's important to have an LEP plan, citing DOJ, Memorandum: Federal Government's Commitment to Language Access, *supra* note 766) and E (why it's important to update LEP plans).

⁸¹³ See U.S. Dep't of Justice, Civil Rights Division, "Guidance and Resources," <https://www.justice.gov/crt/guidance-and-resources> (accessed Jul. 5, 2018).

⁸¹⁴ Ibid.

⁸¹⁵ See U.S. Dep't of Justice, *Combating Religious Discrimination Today: Final Report*, July 2016, https://www.justice.gov/Combating_Religious_Discrimination [hereinafter DOJ, *Combating Religious Discrimination Today*].

⁸¹⁶ See *supra* notes 317-26 (comments of civil rights groups).

During FY 2016, on December 15, 2015, DOJ issued new guidance on preventing gender bias in law enforcement responses to sexual assault and domestic violence.⁸¹⁷ On March 14, 2016, DOJ released guidance (including a dear colleague letter that DOJ later rescinded) encouraging state and local governments to engage in fine and fee reform efforts.⁸¹⁸ On May 13, 2016, DOJ and ED released a joint guidance, which summarized a school's Title IX obligations regarding transgender students and explained how DOJ and ED evaluate a school's compliance with those obligations.⁸¹⁹ On July 1, 2016, as a part of the DOJ's ADA Voting Initiative, CRT released new guidance documents about ADA requirements with respect to polling places.⁸²⁰

FY 2017 spanned two presidential administrations, the end of the Obama Administration, and the beginning of the Trump Administration. On October 31, 2016, DOJ released a statement discussing the application of the integration mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* to state and local governments' employment service systems for individuals with disabilities.⁸²¹

On November 10, 2016, with HUD, DOJ issued an updated Joint Statement on the application of the Fair Housing Act to State and Local Land Use Practices.⁸²² Citing a recently issued Supreme Court decision, the Joint Statement clarified that:

Even absent a discriminatory intent, state or local governments may be liable under the Act for any land use or zoning law or practice that has an unjustified discriminatory effect because of a protected characteristic. In 2015, the United States Supreme Court affirmed this interpretation of the Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* The Court stated that “[t]hese unlawful practices include zoning laws and other housing

⁸¹⁷ U.S. Dep't. of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, Dec. 15, 2015, <https://www.justice.gov/opa/file/799366/download>.

⁸¹⁸ U.S. Dep't. of Justice, “Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices,” Mar. 14, 2016, <https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices>. In 2017, the Commission released a report, *Targeted Fines and Fees Against Communities of Color*, which found that the imposition of fine and fees have disproportionately impacted communities and people of color. See U.S. Comm'n on Civil Rights, *Targeted Fines and Fees Against Communities of Color*, September 2017, https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

⁸¹⁹ U.S. Dep't of Justice & Dep't of Education, Dear Colleague Letter on Transgender Students (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

⁸²⁰ U.S. Dep't of Justice, “Press Release: Justice Department Issues Updated Guidance on the Americans with Disabilities Act Checklist for Polling Places,” Jul. 1, 2016, <https://www.justice.gov/archives/opa/blog/justice-department-issues-updated-guidance-americans-disabilities-act-checklist-polling>.

⁸²¹ U.S. Dep't of Justice, Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* to State and Local Governments' Employment Services Systems for Individuals with Disabilities (Oct. 31, 2016), http://iel.org/sites/default/files/DOJ-Olmstead_Guidance_Employment.pdf [hereinafter DOJ, Statement on Application of the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*].

⁸²² DOJ, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*, *supra* note 554, at 4.

restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification.”⁸²³

Just prior to that, in October 2016, the CRT Housing Section had filed an amicus brief in a case in New York, strongly defending the disparate impact standard in a case alleging that a landlord’s exclusion of applicants with criminal records discriminated against black and Latino applicants.⁸²⁴ This example illustrates how policy guidance and litigation may be utilized together to develop the law and send messages to potential violators.

In December 2016, CRT released updated guidance for election officials on how to comply with Section 203 of the VRA.⁸²⁵ The most recent Census Bureau determinations of which jurisdictions were subject to Section 203 of the VRA, which requires that election materials and assistance be provided in languages spoken by minority voters if their community reaches a certain threshold number or percentage of eligible voters, were made on December 5, 2016 when 263 jurisdictions were determined to be covered by Section 203.⁸²⁶

On December 15, 2016, DOJ issued a guidance letter to State, County, and Municipal Officials explaining obligations under the Religious Land Use and Institutionalized Persons Act.⁸²⁷ In FY 2018, the Housing Section filed two Statements of Interest with federal courts regarding this statute,⁸²⁸ again illustrating how policy and litigation may coordinate to develop the law.

On January 20, 2017, the presidential administration changed as Donald J. Trump was sworn in as President of the U.S. On February 22, 2017, ED and DOJ rescinded joint Title IX guidance clarifying protections under the law with regard to transgender students.⁸²⁹ This issue is further discussed in the U.S. Department of Education chapter of this report.⁸³⁰

⁸²³ Ibid.

⁸²⁴ United States of America’s Statement of Interest, *The Fortune Society v. Sandcastle Towers Housing*, No. 1:14-cv-06410, (E.D.N.Y. Oct. 8, 2016).

⁸²⁵ 28 C.F.R. Pt. 55 (2016).

⁸²⁶ 81 Fed. Reg. 87,532-38 (Dec. 5, 2016).

⁸²⁷ U.S. Dept. of Justice, Letter Re: The Religious Land Use and Institutionalized Persons Act (Dec. 15, 2016), <https://www.justice.gov/crt/page/file/918596/download>.

⁸²⁸ Statement of Interest of the United States, *Roman Catholic Archdiocese of Kansas City in Kansas v. The City of Mission Woods, Kansas*, 337 F.Supp.3d 1122 (D. Kan. 2018) (CRT supported St. Rose Catholic Church’s suit under RLUIPA arguing their religious exercise was substantially burdened by the City after being denied a land use permit to convert a residential house adjacent to the Church’s property into meeting house to allow for additional programming and meeting space); Statement of Interest of the United States, *Jagannath Organization for Global Awareness Inc. v. Howard County, Maryland*, 1:17-cv-02436 (D. Md. 2018) (CRT supported plaintiff’s suit under RLUIPA alleging Howard County’s complete denial of JOGA’s petition to build a temple in a zone where religious use is permitted was arbitrary and imposed a substantial burden on JOGA’s ability to practice their religion, particularly as there was no Jagannath temple anywhere in the State of Maryland.).

⁸²⁹ U.S. Dep’t of Justice and U.S. Dep’t of Educ., Dear Colleague Letter: Office for Civil Rights Withdraws Title IX Guidance on Transgender Students (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [hereinafter DOJ and ED, *Dear Colleague Letter: OCR Withdraws Guidance on Sexual Violence*].

⁸³⁰ See *infra* notes 1200-03 (discussing the impact of the rescission).

Moving on to fiscal year 2018, on October 6, 2017, DOJ issued a memorandum to all U.S. Attorneys and DOJ departments ordering them to take into account new guidance on protecting religious liberties.⁸³¹ This new guidance permits recipients of federal funding to make exceptions to their services based on “sincerely held religious beliefs.”⁸³² The Commission received testimony that this new guidance prioritizes religious freedom over the rights of others and may be retrogressive to protecting the rights of LGBT persons.⁸³³ Craig Leen, Director of OFCCP, noted that OFCCP’s decision to implement new guidance with respect to the religious exemption of Executive Order 11,246 was in part prompted by the Attorney General’s memorandum on religious liberty.⁸³⁴

Two days later, the Justice Department also reversed a policy that previously clarified that transgender workers are protected under Title VII of the Civil Rights Act of 1964.⁸³⁵ During the fiscal years studied, implementation of these changes has occurred in DOL and is underway in HHS (see DOL and HHS chapters of this report).⁸³⁶

On November 16, 2017, then-Attorney General Sessions issued a memorandum to all components of the U.S. Department of Justice prohibiting the issuance of letters or guidance documents that serve to take the place of the regulatory process or modify the law stating, “[d]epartment components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch.”⁸³⁷ However, this guidance made no substantive change to existing DOJ or agency practice.⁸³⁸

Sessions’ memorandum also withdrew several dozen guidance documents pursuant to recommendations made by the U.S. Department of Justice Regulatory Reform Task Force during fiscal year 2018 that had been previously issued by DOJ. On December 21, 2017, DOJ withdrew 25 guidance documents, including *inter alia* guidance on fines and fees, guidance on ADA construction compliance, and guidance pertaining to protecting the rights of legal permanent

⁸³¹ U.S. Dept. of Justice, Office of the Atty General, Implementation of Memorandum on Federal Law Protections for Religious Liberty (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001886/download>.

⁸³² *Ibid.*

⁸³³ Varona Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 255-58; National LGBTQ Task Force Statement, at 8-9.

⁸³⁴ Leen Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 87-88.

⁸³⁵ U.S. Dept. of Justice, *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, Oct. 4, 2017, <https://www.justice.gov/ag/page/file/1006981/download>.

⁸³⁶ See *infra* notes 1395-1419 and 2020-36 (regarding HHS and DOL, especially with regard to reversal a policy clarifying that transgendered workers are protected under Title VII of the Civil Rights Act of 1964 on Oct. 4, 2017).

⁸³⁷ U.S. Dept. of Justice, Memorandum: Prohibition on Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>.

⁸³⁸ See Administrative Conference of the United States, Guidance in the Rulemaking Process, Rec. No. 2014-3 (Jun. 24, 2014), <https://www.acus.gov/recommendation/guidance-rulemaking-process>.

residents.⁸³⁹ The Commission strongly criticized the withdrawal of these guidance documents.⁸⁴⁰ DOJ did not replace these guidance documents with new guidance about how to satisfy the law the rescinded documents described.

On July 3, 2018, the Justice Department withdrew a further 24 guidance documents including *inter alia* guidance on federal protections against national origin discrimination, joint DOJ and ED guidance on the use of race by educational institutions.⁸⁴¹ This set of withdrawals included outdated policy guidance documents that were replaced, such as an outdated version of public outreach material discussing refugees' and asylees' rights to work that was replaced by CRT's Immigrant & Employee Rights Section in December with an updated version.⁸⁴² On April 6, 2018, Attorney General Sessions notified all U.S. Attorneys of the administration's zero-tolerance policy towards immigrants crossing the southern border of the U.S., leading to thousands of Central American children being separated from their parents at the border.⁸⁴³ During the Commission's briefing, the Executive Director of Asian Americans Advancing Justice testified that the positions of the Trump Administration had a chilling effect on immigrant communities' reporting potential civil rights violations to the federal government.⁸⁴⁴

On June 13, 2018 DOJ announced its Place to Worship Initiative, "which will focus on protecting the ability of houses of worship and other religious institutions to build, expand, buy, or rent facilities" as protected by RLUIPA.⁸⁴⁵ The initiative intends to include hosting community outreach events, educating and training organizations about RLUIPA requirements, and providing additional resources to federal prosecutors.⁸⁴⁶ DOJ hosted a community outreach event on June 25, 2018,⁸⁴⁷ released a RLUIPA Q&A document that outlined the law's requirements, scope, and interpretation.⁸⁴⁸ This document emphasized that, in the passage of RLUIPA:

⁸³⁹ U.S. Dept. of Justice, "Press Release: Attorney General Jeff Sessions Rescinds 25 Guidance Documents," Dec. 21, 2017, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>.

⁸⁴⁰ U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Strongly Criticizes Attorney General Jeff Sessions' Withdrawal of Critical Civil Rights Guidance, (Jan. 19, 2018).

⁸⁴¹ See also United States' Statement of Interest, *Students for Fair Admissions v. Harvard*, No. 1:14-cv-14176 (D. Mass., Aug. 30, 2018), <https://www.justice.gov/opa/press-release/file/1090856/download>.

⁸⁴² U.S. Dept. of Justice, "Press Release: Attorney General Jeff Sessions Rescinds 24 Guidance Documents," Jul. 3, 2018, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>; see also U.S. Dep't of Justice, Civil Rights Division, Immigrant & Employee Rights Section, *Information About Refugees and Asylees About Form I-9*, December 2018, <https://www.justice.gov/crt/page/file/1119566/download>.

⁸⁴³ U.S. Dept. of Justice, Office of the Atty General, Memorandum for Federal Prosecutors Along the Southwest Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (April 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> [hereinafter DOJ, Zero-Tolerance Memorandum].

⁸⁴⁴ Yang Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 182-88.

⁸⁴⁵ U.S. Dep't of Justice, "Press Release: Department of Justice Announces Place to Worship Initiative," Jun. 13, 2018, <https://www.justice.gov/opa/pr/department-justice-announces-place-worship-initiative-0>.

⁸⁴⁶ *Ibid.*

⁸⁴⁷ *Ibid.*

⁸⁴⁸ U.S. Dep't of Justice, Civil Rights Division, Statement of the Department of Justice on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (Jun. 13, 2018), <https://www.justice.gov/crt/page/file/1071246/download>.

Congress... heard testimony that, as a whole, religious institutions were treated worse than comparable secular institutions by zoning codes and zoning authorities. As RLUIPA's Senate sponsors, Senator Hatch and the late Senator Kennedy, said in their joint statement issued upon the bill's passage: "Zoning codes frequently exclude churches in places where they permit theaters, meetings halls, and other places where large groups of people assemble for secular purposes. . . . Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes."⁸⁴⁹

CRT also released a shorter informational document about RLUIPA and DOJ's role in its enforcement.⁸⁵⁰ CRT had announced a similar, broader initiative in 2016, the Combatting Religious Discrimination Today Initiative, which brought together community and religious leaders for roundtable discussions across the country.⁸⁵¹ That initiative led to the production of a report about what the DOJ would focus on moving forward to help combat religious discrimination.⁸⁵² One of the themes was the lack of education and awareness about RLUIPA, which yielded a recommendation to increase outreach and education for local officials and religious communities on RLUIPA.⁸⁵³

Campaign for Youth Justice has commented that they were concerned that in June 2018, DOJ's Office of Juvenile Justice and Delinquency Prevention issued new, reduced compliance requirements for states to demonstrate that they are addressing disproportionate minority contact in the juvenile justice system; the new requirements have states assessing themselves rather than reporting sufficient data for DOJ to assess whether states are meeting their responsibilities.⁸⁵⁴

Also in 2018, citing President Trump's Executive Order 13,777 calling for reduction in government regulation, then-Attorney General Sessions rescinded ten ADA guidance documents.⁸⁵⁵ Some experts believe that rescission of many of these documents will not have much effect on disability rights enforcement or compliance.⁸⁵⁶ Whether or not that view is accurate, without question the rescission of a 2016 *Olmstead* guidance has been widely described as

⁸⁴⁹ *Ibid.*, 1.

⁸⁵⁰ DOJ, *Federal Religious Land Use Protections*, *supra* note 555.

⁸⁵¹ Letter from Vanita Gupta, Principal Deputy Assistant Atty General, to State, County and Municipal Officials (Dec. 15, 2016), <https://www.justice.gov/crt/page/file/918596/download> (re: the Religious Land Use and Institutionalized Persons Act).

⁸⁵² DOJ, *Combating Religious Discrimination Today*, *supra* note 815.

⁸⁵³ *Ibid.*, 23.

⁸⁵⁴ Campaign for Youth Justice, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Commission on Civil Rights, Dec. 17, 2018, at 2.

⁸⁵⁵ "DOJ Rescinds 10 ADA Guidance Documents," *Ballard Spahr*, Jan. 3, 2018, <https://www.ballardspahr.com/alertspublications/legalalerts/2018-01-03-doj-rescinds-10-ada-guidance-documents-continue.aspx>.

⁸⁵⁶ *Ibid.*; *see also* Michelle Diamant, "Justice Department Scraps ADA Guidance," *Disability Scoop*, Jan. 4, 2018, <https://www.disabilityscoop.com/2018/01/04/justice-scraps-ada-guidance/24546/>.

concerning.⁸⁵⁷ This guidance document outlined the integration mandate of Title II of the ADA. The integration mandate requires allowing people with disabilities to live integrated lives and avoid unnecessary, and unlawful segregation from society,⁸⁵⁸ and, more specifically, requires public entities to administer their services, including their employment programs, in the manner “that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”⁸⁵⁹ The Supreme Court in *Olmstead* held that public entities are required to provide community-based services to persons with disabilities when appropriate, when agreed to by these individuals, and when reasonable accommodations can be made.⁸⁶⁰ The Code of Federal Regulations requires that: “To comply with the ADA’s integration mandate, public entities must reasonably modify their policies, procedures, or practices when necessary to avoid discrimination.”⁸⁶¹ ADA’s integration mandate is a statutory requirement that cannot be overturned by a guidance.⁸⁶² Nor can a guidance overturn a Supreme Court opinion or federal regulations,⁸⁶³ so the related rules were not overturned by the Sessions guidance.

CRT told the Commission that, “Enforcement actions are far more important than any guidance document, which cannot change the law[.]” and “that the Division continued its work with *Olmstead* settlements, trials, and actions under the Trump Administration.”⁸⁶⁴

The value of this guidance was shown by it being complemented by enforcement actions as well as interaction and coordination with other agencies. After the *Olmstead* decision, CRT brought

⁸⁵⁷ U.S. Dep’t of Justice, Withdrawal of the Statement of the Department of Justice on Application of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C. to State and Local Governments’ Employment Service Systems for Individuals with Disabilities* (Dec. 21, 2017), https://www.ada.gov/withdrawn_olmstead.html [hereinafter DOJ, Withdrawal of Statement on Application of the Integration Mandate of Title II of the ADA and *Olmstead*]; “ACLU Statement on DOJ Withdrawal of Disabilities Guidance,” *supra* note 793; Perry, “Companies that Exploit Disabled People Have a Friend in Jeff Sessions,” *supra* note 792.

⁸⁵⁸ The guidance summarized the statutory and regulatory provisions as follows:

[T]he ADA and its Title II regulations require public entities to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” The preamble to the “integration mandate” regulation explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]” DOJ, Statement on Application of the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, *supra* note 821, at 2.

⁸⁵⁹ *Ibid.* (“Therefore, the ADA and its Title II regulations require public entities to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁶ The preamble to the “integration mandate” regulation explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible[.]”).

⁸⁶⁰ *Ibid.*, note 8, citing *Olmstead*, 527 U.S. at 607.

⁸⁶¹ *Ibid.*, note 9, citing 28 C.F.R. § 35.130(b)(7).

⁸⁶² *See, e.g.*, Order, *Texas v. E.E.O.C.*, No. 513-CV-255-C, at *4 (N.D. Tex. Feb. 1, 2018), <http://www.naacpldf.org/files/about-us/Doc.%20117.pdf> (explaining that a guidance is only as enforceable as the underlying law).

⁸⁶³ *Id.*

⁸⁶⁴ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

two cases against states for ADA violations over non-integrative and discriminatory employment practices, procuring a consent decree in Rhode Island in 2014,⁸⁶⁵ and after CRT intervention in a private case, a court-approved settlement agreement in Oregon in 2015.⁸⁶⁶ In January 2015, CRT led an Advisory Committee on Increasing Competitive Integrated Employment for Individuals With Disabilities, based on the DOJ's *Olmstead* enforcement and the Obama Administration's prioritization of this issue.⁸⁶⁷ Based on these cases as well as the underlying law discussed above, in 2016, CRT took the position that the ADA integration mandate required that public entity workshops had to make sufficient opportunity for qualified individuals with disabilities to work in integrated settings, where they would receive wages the same as non-disabled workers.⁸⁶⁸

As discussed in Chapter 1, the Commission has previously found that affirmative policy guidance helps send a message that the federal government will protect civil rights, whereas restrictive guidance may send the opposite message and therefore be ineffective.⁸⁶⁹

Disparate Impact Policy

In January 2019, the *Washington Post* reported that internal memoranda directed Justice Department officials to consider the impact of modifying or removing disparate impact regulations.⁸⁷⁰ The *Post* also reported the Education Department and HUD were considering changes in their policies on enforcing "disparate impact" protections against discrimination,⁸⁷¹ and HUD had already announced its intentions and by April 2019, the proposed rulemaking public meeting process had begun.⁸⁷² Although the Commission cannot independently verify the *Washington Post* report about internal DOJ memoranda, as discussed in Chapter 5, HUD has now issued a notice of proposed rulemaking weakening disparate impact enforcement. CRT has over time, actively enforced the disparate impact body of civil rights law.

⁸⁶⁵ Order Approving Consent Decree & Consent Decree, *United States v. Rhode Island*, No. 1:14-cv-00175 (D.R.I. April 9, 2014), https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana.

⁸⁶⁶ United States of America's Motion to Intervene, *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST (D. Ore. Mar. 27, 2013); Settlement Agreement, *Lane v. Brown* (formerly *Lane v. Kitzhaber*), No. 3:12-cv-00138-ST (D. Ore. Sept. 8, 2015), approved by U.S. Magistrate Judge Janice Stewart (Dec. 29, 2018); and see Independent Reviewer, 2016 Report to the Court, *Lane v. Brown* (Jan. 1 – Dec. 31, 2016), https://www.ada.gov/olmstead/olmstead_cases_list2.htm#louisiana.

⁸⁶⁷ U.S. Dep't. of Justice, Civil Rights Division, Presentation: Department of Justice Olmstead Enforcement: Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, *passim*. (Jan. 23, 2015), <https://www.dol.gov/odep/topics/date/SheilaForan.pdf>.

⁸⁶⁸ Perry, *Companies that Exploit Disabled People*, *supra* note 793; DOJ, Withdrawal of Statement on Application of the Integration Mandate of Title II of the ADA and Olmstead, *supra* note 857; DOJ, Statement on Application of the Integration Mandate of Title II of the ADA and Olmstead v. L.C., *supra* note 821.

⁸⁶⁹ See *supra* notes 295-96.

⁸⁷⁰ See Meckler *et al.*, "Trump Administration Considers Rollback of Anti-discrimination Rules," *supra* note 312.

⁸⁷¹ *Ibid.*

⁸⁷² See Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standards, 83 Fed. Reg. 28,560 (proposed Jun. 20, 2018); and See Office of Management and Budget, EO 12866 Meeting 2529-AA98, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (FR-6111-P-01), Proposed Rule Stage (Apr. 25, 2019), <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=2529-AA98&meetingId=3917&acronym=2529-HUD/FHEO>.

Disparate impact discrimination can be unintentional discrimination that stems from policies that are neutral as written, but have an unlawful adverse and discriminatory effect on a particular protected class of individuals.⁸⁷³ Since the Commission called for use of the disparate impact standard when developing the first regulations implementing the 1964 Civil Rights Act, which agencies incorporated, and Congress and agencies incorporated it into later civil rights laws and regulations,⁸⁷⁴ the disparate impact standard has been an enforcement tool available to federal civil rights offices. The standard helps to “ensure that there isn't discrimination that whether intentionally or inadvertently is having an impact on particular protected classes of people in this country.”⁸⁷⁵ Many federal civil rights statutes recognize the use of disparate impact to root out unintentional discrimination.⁸⁷⁶ Some of these statutes govern governmental agencies and some private actors.⁸⁷⁷ Additionally, recipients of federal funding are subject to disparate impact regulations, so regulatory changes or changes in federal enforcement of disparate impact protections could have a sweeping impact. Twenty-six federal funding agencies have Title VI regulations prohibiting not only intentional discrimination, but also prohibiting certain types of discrimination based on disparate impact caused by legally questionable policies or practices.⁸⁷⁸ The 26 agencies with Title VI disparate impact regulations include 12 of the 13 agencies studied in this report.⁸⁷⁹ The remaining agency, EEOC, enforces federal disparate impact statutory protections and regulations under Title VII, which the Supreme Court upheld in 1971.⁸⁸⁰

⁸⁷³ “Disparate Impact,” *Legal Information Institute*, https://www.law.cornell.edu/wex/disparate_impact.

⁸⁷⁴ See Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 Harv. C.R.-C.L. L. Rev. 125, 139 (2014), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2086&context=faculty_scholarship (describing how, after Title VI passed in 1964, the Commission worked on a task force with the White House, the Department of Justice, and the Bureau of Budget to draft the final regulations first “for the Department of Health, Education, and Welfare, which then became the model for all other federal agencies.”).

⁸⁷⁵ Gupta Testimony, *Federal Civil Rights Enforcement Briefing*, p. 198.

⁸⁷⁶ See 52 U.S.C. § 10101(a)(1) [previously 42 § 1971] (Civil Rights Act); .” 52 U.S.C. § 10301(a) (Voting Rights Act); 42 U.S.C. § 12112(a), 42 U.S.C. § 12112(b)(3), 42 U.S.C. § 12112(b)(2), 42 U.S.C. § 12112(b)(6), 42 U.S.C. § 12182, 42 U.S.C. § 12182(b)(3)(A) (Americans With Disabilities Act); 42 U.S.C. § 2000c-6(a) (Civil Rights Act, Title IV); 42 U.S.C. § 12132 (Americans With Disabilities Act Title II); 15 U.S.C. § 1691(a) (Equal Credit Opportunity Act); 42 U.S.C. § 2000a(a) (Civil Rights Act of 1964, Title II); 42 § 3604(a), 42 § 3604(b), 42 U.S.C. § 3606, 42 U.S.C. § 3607 (Fair Housing Act); 42 U.S.C. § 2000e-2(b), 42 U.S.C. § 2000e-2(c)(3), 42 U.S.C. § 2000e-2(k) (Civil Rights Act of 1964, Title VII); 34 U.S.C. § 10228 [previously 42 U.S.C. § 3789D] (Omnibus Crime Control and Safe Streets Act). See also The Editorial Board, “The Latest Front Against Civil Rights,” *The New York Times*, Jan. 4, 2019, <https://www.nytimes.com/2019/01/04/opinion/disparate-impact-discrimination-trump.html>.

⁸⁷⁷ See, e.g., 42 U.S.C. § 10301 (Section 2 of the Voting Rights Act, providing that “no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State... in a manner which results in denial or abridgement of the right of any United States citizen to vote on account of race or color[.]”)

⁸⁷⁸ DOJ, Title VI Legal Manual, *supra* note 39, at Section VII.A.

⁸⁷⁹ See 7 C.F.R. § 15.3(b)(2)–(3) (USDA); 34 C.F.R. § 100.3(b)(2)–(3) (ED); 40 C.F.R. § 7.35(b)–(c) (EPA); 45 C.F.R. § 80.3(b)(2)–(3) (HHS); 6 C.F.R. § 21.5(b)(2)–(3) (DHS); 24 C.F.R. § 1.4(b)(2)(i)–(3) (HUD); 43 C.F.R. § 17.3(b)(2)–(3) (DOI); 28 C.F.R. § 42.104(b)(2)–(3) (DOJ); 29 C.F.R. § 31.3(b)(2)–(3) (DOL); 49 C.F.R. § 21.5(b)(2)–(3) (DOT); 31 C.F.R. § 22.4(b)(2) (Treasury); 38 C.F.R. § 18.3(b)(2)–(3) (VA).

⁸⁸⁰ See Equal Employment Opportunity Comm’n, *Employment Tests and Selection Procedures*, https://www.eeoc.gov/policy/docs/factemployment_procedures.html (discussing *Griggs v. Duke Power*, 401 U.S. 424 (1971)).

While other federal agencies have engaged in efforts to limit the use of disparate impact in their enforcement efforts,⁸⁸¹ they contrast sharply with the revision of the DOJ's Title VI legal manual that leaves intact the strong admonition that agencies must use the disparate impact legal standard in their Title VI (race discrimination) civil rights enforcement work, in part because the tool is exclusively available to federal administrative agencies for enforcement.⁸⁸² This legal manual continues to strongly endorse the disparate impact legal tool and discusses the lawfulness and practical utility of the tool.⁸⁸³ The legal manual also states that since the Supreme Court ruled in 2001 that private parties may not enforce disparate impact regulations, the role of the federal government is vital.⁸⁸⁴ In addition, several statutes the Justice Department enforces proscribe discrimination that is shown through disparate impact.⁸⁸⁵ The Americans with Disabilities Act, Title VII of the Civil Rights Act, the Fair Housing Act, and the Voting Rights Act contain language that either explicitly authorizes, or has been interpreted to authorize, disparate impact claims.⁸⁸⁶ Courts have also interpreted the Equal Credit Opportunity Act as encompassing disparate impact claims, while they have had differing views with regard to Title II of the Civil Rights Act.⁸⁸⁷

⁸⁸¹ Meckler et al., “Trump administration considers rollback of anti-discrimination rules,” *supra* note 312.

⁸⁸² DOJ, Title VI Legal Manual, *supra* note 39, at § VII:B. The website states “updated March 18, 2019.” *Id.* CRT told the Commission that the Title VI Legal Manual has not been updated since Jan. 12, 2017. U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁸⁸³ *Ibid.*

⁸⁸⁴ In the 2001 case of *Alexander v. Sandoval*, the Supreme Court held that private parties may not enforce Title VI disparate impact regulations, and that only the federal government can enforce them. 532 U.S. 275 (2001). CRT pointed out in its Title VI Manual (according to DOJ website, “Updated March 18, 2019”) that federal “agencies’ critical role [in enforcing Title VI disparate impact regulations] only increased after the Supreme Court’s 2001 decision in *Alexander v. Sandoval*[.]” DOJ, Title VI Legal Manual, *supra* note 39, at § VII.B (citing 532 U.S. 275 (2001)). The Manual explains that:

Following *Sandoval*, the Civil Rights Division issued a memorandum on October 26, 2001, for “Heads of Departments and Agencies, General Counsels and Civil Rights Directors” that clarified and reaffirmed federal government enforcement of the disparate impact regulations. The memorandum explained that although *Sandoval* foreclosed private judicial enforcement of Title VI the regulations remained valid and funding agencies retained their authority and responsibility to enforce them. Nor does *Sandoval* affect the disparate impact provisions of other laws, such as Title VII or the Fair Housing Act. The agencies’ Title VI disparate impact regulations continue to be a vital administrative enforcement mechanism. *Ibid.*

⁸⁸⁵ See Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2012); Omnibus Crime Control and Safe Streets Act, 34 U.S.C. § 10228 (2012); The Civil Rights Act, 42 U.S.C. §§ 2000a, 2000c-6, 2000e-2 (2012); The Fair Housing Act, 42 U.S.C. §§ 3604, 3606, 3607 (2012); Americans with Disabilities Act, 42 U.S.C. §§ 12112, 12132 (2012); The Civil Rights Act, 52 U.S.C. § 10101 (2012); The Voting Rights Act, 52 U.S.C. § 10301 (2012).

⁸⁸⁶ See Civil Rights Act, 42 U.S.C. § 2000e-2(b), (c), (k) (2012); Voting Rights Act, 52 U.S.C. § 10301(a) (2012); Americans with Disabilities Act, 42 U.S.C. § 12112(b) (2012). Fair Housing Act, 42 U.S.C. §§ 3604-3605.

⁸⁸⁷ See *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1340-41 (2d Cir. 1974) (applying disparate impact analysis to a claim under Title II of the Civil Rights Act); *Nat’l Ass’n for Advancement of Colored People v. Ameriquest Mortg. Co.*, 635 F.Supp.2d 1096, 1104 (C.D. Cal. 2009) (finding disparate impact claims cognizable under the Equal Credit Opportunity Act and Fair Housing Act). See also *Akiyama v. U.S. Judo Inc.*, 181 F.Supp.2d 1179, 1185-86 (W.D. Wash. 2002) (declining to apply disparate impact analysis to a religious discrimination claim under Title II).

The Supreme Court has repeatedly upheld disparate impact regulations.⁸⁸⁸ Moreover, the term “disparate impact” elides the reality that mere statistical disparities are not enough to prove unlawful discrimination; instead, plaintiffs must prove that a policy or practice caused the disparities and that the policy was not necessary to advance a legitimate interest.⁸⁸⁹ Courts have long been clear that proving disparate impact discrimination requires more than just proving the existence of a statistical disparity in impact.⁸⁹⁰ For example, in the *Inclusive Communities* housing case, the Supreme Court recently held that a showing that the defendant’s policies unfairly and directly caused the disparate impact is required.⁸⁹¹ In addition, discrimination claims based on Title VI disparate impact regulations (which 12 of the agencies reviewed in this report enforce) can be defeated when the policies are necessary for a “legitimate, nondiscriminatory goal.”⁸⁹² Moreover, the DOJ Title VI legal manual states that the disparate impact standard used under the Fair Housing Act “is substantially similar to the Title VI... standard.”⁸⁹³ This holds true for Title VII employment discrimination claims as well.⁸⁹⁴ That means that across these agencies, if a policy with disparate impact is not needed to further a legitimate goal, it may be unlawful.

The former head of CRT Vanita Gupta has opined that, “Disparate-impact liability can uncover disguised discriminatory intent and/or unconscious prejudices. And unconscious bias can have the same effect as overt bias: It can undermine equal opportunity.”⁸⁹⁵ On the other hand, at the Commission’s briefing, Pacific Legal Foundation’s Joshua Thompson posited that using a disparate impact theory of enforcement is not the best use of agency resources.⁸⁹⁶ At the Commission’s briefing, Thompson remarked that, “Title VI disparate impact enforcement should be focused on rooting out covert intentional discrimination. ‘The question of intent, rather than incidental effect, ought to be at the heart’ of disparate impact enforcement...[R]egarding it as an end in itself perverts a law against racial discrimination into a law that can require racial

⁸⁸⁸ See *infra* notes 892 and 894 (discussing Supreme Court cases).

⁸⁸⁹ See *Texas Dep’t. of Housing & Community Affairs v. Inclusive Communities*, 135 S. Ct. 2507, 2512 (2015) (“A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas.”).

⁸⁹⁰ *Id.*; see also *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1412 (11th Cir. 1993).

⁸⁹¹ *Inclusive Communities*, 135 S. Ct. at 2519, 2522-24.

⁸⁹² U.S. Dep’t of Educ., Office for Civil Rights, “Dear Colleague Letter: Preventing Racial Discrimination in Special Education,” <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf>. See also *Elston*, 997 F.2d at 1412 (explaining that, in disparate impact cases under Title VI, “defendants attempting to meet the ‘substantial legitimate justification’ burden have commonly been required to demonstrate the ‘educational necessity’ of their practices, that is, to show that their challenged practices ‘bear a manifest demonstrable relationship to classroom education’”) (quoting *Georgia State Conf. of Branches of NAACP v. State of Ga.*, 775 F.2d 1403, 1418 (11th Cir. 1985)).

⁸⁹³ DOJ, Title VI Legal Manual, *supra* note 39, at § VII.B.

⁸⁹⁴ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (upholding disparate impact employment discrimination claims when there was past purposeful discrimination and a new eligibility test that was not related to job performance).

⁸⁹⁵ Adam Serwer, “Trump Is Making It Easier to Get Away With Discrimination,” *The Atlantic*, Jan. 4, 2019, <https://www.theatlantic.com/ideas/archive/2019/01/disparate-impact/579466/> [hereinafter Serwer, “Trump Is Making It Easier to Get Away With Discrimination”].

⁸⁹⁶ See Thompson Statement, at 3; Thompson Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 176-77.

discrimination.”⁸⁹⁷ Thompson also argued that “plausible disparate impact claims can be raised from any host of benign policies or practices”⁸⁹⁸ and that “racial disparities can often simply be caused by the laws of chance.”⁸⁹⁹ In his written statement, Thompson acknowledged that the current CRT enforcement manual states that disparate impact is a regulatory requirement to be enforced, and that the Bush Administration also reaffirmed commitment to disparate impact as an enforcement tool.⁹⁰⁰ Nonetheless, Thompson advocated against federal enforcement of this mandatory enforcement tool.

Technical Assistance

CRT told the Commission that:

One of the central missions of the Federal Coordination and Compliance Section is providing technical assistance, to federal agency partners and to recipients of federal financial assistance. For example, FCS runs the federal clearinghouse for language access-related TA to both federal agencies and recipient entities. LEP.gov, which is managed and curated by FCS, receives approximately 60,000 hits a year and is a major resource for language access technical assistance. This is only one example of the myriad technical assistance projects that FCS has spearheaded over the years – from training videos to in person technical assistance to technical assistance publications. Beyond LEP, FCS has also provided child welfare, environmental justice, emergencies, and other public-facing technical assistance between October 2015-September 30, 2018.⁹⁰¹

Further, since FCS also works in coordination and interaction with other federal agencies, more of its work, particularly in the area of interacting with those agencies regarding LEP issues in relation to federal emergency response, is described in that section of this chapter.

Some other CRT sections provide technical assistance to help entities know how to comply and come into compliance with civil rights law. For example, IER provides the public information about the INA’s anti-discrimination provision through its hotlines, public education materials, and other outreach to the public.⁹⁰² DRS operates the ADA Technical Assistance Program, which provides free information and technical assistance to businesses, governments and people with disabilities to promote voluntary compliance with the ADA.⁹⁰³

⁸⁹⁷ *Ibid.*; see also Thompson Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 176-77.

⁸⁹⁸ Thompson Testimony, *Federal Civil Rights Enforcement Briefing*, p. 177.

⁸⁹⁹ *Ibid.*

⁹⁰⁰ See Thompson Statement, at 2 and n. 6.

⁹⁰¹ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁹⁰² DOJ CRT, “Immigrant and Employee Rights Section,” *supra* note 428.

⁹⁰³ U.S. Dep’t of Justice, Civil Rights Division, “Disability Rights Section,” <https://www.justice.gov/crt/disability-rights-section> (accessed Oct. 22, 2019).

Another example is when CRT provides technical assistance through a letter. For example, in 2012, CRT's former Special Litigation Section Chief wrote to the Escambia County Sheriff's Office that he appreciated their cooperation with CRT's investigation and that:

While we are closing our investigation without a finding, we did conclude that there are systemic deficiencies relating to the way in which ECSO officers use force that, if left unaddressed, may result in civil rights violations. The following recommendations, if implemented, will reduce the risk of future violations.⁹⁰⁴

More recent examples of such letters may be found in the FCS partnership and other CRT communications through agreements that include CRT's provision of technical assistance, discussed above.⁹⁰⁵

CRT may also provide technical assistance through strategic initiatives and interaction with stakeholders. For example, through the Multi-family Accessibility Initiative, "HCE is developing plans to collaborate with developers, architects, code officials, accessibility advocates and other stakeholders" to increase accessible housing for persons with disabilities and ensure compliance with Fair Housing Act accessibility standards.⁹⁰⁶ DOJ reported to Congress that as part of the DOJ-wide Religious Discrimination Initiative and in line with its focus on religious discrimination in schools, EOS trains U.S. Attorneys to partner and support community school leaders to be more responsive to possible religious discrimination.⁹⁰⁷

Publicity

This section discusses only a few examples of how CRT disseminates information about civil rights through outreach and publicity. In July 2016, DOJ released its final report on *Combating Religious Discrimination Today*, compiled after conducting several roundtables with various other federal agencies and with community groups across the country.⁹⁰⁸ In addition to several common trends in education settings that arose from roundtable discussions, the report had various recommendations to improve on the "noticeable uptick" of religious discrimination in schools.⁹⁰⁹ These focused on providing increased resources for education, guidance regarding students' understanding of religions and stakeholders' awareness of their religious rights, and training for

⁹⁰⁴ U.S. Dep't of Justice, Civil Rights Division, Technical Letter from Special Litigation Section Chief to Sheriff (Sep. 4, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/05/escambia_tletter_9-4-12.pdf.

⁹⁰⁵ See *supra* note 902.

⁹⁰⁶ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 28-29.

⁹⁰⁷ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 24.

⁹⁰⁸ DOJ, *Combating Religious Discrimination Today*, *supra* note 815, at 9 ("Agencies that participated in the roundtables include the Departments of Education, Homeland Security (DHS), and Labor (DOL); the Equal Employment Opportunity Commission (EEOC); the White House Initiative on Asian Americans and Pacific Islanders; the White House Office of Faithbased and Neighborhood Partnerships; and within the Justice Department, the Civil Rights Division, Federal Bureau of Investigation (FBI), Office of Justice Programs, Executive Office for U.S. Attorneys, and Community Relations Service.").

⁹⁰⁹ *Ibid.*, 12.

supervisors and teachers.⁹¹⁰ Reportedly, this initiative led EOS and U.S. Attorney's Offices to open six investigations into religious discrimination in schools.⁹¹¹ However, EOS has not resolved any cases about religious discrimination in school since then.⁹¹²

IER's work includes public outreach and education to inform the public, employers and organizations about rights and responsibilities under the INA.⁹¹³ IER has an extensive list of educational materials on its website for both workers and employers. It has 16 worker-related educational or guidance documents (but only one of which was written in 2017 and another in 2018),⁹¹⁴ and 15 employer related documents (two of which were written or revised in 2017 and one that was written in 2018).⁹¹⁵ Additionally, IER hosts regular webinars for workers and employers.⁹¹⁶ For example, it had five webinars scheduled and available for free registration on its website between July 9 and August 27, 2018.⁹¹⁷ It also hosts joint webinars regarding workers' rights and how to complete the I-9 employment verification process,⁹¹⁸ provides information about the INA and its obligations, and attempts to informally resolve disputes using its hotline.⁹¹⁹

Improvements could be made to the data CRT reports about its own work. As discussed above, information about cases resolved can generally be found on the CRT website for most of the CRT sections.⁹²⁰ The public information is most complete for cases that have been resolved by settlement, consent decree, or judicial opinions. However, the Criminal Section does not publish this information on the CRT website, and instead only publishes press releases about its cases without links to the litigation documents,⁹²¹ making it exceedingly difficult to find information about the details of CRT's criminal civil rights enforcement work.⁹²² In criminal cases, grand jury information is privileged; however, plea agreements, court orders and decisions, and most CRT briefs are not as they are published on websites that require the case numbers, which the Criminal

⁹¹⁰ Ibid., 14-16.

⁹¹¹ Ibid.

⁹¹² See *supra* notes 666-68 (listing EOS cases by type).

⁹¹³ Ibid.

⁹¹⁴ U.S. Dep't of Justice, Civil Rights Division, "Worker Information," <https://www.justice.gov/crt/worker-information> (accessed Jul. 16, 2018).

⁹¹⁵ U.S. Dep't of Justice, Civil Rights Division, "Employer Information," <https://www.justice.gov/crt/page/file/1080256/download> (accessed Jul. 16, 2018).

⁹¹⁶ U.S. Dep't of Justice, Civil Rights Division, "Webinars," <https://www.justice.gov/crt/webinars> (accessed Jun. 29, 2018).

⁹¹⁷ Ibid.

⁹¹⁸ Ibid.

⁹¹⁹ U.S. Dep't of Justice, Civil Rights Division, "Frequently Asked Questions," <https://www.justice.gov/crt/frequently-asked-questions-faqs> (accessed Jan. 31, 2017).

⁹²⁰ See *supra* notes 536 and 622-25.

⁹²¹ DOJ CRT, "Criminal Section," *supra* note 733.

⁹²² Cases were located mainly on PACER and Westlaw, which are paid legal research services. The CRT website only provides press releases on cases, which do not include links to legal documents. Only a few of the court documents needed to research these cases were free and publicly available on the DOJ website. See U.S. Dep't of Justice, Civil Rights Division, Criminal Section, "Press Releases," <https://www.justice.gov/crt/press-releases>; see also DOJ CRT, "Search Cases and Matters," *supra* note 632 (showing cases from other DOJ CRT sections, but no cases from the Criminal Section) (accessed Oct. 30, 2019).

Section does not provide on its website’s press releases, and these websites require paid access that members of the public should not have to rely on to review these important cases.

In addition to access to basic and non-privileged legal documents such as complaints, briefs, and consent decrees or settlements along with judicial decisions in the case, some sections provide information about investigations, when the statute requires that investigative findings be issued,⁹²³ and others provide information about complaints filed,⁹²⁴ whereas others do not.⁹²⁵ This variation in transparency hampers external evaluation of the important work of CRT,⁹²⁶ and dilutes the ability of CRT to “send a message to potential violators about the strength of the agency’s enforcement program,” which the Commission considers an important goal of systemic civil rights litigation.⁹²⁷ Furthermore, it is not clear how CRT chooses the issues to investigate or the cases it will litigate, making it difficult to evaluate if CRT makes appropriate choices and uses its resources to effectively enforce civil rights.⁹²⁸

Interaction and Coordination with External Agencies and Organizations

FCS issues Title VI reports, which are summarized in the following section of this chapter,⁹²⁹ provides information about Title VI and Title IX regulations in all relevant federal agencies,⁹³⁰ and includes links to agencies’ Title VI delegation agreements (in which they may delegate enforcement authority),⁹³¹ as well as these four Title VI collaboration agreements:

⁹²³ See, e.g., U.S. Dep’t of Justice, Civil Rights Division, “Special Litigation Section,” <https://www.justice.gov/crt/special-litigation-section> (accessed May 21, 2019).

⁹²⁴ See, e.g., U.S. Dep’t of Justice, Civil Rights Division, Voting Section, “Voting Section Litigation,” <https://www.justice.gov/crt/voting-section-litigation> (including complaints filed) (accessed May 21, 2019); U.S. Dep’t of Justice, Civil Rights Division, Employment Litigation Section, “Complaints Filed,” <https://www.justice.gov/crt/employment-litigation-section-cases#compl> (accessed May 21, 2019).

⁹²⁵ See, e.g., U.S. Dep’t of Justice, Civil Rights Division, Educational Opportunities Section, “Educational Opportunities Cases,” <https://www.justice.gov/crt/educational-opportunities-cases> (accessed May 21, 2019).

⁹²⁶ See, e.g., Rob Arthur, “Exclusive: Trump’s Justice Department is Investigating 60 Percent Fewer Cases Than Obama’s,” *VICE*, Mar. 6, 2019, https://news.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas (“VICE News analyzed the [public information](#) posted online by five of the division’s eight civil rights sections — Voting, Education, Disability Rights, Housing, and Special Litigation — and confirmed with multiple DOJ sources that the data posted by those sections was complete. Three sections — Criminal, Employment, and Immigrant and Employee Rights — had incomplete data and were left out of the analysis.”).

⁹²⁷ USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 38.

⁹²⁸ See *supra* notes 599-616.

⁹²⁹ See *infra* notes 995-6.

⁹³⁰ U.S. Dep’t of Justice, Civil Rights Division, “Federal Agency Specific Regulations,” https://www.justice.gov/crt/fcs/Agency_Regulations (accessed Aug. 1, 2019).

⁹³¹ *Ibid.*

Table 2.6: Memoranda Of Understanding

Department of Agriculture and Department of Housing and Urban Development	Department of Education, Office of Civil Rights and Department of Justice, Civil Rights Division
Department of Health & Human Services, Office for Civil Rights & Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section	Department of Defense and Department of Health, Education, and Welfare

SOURCE: U.S. Dep't of Justice, Civil Rights Division, Federal Coordination & Compliance Section, "Federal Agency Specific Regulations," https://www.justice.gov/crt/fcs/Agency_Regulations (accessed May 20, 2019).

On January 9, 2017, before the change in federal administrations, FCS and the U.S. Department of Health and Human Services entered into a Memorandum of Understanding that established agreed upon procedures for coordination, information sharing, and delegation of authority relating to the agencies' civil rights efforts.⁹³²

FCS also utilizes materials from its technical assistance work in ensuring meaningful access to federal and federally assisted program, discussed in the previous subsection, to promote consistency and collaboration amongst agencies who are engaged in the same effort.⁹³³

Furthermore, FCS regularly shares interagency information through newsletters about Title VI developments including investigations, resolutions, regulatory updates, new agency guidance, directives, initiatives, reports, outreach, and training. It issued these newsletters seasonally (Winter, Spring, Summer, Fall) up until Winter 2017.⁹³⁴ During the Fiscal Years studied, CRT published information about seven Title VI agency policy regulations or guidance documents proposed or issued in FY 2016 and two in FY 2017.⁹³⁵

At the Commission's briefing, former Deputy Assistant Attorney General Leon Rodriguez testified that during the Obama Administration, FCS used its authority in a broad and powerful manner, including providing training on civil rights laws to federal employees in other agencies, to ensure their consistent application.⁹³⁶

⁹³² U.S. Dep't of Justice, Civil Rights Division & U.S. Department of Health and Human Services, Office for Civil Rights, Memorandum of Understanding Between the U.S. Departments Of Health And Human Services And Justice (Jan. 9, 2017), <https://www.justice.gov/crt/page/file/924161/download>. (The memo sought "to maximize effort, promote efficiency, and eliminate duplication and inconsistency in the enforcement of civil rights laws in child welfare and in other areas of mutual interest or overlapping jurisdiction.").

⁹³³ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁹³⁴ See U.S. Dep't of Justice, Civil Rights Division, Federal Coordination & Compliance Section, "Title VI Newsletters," <https://www.justice.gov/crt/fcs/newsletters> (the most recently posted newsletter was issued in Winter 2017).

⁹³⁵ Ibid.

⁹³⁶ Rodriguez Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 83-94 (Leon Rodriguez regarding the importance of coordination, civil rights offices being "infinitely more powerful if coordinated;" as well as the Civil Rights Training Institute he helped establish for unified training at the National Advocacy Center).

In April 2018, Acting Assistant Attorney General Gore issued a memo to all federal agency civil rights directors and general counsels, drafted by FCS, reiterating that Executive Order 12,250 requires federal agencies to gain the Attorney General’s approval for enacting, amending or repealing any regulation that effectuates Title VI, Title IX, and Section 504 of the Rehabilitation Act to ensure that agencies are fulfilling their civil rights obligations and that there is consistent implementation across the federal government.⁹³⁷ The memo asserts that CRT may require clearance of any other regulation that implements other nondiscrimination provisions or laws.⁹³⁸ Also in April 2018, Gore issued another memo clarifying the Department’s exclusive authority to issue technical assistance and regulations implementing Title II, Subtitle A of the ADA and the need for consistency in interpretation between Title II and Section 504.⁹³⁹

DOJ CRT’s former Coordination and Review Section primarily conducted the duties of coordinating compliance under Executive Order 12,250. In 2002, the Commission emphasized that CORS had “*responsibility to make certain* that designated federal agencies meet their responsibility for nondiscrimination under Title VI.”⁹⁴⁰ In 1996, the Commission issued a report assessing DOJ’s Title VI enforcement activities, and found that DOJ “lacked commitment” to Title VI enforcement, as changes in its budget and resources dedicated to Title VI showed that DOJ’s civil rights priorities had shifted.⁹⁴¹ Specifically, the Commission reported that:

DOJ transferred CORS staff to other sections and reduced drastically the resources available for Title VI enforcement activities. The Commission noted that CORS lacked adequate resources and funding to support Title VI enforcement and because of the Department’s poor planning could not carry out the enforcement of Title VI effectively. As a result, the Commission found CORS’ Title VI work inadequate and recommended changes in the organizational structure of the section.⁹⁴²

Those changes included clearly defining CORS’ responsibility to coordinate and monitor agency delegation agreements, and improving its litigation referral and support duties as it had only referred a couple of case for litigation and did not participate in substantive advice or review of briefs based on Title VI expertise.⁹⁴³ In 2002, the Commission recommended that CORS “provide

⁹³⁷ U.S. Dep’t of Justice, Civil Rights Division Acting Ass’t Atty General John M. Gore, Memorandum to Federal Agency Civil Rights Directors and General Counsels, Clearance Requirements for Title VI, Title IX, Section 504 and Related Nondiscrimination Regulations and Policy Guidance Documents (Apr. 24, 2018), <https://www.justice.gov/crt/page/file/1060276/download>.

⁹³⁸ *Ibid.*, 1-2.

⁹³⁹ U.S. Dep’t of Justice, Civil Rights Division Acting Ass’t Atty General John M. Gore, Memorandum to Federal Agency Civil Rights Directors and General Counsels, Clearance Requirements for Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (Apr. 24, 2018), <https://www.justice.gov/crt/page/file/1060276/download>; U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁹⁴⁰ USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, *supra* note 31, at 6 (emphasis added).

⁹⁴¹ *Ibid.*, 7.

⁹⁴² *Ibid.*, 7.

⁹⁴³ USCCR, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, *supra* note 51, at 132-34.

information to the public on Title VI and consult with stakeholders regularly.”⁹⁴⁴ CRT told the Commission that it is active, especially in training agencies on compliance, but as discussed above, it considers much of its work with other agencies privileged.⁹⁴⁵

Some other CRT sections also have specific coordination roles with other agencies. The Criminal Section works in coordination with the U.S. Department of Labor and DHS to combat human trafficking.⁹⁴⁶ CRT has operated a Human Trafficking Prosecution Unit (HTPU) since 2008.⁹⁴⁷ In addition to prosecution, HTPU also provides “victim assistance resources, legal guidance and coordination between prosecuting districts overlapping criminal networks.”⁹⁴⁸ HTPU leads the Anti-Trafficking Coordination Team Initiative, an effort that convenes agents and prosecutors from the FBI, U.S. Attorneys’ Office, DHS, and U.S. Department of Labor together with CRT in “combatively selected districts to develop high-impact human trafficking investigations and prosecutions.”⁹⁴⁹ Phase I ran from 2011-2013 and reportedly resulted in an 86 percent increase in convictions of human trafficking violations in six selected districts compared to an increase of just 14 percent in other districts.⁹⁵⁰ There was also an increase of 119 percent in cases filed and of 114 percent in defendants charged in selected districts, compared to increases of just 18 percent and 12 percent in the same categories in non-selected districts. Phase II began in December 2015, but similar information is not yet available.⁹⁵¹

Under Executive Order 12,250, CRT, through DRS has authority that includes review and approval of federal agencies’ regulations and policy regarding Section 504; DRS also coordinates and provides technical assistance to covered entities and people with disabilities on the requirements of the ADA.⁹⁵² CRT also told the Commission that:

In 2017, DRS convened an Interagency Working Group on Service Animals to identify issues of concern regarding the use of service animals and to better ensure that Federal agencies are taking a consistent approach under Section 504. The working group has been meeting on a quarterly basis and recently expanded its scope to matters arising under Section 504 more generally. Representatives from over 20 Federal agencies have participated in this working group.

⁹⁴⁴ USCCR, *Ten-Year Check-Up Vol. II: An Evaluation*, *supra* note 31, at 8.

⁹⁴⁵ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁹⁴⁶ U.S. Dep’t of Justice, Civil Rights Division, “Human Trafficking Prosecution Unit (HTPU),” <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu> (accessed Jul. 28, 2017).

⁹⁴⁷ *Ibid.*

⁹⁴⁸ *Ibid.*

⁹⁴⁹ DOJ CRT, *FY 2019 Performance Budget Justification*, *supra* note 495, at 5.

⁹⁵⁰ U.S. Dep’t of Justice, “Press Release: Departments of Justice, Labor and Homeland Security Announce Phase II of Anti-Trafficking Coordination Team Initiative,” Jun. 25, 2015, <https://www.justice.gov/opa/pr/departments-justice-labor-and-homeland-security-announce-phase-ii-anti-trafficking>.

⁹⁵¹ *Ibid.*

⁹⁵² See DOJ Justice Manual, *supra* note 370, at § 8-2.400 (Disability Rights Section).

DRS also partners with the EEOC to enforce Title I of the ADA against state and local government employers⁹⁵³

ELS partners with the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor (DOL) to enforce the civil rights protections under its jurisdiction.⁹⁵⁴ Under Title VII, EEOC receives the initial claims about alleged violations by state or local governments, and “may” refer them to DOJ CRT for “appropriate legal proceedings” if they are “unable to obtain compliance.”⁹⁵⁵ ELS may also initiate pattern or practice suits against state or local employers (even if EEOC has not referred the case). Title VII allegations against private employers fall under EEOC’s authority, and allegations against federal government entities are primarily resolved by EEOC.⁹⁵⁶ However, in conjunction with U.S. Attorney’s Offices, CRT’s ELS is responsible for defending federal contractors or grantees charged with discrimination in federal court.⁹⁵⁷

Similarly, DOL has primary responsibility for resolving complaints of discrimination by service members under USERRA, but it is not up to DOL to refer them if litigation is needed. Instead:

If the Department of Labor does not resolve a complaint, regardless of whether it determines the complaint to have merit, it will refer the complaint to the Employment Litigation Section upon the request of the servicemember who filed the complaint. When the Employment Litigation Section receives an unresolved USERRA complaint from the Department of Labor, the Section reviews the Department of Labor’s investigative file accompanying the complaint to determine whether to extend representation to the complainant.⁹⁵⁸

⁹⁵³ U.S. Dep’t of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

⁹⁵⁴ U.S. Dep’t of Justice, Civil Rights Division, “Laws Enforced by the Employment Litigation Section,” <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> (accessed Oct. 25, 2017).

⁹⁵⁵ DOJ Justice Manual, *supra* note 370, at § 8 – 2.212 (Affirmative Suits Under Executive Order 11,246, As Amended).

⁹⁵⁶ *Id.* at § 8 – 2.211 (“The Department of Justice shares enforcement authority under Title VII with the Equal Employment Opportunity Commission (EEOC). The Department of Justice has authority to seek to remedy employment discrimination by state and local governments and their agencies and political subdivisions. The EEOC has authority to seek to remedy employment discrimination by private employers. The EEOC also has primary enforcement responsibility with respect to allegations of discrimination by the federal government.”). *See also infra* notes 2179-90 (discussing EEOC cases of this type).

⁹⁵⁷ *See* DOJ Justice Manual, *supra* note 370, at § 8 – 2.214 (“The Employment Litigation Section defends suits in which a federal contractor, subcontractor or grantee sues the relevant federal agency to enjoin the actual or threatened termination or suspension of federal contracts or funds under Executive Order 11246. The Employment Litigation Section also defends actions that challenge the constitutionality of congressionally authorized preference programs under the Small Business Administration’s 8(a) program, 15 U.S.C. § 637(a), and other minority and disadvantaged business enterprise programs.”)

⁹⁵⁸ DOJ Justice Manual, *supra* note 370, at § 8 – 2.213 (Affirmative Suits Under the USERRA).

Moreover, CRT retains discretion to provide direct legal representation in federal court to USERRA claimants in both state and federal cases.⁹⁵⁹

HCE partners with several federal agencies (HUD, the Federal Trade Commission, Consumer Finance Protection Board), state and local officials, and bank regulatory agencies to promote fair housing and lending.⁹⁶⁰ The Housing Section was also part of a Federal Interagency Reentry Council that DOJ convened in 2011, “to discuss and implement strategies to remove barriers to successful reentry of formerly incarcerated individuals so that they can compete for jobs, attain stable housing, support their children and families, and contribute to their communities.”⁹⁶¹

CRT announced the Sexual Harassment in Housing Initiative on October 17, 2017 and reportedly seeks to increase CRT’s efforts in protecting women against harassment by property owners, managers, or other individuals who have control over property.⁹⁶² On April 12, 2018,⁹⁶³ DOJ led an inter-agency initiative through a HUD-DOJ Task Force to Combat Sexual Harassment in Housing intended to leverage the combined information, resources, and expertise of the two departments to further the initiative’s goal of combatting sexual harassment.⁹⁶⁴ The other major components involve outreach to stakeholders. DOJ released an outreach toolkit designed to facilitate individuals reaching out to others in their community to raise awareness of the issue and answer common questions and concerns regarding the subject.⁹⁶⁵ DOJ also started a public awareness campaign to help victims of harassment be aware of the resources available to them and report the harassment.⁹⁶⁶ HCE’s website indicates that it filed two cases in 2016 that included

⁹⁵⁹ Ibid. (“USERRA provides that the Attorney General, through the Employment Litigation Section, may represent a claimant in federal district court if he or she determines that the claimant is entitled to the rights or benefits being sought. In USERRA suits involving local government and private employers, the Attorney General is authorized by statute to provide direct legal representation to individuals by filing a lawsuit on the individual’s behalf. In USERRA suits involving state government employers, the Attorney General may file suit in the name of the United States to recover relief that benefits the complainant.”)

⁹⁶⁰ DOJ CRT, *FY 2017 Performance Budget Justification*, *supra* note 495, at 15.

⁹⁶¹ The White House and U.S. Dep’t of Justice, *The Federal Interagency Reentry Council: A Record of Progress and a Roadmap for the Future*, August 2016, pp. 50-52, <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf> (discussing the Federal Interagency Reentry Council’s accomplishments and actions in the context of housing).

⁹⁶² U.S. Dep’t of Justice, Civil Rights Division, “Sexual Harassment in Housing Initiative,” <https://www.justice.gov/crt/sexual-harassment-housing-initiative> (accessed Apr. 13, 2018); U.S. Dep’t of Justice, “Press Release: Justice Department Announces Initiative to Combat Sexual Harassment in Housing,” Oct. 3, 2017, <https://www.justice.gov/opa/pr/justice-department-announces-initiative-combat-sexual-harassment-housing>.

⁹⁶³ U.S. Dep’t of Justice, “Press Release: Justice Department Announces Nationwide Initiative to Combat Sexual Harassment in Housing,” Apr. 12, 2018, <https://www.justice.gov/opa/pr/justice-department-announces-nationwide-initiative-combat-sexual-harassment-housing> [hereinafter DOJ, “Justice Dep’t Announces Nationwide Initiative to Combat Sexual Harassment in Housing”].

⁹⁶⁴ Ibid.

⁹⁶⁵ Ibid. *See also* U.S. Dep’t of Justice, Civil Rights Division, *Sexual Harassment in Housing Partnership Toolkit*, <https://www.justice.gov/crt/page/file/1055011/download>.

⁹⁶⁶ DOJ, “Justice Department Announces Nationwide Initiative to Combat Sexual Harassment in Housing,” *supra* note 963.

allegations of sexual harassment, four similar cases in 2017 and three in 2018.⁹⁶⁷ At the Commission’s briefing, former Assistant Attorney General Driscoll submitted written testimony about the success of this initiative, stating that “recent effective publicity and enforcement by the Civil Rights Division has driven huge increases in enforcement, with complaints increasing by almost 500 percent. This kind of success gains little notoriety because the proposition that residents should not be sexually harassed by their landlords has widespread agreement.”⁹⁶⁸ In addition, although the increase in complaints highlights the widespread scope of the problem, Driscoll argued that the fact that CRT’s initiative led to increasing complaints should also be considered a “success.”⁹⁶⁹ As noted above, the Commission’s research confirms that the Housing Section has secured civil fees and compensatory damages in a number of sexual harassment cases during FY 2016 – 2018.⁹⁷⁰

ECOA grants regulatory and oversight authority over lenders to different federal agencies,⁹⁷¹ and requires that those agencies refer matters they believe constitute a discriminatory “pattern or practice” to the DOJ for possible prosecution.⁹⁷² In 1996, DOJ sent a guidance document to the participating agencies that outlined the factors that the agencies should consider when deciding whether a complaint or other observed practices would constitute a possible discriminatory “pattern or practice” that would allow the DOJ to file charges.⁹⁷³ 2016 CRT reports related to fair lending enforcement referred to these guidelines.⁹⁷⁴

IER has also entered agreements with foreign ministries and consulates to form partnerships aimed at educating foreign nationals from the other signing country working in the U.S. about their rights as U.S. workers and the anti-discrimination provisions of the INA.⁹⁷⁵ IER has entered into five such agreements with five different countries (Ecuador, El Salvador, Mexico, Honduras, Peru), all of which occurred during the Obama administration (1 in Dec. 2015, 3 in 2016 and 1 in Jan. 2017).⁹⁷⁶

CRT sent the Commission information about the Department-wide *Hate Crimes Enforcement and Prevention Initiative* led by CRT’s Policy Section (POL) which coordinates all of the Department’s anti-hate crime efforts. According to CRT:

⁹⁶⁷ U.S. Dep’t of Justice, Civil Rights Division, “Housing and Civil Enforcement Cases,”

<https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#sex> (accessed Jul. 11, 2018) (date of first filed complaint in the action as provided on the HCE website was used to determine when HCE filed the case).

⁹⁶⁸ Robert Driscoll, Member, McGlinchey Stafford, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 2.

⁹⁶⁹ *Ibid.*

⁹⁷⁰ *See supra* notes 678-91 (listing cases).

⁹⁷¹ 15 U.S.C. § 1691c (a).

⁹⁷² *Id.* §§ 1691e (g)-(h).

⁹⁷³ U.S. Dep’t of Justice, *Identifying Lender Practices That May Form the Basis of a Pattern or Practice Referral to the Department of Justice*, 1996, <https://www.justice.gov/sites/default/files/crt/legacy/2014/03/05/regguide.pdf>.

⁹⁷⁴ *See* DOJ CRT, *Attorney General’s 2016 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976*, *supra* note 510.

⁹⁷⁵ DOJ CRT, *FY 2017 Performance Budget Justification*, *supra* note 495, at 17.

⁹⁷⁶ U.S. Dep’t of Justice, Civil Rights Division, “Partnerships,” <https://www.justice.gov/crt/partnerships> (accessed May 11, 2018).

Managed by POL, the Initiative is charged with coordinating the Department's efforts to eradicate hate crimes, and facilitating training, outreach, and education to law enforcement agencies and the public at the federal, state, local and tribal levels. The Initiative reflects the combined and sustained efforts of multiple DOJ components in addition to CRT, including the Office of Community Oriented Policing Services (COPS Office), the Community Relations Service (CRS), the Federal Bureau of Investigations (FBI), the Office of Justice Programs (OJP), and U.S. Attorney's Offices (USAOs). Recent Initiative accomplishments include the following:

- In October 2018, POL and the COPS office co-developed the first-ever law enforcement roundtable on improving the identification and reporting of hate crimes, a 1.5 day event that brought together law enforcement and other leaders from around the country to explore successful practices and challenges in identifying, reporting, and tracking hate crimes. Attendees and presenters included police chiefs of major cities and leaders of major policing organizations.
- POL spearheaded with CRS the launch of a new hate crimes website, a one-stop portal for the general public, law enforcement officials, educators, public officials, media, and other stakeholders to access Department resources about hate crimes. See <https://www.justice.gov/hatecrimes/>. The website aggregates Department resources about effective hate crime laws, prevention programs, best police policies and procedures, community awareness building practices, victim service resources, and law enforcement training initiatives, as well as information about reporting hate crimes and a summary of recent hate crimes prosecutions. See <https://www.justice.gov/opa/pr/justice-department-releases-update-hate-crimes-prosecutions-and-announces-launch-new-hate>.
- POL also worked with components to develop other deliverables advancing the fight against hate crimes, including extension of the COPS Office's Collaborative Reform Technical Assistance Center program, a partnership with the International Association of Chiefs of Police (IACP), and eight leading law enforcement leadership and labor organizations, to cover hate crimes, allowing law enforcement to access significant resources to build and improve their hate crimes investigation and reporting practices. See 10/29/18 press releases for details: See <https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>.⁹⁷⁷

⁹⁷⁷ U.S. Dep't of Justice, Civil Rights Division, Response to USCCR Affected Agency Review, Email from DOJ CRT to USCCR (Jun. 24, 2019) (attaching comments on draft report) (on file).

Research, Data Collection, and Reporting

With some gaps, many CRT sections make their cases generally easily accessible on the CRT website.⁹⁷⁸ Some CRT sections include pamphlets or other information such as FAQs about civil rights protections.⁹⁷⁹ And DRS provides technical assistance materials for ADA compliance on ADA.gov.⁹⁸⁰ In addition to the publications listed above, CRT has maintained a periodic email update, “Religious Freedom in Focus,” about its religious liberty and religious discrimination cases from February 2004 through April 2019 (its latest update, Volume 79).⁹⁸¹

As discussed previously in this chapter, in January 2017, CRT released a comprehensive report regarding its *Pattern and Practice Police Reform Work: 1994-Present*.⁹⁸²

Some CRT reports are required by statute or regulation. For example, the Equal Credit Opportunity Act (ECOA) Amendments of 1976 require that HCE report its overall enforcement efforts and include some information about related efforts related to the FHA Servicemembers Civil Relief Act lending provisions, in an Annual Report to Congress.⁹⁸³ These reports must discuss the administration of HCE’s functions under the ECOA and include a summary of enforcement actions taken.⁹⁸⁴ HCE must also include an assessment of the extent to which compliance with the requirements of ECOA is being achieved.⁹⁸⁵ In 2016, the annual ECOA report showed that CRT received 22 ECOA and FHA referrals from agencies (all but one of which played a role in a lawsuit), 8 of which led to a CRT investigation and 12 of which were returned to the agency pursuant to the 1996 guidelines for administrative enforcement.⁹⁸⁶ In total CRT opened 18 fair lending investigations, filed 7 fair lending lawsuits (settling six of them), and obtained nearly \$37 million in relief.⁹⁸⁷ At the end of 2016, it had 33 open investigations.⁹⁸⁸ The report also emphasized CRT’s focus on education and training, citing its participation in 17 outreach events related to fair lending practices and SCRA enforcement in 2016.⁹⁸⁹ In 2017, the annual ECOA report showed that CRT opened 7 fair lending investigations, filed 3 fair lending lawsuits, and settled two, obtaining nearly \$63 million in relief.⁹⁹⁰ At the end of the year, CRT had 22 open fair lending

⁹⁷⁸ See, e.g., DOJ CRT, “Search Cases and Matters,” *supra* note 632.

⁹⁷⁹ U.S. Dep’t of Justice, Civil Rights Division, “Publications,” <https://www.justice.gov/crt/publications> (accessed May 20, 2019) [hereinafter DOJ CRT, “Publications”].

⁹⁸⁰ See “ADA.gov, Information and Technical Assistance on the Americans With Disabilities Act,” <https://www.ada.gov/>.

⁹⁸¹ U.S. Dep’t of Justice, Civil Rights Division, “Publications,” *supra* note 979.

⁹⁸² See *supra* note 476.

⁹⁸³ 15 U.S.C. §1691f.

⁹⁸⁴ See DOJ CRT, *Attorney General’s 2016 Annual Report to Congress*, *supra* note 510.

⁹⁸⁵ *Ibid.*

⁹⁸⁶ *Ibid.*, 11-13.

⁹⁸⁷ *Ibid.*, 3, 11.

⁹⁸⁸ *Ibid.*, 5.

⁹⁸⁹ *Ibid.*, 11.

⁹⁹⁰ U.S. Dep’t of Justice, Civil Rights Division, *The Attorney General’s 2017 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976*, September 2018, p. 3, <https://www.justice.gov/crt/page/file/1097406/download>.

investigations.⁹⁹¹ Information on CRT's 2018 fair lending enforcement efforts are not yet available, as the annual report has not been released.

The Civil Rights of Institutionalized Persons Act (CRIPA) requires that DOJ must report its annual CRIPA enforcement efforts to Congress.⁹⁹² Each report must include information on all actions instituted pursuant to CRIPA, as follows:

The Attorney General shall include in the report to Congress on the business of the Department of Justice prepared pursuant to section 522 of Title 28

- (1) a statement of the number, variety, and outcome of all actions instituted pursuant to this subchapter including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;
- (2) a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;
- (3) an analysis of the impact of actions instituted pursuant to this subchapter, including, when feasible, an estimate of the costs incurred by States and other political subdivisions;
- (4) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and
- (5) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.⁹⁹³

The Commission's research shows that CRT has been in compliance with these reporting requirements from FY 2016-2018.⁹⁹⁴

Similarly, Title VI regulations include specific reporting requirements that pertain to DOJ as an agency that distributes federal funding.⁹⁹⁵ For example, all Title VI agencies must collect compliance data from applicants for and recipients of federal assistance "sufficient to permit effective enforcement of title VI."⁹⁹⁶ Publicly available information is insufficient to determine whether CRT is in compliance with this data collection requirement.

⁹⁹¹ *Ibid.*, 4.

⁹⁹² 42 U.S.C. § 1997f.

⁹⁹³ *Id.*

⁹⁹⁴ See DOJ CRT, "Publications," *supra* note 979; Commission Staff summary.

⁹⁹⁵ 28 C.F.R. § 42.403.

⁹⁹⁶ *Id.* § 42.406.

Regarding collection of data about race and ethnicity, there are no known statutory requirements for CRT to collect or demand such data, except in the development of a particular enforcement action where it would be useful as evidence. Prior to the Supreme Court's 2013 decision in *Shelby County v. Holder*, under federal regulations, the Voting Section was required to collect, and covered jurisdictions were required to provide, data about whether proposed changes in voting procedures (such as redistricting, or moving a polling place, or changing the rules of voter registration and access) would have a racially discriminatory impact.⁹⁹⁷ However, since that decision eviscerating the preclearance requirements of the Voting Rights Act, that data is no longer required to be collected.⁹⁹⁸

⁹⁹⁷ See USCCR, *Minority Voting*, *supra* note 17, at 29 (citing 28 C.F.R. § 51.27n (required contents of submission of voting changes for preclearance included racial impact data) and 59 (impact of post-*Shelby County* loss of preclearance)).

⁹⁹⁸ *Ibid.*

Chapter 3: U.S. Department of Education, Office for Civil Rights⁹⁹⁹

Congress established the U.S. Department of Education (ED) in 1979,¹⁰⁰⁰ although its origins date back to 1867, when Andrew Jackson signed legislation creating the Department in order to collect information about local schools.¹⁰⁰¹ Congress abolished the Department of Education one year later in 1868, and assigned its remaining duties into the Office of Education under the authority of the Department of the Interior.¹⁰⁰² That Office was later transferred to the Department of Health, Education, and Welfare (now the Department of Health and Human Services).¹⁰⁰³ After the expansion of civil rights through decisions such as *Brown v. Board of Education* in 1954,¹⁰⁰⁴ and federal funding for education in the 1950s, 1960s, and 1970s that created programs to assist low-income students, students of color, women, people with disabilities, and Limited English Proficiency (LEP) students gain equal access to educational opportunity,¹⁰⁰⁵ Congress reestablished the Department in October 1979 with the enactment of the Department of Education Organization Act.¹⁰⁰⁶ Among the Congressional findings were that “education is fundamental to the development of individual citizens and the progress of the Nation;” and that “there is a continuing need to ensure equal access for all Americans to educational opportunities of a high quality, and such educational opportunities should not be denied because of race, creed, color, national origin, or sex[.]”¹⁰⁰⁷ In creating the Department of Education, Congress declared the purposes of the department:

⁹⁹⁹ Pursuant to Commission procedures, the Commission gave all agencies studied in this report an opportunity to review a draft of this report and provide feedback before the final internal draft, however ED OCR did not provide any comments or feedback in response to the Commission’s draft.

¹⁰⁰⁰ 20 U.S.C. § 3411, Department of Educ. Act, Pub. L. No. 96–88 § 210, 93 Stat. 668 (1979).

¹⁰⁰¹ Dep’t of Educ. Establishment Act 14 Stat. 434 (1867); U.S. Dep’t of Education, “An Overview of the U.S. Department of Educ.,” September 2010, <https://www2.ed.gov/about/overview/focus/what.html> [hereinafter ED, “An Overview”].

¹⁰⁰² Department of Educ. Abolition Act of 1868; ED, “An Overview,” *supra* note 1001.

¹⁰⁰³ *Ibid.*

¹⁰⁰⁴ Under the U.S. Constitution, there is no specific right to public education, but there are rights to equal access to public education. As the Supreme Court clarified in *Brown v. Board of Education*, because education is so critical to every person’s ability to become literate and succeed in life and participate in civic society, providing lesser education to persons based on their race violates the Equal Protection clause of the Fourteenth Amendment, which prohibits discrimination based on race. *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954) (racial segregation of students violated the right of African-American students to “equal educational opportunities,” emphasizing that “[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”); *see also Plyler v. Doe*, 457 U.S. 202, 221, 223 (1982) (Constitution does not provide a fundamental right to education) but if the state provides it, status-based discrimination violates Equal Protection, *id.* at 221; and *see* U.S. Commission on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, Introduction: Relevant Civil Rights Laws, July 23, 2019, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> [hereinafter USCCR, *Beyond Suspensions*]. The legislation that today sets forth the civil rights laws that ED enforces flow from the seminal *Brown* case and are based on the Fourteenth Amendment including the Congressional authority to enact appropriate legislation to ensure its enforcement. *Ibid.*; *cf. infra* notes 1016–28 (laws that OCR enforces).

¹⁰⁰⁵ ED, “An Overview,” *supra* note 1001.

¹⁰⁰⁶ 20 U.S.C. § 3400 *et. seq.*, Dep’t of Educ. Organization Act, Pub. L. 96–88, 93 Stat. 668 (1979).

¹⁰⁰⁷ 20 U.S.C. § 3401 (1) and (2).

1. to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual;
2. to supplement and complement the efforts of States, the local school systems and other instrumentalities of the States, the private sector, public and private educational institutions, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education;
3. to encourage the increased involvement of the public, parents, and students in Federal education programs;
4. to promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information;
5. to improve the coordination of Federal education programs;
6. to improve the management and efficiency of Federal education activities, especially with respect to the process, procedures, and administrative structures for the dispersal of Federal funds, as well as the reduction of unnecessary and duplicative burdens and constraints, including unnecessary paperwork, on the recipients of Federal funds; and
7. to increase the accountability of Federal education programs to the President, the Congress, and the public.¹⁰⁰⁸

Along these lines, ED states that its mission is “to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.”¹⁰⁰⁹

As will be discussed herein, ED OCR enforces civil rights laws and regulations under its jurisdiction through processing and acting upon individual complaints, through its own compliance investigations of educational institutions receiving federal funds, through providing technical assistance, and through issuing policy guidance documents to assist schools in understanding their civil rights obligations.¹⁰¹⁰ The Commission received testimony from a 25-year career executive within ED OCR who worked in civil rights enforcement through multiple presidential administrations, underscoring the importance that “OCR must continue to use all of the regulatory, policy, enforcement, and technical assistance tools available to it as a federal civil rights law enforcement agency to promote and ensure compliance with the federal laws prohibiting harassment in education.”¹⁰¹¹

During the period of the Commission’s review, as will be discussed below, ED OCR has dramatically changed its practices in nearly every domain, functionally discontinuing issuance of

¹⁰⁰⁸ 20 U.S.C. § 3402

¹⁰⁰⁹ U.S. Dep’t of Educ., “Mission,” <https://www2.ed.gov/about/overview/mission/mission.html> (accessed May 29, 2019).

¹⁰¹⁰ See *infra* notes 1029-40.

¹⁰¹¹ Debbie Osgood, Partner at Hogan Marren Babbo & Rose, and former National Enforcement Director at the Office for Civil Rights, U.S. Department of Education, Written Statement for the In the Name of Hate: Examining the Federal Government’s Role in Responding to Hate Crimes Briefing before the U.S. Comm’n on Civil Rights, May 11, 2018, pp. 1, 6 [hereinafter Osgood Statement] (noting her 25 years in Office for Civil Rights).

guidance,¹⁰¹² reducing the scope and number of investigations conducted,¹⁰¹³ and seeking to curtail its budget capacity significantly.¹⁰¹⁴ A journalist who reviewed the history of ED OCR at the beginning of the Trump Administration predicted, accurately, that “the strategies that [Secretary] DeVos might well follow” for ED OCR would follow those of prior history when President “Reagan did restrain the power of the Office for Civil Rights [at ED] by cutting back its funding, reducing investigations and reviews, and rescinding guidance.”¹⁰¹⁵

Legal Authority and Responsibility

The Department of Education Organization Act of 1979 created the agency’s Office for Civil Rights (ED OCR).¹⁰¹⁶ Congress tasked ED OCR with external civil rights enforcement.¹⁰¹⁷ The Department of Education Organization Act also created the position of Assistant Secretary for Civil Rights to lead ED OCR.¹⁰¹⁸ ED OCR defines its mission as “to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.”¹⁰¹⁹ ED OCR is responsible for enforcing the following civil rights laws in the context of education:¹⁰²⁰

- Title VI of the Civil Rights Act of 1964¹⁰²¹
- Title IX of the Education Amendments Act of 1972¹⁰²²
- Section 504 of the Rehabilitation Act of 1973¹⁰²³
- Age Discrimination Act of 1975¹⁰²⁴
- Title II of the Americans with Disabilities Act of 1990¹⁰²⁵
- Boy Scouts of America Equal Access Act of 2001¹⁰²⁶

¹⁰¹² See *infra* notes 1196-1214.

¹⁰¹³ See *infra* notes 1086-1183.

¹⁰¹⁴ See *supra* Figure 3.1.

¹⁰¹⁵ James S. Murphy, “The Office for Civil Rights’s Volatile Power,” *The Atlantic*, Mar. 13, 2017, <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/> (cited in: Duncan Statement at 6-7).

¹⁰¹⁶ 20 U.S.C. § 3413, Department of Educ. Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 673 (1979).

¹⁰¹⁷ Dep’t of Educ. Organization Act, 20 U.S.C. § 3413(c); 34 C.F.R. § 100.1.

¹⁰¹⁸ 20 U.S.C. § 3413.

¹⁰¹⁹ ED, “About OCR,” *supra* note 116.

¹⁰²⁰ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 1, at 6.

¹⁰²¹ 42 U.S.C. §§ 2000d-2000d-4.

¹⁰²² 20 U.S.C. §§ 1681-88.

¹⁰²³ 29 U.S.C. § 794.

¹⁰²⁴ 42 U.S.C. §§ 6101-07.

¹⁰²⁵ 28 C.F.R. § 35.

¹⁰²⁶ 20 U.S.C. § 7905 (prohibiting discrimination under any education program or activity receiving Federal financial assistance on the basis of sex, with some limited exceptions for conferences, fraternities and sororities, and other activities).

These laws protect students in American schools and education programs from discrimination based on race, color, national origin, sex, disability, and age.¹⁰²⁷ ED OCR has described its jurisdiction as follows:

Under Title VI, Title IX, Section 504, and the Age Discrimination Act, OCR has jurisdiction over institutions that receive Federal financial assistance from ED, including state education agencies, public elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums. Under Title II, OCR has jurisdiction over public elementary and secondary education systems and institutions, public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools) and public libraries. Under the Boy Scouts Act, OCR has jurisdiction over public elementary schools, public secondary schools, local educational agencies, and State agencies that receive funds made available through ED.¹⁰²⁸

Enforcement Tools

The enforcement tools ED OCR has specific legal authority to use are:

- Complaint resolution¹⁰²⁹
- Agency-initiated charges¹⁰³⁰
- Proactive compliance evaluations¹⁰³¹
- Guidance or other policy documents¹⁰³²
- Regulations¹⁰³³
- Technical assistance¹⁰³⁴
- Publicity¹⁰³⁵

¹⁰²⁷ ED, “About OCR,” *supra* note 116.

¹⁰²⁸ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 1, at 6.

¹⁰²⁹ 34 C.F.R. §§ 100.7(c), 104.61, 105.41(b), 106.71.

¹⁰³⁰ *Id.* § 100.7(a) and (c) (proactive compliance review leading to investigation which can lead to enforcement actions for noncompliance at the end of the process).

¹⁰³¹ *Id.* § 100.7(a) (conduct of investigations).

¹⁰³² *Id.* § 100.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”).

¹⁰³³ 20 U.S.C. § 3474 (Secretary authorized to prescribe regulations); *see also* 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations); 28 C.F.R. § 41.4 (Agency duty to issue Rehabilitation Act Section 504 regulations); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations).

¹⁰³⁴ 34 C.F.R. § 100.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”).

¹⁰³⁵ 28 C.F.R. § 41.5(b)(1) (requirements for notification of rights under Section 504 of the Rehabilitation Act); 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information); 28 C.F.R. § 54.140 (requirements for public dissemination of Title IX information).

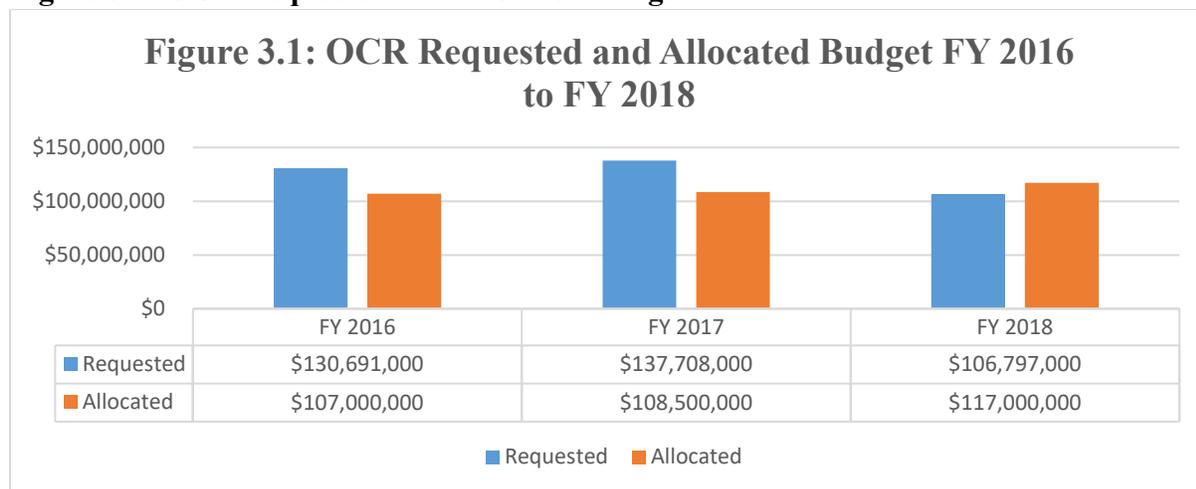
- Research, data collection, and reporting¹⁰³⁶
- Collaboration/partnership with state/local agencies¹⁰³⁷
- Collaboration/partnership with other federal agencies¹⁰³⁸
- Strategic Plans¹⁰³⁹
- Annual Reports¹⁰⁴⁰

While ED OCR does not have specific legal authority for other tools identified by the Commission, nothing prohibits ED OCR from engaging in, for example, outreach to regulated communities and in fact ED OCR regularly does exactly that, as described in further detail below.

Budget and Staffing

See Figure 3.1. In FY 2016, OCR requested a total of \$130.6 million, and Congress appropriated \$107.0 million, which represented a 10% increase from the previous appropriation. In FY 2017, OCR’s budget request increased to \$137.7 million, yet the Congressional appropriation only rose to \$108.5 million. In FY 2018, the first budget request of the Trump Administration, OCR’s budget request decreased significantly to \$106.7 million, down \$31 million from the FY 2017 request level and down \$1.8 million from the previous year’s Congressional appropriation, yet the FY 2018 actual Congressional appropriation increased significantly to \$117.0 million.

Figure 3.1: OCR Requested and Allocated Budget



Source: U.S. Dep’t of Educ., Office for Civil Rights, *Fiscal Year 2019 Budget Request*, p. Z-2, <https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf>; U.S. Dep’t of Educ., Office for Civil Rights, *Fiscal Year 2018*

¹⁰³⁶ 20 U.S.C. § 3413(c)(1) (Assistant Secretary authorized “to collect or coordinate the collection of data necessary to ensure compliance with civil rights laws within the jurisdiction of the Office for Civil Rights”); 28 C.F.R. § 42.406 (regarding data collection and information sharing).

¹⁰³⁷ 34 C.F.R. § 100.6(a) (“The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.”); *see also* 34 C.F.R. § 104.5; 34 C.F.R. § 106.4.

¹⁰³⁸ 28 C.F.R. § 42.413.

¹⁰³⁹ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

¹⁰⁴⁰ 20 U.S.C. § 3413(b)(1).

Budget Request, p. Z-2, <https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf>; U.S. Dep't of Educ., *Fiscal Year 2018 Budget Summary and Information*, p. 50, <https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>; U.S. Dep't of Educ., *Fiscal Year 2018 Congressional Action*, Mar. 27, 2018, p. 14, U.S. Dep't of Educ., <https://www2.ed.gov/about/overview/budget/budget18/18action.pdf>; *Fiscal Year 2017 Budget Summary and Information*, p. 75, <https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>; U.S. Dep't of Educ., *Fiscal Year 2016 Budget Summary and Information*, p. 70, <https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>; U.S. Dep't of Education, Response to Interrogatory No. 9, at 13-14.

ED OCR noted that its budget “does not include a separate listing of funds designated for enforcement activities versus other activities,” nor does it “include a separate listing of funds designated for use on investigating civil rights concerns that OCR raises proactively or that do not arise from complaints.”¹⁰⁴¹

A key distinction between the Trump Administration’s budget request in FY 2018 and the FY 2016 request is that the FY 2016 budget request included a separate listing of an additional 192 investigators and 8 additional non-investigative staff ED planned to hire if Congress appropriated additional funds. Between 2006 and 2016, the number of complaints filed with ED OCR increased by 188 percent, while ED OCR staffing decreased by 11 percent during the same ten year period.¹⁰⁴² The FY 2016 budget request stated that a total increase in 200 full time equivalent (FTE) staff was necessary to reduce the “anticipated case level per staff from 28 to 19.”¹⁰⁴³ For FY 2016, the agency asked for an additional 30 million dollars to cover the requested increase in OCR personnel.¹⁰⁴⁴ In contrast, the FY 2018 budget request stated that “OCR staff must handle its increased complaint workload while maintaining existing operations,” yet the report acknowledges that OCR may find it difficult to meet the performance target levels to resolve complaints within 180 days.¹⁰⁴⁵ ED OCR’s FY 2018 budget request noted that in FY 2016, the case load per staff was 41 cases, and that this ratio “will likely continue to increase through FY 2018 due to fewer staff.”¹⁰⁴⁶ To compensate for the decreasing staff levels and the steady increase in the number of complaints received by ED OCR, the agency’s FY 2018 budget request stated that, “OCR must make difficult choices, including cutting back on initiating proactive investigations.”¹⁰⁴⁷ Further, the Trump Administration’s FY 2019 budget request highlighted that in FY 2018, ED OCR reduced the number of FTEs from 569 to 529, and made changes to ED OCR’s case processing manual in order to allow for a smaller number of FTEs to handle a larger caseload.¹⁰⁴⁸ The FY

¹⁰⁴¹ U.S. Dep't of Educ., Response to USCCR Interrogatory No. 9, at 13.

¹⁰⁴² See *infra* notes 1086-1185.

¹⁰⁴³ U.S. Dep't of Educ., *Fiscal Year 2016 Budget Request*, p. 14, <https://www2.ed.gov/about/overview/budget/budget16/justifications/aa-ocr.pdf>.

¹⁰⁴⁴ *Ibid.*, 11 (“The total FY 2016 request is \$130.691 million, supporting a full-time equivalent (FTE) level of 754. This request is a \$30.691 million, or 31 percent, increase above the 2015 level. The majority of the increase is for an additional 200 FTE, which the Department believes is essential for OCR to deliver on its mission of fulfilling the promise of the Civil Rights law by ensuring equal access to educational opportunities.”)

¹⁰⁴⁵ U.S. Dep't of Educ., *Fiscal Year 2018 Budget Request*, p. Z-12, <https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf> [hereinafter ED, *FY 2018 Budget Request*].

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ *Ibid.*, Z-15.

¹⁰⁴⁸ U.S. Dep't of Educ., *Fiscal Year 2019 Budget Request*, p. Z-10, <https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf> [hereinafter ED, *FY 2019 Budget Request*].

2019 budget request also stated that the reduction in staff during FY 2018 resulted from attrition, including offering early retirement or voluntary separation incentives.¹⁰⁴⁹ But unlike ED during the Obama Administration, in its FY 2019 budget request, ED predicted that a reduced number of OCR FTEs would adequately be able to process all of ED OCR's cases due to anticipated reductions in the number of cases filed per year.¹⁰⁵⁰ Though Congress ultimately appropriated approximately 10 million dollars in funds above what the administration requested, ED's FY 2018 budget request for ED OCR of approximately 107 million dollars marks a significant reduction in ED's requested budget for ED OCR compared to previous budget requests of approximately 130.7 million dollars in FY 2016 and 137.7 million dollars in FY 2017.¹⁰⁵¹

ED OCR provided staffing data for fiscal years 2016 and 2017, during which time the number of full-time staff devoted to civil rights investigations and enforcement declined from 403 FTE in FY 2016 to 370 FTE in FY 2017.¹⁰⁵²

At the Commission's briefing, Executive Director of the National Disability Rights Network Curt Decker testified that during the Trump Administration so far, ED OCR has lost 11 percent of its workforce, and "[t]hese reductions were so drastic that Congress stepped in, directing more money to maintaining the staffing levels."¹⁰⁵³ Former Secretary of Education Arne Duncan testified that cutting staff is tantamount to "walking back commitments to civil rights."¹⁰⁵⁴ In his written testimony to the Commission, Duncan further noted that "budgets express policy judgments" and that "the Trump Administration takes steps to starve civil rights enforcement that could, if unchecked, last well after the end of the current presidency."¹⁰⁵⁵

¹⁰⁴⁹ Ibid.

¹⁰⁵⁰ Ibid.

¹⁰⁵¹ See *supra* Figure 3.1.

¹⁰⁵² U.S. Dep't of Educ., Response to USCCR Interrogatory No. 8, at 12. Note that ED OCR staff totals were appreciably higher in both years as discussed below; the text totals here refer only to staff devoted to investigations and enforcement, excluding policy and administrative staff, for examples.

¹⁰⁵³ Curtis L. Decker, Executive Director, National Disability Rights Network, testimony, *Federal Civil Rights Enforcement Briefing*, p. 226; Consolidated Appropriations Act of 2018, Pub. L. No. 115-141 (2018); Andrew Kreighbaum, "Under DeVos, a Smaller Department of Education," *Inside Higher Ed*, Jun. 13, 2018, <https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began>. ED reportedly "purchased more than \$28,000 worth of training related to how to plan and conduct a 'reduction in force' action – which is bureaucratic parlance for laying off employees." Michael Stratford, "North Carolina opens investigation into for-profit law school," *Politico*, Apr. 24, 2017, <https://www.politico.com/tipsheets/morning-education/2017/04/north-carolina-opens-investigation-into-for-profit-law-school-219931>.

¹⁰⁵⁴ Duncan Testimony, *Federal Civil Rights Enforcement Briefing*, p. 77 ("To see the current administration actually get rid of civil rights attorneys, I think speaks -- it tells you everything you need to know about their values. And I would say budgets tell you values, not words, and when you cut staff, you're walking back those commitments by definition.").

¹⁰⁵⁵ Duncan Statement, at 6.

In FY 2017, ED requested 753 FTEs for ED OCR, which was comparable to FY 2016, when ED requested 754 FTEs for ED OCR.¹⁰⁵⁶ In alignment with the decreased budget request for FY 2018, President Trump's first proposed budget only requested funds for 523 FTEs for ED OCR.¹⁰⁵⁷ These proposals contrast with ED OCR's actual staffing levels, with 563 FTEs in FY 2016, 579 FTEs in FY 2017, and 529 FTEs in FY 2018 through the annualized continuing resolution.¹⁰⁵⁸

Regarding their roles, in response to the Commission's Interrogatories, ED OCR reported that for FY 2016 and FY 2017, 403 FTEs and 370 FTEs (including General Attorneys, Investigators, Equal Opportunity Specialists, and Equal Opportunity Assistants) were assigned to work exclusively on enforcement-related activities.¹⁰⁵⁹ In addition to the full-time enforcement staff, a total of 14 and 11 investigative staff members worked part-time on enforcement-related activities in FY 2016 and FY 2017 respectively, including General Attorneys and Equal Opportunity Specialists.¹⁰⁶⁰ ED OCR did not have any outside contractors working on enforcement activities during FY 2016 or FY 2017.¹⁰⁶¹

ED OCR also told the Commission that it finalizes its staffing levels after it receives notification of its appropriated funds for a given fiscal year, and staffing levels are "set in a manner to allow [ED] OCR to best meet its mission while operating within its appropriated budget."¹⁰⁶² Moreover, several other factors may affect staffing levels, such as appropriations or hiring freeze directives, or attrition,¹⁰⁶³ and according to ED OCR, "[ED] OCR continually assesses its staffing needs in light of its complaint receipts, and for FY2018 has initiated the process of hiring for 65 positions."¹⁰⁶⁴

In its FY 2016 annual report, ED OCR stated that its general staffing level has historically decreased over time, despite the fact that its complaint volume has "exponentially increased."¹⁰⁶⁵ Between FY 2006 and 2016, the number of complaints filed with ED OCR increased by 188 percent.¹⁰⁶⁶ During that same time period, ED OCR staffing levels decreased by 11 percent.¹⁰⁶⁷

¹⁰⁵⁶ U.S. Dep't of Educ., *Fiscal Year 2017 Budget Summary and Background Information*, p. 75, <https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>; U.S. Dep't of Educ., *Fiscal Year 2016 Budget Summary and Background Information*, p. 70, <https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>.

¹⁰⁵⁷ U.S. Dep't of Educ., *Fiscal Year 2018 Budget Summary and Background Information*, p. 50, <https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf>.

¹⁰⁵⁸ *Ibid.*; U.S. Dep't of Educ., *Fiscal Year 2019 Budget Summary and Background Information*, p. 58, <https://www2.ed.gov/about/overview/budget/budget19/summary/19summary.pdf>.

¹⁰⁵⁹ U.S. Dep't of Educ., Response to USCCR Interrogatory No. 8, at 12 (noting that "[Office of Civil Rights] staffing fluctuates and responses to Interrogatory 8 reflect end-of-fiscal year data.")

¹⁰⁶⁰ *Ibid.*

¹⁰⁶¹ *Ibid.*, 12-13.

¹⁰⁶² U.S. Dep't of Educ., Response to Interrogatory 9, p. 14.

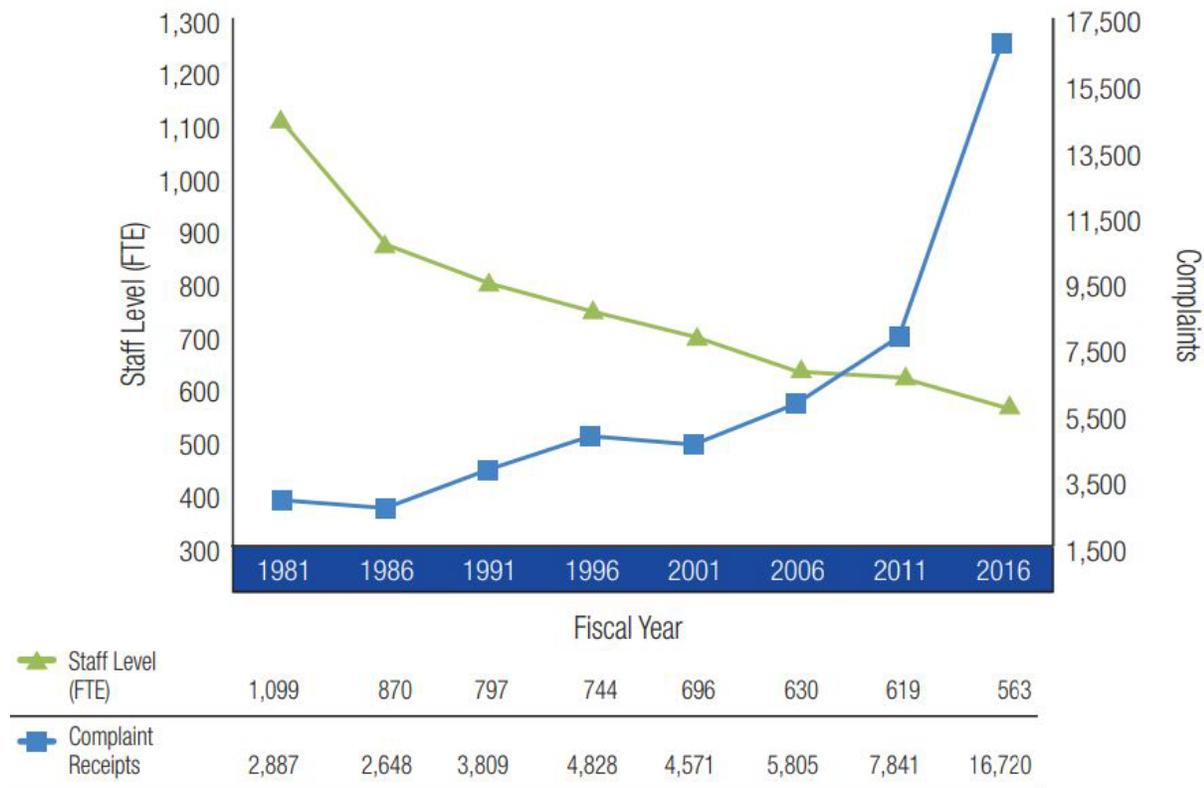
¹⁰⁶³ *Ibid.*

¹⁰⁶⁴ *Ibid.*

¹⁰⁶⁵ U.S. Dep't of Educ., Office of Civil Rights, *Fiscal Year 2016, Securing Equal Educational Opportunity: Report to the President and Secretary of Education*, p. 8, <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> [hereinafter ED OCR, *FY 16 Securing Equal Educational Opportunity*].

¹⁰⁶⁶ *Ibid.*, 7.

¹⁰⁶⁷ *Ibid.*, 8.

Figure 3.2: ED OCR Staffing Levels vs. Complaints Received FY 1981-2016

Source: U.S. Dep't of Education

Assessment

Prioritization for Civil Rights Agency-wide

In 2002, the Commission recommended that federal agencies “should ensure that civil rights enforcement is given priority through the organizational structure for civil rights, allocation of resources and staffing, and efforts to integrate civil rights into every component of the agency.”¹⁰⁶⁸

Organizational Structure

As the Commission has noted in the past, with the passage of the Department of Education Organization Act in 1979, Congress ensured that the Assistant Secretary of Education for Civil Rights would have a direct line to the Secretary of Education, and tasked the Assistant Secretary with providing civil rights leadership throughout ED.¹⁰⁶⁹

¹⁰⁶⁸ USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, supra note 1, at 47.

¹⁰⁶⁹ 20 U.S.C. § 3413.

ED OCR is currently led by Kenneth L. Marcus, Assistant Secretary of Education for Civil Rights, whom the U.S. Senate confirmed on June 7, 2018.¹⁰⁷⁰ The Assistant Secretary reports directly to the Secretary of Education, and is the principal advisor on civil rights matters, providing “overall direction, coordination, and leadership,” which indicates an effort to integrate civil rights into every component of the organization.¹⁰⁷¹

ED OCR enforces external civil rights matters at its headquarters in Washington, DC, as well as through its 12 regional offices around the country in:

- Atlanta
- Boston
- Chicago
- Cleveland
- Dallas
- Denver
- Kansas City
- New York
- Philadelphia
- San Francisco
- Seattle
- DC Metro¹⁰⁷²

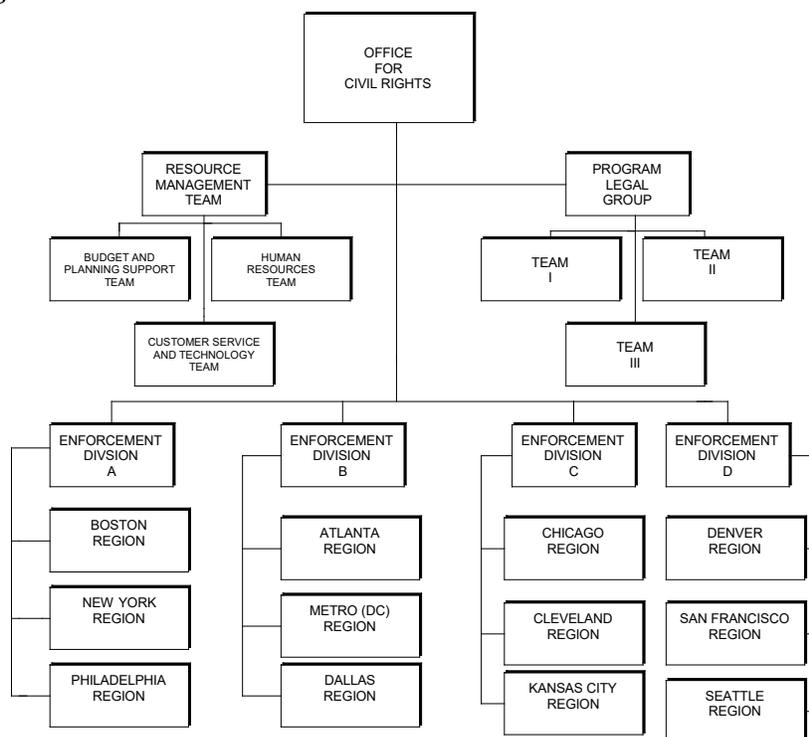
When all positions are filled, each regional office has a Regional Director and a Program Manager, a Chief Attorney, Team Leaders, Attorneys, Equal Opportunity Specialists, and administrative support positions.¹⁰⁷³

¹⁰⁷⁰ U.S. Dep’t of Educ., “Kenneth L. Marcus, Assistant Secretary for Civil Rights — Biography,” <https://www2.ed.gov/news/staff/bios/marcus.html> (accessed May 20, 2019) (Assistant Secretary Marcus served as the Staff Director of the Commission from 2004 to 2008; Marcus was appointed to the Commission Staff Director position in the second term of the George W. Bush Administration.).

¹⁰⁷¹ 20 U.S.C. § 3413 (a), (c); U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 7, at 10-11.

¹⁰⁷² ED OCR, *FY 16 Securing Equal Educational Opportunity*, *supra* note 1065, at 6.

¹⁰⁷³ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 7, at 10.

Figure 3.3: Organizational Structure of OCR

Source: U.S. Department of Education, Office for Civil Rights

Figure 3.3 displays ED OCR’s organizational structure in August of 2018.¹⁰⁷⁴ In its response to the Commission’s Interrogatories, ED OCR clarified that the Resource Management Team, the Program Legal Group, and all Enforcement Divisions report to the Assistant Secretary for Civil Rights, and there is a Deputy Assistant Secretary for Policy and Development, a Deputy Assistant Secretary for Management and Planning, a Deputy Assistant Secretary for Enforcement, a Deputy Assistant Secretary for Management, and senior counsel.¹⁰⁷⁵ ED OCR also noted that it had a Chief of Staff as a part of its senior staff in FY 2016 and FY 2017, and when vacancies in senior positions occur, staff may be designated to fill these vacancies on an “acting” basis.¹⁰⁷⁶

¹⁰⁷⁴ U.S. Dep’t of Educ., Response to Document Request No. 2, OCR Org Chart Dated Aug. 2018.

¹⁰⁷⁵ The Resource Management Team and the Budget and Planning Support Team are responsible for “planning, developing, and implementing budget, operational, and administrative policy for OCR.” The Program Legal Group “provides a range of legal services that can include: developing technical assistance materials, regulation development, developing policy guidance, consulting on novel cases from the enforcement offices, and helping to ensure that civil rights issues are appropriately addressed within the Department’s programs and initiatives and among federal agencies,” and administers the Civil Rights Data Collection. The Enforcement Division manages the operations of the regional offices and oversees ED OCR’s enforcement program. U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 7, at 11; *see also* ED OCR, *FY 16 Securing Equal Educational Opportunity*, *supra* note 1065, at 6.

¹⁰⁷⁶ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 7, at 11-12.

Strategic Planning and Self-Evaluation

ED as a whole published a Strategic Plan for fiscal years 2018-2022.¹⁰⁷⁷ This follows ED's previous strategic plan spanning fiscal years 2014-2018.¹⁰⁷⁸ The 2014-2018 plan includes equity as one of the six strategic goals for the four year period the plan covers.¹⁰⁷⁹ The 2018-2022 plan includes equal access to high-quality educational opportunities as a strategic objective under the larger strategic goal of supporting state and local efforts to improve learning outcomes for all preschool through grade 12 students in every community.¹⁰⁸⁰

The Assistant Secretary for Civil Rights is statutorily required to report annually to the Secretary of Education and the President summarizing the compliance and enforcement activities of the office.¹⁰⁸¹ The report must also identify significant civil rights or compliance problems for which the Assistant Secretary has recommended corrective action, but has not seen adequate progress made in the judgement of the Assistant Secretary.¹⁰⁸²

ED OCR has released every report since 1995 to the public, including the most recent report available which covers FY 2016.¹⁰⁸³ However, Commission research indicated that ED OCR has not published an FY 2017 or FY 2018 annual report, in violation of its statutory obligation.¹⁰⁸⁴ The Commission received written testimony from Fatima Goss Graves, President and CEO of the National Women's Law Center, expressing her concerns about the absence of recent annual reports from ED OCR, and stating that annual reports are an important civil rights enforcement tool, as they allow the public to see how ED OCR enforces statutes and regulations, facilitate Congressional oversight over agency enforcement efficacy, describe what the agency considers important about the state of civil rights, and facilitate agency self-evaluation which is critical to effective enforcement.¹⁰⁸⁵

¹⁰⁷⁷ U.S. Dep't of Educ., *Strategic Plan for Fiscal Years 2018-2022*, <https://www2.ed.gov/about/reports/strat/plan2018-22/strategic-plan.pdf> [hereinafter ED, *Strategic Plan FY 2018-2022*].

¹⁰⁷⁸ U.S. Dep't of Educ., *Strategic Plan for Fiscal Years 2014 – 2018*, <https://www2.ed.gov/about/reports/strat/plan2014-18/strategic-plan.pdf>.

¹⁰⁷⁹ *Ibid.*

¹⁰⁸⁰ ED, *Strategic Plan FY 2018-2022*, *supra* note 1077.

¹⁰⁸¹ 20 U.S.C. § 3413(b).

¹⁰⁸² *Id.* § 3413(b)(1).

¹⁰⁸³ U.S. Dep't of Educ., "Serial Reports Regarding OCR Activities," *supra* note 205.

¹⁰⁸⁴ 20 U.S.C. § 3413(b)(1).

¹⁰⁸⁵ *Id.*; see also Fatima Goss Graves, President and CEO, National Women's Law Center, Written Statement for the Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2019, at 4 [hereinafter Goss Graves Statement] ("[ED] OCR's reports are an important tool to inform the Department, Congress, the President, and the public of [ED] OCR's priorities and enforcement efforts."). See also Shahab Ahmed Mirza and Frank J. Bewkes, "Secretary DeVos Is Failing to Protect the Civil Rights of LGBTQ Students," *Center for American Progress*, Jul. 29, 2019, <https://www.americanprogress.org/issues/lgbt/reports/2019/07/29/472636/secretary-devos-failing-protect-civil-rights-lgbtq-students/> [hereinafter CAP, *Civil Rights of LGBTQ Students*] (noting that ED OCR has not published any annual reports during the Trump Administration, rendering it "not possible" to specifically analyze complaints in particular categories).

Complaint Processing, Agency-Initiated Charges, & Litigation

In FY 2016, ED’s independent Office of the Inspector General (ED OIG) published an audit of the effectiveness of ED OCR’s case resolution work stating that:

We found that OCR generally resolves discrimination complaints in a timely and efficient manner and in accordance with applicable policies and procedures. Specifically, we determined that OCR resolves discrimination complaints in a timely fashion at a high overall rate and does not have a large backlog of unresolved cases. The primary factors that contribute to OCR’s timely and efficient resolution of complaints include efficient case resolution methods, consistency in case investigation practices, and effective case tracking and information management systems.¹⁰⁸⁶

The Inspector General also concluded that:

OCR has generally developed clearly defined procedures that allow regional staff to follow established policy when resolving the different types of discrimination complaints and allow management to provide clear direction to regional staff when complications or questions arise. We also noted OCR management has created a control environment that ensures the investigative teams understand the importance of compliance with policies and procedures. As a result, OCR is able to ensure that complaints are processed and resolved consistently, efficiently, and effectively across the regions, in line with OCR’s statutory and regulatory responsibilities.¹⁰⁸⁷

ED OIG’s semiannual report to Congress covering the first half of FY 2016 summarized the findings quoted above from the audit of ED OCR, and noted that an increasing workload combined with decreasing resources “could have a negative effect on complaint resolution,” because staff may not be able to maintain their levels of productivity.¹⁰⁸⁸

The ED OIG evaluation finding high levels of efficacy is notable given the high volume of investigations ED OCR processed during the time period it examined. In FY 2016, ED OCR received 16,720 complaints and initiated 13 proactive investigations.¹⁰⁸⁹ ED OCR stated that this complaint volume was a record high and was partly attributed to a single individual who filed

¹⁰⁸⁶ U.S. Dep’t of Educ. Office of the Inspector General, *The Resolution of Discrimination Complaints by the Department’s Office for Civil Rights*, p. 2, Dec. 10, 2015, <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a19n0002.pdf> [hereinafter ED OIG, *Resolution of Discrimination Complaints by OCR*].

¹⁰⁸⁷ *Ibid.*, 3.

¹⁰⁸⁸ *Ibid.*

¹⁰⁸⁹ U.S. Dep’t of Educ., Office for Civil Rights, *Fiscal Year 2016 Report to the President and Secretary of Education*, p. 5, <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> [hereinafter ED OCR, *FY 16 Report to the President and Secretary*] (ED OCR uses the term “proactive investigation” to indicate a compliance review of a recipient of federal financial assistance).

6,201 Title IX complaints against elementary and secondary schools and school districts.¹⁰⁹⁰ In comparison, in FY 2015, ED OCR received 10,392 total complaints.¹⁰⁹¹ In FY 2017, the total number of complaints ED OCR received decreased to 12,837.¹⁰⁹² In FY 2018 ED OCR received 12,435 complaints.¹⁰⁹³ The number of cases ED OCR investigated for FY 2016 and FY 2017 were 7,396 and 8,577 respectively.¹⁰⁹⁴ In FY 2018, ED OCR resolved 14,074 complaints, a number that includes cases that resulted in dismissal, administrative closure, a finding of no violation, an early complaint resolution, or a resolution agreement, including cases received prior to FY 2018.¹⁰⁹⁵

These numbers differ slightly from case numbers that ED OCR provided USCCR in its Interrogatory/document request responses. ED OCR reported to USCCR that it opened 16,733 cases in FY 2016 and 12,839 cases in FY 2017.¹⁰⁹⁶ ED OCR reported that it resolved 8,631 cases in FY 2016, and in sharp contrast, resolved 17,821 cases—more than double—in FY 2017.¹⁰⁹⁷ As of the close of FY 2016 and FY 2017 (September 30), 12,055 cases and 7,107 cases were pending respectively.¹⁰⁹⁸ See figure 3.4.

¹⁰⁹⁰ Ibid., 24.

¹⁰⁹¹ Ibid., 24.

¹⁰⁹² Ibid., 24.

¹⁰⁹³ U.S. Dep’t of Educ., “Press Release: New Data Show Secretary DeVos’ Reforms to the Office for Civil Rights are Driving Better Results for Students,” Jul. 10, 2019, <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students> [hereinafter ED, “Reforms to OCR are Driving Better Results for Students”].

¹⁰⁹⁴ ED OIG, *Resolution of Discrimination Complaints by OCR*, *supra* note 1086. (noting that “[t]he selection of investigated cases is based on cases either still pending or cases that progressed beyond dismissal and were resolved with administrative closure, no violation, Early Complaint Resolution, or change with or without a resolution agreement”).

¹⁰⁹⁵ ED, “Reforms to OCR are Driving Better Results for Students,” *supra* note 1093.

¹⁰⁹⁶ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 10, at 15, and Appendix 1, at 1.

¹⁰⁹⁷ Ibid.

¹⁰⁹⁸ Ibid. As discussed above, the number of pending cases reported means cases that were not resolved by the end of the fiscal year.

Figure 3.4: OCR Status of Complaints for FY 2016 and FY 2017

Attachment 1
U.S. Commission on Civil Rights' February 9, 2018 Interrogatories¹

	FY2016	FY2017
Cases Received	16,733	12,839
Title VI	1,300	1,280
Title IX	7,072	2,249
Disability	5,065	5,569
Age	108	156
Multiple Jurisdictions ²	1,656	1,702
Others ³	1,532	1,883
Cases Resolved	8,631	17,821
Dismissal & Administrative Closures ⁴	6,492	14,785
Insufficient Evidence	1,017	1,255
FRBP/ECR ⁵	309	292
Change without agreement	115	134
Change with agreement	698	1,355
Cases Pending as of September 30	12,055	7,107
Cases Closed Monitoring	368	569
GPRA – Complaints Due by Day 180	9,823	17,476
Complaints Due by Day 180 Resolved by Day 180	7,625	14,185
<i>% of Complaints Due by Day 180 Resolved by Day 180</i>	<i>78%</i>	<i>81%</i>
GPRA – Complaints Pending as of 9/30	11,936	7,020
Complaints Pending as of 9/30 over 180 Days	2,715	4,041
<i>% of Complaints Pending as of 9/30 over 180 Days</i>	<i>23%</i>	<i>58%</i>

¹ Data is based on end-of-year information.

² *Multiple Jurisdictions* are combination of Title VI, IX, Disability, Boy Scouts of America Equal Access Act, and/or Age.

³ *Others* are combination of Boy Scouts of America Equal Access Act, jurisdiction not yet identified, no jurisdiction, or unknown.

⁴ Prior to the March 5, 2018 revision of OCR's CPM, there was a category for administrative closures, as well as dismissals, but effective March 5, 2018, circumstances that previously would have resulted in an administrative closure are included among the reasons for dismissal.

⁵ Prior to the March 5, 2018 revision of OCR's CPM, OCR had a similar process called Early Complaint Resolution (ECR).

According to the figures ED OCR reported to the Commission, in FY 2016, the largest number of complaints received (7,072) were Title IX complaints (regarding sex discrimination), which coincides with the information presented in the FY 2019 Budget Request that reported a single

individual who filed 6,201 Title IX complaints against elementary and secondary schools and school districts.¹⁰⁹⁹ In FY 2017, the largest number and percent of complaints received (5,569/43.4 percent) were complaints alleging discrimination against individuals with disabilities.¹¹⁰⁰

In contrast with the FY 2016 ED OIG report concluding that at that time ED OCR generally effectively and timely resolved complaints in accord with the law, a more recent evaluation from the Center for American Progress focused specifically on ED OCR resolution of sexual orientation and gender identity [SOGI] specific complaints concluded that “SOGI-related complaints were more than nine times less likely to result in corrective action under the Trump Administration than under the Obama Administration.”¹¹⁰¹ The report noted that in the Obama Administration ED OCR found no violation or insufficient evidence of a violation in 12.2 percent of sexual orientation and gender identity discrimination complaints, compared to 6.1 percent of such findings in the Trump Administration.¹¹⁰² These data reflect that the Obama Administration found no violation twice as often as the Trump Administration does for this category of cases. As the report explained:

Actions taken by the Obama Administration to protect transgender students had been criticized as overreaching and mandating things that schools weren’t ready for. However, the data show that 12 percent of complaints resulted in a finding of no violation or insufficient evidence – twice as much as under the Trump Administration. Recipients were more likely to be found in compliance with Title IX under investigations into SOGI complaints under the previous administration. This finding suggests that schools and colleges were prepared to support their transgender students, and the joint ED-DOJ guidance issued in 2016 was not unduly burdensome on recipients of federal funding.¹¹⁰³

The report also took issue with ED OCR’s public claim that it is delivering more change through its current practices:

While [ED] OCR claimed in a July 2019 press release that “instead of seeing every case as an opportunity to advance a political agenda, [OCR is] focused on the needs of each individual student and on faithfully executing the laws [...]” Assistant Secretary for Civil Rights Kenneth Marcus’s claim is countered by the very data published in the release. Author analysis of the data show that the rate of civil rights complaints resolved with a change benefitting the student actually decreased from 13 percent between fiscal years 2009 and 2016 to 11 percent in fiscal years 2017 and 2018.¹¹⁰⁴

¹⁰⁹⁹ See *supra* Figure 3.4.

¹¹⁰⁰ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 10, at 15, and Appendix 1, at 1.

¹¹⁰¹ CAP, *Civil Rights of LGBTQ Students*, *supra* note 1085.

¹¹⁰² *Ibid.*

¹¹⁰³ *Ibid.*

¹¹⁰⁴ *Ibid.* Indeed, the report noted that SOGI complaints were “nine times less likely to result in corrective action [in the Trump Administration] than under the Obama Administration.” *Ibid.*

ED OCR noted in its response to the Commission's Interrogatories that it had dismissed or administratively closed 6,492 complaints in FY 2016, and that number more than doubled in FY 2017, with 14,785 complaints dismissed or administratively closed.¹¹⁰⁵ See Figure 3.4. These case closure rates have raised concern among analysts who have evaluated ED OCR case resolution data during the time period investigated. For example, the Center for American Progress reported that ED OCR during the Trump Administration closed 91.5 percent of complaints related to sexual orientation and gender identity through dismissal or administrative closure, whereas in the Obama Administration ED OCR closed 65.4 percent of such cases through these means.¹¹⁰⁶ A ProPublica analysis of more than 40,000 ED OCR cases resolved during the time period the Commission studied for this report characterized ED OCR in the Trump Administration as having "scuttled" cases on the ground that "efficiency is the Trump Administration's priority."¹¹⁰⁷

ED OCR also noted that "[p]rior to the March 5, 2018 revision of OCR's [Case Processing Manual], there was a category for administrative closures, as well as dismissals, but effective March 5, 2018, circumstances that previously would have resulted in an administrative closure are included among the reasons for dismissal."¹¹⁰⁸ Prior to March 5, 2018, ED OCR would administratively close a complaint if any of the following criteria were met:

- (a) The same complaint allegations have been filed by the complainant against the same recipient with another federal, state, or local civil rights enforcement agency or through a recipient's internal grievance procedures, including due process proceedings, and
 1. for pending complaint allegations, OCR anticipates that there will be a comparable resolution process under comparable legal standards; i.e., all allegations will be investigated, appropriate legal standards will be applied, and any remedies secured will meet OCR's standards. OCR will advise the complainant that she or he may re-file within 60 days of the completion of the other entity's action. Generally, OCR will not conduct its own investigation; instead, OCR reviews the results of the other entity's determination and determines whether the other entity provided a comparable process and met appropriate legal standards.
 2. for resolved complaint allegations, the resolution meets OCR regulatory standards; i.e., all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet OCR's standards.

¹¹⁰⁵ Ibid.

¹¹⁰⁶ Ibid.

¹¹⁰⁷ Annie Waldman, "DeVos Has Scuttled More than 1,200 Civil Rights Probes Inherited From Obama," *ProPublica*, Jun. 21, 2018, <https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama> (accessed Oct. 16, 2019) [hereinafter Waldman, "DeVos Has Scuttled More than 1,200 Civil Rights Probes Inherited From Obama"].

¹¹⁰⁸ U.S. Dep't of Educ., Response to USCCR Interrogatory 11, at 17, n.12.

(b) The same allegations have been filed by the complainant against the same recipient with state or federal court. An OCR complaint may be re-filed within 60 days following termination of the court proceeding if there has been no decision on the merits or settlement of the complaint allegations. (Dismissal with prejudice is considered a decision on the merits.)

(c) The complaint allegations are foreclosed by previous decisions of the federal courts, the U.S. Secretary of Education, or the U.S. Department of Education's Civil Rights Reviewing Authority.

(d) The complaint allegations are foreclosed by OCR policy determinations. (e.g., OCR's policy to refrain from assessing the appropriateness of decisions made by a group of knowledgeable persons convened pursuant to Section 504, or to refrain from assessing the appropriateness of pedagogical decisions.)

(e) OCR obtains credible information indicating that the allegations raised by the complaint have been resolved, and there are no class-wide allegations. In such a case, OCR will attempt to ascertain the apparent resolution. If OCR determines that there are no current allegations appropriate for further complaint resolution, the complaint will be closed.

(f) The Enforcement Office determines that its ability to complete the investigation is substantially impaired by the complainant's or injured party's refusal to provide information that is reasonably accessible to the complainant and is necessary for investigation of the complaint.

(g) The Enforcement Office determines that its ability to complete the investigation is substantially impaired by its inability to contact the complainant in order to obtain information that is necessary for investigation of the complaint. The Office will include documentation in the case file of its efforts to contact the complainant by phone, in writing, or via electronic mail to request the necessary information. OCR will not close the complaint until more than 20 calendar days have passed since the date of OCR's attempt to contact the complainant.¹¹⁰⁹

ED OCR noted in its response to interrogatories that any basis that would have previously resulted in an administrative closure would now be grounds for ED OCR to dismiss the complaint under the updated CPM procedures.¹¹¹⁰

¹¹⁰⁹ U.S. Dep't of Educ., "OCR Case Processing Manual (CPM) Archived Information," Art. I § 110 (Jan. 2010) <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm-2010.html#ftnref4> [hereinafter ED OCR, "Case Processing Manual (Archived)"].

¹¹¹⁰ U.S. Dep't of Educ., Response to USCCR Interrogatory No. 11, at 16-17; *see also* U.S. Dep't of Educ., Office for Civil Rights, Case Processing Manual, Nov. 19, 2018, pp. 9-12, <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [hereinafter ED OCR, Case Processing Manual].

During the time period studied in this report, ED OCR resolved thousands of cases of allegations of discrimination on the basis of race, national origin, sex, disability, and/or retaliation. For example, after an ED OCR investigation identified civil rights concerns, including that black students were consistently overrepresented in the district's disciplinary actions, in April 2016, Oklahoma City Public Schools agreed to reform their school discipline policies.¹¹¹¹ ED OCR's review of the district's discipline practices revealed concerns about incomplete or inconsistent recordkeeping, data collection, provision of due process rights, administration of discipline, and information provided to parents of suspended students, as well as a lack of clarity in misconduct resulting in disciplinary sanctions such as "defiance of authority" or "disrespect."¹¹¹² In its agreement with ED OCR, the district committed to implement several changes including staff training, a reevaluation of disciplinary policies, and measures to change the culture within the district.¹¹¹³

In November of 2016, ED OCR resolved a case with East Hartford Public Schools in Connecticut, after finding that the district discriminated against limited English proficient (LEP) parents and guardians, including that the district had highlighted in red on its website that LEP families seeking to register their children in their district should bring their own translators, facially violating Supreme Court precedent in *Plyler v. Doe* requiring that school districts not deny students education based on national origin.¹¹¹⁴ An ED OCR agreement with the district committed the district to develop a uniform policy for assisting LEP parents and notifying them of the availability of free translation services.¹¹¹⁵

In March of 2017, ED OCR signed an agreement with Wittenberg University mandating several changes to the University's Title IX investigation and hearing process including revisions to Title IX policies and procedures and offering to reimburse two students adversely affected by the University's policies for counseling. In November 2016, ED OCR entered into an agreement with Yonkers Public Schools after an ED OCR investigation finding that the district discriminated against students with disabilities by failing to place them in a regular educational environment even when students would have been able to participate in that environment with the help of supplementary aids or services.¹¹¹⁶ The ED OCR resolution agreement required that the district remind all teachers and administrators about district policies regarding students with disabilities and implement new training.¹¹¹⁷

¹¹¹¹ U.S. Dep't of Educ., "Oklahoma City Public Schools, U.S. Education Department Reach Settlement to Address Disproportionate Discipline of Black Students," Apr. 20, 2016, <https://www.ed.gov/news/press-releases/oklahoma-city-public-schools-us-education-department-reach-settlement-address-disproportionate-discipline-black-students>.

¹¹¹² ED OCR, *FY 16 Securing Equal Educational Opportunity*, *supra* note 1065, at 22-23.

¹¹¹³ *Ibid.*

¹¹¹⁴ U.S. Dep't of Educ., *Resolution Letter: Case No. 01-15-5001 East Hartford Public Schools*, Nov. 30, 2016, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01155001-a.pdf> [hereinafter ED, *Resolution Letter: Case No. 01-15-5001*]; see also *Plyler v. Doe*, 457 U.S. 202 (1982).

¹¹¹⁵ ED, *Resolution Letter: Case No. 01-15-5001*, *supra* note 1114.

¹¹¹⁶ *Ibid.*

¹¹¹⁷ *Ibid.*

In November 2017, ED OCR entered into a resolution agreement with the Loleta Union Elementary School District, in California, over alleged verbal and physical harassment and discriminatory discipline of Native American students, including students with disabilities.¹¹¹⁸ Students and their families reported that harassment by school administrators and staff was part of a pattern of racial discrimination that included discriminatory discipline practices and a failure to provide special education services to Native American students with disabilities. ED OCR found repeated cases of “unwelcome physical behaviors and derogatory statements made by the former principal, and/or staff members to Native American students.”¹¹¹⁹ The investigation found many incidents of disparate treatment. For example, a Native American student was suspended six times in a single school year without a disability evaluation even though his student file included a note from a teacher saying his “behavior is keeping him from learning” and a staff member had recommended evaluation and testing.¹¹²⁰ The letter also described a fourth-grade Native American student who had 43 behavioral incidents in a single school year, 38 of which the school described as “major” but whom the school did not evaluate for a disability even though her teacher noted the student had problems focusing and repeated behavioral issues ranging from tantrums to breaking down in tears in class.¹¹²¹ ED OCR investigators also found that there was a statistically significant difference in the number of discipline referrals to school officials, the number of in-school and out-of-school suspensions, and Native students were overrepresented in the number of referrals to law enforcement—these students made up 30 percent of the student body in 2011-12 and 8 percent in 2012-13, but 100 percent of the referrals from 2011-2013.¹¹²² The Resolution Agreement included consultants, experts and a stakeholder equity committee along with reporting requirements and data-based corrective action plans to help the district come into compliance with its civil rights obligations to provide equal access to education for all, and to ensure against discrimination and harassment based on race or national origin.¹¹²³

In August 2018, ED OCR entered into a voluntary resolution agreement with Florence City School District in Alabama to ensure that announcements sent by the school district were published in an accessible format.¹¹²⁴ The agreement required, in part, that the school district develop accessibility features for its website, and required the district to periodically send updates to ED OCR demonstrating that the district remained in compliance with the agreement.¹¹²⁵

¹¹¹⁸ See U.S. Dep’t of Educ., Office for Civil Rights, Letter to Superintendent John Sutter for the Loleta Union Elementary School District (Nov. 22, 2017), p. 8, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-a.pdf> [hereafter ED OCR, Loleta Union Letter to Superintendent]; U.S. Dep’t of Educ., Office for Civil Rights, Resolution Agreement, Loleta Union Elementary School District, Case No. 09-14-1111, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141111-b.pdf> [hereinafter ED OCR, Loleta Union Resolution Agreement, Case 09-14-1111].

¹¹¹⁹ ED OCR, Loleta Union Letter to Superintendent, *supra* note 1118, at 8.

¹¹²⁰ *Ibid.*, 26-27.

¹¹²¹ *Ibid.*, 27.

¹¹²² *Ibid.*, 12 (enrollment), 13 (disciplinary referrals), 13-15 (suspensions), 17 (law enforcement referrals).

¹¹²³ ED OCR, Loleta Union Resolution Agreement, Case 09-14-1111, *supra* note 1118.

¹¹²⁴ U.S. Dep’t of Educ. Office for Civil Rights, Resolution Agreement, Florence County School District Complaint Number 04-18-1249, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04181249-b.pdf>.

¹¹²⁵ *Ibid.*

Process of Investigation and Case Resolution

Consistent with its regulatory requirements,¹¹²⁶ ED OCR has a formalized complaint resolution process that begins with complainants submitting written information for ED OCR to examine, “pursuant to applicable statutes and regulations.”¹¹²⁷ ED OCR’s Case Processing Manual states that it will provide reasonable assistance to complainants with disabilities and LEP individuals.¹¹²⁸ When ED OCR receives written information, it must undergo an evaluation process to determine whether the information constitutes a “complaint” and requires a further investigation.¹¹²⁹

¹¹²⁶ 28 C.F.R. § 42.408.

¹¹²⁷ ED OCR, Case Processing Manual, *supra* note 1110, at 4.

¹¹²⁸ *Ibid.*

¹¹²⁹ *Ibid.*

Figure 3.5: ED OCR Complaint Process



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Source: U.S. Dep't of Education

Under its current practices, ED OCR will not pursue a further investigation if:

- Correspondence received is anonymous
- Only courtesy copies of information/complaints filed with another entity or person were received
- Written information is seeking advice or information from ED OCR
- Information is communicated orally, and not in writing
- Subject matter of the allegations falls outside of ED OCR’s jurisdiction
- Written information relies exclusively on statistical data to present an allegation of discrimination.¹¹³⁰

The Case Processing Manual goes on to state that if ED OCR determines that the subject matter of the allegations falls outside its jurisdiction, it will determine if the complaint should be investigated by another federal government agency and if so, will forward it to the appropriate agency and notify the complainant.¹¹³¹ The following types of complaints may be referred to other agencies:

- Complaints against proprietary schools, or “privately owned, profit-making enterprises that teach a trade or skill” may be delegated to the U.S. Department of Veterans Affairs;¹¹³²
- Complaints against proprietary schools operated by a hospital must be delegated to the U.S. Department of Health and Human Services;¹¹³³
- Complaints claiming a service violation of the Age Discrimination Act of 1975 may be delegated to the Federal Mediation and Conciliation Service;¹¹³⁴
- Complaints claiming a violation of the Americans with Disabilities Act that OCR does not have jurisdiction over are referred to the DOJ, and OCR will notify DOJ if they receive a complaint claiming discrimination “by a recipient against which DOJ represents the United States as a party in pending litigation.”¹¹³⁵

¹¹³⁰ ED OCR, Case Processing Manual, *supra* note 1110, at 4-6; Andrew Kreighbaum, “Education Department Updates Manual for Civil Rights Investigations,” *Inside Higher Ed*, Nov. 21, 2018, <https://www.insidehighered.com/quicktakes/2018/11/21/education-department-updates-manual-civil-rights-investigations> (The Department of Education’s Office for Civil Rights case processing manual was updated significantly during the Trump Administration, including adding a controversial provision, later removed, that allowed Department of Education’s Office for Civil Rights to dismiss complaints from people who filed multiple complaints under the same or similar bases); *see also* Laura Meckler, “Education Department’s civil rights office retreats, will consider claims filed en masse,” *The Washington Post*, Nov. 20, 2018, https://www.washingtonpost.com/local/education/education-departments-civil-rights-office-retreats-will-consider-claims-filed-en-masse/2018/11/20/a7ed362a-ed05-11e8-96d4-0d23f2aaad09_story.html?utm_term=.d71a7772a920.

¹¹³¹ 34 C.F.R. § 100.2 (2000); 34 C.F.R. § 105 (2000); 34 C.F.R. § 108.2 (2000); ED OCR, Case Processing Manual, *supra* note 1110, at 6.

¹¹³² 38 C.F.R. § 18a.1(a) (1989); ED OCR, Case Processing Manual, *supra* note 1110, at 26.

¹¹³³ 38 C.F.R. § 18a.1(a); ED OCR, Case Processing Manual, *supra* note 1110, at 26.

¹¹³⁴ 34 C.F.R. § 110.32(a) (2000); ED OCR, Case Processing Manual, *supra* note 1110, at 25.

¹¹³⁵ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 4, at 9; *see also* Ch. 1, Department of Justice Civil Rights Division, Federal Coordination and Compliance Section.

ED OCR's complaint processing manual states that it notifies complainants when it evaluates written information and determines the information to constitute a complaint under its jurisdiction.¹¹³⁶ ED OCR will then determine whether the allegations in the complaint are timely, which based on federal regulations, means that the complaint was filed within "180 calendar days of the date of the alleged discrimination."¹¹³⁷ If the complaint was not timely, the complainant has the opportunity to request a waiver, which can be granted if "the time for filing is extended by the responsible Department official or his designee."¹¹³⁸

Investigations may be opened through the complaint process, or through agency-initiated compliance reviews.¹¹³⁹ Available data indicates that most arrive through complaints as in FY 2016, ED OCR reported that it initiated 13 proactive compliance evaluations while resolving 8,625 cases overall.¹¹⁴⁰

Federal regulations require:

The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part [Title VI]. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.¹¹⁴¹

Importantly, this regulatory language mandates that ED OCR must investigate "whenever" information indicates a possible failure to comply with the civil rights laws ED OCR enforces.¹¹⁴² The marked increase in case dismissal and closure rates in Fiscal Years 2017 and 2018 raise questions about whether ED OCR is meeting this regulatory mandate.

The current complaint processing manual provides that during the evaluation stage, an allegation or a complaint can be dismissed if it does not fall under one of the laws or regulations that ED OCR enforces, lacks factual detail, or is "so speculative, conclusory or incoherent that ED OCR

¹¹³⁶ 34 C.F.R. § 100.7 (2000); ED OCR, Case Processing Manual, *supra* note 1110, at 7.

¹¹³⁷ *Ibid.*, 8; 34 C.F.R. § 100.7(b) (2000) <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>; *see also* 34 C.F.R. § 100.7(b) (2019).

¹¹³⁸ 34 C.F.R. § 100.7(b); ED OCR, Case Processing Manual, *supra* note 1110, at 8-9.

¹¹³⁹ 34 C.F.R. § 100.7(a) and (b).

¹¹⁴⁰ ED OCR, *FY 16 Securing Equal Educational Opportunity*, *supra* note 1065, at 5. As noted above, ED OCR did not publish an FY 2017 or FY 2018 Annual Report. *See supra* notes 1084.

¹¹⁴¹ 34 C.F.R. § 100.7(c). These requirements similarly apply to ED OCR's investigation of discrimination on the basis of disability and sex. *See* 34 C.F.R. § 104.61 (stating that "The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in 100.6-100.10 and part 101 of this title) and 34 C.F.R. § 106.71 (stating that "The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, part 101).

¹¹⁴² *Id.*

cannot infer that discrimination or retaliation may have occurred or may be occurring.”¹¹⁴³ Complaints or allegations may also be dismissed if they are not timely and a waiver is not granted, if ED OCR lacks jurisdiction, or for other administrative reasons.¹¹⁴⁴ If an allegation is dismissed, ED OCR will notify the complainant in writing.¹¹⁴⁵ When ED OCR dismisses a complaint or allegation, it is considered resolved and the complaint will be closed.¹¹⁴⁶

If the allegation is not dismissed, ED OCR’s current complaint processing manual provides that ED OCR can open the complaint allegations for investigation or utilize the Rapid Resolution Process (RRP), where a case resolution is expedited during the evaluation stage or after issuing a letter of notification.¹¹⁴⁷ This is a departure from the earlier ED OCR process in the previous version of the Case Processing Manual issued in February 2015, in which RRP was only available in substantive areas deemed by ED OCR to be appropriate for RRP resolution.¹¹⁴⁸ ED OCR’s current practice as described in its updated complaint processing manual results in the Rapid Resolution Process being available for any case not dismissed during the evaluation stage of the complaint, which is a significant change from previous ED OCR practice that only allowed RRP in limited circumstances.¹¹⁴⁹

Another path to resolution is through mediation. If ED OCR determines that a complaint is appropriate for mediation, ED OCR starts by facilitating a dialogue between the parties involved through the process entitled Facilitated Resolution Between the Parties.¹¹⁵⁰ During this process, ED OCR serves as “an impartial, confidential facilitator” between the parties that encourages both parties to “work expeditiously and in good faith toward a mutually acceptable resolution.”¹¹⁵¹ In FY 2016, the most recent fiscal year for which data was publicly available, ED OCR resolved 309 complaints through its mediation process.¹¹⁵² If the informal resolution process fails:

[C]ompliance with this part [Title VI] may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.¹¹⁵³

¹¹⁴³ 34 C.F.R. § 100.7(c); ED OCR, Case Processing Manual, *supra* note 1110, at 10.

¹¹⁴⁴ ED OCR, Case Processing Manual, *supra* note 1110, at 10.

¹¹⁴⁵ *Ibid.*, 9.

¹¹⁴⁶ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 11, p. 16.

¹¹⁴⁷ ED OCR, Case Processing Manual, *supra* note 1110, at 12.

¹¹⁴⁸ ED OCR, “Case Processing Manual (Archived),” *supra* note 1110, at 16-17.

¹¹⁴⁹ 34 C.F.R. § 100.7.

¹¹⁵⁰ ED OCR, Case Processing Manual, *supra* note 1110, at 13.

¹¹⁵¹ *Ibid.*; 34 C.F.R. § 100.7(d).

¹¹⁵² ED OCR, *FY 16 Securing Equal Educational Opportunity*, *supra* note 1065, at 21.

¹¹⁵³ 34 C.F.R. § 100.8; *see also*, 34 C.F.R. § 104.61 (providing that complaints and compliance investigations initiated under Section 504 of the Rehabilitation Act will follow procedures applicable to Title VI of the Civil Rights Act of

Whether through a compliance investigation or a complaint-initiated process, if ED OCR discovers that an entity is noncompliant with a resolution agreement or the laws and regulations it enforces, ED OCR says that it will issue a notice of deficiencies and request that appropriate action is taken to remediate such deficiencies.¹¹⁵⁴ Where ED OCR has secured a resolution agreement with a recipient, ED OCR will continue monitoring the recipient until ED OCR has determined that the recipient has “fully and effectively implemented the terms of the resolution agreement.”¹¹⁵⁵ If ED OCR determines that the entity has failed to comply with the terms and obligations of the agreement, then ED OCR may take action to enforce the agreement.¹¹⁵⁶ If ED OCR and the entity cannot reach an agreement, or if the entity violates an agreement, then ED OCR has authority to initiate enforcement actions, and may suspend, terminate, or refuse to grant or continue financial assistance, or refer the case to DOJ for litigation.¹¹⁵⁷

But before any enforcement action, ED OCR must first seek voluntary compliance.¹¹⁵⁸ This is true in the case of investigations prompted by complaints or proactive compliance evaluation.¹¹⁵⁹ Once ED OCR shares a proposed resolution agreement with the recipient, then the recipient has 90 days to reach a formal resolution agreement with ED OCR.¹¹⁶⁰ In this circumstance, the complaint is resolved when the recipient “enters into and fulfills the terms of the resolution agreement.”¹¹⁶¹ If an education recipient of federal funds does not comply voluntarily, ED OCR may initiate an enforcement action after first providing the federal funds recipient with notice and an opportunity for formal administrative hearing before a hearing examiner.¹¹⁶² The hearing examiner would either issue an initial decision, from which a federal funds recipient could appeal to the Secretary or another authority designated by the Secretary,¹¹⁶³ or the federal funds recipient could certify the record for decision by the reviewing authority.¹¹⁶⁴ Any adverse decision from a hearing examiner or reviewing authority would identify findings and the requirement or requirements with which the federal funds recipient is found not to comply.¹¹⁶⁵ If the Secretary were not the reviewing authority, either the federal funds recipient or ED OCR could request Secretary review of the

1964 at 34 C.F.R. §§ 100.6-100.10, 101); 34 C.F.R. § 106.71 (providing that complaints and compliance investigations initiated under Title IX of the Education Amendments of 1972 will follow procedures applicable to Title VI of the Civil Rights Act of 1964 at 34 C.F.R. §§ 100.6-100.10, 101).

¹¹⁵⁴ ED OCR, Case Processing Manual, *supra* note 1110, at 22-23.

¹¹⁵⁵ *Ibid.*, 22.

¹¹⁵⁶ 34 C.F.R. §100.8.; ED OCR, Case Processing Manual, *supra* note 1110, at 23.

¹¹⁵⁷ 34 C.F.R. §100.8(a); ED OCR, Case Processing Manual, *supra* note 1110, at 22.

¹¹⁵⁸ 20 U.S.C. § 1682 (for Title IX; there are analogous statutory provisions for Title VI and the other statutes OCR enforces); 34 C.F.R. § 100.8(a), (c).

¹¹⁵⁹ 34 C.F.R. §§ 100.7 – 100.8.

¹¹⁶⁰ ED OCR, Case Processing Manual, *supra* note 1110, at 18. Of note, ED OCR instituted this 90-day limit on negotiations in 2014 as a means to ensure effective civil rights enforcement. *See* White House Task Force to Protect Students From Sexual Assault, *Not Alone*, *supra* note 332, at 19.

¹¹⁶¹ ED OCR, Case Processing Manual, *supra* note 1110, at 19.

¹¹⁶² 34 C.F.R. §§ 100.8(c), 100.9.

¹¹⁶³ *Id.* § 100.13(d).

¹¹⁶⁴ *Id.* § 100.10(a)-(c).

¹¹⁶⁵ *Id.* § 100.10(d).

decision, or the Secretary could choose on his or her own to review the decision.¹¹⁶⁶ Following this administrative review process, a federal funds recipient that did not succeed through this process could seek judicial review,¹¹⁶⁷ including “at any time” requesting full restoration of fund eligibility.¹¹⁶⁸ To secure fund eligibility, the federal funds recipient would need to show either that the recipient had satisfied the terms and conditions of the Department’s final decision or that the recipient had come into statutory compliance and would continue in future so to comply.¹¹⁶⁹

Performance Criteria

ED OCR strives to resolve complaints within 180 days of receipt, noting that the Government Performance and Results Act of 1993 (GPRA) performance measures it has chosen for itself are based upon the percentage of complaints resolved within that time frame, and the percentage of complaints that are pending past that 180 day mark.¹¹⁷⁰ In its response to the Commission’s Interrogatories, ED OCR reported that it resolved 78 percent of its complaints due within 180 days in FY 2016, and resolved 80 percent of its complaints within 180 days in FY 2017.¹¹⁷¹ Furthermore, it reported that 11,936 complaints were pending¹¹⁷² at the end of FY 2016, and this number fell to 7,020 pending complaints at the end of FY 2017.¹¹⁷³

Further ED OCR told the Commission that it measures its efficacy through indicators regarding its case processing, such as internal management matters and the performance of staff,¹¹⁷⁴ which includes tracking the number of cases assigned and investigated per staff member.¹¹⁷⁵ To help make ED OCR more efficient, “[ED] OCR increased staff training opportunities and reduced associated costs by shifting from live training and meetings to more cost-efficient online training and videoconferencing.”¹¹⁷⁶ They also established an online presence by updating their website, publishing an “OCR Frequently Asked Questions Hub,”¹¹⁷⁷ and publishing policy guidance as well as case documents to “maximize [ED] OCR enforcement staff time on compliance activities” and transparency.¹¹⁷⁸

A ProPublica investigation of case closure rates during the time period the Commission studied reflects dramatic reduction in time to close cases and notably less systematic investigation

¹¹⁶⁶ *Id.* § 100.10(e).

¹¹⁶⁷ 20 U.S.C. § 1683 (for Title IX); 34 C.F.R. § 100.11.

¹¹⁶⁸ 34 C.F.R. § 100.10(g)(2).

¹¹⁶⁹ *Id.* § 100.10(g)(1).

¹¹⁷⁰ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 16, at 22.

¹¹⁷¹ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 10, at 15, and Appendix 1, at 1.

¹¹⁷² *See supra* Figure 3.4.

¹¹⁷³ *Ibid.*

¹¹⁷⁴ U.S. Dep’t of Educ., Response to USCCR Interrogatory No. 17, at 23.

¹¹⁷⁵ ED, *FY 2019 Budget Request*, *supra* note 1049, at Z-14.

¹¹⁷⁶ ED OCR, *FY 16 Securing Equal Educational Opportunity*, *supra* note 1065, at 8.

¹¹⁷⁷ U.S. Dep’t of Educ., “Frequently Asked Questions,” <http://www2.ed.gov/about/offices/list/ocr/faqs.html> (accessed Jun. 3, 2019).

¹¹⁷⁸ ED OCR, *FY 16 Securing Equal Educational Opportunity*, *supra* note 1065, at 8.

associated with less comprehensive resolution.¹¹⁷⁹ “Under Obama, 51 percent of cases that took more than 180 days culminated in findings of civil rights violations, or corrective changes. Under the Trump administration, that rate has dropped to 35 percent.”¹¹⁸⁰ The ProPublica investigation noted that these patterns are consistent across substantive issue areas:

Outcomes on specific topics reflect this pattern. For instance, 70 percent of complaints of discrimination against students with limited proficiency in the English language were upheld under Obama, compared to 52 percent under the current administration. The proportion of complaints substantiated regarding the individualized educational needs of students with disabilities has dropped from 45 percent to 34 percent; regarding sexual harassment and violence, from 41 percent to 31 percent; and regarding racial harassment, from 31 percent to 21 percent.¹¹⁸¹

As the ProPublica investigation explained:

These differences reflect the contrasting approaches of the Obama and Trump administrations to civil rights enforcement, according to people familiar with both. Under Obama, the Office for Civil Rights looked into instances of discrimination against individuals, but also made it a priority to carry out more time-consuming and systemic investigations into disparate treatment of students based on race, disability, or other factors.

On the other hand, efficiency is the Trump administration’s priority. It has restricted the time and scope of investigations, concentrating on individual complaints that can be handled quickly, and seeking to clear a backlog of more expansive cases. As a result, it has resolved about 3,250 cases that lasted more than six months, compared to about 1,150 during the last 15 months of the Obama administration. Because of this high volume, the raw number of cases concluded with findings of wrongdoing has increased under DeVos, although the percentage is considerably lower.¹¹⁸²

ED OCR has, over time, considered whether other indicators of performance effectiveness would be appropriate, conceding that timeliness, while important, is only one way to measure performance. ED OCR’s FY 2001 and 2002 report to Congress noted that:

OCR’s current performance indicators measure timeliness of case processing and program outputs, such as percentages of OCR-directed technical assistance and resource materials for recipients and parents. These indicators address only a

¹¹⁷⁹ Waldman, “DeVos Has Scuttled More Than 1,200 Civil Rights Probes Inherited From Obama,” *supra* note 1107. The ProPublica investigation studied the first 15 months of the Trump Administration compared with the final 15 months of the Obama Administration.

¹¹⁸⁰ *Ibid.*

¹¹⁸¹ *Ibid.*

¹¹⁸² *Ibid.*

portion of OCR’s enforcement activities, and we are collecting data and working to develop additional indicators to reflect more fully the work that we do.¹¹⁸³

Proactive Compliance Evaluation

Recipients of federal funding through ED programs are required to comply with applicable nondiscriminatory civil rights provisions.¹¹⁸⁴ In practice this requirement means that every K-12 public school and nearly all public and private colleges and universities must comply with federal nondiscrimination provisions because all these entities receive federal funding.¹¹⁸⁵ Federal regulations require that funding recipients keep sufficient records so that ED OCR can ascertain whether the entity is in compliance.¹¹⁸⁶

In FY 2016, the most recent year for which data was publicly available, ED OCR initiated 13 proactive compliance reviews, including seven Title VI compliance reviews and four Title IX compliance reviews.¹¹⁸⁷ During FY 2016, ED OCR resolved one Title VI compliance review, four Title IX compliance reviews, and one compliance review initiated on the basis of disability.¹¹⁸⁸ ED OCR has not reported since that time on its conduct of compliance reviews but its budget request documents have noted that ED OCR expected to reduce the number of proactive compliance reviews it would initiate because ED OCR sought fewer investigative staff and would, because of that choice, have fewer staff available to conduct compliance reviews¹¹⁸⁹

The compliance reviews ED OCR resolved in FY 2016 included an ED OCR review of Toledo, Ohio public schools following an investigation to “assess whether the district was providing black students with equal access to educational resources.”¹¹⁹⁰ ED OCR and the district entered into a resolution agreement that required the district to ensure all students have equal access to resources, including equal access to teachers with advanced degrees, ensuring equitable distribution of

¹¹⁸³ U.S. Department of Educ., Office for Civil Rights, *Annual Report to Congress: Fiscal Years 2001 and 2002*, July 2003, <https://www2.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html> [hereinafter ED OCR, *FY 2001 and 2002 Annual Report*].

¹¹⁸⁴ 34 C.F.R. § 100.6.

¹¹⁸⁵ See, e.g., U.S. Department of Educ., Office for Civil Rights, “Sex Discrimination: Frequently Asked Questions,” <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html> (accessed Aug. 22, 2019) (“Are all school districts, colleges, and universities covered by Title IX? Generally yes. All public school districts are covered by Title IX because they receive some federal financial assistance and operate education programs. All public colleges and universities and virtually all private colleges and universities are covered because they receive such assistance by participating in federal student aid programs. There are some private schools that do not receive any federal assistance, and Title IX does not apply to them. Additionally, there are some schools that are specifically exempt from certain parts of Title IX, such as an educational institution that is controlled by a religious organization but only to the extent the application of Title IX would not be consistent with the religious tenets of such organization.”).

¹¹⁸⁶ 34 C.F.R. § 100.6(b).

¹¹⁸⁷ ED OCR, *FY 16 Securing Equal Educational Opportunity*, *supra* note 1065, at 5, 18, and 24.

¹¹⁸⁸ *Ibid.*, 42.

¹¹⁸⁹ ED, *FY 2018 Budget Request*, *supra* note 1045, at Z-15.

¹¹⁹⁰ ED OCR, *FY 16 Securing Equal Educational Opportunity*, *supra* note 1065, at 20.

experienced teachers throughout the district, and providing more live instruction for students.¹¹⁹¹ ED OCR also resolved a compliance review of Montana State University Billings after launching an investigation to determine whether the university was discriminating against female students by denying them equal opportunity to participate in athletics, “and whether the university discriminates against male or female students by not awarding athletic financial assistance in proportion to the number of students of each sex participating in the university’s athletic programs.”¹¹⁹² Under the resolution agreement, the university must develop a plan to meet the interests and abilities of the underrepresented sex, and submit the plan to ED OCR for review and approval.¹¹⁹³ ED OCR also conducted a compliance review of the San Bernardino County Office of Education in California and entered into a resolution agreement after finding that the county did not have adequate procedures in place to identify students with disabilities.¹¹⁹⁴ The resolution agreement stipulated that the county ensure that all students with disabilities are appropriately identified and that students with disabilities are provided with appropriate access to public education.¹¹⁹⁵ Comparative compliance review data for FY 2017 and 2018 was not publicly available at the time of publication of this report.

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity

Guidance

ED OCR issued 38 guidance documents during the Obama Administration.¹¹⁹⁶ Of these 38, ED OCR issued five during FY 2016 and six in FY 2017 before the change in administration.¹¹⁹⁷ In comparison, ED OCR during the Trump Administration has issued two guidance documents as of the publication of this report.¹¹⁹⁸ Secretary DeVos has undertaken a deregulatory push at ED, seeking to roll back many previously issued guidance documents.¹¹⁹⁹ In both instances of issuing new guidance, as well as in two other instances where it did not affirmatively issue new guidance, the Trump Administration rescinded previously issued guidance. The Trump Administration ED OCR rescinded Title IX guidance on transgender students, guidance on sexual violence and campus sexual misconduct, and several Title VI guidance documents on school discipline and diversity in higher education, among other topics, some of which were previously issued jointly

¹¹⁹¹ Ibid.

¹¹⁹² Ibid., 30.

¹¹⁹³ Ibid.

¹¹⁹⁴ Ibid., 35.

¹¹⁹⁵ Ibid.

¹¹⁹⁶ U.S. Dep’t of Educ, Office for Civil Rights, “Policy Guidance,”

<https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf>. (accessed Jul. 19, 2019) [hereinafter ED OCR, “Policy Guidance”].

¹¹⁹⁷ Ibid.

¹¹⁹⁸ Ibid.

¹¹⁹⁹ USCCR, *Beyond Suspensions*, *supra* note 1004, at 147-50; Andrew Kreighbaum, “DeVos to Announce New Push for Deregulation, Innovation,” *Inside Higher Ed*, Jul. 30, 2018,

<https://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>.

by ED OCR and DOJ.¹²⁰⁰ In only two of these instances has the Trump Administration affirmatively issued replacement guidance: in September 2017, ED OCR issued interim guidance while withdrawing prior guidance related to campus sexual violence,¹²⁰¹ and in December 2018 ED OCR issued a questions and answers document related to race discrimination in school discipline while withdrawing prior guidance on the same issue.¹²⁰² Fatima Goss Graves, President and CEO of the National Women’s Law Center, characterized the rescission of guidance as ED OCR not meeting its duty to protect students from discrimination, writing that “since February 2017, OCR has retreated from its proactive commitment to enforcing civil rights.”¹²⁰³

The Commission received testimony from Shep Melnick criticizing ED OCR’s use of guidance as a tool during the Obama Administration, charging that ED OCR lacked authority to issue that guidance, stating that “their legal status remains ambiguous.”¹²⁰⁴ But the United States Supreme Court has issued a unanimous and dispositive ruling on the question, which determined that agencies do have authority to issue policy guidance.¹²⁰⁵ Also, as Judge Posner has noted, “Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement.”¹²⁰⁶ While guidance documents are not themselves legally binding¹²⁰⁷—binding parties depends on the underlying law they rely on¹²⁰⁸—the Commission has found that they are an important tool for effective civil rights enforcement.¹²⁰⁹

In April 2017, President Trump signed an Executive Order aimed at decreasing the federal government’s role in education, directing the Secretary of Education to study federal overreach in

¹²⁰⁰ U.S. Dep’t of Educ., Dear Colleague Letter: Office for Civil Rights Withdraws Guidance on Sexual Violence and Issues Q&A on Campus Sexual Misconduct (Sep. 22, 2017); DOJ and ED, Dear Colleague Letter: OCR Withdraws Guidance on Sexual Violence, *supra* note 829; U.S. Dep’t of Educ., Dear Colleague Letter: Updates to Department of Education and Department of Justice Guidance on Title VI (Dec. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>; U.S. Dep’t of Educ., Dear Colleague Letter: Updates to Department of Education and Department of Justice Guidance on Title VI (Jul. 3, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf>.

¹²⁰¹ ED, Dear Colleague Letter: OCR Withdraws Guidance on Sexual Violence, *supra* note 829.

¹²⁰² ED OCR, “Policy Guidance,” *supra* note 1196.

¹²⁰³ Goss Graves Statement, at 2.

¹²⁰⁴ Shep Melneck, Thomas P. O’Neill, Jr. Professor of American Politics, Boston College, testimony, *Federal Civil Rights Enforcement Briefing*, p. 242.

¹²⁰⁵ See *Perez v. Mortgage Bankers Ass’n.*, 135 S.Ct. at 1203-04.

¹²⁰⁶ *Hocort v. U.S. Dep’t of Agriculture*, 82 F.3d 165, 167 (7th Cir. 1996).

¹²⁰⁷ U.S. Gov’t Accountability Office, *Federal Regulations: Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices*, p. 2 (Mar. 14, 2018) <https://www.gao.gov/assets/700/690650.pdf>.

¹²⁰⁸ See, e.g., USCCR, *Beyond Suspensions*, *supra* note 1004, at n. 23 (“While these [Dear Colleague or guidance] letters do not set legal precedents, they help to inform the public and education officials of the Education Department’s (and, where appropriate, the Justice Department’s) stance on major issues, the legal standards and requirements of schools, and solutions that the Department believes educational institutions should implement. See U.S. Dep’t of Educ., “U.S. Dep’t of Education Releases Guidance on Civil Rights of Students with Disabilities” (Dec. 28, 2016), <https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-civil-rights-studentsdisabilities> (explaining that “[t]hese guidance documents clarify the rights of students with disabilities and the responsibilities of educational institutions in ensuring that all students have the opportunity to learn”).

¹²⁰⁹ *Ibid.*; see USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 48-49.

education.¹²¹⁰ As a result, ED appointed a Regulatory Reform Task Force to analyze and identify Department regulations and policy guidance for “potential repeal, modification, or replacement.”¹²¹¹ In October 2018, ED announced that it was in the process of withdrawing approximately 600 “out-of-date” pieces of subregulatory guidance, including OCR guidance, which ED announced have either been replaced or have been determined to be no longer in effect.¹²¹² The Policy Dissemination section below provides further details.

In written testimony to the Commission, Debbie Osgood, partner at the law firm of Hogan Marren Babbo & Rose, Ltd and former National Enforcement Director at ED OCR, indicated how helpful it is to school communities to know what the law is and how OCR will enforce it in order to assist in voluntary compliance with the law.¹²¹³ Similarly, former supervisory attorney at ED OCR and current Of Counsel at Ballard Spahr LLP, Olabisi Okubadejo noted that guidance documents published by ED OCR are beneficial to schools in that guidance provides notice of educational institutions’ obligations under the law.¹²¹⁴

Technical Assistance

ED OCR is required by regulation to provide “assistance and guidance to recipients to help them comply voluntarily” with the requirements of Title VI of the Civil Rights Act of 1964.¹²¹⁵ Pursuant to that requirement, ED OCR makes available civil rights tutorials and technical assistance on its website.¹²¹⁶ ED OCR provides technical assistance in the form of frequently asked questions regarding race and national origin discrimination, sex discrimination, disability discrimination, and age discrimination.¹²¹⁷ As ED OCR noted in its 2003 annual report, “[ED] OCR strives to communicate clearly how the civil rights laws apply in particular situations to help people understand their rights and education institutions understand their obligations. Clearly articulated standards enable OCR staff to make consistent compliance determinations that are legally supportable and based on a fair and thorough analysis of information.”¹²¹⁸

¹²¹⁰ Mary Emily O’Hara, “Trump Signs Executive Order Reviewing Federal Role in Education,” *NBC News*, Apr. 26, 2017, <https://www.nbcnews.com/news/us-news/trump-signs-executive-order-reviewing-federal-role-education-n751476>.

¹²¹¹ U.S. Dep’t of Educ., “Department of Education Withdraws Outdated Subregulatory Guidance,” Oct. 27, 2017, <https://content.govdelivery.com/accounts/USED/bulletins/1c07774>.

¹²¹² *Ibid.*

¹²¹³ Osgood Statement, at 5-6.

¹²¹⁴ *Ibid.*, 3-4.

¹²¹⁵ 34 C.F.R. § 100.6.

¹²¹⁶ U.S. Dep’t of Educ., “Civil Rights Tutorials and Technical Assistance” <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/crt-ta.html> (accessed Jul. 19, 2019).

¹²¹⁷ *Ibid.*

¹²¹⁸ U.S. Dep’t of Educ., *Office for Civil Rights Annual Report to Congress FY 2003*, December 2004, p. 15, <https://www2.ed.gov/about/offices/list/ocr/annrpt2003/index.html>.

Outreach

ED OCR engages in outreach to its regulated community and potentially affected populations through various program. According to ED OCR's FY 2016 annual report, for example, the office convened university presidents to discuss racial harassment on college and university campuses.¹²¹⁹ Additionally, in FY 2016, "OCR provided more than 295 technical assistance sessions to a wide range of stakeholders – including schools and districts, state education agencies, colleges and universities, parent groups, nonprofit and advocacy organizations, and other federal agencies – and conducted other outreach to galvanize action on important civil rights topics."¹²²⁰ Information about ED OCR outreach was not similarly available for FY 2017 or FY 2018.¹²²¹

Interaction and Coordination with External Agencies and Organizations

In ED OCR's most recent available annual report covering FY 2016, the office noted that at that time it had several agreements with other federal agencies, including hosting a conference with the U.S. Department of Housing and Urban Development and U.S. Department of Transportation "to engage in a dialogue about the value of diversity and opportunity in schools and neighborhoods, and to identify effective paths to increase and sustain healthy, non-discriminatory, racially and socioeconomically diverse school environments."¹²²² ED OCR also participated in the Obama Administration's United State of Women Summit, the White House Task Force to Protect Students from Sexual Assault, and the Asian American and Pacific Islander Bullying Prevention Task Force.¹²²³ ED OCR has not released an annual report since the FY 2016 report, making it difficult to determine whether ED OCR continues to engage in interaction and coordination with other federal government agencies, or if any of the above initiatives remain operative.

ED OCR has agreements with several other agencies related to enforcement of civil rights laws. For example, ED OCR and DOJ CRT signed a memorandum of understanding in 2014 agreeing to a "collaborative interagency effort to vigorously enforce Title IX."¹²²⁴ Also, ED OCR delegates the authority to processes certain complaints against proprietary schools to either the U.S. Department of Veterans Affairs or the U.S. Department of Health and Human Services depending on the type of school.¹²²⁵ ED OCR cited in its Interrogatory response an agreement to share data and information with HHS regarding ongoing investigations at Michigan State University.¹²²⁶ Furthermore, for any complaints received by ED OCR alleging certain violations of the ADA over

¹²¹⁹ ED OCR, *FY 16 Report to the President and Secretary*, *supra* note 1089, at 11.

¹²²⁰ *Ibid.*, 5.

¹²²¹ *See infra* Chapter 3, Interaction and Coordination with External Agencies and Organizations.

¹²²² ED OCR, *FY 16 Report to the President and Secretary*, *supra* note 1089, at 11.

¹²²³ *Ibid.*, 11.

¹²²⁴ U.S. Dep't of Educ. and U.S. Dep't of Justice, Memorandum of Understanding between the United States Department of Education, Office for Civil Rights, and the United States Department of Justice, Civil Rights Division (Apr. 29, 2014) https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf.

¹²²⁵ U.S. Dep't of Educ., Response to USCCR Interrogatories, at 8.

¹²²⁶ *Id.*

which ED OCR does not have jurisdiction, or when ED OCR is unable to negotiate a resolution agreement with a funding recipient, ED OCR will refer the matter to DOJ.¹²²⁷

Research, Data Collections, and Reporting

Since 1968, ED has conducted the Civil Rights Data Collection (CRDC) to collect information on civil rights issues in public schools, including enrollment information, educational programs, limited English proficiency, and disability.¹²²⁸ Authority for the CRDC comes directly from its statute, however ED OCR is not explicitly required to conduct the biannual data collection.¹²²⁹ During the Obama Administration, ED OCR stated that it improved the CRDC including making the collection more inclusive of key indicators of equity and opportunity.¹²³⁰ In July of 2017, ED OCR published notice in the Federal Register of proposed modifications to ED OCR's data collection procedures through CRDC in preparation for the biannual CRDC.¹²³¹ ED stated the changes aim to reduce the burden data collection places on school districts. The purpose of data collection through CRDC is to obtain data regarding implementation of civil rights laws that provide equal educational opportunity to all.¹²³² The 2017-2018 CRDC added data collection on computer science classes and school internet access, while eliminating the need for schools to provide data on high school equivalency course exam results, Advanced Placement course exam results, and student chronic absenteeism.¹²³³ Data collected through CRDC is publicly available through the CRDC Reporting Tool.¹²³⁴

During the Obama Administration, ED OCR expanded the CRDC to be more accessible to the public for the purpose of transparency.¹²³⁵ This boost in transparency provides a resource for institutions and the public to see the data collected by ED OCR.

¹²²⁷ *Id.*

¹²²⁸ U.S. Dep't of Educ., "Civil Rights Data Collection," Sep. 25, 2018, <https://www2.ed.gov/about/offices/list/ocr/data.html?src=rt>.

¹²²⁹ 20 U.S.C. 3413(c)(1); *see also* 34 C.F.R. §§ 100.6(b), 106.71, 104.61 (requiring recipients of ED OCR's federal financial assistance to submit to ED OCR "complete and accurate compliance reports at such times, and in such form and containing such information" as ED OCR "may determine to be necessary to enable [ED OCR] to ascertain whether the recipient has complied or is complying" with these laws and implementing regulations).

¹²³⁰ U.S. Dep't of Educ., Office for Civil Rights, *Achieving Simple Justice: Highlights of Activities, Office of Civil Rights 2009-2016*, 2016, pp. 2-3 <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf> [hereinafter ED OCR, *Achieving Simple Justice*]; ED OCR, *FY 16 Report to the President and Secretary*, *supra* note 1089, at 12.

¹²³¹ Mandatory Civil Rights Data Collection, 82 Fed. Reg. 33,880 (Jul. 21, 2017). ED OCR publishes notice in the Federal Register ahead of each CRDC to note changes made from the previous CRDC.

¹²³² *Id.*

¹²³³ U.S. Dep't of Educ., "Civil Rights Data Collection," <https://ocrdata.ed.gov/>.

¹²³⁴ *Ibid.*

¹²³⁵ ED OCR, *Achieving Simple Justice*, *supra* note 1230, at 2.

ED OCR also collects data during the complaint process through ED OCR's case management system, which ED OCR fully implemented in 2003.¹²³⁶ The case management system collects demographic information, as well as the bases upon which complaints were filed and other factual information gathered during the investigation of a complaint.¹²³⁷ The raw data gathered by ED OCR's case management system is not publicly available, although information gathered from the case management system may be used in publicly available ED OCR reports.¹²³⁸

The Collection of Racial and Ethnic Data and Data Disaggregation

During FY 2016 to FY 2018, ED OCR revised its racial and ethnic data collection in case investigations. This revision was based in part on Executive Order 13,515 of 2009, which called for increased participation of Asian Americans and Pacific Islanders (AAPI) in federal programs, and aimed to, among other things, advance research, data collection, and data analysis for AAPI populations and subpopulations.¹²³⁹ With respect to collecting and analyzing data pertinent to case/complaint processing in relation to Executive Order 13,515, ED OCR indicated the following:

In investigating and resolving cases, ED OCR's data requests and analysis of data, including racial and ethnic data, depends on the allegations and the matters pertinent to the case. ED OCR does not, however, read Executive Order 13,515 as requiring ED OCR, in its collection and analysis of data in case investigations, to collect and disaggregate its data on certain racial and ethnic populations, including Asian Americans and Pacific Islanders, where such information and analysis is not relevant to the allegations of a particular case.¹²⁴⁰

¹²³⁶ U.S. Dep't of Educ., *Privacy Impact Assessment for the Case and Activity Management System*, Jun. 26, 2017, p. 2, <https://www2.ed.gov/notices/pia/cams.pdf> [hereinafter ED, *Privacy Impact Assessment*]; ED OCR, *FY 2001 and 2002 Annual Report*, *supra* note 1183.

¹²³⁷ ED, *Privacy Impact Assessment*, *supra* note 1236, at 2.

¹²³⁸ See, e.g., ED OCR, *Achieving Simple Justice*, *supra* note 1230.

¹²³⁹ Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,515, 74 Fed. Reg. 53,635 (Oct. 14, 2009).

¹²⁴⁰ U.S. Dep't of Educ., Response to USCCR Interrogatory No. 14, at 20.

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Chapter 4: U.S. Department of Health and Human Services, Office for Civil Rights

Legal Authority and Responsibility

Congress established the U.S. Department of Health and Human Services (HHS) in April 1953 through the Reorganization Plan No. 1 of 1953.¹²⁴¹ The Secretary of Health and Human Services, Alex M. Azar II, who was sworn in on January 29, 2018, currently leads HHS.¹²⁴² HHS' Strategic Plan defines its mission as to “enhance the health and well-being of all Americans, by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services.”¹²⁴³ HHS has a number of operating divisions such as the Administration for Children and Families (ACF), Centers for Disease Control (CDC), Centers for Medicaid and Medicare Services (CMS), Indian Health Services (IHS), and the National Institutes of Health (NIH), among others.¹²⁴⁴ Through the Administration for Children and Families, HHS also administers the Office of Refugee Resettlement (ORR);¹²⁴⁵ some of the civil rights issues arising under ORR's housing of migrants and refugees are discussed in Chapter 8 (U.S. Department of Homeland Security's Office for Civil Rights and Civil Liberties).¹²⁴⁶

The Office for Civil Rights (HHS OCR) told the Commission that it is the only HHS office with authority to enforce civil rights laws against external entities as well as enforce civil rights authorities that apply to HHS.¹²⁴⁷ HHS OCR enforces laws that prohibit discrimination based on race, color, national origin, disability, age, sex, religion, and the exercise of conscience for individuals who receive services from HHS-funded or HHS-administered programs, including healthcare providers.¹²⁴⁸ In May 2019, HHS OCR updated its mission statement:

As an HHS law enforcement agency, OCR investigates complaints, conducts compliance reviews, vindicates rights, develops policy, promulgates regulations, provides technical assistance, and educates the public concerning our nation's civil rights, conscience and religious freedom, and health information privacy and security laws. OCR accomplishes this by:

¹²⁴¹ 42 U.S.C. §3501, Pub. L. No. 88-426, 67 Stat. 631 (1953) (HHS was originally called the Department of Health, Education, and Welfare).

¹²⁴² U.S. Dep't of Health and Human Services, “HHS Secretary,” <https://www.hhs.gov/about/leadership/secretary/index.html> (accessed Jun. 5, 2019).

¹²⁴³ U.S. Dep't of Health and Human Services, “Introduction: About HHS,” <https://www.hhs.gov/about/strategic-plan/introduction/index.html> (accessed Jul. 30, 2019).

¹²⁴⁴ See U.S. Dep't of Health and Human Services, “HHS Agencies & Offices,” <https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html> (accessed Jul. 30, 2019).

¹²⁴⁵ See U.S. Dep't of Health and Human Services, Administration for Children & Families, Office of Refugee Resettlement, “Office of Refugee Resettlement,” <https://www.acf.hhs.gov/orr> (accessed Jul. 30, 2019).

¹²⁴⁶ See *infra* notes 2368-2425 (discussing Zero Tolerance and Family Separation; Detention of Migrant Children).

¹²⁴⁷ U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

¹²⁴⁸ See *generally*, 45 C.F.R. §§ 80; 83; 84; 85; 86; 88; 91 and 92.

Ensuring that recipients of HHS federal financial assistance comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age, sex and religion.

Ensuring that HHS, state and local governments, health care providers, health plans, and others comply with federal laws that guarantee the protection of conscience and free exercise of religion and prohibit coercion and religious discrimination in HHS-conducted or funded programs.

Ensuring the practices of health care providers, health plans, healthcare clearinghouses, and their business associates adhere to federal privacy, security, and breach notification regulations under the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act, through the investigation of complaints, self-reported breaches, compliance reviews, and audits.¹²⁴⁹

HHS OCR has independent duties and jurisdiction to enforce a wide variety of civil rights laws.¹²⁵⁰ HHS OCR currently describes its role as ensuring that “individuals receiving services from HHS-funded programs are not subject to unlawful discrimination, providers and others can exercise their conscience rights, and individuals can exercise their rights to access their health information and can trust the privacy and security of their health information.”¹²⁵¹ HHS OCR states that it advances its mission by “rooting out invidious discrimination and removing unlawful barriers to HHS-funded services.”¹²⁵² Furthermore, following creation of a new unit it terms the “conscience protection unit” in 2018, HHS OCR indicates that “by ensuring individuals and institutions can exercise their conscience rights, HHS OCR furthers justice and tolerance in a pluralistic society.”¹²⁵³

¹²⁴⁹ U.S. Dep’t of Health and Human Services, “OCR Leadership,” <https://www.hhs.gov/ocr/about-us/leadership/index.html> (accessed Jul. 22, 2019); *see infra* note 1322.

¹²⁵⁰ *See* 45 C.F.R. §§ 80.1-80.13 (1964).

¹²⁵¹ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 1.

¹²⁵² *Ibid.*

¹²⁵³ *Ibid.*

Through HHS OCR, HHS enforces the following major civil rights statutes:

- Title VI of Civil Rights Act of 1964¹²⁵⁴
- Section 504 of the Rehabilitation Act¹²⁵⁵
- Title IX of the Education Amendments Act of 1972¹²⁵⁶
- The Age Discrimination Act of 1975¹²⁵⁷
- Titles VI and XVI of the Public Health Service Act¹²⁵⁸
- Section 1557 of the Patient Protection and Affordable Care Act¹²⁵⁹
- The Americans with Disabilities Act¹²⁶⁰

HHS OCR also enforces several additional civil rights laws:¹²⁶¹

- *Section 508 of the Rehabilitation Act of 1973*, which requires federal departments to ensure that persons with disabilities have equal access to publicly available electronic information and technology.¹²⁶²
- *Section 1808(c) of the Small Business Job Protection Act of 1996*, which prohibits federally funded child welfare entities from discrimination on the basis of race, color, and national origin when making child placement decisions in adoption and foster care.¹²⁶³
- *Sections 794 and 855 of the PHSA*, which prohibit sex-based discrimination in federally assisted health training programs.¹²⁶⁴

¹²⁵⁴ 42 U.S.C. § 2000d.

¹²⁵⁵ 29 U.S.C. § 794.

¹²⁵⁶ 20 U.S.C. § 1681.

¹²⁵⁷ 42 U.S.C. § 6101.

¹²⁵⁸ *Id.* §§ 291, 291a.

¹²⁵⁹ *Id.* § 18116 (codifying section 1557 of the ACA):

Except as otherwise provided for in this title [the ACA] (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

¹²⁶⁰ 42 U.S.C. § 12132.

¹²⁶¹ *See* U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 10-16.

¹²⁶² 29 U.S.C. § 794.

¹²⁶³ 42 U.S.C. § 1996b.

¹²⁶⁴ *Id.* §§ 295m, 296g.

- *Section 508 of the Social Security Act*, which bans discrimination based on race, color, national origin, sex, disability, and religion in the Maternal and Child Health Services Block Grant.¹²⁶⁵
- *Section 533 of the PHS Act*, which prohibits discrimination based on race, color, national origin, sex, disability, and religion in the Projects for Assistance in Transition from Homelessness program.¹²⁶⁶
- *Section 1908 of the PHS Act*, which prohibits discrimination based on race, color, national origin, sex, disability, and religion programs and services funded by Preventative Health and Health Services Block Grants.¹²⁶⁷
- *Section 1947 of the PHS Act*, which prohibits discrimination on the basis of age, race, color, national origin, disability, sex, (and, in the case of a woman, pregnancy), and religion in programs and activities funded by Community Mental Health Services Block Grants and Substance Abuse Prevention and Treatment Block Grants.¹²⁶⁸
- *Family Violence Prevention and Services Act*, which bans discrimination based on age, race, color, national origin, disability, sex, and religion in services funded by the statute, such as programs to prevent incidents of family, domestic, and dating violence, to provide support services for victims of such violence, and to provide specialized services for children exposed to such violence.¹²⁶⁹
- *Low-Income Home Energy Assistance Act of 1981*, which bans discrimination based on race, color, national origin, and sex in programs and activities funded by the statute (including grants to states to assist low-income households and those that pay a high proportion of their income for home energy).¹²⁷⁰
- *Community Services Block Grant*, which bans the discrimination on the basis of age, race, color, national origin, and sex in programs and activities funded by the block grant.¹²⁷¹
- *Communications Act of 1934*, which prohibits discrimination on the basis of age, race, color, national origin, and sex by federally funded public telecommunications entities who conduct demonstration projects for developing techniques of using non-broadcast telecommunications facilities.¹²⁷²

Enforcement Tools

The agency enforcement tools HHS OCR has specific legal authority to use are:

- Complaint resolution¹²⁷³

¹²⁶⁵ *Id.* § 708.

¹²⁶⁶ *Id.* § 290cc-33.

¹²⁶⁷ *Id.* § 300w-7.

¹²⁶⁸ *Id.* § 300x-57.

¹²⁶⁹ *Id.* § 10406.

¹²⁷⁰ *Id.* § 8625.

¹²⁷¹ *Id.* § 9918.

¹²⁷² *Id.* § 398.

¹²⁷³ 45 C.F.R. §§ 80.7(b); 83.20; 84.61; 85.61(d); 86.71; 88.2; 91.42; 92.301.

- Agency-initiated charges¹²⁷⁴
- Proactive compliance evaluations¹²⁷⁵
- Testing¹²⁷⁶
- Guidance or other policy documents¹²⁷⁷
- Regulations¹²⁷⁸
- Technical assistance¹²⁷⁹
- Publicity¹²⁸⁰
- Research, data collection, and reporting¹²⁸¹
- Collaboration/partnership with state/local agencies¹²⁸²
- Collaboration/partnership with other federal agencies¹²⁸³
- Strategic Plans¹²⁸⁴
- Annual Reports¹²⁸⁵

While HHS OCR does not have specific legal authority for other tools identified by the Commission, nothing prohibits HHS OCR from engaging in, for example, outreach to regulated communities, as described in further detail below.

Budget and Staffing

HHS's budget is earmarked for HHS OCR's role within the department for the purposes of: defending the public's right to nondiscriminatory access to HHS funded health and human services, conscience and religious freedom, and access to, and the privacy and security of, individually identifiable health information.¹²⁸⁶

¹²⁷⁴ *Id.* § 80.7(a) and (c) (proactive compliance review leading to investigation which can lead to enforcement actions for noncompliance at the end of the process).

¹²⁷⁵ *Id.* §§ 80.7(a); 85.62(b); 91.46; 92.303(c) (conduct of investigations).

¹²⁷⁶ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23 ("Testing utilizes individuals who, without any bona fide intent to seek a service or health care, pose as prospective patients or customers for gathering information for determining whether an entity is violating civil rights laws.").

¹²⁷⁷ 45 C.F.R. § 80.6(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

¹²⁷⁸ *Id.* § 90.31; 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations).

¹²⁷⁹ 45 C.F.R. § 80.6(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

¹²⁸⁰ 28 C.F.R. § 42.405 (requirements for Public dissemination of Title VI information).

¹²⁸¹ *Id.* § 42.406 (regarding data collection and information sharing).

¹²⁸² 45 C.F.R. § 80.6(a) ("The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.").

¹²⁸³ 28 C.F.R. § 42.413.

¹²⁸⁴ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 306(a)(1-8) (2010).

¹²⁸⁵ *Id.* § 1115(b).

¹²⁸⁶ U.S. Dep't of Health & Human Servs., *OCR Fiscal Year 2019 Congressional Justification*, 2019, p. 7, <https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf> [hereinafter HHS, *OCR FY 19 Congressional Justification*].

According to HHS, money allocated to HHS OCR's Civil Rights Division (CRD) is used primarily for civil rights policy development, but HHS stated that CRD also functions as an integral part of HHS OCR's overall civil rights enforcement program by addressing novel issues of law and enforcement policy, training HHS OCR's civil rights investigators, coordinating enforcement with other Federal civil rights enforcement agencies, and ensuring that HHS' civil rights authorities are enforced uniformly across all regional offices – which consumes about 25% of CRD's time and resources.¹²⁸⁷ Approximately 25% of money allocated to the Operations and Resources Division (ORD) (HHS OCR's direct enforcement offices) is used for civil rights enforcement; the remaining 75% of money allocated to ORD is used for enforcement of HIPAA (health care privacy act) claims.¹²⁸⁸ In contrast, 100% of money allocated to HHS OCR's newly created Conscience and Religious Freedom Division (CRFD) is used for civil rights enforcement.¹²⁸⁹ See Figure 4.1 and Table 4.1.

In FY 2016, HHS requested a total of \$42.70 million for HHS OCR.¹²⁹⁰ Congress allocated to HHS OCR a total of \$38.79 million,¹²⁹¹ which included allocations of \$3.65 million to CRD and \$31.49 million to ORD.¹²⁹² In FY 2017, HHS requested a total of \$42.70 million for OCR, the same as FY 2016.¹²⁹³ In FY 2017, Congress allocated to HHS OCR a total of \$38.70 million,¹²⁹⁴ which included allocations of \$4.525 million to CRD and \$30.027 million to ORD.¹²⁹⁵ Between FY 2016 and FY 2017, funds for CRD (policy development) increased by \$873,000 and funds decreased for ORD (direct investigations) by \$1.468 million.¹²⁹⁶ In FY 2018, HHS requested a total of \$32.53 million for HHS OCR.¹²⁹⁷ In FY 2018, Congress appropriated to HHS OCR a total of \$38.79 million,¹²⁹⁸ which included allocations of \$4.565 million to CRD, \$28.566 million to ORD, and \$602,000 to support the creation of CRFD.¹²⁹⁹ For FY 2018, HHS OCR requested \$602,000 in federal funding for CRFD's budget.¹³⁰⁰

¹²⁸⁷ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47.

¹²⁸⁸ *Ibid.*

¹²⁸⁹ *Ibid.*, 48.

¹²⁹⁰ U.S. Dep't of Health & Human Servs., *OCR Fiscal Year 2016 Congressional Justification*, p. 11, <https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>.

¹²⁹¹ U.S. Dep't of Health & Human Servs., *OCR Fiscal Year 2018 Congressional Justification*, p. 12, https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf [hereinafter HHS, *OCR FY 2018 Congressional Justification*].

¹²⁹² Consolidated Appropriations Act, 2016, H.R. 2029, 114th Cong. (2015); U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47.

¹²⁹³ U.S. Dep't of Health & Human Servs., *OCR Fiscal Year 2017 Congressional Justification*, p. 12, https://www.hhs.gov/sites/default/files/fy2017-budget-justification-ocr_1.pdf.

¹²⁹⁴ HHS, *OCR FY 19 Congressional Justification*, *supra* note 1286, at 13.

¹²⁹⁵ Consolidated Appropriations Act, 2017, H.R. 244, 115th Cong. (2017); U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47.

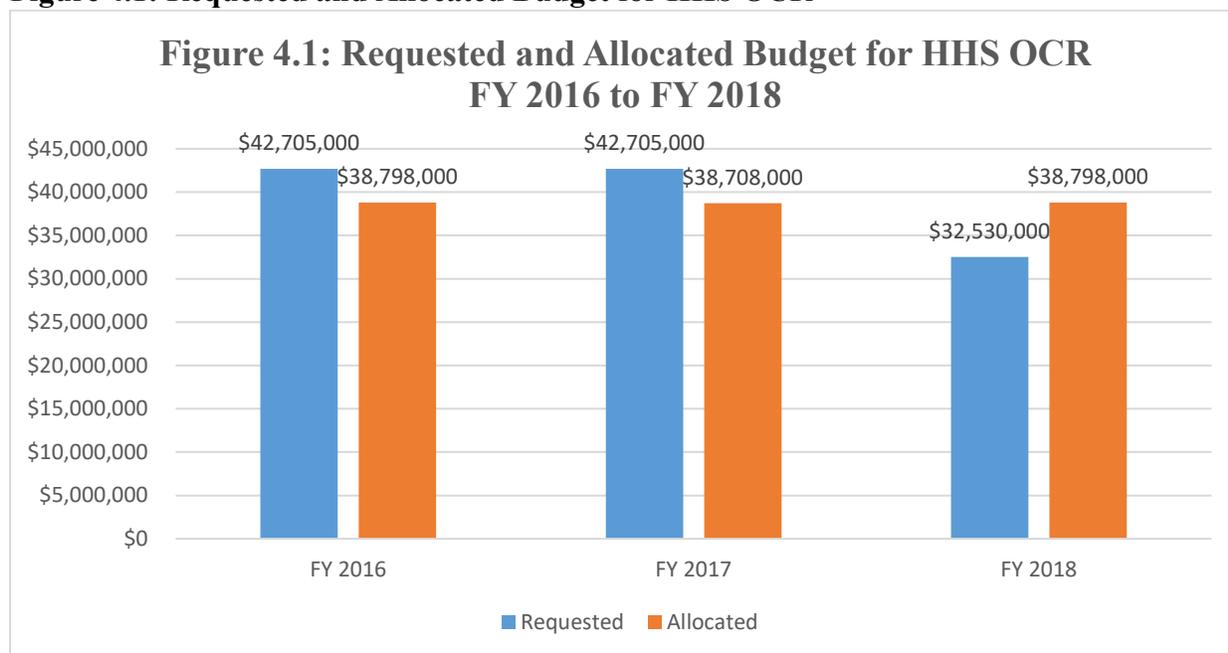
¹²⁹⁶ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 47.

¹²⁹⁷ HHS, *OCR FY 2018 Congressional Justification*, *supra* note 1291, at 12.

¹²⁹⁸ U.S. Dep't of Health & Human Servs., *Fiscal Year 2020 Justification of Estimates for Appropriations Committees*, p. 9, <https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>.

¹²⁹⁹ HHS, *OCR FY 2018 Congressional Justification*, *supra* note 1291, at 7; U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 48.

¹³⁰⁰ U.S. Dep't of Health and Human Servs., Response to Interrogatory No. 9, at 48.

Figure 4.1: Requested and Allocated Budget for HHS OCR

Source: U.S. Dep't of Health & Human Servs., *OCR Fiscal Year 2016 Congressional Justification*, p. 11, <https://www.hhs.gov/sites/default/files/office-of-civil-rights-budget-justification-2016.pdf>; U.S. Dep't of Health & Human Servs., *OCR Fiscal Year 2017 Congressional Justification*, p. 12, https://www.hhs.gov/sites/default/files/fy2017-budget-justification-ocr_1.pdf; U.S. Dep't of Health & Human Servs., *OCR Fiscal Year 2018 Congressional Justification*, p. 12, https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf; U.S. Dep't of Health & Human Servs., *OCR Fiscal Year 2019 Congressional Justification*, p. 13, <https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf>; U.S. Dep't of Health & Human Servs., *Fiscal Year 2020 Justification of Estimates for Appropriations Committees*, p. 9, <https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>.

From FY 2016 to FY 2018, HHS OCR's request for funds decreased by approximately \$6 million from its nearly \$40 million budget; in addition to shifting funds to the newly created CRFD, in FY 2018, HHS OCR also asked to increase the budget for its policy development office and decrease funds for its enforcement offices, however, Congress' allocation to HHS OCR remained constant at \$38.8 million.

From FY 2016 to FY 2018, HHS OCR staffing has remained relatively constant for its policy development office, but decreased by more than 10 percent in its enforcement offices. Within HHS OCR's enforcement offices, approximately 25 percent of the work is dedicated to civil rights enforcement, and 75 percent to HIPAA compliance and enforcement.¹³⁰¹

HHS OCR reported that 142 staff members and 69 contractors located throughout HHS OCR work part time on civil rights issues, along with eight full time contractors at Headquarters.¹³⁰²

¹³⁰¹ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 10, at 48-49; U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

¹³⁰² U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

Table 4.1: Staffing Levels in CRD, ORD, and CRFD between FY 2016 and FY 2018

FTE Staffing	End of FY16	End of FY17	End of FY18
CRD	17	15 (-2)	16 (+1)
ORD	126	114 (-12)	110 (-4)
CRFD ¹³⁰³	0	0	1 (+1)

Source: U.S. Department of Health and Human Services

In FY 2016, CRD had a total of 17 employees and ORD had a total of 126 employees.¹³⁰⁴ In FY 2017, CRD had two fewer employees at a total of 15 and ORD had 12 fewer employees at 114.¹³⁰⁵ In FY 2018, CRD had one more employee at a total of 16, ORD had four fewer employees at a total of 110, and CRFD had one employee.¹³⁰⁶ However, HHS OCR asserts the decreases in personnel have not affected the effectiveness of the divisions impacted between FY 2016 and FY 2017.¹³⁰⁷

In June of 2019, HHS OCR employed 24 staff members who work full time on civil rights enforcement who are based at HHS OCR Headquarters and are assigned to the Conscience and Religious Freedom Division and the Headquarters Civil Rights Division.¹³⁰⁸ Their positions are described in the table below.

Table 4.2: Staffing Levels at HHS OCR Headquarters 2018-2019

Title & Grade	2018	2019
Deputy Director, SES	2	2
Associate Deputy Director, GS-15		1
Senior Advisor	1	2
Supervisory Civil Rights Analyst, GS-15	4	7
Civil Rights Analyst, GS-14	5	7
Civil Rights Analyst, GS-13	1	1
Civil Rights Analyst, GS-12	1	2
Civil Rights Analyst, GS-11	1	1
Civil Rights Analyst, GS-9	1	
Program Support Assistant, GS-11	1	1
Total	17	24

Source: U.S. Dep't of Health and Human Services. "GS" stands for "General Schedule" and refers to the classification and pay system that applies to the majority of federal employees. Office of Personnel Management, Pay & Leave, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/> (accessed Aug. 15, 2019).

¹³⁰³ See HHS, *OCR FY 19 Congressional Justification*, *supra* note 1286.

¹³⁰⁴ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 48.

¹³⁰⁵ *Ibid.*

¹³⁰⁶ *Ibid.*

¹³⁰⁷ *Ibid.*

¹³⁰⁸ U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

As of February 2018, HHS OCR stated that it had hired one staff member for CRFD and that it intended to add more career staff “in the near future” for CRFD.¹³⁰⁹ In contrast, staffing in the HHS OCR’s Operations and Resources Division (ORD) was reduced by two employees.¹³¹⁰

Assessment

Prioritization for Civil Rights Agency-wide

HHS OCR is a department within the HHS Office of the Secretary, and is led by a Director, rather than an Assistant Secretary. The Director of HHS OCR reports to the Secretary of Health and Human Services. The Director of HHS OCR is appointed by the President and does not require Senate confirmation.¹³¹¹

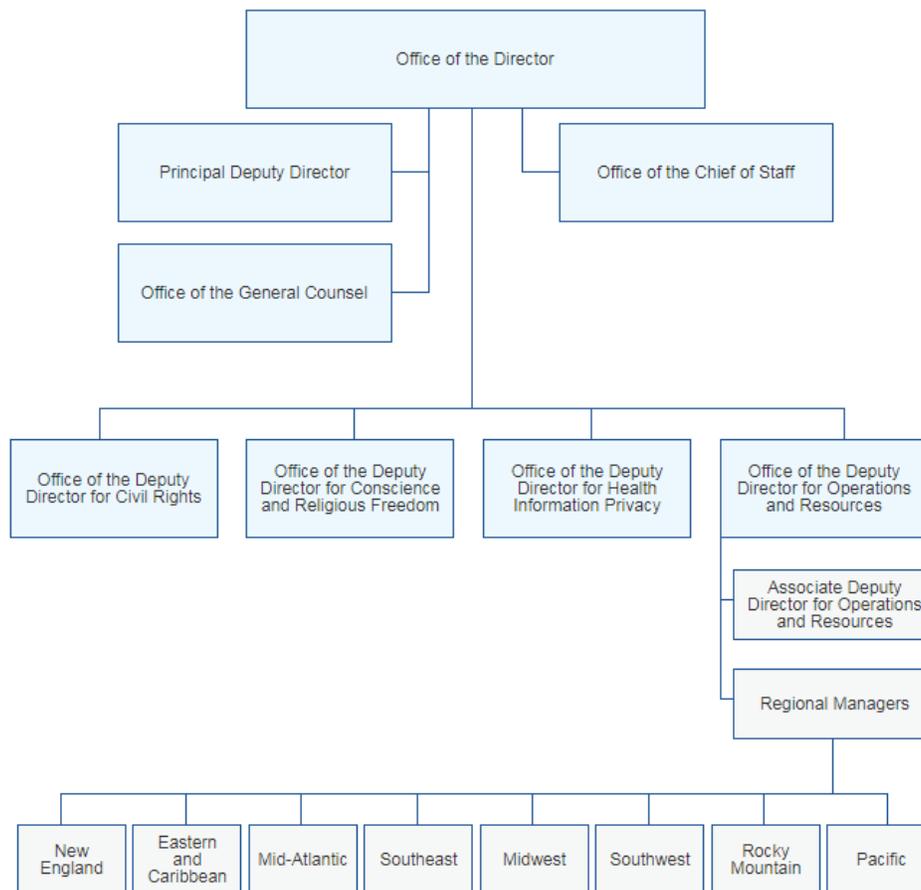
HHS OCR is led by its current Director, Roger Severino, whom President Trump appointed to the position in early 2017.¹³¹² The current organizational structure of OCR is as follows (see Figure 4.2):

¹³⁰⁹ Ibid.

¹³¹⁰ Ibid.

¹³¹¹ 45 C.F.R. § 85.3 (the Director of the Office for Civil Rights serves concurrently as the Special Assistant to the Secretary for Civil Rights).

¹³¹² U.S. Dep’t of Health & Human Servs., “Roger Severino,” <https://www.hhs.gov/about/leadership/roger-severino/index.html> (accessed Jun. 10, 2019); Heather Landi, “Trump Administration Appoints Roger Severino to Head Office for Civil Rights,” *Healthcare Innovation*, Mar. 27, 2017, <https://www.hcinovationgroup.com/cybersecurity/news/13028311/trump-administration-appoints-roger-severino-to-head-office-for-civil-rights>. (This position does not require Senate confirmation.)

Figure 4.2: Organizational Chart for OCR

Source: U.S. Dep't of Health and Human Services, "Office for Civil Rights Organization Chart," <https://www.hhs.gov/about/agencies/orgchart/ocr/index.html>.

The Director is supported by the Principal Deputy Director, General Counsel Civil Rights Division, and five other Senior Executives who lead four OCR divisions and eight regional offices.¹³¹³ The following offices and personnel report to the Office of the Director:

- Principal Deputy Director
- Office of the Chief of Staff
- Office of the Deputy Director of Civil Rights
- Office of the Deputy Director for Conscience and Religious Freedom
- Office of the Deputy Director for Health Information Privacy
- Office of the Deputy Director for Operations and Resources¹³¹⁴

¹³¹³ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 7, at 9.

¹³¹⁴ U.S. Dep't of Health & Human Servs., "Office for Civil Rights Organization Chart," <https://www.hhs.gov/about/agencies/orgchart/ocr/index.html> (accessed Jun. 10, 2019).

The majority of HHS OCR's enforcement work, including investigations, compliance reviews, and case resolutions, is handled at HHS OCR's eight regional offices, which are all a part of HHS OCR's Operations and Resources Division (ORD):

- **New England:** Connecticut; Maine, Massachusetts; New Hampshire; Rhode Island; Vermont
- **Eastern and Caribbean:** New Jersey; New York; Puerto Rico; Virgin Islands
- **Mid-Atlantic:** Delaware; District of Columbia; Pennsylvania; Virginia; West Virginia
- **Southeast:** Alabama; Atlanta; Florida; Georgia; Kentucky; Mississippi; North Carolina; South Carolina; Tennessee
- **Midwest:** Illinois; Indiana; Iowa; Kansas; Michigan; Minnesota; Missouri; Nebraska; Ohio; Wisconsin
- **Southwest:** Arkansas; Louisiana; New Mexico; Oklahoma; Texas
- **Rocky Mountain:** Colorado; Montana; North Dakota; South Dakota; Utah; Wyoming
- **Pacific:** Alaska; American Samoa; Arizona; California; Commonwealth of the Northern Mariana Islands; Federated States of Micronesia; Guam; Hawaii; Idaho; Marshall Islands; Nevada; Oregon; Republic of Palau; Washington

In January 2018, HHS OCR announced that it had changed its organizational structure to reflect its focus on conscience and religious freedom protections, by adding the CRFD.¹³¹⁵ HHS OCR stated that CRFD was a new division “dedicated exclusively to enforcing laws that protect conscience and religious exercise, and that prohibit coercion and religious discrimination in health care and human services.”¹³¹⁶

In May of 2019, HHS OCR changed its mission statement to define itself as a law enforcement agency, and to emphasize the agency's commitment to religious freedom and to health information privacy.¹³¹⁷ According to news reports, officials cited an increase in the number of complaints filed regarding religious freedom, stating that HHS OCR had received 36 such complaints since January 2017 compared with 10 such complaints filed between 2008 and 2017.¹³¹⁸ In HHS OCR's FY 2020 budget justification, the agency reported receiving 1,333 complaints that contained an

¹³¹⁵ Ibid; U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 44; U.S. Dep't of Health and Human Servs., “HHS Announces New Conscience and Religious Freedom Division,” Jan. 18, 2018, <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

¹³¹⁶ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 7, at 41.

¹³¹⁷ U.S. Dep't of Health & Human Servs., “OCR Mission and Vision,” Oct. 16, 2019, <https://www.hhs.gov/ocr/about-us/mission-vision/index.html> [hereinafter HHS, “OCR Mission and Vision”]; Rachel Bergman, “HHS Office for Civil Rights overhauled its mission and vision statements on its website,” *Sunlight Foundation*, May 1, 2019, <https://sunlightfoundation.com/2019/05/01/hhs-office-for-civil-rights-overhauled-its-mission-and-vision-statements-on-its-website/>.

¹³¹⁸ Emmarie Huetteman, “At New Health Office, ‘Civil Rights’ Means Doctors’ Right To Say No To Patients,” *Kaiser Health News*, Mar. 5, 2018, <https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/>.

allegation of a conscience or religious freedom violation during FY 2018.¹³¹⁹ Of those 1,333, HHS OCR retained 784 complaints, 343 of which alleged conscience violations and 441 of which alleged religious freedom violations.¹³²⁰ In FY 2017, the most recent data available in HHS' FY 19 budget request, HHS OCR received 30,166 complaints overall.¹³²¹

HHS OCR previously described its mission as “to improve the health and well-being of people across the nation; to ensure that people have equal access to and the opportunity to participate in and receive services from HHS programs without facing unlawful discrimination; and to protect the privacy and security of health information in accordance with applicable law.”¹³²²

Strategic Planning and Self-Evaluation

Every four years, HHS is required to produce a strategic plan that lays out the goals and priorities for the department over the next four fiscal years.¹³²³

HHS OCR does not have its own strategic plan, but the agency-wide strategic plan includes objectives and priorities that are handled by HHS OCR. In 2018, HHS published its strategic plan for fiscal years 2018-2022. The plan includes five strategic objectives:

- Strategic Goal 1: Reform, Strengthen, and Modernize the Nation's Healthcare System
- Strategic Goal 2: Protect the Health of Americans Where They Live, Learn, Work, and Play
- Strategic Goal 3: Strengthen the Economic and Social Well-Being of Americans Across the Lifespan
- Strategic Goal 4: Foster Sound, Sustained Advances in the Sciences
- Strategic Goal 5: Promote Effective and Efficient Management and Stewardship.¹³²⁴

In line with HHS OCR's move to protect health care providers' right to religious freedom, *HHS Strategic Plan, FY 2018 – 2022* has identified several goals and strategies that will help advance this overarching policy priority:

- *Improve health care access and expand choices of care and services options.* HHS has identified a strategy to “design healthcare options that are responsive to consumer demands, while removing barriers for faith-based and other community-based

¹³¹⁹ U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file); HHS OCR's FY 2020 budget justification was not publicly available on its website at the time of publication of this report.

¹³²⁰ U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

¹³²¹ U.S. Dep't of Health & Human Servs., *FY 2019 Budget in Brief*, Feb. 19, 2018, p. 124.

¹³²² HHS, “OCR Mission and Vision,” *supra* note 1317.

¹³²³ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 306(a)(1-8) (2010).

¹³²⁴ U.S. Dep't of Health & Human Servs., “Strategic Plan FY 2018 - 2022,” <https://www.hhs.gov/about/strategic-plan/index.html> (accessed Jul. 23, 2019).

providers.”¹³²⁵ Specifically, the plan calls for HHS to implement and “vigorously enforce” Executive Order 13,798, *Promoting Free Speech and Religious Liberty*, to “reduce burdens on the exercise of religious and moral convictions, promote equal and nondiscriminatory participation by faith-based organizations in HHS-funded or conducted activities, and remove barriers to the full and active engagement of faith-based organizations in the work of HHS through targeted outreach, education, and capacity building.”¹³²⁶

- *Strengthen and expand the healthcare workforce to meet diverse needs.* HHS has identified a strategy to “support professional development of the healthcare workforce,” specifically by “remov[ing] any barriers to, and promot[ing], full participation in the health care workforce by persons and/or organizations with religious beliefs or moral convictions.”¹³²⁷
- *Empower people to make more informed healthcare choices.* Similarly, HHS has indicated that in order to achieve this goal, barriers to “HHS conducted, regulated, and funded programs and organizations with religious beliefs or moral convictions” must be removed.¹³²⁸

HHS OCR referred to “Executive Orders 13,771, Reducing Regulation and Controlling Regulatory Costs, and 13,777, Enforcing the Regulatory Reform Agenda,” and asserted that HHS “took required steps to reduce regulatory burden” when developing its 2018 strategic plan and civil rights policy priorities.¹³²⁹

During the time period examined in this report, HHS also operated under the FY 2014-2018 strategic plan.¹³³⁰ The strategic plan identified seven goals:

1. To help more Americans achieve the security of quality, affordable health care for themselves and for their families;
2. To keep food and medical products safe;
3. To protect against chronic and infectious diseases;
4. To help Americans find jobs;
5. To help parents access affordable child care;
6. To explore the frontiers of cutting-edge biomedical research; and
7. To fulfill our obligations to tribal communities for health care and human services.¹³³¹

¹³²⁵ U.S. Dep’t of Health & Human Servs., *HHS Strategic Plan, FY 2018 – 2022 Draft*, September 2017, p. 14, <https://www.vor.net/images/stories/2017-2018/hhs-draft-strategic-plan-fy2018-2022.pdf>.

¹³²⁶ *Ibid.*, 15.

¹³²⁷ *Ibid.*, 17-18.

¹³²⁸ *Ibid.*, 20.

¹³²⁹ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 17-18 (citing Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017) and Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017)) (emphasis added).

¹³³⁰ U.S. Dep’t of Health and Human Servs., *HHS Strategic Plan FY 2014-2018*, Mar. 10, 2014, <https://aspe.hhs.gov/system/files/pdf/258821/StrategicPlanFY2014-2018.pdf> [hereinafter HHS, *Strategic Plan FY 2014-2018*].

¹³³¹ *Ibid.*, 1.

The 2014 strategic plan identified the need for HHS to continue to collaborate with DOJ to protect the civil rights of people with disabilities and older adults consistent with the Americans with Disabilities Act and the Supreme Court's 1999 decision in *Olmstead*, which held that the ADA requires that states place persons with disabilities in integrated, community settings when reasonable and appropriate.¹³³²

HHS releases an annual report each year and makes the report publicly available on its website.¹³³³ HHS' FY 2018 annual report identified five goals for the coming year, consistent with the Department's FY 2018-2022 strategic plan:

1. Reform, Strengthen, and Modernize the Nation's Health Care System
2. Protect the Health and Well-Being of Americans Where They Live, Learn, Work, and Play
3. Strengthen the Economic and Social Well-Being of Americans across the Lifespan
4. Foster Sound, Sustained Advances in the Sciences
5. Promote Effective and Efficient Management and Stewardship¹³³⁴

Complaint Processing, Agency-Initiated Charges, and Litigation

The majority of HHS OCR's enforcement work, including investigations, compliance reviews, and case resolutions, is handled at HHS OCR's eight regional offices.¹³³⁵ In resolving an investigation based on a complaint, HHS OCR can engage in early complaint resolution (when allegations are specific to a single injured party/group); provide technical assistance; enter into a voluntary resolution agreement or formal settlement agreement; issue a letter with violation findings, insufficient evidence for findings, or no violation findings; or rely on administrative closure under some circumstances (e.g., complainant withdraws complaint or refuses to cooperate with the investigation).¹³³⁶ After closing an investigation, HHS OCR can monitor an entity to ensure that it complies with an agreement (voluntary or otherwise). HHS OCR can engage in further enforcement action, including a suspension or termination of HHS funding if entities refuse or fail to comply after HHS OCR has issued violation findings.¹³³⁷

The history of complaints regarding the sexual abuse of migrants, particularly minor migrants, in HHS custody through the shelters that ORR operates, is concerning. In February 2019, *Axios* obtained HHS records detailing the large number of complaints alleging that children were being sexually abused while in the federal government's custody, after being placed in HHS custody by DHS, which was charged with implementing family separation policies by the White House and

¹³³² 42 U.S.C. 12101 Pub. L. 101-336, 104 Stat. 327; *Olmstead v. L.C.*, 527 U.S. 581 (1999); HHS, *Strategic Plan FY 2014-2018*, *supra* note 1330, at 53.

¹³³³ U.S. Dep't of Health and Human Services, *2018 Annual Report*, 2018, <https://www.hhs.gov/sites/default/files/2018-annual-report.pdf>.

¹³³⁴ *Ibid.*, 5-6.

¹³³⁵ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 9, at 44.

¹³³⁶ 45 C.F.R. §§ 80.7(d), 80.8.

¹³³⁷ *Id.* § 80.8(a); U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 14.

DOJ.¹³³⁸ During the past four years, the federal government received over 4,500 complaints of sexual abuse of immigrant children in detention facilities.¹³³⁹ “From October 2014 to July 2018, the HHS’ Office of Refugee Resettlement received 4,556 complaints, and the Department of Justice received 1,303 complaints.”¹³⁴⁰ Numbers increased after President Trump’s “zero tolerance policy” was put in place in April 2018 (this policy is further discussed in Chapter 8 of this report).¹³⁴¹ The *New York Times* reported that from March to July 2018, ORR recorded 859 complaints of sexual abuse of minors, “the largest number of reports during any five-month span in the previous four years.”¹³⁴²

And relevant to external civil rights enforcement, there have been widespread allegations of sexual abuse among HHS contractors. The largest contractor, Southwest Key, provided housing in Arizona, California, and Texas for over 5,000 children, who were not free to leave.¹³⁴³ It received more than \$1.3 billion in government contracts for housing immigrant children, from 2013-2018. Of the many allegations, the following is elucidating:

A ProPublica story in August [2018] detailed the charges against Levian Pacheco, a former Southwest Key employee who is accused of molesting eight boys at a Mesa shelter over an 11-month period. Pacheco, who is HIV-positive, [was hired] without a background check [and allowed to work] for nearly four months. He was convicted earlier this month of 10 sex offenses connected to the molestation.

In response to media attention and complaints, Arizona health officials reviewed records on background checks at every Southwest Key facility across the state. Of the 13 shelters, the state found two additional facilities also had problems with background checks...

Arizona health officials also found that Southwest Key hadn’t vetted all employees by interviewing their previous employers and hadn’t ensured all employee files contained proof of tuberculosis testing. At some facilities, officials discovered

¹³³⁸ Caitlin Ownes, Stef W. Kight & Harry Stevens, “Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody,” *AXIOS*, Feb. 26, 2019, <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>.

¹³³⁹ *Ibid.*

¹³⁴⁰ *Ibid.*

¹³⁴¹ *Ibid.*; see also *infra* notes 2368-2425 (in this report’s chapter assessing the Office for Civil Rights and Civil Liberties of the DHS, discussing zero tolerance, migrant family separation, and how DHS detained and then sent thousands of Central American migrant children to be detained in HHS/ORR shelters).

¹³⁴² Matthew Haag, “Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says,” *New York Times*, Feb. 27, 2019, <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>.

¹³⁴³ Topher Sanders and Michael Grabbel, “‘Humanitarian Crisis’ Looms As Arizona Threatens to Revoke Immigrant Children Shelter Licenses,” *ProPublica*, Sep. 21, 2018, <https://www.propublica.org/article/southwest-key-arizona-threatens-to-revoke-immigrant-children-shelter-licenses>.

bedroom and bathroom doors missing and problems with the size of residents' rooms.¹³⁴⁴

Concerned state officials stepped in. After the state of Arizona revoked its permits, Southwest Key was forced to close two shelters.¹³⁴⁵ In other Southwest Key shelters run under federal government contracts, videos show physical abuse, including staff at the shelters dragging and slapping migrant children.¹³⁴⁶

Complaint Enforcement Process

HHS OCR describes itself as responsible for “enforcing all HHS’ civil rights authorities,” ensuring that “everyone has access to health care and human services without discrimination or violation of conscience.”¹³⁴⁷ (This enforcement responsibility includes responsibility for enforcing HHS’ civil rights authorities in ORR-funded services.¹³⁴⁸) HHS OCR states that it achieves these responsibilities by 1) ensuring that all federal funding recipients comply with civil rights laws, 2) enforcing provisions of the ACA that prohibit discrimination in health care programs and activities, and 3) ensuring that all relevant entities comply with federal laws that guarantee “the exercise of religious beliefs and moral convictions in HHS conducted or funded programs.”¹³⁴⁹

HHS OCR regulations require that HHS OCR investigate all complaints within its jurisdiction.¹³⁵⁰ According to the HHS OCR website, the Department “reviews *all* complaints that it receives” and investigates all complaints for which it can assert jurisdiction.¹³⁵¹ It further states that “in some cases, OCR may determine that it cannot investigate an individual’s complaint,”¹³⁵² and in some cases OCR will investigate even untimely filed complaints if jurisdiction can be established.¹³⁵³

HHS OCR states that after it receives a complaint, staff conduct an initial review to determine whether HHS OCR has jurisdiction to review and investigate the complaint.¹³⁵⁴ If the complaint

¹³⁴⁴ Ibid.

¹³⁴⁵ Agnel Phillips, “Southwest Key to Close 2 Phoenix-area Migrant Shelters, Pay Fine to State,” *Arizona Republic*, Oct. 24, 2018, <https://www.azcentral.com/story/news/politics/immigration/2018/10/24/southwest-key-close-2-phoenix-area-child-immigrant-shelters-pay-fine-arizona-settlement/1754460002/>.

¹³⁴⁶ Janice Williams, “Video Shows Migrant Children Physically Abused by Staffers at Arizona Shelter,” *Newsweek*, Dec. 30, 2018, <https://www.newsweek.com/southwest-key-migrant-child-abuse-1274796>.

¹³⁴⁷ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 2, at 16.

¹³⁴⁸ See 45 C.F.R. § 80.2.

¹³⁴⁹ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 2, at 16.

¹³⁵⁰ For example, HHS’ Title VI implementing regulation states that “the responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part.” 45 C.F.R. § 80.7(c).

¹³⁵¹ U.S. Dep’t of Health & Human Servs., “What [Office of Civil Rights] considers during intake and review of complaint,” <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/enforcement-process/intake-and-review-of-complaint/index.html> (accessed Jun. 6, 2019).

¹³⁵² Ibid.

¹³⁵³ Ibid.

¹³⁵⁴ 45 C.F.R. § 80.7(b); U.S. Dep’t of Health and Human Servs., “How does OCR investigate a civil rights complaint?” <https://www.hhs.gov/civil-rights/for-individuals/faqs/how-does-ocr-investigate-a-civil-rights-complaint/303/index.html>.

is determined to be within HHS OCR's jurisdiction, then HHS OCR states that its investigators will pursue several different avenues through which to obtain more information, such as interviews, obtaining documentation, independent research or site visits.¹³⁵⁵ HHS OCR reports that Regional Managers typically have discretion to select the most appropriate method of case resolution, based on the facts and circumstances of an individual case.¹³⁵⁶ HHS OCR's practice is that prior to a regional office issuing a Voluntary Resolution Agreement, a Violation Letter of Findings, or a Settlement Agreement, a review must take place and HHS OCR Headquarters must approve the necessary course of action.¹³⁵⁷

HHS OCR says it uses the same criteria to assess all of its complaints, evaluating to determine whether "it has the legal authority to review and investigate the complaint":

- Complaint is timely filed
- Complaint is against an entity covered by an authority enforced by OCR
- Complaint alleges issues that allow OCR to determine subject matter jurisdiction
- Complaint is complete¹³⁵⁸

Complaints

In its response to interrogatories, HHS OCR noted that the number of civil rights complaints submitted via its online portal in 2017 was nearly double the number submitted the same way in FY 2013.¹³⁵⁹ In terms of the civil rights cases investigated and/or resolved during the relevant fiscal years, HHS OCR provided charts showing changes in numbers of cases opened, investigated, and not investigated.¹³⁶⁰ In FY 2016, HHS OCR opened 4,380 cases, investigated and closed 211 cases, and closed without investigation (i.e., designated as an administrative closure) 4,652 cases.¹³⁶¹ In FY 2017, HHS OCR opened 6,469 cases, investigated and closed 459 cases, and closed without investigation 4,797 cases.¹³⁶² In FY 2018, HHS OCR opened 7,692 cases, investigated and closed 858 cases, and closed without investigation 4,881 cases.¹³⁶³ These data indicate that HHS OCR opened more cases and closed more cases (either with or without investigation) in FY 2018 than in FY 2016 or FY 2017.¹³⁶⁴

¹³⁵⁵ 45 C.F.R. § 80.7(c).

¹³⁵⁶ 45 C.F.R. § 80.7(d); U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 25.

¹³⁵⁷ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 25.

¹³⁵⁸ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 12, at 55 (Office of Civil Rights has noted that a complaint is "complete" when it includes a name, signature, and contact information of the complainant; identification of the entity that allegedly violated the complainants civil rights; and a clear allegation of a violation of any laws that are enforced by Office of Civil Rights.).

¹³⁵⁹ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 14, at 56.

¹³⁶⁰ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 10, at 48-49.

¹³⁶¹ *Ibid.*, 49.

¹³⁶² *Ibid.*

¹³⁶³ *Ibid.* (note that Office of Civil Rights included information about 2018 that was current as of February 28, 2018, thus the 2018 numbers likely changed to some extent by the time of publication).

¹³⁶⁴ *Ibid.*; *see infra* Table 4.5, for more information about processing times for various types of claims.

Table 4.3: Number of Complaints/Cases Opened and Carried-in¹³⁶⁵ between FY 2016 and FY 2018

Year	Carry-Ins	Cases Opened	Total
FY 2016	1910	4380	6290
FY 2017	1418	6469	7887
FY 2018	2630	7692	10322

Source: U.S. Department of Health and Human Services

Table 4.4: Number of Complaints/Cases Investigated and Not Investigated between FY 2016 and FY 2018

Year	Number of Complaints/Cases Investigated	Number of Complaints/Cases Not Investigated*
FY 2016	211	4652
FY 2017	459	4797
FY 2018	858	4881

* This number includes cases that were closed.

Source: U.S. Department of Health and Human Services

But notably, HHS OCR has reduced the amount of time it takes to close a case (with or without investigation) since FY 2016.¹³⁶⁶ In FY 2016, the average number of days HHS OCR took to close a case after an investigation was 705 days.¹³⁶⁷ In FY 2017 and FY 2018, the average number of days taken to close a case after an investigation plummeted to 324 days and 269 days, respectively.¹³⁶⁸ In FY 2016, the average number of days HHS OCR took to close a case without an investigation was 102 days.¹³⁶⁹ In FY 2017 and FY 2018, the average number of days taken to close a case without an investigation dropped to 65 days and 89 days, respectively.¹³⁷⁰ See Table 4.5.

Table 4.5: Length of Time to Investigate and Close/Settle Complaints/Cases between FY 2016 and FY 2018

	FY 2016	FY 2017	FY 2018
Average Days Investigative	705	324	548
Average Days Administrative	102	65	243
Total Average Age	128	88	289

Source: U.S. Department of Health and Human Services

The patterns become especially striking when reviewing the numbers and types of civil rights complaints closed after investigation in FY 2016, FY 2017, and FY 2018. In FY 2016, HHS OCR

¹³⁶⁵ HHS OCR defines carried-in cases as cases that were already open when the year began.

¹³⁶⁶ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 10, at 48-49.

¹³⁶⁷ Ibid.

¹³⁶⁸ Ibid (note that OCR included information about 2018 that was current as of February 28, 2018, thus the 2018 numbers may have increased at the time of this writing).

¹³⁶⁹ Ibid.

¹³⁷⁰ Ibid.

investigated and closed 80 civil rights complaints based on race, color, or national origin.¹³⁷¹ But in FY 2017, HHS OCR investigated and closed 266 civil rights complaints based on race, color, or national origin.¹³⁷² In FY 2018, HHS investigated and closed 691 complaints based on race, color, or national origin.¹³⁷³ Other notable differences included investigation and closure of civil rights complaints based on age in FY 2016 (40), in FY 2017 (113), and in FY 2018 (309); investigation and closure of civil rights complaints based on general disability in FY 2016 (178), in FY 2017 (498), and in FY 2018 (1,107); and investigation and closure of civil rights complaints based on mental health-related disability in FY 2016 (46), in FY 2017 (112), and in FY 2018 (248).¹³⁷⁴ These data show a dramatic increase in productivity in processing each of these types of complaints.

The data patterns could indicate use of new and effective management strategies to resolve cases more efficiently than they had been resolved in the past. The Commission heard testimony from Leon Rodriguez, who formerly led HHS OCR, about management efficiencies instituted in his tenure and tough decisions between systemic, time-consuming cases versus routine, individual cases.¹³⁷⁵ HHS OCR's case resolution data between FY 2016 through FY 2018 show notable increases in the number of cases closed with finding no violations (rising from 63 cases in FY 2016 to 150 cases in FY 2018), but also dramatic increases in the cases closed after the regulated entity took corrective action (increasing from 42 cases in FY 2016 to 94 cases in FY 2018), or HHS OCR provided technical assistance (increasing from 75 cases in FY 2016 to 157 cases in FY 2018).¹³⁷⁶

Proactive Compliance Evaluation

HHS OCR pointed out that some regulations “require attempts at achieving voluntary compliance of covered entities before a case is taken to enforcement.”¹³⁷⁷ Cases may be initiated through complaints or through proactive compliance monitoring.¹³⁷⁸ HHS OCR receives most discrimination complaints from members of the public, but can also exercise its discretion to engage in testing and compliance reviews to investigate violations in the absence of complaints.¹³⁷⁹ Testing utilizes individuals who, without any bona fide intent to seek a service or health care, pose

¹³⁷¹ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 10(c) in Excel spreadsheet “10 Interrogatory Response US Comm CR.”

¹³⁷² *Ibid.*

¹³⁷³ *Ibid.*

¹³⁷⁴ *Ibid.*

¹³⁷⁵ Rodriguez Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 69-70.

¹³⁷⁶ U.S. Dep't of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

¹³⁷⁷ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23.

¹³⁷⁸ See 45 C.F.R. § 80.7(a) (periodic compliance reviews of recipients of federal financial assistance); 45 C.F.R. § 80.7(b) (requiring that HHS OCR process complaints of discrimination filed with HHS OCR).

¹³⁷⁹ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23; see also 45 C.F.R. § 80.7(a) (regarding compliance reviews).

as prospective patients or customers for gathering information for determining whether an entity is violating civil rights laws.¹³⁸⁰

HHS OCR stated that the primary purpose of compliance reviews is to “address comprehensive systemic issues.”¹³⁸¹ HHS OCR periodically initiates compliance reviews to review the policies, procedures, and practices of recipients of federal financial assistance through HHS to ensure that the recipients are in compliance with federal civil rights laws enforced by HHS OCR.¹³⁸² In response to Commission Interrogatories, HHS OCR indicated that it views compliance reviews as a way to address discrimination against under-served communities that might not be addressed by individually filed complaints.¹³⁸³ Moreover, the civil rights office reported that compliance reviews initiated by HHS OCR must be accompanied by a justification memorandum that explains “the purpose of the review and any indicators that a review is needed, including any preliminary evidence.”¹³⁸⁴

In some circumstances, HHS OCR will treat a filed complaint as a compliance review when the manager of an HHS OCR regional office determines that:

- The complaint, because of its scope, involves systemic issues;
- OCR identifies compliance concerns during the course of an investigation involving unrelated issues that were not raised in the original complaint;
- A compliance review would be the most effective means of addressing multiple individual complaints against the same covered entity; or
- The complainant decides to withdraw a complaint that includes class allegations.¹³⁸⁵

HHS OCR also reported to the Commission that it resolves compliance reviews through the following processes (many of which are also applicable to complaint resolution):

- *Providing Technical Assistance.* In order to assist an entity to comply with its obligations under the relevant nondiscrimination laws, HHS OCR may opt to provide technical assistance. Technical assistance can be provided at any stage of an investigation.
- *Letter Confirming Voluntary Action Taken/to Be Taken by a Covered Entity.* This is an alternative to a more formal method of case resolution, when an entity will voluntarily provide information outlining a plan of action that this entity will take in order to resolve a complaint.
- *Voluntary Resolution Agreement.* A Voluntary Resolution Agreement may be utilized when complexities of a certain complaint may make it difficult for HHS OCR to monitor

¹³⁸⁰ U.S. Dep’t of Health and Human Servs., Response to USCR Interrogatory No. 5, at 23-38.

¹³⁸¹ *Ibid.*, 35.

¹³⁸² *Ibid.*

¹³⁸³ *Ibid.*

¹³⁸⁴ *Ibid.*

¹³⁸⁵ *Ibid.*, 36.

voluntary action. The Voluntary Resolution Agreements are developed to allow for effective monitoring, accountability, and consistency with HHS OCR guidelines.

- *Violation Letter of Findings*. The Violation Letter of Findings is used when an investigation uncovers evidence that establishes a violation. HHS OCR describes this tool as particularly useful when an egregious violation is discovered, or when achieving compliance would promote HHS OCR's enforcement priorities.
- *Settlement Agreement*. A formalized agreement that outlines certain remedies to ensure that an entity will take certain actions to achieve compliance. A Settlement Agreement is typically negotiated after the Violation Letter of Findings has been issued, and will be considered resolved once the entity has performed all outlined actions to remedy the violation.
- *Insufficient Evidence of a Violation Letter*. A letter that is issued when HHS OCR has conducted its investigation and has found insufficient evidence of a violation, which will cease any further investigation into the matter.
- *No Violation Findings Letter*. When an investigation has been concluded and an entity has been found to be in compliance, a No Violation Findings Letter will be issued.
- *Closing an Investigated Case without Resolution (Administrative Closure)*. An Administrative Closure will close a complaint without providing a resolution of the allegations under certain circumstances (complainant withdraws the complaint or refuses to cooperate, etc.). An Administrative Closure can occur at any point during the complaint investigation.
- *Requests for Reconsideration*. Under certain circumstances, when a complainant requests that a complaint be reconsidered, HHS OCR Headquarters has the discretion to reconsider its initial resolution, limited to the issues raised in the complaint or during the investigation, and identifying errors in OCR's consideration of the facts.
- *Monitoring*. Monitoring is utilized to ensure that all necessary steps are taken to ensure compliance, consistent with the terms of a Voluntary Resolution Agreement, a Settlement Agreement, a voluntary plan of action, or another agreed-upon action.
- *Reviews of State Transition Plans for Home and Community Based Services*. The goal of these reviews is to ensure that state transition plans (for compliance with Medicaid regulations) do not put patients at risk of unnecessary institutionalization.
- *Enforcement Action*. Enforcement action is taken when entities have refused to voluntarily comply or failed to achieve voluntary compliance after Violation Findings have been made. Enforcement action may include a suspension or termination of HHS funding or referral to DOJ for judicial processing.¹³⁸⁶

¹³⁸⁶ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 23-38.

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

Policy Priorities

HHS OCR indicated that it “investigate[s] all complaints of discrimination for which it has jurisdiction” and “does not assign priority to enforcement under one civil rights authority over another.”¹³⁸⁷ However, HHS OCR acknowledged that it has intensified its focus on policy and enforcement related to “discrimination on the basis of religion and conscience.”¹³⁸⁸ Describing conscience and religious freedom as a “neglected area of policy and enforcement,” HHS OCR explained its creation of CRFD, “a new Conscience and Religious Freedom Division to more vigorously and effectively enforce existing laws protecting the rights of conscience and religious freedom.”¹³⁸⁹ HHS OCR also discussed its commitment to addressing the opioid crisis and its support for child welfare agencies’ abilities to comply with civil rights laws.¹³⁹⁰

With regard to how HHS OCR’s policy priorities have changed over FY 2016 to FY 2018, HHS OCR stated that “HHS’s civil rights-related policy priorities have not changed over the fiscal years in question.”¹³⁹¹ However, HHS OCR asserted that it had identified “a significant need to amend” current federal regulations governing its authority to address complaints about discrimination based on religion and conscience.¹³⁹²

Policy changes in HHS OCR have included appointing a “Regulatory Reform Officer” to lead a “Regulatory Reform Task Force.”¹³⁹³ There were also policy changes such as limiting the interpretation of sex discrimination—as discussed herein, the Trump administration takes the legal position that sex discrimination should not include discrimination on the basis of gender identity and that providers should not have to refrain from discrimination on the basis of gender identity when providing health care.¹³⁹⁴

Section 1557 (Defining the Scope of the Meaning of Sex Discrimination)

In 2016, HHS finalized its regulations governing its enforcement of Section 1557 of the Affordable Care Act, Title IX, and other civil rights laws applicable to HHS-funded programs and activities,

¹³⁸⁷ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 17. It’s regulations require that “the [responsible Department official](#) or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part.” 45 C.F.R. § 80.7(c).

¹³⁸⁸ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 17.

¹³⁸⁹ *Ibid.*

¹³⁹⁰ *Ibid.*

¹³⁹¹ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 3, at 19.

¹³⁹² *Ibid.*, 20.

¹³⁹³ *Ibid.*, 18 (citing Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017) and Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017)) (emphasis added).

¹³⁹⁴ See *infra* notes 1395-1419 (Section 1557).

to address sex discrimination.¹³⁹⁵ The HHS rules define sex discrimination as discrimination based on, *inter alia*, pregnancy, false pregnancy, childbirth or related medical conditions, sex stereotyping, and gender identity.¹³⁹⁶ HHS then defined gender identity as a person’s “internal sense of gender, which may be male, female, neither, or a combination of male and female,” which “may be different from an individual’s sex assigned at birth,” and “may or may not conform to social stereotypes associated with a particular gender.”¹³⁹⁷ HHS further specified that a transgender individual is a person “whose gender identity is different from the sex assigned” at birth.¹³⁹⁸ However, in its response to Commission interrogatories, HHS OCR stated that as of December 31, 2016, based on a federal court injunction, it no longer enforces Section 1557’s provision prohibiting discrimination based on gender identity.¹³⁹⁹

On June 14, 2019, HHS OCR issued a proposed rule that extensively revised Section 1557 of the Patient Protection and Affordable Care Act.¹⁴⁰⁰ One of the most critical revisions proposed was the redefinition of “sex” to refer only to the biological and anatomical differences between males and females as determined at their birth.¹⁴⁰¹ Unlike under the Obama Administration, “gender identity” would no longer be a protected class under the scope of Section 1557’s civil rights statutes and Title IX’s prohibition of discrimination on the basis of sex.¹⁴⁰² The comment period for this proposed rule ended August 13, 2019.¹⁴⁰³ More than 130,000 comments were submitted and many comments made by stakeholders were critical of the proposed changes.¹⁴⁰⁴ Commenters who oppose the proposed rule cited as their bases the consequences vulnerable patient populations may face as a result of this walk-back on anti-discrimination protections, such as increased barriers for patients seeking gender transition services and care, categorical exclusion by insurers of coverage for certain health care services, and differential treatment by insurers of certain vulnerable patient populations, including LGBT individuals, with respect to certain benefits.¹⁴⁰⁵

¹³⁹⁵ 45 C.F.R. § 92.4, 81 Fed. Reg. 31,375 (July 18, 2016) (Section 1557 covers discrimination on the basis of race, color, national origin, disability, age, and sex); U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 7.

¹³⁹⁶ 45 C.F.R. § 92.4, 81 Fed. Reg. 31,375 (July 18, 2016).

¹³⁹⁷ *Id.*

¹³⁹⁸ *Id.*

¹³⁹⁹ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 7; *see* Franciscan Alliance, Inc., et al. v. Burwell, et al., 227 F. Supp. 3d 660 (N.D. Tex. 2016).

¹⁴⁰⁰ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (proposed Jul. 14, 2019).

¹⁴⁰¹ *Id.*

¹⁴⁰² “HHS Issues Proposed Rulemaking Drastically Revising ACA Section 1557 Nondiscrimination Regulations,” *Groom Law Group*, Jul. 16, 2019, <https://www.groom.com/resources/hhs-issues-proposed-rulemaking-drastically-revising-aca-section-1557-nondiscrimination-regulations/>.

¹⁴⁰³ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. at 27,846.

¹⁴⁰⁴ “HHS Receives Thousands of Comments on Proposed Reversal of Certain Discrimination Protections,” *Hall Render*, Aug. 20, 2019, <https://www.hallrender.com/2019/08/20/hhs-receives-thousands-of-comments-on-proposed-reversal-of-certain-discrimination-protections/> (commenters include the American Medical Association, the American Hospital Association, a coalition of 22 state Attorneys General, America’s Essential Hospitals and the Association for Community Affiliated Plans, all of whom oppose the proposed changes).

¹⁴⁰⁵ *Ibid.*

In December of 2018, the Commission sent a letter to HHS Secretary Alex Azar urging HHS not to narrowly define gender to a biological, immutable condition determined at birth.¹⁴⁰⁶ Advocacy groups critical of HHS OCR's proposed regulation have said that the policy is tantamount to pretending that transgender people simply do not exist.¹⁴⁰⁷ The policy, if implemented as reported, would likely face legal challenges.¹⁴⁰⁸ LGBT legal advocacy organization Lambda Legal says that the administration-wide rollback of LGBT protections raises serious legal questions, including implications under the Constitution's Equal Protection Clause.¹⁴⁰⁹ The National LGBTQ Task Force, in a written comment to the Commission, expressed concern that the proposed rule would result in an increase in discrimination against the LGTBQ community.¹⁴¹⁰

At the Commission's briefing, then-American University Washington College of Law Professor Anthony Varona testified regarding rollbacks of protections for transgender persons and LGBT persons that "we are not talking about regulatory minutiae or esoteric points of legal theory when we discuss whether the federal government is satisfying its duty to advance civil rights," and further stated that:

The retrenchment and even the antagonism of federal civil rights enforcement efforts is exemplified vividly through the lens focused on the LGBT community, which is significant both in its size and in our vulnerability. For many years, through both Democratic and Republican administrations, agencies throughout the federal government have responded to the bias and harassment faced by LGBT people with meaningful measures aimed at enforcing and protecting our basic civil rights. But then came the Trump administration and what appears to be a deliberate weaponization of regulatory homophobia and transphobia[.]¹⁴¹¹

The Commission also received public comments and data from the National LGBTQ Task Force and the National Center for Transgender Equality, echoing Professor Varona's analysis and detailing the harm to the LGBT and transgender communities stemming from these federal policy

¹⁴⁰⁶ Correspondence from U.S. Comm'n on Civil Rights to U.S. Dep't of Health and Human Services (Dec. 7, 2018), <https://www.usccr.gov/press/2018/12-07-Transgender-Letter-to-Health-Human-Services.pdf>.

¹⁴⁰⁷ Sarah Mervosh & Christine Hauser, "At Rallies and Online, Transgender People Say They #WontBeErased," *The New York Times*, Oct. 22, 2018, <https://www.nytimes.com/2018/10/22/us/transgender-reaction-rally.html?action=click&module=inline&pgtype=Article>.

¹⁴⁰⁸ Patricia A. Smith, Olabisi Ladeji Okubadejo, & Maraya N. Pratt, "What Remedy for Transgender Students if HHS Succeeds in Narrowly Redefining Gender Under Title IX?," *National Law Review*, Oct. 25, 2018, <https://www.natlawreview.com/article/what-remedy-transgender-students-if-hhs-succeeds-narrowly-redefining-gender-under>.

¹⁴⁰⁹ Lambda Legal, *Trump Administration Plan to Expand Religious Refusal Rights of Health Professionals: Legal Issues and Concerns*, Jan. 18, 2018, <https://www.lambdalegal.org/health-care-analysis>.

¹⁴¹⁰ National LGBTQ Task Force Statement, at 13-14.

¹⁴¹¹ Varona Testimony, *Federal Civil Rights Enforcement Briefing*, p. 252.

changes.¹⁴¹² A report by the Fenway Institute also documents concerns with the rollback of LGBT nondiscrimination regulations, in health as well as education and housing.¹⁴¹³

In a 2018 report, Human Rights Watch found that LGBT people seeking medical care are routinely discriminated against because of their sexual orientation or gender identity, including being denied services and encountering discriminatory language.¹⁴¹⁴ Discriminatory treatment often results in barriers to healthcare treatment for LGBT people or reluctance to seek care.¹⁴¹⁵ The result of this discriminatory treatment, says Shabab Mirza, an LGBT research assistant at the Center for American Progress, is that LGBT people frequently report poorer health than their non-LGBT peers.¹⁴¹⁶ LGBT advocates fear that HHS' creation of CRFD along with a rollback of section 1557 of the Affordable Care Act will increase discrimination against the LGBT community.¹⁴¹⁷ Rea Carey, executive director of the National LGBTQ Task Force, says that, "Health professionals have a duty to care for all their patients regardless of one's gender identity, sexual orientation, faith, creed, race, political views, gender or disability, and no one should be denied care for being who they are."¹⁴¹⁸ In a statement to the Commission, the National LGBTQ Task Force wrote that failure to provide equal access to health care has negative impacts on community members and is not an effective way to enforce civil rights, explaining that 33 percent of transgender patients had at least one negative experience in a healthcare setting within the past year related to their gender identity.¹⁴¹⁹

Language Access in Federally Assisted and Conducted Programs

HHS OCR reports that it has complied fully with Executive Order 13,166 (requiring federal agencies to issue guidance under Title VI regarding language access) and also complied fully with a 2013 memo from the Attorney General, which requested federal agencies to "join DOJ in

¹⁴¹² National LGBTQ Task Force Statement; National Center for Transgender Equality, Written Statement for the Are Rights a Reality? Evaluating *Federal Civil Rights Enforcement Briefing* before the U.S. Commission on Civil Rights, Dec. 17, 2018.

¹⁴¹³ Sean Cahill, Tim Want, and Bishar Jenkins, *Trump Administration Continued to Advance Discriminatory Policies and Practices Against LGBT People and People Living with HIV in 2018*, The Fenway Institute, 2019, pp. 4-6, https://fenwayhealth.org/wp-content/uploads/Trump-Administration-Impact-on-LGBTs-Year-Two-Brief_Web.pdf.

¹⁴¹⁴ Ibid.

¹⁴¹⁵ Ibid.

¹⁴¹⁶ Chris Johnson, "New HHS division slammed as tool for anti-LGBT discrimination," *Washington Blade*, Jan. 18, 2018, <https://www.washingtonblade.com/2018/01/18/new-hhs-conscience-division-slammed-tool-anti-lgbt-discrimination/> [hereinafter Johnson, "New HHS division slammed as tool for anti-LGBT discrimination"].

¹⁴¹⁷ Julie Moreau, "Trump administration 'exacerbating' LGBTQ health care discrimination, report says," *NBC News*, Jul. 24, 2018, <https://www.nbcnews.com/feature/nbc-out/trump-administration-exacerbating-lgbtq-health-care-discrimination-report-says-n894151>.

¹⁴¹⁸ Johnson, "New HHS division slammed as tool for anti-LGBT discrimination," *supra* note 1416.

¹⁴¹⁹ National LGBTQ Task Force Statement, at 13-14.

recommitting to the implementation” of the order.¹⁴²⁰ The 2013 memo outlined action items for each agency in “an effort to secure the federal government’s full compliance with Executive Order 13,166, including establishment of agency-wide Language Access Working Groups to, among other things, develop or update agency language access plans.”¹⁴²¹ HHS OCR explained its enforcement of national origin protections regarding entities that receive Federal funds through HHS is achieved by enforcing the Title VI statute and HHS’s Title VI implementing regulations. HHS explained that its *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* “helps recipients of HHS financial assistance voluntarily comply with Title VI and thereby reduce discriminatory barriers” to services and programs.¹⁴²²

In the context of public education, the Supreme Court has held, based on civil rights regulatory language that HHS still operates under,¹⁴²³ that recipients of federal funding must affirmatively provide language access so that students would have meaningful access.¹⁴²⁴ With regard to recipients of federal funds for health, compliance with the underlying rules of Title VI against national origin discrimination would also be subject to a “meaningful access” standard.¹⁴²⁵ The meaningful access standard is codified in federal regulations, HHS OCR is obligated to enforce these regulations, as recipients of HHS funding must provide meaningful access to LEP persons.¹⁴²⁶

¹⁴²⁰ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 1, at 1 (citing U.S. Dep’t of Justice, Office of the Atty Gen., Memorandum for Heads of Federal Agencies, General Counsels, and Civil Rights Heads, Federal Government’s Renewed Commitment to Language Access Obligations Under Executive Order 13166 (Feb. 17, 2011),

https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf). Exec. Order No. 13,166 seeks to improve access to services for persons with limited English proficiency.

¹⁴²¹ U.S. Dep’t of Justice, Office of the Atty Gen., Memorandum for Heads of Federal Agencies, General Counsels, and Civil Rights Heads, Federal Government’s Renewed Commitment to Language Access Obligations Under Executive Order 13166, (Feb. 17, 2011), p. 2,

https://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf.

¹⁴²² Ibid.

¹⁴²³ At the time of the Supreme Court’s decision, it evaluated the Title VI regulations of the Department of Health, Education, and Welfare (HEW). That Department has since been split into the Departments of Education and Health and Human Services; the underlying regulation, though, continues to apply to HHS. See 45 C.F.R. 80.3(b)(2) (2005).

¹⁴²⁴ *Lau v. Nichols*, 414 U.S. at 568.

¹⁴²⁵ See, e.g., *Sandoval v. Hagan*, 197 F.3d 484, 510-11 (11th Cir. 1999) (holding that English-only policy for driver’s license applications constituted national origin discrimination under Title VI), *rev’d on other grounds*, 532 U.S. 275 (2001); *Almendares v. Palmer*, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003) (holding that allegations of failure to ensure bilingual services in a food stamp program could constitute a violation of Title VI).

¹⁴²⁶ 45 C.F.R. § 92.201 (Meaningful access for individuals with limited English proficiency); see also 28 C.F.R. § 42.405(d)(1) (2019) (“Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public.”).

At the Commission’s briefing, former HHS OCR Director Leon Rodriguez discussed the office’s commitment to providing language access enforcement, to avoid unlawful national origin discrimination; HHS OCR stated that this commitment is unchanged.¹⁴²⁷ He also described cases of persons in dire health circumstances being unable to understand doctors and other health care providers and stated that data showed that providing language access saved money and saved lives.¹⁴²⁸ He added that: “As Director of the Office for Civil Rights, I emphasized the fact that civil rights compliance is part and parcel of the overall mission of the Department that we serve. It is a false choice to ever say that civil rights compliance and the core missions of any department in which we serve, are at odds with one another.”¹⁴²⁹

Technical Assistance

HHS OCR indicated that it offers technical assistance to recipients of federal financial assistance at any stage of an investigation if it determines there appears to be a compliance concern.¹⁴³⁰ As part of all compliance reviews, HHS OCR stated that it supplies technical assistance.¹⁴³¹ Technical assistance provided to HHS OCR covered entities includes “sample documents and policies; electronic links to regulations, OCR’s fact sheets and website; suggested sources of helpful information from other HHS components; and explanations of regulatory requirements where needed.”¹⁴³² Furthermore, HHS OCR makes some technical assistance available on its website.¹⁴³³

Interaction and Coordination with External Agencies and Organizations

In August 2016, HHS OCR, DOJ and HUD issued a joint statement “to remind recipients of federal financial assistance that they should not withhold certain services based on immigration status when the services are necessary to protect life or safety.”¹⁴³⁴ Prior to the scope of review of this report, in December of 2014, HHS OCR and DOJ issued joint guidance explaining states’ obligations under Title II of the ADA to avoid placing individuals at serious risk of institutionalization when considering implementation options of the new Fair Labor Standards Act.¹⁴³⁵

¹⁴²⁷ U.S. Dep’t of Health and Human Servs., Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

¹⁴²⁸ Rodriguez Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 44-45.

¹⁴²⁹ *Ibid.*, 44.

¹⁴³⁰ U.S. Dep’t of Health and Human Servs., Response to USCCR Interrogatory No. 5, at 24.

¹⁴³¹ *Ibid.*, 36.

¹⁴³² *Ibid.*

¹⁴³³ See, e.g., U.S. Dep’t of Health and Human Servs., “Civil Rights for Providers of Health Care and Human Services,” <https://www.hhs.gov/civil-rights/for-providers/index.html> (accessed Jul. 23, 2019).

¹⁴³⁴ U.S. Dep’t of Health and Human Servs., U.S. Dep’t of Hous. and Urban Dev., U.S. Dep’t of Justice, Tri-Agency Joint Letter by DOJ HUD HHS on Life and Safety Services (Aug. 5, 2016), <https://www.hhs.gov/sites/default/files/Joint-Letter-August-2016.pdf>.

¹⁴³⁵ U.S. Dep’t of Health and Human Servs., U.S. Dep’t of Justice, Dear Colleague Letter from DOJ and HHS re: the Home Care Rule (Dec. 15, 2014) https://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf.

A major civil rights issue that emerged involved thousands of migrant children who have been held in cages in former warehouses, in buildings with little light, forced to sleep on cement floors in cold temperatures, with only aluminum blankets issued to cover them.¹⁴³⁶ The shelters are run by HHS' Office of Refugee Resettlement.¹⁴³⁷ At the shelters, many children are not able to speak to their parents, hug their siblings who are also in custody, go to school, know when they will be released, and there are a troubling number of allegations of abuse.¹⁴³⁸

During a February 2019 Congressional hearing, Representative Pramila Jayapal questioned Scott Lloyd, the former head of the agency caring for migrant children, about an HHS child welfare expert's warning about the extremely negative psychological effects caused by separating them from their parents.¹⁴³⁹ Lloyd, along with officials from DOJ and the Border Patrol who were also aware of the warning, testified that they did not voice concern over its impact in any other meetings.¹⁴⁴⁰ Furthermore, GAO found that the lack of coordination between DHS and HHS resulted in extreme difficulties in reuniting with their parents, even when ordered to do so by a federal court due to civil rights concerns.¹⁴⁴¹

HHS OCR indicated that it participates in 21 external groups or partnerships across the federal government, a list of which is included herein at Table 4.6.

¹⁴³⁶ Manny Fernandez, "Inside the Former Walmart That Is Now a Shelter for Almost 1,500 Migrant Children," *The New York Times*, Jun. 14, 2018, <https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html>.

¹⁴³⁷ U.S. Government Accountability Office, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border*, Oct. 2018, pp. 17- 26, <https://www.gao.gov/assets/700/694963.pdf> [hereinafter GAO, *Unaccompanied Children*].

¹⁴³⁸ See *supra* notes 1337-46.

¹⁴³⁹ "What we learned from congressional hearing on family separations," *PBS*, Feb. 26, 2019, <https://www.pbs.org/newshour/show/what-we-learned-from-congressional-hearing-on-family-separations> [hereinafter PBS, "What we learned from congressional hearing on family separations"].

¹⁴⁴⁰ *Ibid.*

¹⁴⁴¹ GAO, *Unaccompanied Children*, *supra* note 1437, at 17-26 Oct. 2018.

Table 4.6 External Coordination Groups or Partnerships that Include HHS OCR as a Member

Name of Group	Description of Group
Association of Federal External Civil Rights Specialists/Officers	Inter-agency Association- best practices in Fed civil rights programs.
Child Abuse & Neglect Federal Interagency Workgroup	Share information and receive and review ACF reports on child abuse and neglect.
Child Welfare Coordinating Group	Coordination between OCR, ACF and DOJ on child welfare cases.
Dept. of Education LGBT Intra-Agency Roundtable	Identifies LGBT issues of concern and agencies' enforcement positions regarding LGBT issues.
DHS Federal Civil Rights Coordination in Disasters	Civil rights offices within DHS, FEMA, HHS, and DOJ report and coordinate on disaster-related activities.
DOJ LEP Enforcement Interagency Working Group	Coordinate & Inform LEP enforcement.
DOJ LEP Interagency Working Group	Promote cross agency efforts promoting LEP access.
DOJ Service Animal Interagency Working Group	Identifies issues of concern regarding the use of service animals to better ensure Federal agencies take a consistent policy and enforcement approach to service animals under section 504 and Americans with Disabilities Act.
DOJ Title IX Compliance Discussion Group	Share information.
DOL-HHS Coordinating Group for FLSA	To coordinate re: FLSA rules (roll out completed).
Environmental Justice Title VI Interagency Working Group	Established in 1994 under EO 12892, to guide, support and enhance Federal environmental justice and community-based activities.
Home and Community Based Settings (HCBS) Workgroup	Monthly meeting between HHS (OCR, ACL, CMS) and DOJ to provide updates on the HCBS Rule and to discuss State' progress in modifying state transition plans to ensure that Medicaid-funded services are provided in settings that exhibit home and community-based characteristics.
Human Rights Treaties - Interagency Policy Committee	Report enforcement efforts related to UN Treaties.
Interdepartmental Serious Mental Illness Coordinating Committee (ISMICC)	Reports to Congress and federal agencies on issues related to serious mental illness and serious emotional disturbance – specifically reports on advances in research, prevention, diagnosis, etc.

Federal Interagency Health Equity Team: National Partnership for Action to End Health Disparities (NPA)	The FIHET participates in the development and implementation of the NPA.
National Project Advisory Committee on Culturally and Linguistically Appropriate Services	Provide advice and expertise to HHS Office of Minority Health on improving culturally and linguistically appropriate services in health care.
Transforming Mental Health Care in America: Federal Partners Senior Workgroup	Interagency collaboration on mental health.
Universal Periodic Review (UPR) – Interagency Delegation	Drafts materials for U.S. delegates who attend UPR meetings re U.S. human rights activities.
Title IX STEM Interagency Working Group – Led by DOJ	Data/Information Sharing to Improve Oversight of Federal Grant-making and Title IX Compliance. http://www.gao.gov/products/GAO-16-14
White House Initiative on Asian Americans and Pacific Islanders Language Access Subcommittee	Share best practices and challenges; coordinate during disaster response and recovery.
White House Council on Women and Girls STEM Working Group	Information sharing.

Source: U.S. Dep't of Health and Human Services

Research, Data Collection, and Reporting

In its FY 2018 budget justification to Congress, HHS OCR identified the collection of health information as essential to improving health care outcomes.¹⁴⁴² HHS OCR implemented its Complaint Portal in 2013 that tracks data related to the intake and processing of complaints.¹⁴⁴³ HHS OCR identified one change to its data collection procedures during FY 2016-2018 regarding collection of data from complaints filed under Section 1557 of the Affordable Care Act.¹⁴⁴⁴ The change was prompted by a court injunction prohibiting enforcement of some provisions of Section 1557 addressing sex discrimination.¹⁴⁴⁵

¹⁴⁴² HHS, *OCR FY 2018 Congressional Justification*, *supra* note 1291, at 25.

¹⁴⁴³ U.S. Dep't of Health and Human Servs., Response to USCCR Interrogatory No. 14, at 56.

¹⁴⁴⁴ *Ibid.*, 60.

¹⁴⁴⁵ *Ibid.*, 60; *see also Franciscan Alliance v. Azar*, Case No. 7:16-cv-00108 (N.D. Tex. Filed Dec. 31, 2016).

Chapter 5: U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity

Legal Authority and Responsibility

Congress established the U.S. Department of Housing and Urban Development (HUD) in 1965.¹⁴⁴⁶ HUD is currently led by Secretary Benjamin S. Carson, who was sworn into office in March 2017.¹⁴⁴⁷ HUD's mission, as presently indicated on its website, is to:

Create strong, sustainable, inclusive communities and quality affordable homes for all. HUD is working to strengthen the housing market to bolster the economy and protect consumers; meet the need for quality affordable rental homes; utilize housing as a platform for improving quality of life; build inclusive and sustainable communities free from discrimination, and transform the way HUD does business.¹⁴⁴⁸

HUD reports on its website that it strives to uphold its mission by administering federal programs and creating housing policy that can help create affordable housing opportunities in the rental and sales markets for individuals and families; combat homelessness; promote fair housing and inclusive community development; and foster sustainability.¹⁴⁴⁹ HUD reported that the Office of Fair Housing and Equal Opportunity (FHEO) is the primary office at HUD that handles external civil rights enforcement, in conjunction with the Office of the General Counsel (OGC). The mission of FHEO is to “eliminate housing discrimination, promote economic opportunity, and achieve diverse, inclusive communities by leading the nation in the enforcement, administration, development, and public understanding of federal fair housing policies and laws.”¹⁴⁵⁰ In his written statement to the Commission, then General Deputy Assistant Secretary Bryan Greene distilled the need for FHEO's work: “Ongoing segregation in America, regular reports of sexual harassment in housing, and newly-constructed properties inaccessible to people with disabilities are just some examples that underscore that we have not yet conquered housing discrimination.”¹⁴⁵¹ Through FHEO and OGC, HUD enforces the following statutes, executive orders, and regulations:¹⁴⁵²

¹⁴⁴⁶ 42 U.S.C. § 3532 (1965).

¹⁴⁴⁷ U.S. Dep't of Hous. and Urban Dev., “Secretary Ben Carson,” https://www.hud.gov/about/leadership/ben_carson.

¹⁴⁴⁸ U.S. Dep't of Hous. and Urban Dev.t, “About HUD's Mission,” <https://www.hud.gov/about/mission> (last accessed Oct. 9, 2018); U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1.

¹⁴⁴⁹ See generally HUD, *FY 2018-2022 Strategic Plan*, *supra* note 194.

¹⁴⁵⁰ 42 U.S.C. §§ 36101-19 and implementing regulations at 24 C.F.R. parts 100, 103, and 180; U.S. Dep't of Hous. and Urban Dev., “About FHEO,” https://www.hud.gov/program_offices/fair_housing_equal_opp (accessed Oct. 9, 2018); U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1. See also 24 C.F.R. pt. 115.

¹⁴⁵¹ Greene Statement, at 3.

¹⁴⁵² U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 2-3.

- The Fair Housing Act;¹⁴⁵³
- The obligation to affirmatively further fair housing under the Fair Housing Act, the obligation for grantees to certify compliance with the Affirmatively Furthering Fair Housing (AFFH) obligation under the Housing and Community Development Act of 1974,¹⁴⁵⁴ the Cranston-Gonzalez National Affordable Housing Act,¹⁴⁵⁵ and the Quality Housing and Work Responsibility Act of 1998;¹⁴⁵⁶
- Title VI of the Civil Rights Acts of 1964;¹⁴⁵⁷
- The Age Discrimination Act of 1975;¹⁴⁵⁸
- Section 504 of the Rehabilitation Act of 1973;¹⁴⁵⁹
- Section 508 of the Rehabilitation Act of 1973;¹⁴⁶⁰
- Title II of the American Disabilities Act;¹⁴⁶¹
- Architectural Barriers Act of 1968;¹⁴⁶²
- Section 3 of the Housing and Urban Development Act of 1968;¹⁴⁶³
- Section 109 of Title I of the Housing and Community Development Act of 1974;¹⁴⁶⁴
- Equal Access to Housing;¹⁴⁶⁵
- Title IX of the Education Amendments Act of 1972;¹⁴⁶⁶
- Executive Order 11,063, as amended;¹⁴⁶⁷
- Executive Order 11,246, as amended (Equal Employment Opportunity Programs);¹⁴⁶⁸
- Executive Order 12,892, as amended (Leadership and Coordination of Fair Housing in Federal Programs; Affirmatively Furthering Fair Housing);¹⁴⁶⁹
- Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations);¹⁴⁷⁰
- Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency; and¹⁴⁷¹

¹⁴⁵³ 42 U.S.C. §§3601-19 and implementing regulations at 24 C.F.R. parts 100, 103, and 180.

¹⁴⁵⁴ 42 U.S.C. § 5309.

¹⁴⁵⁵ *Id.* § 12703.

¹⁴⁵⁶ 42 U.S.C. §§3608, 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16) and the implementing regulations at 24 C.F.R. §§ 5, 91, 92, 200, 570, 574, 576, and 903.

¹⁴⁵⁷ 42 U.S.C. §§2000d-2000d-4 and implementing regulations at 24 C.F.R. part 1.

¹⁴⁵⁸ 42 U.S.C. §§ 6101-07 and implementing regulations at 24 C.F.R. part 146.

¹⁴⁵⁹ 29 U.S.C. § 794 and implementing regulations at 24 C.F.R. parts 8 and 9.

¹⁴⁶⁰ 29 U.S.C. § 794(d) and 36 C.F.R. part 1194.

¹⁴⁶¹ 42 U.S.C. §12131-34 and 28 C.F.R. part 35.

¹⁴⁶² 42 U.S.C. § 4151 et seq. and implementing regulations at 24 C.F.R. part 41.

¹⁴⁶³ 12 U.S.C. § 1701u and implementing regulations at 24 C.F.R. part 135.

¹⁴⁶⁴ 42 U.S.C. § 5309 and implementing regulations at 24 C.F.R. part 6.

¹⁴⁶⁵ 24 C.F.R. parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982 (1996).

¹⁴⁶⁶ 20 U.S.C. §§ 1681-88 and implementing regulations at 24 C.F.R. part 3.

¹⁴⁶⁷ Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962).

¹⁴⁶⁸ Exec. Order No. 11,246, 30 Fed. Reg. 12,319.

¹⁴⁶⁹ Exec. Order No. 12,892, 59 Fed. Reg. 2,939 (Jan. 17, 1994).

¹⁴⁷⁰ Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

¹⁴⁷¹ Exec. Order No. 13,166, 65 Fed. Reg. 50,121.

- Executive Order 13,217, as amended (Community-Based Alternatives for Individuals with Disabilities).¹⁴⁷²

HUD enforces the Fair Housing Act and other laws that protect people from discrimination in housing on the basis of race, color, religion, national origin, sex, disability, and familial status (among other categories).¹⁴⁷³ HUD reports that it also ensures that housing providers and grantees comply with other civil rights statutes, executive orders, and regulations.¹⁴⁷⁴ HUD also works to enforce the Fair Housing Act through two programs—the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP)—that promote fair housing at the state and local level.¹⁴⁷⁵

Enforcement Tools

The agency enforcement tools FHEO has specific legal authority to use are:

- Complaint Resolution¹⁴⁷⁶
- Agency-Initiated Charges¹⁴⁷⁷
 - FHEO may also bring administrative proceedings to judgement before an administrative law judge¹⁴⁷⁸

¹⁴⁷² Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (Jun. 21, 2001).

¹⁴⁷³ 42 U.S.C. 3535(d); 42 U.S.C. §§ 3601-19 and implementing regulations at 24 C.F.R. parts 100, 103, and 180; U.S. Dep’t of Hous. and Urban Dev., “Fair Housing Rights and Obligations,” https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_rights_and_obligations; U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1.

¹⁴⁷⁴ U.S. Dep’t of Housing and Urban Development, Response to Interrogatory No. 1, at 1.

¹⁴⁷⁵ 42 U.S.C. §§ 3535(d), 3610(f), 3616; 24 C.F.R. parts 115 and 125; U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5; U.S. Dep’t of Hous. and Urban Dev., “Fair Housing Assistance Program (FHAP),” https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP [hereinafter HUD, “FHAP”]; U.S. Dep’t of Hous. and Urban Dev., “Fair Housing Initiatives Program,” https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHIP [hereinafter HUD, “FHIP”]; *see infra* notes 1536-1551.

¹⁴⁷⁶ 24 C.F.R. §§ 1.7, 3.605, 6.11, 8.56, 9.170 (indicating that “[t]he agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 [sic.] under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),” however 29 C.F.R. part 1613 is nonexistent, and the HUD regulation intended to refer to these compliance procedures is 29 C.F.R. part 1615.170 (Compliance procedures)); 24 C.F.R. § 41.5(d); 24 C.F.R. Part 103; 24 C.F.R. Part 115 Subpart C; 24 C.F.R. Part 125; 24 C.F.R. §§ 146.33-146.37.

¹⁴⁷⁷ 42 U.S.C. § 3610(a)(iii).

¹⁴⁷⁸ 24 C.F.R. §§ 103.400-103.410 indicates that while the HUD Assistant Secretary can “direct the issuance of a charge under § 103.405 on behalf of the aggrieved person” and can elect to initiate a civil action in lieu of an administrative proceeding, “the General Counsel shall immediately notify and authorize the Attorney General to commence and maintain a civil action seeking relief under section 812(o) of the Fair Housing Act on behalf of the aggrieved person in an appropriate United States District Court,” thus clarifying that authority to initiate a civil action in federal court lies within DOJ; *see also* DOJ Justice Manual, *supra* note 370, at § 8-2.231 *and see infra* notes 1584-1608.

- FHEO may elect, in lieu of an administrative proceeding, to have the claims asserted in the charge decided in a civil action in a court of law, which would be handled by the Attorney General.¹⁴⁷⁹
 - Proactive Compliance Evaluations¹⁴⁸⁰
 - Testing¹⁴⁸¹
 - Issuance of Policy Guidance¹⁴⁸²
 - Issuance of Regulations¹⁴⁸³
 - Technical Assistance¹⁴⁸⁴
 - Publicity¹⁴⁸⁵
 - Community outreach to stakeholders¹⁴⁸⁶
 - Research, data collection, and reporting¹⁴⁸⁷
 - Collaboration with states/local agencies¹⁴⁸⁸

¹⁴⁷⁹ 24 C.F.R. § 103.410(a) discusses how “[i]f a charge is issued under §103.405, a complainant (including the Assistant Secretary, if HUD filed the complaint), a respondent, or an aggrieved person on whose behalf the complaint is filed may elect, in lieu of an administrative proceeding under 24 CFR part 180, to have the claims asserted in the charge decided in a civil action under section 812(o) of the Fair Housing Act,” thus defining adjudication through the administrative process differently than an election of civil action. 24 C.F.R. § 103.500 outlines procedures for HUD to take prompt judicial action at any time following the filing of a complaint, however states that “the General Counsel may authorize the Attorney General to commence a civil action,” and to “ensure that prompt initiation of the civil action, the General Counsel will consult with the Assistant Attorney General for the Civil Rights Division before making the determination that prompt judicial action is necessary,” thus clarifying that the authority to initiate a civil action in federal court lies within DOJ; *see also* DOJ Justice Manual, *supra* note 370, at § 8-2.231 *and see infra* notes 1584-1608.

¹⁴⁸⁰ 24 C.F.R. § 1.7(a) (conduct of investigations); 24 C.F.R. § 3.605; 24 C.F.R. § 6.11(b); 24 C.F.R. § 8.56(a); 24 C.F.R. § 41.5(b); 24 C.F.R. § 103.204; 24 C.F.R. 108.40(b); 24 C.F.R. § 146.31.

¹⁴⁸¹ 24 C.F.R. §§ 115.100(c), 115.311, 125.107.

¹⁴⁸² 24 C.F.R. § 1.6(a) (The responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part 1”); 24 C.F.R. § 3.605; 24 C.F.R. § 6.10 (“The Responsible Official and the Award Official will provide assistance and guidance to Recipients to help them comply voluntarily with this part”); 24 C.F.R. § 8.55 (“The responsible civil rights official and the award official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part”).

¹⁴⁸³ 24 C.F.R. §§ 10.2, 10.6; 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations).

¹⁴⁸⁴ 42 U.S.C. § 3608(e)(3); 24 C.F.R. § 1.6(a) (The responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part 1”); 24 C.F.R. § 3.605; 24 C.F.R. § 6.10 (“The Responsible Official and the Award Official will provide assistance and guidance to Recipients to help them comply voluntarily with this part”); 24 C.F.R. § 8.55 (“The responsible civil rights official and the award official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part”).

¹⁴⁸⁵ 24 C.F.R. § 115.308(c); 24 C.F.R. § 180.680(a); 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information).

¹⁴⁸⁶ 24 C.F.R. §§ 115.300(e), 115.304(d); 24 C.F.R. § 125.301; 28 C.F.R. § 42.405.

¹⁴⁸⁷ 42 U.S.C. §§ 3608(e)(1)-3608(e)(2), 3608(e)(6); 24 C.F.R. § 115.307(a)(3); 28 C.F.R. § 42.406 (regarding data collection and reporting).

¹⁴⁸⁸ 24 C.F.R. § 1.6(a) (The responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part 1”); 24 C.F.R. § 3.605; 24 C.F.R. § 6.10 (“The Responsible Official and the Award Official will provide assistance and guidance to Recipients to help them comply voluntarily with this part”); 24 C.F.R. § 8.55 (“The responsible civil rights official and the award official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part”); 24 C.F.R. § 103.220.

- Collaboration with other federal agencies¹⁴⁸⁹
- Strategic Plan¹⁴⁹⁰
- Annual Reports¹⁴⁹¹

According to FHEO, testing “is a critical tool in the fight against housing discrimination.”¹⁴⁹² Testing refers to “the use of an individual or individuals (‘testers’) who, without bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws.”¹⁴⁹³ Paired testing is conducted when two people assume the roles of applicants with equivalent social and economic characteristics who differ only in terms of the characteristic being tested for discrimination, such as race, disability status, or marital status.¹⁴⁹⁴ Testers and the organizations conducting the tests are not allowed to have any economic or personal interests in the outcome of the tests.¹⁴⁹⁵

Budget and Staffing

The Assistant Secretary, Fair Housing and Equal Opportunity leads FHEO. Anna Maria Farías currently serves as the Assistant Secretary for FHEO, having been confirmed by the Senate in August 2017.¹⁴⁹⁶ While the leadership at HUD has changed with the Trump Administration, HUD reports that its organizational structure and general roles and responsibilities of FHEO have not changed from FY 2016 through FY 2018.¹⁴⁹⁷ See Figure 5.1.

¹⁴⁸⁹ 24 C.F.R. § 103.220; 28 C.F.R. § 42.413.

¹⁴⁹⁰ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b); 5 U.S.C. § 306(a); *see* HUD, *FY 2018-2022 Strategic Plan*, *supra* note 194.

¹⁴⁹¹ 42 U.S.C. §§ 3608(e)(6), 3608(e)(2)(A), and 3608(e)(2)(B)(i-iii).

¹⁴⁹² U.S. Dep’t of Hous. and Urban Dev., Memorandum Re: Treatment of Testing Evidence in Fair Housing Complaint Investigations, <https://apps.hud.gov/offices/fheo/library/testing.pdf>.

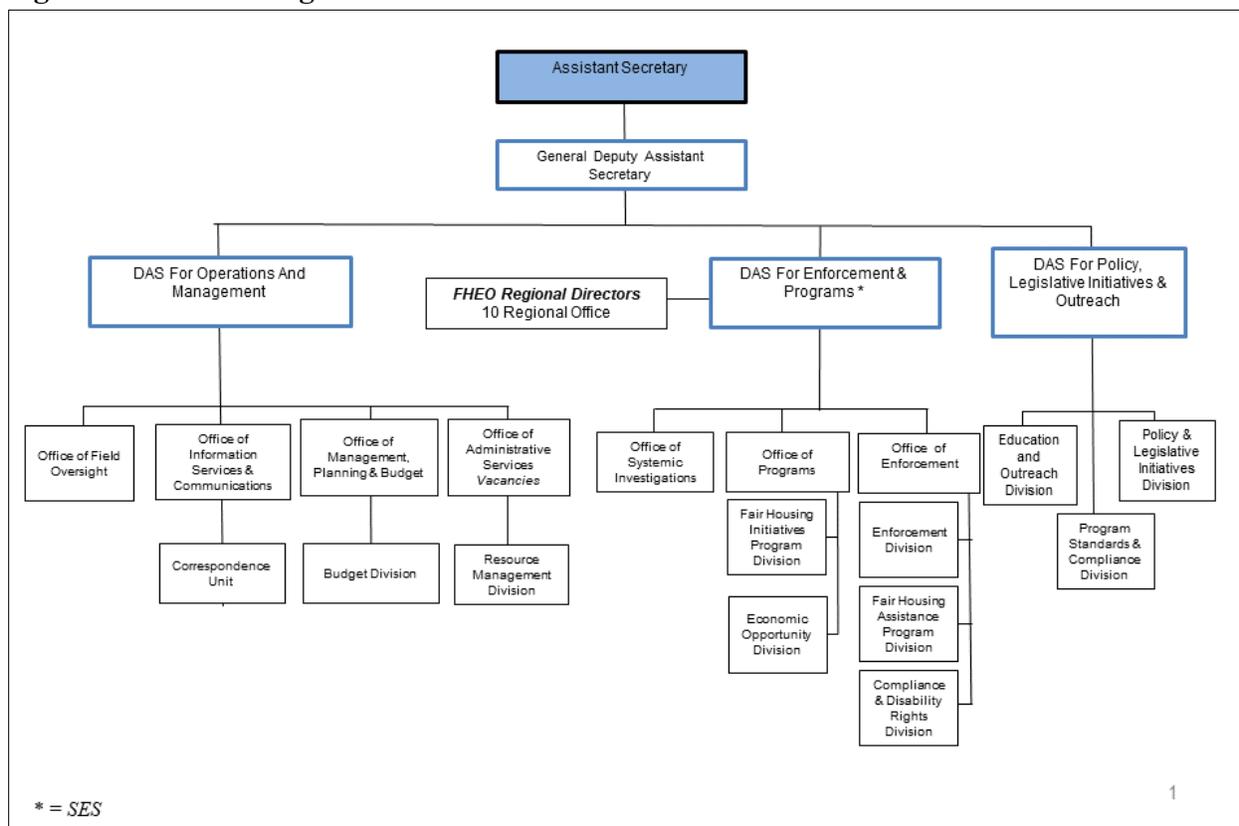
¹⁴⁹³ 24 C.F.R. § 115.100.

¹⁴⁹⁴ “Paired Testing and the Housing Discrimination Studies,” Office of Policy Development and Research, *HUD User*, Spring/Summer 2014, <https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html>.

¹⁴⁹⁵ 24 C.F.R. § 125.107.

¹⁴⁹⁶ PN680 – Anna María Farías – Department of Hous. and Urban Dev., 115th Congress (2017-2018), <https://www.congress.gov/nomination/115th-congress/680>.

¹⁴⁹⁷ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 11.

Figure 5.1: FHEO Organizational Chart

Source: U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity

Under the Fair Housing Act, the HUD Secretary must delegate the responsibility of civil rights enforcement to the Assistant Secretary for Fair Housing and Equal Opportunity,¹⁴⁹⁸ who re-delegates this responsibility to the General Deputy Assistant Secretary for the Office of Fair Housing and Equal Opportunity, the Deputy Assistant Secretary for the Office of Enforcement and Programs, and the Deputy Assistant Secretary for the Office of Policy, Legislative Initiatives, and Outreach.¹⁴⁹⁹ Several of the offices listed under the aforementioned Deputy Assistant Secretaries in Figure 5.1 have a role in civil rights enforcement:

- The Office of Enforcement – conducts complaint investigations, reviews fair housing cases, reconsiders cases if a “no reasonable cause” determination is issued, drafts fair housing policies and guidance, and administers the Fair Housing Assistance Program.¹⁵⁰⁰
- The Office of Programs – provides guidance and conducts compliance reviews and complaint investigations on Section 3 of the Housing and Urban Development Act; and administers the Fair Housing Initiatives Program.¹⁵⁰¹

¹⁴⁹⁸ 42 U.S.C. § 3608(a)-3608(c).

¹⁴⁹⁹ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 12.

¹⁵⁰⁰ *Ibid.*, 13; *see infra* notes 1536-1551.

¹⁵⁰¹ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 13; *see infra* notes 1536-1551.

- The Office of Systematic Investigations – investigates systematic allegations of discrimination and handles Secretary-initiated complaints.¹⁵⁰²
- The Office of Program Standards and Compliance – provides applicable housing-related federal civil rights guidance to other program areas.¹⁵⁰³
- The Policy and Legislative Initiatives Division – oversees FHEO policy development by tracking legislative developments and studies.¹⁵⁰⁴
- The Education and Outreach Division – initiates fair housing education and outreach.¹⁵⁰⁵
- HUD Regional Offices – HUD has 10 regional offices in total around the U.S., each with a Regional Director who oversees FHEO staff to handle the intake, processing, investigation, and determinations as to reasonable cause of complaints. Regional Offices also monitor FHAP agencies within their jurisdiction. The Regional Directors report to the Deputy Assistant Secretary for Enforcement and Programs.¹⁵⁰⁶

HUD reports that FHEO’s budget is earmarked for “civil rights intake, investigation[s], enforcement, compliance, and outreach.”¹⁵⁰⁷ In FY 2016, FHEO requested a total of \$152.1 million,¹⁵⁰⁸ which decreased to \$144.2 million in FY 2017¹⁵⁰⁹ and \$135.1 million in FY 2018.¹⁵¹⁰ Congress appropriated to FHEO \$135.5 million in FY 2016,¹⁵¹¹ which increased slightly to \$136.5

¹⁵⁰² U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 7, at 13.

¹⁵⁰³ *Ibid.*

¹⁵⁰⁴ *Ibid.*

¹⁵⁰⁵ *Ibid.*

¹⁵⁰⁶ *Ibid.*, 13.

¹⁵⁰⁷ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 9, at 14.

¹⁵⁰⁸ U.S. Dep’t of Hous. and Urban Dev., *Fair Housing and Equal Opportunity Fair Housing Programs – 2016 Summary Statement and Initiatives*, p. 32-2, <https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF> [hereinafter HUD FHEO, *Fair Housing Programs 2016 Summary*]; U.S. Dep’t of Hous. and Urban Dev., *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2016*, p. 50-2, <https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF> [hereinafter HUD FHEO, *Program Office Salaries and Expenses FY 2016*]. The total figure requested reflected represents the total for fair housing programs plus salaries and expenses.

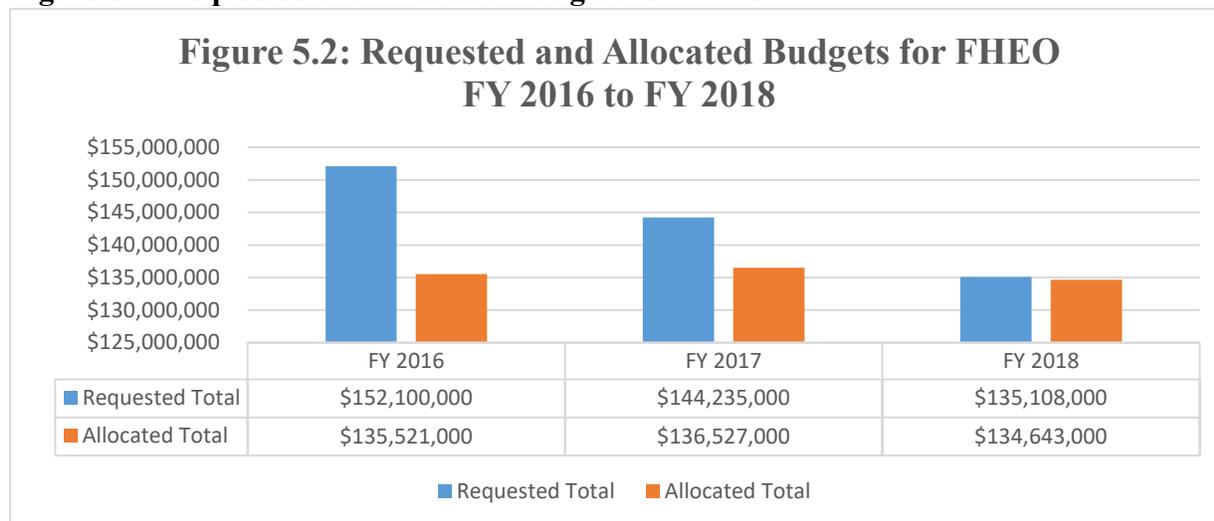
¹⁵⁰⁹ U.S. Dep’t of Hous. and Urban Dev., *Fair Housing and Equal Opportunity Fair Housing Programs – 2017 Summary Statement and Initiatives*, p. 33-2, <https://www.hud.gov/sites/documents/33-FAIRHSNGPROGRAMS.PDF> [hereinafter HUD FHEO, *Fair Housing Programs 2017 Summary*]; U.S. Dep’t of Hous. and Urban Dev., *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2017*, p. 51.1, <https://www.hud.gov/sites/documents/51-FHEO.PDF> [hereinafter HUD FHEO, *Program Office Salaries and Expenses FY 2017*]. The total figure requested reflected represents the total for fair housing programs plus salaries and expenses.

¹⁵¹⁰ U.S. Dep’t of Hous. and Urban Dev., *Fair Housing and Equal Opportunity Fair Housing Programs – 2018 Summary Statement and Initiatives*, p. 32-2, <https://www.hud.gov/sites/documents/35-FAIRHSNGACTS.PDF> [hereinafter HUD FHEO, *Fair Housing Programs 2018 Summary*]; U.S. Dep’t of Hous. and Urban Dev., *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2018*, p. 50-1, <https://www.hud.gov/sites/documents/54-FHEO.PDF> [hereinafter HUD FHEO, *Program Office Salaries and Expenses FY 2018*]. The total figure requested reflected represents the total for fair housing programs plus salaries and expenses.

¹⁵¹¹ HUD FHEO, *Fair Housing Programs 2018 Summary*, *supra* note 1510, at 32-2; HUD FHEO, *Program Office Salaries and Expenses FY 2018*, *supra* note 1510, at 50-1. The total figure allocated reflected represents the total for fair housing programs plus salaries and expenses.

million in FY 2017,¹⁵¹² and then decreased slightly to \$134.6 million in FY 2018.¹⁵¹³ See Figure 5.2.

Figure 5.2: Requested and Allocated Budgets for FHEO



Source: U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2016 Summary Statement and Initiatives*, p. 32-2, <https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2017 Summary Statement and Initiatives*, p. 33-2, <https://www.hud.gov/sites/documents/33-FAIRHSNGPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2018 Summary Statement and Initiatives*, p. 32-2, <https://www.hud.gov/sites/documents/35-FAIRHSNGACTS.PDF>; U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2019 Summary Statement and Initiatives*, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>; U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2020 Summary Statement and Initiatives*, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>; U.S. Dep't of Housing and Urban Development, *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2016*, p. 50-2, <https://www.hud.gov/sites/documents/54-FY16CJ-FHEO.PDF>; U.S. Dep't of Housing and Urban Development, *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2017*, p. 51.1, <https://www.hud.gov/sites/documents/51-FHEO.PDF>; U.S. Dep't of Housing and Urban Development, *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2018*, p. 50-1, <https://www.hud.gov/sites/documents/54-FHEO.PDF>; U.S. Dep't of Housing and Urban Development, *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2019*, p. 49-1, <https://www.hud.gov/sites/dfiles/CFO/documents/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf>; U.S. Dep't of Housing and Urban Development, *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2020*, p. 48-1, https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FHEO_SE.pdf.
Note: Total requested and allocated figures for each fiscal year include sum of the totals for fair housing programs and salaries & expenses.

¹⁵¹² U.S. Dep't of Hous. and Urban Dev., *Fair Housing and Equal Opportunity Fair Housing Programs – 2019 Summary Statement and Initiatives*, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf> [hereinafter HUD FHEO, *Fair Housing Programs 2019 Summary*]; U.S. Dep't of Hous. and Urban Dev., *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2019*, p. 49-1, <https://www.hud.gov/sites/dfiles/CFO/documents/52%20-%20FY19CJ%20-%20S%26E%20-%20FHEO.pdf> [hereinafter HUD FHEO, *Program Office Salaries and Expenses FY 2019*]. The total figure allocated reflected represents the total for fair housing programs plus salaries and expenses.

¹⁵¹³ U.S. Dep't of Hous. and Urban Dev., *Fair Housing and Equal Opportunity Fair Housing Programs – 2020 Summary Statement and Initiatives*, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf> [hereinafter HUD FHEO, *Fair Housing Programs 2020 Summary*]; U.S. Dep't of Hous. and Urban Dev., *Department of Housing and Urban Development Program Office Salaries and Expenses – Office of Fair Housing and Equal Opportunity FY 2020*, p. 48-1, https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FHEO_SE.pdf [hereinafter HUD FHEO, *Program Office Salaries and Expenses FY 2020*]. The total figure allocated reflected represents the total for fair housing programs plus salaries and expenses.

FHEO's total allocated budget for FY 2016 included \$65.3 million for programs and \$70.2 million for salary and expenses.¹⁵¹⁴ FHEO's total allocated budget for FY 2017 included approximately \$65.3 million for programs and \$71.2 million for salary and expenses.¹⁵¹⁵ FHEO's total allocated budget included for FY 2018 included \$65.3 million for programs and \$69.3 million for salaries and expenses.¹⁵¹⁶

In FY 2016, FHEO requested a total of \$71.0 million for fair housing programs, which included \$45.6 million for FHIP and \$23.3 million for FHAP.¹⁵¹⁷ In FY 2016, Congress appropriated to FHEO a total of \$65.3 million for fair housing programs, with allocations of \$39.2 million for FHIP and \$24.3 million for FHAP.¹⁵¹⁸ In FY 2017, FHEO requested a total of \$70.0 million for fair housing programs, including \$46.0 million for FHIP and \$21.9 million for FHAP.¹⁵¹⁹ In FY 2017, Congress appropriated to FHEO \$65.3 million for fair housing programs, with allocations of \$39.2 million for FHIP and \$24.3 million for FHAP.¹⁵²⁰ In FY 2018, FHEO requested a total of \$65.3 million for fair housing programs, which included \$39.2 million for FHIP and \$24.3 million for FHAP.¹⁵²¹ In FY 2018, Congress appropriated to FHEO a total of \$65.3 million for fair housing programs, with allocations of \$39.6 million for FHIP and \$23.9 million for FHAP.¹⁵²² While FHEO's requested budget changed significantly from FY 2016 to FY 2018, FHEO's allocated budget remained relatively the same during that time.¹⁵²³ See Figure 5.3.

¹⁵¹⁴ HUD FHEO, *Program Office Salaries and Expenses FY 2018*, *supra* note 1510, at 50-1.

¹⁵¹⁵ HUD FHEO, *Program Office Salaries and Expenses FY 2019*, *supra* note 1512, at 49-1.

¹⁵¹⁶ HUD FHEO, *Program Office Salaries and Expenses FY 2020*, *supra* note 1513, at 48-1.

¹⁵¹⁷ HUD FHEO, *Fair Housing Programs 2016 Summary*, *supra* note 1508, at 32-2.

¹⁵¹⁸ HUD FHEO, *Fair Housing Programs 2018 Summary*, *supra* note 1510, at 32-2.

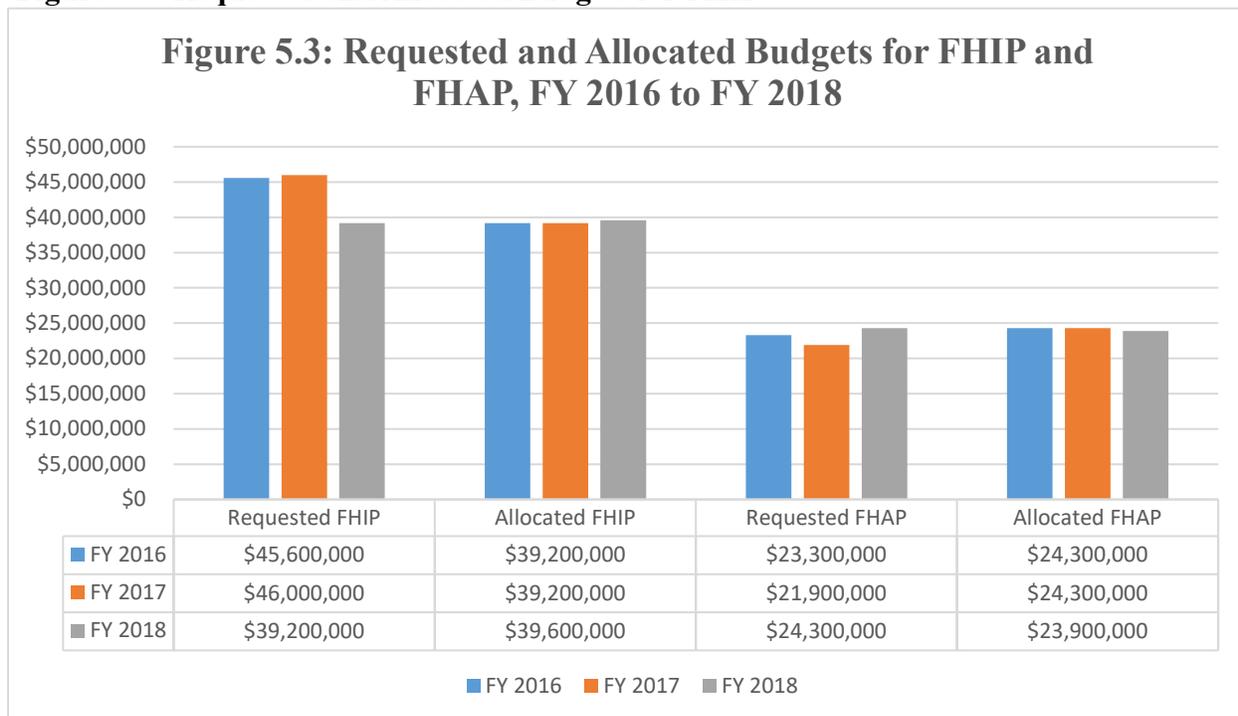
¹⁵¹⁹ HUD, *Fair Housing Programs 2017 Summary*, *supra* note 1509, at 33-2.

¹⁵²⁰ HUD FHEO, *Fair Housing Programs 2019 Summary*, *supra* note 1512, at 31-2.

¹⁵²¹ HUD FHEO, *Fair Housing Programs 2018 Summary*, *supra* note 1510, at 31-2.

¹⁵²² HUD FHEO, *Fair Housing Programs 2020 Summary*, *supra* note 1513, at 31-2.

¹⁵²³ *Ibid.*

Figure 5.3: Requested and Allocated Budgets for FHIP

Source: U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2016 Summary Statement and Initiatives*, p. 32-2, <https://www.hud.gov/sites/documents/36-FY16CJ-FHPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2017 Summary Statement and Initiatives*, p. 33-2, <https://www.hud.gov/sites/documents/33-FAIRHSNGPROGRAMS.PDF>; U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2018 Summary Statement and Initiatives*, p. 32-2, <https://www.hud.gov/sites/documents/35-FAIRHSNGACTS.PDF>; U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2019 Summary Statement and Initiatives*, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/34%20-%20FY19CJ%20-%20FHEO%20-%20Fair%20Housing%20Programs.pdf>; U.S. Dep't of Housing and Urban Development, *Fair Housing and Equal Opportunity Fair Housing Programs – 2020 Summary Statement and Initiatives*, p. 31-2, <https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-FairHousingActivities.pdf>.

HUD reported that FHEO employed 484 full-time staff in FY 2016, 496 full-time staff in FY 2017, and 484 full-time staff in FY 2018.¹⁵²⁴ In his statement to the Commission, Bryan Greene, then General Deputy Assistant Secretary for FHEO, noted that at that time in October 2018, 253 people were dedicated to Fair Housing Act investigations.¹⁵²⁵ HUD also reported that in addition to FHEO staff, HUD's OGC has 18 attorneys and a paralegal at headquarters in Washington, DC who do civil rights enforcement work, and additional attorneys at HUD's regional offices who work on fair housing and civil rights matters.¹⁵²⁶ According to HUD's responses to the Commission's Interrogatories, FHEO's "staffing levels are unrelated to the budget."¹⁵²⁷ But Greene indicated during his testimony before the Commission that "FHEO relies entirely on salaries and expenses funding for its Fair Housing Act investigations."¹⁵²⁸

¹⁵²⁴ U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 9, at 14.

¹⁵²⁵ Greene Statement, at 1.

¹⁵²⁶ U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 8, at 13.

¹⁵²⁷ Ibid.

¹⁵²⁸ Greene Testimony, *Federal Civil Rights Enforcement Briefing*, p. 19.

Whereas the FHEO budget has fluctuated minimally during the time period the Commission investigated, as described below the Commission heard compelling testimony regarding consequences of the longstanding failure to increase budget and staffing for fair housing enforcement and comparing the especially lean budget and staffing in recent years to earlier, reportedly still insufficient, budget and staffing.

Assessment

Prioritization of Civil Rights Agency-Wide

FHEO does not have a direct line of authority to the Secretary of HUD, as the Assistant Secretary for Fair Housing and Equal Opportunity reports to the Deputy Secretary of HUD, who in turn reports to the Secretary of HUD.¹⁵²⁹

With respect to the resources that FHEO has available to effectively execute its enforcement work, then General Deputy Assistant Secretary Bryan Greene indicated in his written testimony before the Commission that:

- “HUD’s effectiveness in carrying out its fair-housing enforcement mission depends on a robust S&E budget.”¹⁵³⁰
- “When budgets are tight, it is challenging for HUD to respond effectively to complaints filed by individuals and pursue many Secretary-initiated cases. Still, HUD recognizes these cases as an opportunity to obtain broad relief for systemic discrimination, when resources are available.”¹⁵³¹

Academic literature supports Greene’s assessment, recognizing for example that “staffing and other administrative problems have historically hampered HUD’s ability to investigate discrimination claims.”¹⁵³² HUD’s Chicago office regional director testified to the Commission’s Illinois Advisory Committee in May 2019 that “[T]his Administration has made budget proposals that are significantly less in terms of staff than previous administrations have done. . . . These funding proposals ultimately result in staffing levels being established.”¹⁵³³

After acknowledging that without budget increases to allow for increases in staff, HUD cannot focus on all areas in its Secretary-initiated investigations or complaints, Greene’s written testimony identified current subject area priorities for HUD FHEO.¹⁵³⁴ Those priorities are: “[i]ssuance of

¹⁵²⁹ U.S. Dep’t of Hous. and Urban Dev., *Agency Financial Report 2017*, p. 3, <https://www.hud.gov/sites/dfiles/CFO/documents/afr2017.pdf>.

¹⁵³⁰ Greene Statement, at 2.

¹⁵³¹ *Ibid.*, 3.

¹⁵³² Johnson, *Beyond the Private Attorney General*, *supra* note 36, at 1360 (citing 2004 GAO report).

¹⁵³³ Maurice McGough, Region V Director Office of Fair Hous. and Equal Opportunity, U.S. Dep’t of Hous. and Urban Dev., testimony, *Illinois SAC Fair Housing Briefing*, pp. 63-64 (responding to question from Committee member Haleem).

¹⁵³⁴ Greene statement, at 3.

clear, helpful assistance-animal guidance”, “[c]ombating of sexual harassment in housing”, and “[m]eaningful, less burdensome implementation of the Fair Housing Act’s ‘affirmatively furthering’ mandate.”¹⁵³⁵

HUD also works to enforce the Fair Housing Act through two programs—the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP)—that promote fair housing at the state and local level.¹⁵³⁶ FHAP is a noncompetitive grant program that funds agencies on the state and local level that administer fair housing laws that HUD has determined to be substantially equivalent to the federal Fair Housing Act.¹⁵³⁷ HUD is generally required to refer complaints to FHAP agencies when those complaints allege violations of state or local fair housing laws,¹⁵³⁸ and FHAP agencies engage in enforcement activities that include complaint investigation, conciliation, administrative and/or judicial enforcement, training, implementation of data and information systems, and education and outreach.¹⁵³⁹ FHIP provides competitive grant funding to fair housing organizations and other non-profits to process complaints of housing discrimination.¹⁵⁴⁰ FHIP agencies assist victims of alleged housing discrimination to identify government agencies (i.e. HUD or a FHAP agency) that can process fair housing complaints, and can conduct a preliminary investigation of claims, which may utilize fair housing testing (a method of assessing discrimination in the housing market), and engage in education and outreach to promote fair housing laws and equal housing opportunity awareness.¹⁵⁴¹ FHIP has four specific initiatives that provide competitive grant funding for fair housing organizations and other non-profits: the Fair Housing Organizations Initiative (FHOI), the Private Enforcement Initiative (PEI), the Education and Outreach Initiative (EOI), and the Administrative Enforcement Initiative (AEI)—that promote fair housing laws and equal housing opportunity awareness.¹⁵⁴²

According to some advocates, including the International Association of Official Human Rights Agencies (IAOHRA) and the Columbia Human Rights Institute, recent cuts in HUD funding have negatively impacted the ability of state and local agencies to enforce fair housing protections.¹⁵⁴³ Responses to a survey of local and state human rights agencies included concern from several agencies about ongoing challenges, and “deep concern about further loss of general funding.”¹⁵⁴⁴ Many local and state agencies depend on federal funding to continue their enforcement of fair

¹⁵³⁵ *Ibid.*

¹⁵³⁶ U.S.C. §§ 3535(d), 3601(f), 3616; 24 C.F.R. part 103 Subpart C; 24 C.F.R. parts 115 and 125; U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5; HUD, “FHAP,” *supra* note 1475; HUD, “FHIP,” *supra* note 1475.

¹⁵³⁷ HUD, “FHAP,” *supra* note 1475; U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5.

¹⁵³⁸ HUD, “FHAP,” *supra* note 1475.

¹⁵³⁹ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 6.

¹⁵⁴⁰ HUD, “FHIP,” *supra* note 1475.

¹⁵⁴¹ *Ibid.*

¹⁵⁴² *Ibid.*

¹⁵⁴³ Columbia Law School Human Rights Institute and the International Association of Official Human Rights Agencies (IAOHRA), Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 8-9.

¹⁵⁴⁴ *Ibid.*, 9.

housing laws, through FHAP or FHIP partnerships. Without the requisite level of federal funding, these local agencies may shut down or minimize their fair housing work for lack of funds to support it.

Bryan Greene noted in his testimony that oversight for the FHIP and FHAP programs accounts for approximately 10 percent of FHEO's work.¹⁵⁴⁵ Greene also testified that since HUD funds and supervises local enforcement (through the FHIP and FHAP programs), funding cuts to HUD undermine the capacity for that local enforcement: "[HUD's] ongoing review of those agencies and the oversight [HUD] provide[s] to them is critical for those agencies to remain viable. When they lose certification, those cases come to HUD and tax our limited resources."¹⁵⁴⁶ Greene noted that it is important to do "mission oversight" and indicated that FHEO is "trying to establish consistency in operations across them and devote staff resources to that currently."¹⁵⁴⁷ Greene mentioned that there are "24 people [on staff] doing that for all of those agencies and several thousand cases."¹⁵⁴⁸

HUD noted that:

[Seventy-seven] percent of fair housing cases are handled by state and local agencies. Those activities are funded through FHEO's FHIP and FHAP programs. HUD's budget request for those two programs that are responsible for the lion's share of the enforcement work has not changed since 2016. HUD's total request for those two programs in both 2016 and 2018 was identical at \$63.5 million. Overall, funding for FHEO in 2019 was actually the highest since 2010, albeit only by a little because funding levels have been generally flat.¹⁵⁴⁹

Additionally, Greene stated in his testimony before the Commission:

FHEO relies entirely on Salaries and Expenses funding for its Fair Housing Act investigations. How many complaints we can investigate and how fast we can investigate them depends on staff resources, both in FHEO and HUD's Office of General Counsel, who provide legal support for our cases. We have a staff today of 460 persons, of which [sic] approximately 253 are dedicated to Fair Housing Act investigations. Notwithstanding declining staff, on average, each year for the last several years, HUD has reduced the time it takes to resolve cases.¹⁵⁵⁰

¹⁵⁴⁵ Greene Statement, at 2.

¹⁵⁴⁶ Greene Testimony, *Federal Civil Rights Enforcement Briefing*, p. 20.

¹⁵⁴⁷ *Ibid.*, 74.

¹⁵⁴⁸ Greene Testimony, Testimony, *Federal Civil Rights Enforcement Briefing*, p. 74.

¹⁵⁴⁹ U.S. Dep't of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

¹⁵⁵⁰ Greene Statement, at 1.

He went on to say:

HUD's effectiveness in carrying out its fair-housing enforcement mission depends on a robust Salaries and Expenses budget that supports:

- Sufficient numbers of skilled investigators and specialists;
- Travel funds to support onsite visits in most of its case investigations;
- Information-technology support for field investigations, case-management, and grants management;
- Sufficient compliance staff so we don't have to redirect staff from other investigations;
- Adequate staff for grants management and policy oversight of FHIP and FHAP;
- Sufficient numbers of experienced fair housing attorneys in HUD's Office of General Counsel to provide FHEO with the legal advice and support necessary for efficient, effective fair housing enforcement.

All the foregoing activities are resource-intensive. The demand-driven Fair Housing Act complaint work [acts] to draw resources from other areas (where we have more discretion), especially if we see an uptick in complaint volume, or if we must devote more resources to closing out a case backlog.¹⁵⁵¹

HUD FHEO regional staff who testified to a briefing of the Commission's Illinois Advisory Committee held in May 2019 regarding fair housing underscored these critical points, noting that "[R]ight now there are approximately 50 of us who are responsible for doing all of that enforcement work, all of the investigation work, all of the monitoring of the grants, all of that" in the Chicago regional office.¹⁵⁵² Another FHEO Chicago regional office staff member answered a question whether he believes staffing levels are sufficient for a minimum level of enforcement by testifying that "When I first became regional director in 2011, we had a staff of 82" people but "currently have 50 staff persons in the Chicago region . . . cover[ing] 6 states in the industrial Midwest," which he characterized as " areas where there's a great deal of housing segregation and concurrent discrimination."¹⁵⁵³

Also during the May 2019 Illinois Advisory Committee briefing, a former career HUD executive testified that after having worked in both Republican and Democratic administrations at HUD, her perspective now is that "[a]lthough no administration has fully staffed civil rights enforcement at HUD . . . , this [Trump] Administration has allowed staffing levels nationally to drop to historic

¹⁵⁵¹ Ibid., 2.

¹⁵⁵² Kimberly Nevels, Director, Chicago Fair Hous. and Equal Opportunity Center for HUD, testimony, *Illinois SAC Fair Housing Briefing*, p. 17.

¹⁵⁵³ McGough Testimony, *Illinois SAC Fair Housing Briefing* (McGough responding to a question from the Committee chair), pp. 66-67.

laws.”¹⁵⁵⁴ She shared that, as reported on the basis of open records requests and reports to Congress, the current staff level of HUD FHEO is “the lowest level since 1981” and the Trump “administration has submitted reduced staffing requests for FHEO asking for fewer people in the next year in their budget requests.”¹⁵⁵⁵ She went on to state that “numerous studies and reports . . . supported a minimum staffing level of at least 750 persons . . . at the national level to effectively do the basic enforcement compliance program monitoring functions that FHEO has” even without the “add-on responsibilities, such as the obligation to enforce affirmatively furthering fair housing.”¹⁵⁵⁶ Despite this record, “today, staffing levels of fair housing enforcement are so low that it’s easy to believe that understaffing of the civil rights function is a deliberate action designed to reduce the effectiveness of enforcement and the other work that FHEO does.”¹⁵⁵⁷

HUD noted:

FHEO has experienced a decline in staff over many years, including, notably, a decrease from 585 to 491 staff from FY 2013 to FY 2015. It is a priority of Secretary Carson to reinvigorate FHEO’s hiring to ensure it has sufficient staff to carry out its core enforcement functions. So far this year, 68 FHEO positions have been advertised, with 18 more positions expected to be posted by August. The Secretary directed that at least 70% of FHEO’s new hiring support fair housing enforcement activities. This year FHEO will dedicate 89.7% of positions advertised for new investigators. The Department believes that FHEO’s staffing is adequate to carry out its mission.¹⁵⁵⁸

Strategic Planning and Self-Evaluation

HUD has a statutory obligation to issue annual reports that include data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of households that are applicants, participants, or beneficiaries of programs administered by HUD.¹⁵⁵⁹ The Secretary is also obligated to report on the progress made nationally in eliminating discriminatory housing practices, what obstacles remain in the way of eliminating these practices, and recommendations for further actions.¹⁵⁶⁰ HUD has issued annual performance reports for each of the fiscal years in question (FY 2016-2018).

In FY 2016, HUD indicated that it achieved the following major milestones when evaluating its performance on the Strategic Objective: Fair Housing in its Strategic Plan for 2014-2018:

¹⁵⁵⁴ Sara Pratt, Counsel at Relman Dane and Colfax, testimony, *Illinois SAC Fair Housing Briefing*, pp. 35-36.

¹⁵⁵⁵ *Ibid.*, 36 (citing Danielle McLean, “Trump’s HUD wants to expand flawed program that is ‘privatizing public housing,’” *ThinkProgress*, Feb. 28, 2019, <https://thinkprogress.org/a-flawed-public-housing-program-leaves-vulnerable-residents-at-the-mercy-of-developers-66a0ee5b2321/>).

¹⁵⁵⁶ *Ibid.*, 36.

¹⁵⁵⁷ *Ibid.*, 37.

¹⁵⁵⁸ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

¹⁵⁵⁹ 42 U.S.C. § 3608(e)(6).

¹⁵⁶⁰ 42 U.S.C. § 3608(e)(2)(A).

- *Develop a measure for assessing the effect of targeted education and outreach efforts.* This involves using reporting capabilities of social media platforms to “monitor the total users reached, web clicks, and engagements (liked or shared)” to measure the effectiveness of gaining viewer attention; and monitoring the number of contacts, inquiries, and complaints filed “as measures of the effectiveness of a campaign to encourage subsequent action.”¹⁵⁶¹
- *Incorporate fair housing topics into existing technical assistance delivery by HUD program offices.* This includes incorporating technical assistance on Affirmatively Furthering Fair Housing (AFFH).
- *Develop and implement internal training to increase HUD employee understanding of the role of fair housing in HUD’s mission.* HUD has organized multiple staff trainings on the AFFH rule and has conducted an ongoing speaker series on general fair housing topics.¹⁵⁶²

Additionally, during that fiscal year, HUD reported:

- 7,425¹⁵⁶³ people received remedies through FHEO’s enforcement work;
- 35 cases have resulted in monetary relief in excess of \$25,000; and
- 579 cases were open more than 300 days, which is a reduction of 19.5 percent since the beginning of FY 2016.¹⁵⁶⁴

In FY 2017, HUD reported the following items about its performance on the Strategic Objective: Fair Housing in its Strategic Plan for 2014-2018:

- 1,914¹⁵⁶⁵ people received remedies through FHEO’s enforcement work;
- 27 cases have resulted in monetary relief in excess of \$25,000
- 436 cases were open more than 300 days, which reduced the number of cases that had been under investigation for over 300 days by almost 25 percent¹⁵⁶⁶

¹⁵⁶¹ HUD, *2016 Annual Performance Report*, *supra* note 193, at 65.

¹⁵⁶² *Ibid.*

¹⁵⁶³ As noted in HUD’s FY 2016 Annual Performance Report, “[t]he relatively high number of persons receiving relief in FY 2016 [was] due to two cases resolved through conciliation that together provided relief to an estimated 4,500 persons.” *Ibid.*

¹⁵⁶⁴ *Ibid.*

¹⁵⁶⁵ HUD noted in its FY 2017 performance report that “FHEO staff have been working during FY 2017 on creating greater consistency in how relief numbers are reported. In a few instances this has led to more conservative estimates of relief in cases involving larger housing providers, which had a significant effect on the reported results.”

¹⁵⁶⁶ U.S. Dep’t of Hous. and Urban Dev., *Fiscal Year 2017 Annual Performance Report*, p. 20, https://www.hud.gov/sites/dfiles/SPM/documents/FY17_APR.pdf.

In FY 2018, HUD’s annual performance report noted that HUD issued a new strategic plan for FY 2018-2022.¹⁵⁶⁷ In stark contrast to the previous strategic plan,¹⁵⁶⁸ it no longer includes “fair housing” as a strategic objective.¹⁵⁶⁹ While there is a strategic objective to “reduce barriers to affordable housing,”¹⁵⁷⁰ there is no discussion of FHEO’s enforcement responsibilities.¹⁵⁷¹ The objective description does reference the new AFFH rulemaking, but does not reference a role for FHEO, and the “objective lead” is an official in HUD’s Office of Congressional and Intergovernmental Relations.¹⁵⁷²

In line with HUD’s requirement for annual reporting,¹⁵⁷³ FHEO publishes an annual report of fair housing. Over the fiscal years in question (FY 2016-2018), FHEO has published annual fair housing reports for FY 2016 and FY 2017, which provide an overview of FHEO’s activities and programs, as well as information about FHEO’s enforcement work, which includes complaint data about investigations, monetary relief, compliance with notice requirements, adjudication of Fair Housing Act complaints, and Secretary-initiated enforcement.¹⁵⁷⁴ To date, FHEO has not yet published an annual report for FY 2018.

Complaint Processing, Agency-Initiated Charges, and Litigation

Federal regulations require HUD to conduct a Fair Housing Act investigation once a complaint is filed against a recipient of HUD funding and other housing providers.¹⁵⁷⁵ HUD may also initiate its own investigation of housing practices at “the written direction of the Assistant Secretary.”¹⁵⁷⁶ HUD regulations contemplate systemic investigations, if FHEO “determines that the alleged discriminatory practices contained in a complaint are pervasive or institutional in nature, or that the processing of the complaint will involve complex issues, novel questions of fact or law, or will affect a large number of persons[.]”¹⁵⁷⁷

¹⁵⁶⁷ U.S. Dep’t of Hous. and Urban Dev., *Fiscal Year 2018 Annual Performance Report*, Mar. 22, 2019, <https://www.hud.gov/sites/dfiles/SPM/documents/HUDFY2020APP-FY2018APR-3.22.2019.pdf> [hereinafter HUD, *FY 2018 Annual Performance Report*].

¹⁵⁶⁸ U.S. Dep’t of Hous. and Urban Dev., *Strategic Plan 2014-2018*, April 2014, <https://www.huduser.gov/portal/publications/pdf/HUD-564.pdf>.

¹⁵⁶⁹ HUD, *Strategic Plan 2018-2022*, *supra* note 194.

¹⁵⁷⁰ *Ibid.*, 25; HUD, *FY 2018 Annual Performance Report*, *supra* note 1567, at 44.

¹⁵⁷¹ *Ibid.*

¹⁵⁷² HUD, *FY 2018 Annual Performance Report*, *supra* note 1567, at 44.

¹⁵⁷³ *See supra* note 1559.

¹⁵⁷⁴ U.S. Dep’t of Hous. and Urban Dev., *Office of Fair Hous. and Equal Opportunity, Annual Report to Congress FY 2016*, <https://www.hud.gov/sites/documents/FY2016FHEOANNUALREPORT.PDF> [hereinafter HUD FHEO, *Annual Report to Congress FY 2016*]; U.S. Dep’t of Housing and Urban Development, Office of Fair Hous. and Equal Opportunity, *Annual Report to Congress FY 2017*, https://www.hud.gov/sites/dfiles/FHEO/images/FHEO_Annual_Report_2017-508c.pdf [hereinafter HUD FHEO, *Annual Report to Congress FY 2017*].

¹⁵⁷⁵ 24 C.F.R. § 103.200 (“Upon the filing of a complaint . . . the Assistant Secretary *will* initiate an investigation”) (emphasis added).

¹⁵⁷⁶ 24 C.F.R. § 103.200(b).

¹⁵⁷⁷ *Id.* § 103.205.

FHEO enforces the Fair Housing Act primarily through complaint review and investigation, however indirect mechanisms of enforcement such as public education and outreach are also funded by HUD.¹⁵⁷⁸ HUD also issues guidance documents about civil rights enforcement issues.¹⁵⁷⁹

In addition, HUD reports that it also utilizes the following mechanisms for enforcing the Fair Housing Act,¹⁵⁸⁰ which are provided for under federal regulations:

- Conciliating complaints¹⁵⁸¹
- Seeking “prompt judicial action” for appropriate temporary or preliminary relief pending final disposition of the complaint while an investigation is ongoing¹⁵⁸²
- Issuing subpoenas¹⁵⁸³
- Pursuing litigation before an administrative law judge or in federal court through referral to DOJ¹⁵⁸⁴

HUD can seek actual damages for “emotional distress and out-of-pocket losses, civil penalties, and injunctive relief.”¹⁵⁸⁵ In 2018, the maximum civil penalties ranged from \$20,521 to \$102,606¹⁵⁸⁶ depending on the nature and/or severity of the violation, and these maximum penalties are adjusted annually.¹⁵⁸⁷

In its response to the Commission’s Interrogatories, FHEO reported that typically, when HUD receives a complaint, “FHEO investigates the complaint, engages in conciliation, and, if conciliation is unsuccessful in resolving the complaint, determines whether or not there is reasonable cause to believe discrimination has occurred.”¹⁵⁸⁸ If the Secretary believes it necessary to carry out the purposes of FHA enforcement, complaints are referred to the DOJ for temporary or preliminary relief, without “findings as to reasonable cause.”¹⁵⁸⁹

The Fair Housing Act requires that if FHEO finds reasonable cause to believe that housing discrimination has occurred, HUD OGC files a charge of discrimination with HUD’s Office of

¹⁵⁷⁸ 24 C.F.R. § 103.1; U.S. Dep’t of Hous. and Urban Dev., “Learn About the FHEO Complaint and Investigation Process,” https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process [hereinafter HUD, “Learn About the FHEO Complaint and Investigation Process”].

¹⁵⁷⁹ 24 C.F.R. § 1.6; 24 C.F.R. § 3.605; 24 C.F.R. § 6.10; 24 C.F.R. § 8.55.

¹⁵⁸⁰ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 1-2.

¹⁵⁸¹ 42 U.S.C. § 3610(b).

¹⁵⁸² *Id.* § 3610(e).

¹⁵⁸³ *Id.* § 3611.

¹⁵⁸⁴ *Id.* §§ 3612, 3614.

¹⁵⁸⁵ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 5, at 10.

¹⁵⁸⁶ HUD provided a correction to the civil penalty amounts in their agency review (as outlined above, noting that these numbers change annually). See Adjustment of Civil Monetary Penalty Amounts for 2018, 83 Fed. Reg. 32,790 (Effective: Aug. 15, 2018).

¹⁵⁸⁷ 24 C.F.R. § 180.671(a).

¹⁵⁸⁸ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 4.

¹⁵⁸⁹ 42 U.S.C. §§ 3610(e)(2), 42 U.S.C. § 3610 (g)(2)(C), and 42 U.S.C. § 3614 (a); U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 4.

Hearing and Appeals.¹⁵⁹⁰ Once the charge is filed, any party may elect for civil action and have the case heard in District Court in lieu of utilizing HUD's administrative enforcement process.¹⁵⁹¹ If no such election is made, HUD reports that its OGC will litigate the charge of discrimination before an administrative law judge (ALJ) as part of its administrative enforcement proceedings.¹⁵⁹² HUD reports that the ALJ will conduct a hearing within 120 days of the charge¹⁵⁹³ and "make findings of fact and conclusions of law within 60 days after the end of the hearing."¹⁵⁹⁴ If the ALJ finds a respondent responsible for engaging or attempting to engage in a discriminatory housing practice, the ALJ issues an order that may include damages to the aggrieved person.¹⁵⁹⁵ Parties adversely affected by the final decision may appeal to the U.S. Court of Appeals,¹⁵⁹⁶ and HUD or any person entitled to relief may also petition the appropriate U.S. Court of Appeals for enforcement of the final decision.¹⁵⁹⁷ Additionally, HUD may opt to refer the case to DOJ for temporary or preliminary relief pending final decision on the complaint, if necessary to enforce the civil rights laws under its jurisdiction, and it may also immediately refer systemic "pattern or practice" cases or subpoenas, or for criminal proceedings.¹⁵⁹⁸

DOJ explains the process of shared jurisdiction as follows:

In the event that the conciliation process fails, HUD may, upon finding reasonable cause to believe discrimination occurred, issue administrative charges alleging a Fair Housing Act violation. After HUD issues a charge, the matter can proceed in one of two ways: (1) HUD conciliates the complaint or litigates the complaint to judgment before an administrative law judge; or (2) one of the parties to the administrative charge "elects" to have the case heard in federal court, in which case the Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, is required to initiate and maintain a lawsuit in federal court on behalf of the complainant. These suits by the Civil Rights Division on behalf of complainants are often referred to as "election" cases.

Additionally, under the Fair Housing Act, HUD is required to refer to the Attorney General (1) any complaint that involves the legality of a state or local zoning or other land use law or ordinance, 42 U.S.C. § 3614(b)(1); (2) any breach of a HUD conciliation agreement, 42 U.S.C. § 3614(b)(2); (3) requests by the Secretary of HUD to enforce HUD subpoenas in federal district court, 42 U.S.C. § 3614(c); and (4) an authorization by the Secretary of HUD to file a civil action for temporary or preliminary relief relating to Fair Housing Act complaint pending with HUD, 42 U.S.C. § 3610(e)(1).

¹⁵⁹⁰ 42 U.S.C. § 3612(b); U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 1, at 4.

¹⁵⁹¹ 42 U.S.C. § 3612(a).

¹⁵⁹² *Id.* § 3612(b); U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 4.

¹⁵⁹³ 42 U.S.C. § 3612(g)(1).

¹⁵⁹⁴ *Id.* § 3612(g)(2); U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 4-5.

¹⁵⁹⁵ U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5.

¹⁵⁹⁶ 42 U.S.C. § 3612(i) and implementing regulations at 24 C.F.R. § 180.710(a).

¹⁵⁹⁷ 42 U.S.C. §§ 3216(m); 24 C.F.R. § 180.715.

¹⁵⁹⁸ 24 C.F.R. §§ 103.500, 103.510.

Finally, in conjunction with the Civil Rights Division Appellate Section, the Housing and Civil Enforcement Section has responsibility for the enforcement of orders entered by HUD administrative law judges in Fair Housing Act cases, 42 U.S.C. § 3612(j). United States Attorney's Offices, in coordination with the Housing and Civil Enforcement Section, also have responsibility for seeking collection of monetary judgments, when necessary. The United States Attorney's Offices also have responsibility for enforcing administrative subpoenas issued by HUD under Section 811 of the Fair Housing Act, 42 U.S.C. § 3611. HUD will either refer these matters directly to the relevant United States Attorney's Office or to the Housing and Civil Enforcement Section.¹⁵⁹⁹

The Fair Housing Act also includes a criminal provision, Section 901.¹⁶⁰⁰ Section 901 of the Fair Housing Act makes it unlawful for any individual(s), by the use of force or threatened use of force, to intentionally injure, intimidate, or interfere with, any person's housing rights on the bases of race, national origin, religion, sex, disability or familial status.¹⁶⁰¹ HUD reports that it refers Section 901 complaints to the DOJ, which handles investigations through the FBI and prosecutions through the Criminal Section of the Civil Rights Division at DOJ.¹⁶⁰² DOJ confirms this in its Justice Manual,¹⁶⁰³ and through recently enforcing this section of the FHA in hate crimes cases.¹⁶⁰⁴

- Aggrieved persons or HUD may also file housing complaints under Section 504 of the Rehabilitation Act of 1973 or Title VI of the Civil Rights Acts of 1964, which protect against discrimination on the basis of disability, race, color, and national origin. After a complaint is filed, HUD reports that it conducts an investigation, which may lead to findings of discrimination.¹⁶⁰⁵ The agency then tries to reach a voluntary resolution between parties, but if that is not possible, HUD may pursue enforcement before an ALJ

¹⁵⁹⁹ DOJ Justice Manual, *supra* note 370, at § 8-2.231(A).

¹⁶⁰⁰ 42 U.S.C. § 3631.

¹⁶⁰¹ *Id.*

¹⁶⁰² Federal Bureau of Investigation, "What We Investigate," <https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes>.

¹⁶⁰³ DOJ Justice Manual, *supra* note 370, at § 8-3.010 (enforcement of 42 U.S.C. § 3631 (Interference with Fair Housing Activities)).

¹⁶⁰⁴ See e.g., *In the Name of Hate*, *supra* note 63, at notes 854 (discussing the DOJ CRT case of *United States v. Dennis*, 8:16-CR-365 (M.D. Fla. 2015), conviction of defendants who attempted to intimidate their neighbors, an interracial couple, by burning a six-foot cross in their front yard); 857 (discussing *United States v. Saucedo, et al.*, 2:16-CR-0442 (C.D. Ca. 2016), conviction of defendants who attacked the homes of black families with Molotov cocktails); 879 (discussing *United States v. Halfin*, 4:18-CR-142 (N.D. Tex. 2018), conviction of defendant who threatened force against black family in his apartment complex); 955 (discussing *United States v. Howard*, 8:18-CR-51 (M.D. Fla. 2018), conviction of defendants who harassed, threatened and intimidated a Muslim family in attempt to deter them from buying a home in their neighborhood).

¹⁶⁰⁵ *Ibid.*; *but see*, Suzy Khimm, Laura Strickler, Hannah Rappleye and Stephanie Gosk, "Under Ben Carson, more families live in HUD housing that fails health and safety inspections," *NBCNews*, Nov. 14, 2018, <https://www.nbcnews.com/politics/white-house/under-ben-carson-more-families-live-hud-housing-fails-health-n935421> (noting that "... more failing properties also mean that HUD has a bigger caseload of troubled homes to oversee. And rather than beefing up the department's staff to oversee them, HUD has lost hundreds of staff members in the wake of a hiring freeze mandated by President Donald Trump. HUD's enforcement office, tasked with going after the worst landlords, now has the lowest staff levels since 1999, according to a federal watchdog.")

or make a referral to the DOJ who may take additional action.¹⁶⁰⁶ In addition, HUD can initiate suspension or debarment proceedings,¹⁶⁰⁷ or refuse to grant or continue federal financial assistance.¹⁶⁰⁸

Figure 5.4 summarizes FHEO's complaint and investigation process:

¹⁶⁰⁶ U.S. Dep't of Hous. and Urban Dev., Response to USCCR Interrogatory No. 2, at 5.

¹⁶⁰⁷ *See, e.g.*, 24 C.F.R. § 8.57(a)(2).

¹⁶⁰⁸ *See, e.g., Id.* § 1.8(c).

Figure 5.4: FHEO Complaint and Investigation Process

<p>Intake</p> <p>When an individual reports possible discrimination, we check whether a formal complaint can be filed under one of the laws we enforce.</p> <p><i>What to Expect:</i></p> <ul style="list-style-type: none"> • FHEO may interview the individual who wishes to file a complaint. • Where appropriate, FHEO will draft a formal complaint, have the individual review and sign the complaint, and notify the parties that a complaint has been filed. • As part of HUD's Fair Housing Assistance Program (FHAP), FHEO may refer a fair housing complaint to a state or local government agency for investigation. • In certain circumstances, FHEO may initiate a compliance review based on the information submitted in a complaint.
<p>Investigation</p> <p>After a formal complaint is filed, we investigate the allegations.</p> <p><i>What to Expect:</i></p> <ul style="list-style-type: none"> • HUD will assign one or more investigators to investigate the allegations made in the complaint. • After you submit a complaint, the investigator may ask you to provide more information. Generally, it will be helpful if you are prepared to provide: <ul style="list-style-type: none"> ◊ A timeline of events, starting with the first contact you had with the person or entity you believe violated your rights; ◊ The locations of events; ◊ Any people who were present when events occurred; ◊ Any other people who might have information related to your complaint; and ◊ Any relevant documents. • HUD will provide the party against whom the complaint has been filed notice and an opportunity to respond to the allegations. • HUD may gather evidence in many ways, including interviewing parties and witnesses, getting documents, and inspecting properties. • After completing the investigation, FHEO will send you a written report of its findings.
<p>Conciliation or Voluntary Compliance</p> <p>At any time, the parties can resolve the complaint under terms that are satisfactory to the parties and HUD.</p> <p><i>What to Expect:</i></p> <ul style="list-style-type: none"> • Throughout the investigation, HUD will try to help the parties resolve the complaint through an agreement. Any agreement is voluntary; no party is required to accept an offer. • If the parties agree, HUD will prepare an agreement for signature. • Following a signed agreement, HUD will close the investigation and monitor compliance with the agreement. • Depending on the authorities that apply to the complaint, HUD may resolve the investigation through a document called a Conciliation Agreement, a Voluntary Compliance Agreement, or both.
<p>Legal Action</p> <p>Where appropriate, we take actions to enforce the law.</p> <p><i>What to Expect:</i></p> <ul style="list-style-type: none"> • The government may bring a Fair Housing Act or other civil rights case based on the findings of a HUD investigation. Examples of relief sought in such cases may include compensation for victims, changes to policies and procedures, and training. • When the government brings a legal action, it does not charge any fees or costs to individuals who are alleging discrimination. • Cases before HUD Administrative Law Judges are handled by HUD's Office of General Counsel, and cases in the federal courts are handled by the U.S. Department of Justice.

Source: U.S. Dep't of Housing and Urban Development, "Learn About the FHEO Complaint and Investigation Process," https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process#_Overview_of_FHEO's.

In contrast to some other civil rights statutes such as Title VI,¹⁶⁰⁹ the Fair Housing Act provides a private right of enforcement for protections against discrimination, including claims regarding

¹⁶⁰⁹ *Alexander v. Sandoval*, 532 U.S. 275 (2001) (only DOJ could enforce disparate impact regulations it promulgated under Title VI).

nonintentional types of prohibited discrimination.¹⁶¹⁰ This tool has led to a broader range of private claims and private civil rights litigation initiated during times when the federal government has not aggressively enforced such rights, including during recent years.¹⁶¹¹ As the Commission has discussed, while private litigation is an important tool, the effective civil rights enforcement work of the federal government is also needed.¹⁶¹²

Table 5.1: Total FHEO Complaints Received, FY 2016 to FY 2018

	Number of Complaints Received		
	FY 2016	FY 2017	FY 2018
HUD	1,397	1,342	1,790
FHAP	7,063	6,920	5,991
TOTAL	8,460	8,262	7,781

Source: U.S. Dep't of Housing and Urban Development, Affected Agency Review Response, Jul. 3, 2019.

HUD reported that FHEO closed approximately 48 percent of the total number of complaints for FY 2016-2018 for “no cause,” and closed approximately 30 percent of complaints for those fiscal years due to conciliation or settlements.¹⁶¹³ HUD reported that in FY 2016, it took FHEO 191 days to process and close Title VIII complaints, which rose slightly in FY 2017 and FY 2018 to 202 days and 207 days respectively.¹⁶¹⁴ In contrast, for complaints filed under other authorities in FY 2016, it took FHEO an average of 464 days to process and close these cases, which decreased to 441 days in FY 2017 and 240 days in FY 2018, as of information reported on June 30, 2018.¹⁶¹⁵ Bryan Greene noted in his testimony that “[n]otwithstanding declining staff, on average, each year for the last several years, HUD has reduced the amount of time it takes to resolve cases.¹⁶¹⁶ Additionally, HUD noted that “[l]ikewise, among those cases that had [sic] could have aged beyond 100 days during the fiscal year, each year for the last three years, we are closing a higher percentage of those cases timely.”¹⁶¹⁷

As noted earlier, FHIP and FHAP agencies process approximately 77 percent of FHEO’s Fair Housing Act complaints.¹⁶¹⁸ According to HUD’s FY 2016 report submitted to Congress, that year

¹⁶¹⁰ *Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507 (2015); see also *infra* notes 1706-1734 (discussing disparate impact under the FHA).

¹⁶¹¹ See, e.g., Alex Gano, *Disparate Impact and Mortgage Lending: A Beginner’s Guide*, 88 Univ. Colo. L. Rev. 1109, 1112 (2017), http://lawreview.colorado.edu/wp-content/uploads/2017/05/13.-88.4-Gano_Final.pdf; Relman Dane & Colfax, “Cases & Matters,” <https://www.relmanlaw.com/cases>.

¹⁶¹² USCCR, *Minority Voting*, *supra* note 17, at 14.

¹⁶¹³ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatories, “Civil Rights Commission Data updated 6-1-2018.”

¹⁶¹⁴ *Ibid.* Although, Bryan Greene’s testimony noted different numbers for the average amount of days it takes FHEO to process fair housing complaints, specifying 247 days in FY 2016, 209 days in FY 2017, and 122 days in 2018, and noting that “[w]hile some of the cases filed in FY 2018 remain open, as the fiscal year just ended September 30, 2018, we expect the final average to still be lower than FY 2017, consistent with a five-year trend.” See Greene Statement, at 1.

¹⁶¹⁵ *Ibid.*

¹⁶¹⁶ *Ibid.*

¹⁶¹⁷ *Ibid.*

¹⁶¹⁸ Greene Testimony, *Federal Civil Rights Enforcement Briefing*, p. 74.

there were 1,366 complaints filed with HUD and 7,019 complaints filed with FHAP agencies and 8,385 complaints overall.¹⁶¹⁹ In FY 2017, the number of complaints filed with both HUD and FHAP decreased slightly to 8,186—there were 6,878 complaints filed with FHAP agencies and 1,308 complaints filed with HUD.¹⁶²⁰

While HUD only has the authority to issue a formal charge in federal court through DOJ,¹⁶²¹ HUD does have the authority to initiate complaints on behalf of aggrieved persons or identify a complaint for systemic processing.¹⁶²² These complaints can be administratively litigated to judgement before an ALJ, or they can be litigated in federal court by DOJ.¹⁶²³ Secretary-initiated complaints are an important enforcement tool for HUD. According to Bryan Greene, speaking of HUD FHEO, “one of the most powerful tools the Fair Housing Act provides HUD is the authority to bring cases of its own initiative to address a potentially discriminatory practice where no specific individual has filed a complaint. These Secretary-initiated cases are important in combatting policies or practices that can potentially harm a great number of people.”¹⁶²⁴ In 2002, the Commission recommended that agencies initiate litigation on systemic civil rights issues, reasoning that “[b]ecause few complaints result in litigation, enforcement agencies must have strong litigation strategies.”¹⁶²⁵ The Commission’s prior recommendations that were incorporated in 2002 included “stepping up litigation in areas of law that are relatively undeveloped,” and advising agencies “to seek and litigate cases that set legal precedent and mediate other cases.”¹⁶²⁶

In March 2018, the New York Times reported that Anna Maria Fariás, Assistant Secretary of Fair Housing and Equal Opportunity at HUD, had ordered a hold on approximately half a dozen Secretary-initiated complaints “until further notice.”¹⁶²⁷ Some of these halted Secretary-initiated complaints focused on issues of accessibility of residential dwellings; an investigation of a local ordinance in California that could hinder access to group homes for formerly incarcerated individuals; and a high-profile complaint involving advertisers on Facebook having the ability to exclude certain “ethnic affinities,” or specific racial or ethnic groups from viewing ads when social media activities have identified them as black, Hispanic, or Asian persons.¹⁶²⁸

¹⁶¹⁹ HUD FHEO, *Annual Report to Congress FY 2016*, *supra* note 1574, at 18.

¹⁶²⁰ HUD FHEO, *Annual Report to Congress FY 2017*, *supra* note 1574, at 45.

¹⁶²¹ *See supra* notes 1477-1479.

¹⁶²² 24 C.F.R. § 103.204-103.205.

¹⁶²³ *See* Justice Manual at § 8.22.231.A (“After HUD issues a charge [of FHA violation], the matter can proceed in one of two ways: (1) HUD conciliates the complaint or litigates the complaint to judgment before an administrative law judge; or (2) one of the parties to the administrative charge “elects” to have the case heard in federal court, in which case the Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, is required to initiate and maintain a lawsuit in federal court on behalf of the complainant.”).

¹⁶²⁴ Greene Statement, at 2.

¹⁶²⁵ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 38.

¹⁶²⁶ *Ibid.*

¹⁶²⁷ Glenn Thrush, “Under Ben Carson, HUD Scales Back Fair Housing Enforcement,” *The New York Times*, Mar. 28, 2018, <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html?mtrref=www.google.com>.

¹⁶²⁸ *Ibid.*

Concerning the Facebook complaint, private fair housing organizations subsequently filed a lawsuit against Facebook in March 2018,¹⁶²⁹ for which DOJ and HUD issued a Statement of Interest filed by the U.S. Attorney for the Southern District of New York in August 2018, advising the federal court that Facebook could be held liable under the FHA if housing providers use its ad targeting functions to illegally discriminate against prospective renters that fall under protected classes.¹⁶³⁰ Whereas Facebook argued that it was protected by the Communications Decency Act as it is “merely an interactive computer service,” HUD and DOJ told the federal court that Facebook is an internet service provider, which the Complaint alleges creates and harvests data about the demographic characteristics of “then solicits demographic and other audience preferences from advertisers and implements those preferences using Facebook’s proprietary algorithms to enable advertisers to include some customers and exclude others,” including through housing advertisements.¹⁶³¹ HUD also reopened its Secretary-initiated complaint against Facebook in August 2018.¹⁶³² HUD investigated the complaint and charged Facebook with violating the Fair Housing Act “by encouraging, enabling, and causing housing discrimination through the company’s advertising platform.”¹⁶³³ HUD has noted that “Facebook elected to have the case heard in Federal district court rather than before a HUD Administrative Law Judge,” thus “HUD referred the case to the Department of Justice as required by the Fair Housing Act.”¹⁶³⁴ HUD also noted that it “pursued the case even though private organizations settled their complaint with Facebook,” and that its actions “were based on the evidence in its investigation and all applicable law.”¹⁶³⁵ It is unclear whether the reopening of this Secretary-initiated complaint was motivated by the high-profile lawsuit brought by the private fair housing organizations.

In March 2019, the private fair housing organizations entered into a settlement agreement with Facebook, where Facebook agreed to pay \$1.9 million in damages and expenses to the plaintiffs, and another \$500,000 for advertising on Facebook to promote fair housing and fair lending

¹⁶²⁹ Complaint, *National Fair Housing Alliance et al. v. Facebook, Inc.*, No. 1:18-cv-02689 (S.D.N.Y. 2018), <https://nationalfairhousing.org/wp-content/uploads/2019/03/2018-06-25-NFHA-v.-Facebook.-First-Amended-Complaint.pdf>.

¹⁶³⁰ Statement of Interest, *National Fair Housing Alliance et al. v. Facebook, Inc.*, No. 1:18-cv-02689 (S.D.N.Y. 2018), <https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>; see also Katie Benner, “Justice Dept. Backs Suit Accusing Facebook of Violating Fair Housing Act,” *The New York Times*, Aug. 17, 2018, <https://www.nytimes.com/2018/08/17/us/politics/justice-dept-facebook-fair-housing.html>.

¹⁶³¹ Statement of Interest, *National Fair Housing Alliance et al. v. Facebook, Inc.*, No. 1:18-cv-02689, 2 (S.D.N.Y. 2018), <https://www.justice.gov/crt/case-document/statement-interest-national-fair-housing-alliance-v-facebook-inc-sdny>.

¹⁶³² U.S. Dep’t of Hous. and Urban Dev., “HUD Files Housing Discrimination Complaint Against Facebook,” Aug. 17, 2018, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_085 [hereinafter HUD, “HUD Files Housing Discrimination Complaint Against Facebook”].

¹⁶³³ U.S. Dep’t of Hous. and Urban Dev. v. Facebook, FHEO No. 01-18-0323-8, Charge of Discrimination, https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf; U.S. Dep’t of Hous. and Urban ., “HUD Charges Facebook with Housing Discrimination over Company’s Targeted Advertising Practices,” Mar. 28, 2019, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_035.

¹⁶³⁴ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

¹⁶³⁵ *Ibid.*

educational programs and services.¹⁶³⁶ Facebook will also “undertake far-reaching steps that will prevent discrimination in housing, employment, and credit advertising on Facebook, Instagram, and Messenger demonstrating significant progress and a commitment to advancing civil rights.”¹⁶³⁷

The New York Times also published information with regard to another one of the complaints (against Epcon Communities, Inc., and Epcon Communities Franchising, Inc.) that was reportedly halted by FHEO Secretary Fariás.¹⁶³⁸ Since then HUD has charged Epcon Communities with housing discrimination for “failing to design and construct thirty-two multifamily housing communities throughout Ohio that meet the accessibility requirements of the Fair Housing Act.”¹⁶³⁹

With regard to Secretary-initiated complaints, HUD has noted:

HUD takes seriously its authority to issue Secretary-initiated complaints under the Fair Housing Act. These matters often involve significant novel matters of national significance requiring substantial resources to investigate. The significance of these matters cannot be measured by the number of filings alone.

During testimony, then General Deputy Assistant Secretary Greene stated that there has been a “sort of a tug-of-war over the issues of volume and getting cases done on a timely basis and achieving the optimal outcomes for individuals in those cases. They are not mutually exclusive.”¹⁶⁴⁰ Greene said he thinks the key is “having staff resources to go in and do quality assurance.”¹⁶⁴¹

Former FHEO Assistant Secretary Kim Kendrick stated that in retrospect, she wished that when she led FHEO from 2005 through 2009 she had prioritized systemic issues rather than “focusing on the number of complaints that FHEO filed each year.”¹⁶⁴² Kendrick explained that during her tenure, the Mortgage Lending Division was established to examine lending discrimination, which had “small successes that impacted a large number of holders, mortgage holders and applicants,”

¹⁶³⁶ Settlement Agreement and Release, *National Fair Housing Alliance et al. v. Facebook, Inc.*, No. 1:18-cv-02689, 2 (S.D.N.Y. 2019), <https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-SIGNED-NFHA-FB-Settlement-Agreement-00368652x9CCC2.pdf>.

¹⁶³⁷ National Fair Housing Alliance, “Civil Rights Advocates Settle Lawsuit with Facebook: Transforms Facebook’s Platform Impacting Millions of Users,” <https://nationalfairhousing.org/facebook-settlement/>.

¹⁶³⁸ Glenn Thrush, “Under Ben Carson, HUD Scales Back Fair Housing Enforcement,” *The New York Times*, Mar. 28, 2018, <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html>.

¹⁶³⁹ U.S. Dep’t of Hous. and Urban Dev. v. Epcon Communities, Inc., FHEO Nos. 05-12-0088-8 05-13-0010-8, Charge of Discrimination, <https://www.hud.gov/sites/dfiles/FHEO/documents/18ACCESSIBLE%20Epcon%20Charge%20final.pdf>; U.S.

Dep’t of Hous. and Urban Dev., “HUD Charges Two Ohio Companies with Discrimination Against Residents with Disabilities, May 17, 2018, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_042.

¹⁶⁴⁰ Greene Testimony, *Federal Civil Rights Enforcement Briefing*, p. 73.

¹⁶⁴¹ *Ibid.*

¹⁶⁴² Kendrick Testimony, *Federal Civil Rights Enforcement Briefing*, p. 236.

and noted that “the impact could be felt because discriminatory practices declined.”¹⁶⁴³ She explained that FHEO could have had “a greater impact if we directed more resources to divisions such as that, and to impact -- the fair lending investigations could certainly have a greater impact than a few fair housing complaints that have been serviced by -- that could be serviced by other fair housing agencies or even by the private sector.”¹⁶⁴⁴

Testimony during the Commission’s Illinois Advisory Committee briefing on fair housing, in May 2019, highlighted the value of systemic case results when FHEO is able to achieve them. HUD’s Midwest regional director testified regarding what HUD terms a “cross-programmatic team” investigation, involving FHEO among other HUD programs including the Office of Public Housing and the Office of General Counsel.¹⁶⁴⁵ In 2016 following FHEO findings of racial segregation in housing and race discrimination in employment at the Alexander County public housing authority, among other HUD violations identified, HUD took control of the public housing authority.¹⁶⁴⁶ The regional director testified: “I have been doing fair housing and housing related work for the better part of 40 years, and I can say personally from my own experiences within Alexander County I have never seen housing in the continental United States that compares [as badly] to the housing that people were living in in Alexander County.”¹⁶⁴⁷ An Inspector General report also notes about this investigation that “HUD was ‘stunned . . . at what we saw, not just in terms of the deplorable living conditions that we encountered but at the poor, even absent record keeping, the staggering backlog of critical repairs, all of this going to the very health and safety of the residents living there” and that these deplorable conditions occurred in “segregated housing” with “broken and outdated appliances and pest infestations in housing developments occupied by African-Americans.”¹⁶⁴⁸

The regional director also testified that HUD had taken distressingly long to act: “HUD had been aware of the negative conditions at the housing authority since at least 2010, including the misuse of funds, conflicts of interest, and failures to comply with HUD policies and federal civil rights laws.”¹⁶⁴⁹ Only following what the regional director described as “significant findings” regarding race and disability based discrimination, including the maintenance of racially segregated public housing, combined with enforcement authorities from other components within HUD, did HUD ultimately take control of the housing authority in 2016 and tear down two of the public housing developments. HUD explained that it tore down the developments because they “were beyond the point of viability”: the “cost of trying to bring those developments back into some sort of condition of habitability would be cost prohibitive.”¹⁶⁵⁰ The HUD Inspector General report elaborates that

¹⁶⁴³ Ibid., 238.

¹⁶⁴⁴ Ibid., 238.

¹⁶⁴⁵ McGough Testimony, *Illinois SAC Fair Housing Briefing*, p. 27.

¹⁶⁴⁶ Ibid., 27-29.

¹⁶⁴⁷ Ibid., 26.

¹⁶⁴⁸ U.S. Dep’t of Housing and Urban Development, Office of Inspector General, Memorandum Re: Final Evaluation Report – HUD’s Oversight of the Alexander County Housing Authority (Jul. 24, 2018), pp. 5, 7, <https://www.hudoig.gov/sites/default/files/documents/2017-OE-0014.pdf> [hereinafter HUD, Memo Re: Oversight of the Alexander County Housing Authority].

¹⁶⁴⁹ McGough Testimony, *Illinois SAC Fair Housing Briefing*, p. 26.

¹⁶⁵⁰ Ibid., 29-30.

FHEO had issued findings regarding race discrimination in 2014. “FHEO’s authorities enable it to act more quickly than other HUD program offices” with the Public Housing Authority “required to review the finding within a 30-day window and enter into a voluntary compliance agreement to remedy the identified negative conditions.” Other HUD program offices took more time to resolve the remainder of the cross-programmatic review, taking until 2016 for effective action.¹⁶⁵¹ Ultimately the Inspector General report notes that “[w]ithout FHEO’s involvement, negative conditions at ACHA [the housing authority] may have persisted longer before HUD took it into receivership.”¹⁶⁵²

Proactive Compliance Evaluation

For recipients of federal financial assistance, HUD FHEO engages in periodic compliance reviews,¹⁶⁵³ to which it currently devotes about 20 percent of its staffing resources.¹⁶⁵⁴ FHEO can initiate a compliance review for funding recipients as well as some entities that are not recipients of HUD funding, if allegations of relevant statutory violations have been made,¹⁶⁵⁵ based on the information submitted in a complaint or based on FHEO’s own choice.¹⁶⁵⁶ Compliance reviews could evaluate nondiscrimination compliance work among 5,000+ public assisted entities (Public Housing Authorities, Community Development Block Grant/HOME recipients, Rental Assistance Demonstration, AFFH, AFH marketing plans, reviews of Demolition/Disposition plans, and site and neighborhood reviews).¹⁶⁵⁷ According to the FY 2107 Annual Report, “In FY 2017, the FHIP program awarded \$38 million in grants to 155 organizations to meet the objectives under one or more of the core program initiatives: enforcing the Fair Housing Act under the Private Enforcement Initiative, educating the public and industry stakeholders on fair housing under the Education and Outreach Initiative, and building organizational capacity under the Fair Housing Organizations Initiative.”¹⁶⁵⁸ In contrast, the FY 2017 Annual Report only described one compliance outcome, in which it negotiated a voluntary compliance agreement including a monetary award and rent a Nevada housing authority accountable for violations of Section 504 of the Rehabilitation Act and the FHA, “among the outcomes reached by HUD in FY 2017 under these [compliance] authorities.”¹⁶⁵⁹

¹⁶⁵¹ HUD, Memo Re: Oversight of the Alexander County Housing Authority, *supra* note 1648, at 11.

¹⁶⁵² *Ibid.*, 12.

¹⁶⁵³ 24 C.F.R. § 1.7(a); 24 C.F.R. § 3.605; 24 C.F.R. § 6.11(b); 24 C.F.R. § 8.56(a); 24 C.F.R. § 41.5(b); 24 C.F.R. § 103.204; 24 C.F.R. Part 115 Subpart C; 24 C.F.R. Part 125; 24 C.F.R. § 146.31.

¹⁶⁵⁴ Greene Statement, at 1-2.

¹⁶⁵⁵ 24 C.F.R. § 1.7(a); 24 C.F.R. § 3.605; 24 C.F.R. § 6.11(b); 24 C.F.R. § 8.56(a); 24 C.F.R. § 41.5(b); 24 C.F.R. § 103.204; 24 C.F.R. Part 115 Subpart C; 24 C.F.R. Part 125; 24 C.F.R. § 146.31.

¹⁶⁵⁶ HUD, “Learn About the FHEO Complaint and Investigation Process,” *supra* note 1578.

¹⁶⁵⁷ Greene Statement, at 1-2.

¹⁶⁵⁸ HUD FHEO, *Annual Report to Congress FY 2017*, *supra* note 1574, at 12.

¹⁶⁵⁹ *Ibid.*

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

FHEO has the authority to issue guidance under the statutes it enforces as a tool for enforcement.¹⁶⁶⁰ Sara Pratt, a longtime former career HUD executive testified to the importance of policy guidance as a civil rights enforcement tool during an Illinois Advisory Committee briefing on fair housing in May 2019: “There is a need for strong, consistent guidance, instruction, educational materials that are available consistently nationally” from HUD. She explained HUD “should have fair housing materials up online so anybody doing the work around the country could download them.” But, she noted: “I am unaware of any useful civil rights guidance issued in this Administration. This is not political. It’s timeframes I’m observing.”¹⁶⁶¹ Bryan Greene also testified to the Commission regarding guidance as one of five current civil rights enforcement priorities for HUD FHEO, underscoring the value of the tool.¹⁶⁶² The Commission’s review of HUD’s website shows HUD has issued no civil rights guidance since 2016.

In FY 2016, however, HUD issued two guidance documents on the following topics:

- Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions¹⁶⁶³
- Fair Housing Act Protections for Persons with Limited English Proficiency¹⁶⁶⁴

Also in FY 2016, HUD finalized the following rule:

Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act¹⁶⁶⁵

FHEO publicized this guidance and rulemaking in its FY 2016 annual report.¹⁶⁶⁶ Since then, HUD has engaged in other rulemaking and policy initiatives regarding civil rights during FY 2016-2018 which have demonstrated a notable policy shift. For example, in September 2016, HUD published a final rule regarding the rights of transgender persons against discrimination in federally funded emergency shelters.¹⁶⁶⁷ The rule provides that persons must be provided shelter in accordance with their self-described gender identity and provided practical guidance for how to accommodate all

¹⁶⁶⁰ 24 C.F.R. § 1.6; 24 C.F.R. § 3.605; 24 C.F.R. § 6.10; 24 C.F.R. § 8.55.

¹⁶⁶¹ Pratt Testimony, *Illinois SAC Fair Housing Briefing*, p. 40.

¹⁶⁶² Greene Statement, at 3.

¹⁶⁶³ U.S. Dep’t of Hous. and Urban Dev., Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

¹⁶⁶⁴ U.S. Dep’t of Hous. and Urban Dev., Fair Housing Act Protections for Persons with Limited English Proficiency (Sep. 15, 2016), <https://www.hud.gov/sites/documents/LEPMEMO091516.PDF>.

¹⁶⁶⁵ Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sep. 14, 2016).

¹⁶⁶⁶ HUD FHEO, *Annual Report to Congress FY 2016*, *supra* note 1574.

¹⁶⁶⁷ Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (Sep. 21, 2016).

persons in shelter safely.¹⁶⁶⁸ Previously, HUD had clarified that rights to freedom from discrimination in housing applied to LGBT communities.¹⁶⁶⁹ In May 2019, one day following Secretary Ben Carson's Congressional testimony stating that he had no plans to modify that rule, HUD published a notice of proposed rulemaking in the federal register, proposing to repeal its prior equal access shelter rule and instead to permit shelters to require facility access based on biological sex.¹⁶⁷⁰

In addition, HUD has acted to clarify civil rights to mortgage lenders who were acting on the administration's other policies. In 2018, federal mortgage lenders reportedly began denying housing applications to recipients of Deferred Action for Childhood Arrivals (DACA),¹⁶⁷¹ a temporary immigration status extended by the Obama administration, which the Trump administration has opposed.¹⁶⁷² Soon after the reports surfaced, HUD told Congress that its rules requiring lawful immigration status to receive federal mortgage assistance had not changed, stating that "HUD has a longstanding policy regarding eligibility for non-U.S. citizens without lawful status."¹⁶⁷³ HUD's letter to Congress clarified that legal permanent residents and nonpermanent residents with lawful status are eligible for federally backed mortgages, and that there had been no change in policy.¹⁶⁷⁴

In contrast, HUD proposed a new rule in May 2019 that aims to limit access to federal public housing to households composed exclusively of U. S. citizens.¹⁶⁷⁵ According to the reports, HUD's own data suggests that as many as 55,000 U.S. citizen children could be rendered homeless by this change in policy because these children and their families now reside in public housing but will be rendered ineligible based on an adult family member's immigration status.¹⁶⁷⁶ Secretary Carson

¹⁶⁶⁸ Ibid.

¹⁶⁶⁹ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,661 (Feb. 3, 2012).

¹⁶⁷⁰ U.S. Dep't of Hous. and Urban Dev., Revised Requirements Under Community Planning and Development Housing Programs, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>; Tracy Jan, "Proposed HUD rule would strip transgender protections at homeless shelters," *The Washington Post*, May 22, 2019, https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/?utm_term=.8c9f9170263d.

¹⁶⁷¹ See Ben Lane, "HUD to Lenders: We Are Not Denying Mortgages to DACA Dreamers," *Housing Wire*, Mar. 7, 2019, <https://www.housingwire.com/articles/48374-hud-to-lenders-we-are-not-denying-mortgages-to-daca-dreamers> (discussing reports of lenders denying mortgage assistance to Dreamers, after which HUD clarified that was not its policy).

¹⁶⁷² See *infra* note 2436 (discussion of DACA litigation in DHS CRCL chapter).

¹⁶⁷³ Letter from Len Wolfson, HUD Assistant Secretary for Congressional and Intergovernmental Relations, letter to Senator Robert Menendez (Dec. 21, 2018), <https://www.housingwire.com/ext/resources/files/Editorial/Documents/Menendez-DACA-Final.pdf>.

¹⁶⁷⁴ Ibid.

¹⁶⁷⁵ Housing and Community Development Act of 1980: Verification of Eligible Status, 84 Fed. Reg. 20,589 (May 10, 2019); Sylvan Lane, "Carson on HUD eviction plan: 'You take care of your own first,'" *The Hill*, Mar. 21, 2019, <https://thehill.com/policy/finance/444791-dems-rip-carson-for-proposal-to-evict-undocumented-immigrants-from-public>.

¹⁶⁷⁶ Tracy Jan, "Trump Proposal Would Evict Undocumented Immigrants from Public Housing," *The Washington Post*, Apr. 18, 2019, https://www.washingtonpost.com/business/2019/04/18/trump-proposal-would-evict-undocumented-immigrants-public-housing/?utm_term=.bdd083406b80.

testified that the change is based in “logic” rather than lack of “heart”: U.S. resources, he said, should be reserved for citizens.¹⁶⁷⁷ However, it has been reported that local public housing authorities that are charged with enforcing the rule are opposed to it, citing additional financial and administrative strain.¹⁶⁷⁸ Tim Kaiser, the Executive Director of the Public Housing Authorities Directors Association (PHADA) said that “it feels unnecessary, and like they are changing the rules in the middle of the game,” and it is “a reinterpretation of a long-standing policy, making families that we are already serving ineligible.”¹⁶⁷⁹ John Clarke, President of PHADA, explained that: “Removing a family is not free. It takes staff time. It takes legal resources. Staff will have to sit in court instead of screening families or going over eligibility applications. It doesn’t seem like a quality way to maximize the slim resources we do have.”¹⁶⁸⁰

Affirmatively Furthering Fair Housing

Section 808(d) of the Fair Housing Act mandates that HUD program participants affirmatively further fair housing, and stipulates:

Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes.

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.¹⁶⁸¹

A major goal of the Fair Housing Act, as affirmed by the Supreme Court, is to establish integrated communities.¹⁶⁸² The Fair Housing Act requires recipients of HUD funding to affirmatively further fair housing by taking active steps to assess, remediate, and document the patterns and practices of segregation in their communities,¹⁶⁸³ and failure to do so could lead to a loss of federal funding or legal exposure.¹⁶⁸⁴ Formally, this rule required jurisdictions to conduct an analysis of impediments to fair housing and document the analysis and steps taken to eliminate these

¹⁶⁷⁷ Ibid.

¹⁶⁷⁸ Mattie Quinn, “Public Housing Agencies Oppose HUD’s Plan to Evict Immigrant Families,” *Governing*, May 21, 2019, <https://www.governing.com/topics/health-human-services/gov-hud-public-housing-immigrants-rule-hearing-congress.html>.

¹⁶⁷⁹ Ibid.

¹⁶⁸⁰ Ibid.

¹⁶⁸¹ 42 U.S.C. 3601 § 808(d).

¹⁶⁸² *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 209 (1972).

¹⁶⁸³ Timothy M. Smyth, Michael Allen, and Marisa Schnaith, “The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients,” *Journal of Affordable Housing*, vol. 23, no. 2 (2015), pp. 231-258 [hereinafter Smyth *et al.*, “The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients”].

¹⁶⁸⁴ Ibid.

impediments.¹⁶⁸⁵ The affirmatively furthering fair housing provision has existed since the passing of the Fair Housing Act in 1968.¹⁶⁸⁶

On July 16, 2015, HUD issued the Affirmatively Furthering Fair Housing (AFFH) rule,¹⁶⁸⁷ which clarifies the Fair Housing Act's requirement that HUD programs be implemented in a way that affirmatively furthers the purposes of the Act,¹⁶⁸⁸ and enables HUD program participants to meet "long-standing fair housing obligations in their use of HUD funds."¹⁶⁸⁹ According to HUD, the "new rule will provide communities and local decision-makers with the information, tools, and clear guidance they need to comply with their statutory duty to affirmatively further fair housing."¹⁶⁹⁰ Implementation of the AFFH rule began in 2016, and required jurisdictions to submit an Assessment of Fair Housing (AFH) to HUD, for which HUD created an AFH assessment tool and made data publicly available to help program participants identify and analyze fair housing issues pertaining to patterns of segregation, concentrated poverty among racial and ethnic minorities, disparities in access to opportunity, and disproportionate housing needs.¹⁶⁹¹ The AFH process also included a review process, where HUD would have 60 days to determine whether the program participant had met all requirements for providing its analysis, assessment, and goal setting.¹⁶⁹² HUD would provide a notification to the program participant within 60 days if the AFH was not accepted, and would provide guidance on how to revise the AFH if it is found that any portion of the AFH is "inconsistent with fair housing or civil rights requirements or is substantially incomplete."¹⁶⁹³

In January 2018, HUD issued a notice postponing the deadline for submission of an AFH by program participants, which noted that "program participants will not be required to submit an AFH using the current Office of Management and Budget (OMB)-approved version of the Assessment of Fair Housing Tool for Local Governments [], but must continue to comply with existing obligations to affirmatively further fair housing."¹⁶⁹⁴ HUD noted that it "is seeking revisions to the 2015 AFFH rule because there were substantial implementation difficulties with the 2015 AFFH rule," highlighting that "one estimate found that HUD would need 538 full-time employees to conduct reviews of the 2019 AFFH plans, while HUD would have been able to use

¹⁶⁸⁵ Smyth *et al.*, "The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients," *supra* note 1683, at 231-258; 24 C.F.R. §§ 91.225(a) (1), 91.325(a) (1); 24 C.F.R. §§ 570.487(b), 570.601(a) (2).

¹⁶⁸⁶ James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 Yale L. & POL'Y REV., 348, 348-60 (1988); U.S. Government Accountability Office, *GAO-10-905, Housing And Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions' Fair Housing Plans*, 2010, <http://www.gao.gov/new.items/d10905.pdf> [hereinafter GAO, *Housing And Community Grants*].

¹⁶⁸⁷ 80 Fed. Reg. 42,271 (Jul. 16, 2015).

¹⁶⁸⁸ *Id.*

¹⁶⁸⁹ *Id.*

¹⁶⁹⁰ HUD, *2016 Annual Performance Report*, *supra* note 193.

¹⁶⁹¹ U.S. Dep't of Hous. and Urban Dev., "AFFH Fact Sheet: The Duty to Affirmatively Further Fair Housing," <https://www.huduser.gov/portal/sites/default/files/pdf/AFFH-Fact-Sheet.pdf>.

¹⁶⁹² U.S. Dep't of Hous. and Urban Dev., "The Assessment of Fair Housing," <https://www.hudexchange.info/programs/affh/overview/>.

¹⁶⁹³ *Ibid.*

¹⁶⁹⁴ 83 Fed. Reg. 683 (Jan. 5, 2018).

as little as just 28 employees for the task.”¹⁶⁹⁵ Subsequently, in September 2018, HUD issued a notice that proposed to rollback the AFFH assessment tool, which indicated:

HUD's experience over the three years since the newly specified approach was promulgated demonstrates that it is not fulfilling its purpose to be an efficient means for guiding meaningful action by program participants. Accordingly, HUD has determined that a new approach towards AFFH is required. As HUD begins the process of developing a proposed rule to amend the existing AFFH regulations, it is soliciting public comment on changes that will: Minimize regulatory burden while more effectively aiding program participants to plan for fulfilling their obligation to affirmatively further the purposes and policies of the Fair Housing Act; create a process that is focused primarily on accomplishing positive results, rather than on performing analysis of community characteristics; provide for greater local control and innovation; seek to encourage actions that increase housing choice, including through greater housing supply; and more efficiently utilize HUD resources.¹⁶⁹⁶

Prior to his appointment as HUD Secretary, Carson wrote in 2015 that this rule amounted to a “failed socialist experiment,” and noted that “government-engineered attempts to legislate racial equality create consequences that often make matters worse.”¹⁶⁹⁷ The National Fair Housing Alliance (NFHA) indicated in their *2018 Fair Housing Trends Report* that the delay by HUD is “an effective suspension of the rule,” viewing the AFH as the “lynchpin” of the 2015 rule, and noting that by returning to the system of conducting an analysis of impediments, HUD has “returned to a process whose faults and deficiencies are well-documented.”¹⁶⁹⁸ In May 2018, the National Fair Housing Alliance, Texas Appleseed, and the Texas Low Income Housing Information Service filed a lawsuit against HUD that requested a federal court to order HUD to reinstate the rule.¹⁶⁹⁹ However in late August 2018, a federal judge dismissed the suit, concluding that the plaintiffs did not prove that they were harmed by HUD’s actions, and noted in the opinion that “HUD’s withdrawal of the tool does not ‘perceptibly impair’ the plaintiffs’ abilities to carry out their missions.”¹⁷⁰⁰

¹⁶⁹⁵ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

¹⁶⁹⁶ 83 Fed. Reg. 40,713 (Sep. 16, 2018).

¹⁶⁹⁷ Ben S. Carson, “Experimenting with failed socialism again,” *The Washington Times*, Jul. 23, 2015, <https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/>.

¹⁶⁹⁸ National Fair Housing Alliance, *Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report*, 2018, pp. 35-36, <https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report.pdf>.

¹⁶⁹⁹ Ben Lane, “Judge tosses civil rights groups’ suit against HUD over delaying Obama fair housing effort,” *Housing Wire*, Aug. 20, 2018, <https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>.

¹⁷⁰⁰ Memorandum Opinion, *National Fair Housing Alliance et al. v. Carson et al.*, No. 18-1076, 40 (D.D.C. 2018), <https://www.courtlistener.com/recap/gov.uscourts.dcd.196383/gov.uscourts.dcd.196383.47.0.pdf>; Ben Lane, “Judge tosses civil rights groups’ suit against HUD over delaying Obama fair housing effort,” *Housing Wire*, Aug. 20, 2018, <https://www.housingwire.com/articles/46520-judge-tosses-civil-rights-groups-suit-against-hud-over-delaying-obama-fair-housing-effort>.

Supporters of AFFH and AFH say that the AFH process forces municipalities to evaluate how housing remains segregated in the community, and that the delay of the rule will effectively halt progress towards desegregation.¹⁷⁰¹ NFHA states that minority neighborhoods often experience resource disparities when compared to more affluent or white neighborhoods.¹⁷⁰² Furthermore, NFHA is concerned that delaying the AFH process will ensure that these systemic issues will continue to go unresolved.¹⁷⁰³

At the Commission’s briefing, former Assistant Secretary for Fair Housing and Equal Opportunity during the George W. Bush Administration Kim Kendrick emphasized the importance of public education on this topic, given the absence of enforcement. To Kendrick, the affirmatively furthering fair housing requirement under the Fair Housing Act needs a rule to explain to communities what it means to affirmatively further fair housing, but in the absence of such a rule, “let’s let the communities be better by giving them the tools that they need through education, guidance, policy statements, if we’re not going to have a rule.”¹⁷⁰⁴ The NAACP Legal Defense and Educational Fund stated that HUD’s delay of the Affirmatively Furthering Fair Housing regulation left “local jurisdictions confused, g[ave] local residents less voice in important decisions about their communities, and reinstat[ed] an approach to fair housing that the GAO found to be ineffective and poorly administered.”¹⁷⁰⁵ The National Fair Housing Alliance emphasized the signaling effect of the suspension of this rule: “it has sent the message to local governments that HUD will not take seriously the obligation to affirmatively further fair housing as required by the Fair Housing Act.”¹⁷⁰⁶

Disparate Impact: Role of the Federal Government and Private Litigation in Housing Discrimination Cases

In June 2018, HUD issued advance notice of proposed rulemaking, inviting public comment on potential amendments to its 2013 final rule that implemented the disparate impact standard,¹⁷⁰⁷ and in August 2019 published a proposed rule amending its 2013 final rule.¹⁷⁰⁸ In its 2018 advance notice, HUD noted that it “seeks to ensure that HUD’s disparate impact rule is consistent with [the

¹⁷⁰¹ Kriston Capps, “The Trump Administration Just Derailed a Key Obama Rule on Housing Segregation,” *CityLab*, Jan. 4, 2019, <https://www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/>.

¹⁷⁰² National Fair Housing Alliance, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at attachment 2 [hereinafter National Fair Housing Alliance Statement].

¹⁷⁰³ *Ibid.*

¹⁷⁰⁴ Kendrick Testimony, *Federal Civil Rights Enforcement Briefing*, p. 266.

¹⁷⁰⁵ NAACP Legal Defense Fund, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Dec. 17, 2018, at 5 [hereinafter NAACP Legal Defense Fund Statement]; *see also* GAO, *Housing and Community Grants*, *supra* note 1686.

¹⁷⁰⁶ National Fair Housing Alliance Statement, at 2.

¹⁷⁰⁷ Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28,560.

¹⁷⁰⁸ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854 (Aug. 19, 2019).

Supreme Court’s 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities*.¹⁷⁰⁹ In the August 2019 Proposed Rule, HUD again reiterated that it seeks to align its regulations with the decision in *Inclusive Communities*, but whether such a change is in fact necessary based on that Supreme Court ruling is contested. The Supreme Court did not rely upon HUD’s disparate impact rule in *Inclusive Communities* (which held that disparate impact is a viable legal claim, but it must be proven by robust causation) relying instead on the statutory language of the Fair Housing Act.¹⁷¹⁰

The 2013 Final Rule contained a 3-part burden-shifting mechanism for claims alleging discrimination based on disparate impact. In contrast to claims made based on intent, in a disparate impact claim, proof of discrimination is based on the effects of a policy on particular groups. The 2013 Rule requires the plaintiff (or charging party) to prove “that a challenged practice caused or predictably will cause a discriminatory effect.”¹⁷¹¹ If this showing is made, the defendant (or respondent) then has the burden to prove “that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.”¹⁷¹² In response, the plaintiff “may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”¹⁷¹³

In its 2019 proposed rule, HUD proposes changing this burden-shifting framework to adopt a new standard a plaintiff must allege to avoid dismissal of a disparate impact claim.¹⁷¹⁴ If adopted, under this rule the plaintiff must allege:

- (1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;
- (2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;
- (3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;
- (4) That the alleged disparity caused by the policy or practice is significant; and

¹⁷⁰⁹ 135 S. Ct. 2507 (2015).

¹⁷¹⁰ *Id.* at 2523 (“a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement ensures that “[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact” and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. V. Antonio*, 490 U.S. 642, 653 (1989)).”

¹⁷¹¹ 24 C.F.R. § 100.500(c)(1)

¹⁷¹² *Id.* § 100.500(c)(2)

¹⁷¹³ *Id.* § 100.500(c)(3)

¹⁷¹⁴ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854 (Proposed amendment to 24 CFR § 100.500(b)).

- (5) That there is a direct link between the disparate impact and the complaining party's alleged injury.¹⁷¹⁵

These five elements are required as an initial showing, in contrast to the 2013 Rule, which did not contain specific requirements for how a plaintiff would show at the outset that a policy had a discriminatory effect.¹⁷¹⁶ In addition, the 2019 Rule provides for new, specified defenses against disparate impact claims. A defendant may defeat a claim by showing that “its discretion is materially limited by a third party” such as a legal or other binding requirement.¹⁷¹⁷ It may also defend the use of an algorithm or other model by showing it has conformed to specific requirements such as third-party validation and that the inputs to the model are not substitutes for protected characteristics.¹⁷¹⁸ In contrast to the 2013 Rule, the 2019 proposal eliminates the burden on the defendant to prove a challenged practice is necessary to its business. It provides a defendant may rebut a charge that a practice is arbitrary, artificial, and unnecessary “by producing evidence showing that the challenged policy or practice advances a valid interest (or interests),”¹⁷¹⁹ but does not require proof. In such a case, the plaintiff has the burden to prove “that a less discriminatory policy or practice exists that would serve the defendant's identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.”¹⁷²⁰ Further, the updated proposed rule issued on August 19, 2019, states that “neither the discriminatory effect standard, nor any other item in HUD's part 100 regulations, requires or encourages the collection of data with respect to protected classes and that the absence of such collection will not result in any adverse inference against a party.”¹⁷²¹

In its preamble to the 2019 proposal, HUD notes plaintiffs will have access to discovery when litigating only when they satisfy each of the 5 new elements, and that failure to satisfy any one will result in dismissal of the case (even if the failure to satisfy is due to a lack of data).¹⁷²² This requirement includes the showing that the defendant has no valid interest in the policy or practice under challenge, which previously was not the plaintiff's initial responsibility to show. At the time of this writing, a number of public comments in response to the rule have already been submitted.¹⁷²³

In public documents surrounding the advance notice of proposed rulemaking, HUD assured the public “it is not contemplating a disparate impact proposed rulemaking to eliminate disparate impact liability,” adding that “[i]n response to HUD's 2018 Advance Notice of Proposed Rulemaking on disparate impact, many commenters argued that HUD should revisit its rule in

¹⁷¹⁵ *Id.*

¹⁷¹⁶ *See* 24 C.F.R. § 100.500(c).

¹⁷¹⁷ HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (Proposed amendment to 24 CFR § 100.500(c)(1)).

¹⁷¹⁸ *Id.* (Proposed amendment to 24 C.F.R. § 100.500(c)(2)).

¹⁷¹⁹ *Id.* (Proposed amendment to 24 C.F.R. § 100.500(d)(1)(ii)).

¹⁷²⁰ *Id.*

¹⁷²¹ HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, § 100.5, Scope (Aug. 19, 2019).

¹⁷²² 84 Fed. Reg. 42,860.

¹⁷²³ Proposed Rule, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg., 42,854 (Aug. 19, 2019), § 100.5, Scope, .

light of the analysis provided in *Inclusive Communities*.”¹⁷²⁴ “HUD is reviewing the Disparate Impact Rule to determine what changes, if any, may be necessary” in light of the decision.¹⁷²⁵

In response to the 2018 advance notice of proposed rulemaking, more than 1,900 public comments were submitted. Comments included responses from by insurance companies and corporations arguing for less burdensome regulation of disparate impact liability, and that the robust causation rule should be included in the HUD rule. They further argued the burden of proof should be on plaintiffs, rescinding the burden-shifting framework in the 2013 Rule.¹⁷²⁶ In addition, the U.S. Department of the Treasury issued a report in October 2017 recommending that HUD reconsider its use of the disparate impact rule that “could also impose unnecessary burdens on insurers and force them to alter practices in a manner that may not be actuarially sound.”¹⁷²⁷

Many fair housing advocates also submitted comments to the notice, speaking in favor of retaining the 2013 rule without amendments. Comments arguing against changes to the 2013 rule take the position that nothing in *Inclusive Communities* requires HUD to change its regulations, as the 2013 Rule was in force at the time of that decision.¹⁷²⁸ They also noted the Rule’s burden-shifting framework effectively implemented the Fair Housing Act’s prohibition on discriminatory housing policies, even without a showing of discriminatory intent, as the law requires.¹⁷²⁹ The National Low Income Housing Coalition noted, in comments submitted to HUD, that the rule is a “critical tool that people in protected classes use to attempt to secure changes to policies and procedures that subtly discriminate them,” and urged HUD not to amend the rule and “instead engage in robust

¹⁷²⁴ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

¹⁷²⁵ Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28,560.

¹⁷²⁶ See, e.g., Hanover Insurance Company, Comment on the U.S. Dep’t of Hous. and Urban Dev. Proposed Rule: FR-6111-A-01 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard 84 Fed. Reg., 42,854 (Aug. 19, 2019),

<https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>; NJM Insurance Group, Comment on the U.S. Dep’t of Hous. and Urban Dev. Proposed Rule: FR-6111-A-01 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard 84 Fed. Reg.,

42,854 (Aug. 19, 2019),

<https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>; International Bancshares Corporation, Comment on the U.S. Dep’t of Hous. and Urban Dev. Proposed Rule: FR-6111-A-01 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard 84 Fed. Reg., 42,854 (Aug. 19, 2019), at 3 (arguing that based on *Wards Cove* and *Inclusive Communities*, the burden of proof should be more focused on the plaintiff),

<https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047>.

¹⁷²⁷ U.S. Department of the Treasury, *A Financial System that Creates Economic Opportunities: Asset Management and Insurance*, October 2017, p. 110, https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf.

¹⁷²⁸ National Community Reinvestment Coalition, “Disparate Impact Reconsideration Comments,” Aug. 20, 2018, <https://www.jdsupra.com/legalnews/17-state-ags-advise-hud-not-to-change-91963/>.

¹⁷²⁹ “17 State AGs Advise HUD Not to Change Disparate Impact Rule,” *JDSUPRA*, Sep. 10, 2018, <https://ncrc.org/disperate-impact-reconsideration-comments/>.

enforcement.”¹⁷³⁰ NAACP LDF also submitted written comments, noting that this rule is crucial for effective civil rights enforcement: “The standards and provisions contained in the Disparate Impact rule protect the rights of individuals in numerous situations and makes significant differences to individuals and communities in life opportunities, public health, intergenerational poverty alleviation, and educational attainment.”¹⁷³¹

Additional scholarship on disparate impact liability in housing includes critics who contend that HUD current regulations do not address “actual racial discrimination in housing” and that HUD’s time would be better spent combatting explicitly discriminatory policies and practices.¹⁷³² Supporters of HUD’s 2013 disparate impact rule state that discrimination and inequality persist largely due to unconscious bias, and that the disparate impact rule combats discrimination by forcing housing providers to implement the least discriminatory policies possible.¹⁷³³ Furthermore, supporters of the 2013 disparate impact rule say that discrimination whether explicit or established through evidence of disparate impact end with the same result, reducing equal opportunity for historically marginalized communities.¹⁷³⁴

Education and Outreach through FHIP

As a formalized component of its FHIP program and as authorized by law,¹⁷³⁵ HUD funds education and outreach initiatives.¹⁷³⁶ HUD funds local fair housing and other nonprofit organizations through the Education and Outreach Initiative (EOI), which “offers a comprehensive range of support for fair housing activities, providing funding to State and local government agencies and non-profit organizations for initiatives that educate the public and housing providers about equal opportunity in housing and compliance with the fair housing laws.”¹⁷³⁷ In FY 2016 and FY 2017, HUD awarded \$7.45 million each year to organizations for education and outreach work.¹⁷³⁸ No data was provided on HUD’s FHIP web page about FY 2018 grant totals.¹⁷³⁹

¹⁷³⁰ National Low Income Housing Coalition, “Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,” Aug. 20, 2018,

https://nlihc.org/sites/default/files/images/NLIHC_Comment_Disparate_Impact_ANPR.pdf.

¹⁷³¹ NAACP Legal Defense Fund Statement, at 5.

¹⁷³² Roger Clegg, “Disparate Impact’ Again — This Time in Housing,” *National Review*, Jan. 2, 2019, <https://www.nationalreview.com/corner/disparate-impact-again-this-time-in-housing/>.

¹⁷³³ Derek W. Black, “Ensuring racial equality – from classrooms to workplaces – depends on federal regulations Trump could roll back,” *The Conversation*, Mar. 6, 2019, <http://theconversation.com/ensuring-racial-equality-from-classrooms-to-workplaces-depends-on-federal-regulations-trump-could-roll-back-110868>.

¹⁷³⁴ See, Serwer, “Trump Is Making It Easier to Get Away With Discrimination,” *supra* note 895.

¹⁷³⁵ 24 C.F.R. § 125.301.

¹⁷³⁶ HUD, “FHIP,” *supra* note 1475.

¹⁷³⁷ *Ibid.*

¹⁷³⁸ U.S. Dep’t of Hous. and Urban Dev., “HUD Awards \$38 Million to Fight Discrimination,” Sep. 30, 2016, <https://archives.hud.gov/news/2016/pr16-150.cfm>; U.S. Dep’t of Hous. and Urban Dev., “HUD Awards \$37 Million to Fight Housing Discrimination,” Mar. 6, 2018, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_004.

¹⁷³⁹ See HUD, “FHIP,” *supra* note 1475.

Technical Assistance

FHEO provides technical assistance to its grantees as required by HUD regulations,¹⁷⁴⁰ and noted in its budget documents that “[i]f the grantee has failed to comply with proper procedures and grant requirements, the Department initially provides technical assistance to correct the error, but if a problem persists, FHEO will withdraw the grant and the organization's funding.”¹⁷⁴¹ As part of its enforcement of the affirmatively furthering fair housing stipulation in the Fair Housing Act and in its efforts to implement the AFFH rule, HUD “plans to provide extensive guidance and training to all program participants and direct Technical Assistance (TA) where needed,” and noted that “[d]evelopment of guidance and training materials will begin in fiscal year 2015, but will need to be completed and delivered in fiscal year 2016 and beyond.”¹⁷⁴² In FY 2016, FHEO planned to provide AFFH technical assistance to approximately 1,245 Community Planning and Development jurisdictions and over 3,000 Public Housing Agencies with Assessments of Fair Housing (AFH), with the provision of significant technical assistance to approximately 83 Community Planning and Development jurisdictions and 200 Public Housing Agencies to ensure that these entities “are in the best position to submit a successful AFH.”¹⁷⁴³ In FY 2017 providing technical assistance to ensure effective implementation of its AFFH rule was also a FHEO priority.¹⁷⁴⁴ In FY 2018, AFFH appears to have been deprioritized, as it was not discussed in the FHEO FY 2018 salaries and expenses budget document, however FHEO did indicate that it would continue to provide technical assistance to public housing authorities in advancing its Rental Assistance Demonstration program.¹⁷⁴⁵ And previously, in FY 2017, FHEO provided technical assistance regarding the Fair Housing Accessibility FIRST program regarding FHA’s accessible design and construction requirements,¹⁷⁴⁶ and extensive technical assistance, including translation in various languages, to help grantees meet the needs of limited-English proficient customers.¹⁷⁴⁷

¹⁷⁴⁰ 24 C.F.R. § 1.6; 24 C.F.R. § 3.605; 24 C.F.R. § 6.10; 24 C.F.R. § 8.55.

¹⁷⁴¹ HUD FHEO, *Fair Housing Programs 2016 Summary*, *supra* note 1508, at 32-10.

¹⁷⁴² HUD FHEO, *Program Office Salaries and Expenses FY 2016*, *supra* note 1508, at 50-2.

¹⁷⁴³ *Ibid.*, 50-3.

¹⁷⁴⁴ HUD FHEO, *Program Office Salaries and Expenses FY 2017*, *supra* note 1509, at 51-2.

¹⁷⁴⁵ HUD FHEO, *Program Office Salaries and Expenses FY 2018*, *supra* note 1510, at 50-4.

¹⁷⁴⁶ HUD FHEO, *Annual Report to Congress FY 2017*, *supra* note 1574, at 23.

¹⁷⁴⁷ *Ibid.*, 6-8.

Publicity

FHEO does publish the outcomes of its enforcement work in its annual reports,¹⁷⁴⁸ posts its enforcement activity on its website,¹⁷⁴⁹ and regularly issues press releases to publicize high-profile cases,¹⁷⁵⁰ particularly for Secretary-initiated complaints.¹⁷⁵¹

Effectiveness of Interaction and Coordination with External Agencies and Organizations

HUD has the legal authority to “seek the cooperation and utilize the services of Federal, State or local agencies, including any agency having regulatory or supervisory authority over financial institutions” under the Fair Housing Act.¹⁷⁵² In addition to its coordination with state and local agencies and organizations through the FHIP and FHAP programs,¹⁷⁵³ HUD has entered into several Memoranda of Understanding (MOU) with both federal agencies and non-government associations.¹⁷⁵⁴ These MOUs include:

- Memorandum of Understanding Between the Civil Rights Division of the Department of Justice, the Department of Housing and Urban Development, and the Federal Bureau of Investigation Concerning Investigations of Complaints that May Violate Both Criminal and Civil Provision of the Fair Housing Act¹⁷⁵⁵
- Memorandum of Understanding Between the Department of Housing and Urban Development and the Consumer Financial Protection Bureau, concerning “the notification and sharing of complaints” and providing “a set of procedures for coordination of FHA and [Equal Credit Opportunity Act] enforcement investigations”¹⁷⁵⁶
- Memorandum of Understanding Between the Department of Agriculture and the Department of Housing and Urban Development, defining “procedures to coordinate the investigation and resolution of complaints alleging violations of the Fair Housing Act”¹⁷⁵⁷

¹⁷⁴⁸ HUD FHEO, *Annual Report to Congress FY 2016*, *supra* note 1574, at 10; HUD FHEO, *Annual Report to Congress FY 2017*, *supra* note 1574, at 14.

¹⁷⁴⁹ U.S. Dep’t of Hous. and Urban Dev., “Fair Housing Enforcement Activity,” https://www.hud.gov/program_offices/fair_housing_equal_opp/enforcement.

¹⁷⁵⁰ U.S. Dep’t of Hous. and Urban Dev., “Press Releases – 2019,” https://www.hud.gov/press/press_releases_media_advisories.

¹⁷⁵¹ *See, e.g.*, HUD, “HUD Files Housing Discrimination Complaint Against Facebook,” *supra* note 1632.

¹⁷⁵² 24 C.F.R. § 103.220.

¹⁷⁵³ *See supra* notes 1537-1559.

¹⁷⁵⁴ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 4, at 8-9.

¹⁷⁵⁵ Memorandum of Understanding Between the Civil Rights Division of the Department of Justice, the Department of Housing and Urban Development, and the Federal Bureau of Investigation Concerning Investigations and Complaints that May Violate Both Criminal and Civil Provision of the Fair Housing Act (Dec. 7, 1990) (on file).

¹⁷⁵⁶ Memorandum of Understanding Between the Department of Housing and Urban Development and the Consumer Financial Protection Bureau (Sep. 2, 2015) (on file).

¹⁷⁵⁷ Memorandum of Understanding Between the Department of Agriculture and the Department of Housing and Urban Development (on file).

- Memorandum of Understanding Between the Department of Justice and the Department of Housing and Urban Development Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988¹⁷⁵⁸
- Memorandum of Understanding Between the Department of Housing and Urban Development and the Federal Financial Institutions Examination Council (FFIEC) Member Agencies, establishing “a set of procedures for coordination and cooperation in the investigation of complaints that allege a violation of the Fair Housing Act”¹⁷⁵⁹
- Memorandum of Understanding Between the Federal Housing Finance Agency and the Department of Housing and Urban Development Regarding Information Sharing¹⁷⁶⁰
- Memorandum of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice, promoting “enhanced compliance with the Fair Housing Act ... for the benefit of residents of low-income housing tax credit properties and the general public”¹⁷⁶¹
- Information Sharing Agreement Regarding Fair Lending Investigations Addendum between the Department of Housing and Urban Development, the Consumer Financial Protection Bureau, the Department of Justice, and the Federal Trade Commission¹⁷⁶²
- Memorandum of Understanding Between the National Association of Attorneys General and the Department of Housing and Urban Development, establishing “institutional mechanisms for communication, cooperation and joint work on affirmative enforcement of laws prohibiting housing discrimination”¹⁷⁶³
- Memorandum of Understanding Between and Among the Department of Housing and Urban Development, the National Association of Asian American Real Estate Professionals, the National Association of Hispanic Real Estate Professionals, the National Association of Real Estate Brokers, and the National Association of Realtors, pledging “continuing cooperation” and identifying “organizational actions that will further fair housing goals and increase minority homeownership”¹⁷⁶⁴

¹⁷⁵⁸ Memorandum of Understanding Between the Department of Justice and the Department of Housing and Urban Development Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988 (Dec. 7, 1990) (on file).

¹⁷⁵⁹ Memorandum of Understanding Between the Department of Housing and Urban Development and the Federal Financial Institutions Examination Council (FFIEC) Member Agencies (on file).

¹⁷⁶⁰ Memorandum of Understanding Between the Federal Housing Finance Agency and the Department of Housing and Urban Development Regarding Information Sharing (Jan. 21, 2010) (on file).

¹⁷⁶¹ Memorandum of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice (August 11, 2000) (on file).

¹⁷⁶² Information Sharing Agreement Regarding Fair Lending Investigations Addendum between the Department of Housing and Urban Development, the Consumer Financial Protection Bureau, the Department of Justice, and the Federal Trade Commission (on file).

¹⁷⁶³ Memorandum of Understanding Between the National Association of Attorneys General and the Department of Housing and Urban Development (Jun. 11, 1999) (on file).

¹⁷⁶⁴ Memorandum of Understanding Between and Among the Department of Housing and Urban Development, the National Association of Asian American Real Estate Professionals, the National Association of Hispanic Real Estate Professionals, the National Association of Real Estate Brokers, and the National Association of Realtors (on file).

HUD also participates in several joint task forces and interagency working groups with representatives from DOJ, Consumer Financial Protection Bureau, the Office of the Comptroller of Currency, the Federal Reserve Board, the National Credit Union Association, the Fair Housing Finance Agency, the Federal Trade Commission, the Federal Deposit Insurance Corporation, and others.¹⁷⁶⁵ These joint task forces and interagency working groups work on the topics of discriminatory and predatory lending practices, sexual harassment in housing, and disability policy.¹⁷⁶⁶

As discussed above, HUD engages in a complex process with DOJ in referring complaints as well as subpoenas and requests for civil actions to enforce its decisions, as well as those of administrative law judges.¹⁷⁶⁷

Use of Research, Data Collection, and Reporting

HUD has the legal authority to conduct “studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States” and “publish and disseminate reports, recommendations, and information derived from such studies;”¹⁷⁶⁸ to “make available to the public, data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, programs administered by the Department...”¹⁷⁶⁹ HUD must also annually report to Congress, “specifying the nature and extent of progress made nationally in eliminating discriminatory housing practices and furthering the purposes of this subchapter, obstacles remaining to achieving equal housing opportunity, and recommendations for further legislative or executive action.”¹⁷⁷⁰

HUD indicated in its Interrogatory responses that it does not have a formal data collection process for collecting data on complainants, but does request the following information from complainants: contact information and a relevant basis for a claim.¹⁷⁷¹ This request includes the protected characteristic on which the complaint is based, for which data may be collected about race, ethnicity, disability, or other protected bases.¹⁷⁷² HUD also acknowledged that it does not disaggregate its data on certain racial or ethnic populations.¹⁷⁷³ HUD indicated that for FY 2016 to FY 2018, “policy guidance and procedures for data collection and case management have not changed over the fiscal years in question.”¹⁷⁷⁴ Since January 1, 2003, HUD collects, maintains,

¹⁷⁶⁵ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 4, at 9-10.

¹⁷⁶⁶ *Ibid.*

¹⁷⁶⁷ *See supra* notes 1598-99.

¹⁷⁶⁸ 42 U.S.C. §§ 3608(e)(1)-3608(e)(2).

¹⁷⁶⁹ *Id.* § 3608(e)(6).

¹⁷⁷⁰ *Id.* §§ 3608(e)(2), 3608(e)(6).

¹⁷⁷¹ U.S. Dep’t of Hous. and Urban Dev., Response to USCCR Interrogatory No. 14, at 19.

¹⁷⁷² *Ibid.*

¹⁷⁷³ *Ibid.*, 19-20.

¹⁷⁷⁴ *Ibid.*, 20.

and reports this data in accordance with standards set forth by the Office of Management and Budget.¹⁷⁷⁵

HUD reports that it actively engages in fair housing research, initiated by its Office of Policy Development and Research,¹⁷⁷⁶ and makes publicly available printed and electronic copies of published HUD research.¹⁷⁷⁷ HUD has funded paired testing housing discrimination studies (both national studies and pilot studies in a selection of cities) each decade since the 1970s to examine the extent to which housing discrimination in the rental and sales housing markets affects people of color,¹⁷⁷⁸ people with disabilities,¹⁷⁷⁹ families with children,¹⁷⁸⁰ Housing Choice Voucher

¹⁷⁷⁵ HUD FHEO, *Annual Report to Congress FY 2016*, *supra* note 1574, at 101; HUD FHEO, *Annual Report to Congress FY 2017*, *supra* note 1574, at 47.

¹⁷⁷⁶ U.S. Dep't of Hous. and Urban Dev., "About PD&R," <https://www.huduser.gov/portal/about/research.html>.

¹⁷⁷⁷ U.S. Dep't of Hous. and Urban Dev., "Fair Housing Publications," <https://www.huduser.gov/portal/taxonomy/term/39?page=5>.

¹⁷⁷⁸ Wienk, Ronald E., Clifford E. Reid, John C. Simonson, and Frederick J. Eggers, *Measuring Discrimination in American Housing Markets: The Housing Market Practices Survey*, Washington, DC: U.S. Dep't of Housing and Urban Development, 1979; Turner, Margery, Raymond Struyk, and John Yinger, *Housing Discrimination Study Synthesis*, Washington, DC: U.S. Dep't of Hous. and Urban Dev. (1991); Turner, Margery, Stephen Ross, George Galster, and John Yinger, *Discrimination in Metropolitan Housing Markets: Phase 1*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., 2002, <https://www.urban.org/sites/default/files/publication/60776/410821-Discrimination-in-Metropolitan-Housing-Markets.PDF>; Turner, Margery, and Stephen Ross, *Discrimination in Metropolitan Housing Markets: Phase 2 – Asians and Pacific Islanders*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., 2003, <https://www.urban.org/sites/default/files/publication/64421/1000502-Discrimination-in-Metropolitan-Housing-Markets.pdf>; Turner, Margery, and Stephen Ross, *Discrimination in Metropolitan Housing Markets: Phase 3 – Native Americans*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., 2003, <https://www.urban.org/sites/default/files/publication/42796/900834-Discrimination-in-Metropolitan-Housing-Markets.PDF>; Margery Austin Turner, Robert Santos, Diane K. Levy, Douglas A. Wissoker, Claudia Aranda, Rob Pitingolo, *Housing Discrimination Against Racial and Ethnic Minorities 2012*, June 2013, https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf.

¹⁷⁷⁹ Diane K. Levy, Margery A. Turner, Rob Santos, Doug Wissoker, Claudia L. Aranda, Rob Pitingolo, and Helen Ho, *Discrimination in the Rental Housing Market Against People Who Are Deaf and People Who Use Wheelchairs: National Study Findings*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., June 2015, http://www.tilrc.org/assests/news/publications/HDS_Disabilities0615.pdf; Joy Hammel, Janet Smith, Susan Scovill, Ron Campbell, and Rui Duan, *Study of Housing Discrimination on the Basis of Mental Disabilities: Final Report*, U.S. Dep't of Hous. and Urban Dev., August 2017, <https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf>; Margery Austin Turner, Carla Herbig, Deborah R. Kaye, Julie Fenderson, Diane K. Levy, *Discrimination Against Persons with Disabilities*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., June 2005, <https://www.urban.org/sites/default/files/publication/42931/900833-Discrimination-Against-Persons-with-Disabilities.PDF>.

¹⁷⁸⁰ Laudan Aron, Claudia Aranda, Douglas Wissoker, Brent Howell, Robert Santos, with Molly Scott and Margery Austin Turner, *Discrimination Against Families with Children in Rental Housing Markets: Findings of the Pilot Study*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., December 2016, <https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFinalReport.pdf>.

recipients based on source of income,¹⁷⁸¹ and same sex couples and transgender people.¹⁷⁸² HUD has also funded paired testing research examining lending discrimination,¹⁷⁸³ and discrimination in home insurance,¹⁷⁸⁴ and other non-paired testing research.¹⁷⁸⁵

Over the fiscal years in question (FY 2016-2018), HUD has funded over seven fair housing research studies¹⁷⁸⁶ and there have been four national Housing Discrimination Studies released since 1977 (the latest published in 2012).¹⁷⁸⁷

¹⁷⁸¹ Mary K. Cunningham, Martha M. Galvez, Claudia Aranda, Robert Santos, Douglas A. Wissoker, Alyse D. Oneto, Rob Pitingolo, James Crawford, *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., August 2018, <https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>.

¹⁷⁸² Diane K. Levy, Douglas A. Wissoker, Claudia Aranda, Brent Howell, Rob Pitingolo, Sarale H. Sewell, Robert Santos, *A Paired-Testing Pilot Study of Housing Discrimination against Same-Sex Couples and Transgender Individuals*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., June 2017, https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf; Samantha Friedman, Angela Reynolds, Susan Scovill, Florence R. Brassier, Ron Campbell, McKenzie Ballou, *An Estimate of Housing Discrimination Against Same-Sex Couples*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., June 2013, https://www.huduser.gov/portal/publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf.

¹⁷⁸³ Turner, Margery Austin, Freiberg, Fred, Godfrey, Erin, Herbig, Carla, Levy, Diane K., Smith, Robin Ross, *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., April 2002, <https://www.huduser.gov/portal/publications/hsgfin/aotbe.html>.

¹⁷⁸⁴ Galster, George, Smith, Robin, Wissoker, Douglas, Zimmermann, Wendy, Hartnett, Kara, *Testing for Discrimination in Home Insurance*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., May 1998, <https://www.huduser.gov/portal/publications/fairhsg/discrim.html>.

¹⁷⁸⁵ Krysan, Maria, Crowder, Kyle, Scott, Molly M., Hedman, Carl, Adeeyo, Sade, Diby, Somala, Latham, Sierra, *Racial and Ethnic Differences in Housing Search: Final Report*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., May 2018, <https://www.huduser.gov/portal/taxonomy/term/39?page=1>; Santos, Robert, Turner, Margery Austin, Aron, Laudan, Howell, Brent, *Future Directions For Research On Discrimination Against Families With Children In Rental Housing Markets*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., December 2016, <https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFutureEssay.pdf>; Miller, Joshua J.Park, Kevin A., *Same-Sex Marriage Laws and Demand for Mortgage Credit*, February 2016, <https://www.huduser.gov/portal/sites/default/files/pdf/Same-Sex-Marriage-Laws.pdf>; Mitchell, Maxine V., CRE, Miller, Robert E., Brett, Deborah, Kinser, Ralph, Moroney, Ann, Tatian, Peter A., Galvez, Martha, Meixell, Braydon, Daniels, Rebecca, *Interface of Mobility and Sustainability: Thompson v. HUD Final Report*, Washington, DC: U.S. Dep't of Hous. and Urban Dev., October 2018, <https://www.huduser.gov/portal/portal/sites/default/files/pdf/Thompson-Report.pdf>.

¹⁷⁸⁶ See *supra* notes 1778-85 (cross referencing to the research presented in the footnotes just above this one); U.S. Dep't of Hous. and Urban Dev., "Fair Housing Publications," <https://www.huduser.gov/portal/taxonomy/term/39?page=5>.

¹⁷⁸⁷ "Paired Testing and the Housing Discrimination Studies," Office of Policy Development and Research, *HUD User*, Spring/Summer 2014, <https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html> (the four studies have been in 1977, 1989, 2000, and 2012. They have increased in scope for each study such that the latest study included testing discrimination against, blacks, Hispanics, Asians, and Native Americans.).

Chapter 6: U.S. Department of Labor, Office of Federal Contract Compliance Programs and the Civil Rights Center

Legal Authority and Responsibility

In 1913, President Taft signed the Organic Act of the Department of Labor that established the U.S. Department of Labor (DOL).¹⁷⁸⁸ The Organic Act provided that the purpose of DOL is “to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.”¹⁷⁸⁹ DOL is currently led by Acting Secretary Patrick Pizzella, who took office in July 2019.¹⁷⁹⁰ According to its website, DOL describes its mission as to “foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.”¹⁷⁹¹ DOL enforces workers’ rights through various components.¹⁷⁹² DOL’s external federal civil rights enforcement has been conducted primarily through the Office of Federal Contract Compliance Programs (OFCCP), which oversees federal contractors,¹⁷⁹³ and the Civil Rights Center (CRC), which administers and enforces laws that apply to recipients of federal financial assistance and, for disability-related matters, public entities operating programs and activities related to labor and the workforce.¹⁷⁹⁴

Office of Federal Contract Compliance Programs

The Office of Federal Contract Compliance Programs (OFCCP) enforces equal employment opportunity laws that apply to federal contractors and subcontractors, and works to “protect

¹⁷⁸⁸ Organic Act of the Department of Labor, 29 U.S.C. § 551 (1913).

¹⁷⁸⁹ *Id.*

¹⁷⁹⁰ U.S. Dep’t of Labor, “Acting Secretary of Labor Patrick Pizzella,” <https://www.dol.gov/osec>.

¹⁷⁹¹ U.S. Dep’t of Labor, “About Us,” <https://www.dol.gov/general/aboutdol>.

¹⁷⁹² *See, e.g.*, U.S. Dep’t of Labor, Agencies and Offices, <https://www.dol.gov/general/dol-agencies> (accessed Mar. 31, 2019). At the Commission’s briefing, Atty Burth Lopez of the Mexican American Legal Defense and Educational Fund (MALDEF) testified that:

In the area of employment the Federal Government plays a vital role in protecting health and safety of workers in the workplace. The need for federal enforcement... of OSHA standards is paramount considering that in 2016 there were over 5,000 workplace related deaths and 2.9 million injuries and illnesses on the job. Of these, 900,000 individuals required some time away from the job and 120,000 of those individuals identified as Hispanic or Latino. Yet under the Trump Administration OSHA enforcement has seen an accelerated decline, both in the number of overall enforcement units,... and in the total number of OSHA inspectors[.] Lopez Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 187-188.

¹⁷⁹³ *See* 41 C.F.R. ch. 60. *See also infra* notes 1796-1813 (cross reference to “authority/jurisdiction” section discussing the laws that OFCCP enforces); U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

¹⁷⁹⁴ *See infra* notes 1813-1842 (cross reference to “authority/jurisdiction” section discussing the laws that CRC enforces); U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

workers, promote diversity and enforce the law.”¹⁷⁹⁵ OFCCP oversees contractors and subcontractors responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity,¹⁷⁹⁶ national origin,¹⁷⁹⁷ disability,¹⁷⁹⁸ or status as a protected veteran.¹⁷⁹⁹

OFCCP enforces these rights under the following:¹⁸⁰⁰

- Executive Order 11,246 of 1965 (Equal Employment Opportunity)¹⁸⁰¹
- The Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA)¹⁸⁰²
- Section 503 of the Rehabilitation Act of 1973¹⁸⁰³

President Johnson signed Executive Order 11,246 in September 1965. As amended, regarding external civil rights enforcement, Executive Order 11,246 requires that an equal opportunity clause be included in each covered government contract and subcontract, including the following:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.¹⁸⁰⁴

¹⁷⁹⁵ See U.S. Dep’t of Labor, “About OFCCP,” <https://www.dol.gov/ofccp/aboutof.html>. See also Further Amendments to Executive Order 11,478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, Exec. Order No. 13,672, Fed. Reg. 42,971 (Jul. 23, 2014) (substituting “sex, sexual orientation, gender identity, or national origin” for “sex or national origin” in several places in the executive order to “provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity”).

¹⁷⁹⁶ Exec. Order No. 11,246, 30 Fed. Reg. 12,319; 41 C.F.R. § 60-1.1; 41 C.F.R. § 60-20.1.

¹⁷⁹⁷ Exec. Order No. 11,246, 30 Fed. Reg. 12,319; 41 C.F.R. § 60-1.1.

¹⁷⁹⁸ 29 U.S.C. § 793(a); Pub. L. 101-336 (July 26, 1990), *as amended by* Pub. L. 110-325 (Sep. 25, 2008), 42 U.S.C. § 12101; 41 C.F.R. § 60-741.1(a); 41 C.F.R. § 60-742.1.

¹⁷⁹⁹ 38 U.S.C. § 4212; 41 C.F.R. § 60-300.1(a).

¹⁸⁰⁰ U.S. Dep’t of Labor, Response to USCCR Document Request No. 1, p. 1.

¹⁸⁰¹ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 and implementing regulations at 41 C.F.R. §§ 60-1 – 60-50. See also Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54,933 (Sep. 11, 2015); 41 C.F.R. § 60-1; Discrimination on the Basis of Sex, final rule, 41 C.F.R. § 60-20.

¹⁸⁰² 38 U.S.C. § 4212 and implementing regulations at 41 C.F.R. § 60-300.

¹⁸⁰³ 29 U.S.C. § 793 and implementing regulations at 41 C.F.R. § 60-741.

¹⁸⁰⁴ Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 202(1).

As per DOL regulations, the head of OFCCP has been delegated authority and has the responsibility to carry out “the responsibilities assigned to the Secretary under [Executive Order 11,246].”¹⁸⁰⁵

OFCCP’s regulations implementing Executive Order 11,246’s prohibition on sex discrimination define “sex” to include pregnancy, childbirth, and related medical conditions; gender identity; transgender status; and sex stereotyping.¹⁸⁰⁶ The regulations expressly prohibit, and provide examples illustrating, both disparate treatment discrimination¹⁸⁰⁷ and disparate impact discrimination.¹⁸⁰⁸ They also prohibit harassment on the basis of sex, which the relevant regulation defines to include “sexual harassment (including sexual harassment based on gender identity or transgender status); harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex or sex-based stereotypes.”¹⁸⁰⁹ By prohibiting harassing conduct that “has the *purpose or effect* of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment,” on the basis of sex, the agency’s hostile work environment regulations also prohibit both intentional discrimination as well as conduct that results in certain discriminatory impacts.¹⁸¹⁰

As noted above, OFCCP also enforces Section 503, which imposes on covered federal contractors and subcontractors certain affirmative action and nondiscrimination obligations regarding individuals with disabilities,¹⁸¹¹ and VEVRAA, which imposes on covered federal contractors and subcontractors certain affirmative action and nondiscrimination obligations regarding covered veterans (disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces Service Medal veterans).¹⁸¹²

Civil Rights Center

The CRC has both internal and external enforcement functions. This combining of functions is contrary to the Commission’s 2002 recommendation that “the implementation, compliance and enforcement of external civil rights programs should be directed by an office and staff that are separate from the office responsible for internal (EEO) civil rights functions.”¹⁸¹³ During fiscal years 2016 through 2018, up until August 2018, CRC had three programmatic offices in total, two of which handled external civil rights enforcement: the Office of External Enforcement (OEE),

¹⁸⁰⁵ 41 C.F.R. § 60-1.2. Note that the text of OFCCP’s regulations refers to the Deputy Assistant Secretary of Labor as the head of OFCCP, but this reference is obsolete. In 2009, the Department of Labor abolished the Employment Standards Administration (ESA), of which OFCCP was a subcomponent; following this change, OFCCP and the other subcomponents became stand-alone programs. See Delegation of Authority and Assignment of Responsibilities to the Director, Office of Federal Contract Compliance Programs, 74 Fed. Reg. 58,834 (Nov. 13, 2009).

¹⁸⁰⁶ 41 C.F.R. § 60-20.2(a).

¹⁸⁰⁷ *Id.* § 60-20.2(b).

¹⁸⁰⁸ *Id.* § 60-20.2(c).

¹⁸⁰⁹ *Id.* § 60-20.8.

¹⁸¹⁰ *Id.* § 60 – 20.8(a)(3)(emphasis added).

¹⁸¹¹ 29 U.S.C. 793(a); Pub. L. 101-336 (July 26, 1990), as amended by Pub. L. 110–325 (Sep. 25, 2008), 42 U.S.C. § 12101; 41 C.F.R. § 60-741.1(a); 41 C.F.R. § 60-742.1.

¹⁸¹² 38 U.S.C. § 4212; 41 C.F.R. § 60-300.1(a).

¹⁸¹³ USSCCR, *Ten-Year Check-up: Vol. 1, supra* note 1, at 47.

and the Office of Compliance and Policy (OCAP).¹⁸¹⁴ DOL reported that OEE underwent a reorganization in August 2018, and the responsibilities of OCAP and OEE were combined under the current “Office of External Enforcement” (OEE).¹⁸¹⁵ OEE is still part of CRC (and CRC still has some internal enforcement responsibilities through its Office of Internal Enforcement).¹⁸¹⁶ See Figure 6.3, CRC Organizational Chart.

The laws that CRC’s external program enforces generally protect against discrimination on the bases of race, color, national origin (including “limited English proficiency”),¹⁸¹⁷ religion (including “failure to accommodate”),¹⁸¹⁸ sex (including “pregnancy and gender identity”),¹⁸¹⁹ age,¹⁸²⁰ disability (including “failure to provide accessible facilities, accommodations or modifications, or equally effective communications”),¹⁸²¹ and political affiliation or belief.¹⁸²² Some programs or activities also prohibit discrimination based on citizenship status or participation in a program/activity that receives Workforce Innovation and Opportunity Act (WIOA) Title I or Workforce Investment Act (WIA) Title I financial assistance.¹⁸²³

DOL’s website describes the mission of the Civil Rights Center (CRC) as “to promote justice and equal opportunity by acting with impartiality and integrity in administering and enforcing various civil rights laws.”¹⁸²⁴ The website states that these laws specifically protect “[i]ndividuals who apply to, participate in, work for, or come into contact with programs and activities that are conducted by or receive financial assistance from DOL, or, under certain circumstances, from other Federal agencies.”¹⁸²⁵ For disability-related matters, CRC also has jurisdiction over public entities’ operating programs and activities related to labor and the workforce.¹⁸²⁶ CRC reportedly carries out its mission by “investigating and adjudicating discrimination complaints, conducting

¹⁸¹⁴ See U.S. Dep’t of Labor, “Civil Rights Center (CRC),” <https://www.dol.gov/oasam/programs/crc/about-crc.htm>. See also U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file) (noting that in August 2018, CRC reorganized its external program, and combined OEE and OCAP under the “Office of External Enforcement” title).

¹⁸¹⁵ U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

¹⁸¹⁶ U.S. Dep’t of Labor, “Internal Enforcement,” <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal>.

¹⁸¹⁷ 29 C.F.R. §§ 31.1, 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (Jun. 23, 2000); Exec. Order No. 13,166, 65 Fed. Reg. 50,121; U.S. Dep’t of Labor, “Civil Rights Center: Mission Statement,” <https://www.dol.gov/oasam/programs/crc/mission.htm> [hereinafter DOL, “CRC Mission Statement”].

¹⁸¹⁸ 29 C.F.R. §§ 37.1, 38.1; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” *supra* note 1817.

¹⁸¹⁹ 29 C.F.R. §§ 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” *supra* note 1817.

¹⁸²⁰ 29 C.F.R. §§ 35.1, 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” *supra* note 1817.

¹⁸²¹ 29 C.F.R. §§ 32.1, 33.1, 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” *supra* note 1817.

¹⁸²² 29 C.F.R. §§ 37.1, 38.1; Exec. Order No. 13,160, 65 Fed. Reg. 39,775; Exec. Order No. 13,166, 65 Fed. Reg. 50,121; DOL, “CRC Mission Statement,” *supra* note 1817.

¹⁸²³ DOL, “CRC Mission Statement,” <https://www.dol.gov/oasam/programs/crc/mission.htm>.

¹⁸²⁴ *Ibid.*

¹⁸²⁵ *Ibid.*

¹⁸²⁶ *Ibid.*

compliance reviews, providing technical assistance and training, and developing and publishing civil rights regulations, policies, and guidance.”¹⁸²⁷

The Office of External Enforcement (OEE) reportedly:

[S]upports CRC’s responsibility to administer and enforce the laws that apply to recipients of financial assistance under Title I of the Workforce Innovation and Opportunity Act and its predecessor, the Workforce Investment Act (WIA); American Job Center partners listed in WIOA/WIA Section 121(b) that offer programs or activities through the workforce development system; State and local governments and other public entities operating programs and activities related to labor and the workforce; and any recipients of financial assistance from, or programs conducted by, DOL that are not included in the categories above.¹⁸²⁸

OEE processes, investigates and adjudicates complaints that allege discrimination on any of the bases prohibited by the laws that it enforces,¹⁸²⁹ or that allege retaliation against anyone who engages in activity protected by those laws.¹⁸³⁰ As discussed above, DOL informed the Commission that in August 2018, CRC reorganized its external program, and combined OEE and OCAP under the “Office of External Enforcement” title.¹⁸³¹ However, during most of the period covered by this report, CRC’s OCAP conducted compliance reviews,¹⁸³² developed regulations,¹⁸³³ reviewed proposed legislation and provided training and technical assistance.¹⁸³⁴

OEE (now including the former OCAP), currently enforces the following laws and executive orders:

- Section 188 of the Workforce Innovation and Opportunity Act and its predecessor, Section 188 of the Workforce Investment Act of 1998, as amended¹⁸³⁵
- Title VI of the Civil Rights Act of 1964, as amended¹⁸³⁶
- Sections 504 and 508 of the Rehabilitation Act of 1973, as amended¹⁸³⁷
- Age Discrimination Act of 1975, as amended¹⁸³⁸
- Title IX of the Education Amendments of 1972, as amended¹⁸³⁹

¹⁸²⁷ Ibid.

¹⁸²⁸ Ibid.

¹⁸²⁹ 29 C.F.R. §§ 31.7-31.12, 32 Subpart D, 33.12-33.13, 35 Subpart D, 36.605, 37 Subpart D, 38 Subpart D.

¹⁸³⁰ 29 C.F.R. §§ 31.7(e), 32.45(g), 33.13, 35.35, 36.605, 37.11, 38.19; U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 2, at 9.

¹⁸³¹ U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

¹⁸³² 29 C.F.R. §§ 31.7(a), 32.45(a), 35.30, 36.605, 37.60, 37.62-64, 38.60, 38.62-38.68 (conduct of investigations).

¹⁸³³ 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations).

¹⁸³⁴ 29 C.F.R. §§ 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 32.44(a), 36.605.

¹⁸³⁵ 29 U.S.C. 3248 § 188 and implementing regulations at 29 CFR pts. 37 and 38.

¹⁸³⁶ 42 U.S.C. 42 U.S.C. §§2000d-2000d-4 and implementing regulations at 29 C.F.R. pt. 31.

¹⁸³⁷ 29 U.S.C. § 794; 29 U.S.C. § 794(d) and implementing regulations at 29 CFR pts. 32 and 33.

¹⁸³⁸ 42 U.S.C. §§ 6101-6107 and implementing regulations at 29 C.F.R. pt. 35.

¹⁸³⁹ 20 U.S.C. §§ 1681-1688 and implementing regulations at 29 C.F.R. pt. 36.

- Title II, Subpart A of the Americans with Disabilities Act of 1990, as amended¹⁸⁴⁰
- Executive Order 13,160, Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs¹⁸⁴¹
- Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency¹⁸⁴²

Enforcement Tools

OFCCP

The agency enforcement tools OFCCP has specific legal authority to use are:

- Complaint Resolution¹⁸⁴³
- Agency-Initiated Charges¹⁸⁴⁴
- Proactive Compliance Evaluations¹⁸⁴⁵
- Issuance of Regulations¹⁸⁴⁶
- Collaboration/partnership with other federal agencies¹⁸⁴⁷
- Strategic Plan¹⁸⁴⁸
- Annual Reports¹⁸⁴⁹

While DOL OFCCP does not have specific legal authority for other tools identified by the Commission, nothing prohibits DOL OFCCP from engaging in, for example, issuing guidance, providing technical assistance, and conducting outreach to regulated communities, as described in further detail below.

CRC

The agency enforcement tools CRC has specific legal authority to use are:

- Complaint Resolution¹⁸⁵⁰

¹⁸⁴⁰ 42 U.S.C. §§ 12131-12134 and implementing regulations at 28 C.F.R. pt. 35.

¹⁸⁴¹ Exec. Order No. 13,160, 65 Fed. Reg. 39,775.

¹⁸⁴² Exec. Order No. 13,166, 65 Fed. Reg. 50,121.

¹⁸⁴³ 41 C.F.R. §§ 60-1.21 – 60-1.24, 60-30.5, 60-50.4, 60-300.61, 60-741.61, 60-742.4 – 60-742.6.

¹⁸⁴⁴ *Id.* § 60-1.26(a) (“Violations of the Order, the equal opportunity clause, the regulations in this chapter, or applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings”).

¹⁸⁴⁵ *Id.* §§ 60-1.20 – 60-1.35, 60-50.4, 60-300.60, 60-741.60; Dep’t of Labor, “About OFCCP: Enforcement Procedures,” <https://www.dol.gov/ofccp/aboutof.html>.

¹⁸⁴⁶ 41 C.F.R. §§ 60-1, 60-20, 60-30, 60-50, 60-300, 60-741, 60-742 *passim*.

¹⁸⁴⁷ *Id.* §§ 60-1.24(a), 60-50.4, 60-742.2, 60-742.5, 60-742.6.

¹⁸⁴⁸ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

¹⁸⁴⁹ 29 U.S.C. § 560.

¹⁸⁵⁰ 29 C.F.R. §§ 31.7, 32.45, 33.12, 35.31, 36.605, 37.70-37.100, 38.69-38.85.

- Agency-Initiated Charges¹⁸⁵¹
- Proactive Compliance Evaluations¹⁸⁵²
- Issuance of Guidance¹⁸⁵³
- Issuance of Regulations¹⁸⁵⁴
- Technical assistance¹⁸⁵⁵
- Data collection, research and reporting¹⁸⁵⁶
- Publicity¹⁸⁵⁷
- Outreach to stakeholders¹⁸⁵⁸
- Collaboration/partnership with state/local agencies¹⁸⁵⁹
- Collaboration/partnership with other federal agencies¹⁸⁶⁰
- Strategic Plan¹⁸⁶¹
- Annual Reports¹⁸⁶²

Budget and Staffing

OFCCP

OFCCP is currently led by Director Craig E. Leen.¹⁸⁶³ Ondray T. Harris, who was the former Director of OFCCP, vacated the position in July 2018.¹⁸⁶⁴ Figure 6.1 displays OFCCP's organizational structure:

¹⁸⁵¹ *Id.* § 31.7(a) and (c).

¹⁸⁵² *Id.* §§ 31.7(a), 32.45(a), 35.30, 36.605, 37.60, 37.62-64, 38.60, 38.62-38.68 (conduct of investigations).

¹⁸⁵³ *Id.* §§ 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 32.44(a), 36.605.

¹⁸⁵⁴ 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations).

¹⁸⁵⁵ 29 C.F.R. §§ 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”), 32.44(a), 36.605.

¹⁸⁵⁶ 28 C.F.R. § 42.406.

¹⁸⁵⁷ 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information).

¹⁸⁵⁸ 29 C.F.R. § 33.11.

¹⁸⁵⁹ *Id.* §§ 31.5(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”).

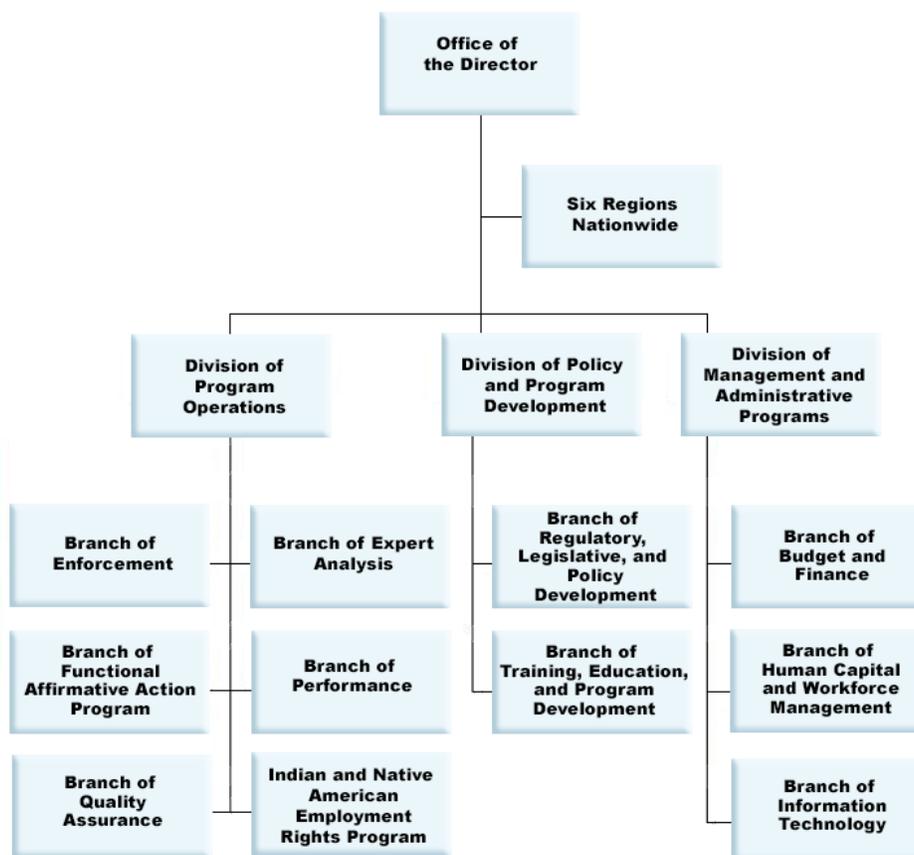
¹⁸⁶⁰ 28 C.F.R. § 42.413.

¹⁸⁶¹ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

¹⁸⁶² 29 U.S.C. § 560.

¹⁸⁶³ U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, “Organization Chart,” <https://www.dol.gov/ofccp/about/ofcpchrt.htm> [hereinafter DOL OFCCP, “Organization Chart”].

¹⁸⁶⁴ Paige Smith and Ben Penn, “Head of Federal Contractor Watchdog Office Stepping Down,” *Bloomberg News*, Jul. 26, 2018, <https://news.bloomberglaw.com/daily-labor-report/head-of-federal-contractor-watchdog-office-stepping-down-1>.

Figure 6.1: OFCCP Organizational Chart

Source: U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, “Organization Chart,” <https://www.dol.gov/ofccp/about/ofcpchrt.htm>.

OFCCP is led by the Office of the Director, which oversees the following Divisions:

- Division of Program Operations
- Division of Policy and Program Development
- Division of Management and Administration Programs

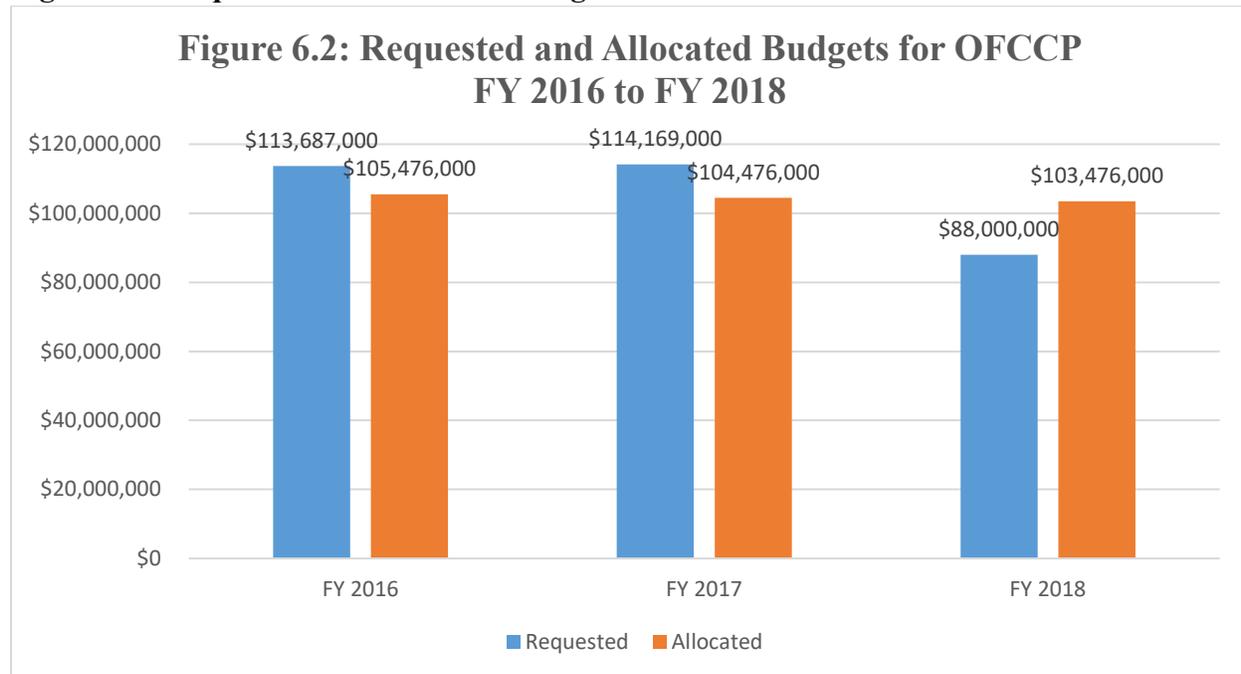
In addition, OFCCP oversees the operations of its six regions nationwide, which include Mid-Atlantic, Midwest, Northeast, Pacific, Southeast, and Southwest and Rocky Mountain (SWARM).¹⁸⁶⁵

¹⁸⁶⁵ DOL OFCCP, “Organization Chart,” *supra* note 1863.

In FY 2016, OFCCP had 581 FTEs.¹⁸⁶⁶ This number slightly decreased to 563 FTEs in FY 2017,¹⁸⁶⁷ and decreased further to 508 FTEs in FY 2018.¹⁸⁶⁸

Figure 6.2 displays OFCCP's requested and allocated budgets for FY 2016 to FY 2018.

Figure 6.2: Requested and Allocated Budgets for OFCCP



Source: U.S. Dep't of Labor, *FY 2016 Congressional Budget Justification Office of Federal Contract Compliance*, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/CBJ-2016-V2-10.pdf>; U.S. Dep't of Labor, *FY 2017 Congressional Budget Justification Office of Federal Contract Compliance*, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>; U.S. Dep't of Labor, *FY 2018 Congressional Budget Justification Office of Federal Contract Compliance*, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V2-10.pdf>; U.S. Dep't of Labor, *FY 2019 Congressional Budget Justification Office of Federal Contract Compliance*, p. 2, <https://www.dol.gov/sites/dolgov/files/general/budget/2019/FY2019BIB.pdf>; U.S. Dep't of Labor, *FY 2020 Congressional Budget Justification Office of Federal Contract Compliance*, p. 2, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V2-10.pdf>.

OFCCP requested a total budget of \$113.68 million in FY 2016.¹⁸⁶⁹ This requested amount increased slightly in FY 2017 to \$114.17 million,¹⁸⁷⁰ but sharply decreased in FY 2018 to only

¹⁸⁶⁶ U.S. Dep't of Labor, *FY 2018 Department of Labor Budget in Brief*, p. 26, https://www.dol.gov/sites/dolgov/files/legacy-files/FY2018BIB_0.pdf [hereinafter DOL, *FY 2018 Budget in Brief*].

¹⁸⁶⁷ U.S. Dep't of Labor, *FY 2019 Department of Labor Budget in Brief*, p. 27, <https://www.dol.gov/sites/dolgov/files/general/budget/2019/FY2019BIB.pdf> [hereinafter DOL, *FY 2019 Budget in Brief*].

¹⁸⁶⁸ U.S. Dep't of Labor, *FY 2020 Department of Labor Budget in Brief*, p. 28, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/FY2020BIB.pdf>.

¹⁸⁶⁹ U.S. Dep't of Labor, *FY 2016 Congressional Budget Justification Office of Federal Contract Compliance*, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/CBJ-2016-V2-10.pdf>.

¹⁸⁷⁰ U.S. Dep't of Labor, *FY 2017 Congressional Budget Justification Office of Federal Contract Compliance*, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf>.

\$88.00 million.¹⁸⁷¹ However, OFCCP's allocated amounts have much less significantly declined between FY 2016 and FY 2018. In FY 2016, Congress appropriated to OFCCP \$105.48 million,¹⁸⁷² which declined to \$104.47 million in FY 2017,¹⁸⁷³ and \$103.48 million in FY 2018.¹⁸⁷⁴

In FY 2016, the U.S. Department of Labor indicated that the FY 2017 budget request for OFCCP would be an increase from its prior request, to create two Skilled Resource Centers and facilitate the continued modernization of its core Case Management System.¹⁸⁷⁵ The budget explained that this increase would allow OFCCP to “better align its investigative skills trainings for existing and new compliance officers with geographically concentrated business sector industries,” and “take proactive cost saving steps to reduce its existing foot print of leased office space, support more quality and timely enforcement efforts, and ultimately benefit the countless victims of discrimination.”¹⁸⁷⁶

In FY 2018, the U.S. Department of Labor proposed a sharp decrease in OFCCP staff, requesting only 440 FTEs¹⁸⁷⁷ down from 563 FTEs employed in FY 2017. OFCCP also indicated that it would decrease the number of field office locations as well, which is in direct alignment with the funding reduction.¹⁸⁷⁸ Director of OFCCP Craig Leen stated in his testimony before the Commission that he expects that OFCCP would still be able to fulfill its enforcement responsibilities, even with a substantially reduced staff due to specific management plans Leen has implemented.¹⁸⁷⁹ These plans include the Affirmative Action Program Verification Initiative where government contractors will be required to certify annually that they have an affirmative action program, discussed in further detail below.¹⁸⁸⁰ Leen testified that OFCCP will audit companies that do not certify that they have such a program.¹⁸⁸¹ Additionally, OFCCP will implement focused reviews,¹⁸⁸² where OFCCP's review will be restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices. For example, Section 503 focused reviews will include a comprehensive review of the contractor

¹⁸⁷¹ U.S. Dep't of Labor, *FY 2018 Congressional Budget Justification Office of Federal Contract Compliance*, p. 2, <https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V2-10.pdf>.

¹⁸⁷² *Ibid.*

¹⁸⁷³ U.S. Dep't of Labor, *FY 2019 Congressional Budget Justification Office of Federal Contract Compliance*, p. 8, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V2-10.pdf>.

¹⁸⁷⁴ U.S. Dep't of Labor, *FY 2020 Congressional Budget Justification Office of Federal Contract Compliance*, p. 2, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V2-10.pdf>.

¹⁸⁷⁵ U.S. Dep't of Labor, *FY 2017 Department of Labor Budget in Brief*, p. 37, https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/FY2017BIB_0.pdf [hereinafter DOL, *FY 2017 Budget in Brief*].

¹⁸⁷⁶ *Ibid.*

¹⁸⁷⁷ DOL, *FY 2018 Budget in Brief*, *supra* note 1866, at 26.

¹⁸⁷⁸ *Ibid.*

¹⁸⁷⁹ Leen Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 23-24.

¹⁸⁸⁰ *Ibid.*, 24-25.

¹⁸⁸¹ *Ibid.*, 25.

¹⁸⁸² See 41 C.F.R. §§ 60-1.20(a)(4), 60-300.60(a)(4), and 60-741.60(a)(4); see also U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Directive (DIR) 2018-04 (Aug. 10, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_04.html [hereinafter DOL OFCCP, Directive 2018-04]; see also *infra* notes 1977, 1981-1985 (discussing focused reviews).

policies and procedures as they relate solely to Section 503, which requires that contractors meet specific affirmative action and nondiscrimination obligations for people with disabilities.¹⁸⁸³

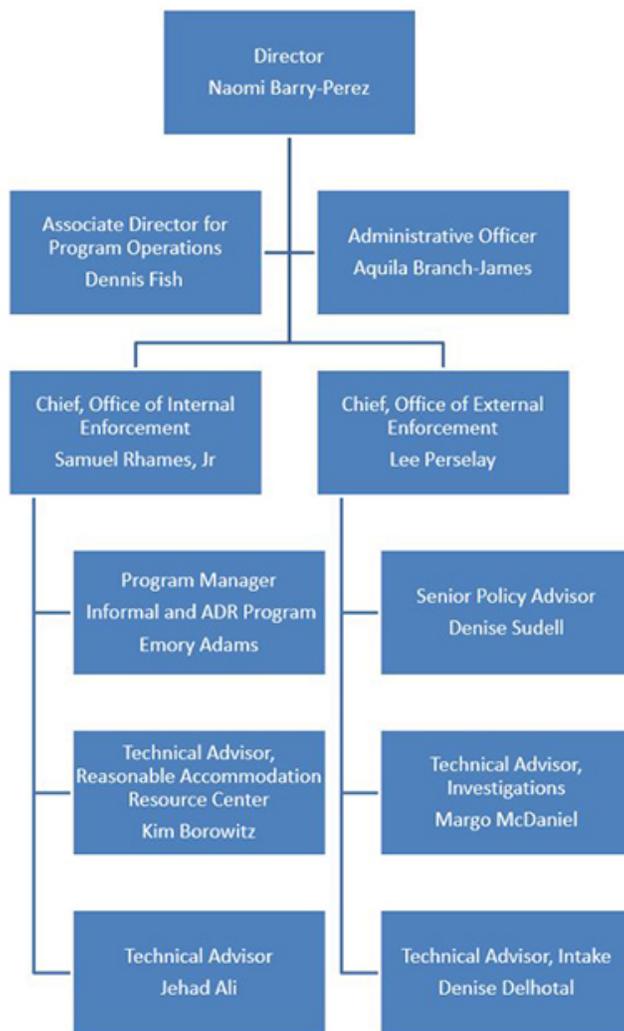
CRC

CRC is a center within the Office of the Assistant Secretary for Administration and Management (OASAM). OASAM “provides leadership and foundation for effective business operations and procurement; performance budgeting; information technology solutions; human resources and civil rights; security and emergency management; environmental sustainability; and long-term planning with a focus on results so that DOL accomplishes its mission on behalf of America’s workers,”¹⁸⁸⁴ CRC is led by its Director, Naomi Barry-Perez. Lee Perselay is the Chief of the Office of External Enforcement.¹⁸⁸⁵ See Figure 6.3.

¹⁸⁸³U.S. Dep’t of Labor, OFCCP, “Focused Review Frequently Asked Questions,” <https://www.dol.gov/ofccp/regs/compliance/faqs/FocusedReviewFAQs.htm>.

¹⁸⁸⁴ U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 3, at 3.

¹⁸⁸⁵ U.S. Dep’t of Labor, Civil Rights Center, “Organization Chart,” <https://www.dol.gov/agencies/oasam/civil-rights-center/about/organizational-chart> [DOL CRC, “Organization Chart”].

Figure 6.3: CRC Organizational Chart

Source: U.S. Dep't of Labor, "Civil Rights Center Organization Chart," <https://www.dol.gov/oasam/programs/crc/orgchart.htm> (accessed Jul. 31, 2019)

In FY 2018, CRC had a total of 14 FTE staff members who worked on civil rights enforcement, up from a total of 13 FTEs in FY 2017 and FY 2016.¹⁸⁸⁶ CRC has not utilized any contractors to support its external enforcement work during the fiscal years in question.¹⁸⁸⁷ Over the fiscal years in question, CRC reports that approximately 50 percent of the Director's time was spent on external civil rights enforcement.¹⁸⁸⁸ CRC also indicated that due to current budget levels, it has "back-filled more senior level positions with entry level positions when they were vacated and has cross-trained/rotated staff from other divisions to assist in enforcement activities."¹⁸⁸⁹

¹⁸⁸⁶ U.S. Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 8, at 7-8.

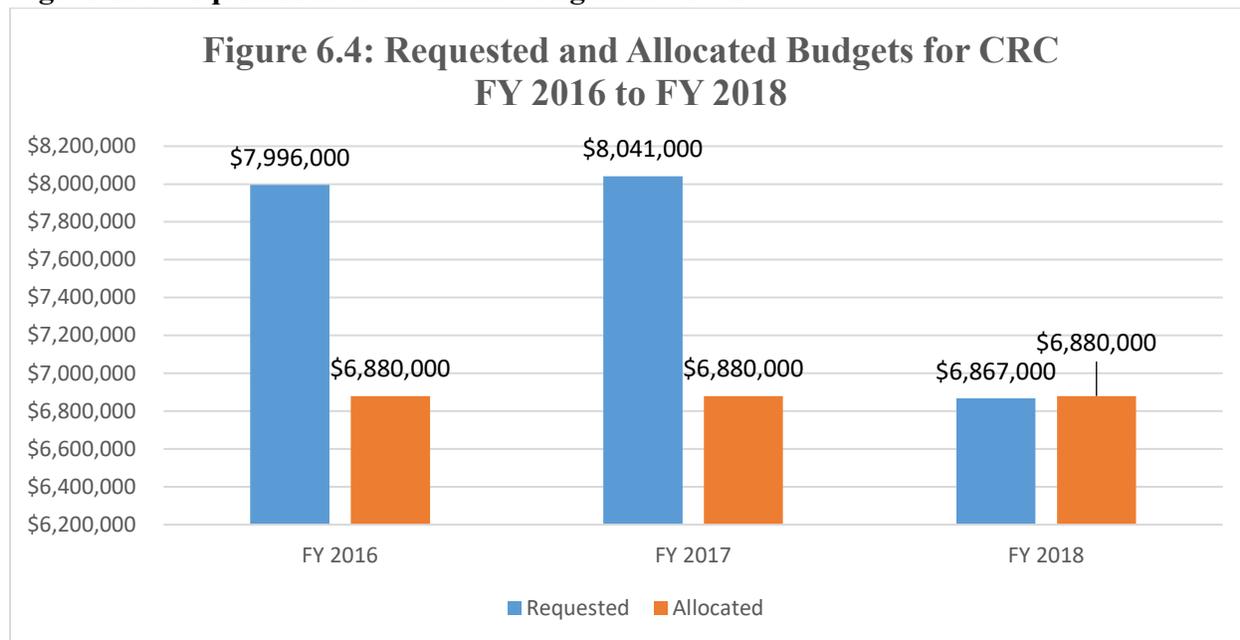
¹⁸⁸⁷ Ibid.

¹⁸⁸⁸ Ibid.

¹⁸⁸⁹ Ibid.

In FY 2016, the requested budget for CRC's operations was \$7.99 million.¹⁸⁹⁰ This request slightly increased to \$8.04 million in FY 2017¹⁸⁹¹ and sharply decreased in FY 2018 to \$6.87 million.¹⁸⁹² Over FY 2016 to FY 2018, the allocated budget for CRC remained flat at \$6.8 million, but it was higher than the low amount requested for FY 2018.¹⁸⁹³ See Figure 6.4.

Figure 6.4: Requested and Allocated Budgets for CRC



Source: U.S. Dep't of Labor, *FY 2016 Budget in Brief*, p. 63,

<https://www.dol.gov/sites/default/files/documents/general/budget/2016/FY2016BIB.pdf>; U.S. Dep't of Labor, *FY 2017 Budget in Brief*, p. 51, https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/FY2017BIB_0.pdf; U.S. Dep't of Labor, *FY 2018 Budget in Brief*, p. 32, <https://www.dol.gov/sites/default/files/FY2018BIB.pdf>; U.S. Dep't of Labor, *FY 2019 Budget in Brief*, p. 33, <https://www.dol.gov/sites/dolgov/files/general/budget/2019/FY2019BIB.pdf>; *FY 2020 Budget in Brief*, p. 36, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/FY2020BIB.pdf>.

Approximately 65 percent of CRC's allocated funding covers personnel and benefits, and of that 65 percent, 35-40 percent has been allocated to staffing both OCAP and OEE (for its External Enforcement Program).¹⁸⁹⁴ In FY 2016, approximately \$1.19 million was allocated for staffing, processing, and responding to civil rights complaints, which decreased to \$1.08 million in FY 2017 and \$1.06 million in FY 2018.¹⁸⁹⁵ This equates to approximately 72 percent, 66 percent, and 53 percent of the total budget for staffing the External Enforcement Program, respectively.¹⁸⁹⁶ Additionally in FY 2016, \$465,259 was allocated to staffing for compliance reviews, which steadily increased to \$558,963 in FY 2017 and \$940,506 in FY 2018.¹⁸⁹⁷ This equates to 28

¹⁸⁹⁰ U.S. Dep't of Labor, *FY 2016 Department of Labor Budget in Brief*, p. 63,

<https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/2016/FY2016BIB.pdf>.

¹⁸⁹¹ DOL, *FY 2017 Budget in Brief*, *supra* note 1875, at 51.

¹⁸⁹² DOL, *FY 2018 Budget in Brief*, *supra* note 1866, at 33.

¹⁸⁹³ U.S. Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 9, at 9.

¹⁸⁹⁴ *Ibid.*

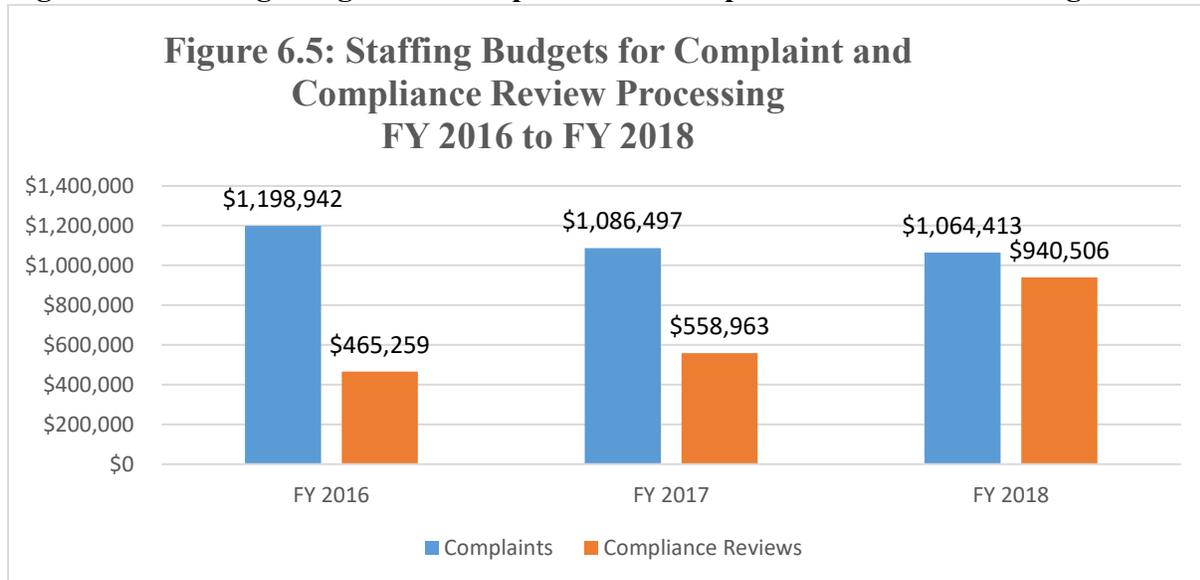
¹⁸⁹⁵ *Ibid.*

¹⁸⁹⁶ *Ibid.*, 9-10.

¹⁸⁹⁷ *Ibid.*

percent, 34 percent, and 46 percent of the total budget for staffing the External Enforcement Program, respectively.¹⁸⁹⁸ See Figure 6.5.

Figure 6.5: Staffing Budgets for Complaint and Compliance Review Processing



Source: U.S. Dep't of Labor, Civil Rights Center, Response to Interrogatory No. 9, p. 9.

CRC has noted that while its allocated budget has remained constant, its overall workload has increased due to:

[W]ork needed to effectively and efficiently implement the nondiscrimination and equal opportunity provisions of Section 188 of WIOA; mitigate the effects of attrition by back-filling more senior level positions with lower-graded/entry level positions and cross training staff from other divisions to assist in enforcement efforts; and absorb career ladder promotions and rental, salary/cost of living, quality step, and within-grade increases.¹⁸⁹⁹

CRC indicated that it has prioritized case processing efficiency, and implementation of Section 188 of WIOA.¹⁹⁰⁰

¹⁸⁹⁸ Ibid.

¹⁸⁹⁹ Ibid., 10.

¹⁹⁰⁰ Ibid., 10.

Assessment

Prioritization of Civil Rights Agency-Wide

The Director of OFCCP reports to the Deputy Secretary of DOL, who in turn reports to the DOL Secretary.¹⁹⁰¹ CRC is housed within the Office of the Assistant Secretary for Administration and Management, for which the Assistant Secretary reports to the Deputy Secretary of DOL, who in turn reports to the DOL Secretary.¹⁹⁰² Neither of these offices has a direct line of authority to the agency head, which the Commission has recommended to ensure prioritization of civil rights enforcement.¹⁹⁰³

Proposed Merger with EEOC

In May 2017, the Trump Administration proposed merging OFCCP into EEOC as a way to promote government efficiency.¹⁹⁰⁴ This proposed move drew criticism that it would blunt OFCCP's work independently evaluating compliance with civil rights laws through proactive evaluation and reduce its focus on evaluating affirmative action plans.¹⁹⁰⁵ Congress rejected the proposal during the FY 2018 budget process, when it once again appropriated for OFCCP separate from EEOC.¹⁹⁰⁶ The FY 2019 budget request abandoned this plan,¹⁹⁰⁷ although DOL asked for a program decrease of \$12.66 million for OFCCP and eliminated other programs with civil rights implications by zeroing out requests for training and employment services for Indians and Native Americans and for Migrant and Seasonal Workers;¹⁹⁰⁸ however the 2019 budget continues separate funding for OFCCP.¹⁹⁰⁹

¹⁹⁰¹ U.S. Dep't of Labor, "Organizational Chart," <https://www.dol.gov/general/aboutdol/orgchart>.

¹⁹⁰² DOL CRC, "Organization Chart," *supra* note 1885.

¹⁹⁰³ USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 47.

¹⁹⁰⁴ DOL, *FY 2018 Budget in Brief*, *supra* note 1866, at 3 and 26.

¹⁹⁰⁵ Jay-Anne B. Casuga and Kevin McGowan, "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," *Bloomberg*, May 22, 2017, <https://news.bloomberglaw.com/daily-labor-report/idea-to-merge-eeoc-contracting-watchdog-not-well-received> (accessed Aug. 15, 2019) [hereinafter Casuga *et al.*, "Idea to Merge EEOC, Contracting Watchdog Not Well-Received"].

¹⁹⁰⁶ Jay-Anne B. Casuga, "Senate Funding Bill Rejects Merger of EEOC, Contractor Watchdog," *Bloomberg*, Sep. 7, 2017, <https://www.bna.com/senate-funding-bill-n73014464290/> (accessed Dec. 19, 2018) [hereinafter Casuga, "Senate Funding Bill Rejects Merger of EEOC, Contractor Watchdog"].

¹⁹⁰⁷ Mike Eastman, "President Trump's Proposed FY 2019 Budget Abandons OFCCP/EEOC Merger Plan, While Slashing Agencies' Funding; Includes Call for Paid Leave and Mandatory E-Verify," *NT Lakis*, Feb. 16, 2018, <http://ntlakis.com/index.php/affirmative-action-and-diversity/president-trumps-proposed-fy-2019-budget-abandons-ofccpeoc-merger-plan-while-slashing-agencies-funding-includes-call-for-paid-leave-and-mandatory-e-verify/> (accessed Aug. 15, 2019) [hereinafter Eastman, "President Trump's Proposed FY 2019 Budget Abandons OFCCP/EEOC Merger Plan, While Slashing Agencies' Funding"].

¹⁹⁰⁸ DOL, *FY 2019 Budget in Brief*, *supra* note 1867, at 7 (reductions in training for specific programs for communities of color) and 29 (OFCCP).

¹⁹⁰⁹ Dep't of Defense and Labor, Health and Human Serv.s, and Educ. Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245 (2018).

While OFCCP and EEOC cover similar issues, differences in the two offices mean a merger would not be simple.¹⁹¹⁰ For example, OFCCP enforces a requirement that contractors have Affirmative Action Plans, while there is no analogous requirement for EEOC to enforce.¹⁹¹¹ Additionally, OFCCP enforces veterans' employment rights whereas EEOC does not.¹⁹¹² EEOC enforces Title VII's prohibitions on discrimination for the same protected categories as those covered by Executive Order 11,246, with the exception that Title VII contains no explicit protection for gender identity and sexual orientation, although EEOC has taken the position discrimination on those bases constitutes discrimination on the basis of sex.¹⁹¹³ The differences stem from OFCCP's focus on affirmative action and broad-based compliance by federal contractors versus EEOC's focus on workplace discrimination and individual complaints.¹⁹¹⁴

DOL described the differences between OFCCP and EEOC with respect to external civil rights enforcement as follows:

First, EEOC operates primarily on a reactive, complaint-based model: it generally takes no action against an employer unless and until someone files a complaint of discrimination. By contrast, OFCCP's model is largely proactive, consisting of broad compliance reviews of federal contractor establishments identified through a neutral scheduling system, without the need for a complaint. This process allows OFCCP to review the entirety of a contractor's personnel practices and identify and remedy systemic equal employment issues, such as compensation discrimination or "glass-ceiling" promotion issues that likely would not come to light in a complaint-based approach. Indeed, in the context of enforcement of nondiscrimination obligations, OFCCP has a particular focus on systemic discrimination, whereas EEOC's focus is primarily on individual discrimination.

Second, while EEOC's jurisdiction is related to nondiscrimination alone, OFCCP's worker protection enforcement also includes the obligation that contractors take additional affirmative action to ensure equal employment opportunity. This includes requirements that contractors analyze their personnel activity and compensation systems proactively to determine whether they results in disparities, and to develop action-oriented programs to correct any problem areas the contractor has identified.

¹⁹¹⁰ Casuga *et al.*, "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," *supra* note 1905.

¹⁹¹¹ 41 C.F.R. pt. 60-2; *see also* U.S. Dep't of Labor, "Affirmative Action,"

<https://www.dol.gov/general/topic/hiring/affirmativeact>.

¹⁹¹² 41 C.F.R. pt. 60-300; *see also* U.S. Department of Labor, OFCCP, "Regulations Implementing the Vietnam Era Veterans' Readjustment Assistance Act," <https://www.dol.gov/ofccp/regs/compliance/vevraa.htm>.

¹⁹¹³ Coalition Letter to Speaker of the House Paul Ryan, House Minority Leader Nancy Pelosi, Chairwoman of the House Committee on Education and the Workforce Virginia Foxx, and Ranking Member on the House Committee on Education and the Workforce Robert C. Scott, Opposing the Elimination of OFCCP (May 26, 2017), p. 2, https://www.aclu.org/sites/default/files/field_document/2017-05-26_ofccp_sign_on_letter_house.pdf [hereinafter Coalition Letter Opposing the Elimination of OFCCP].

¹⁹¹⁴ Casuga *et al.*, "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," *supra* note 1905.

Third, OFCCP's laws provide additional nondiscrimination protections that are not explicitly included in the laws enforced by EEOC. For instance, Executive Order 11,246 contains explicit prohibitions on discrimination on the bases of sexual orientation, gender identity, and against those discussing, disclosing, or inquiring about compensation. Additionally, OFCCP enforces VEVRAA, which prohibits discrimination against protected veterans; EEOC has no equivalent protection.

Finally, there are differences in the remedies that the agencies can seek to remedy discrimination. In addition to "make-whole relief," such as back pay for victims of discrimination, OFCCP has the ability to pursue sanctions against a federal contractor that has violated the laws it enforces, including debarment from receiving future federal contracts.¹⁹¹⁵

The differences articulated here about the way that EEOC and OFCCP respectively approach compliance with federal nondiscrimination laws demonstrate the loss to effective civil rights enforcement if OFCCP were merged into EEOC without the necessary resources (in budget and staffing) to continue the same critical work that OFCCP engages in currently.

Strategic Planning and Self-Evaluation

OFCCP

With respect to DOL's policy priorities for civil rights enforcement, DOL continues to "provide that workers have the opportunity to labor in fair and diverse workplaces."¹⁹¹⁶ In DOL's *Strategic Plan Fiscal Years 2014-2018*, one of the strategic objectives is to "Break down barriers to fair and diverse workplaces and narrow wage and income inequality."¹⁹¹⁷ DOL noted that "[d]iscrimination on the basis of race, color, religion, sex, national origin, disability, or status as a protected veteran not only adversely impacts America's workers and families, but also inhibits economic growth," and it is vital to ensure "that Americans work in workplaces that value diversity and are free from discrimination."¹⁹¹⁸ With this strategic objective in mind, one of OFCCP's performance goals during this period was to "[e]nforce affirmative action and nondiscrimination in Federal contractor workplaces."¹⁹¹⁹

OFCCP stated that it would carry out this goal by:

- Strengthening Enforcement of the Contractual Promise of Equal Employment Opportunity
- Reinforcing Equal Employment Opportunity Requirements through Regulatory Reform
- Expanding Stakeholder Engagement through Effective Relationships¹⁹²⁰

¹⁹¹⁵ U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

¹⁹¹⁶ U.S. Dep't of Labor, *Strategic Plan Fiscal Years 2014-2018*, p. 38 (on file).

¹⁹¹⁷ *Ibid.*, 39.

¹⁹¹⁸ *Ibid.*, 39.

¹⁹¹⁹ *Ibid.*, 41-42.

¹⁹²⁰ *Ibid.*, 41-42.

Additionally, OFCCP's strategic plan set a goal of completing 4,290 compliance evaluations and complaint investigations for each of the fiscal years from FY 2014 through FY 2018 and set the goal of processing 35 to 40 percent of conciliation agreements with pay discrimination findings over the aforementioned fiscal years.¹⁹²¹

DOL's Strategic Plan noted that "[m]any of OFCCP's strategies, initiatives, and activities for Fiscal Years 2018 through 2022 are in response to recommendations in the September 2016 Government Accountability Office (GAO) Report *Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*."¹⁹²² DOL's *Strategic Plan Fiscal Years 2018-2022* also has the strategic objective to "[p]romote fair and diverse workplaces for America's federal contractor employees."¹⁹²³

Therefore, DOL as a whole has indicated its areas of focus are:

- Strong Enforcement and Emphasizing High-Impact Projects
- Expanding Compliance Assistance and Stakeholder Engagement¹⁹²⁴

And similar to the previous strategic plan, OFCCP has set the goal of processing 35 to 40 percent of conciliation agreements with pay discrimination findings over the aforementioned fiscal years, as well as completing anywhere from 50 to 80 percent of construction evaluations from high-impact projects over the fiscal years in question.¹⁹²⁵ During FY 18, OFCCP achieved 109 percent of its target on a new measure for the fiscal year, "Percent of Discrimination Conciliation Agreements with Systemic Pay Discrimination Findings," and completed 90 percent of evaluations from high-impact construction projects.¹⁹²⁶

During the time of the Commission's review, OFCCP indicated it is undergoing a process of determining if it will continue to pursue the strategy of taking on fewer cases, but undertaking a comprehensive examination of each one, or return to handling more cases with less resource-intensive analysis. For context, during the George W. Bush Administration, OFCCP handled 4,000-5,000 cases per year.¹⁹²⁷ During the Obama Administration, caseload averages dropped to approximately 1,700 per year.¹⁹²⁸ In 2017, OFCCP maintained Obama-era policies and caseload

¹⁹²¹ Ibid., 43.

¹⁹²² U.S. Dep't of Labor, *Strategic Plan Fiscal Years 2018-2022*, pp. 26-27, <https://www.dol.gov/sites/dolgov/files/legacy-files/budget/2019/FY2018-2022StrategicPlan.pdf> [hereinafter DOL, *FY 2018-2022 Strategic Plan*].

¹⁹²³ Ibid., 26.

¹⁹²⁴ Ibid., 26-27.

¹⁹²⁵ Ibid., 26-27.

¹⁹²⁶ U.S. Dep't of Labor, *Agency Financial Report Fiscal Year 2018*, p. 19, <https://www.dol.gov/sites/dolgov/files/OPA/reports/2018annualreport.pdf>.

¹⁹²⁷ Bill Osterndorf, "The Year in Review at OFCCP 2017: What DIDN'T Happen at OFCCP," *LocalJobNetwork*, Nov. 17, 2017, <https://www.localjobnetwork.com/employment-resources/detail/the-year-in-review-at-ofccp-2017-what-didnt-happen-at-ofccp/10717> (accessed Dec. 19, 2018).

¹⁹²⁸ Ibid.

levels, which reports indicate was due to a delay in installing a new Director, who was not chosen until December 2017.¹⁹²⁹ Reports also indicate a reduction in personnel and a desire to cut costs may have reduced the number of evaluations the agency took on in 2017.¹⁹³⁰

In FY2017, OFCCP stated that it had “refocused its efforts almost exclusively from systemic hiring discrimination on the basis of sex or race in low-wage jobs to systemic compensation discrimination to ensure workers also receive equal pay without discrimination. This includes placement into lower paying jobs due to gender stereotyping.”¹⁹³¹ OFCCP stated that it had “reduced its case production to focus on fewer, but more complex high quality cases” across different industries and occupations.¹⁹³²

Craig Leen, Director of OFCCP, testified with regard to scheduling compliance evaluations:

[T]here was a [] decision to reduce the total amount of audits and focus more on those that are audited. It’s something called the deep dive, [] which has received both positive and negative responses.

...

Our goal is to take the best aspects of what’s called active case management, which is really the Bush Administration approach, which had more audits. And active case enforcement, which was sort of the Obama Administration approach, [] led to less audits.¹⁹³³

¹⁹²⁹ Bill Parker, “The Trump-Era Office of Federal Contract Compliance Programs Begins to Come Into Focus,” *The Federal Lawyer*, May 2018, p. 1, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2018/May/Columns/Labor-and-Employment-Corner.aspx?FT=.pdf.

¹⁹³⁰ Ibid.

¹⁹³¹ U.S. Dep’t of Labor, *Agency Financial Report Fiscal Year 2017*, pp. 16-17, https://www.dol.gov/sites/dolgov/files/legacy-files/media_0/_Sec/2017annualreport.pdf.

¹⁹³² Ibid.

¹⁹³³ Leen Testimony, *Federal Civil Rights Enforcement Briefing*, p. 52.

CRC

DOL's *FY 2018-2022 Strategic Plan* does not outline any strategic goals for CRC,¹⁹³⁴ and DOL's Annual Performance Reports do not specifically mention the Civil Rights Center.¹⁹³⁵

CRC reported that it provides direct support to DOL's overarching strategic goals, but does not have dedicated performance measures for the goals outlined in DOL's strategic plans.¹⁹³⁶ However, CRC does have its own performance measures, and has prioritized case processing efficiency, and implementation of Section 188 of WIOA over the fiscal years 2016 to 2018.¹⁹³⁷

Complaint Processing, Agency-Initiated Charges, and Litigation

Both OFCCP and CRC engage in complaint processing through an administrative process.¹⁹³⁸ However, the majority of OFCCP's enforcement work involves conducting compliance evaluations.¹⁹³⁹ For example, in FY 2016, complaint investigations constituted only 16 percent of the agency's work.¹⁹⁴⁰ OFCCP's regulations allow OFCCP to refer individual complaints raising potential Title VII violations to the EEOC, and the agency generally does so as a matter of course for all individual complaints in this category.¹⁹⁴¹ The practice is memorialized under a memorandum of understanding (MOU).¹⁹⁴² The MOU provides that OFCCP retains complaint investigations if the issue presented is a class-wide or systemic one.¹⁹⁴³ OFCCP likewise retains individual complaints alleging violations of Section 503 or VEVRAA for investigation.¹⁹⁴⁴

¹⁹³⁴ DOL, *FY 2018-2022 Strategic Plan*, *supra* note 1922.

¹⁹³⁵ U.S. Dep't of Labor, *FY 2016 Annual Performance Report*, <https://www.dol.gov/sites/dolgov/files/legacy-files/CBJ-2018-V1-01.pdf>; U.S. Dep't of Labor, *FY 2017 Annual Performance Report*, <https://www.dol.gov/sites/dolgov/files/general/budget/2019/CBJ-2019-V1-01.pdf>; U.S. Dep't of Labor, *FY 2018 Annual Performance Report*, <https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V1-01.pdf>.

¹⁹³⁶ U.S. Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 3, at 3.

¹⁹³⁷ *Ibid.*

¹⁹³⁸ 29 C.F.R. §§ 31.7, 32.45, 33.12, 35.31, 36.605, 37.70-37.100, 38.69-38.85; 41 C.F.R. §§ 60-1.21 - 60-1.35, 60-30.5, 60-50.4, 60-300.61 - 60.300-70, 60-741.61 - 60-741-70.

¹⁹³⁹ *See infra* notes 1956-1991.

¹⁹⁴⁰ *Ibid.*

¹⁹⁴¹ 41 C.F.R. § 60-1.24 (a); U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, "Who can file a complaint?," <https://www.dol.gov/ofccp/regs/compliance/faqs/ForEmployees/ForEmployeesQ6.htm> [hereinafter "DOL OFCCP, "Who can file a complaint?"].

¹⁹⁴² "Pursuant to this MOU, OFCCP shall act as EEOC's agent for the purposes of receiving the Title VII component of all complaints/charges. All complaints/charges of employment discrimination filed with OFCCP alleging a Title VII basis (race, color, religion, sex, national origin, or retaliation) shall be received as complaints/charges simultaneously dual-filed under Title VII. . . . OFCCP will refer to EEOC allegations of discrimination of an individual nature on a Title VII basis in dual filed complaints/charges." Equal Employment Opportunity Comm'n and U.S. Dep't of Labor, Coordination of Functions: Memorandum of Understanding (Nov. 9, 2011), § (7), https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm.

¹⁹⁴³ *Ibid.*, § (7)(b) ("OFCCP will retain, investigate, process, and resolve allegations of discrimination of a systemic or class nature on a Title VII basis in dual filed complaints/charges."); *see also* DOL OFCCP, "Who can file a complaint?," *supra* note 1941.

¹⁹⁴⁴ DOL OFCCP, "Who can file a complaint?," *supra* note 1941.

OFCCP

See Table 6.1. In FY 2016, OFCCP received 588 complaints, and closed 691 complaints including by referring 328 complaints to EEOC.¹⁹⁴⁵ That left OFCCP closing 363 complaints following investigation in FY 2016. In FY 2017, OFCCP received 686 complaints and closed 720 complaints including by referring 401 complaints to EEOC.¹⁹⁴⁶ That left OFCCP closing 319 complaints following investigation in FY 2017. In FY 2018, OFCCP received 1,418 complaints of discrimination, and resolved 1,320 complaints including by referring 786 complaints to EEOC.¹⁹⁴⁷ That left OFCCP closing 534 complaints following investigation in FY 2018.

Table 6.1: OFCCP Complaints by Basis, FY 2016 to FY 2018

	FY 2016	FY 2017	FY 2018
Received	588	686	1,418
Closed	691	720	1,320
Race	272	255	534
	39.4%	35.4%	40.5%
Sex	147	161	274
	21.3%	22.4%	20.8%
National Origin-Hispanic	41	58	84
	5.9%	8.1%	6.4%
National Origin-Other	33	46	97
	4.8%	6.4%	7.3%
Religion	28	34	93
	4.1%	4.7%	7.0%
Color	39	41	118
	5.6%	5.7%	8.9%
Sexual Orientation	5	14	65
	0.7%	1.9%	4.9%
Gender Identity	11	9	20
	1.6%	1.3%	1.5%
Disability	170	177	294
	24.6%	24.6%	22.3%
Covered Veteran	124	124	132
	17.9%	17.2%	10.0%

Source: U.S. Department of Labor, OFCCP By the Numbers, <https://www.dol.gov/ofccp/BTN/index.html>.

Note: The numbers by Basis do not equal the total number Closed because the Bases are not mutually exclusive.

¹⁹⁴⁵ The number of complaints closed in FY 2016 includes 328 complaints referred to EEOC.

¹⁹⁴⁶ The number of complaints closed in FY 2017 includes 401 complaints referred to EEOC.

¹⁹⁴⁷ The number of complaints closed in FY 2018 includes 786 complaints referred to EEOC.

For each fiscal year analyzed in this report, OFCCP received more discrimination complaints on the basis of race than any other basis, with 39.4 percent, 35.4 percent, and 40.5 percent of complaints filed on the basis of race in FY 2016, FY 2017, and FY 2018 respectively. Disability and sex also topped the list of bases upon which individuals filed complaints of discrimination.

CRC

In FY 2016, CRC received 813 complaints, accepted 24 complaints for investigation, and transferred, referred, or dismissed 563 complaints, largely as non-jurisdictional.¹⁹⁴⁸ CRC also completed 11 complaint investigations during that fiscal year.¹⁹⁴⁹ The number of complaints received decreased moderately in FY 2017 to 733 complaints; however, CRC accepted 32 complaints for investigation, and transferred, referred, or dismissed 1,259 complaints, largely as non-jurisdictional.¹⁹⁵⁰ CRC also completed 35 complaint investigations during that fiscal year.¹⁹⁵¹ In FY 2018, CRC received a total of 670 complaints, accepted 30 complaints for investigation, and transferred, referred, or dismissed 825 complaints, again primarily as non-jurisdictional.¹⁹⁵² It also completed 32 complaint investigations during that fiscal year.¹⁹⁵³ See Table 6.2.

Table 6.2: CRC Complaints by Outcome, FY 2016 to FY 2018

	FY 2016	FY 2017	FY 2018
Total CRC Complaints Received	813	733	670
Total Complaints Accepted for Investigation	24	32	30
Total Complaints Transferred, Referred, or Dismissed	563	1,259	825
Total Complaint Investigations Completed	11	35	32

Source: U.S. Dep't of Labor, Civil Rights Center, Response to Interrogatory No. 10, p. 10.

Note: Complaints that are accepted for investigation may have been received in prior fiscal years.

CRC has noted that a large majority of complaints it receives fall outside its jurisdiction, and are transferred to the appropriate federal, state or local authority to process where possible.¹⁹⁵⁴ Additionally, CRC has joint jurisdiction with other federal agencies with respect to certain complaints, and refers certain complaints “under circumstances specified by regulation.”¹⁹⁵⁵

¹⁹⁴⁸ U.S. Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 10, at 10 (CRC has also noted that complaints that are accepted for investigation “may have been received in prior years.”).

¹⁹⁴⁹ Ibid.

¹⁹⁵⁰ Ibid.

¹⁹⁵¹ Ibid.

¹⁹⁵² U.S. Dep't of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

¹⁹⁵³ Ibid.

¹⁹⁵⁴ U.S. Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 10, at 10.

¹⁹⁵⁵ Ibid.; *see, e.g.* 29 C.F.R. § 38.81.

Proactive Compliance Evaluation

OFCCP

Every covered contract and subcontract must also include an agreement to oversight, including providing access to OFCCP for compliance reviews,¹⁹⁵⁶ as well as a provision stating that in the event of noncompliance “this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11,246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11,246 of Sept. 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.”¹⁹⁵⁷ OFCCP’s regulations implementing Executive Order 11,246 also contain this equal opportunity clause.¹⁹⁵⁸

As discussed above, OFCCP told the Commission, “OFCCP’s model is largely proactive, consisting of broad compliance reviews... without the need for a complaint.”¹⁹⁵⁹ This process allows OFCCP to review the entirety of a contractor’s personnel practices and identify and remedy systemic equal employment issues, such as compensation discrimination or “glass-ceiling” promotion issues that likely would not come to light in a complaint-based approach. Indeed, in the context of enforcement of nondiscrimination obligations, OFCCP has a particular focus on systemic discrimination. To ensure compliance with federal equal employment opportunity and affirmative action requirements of federal contractors, OFCCP utilizes two key approaches: enforcement and compliance assistance.¹⁹⁶⁰

In September 2016, the Government Accountability Office (GAO) issued a report on OFCCP’s work, finding that since 2010, the majority of compliance evaluations (78 percent) conducted by OFCCP identified no violations, when at the same time, only about 2 percent of compliance evaluations resulted in discrimination findings.¹⁹⁶¹ However, GAO expressed concern that the methods used in selecting contractors may not focus evaluations on the contractors that pose the greatest likelihood of noncompliance.¹⁹⁶² In conducting compliance evaluations, GAO reported that OFCCP determines which contractors to review based on neutral but non-random factors, such as alphabetical order, size of contract or contract expiration date.¹⁹⁶³ GAO found that OFCCP “does not use a generalizable sample that would allow for conclusions about the federal contractor population,” and therefore “does not have reasonable assurance that it is focusing its compliance efforts on those contractors with the greatest risk of noncompliance.”¹⁹⁶⁴

¹⁹⁵⁶ Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 202(5).

¹⁹⁵⁷ *Id.* at § 202 (6).

¹⁹⁵⁸ 41 C.F.R. § 60-1.4.

¹⁹⁵⁹ *See supra* notes 283, 1915.

¹⁹⁶⁰ GAO, *Strengthening Oversight*, *supra* note 247, at 10.

¹⁹⁶¹ *Ibid.*, GAO Highlights.

¹⁹⁶² *Ibid.*, GAO Highlights.

¹⁹⁶³ *Ibid.*, 12.

¹⁹⁶⁴ *Ibid.*, 12.

Craig Leen, Director of OFCCP, explained in his testimony before the Commission how OFCCP altered its method of how to choose contractors to review, based on recommendations set forth in the GAO report. As the GAO report highlighted, and Director Leen confirmed in testimony to the Commission, in a single year OFCCP can only audit about 1-2 percent of contractors over which it has jurisdiction.¹⁹⁶⁵ Director Leen therefore began the Affirmative Action Program Verification Initiative, which he describes as a certification program “where government contractors have to certify whether they have an affirmative action program or not.”¹⁹⁶⁶ Director Leen explained that some audits would then be based on a lack of verification, and other audits would seek to confirm and further examine the claims made in the verification process.¹⁹⁶⁷

Additionally, GAO reported that the number of contractors OFCCP reviews each year is based on regional and district staffing levels.¹⁹⁶⁸ Contractors are assigned to regional offices for compliance evaluation based on the contractor’s physical address to account for the possibility of an on-site review, conducted in 25 percent of evaluations in 2015.¹⁹⁶⁹ At 2015 staffing levels OFCCP conducted compliance evaluations of approximately 2 percent of federal contractors.¹⁹⁷⁰ Compliance evaluations followed a process called the Active Case Enforcement (ACE) protocol until the directive implementing ACE was rescinded on November 30, 2018.¹⁹⁷¹ This protocol was adopted in 2010 to require a more in-depth review of contractors under evaluation, where previously a case would be closed after an “abbreviated desk audit” if there were no indicators of discrimination.¹⁹⁷² Under the ACE protocol, a full desk audit was required in each case under compliance evaluation. Now, with the ACE protocol rescinded, OFCCP aims to increase the number of compliance evaluations they complete annually, while shortening the length of time desk audits take and seeking to conciliate issues more efficiently.¹⁹⁷³ A compliance evaluation

¹⁹⁶⁵ Leen Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 23-25.

¹⁹⁶⁶ *Ibid.*, 23-25. See also U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file). See U.S. Dep’t of Labor, OFCCP, Directive 2018-07, Affirmative Action Program Verification Initiative (Aug. 24, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_07.html. On this topic, DOL noted in its comments to the Commission:

GSA denied OFCCP’s request. OFCCP still looks at whether individual contractors check the box, but GSA will not provide a report or access to the database that would provide information on all contractors at once.

Ibid.

¹⁹⁶⁷ Leen Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 23-25.

¹⁹⁶⁸ GAO, *Strengthening Oversight*, *supra* note 247, at 12.

¹⁹⁶⁹ *Ibid.*, 19.

¹⁹⁷⁰ *Ibid.*, 15.

¹⁹⁷¹ U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, Directive 2019-01 (Nov. 30, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html?utm_campaign=directives3&utm_medium=email&utm_source=govdelivery [hereinafter DOL OFCCP, Directive 2019-01].

¹⁹⁷² GAO, *Strengthening Oversight*, *supra* note 247, at 14.

¹⁹⁷³ DOL OFCCP, Directive 2019-01, *supra* note 1971; U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, Federal Contract Compliance Manual (October 2014), https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf [hereinafter DOL OFCCP, Federal Contract Compliance Manual].

may include one or any combination of compliance review, compliance check, focused review, and offsite review of records.¹⁹⁷⁴

- A desk audit is a review of the contractor’s written affirmative action program and supporting documentation. On-site review seeks to determine implementation of the affirmative action program and other regulatory requirements. Off-site analysis is review of the records collected during on-site review.
- Off-site review of records can also occur outside the compliance review process, consisting of review of documentation accompanying the affirmative action program as well as other documents related to the contractor’s personnel policies and employment actions.¹⁹⁷⁵
- Compliance check is a determination of the contractor’s record keeping in compliance with record retention regulations.¹⁹⁷⁶
- Focused review is a review that is limited in scope to component(s) of the organization or employment practice(s) or one or more aspects of the contractor’s employment practices.¹⁹⁷⁷

The GAO report also indicates that when OFCCP finds violations, it has generally resolved them through conciliation agreements; “[b]etween fiscal years 2010 and 2015, OFCCP resolved 99 percent of violations with conciliation agreements—agreements between OFCCP and the contractor—that outline remedial action that contractors agree to take to correct violations.”¹⁹⁷⁸ Violations may be found in response to a complaint, through OFCCP’s compliance evaluation process, or a contractor’s refusal to comply with OFCCP’s oversight during a compliance review through not submitting records or allowing review.¹⁹⁷⁹ Matters not resolved through conciliation are referred to the Solicitor of Labor for administrative enforcement proceedings.¹⁹⁸⁰

In August 2018, OFCCP issued Directive 2018-04 which requires a portion of compliance reviews in 2019 to be comprehensive onsite, focused reviews to ensure compliance with the affirmative action obligations and nondiscrimination laws under its jurisdiction.¹⁹⁸¹ While focused reviews had always been available to OFCCP as an enforcement tool, evidence reflects that this type of review was rarely used in the past.¹⁹⁸² This Directive also orders OFCCP to develop a standard protocol for conducting these focused reviews; to provide staff training, contractor education, and technical assistance; and to publish these protocols in its Frequently Asked Questions (FAQs) to

¹⁹⁷⁴ 41 C.F.R. §§ 60-1.20(a), 60-300.60(a), 60-741.60(a).

¹⁹⁷⁵ *Id.* §§ 60-1.20(a)(2), 60-300.60(a)(2), 60-741.60(a)(2).

¹⁹⁷⁶ *Id.* §§ 60-1.20(a)(3), 60-300.60(a)(3), 60-741.60(a)(3).

¹⁹⁷⁷ *Id.* §§ 60-1.20(a)(4), 60-300.60(a)(4), 60-741.60(a)(4).

¹⁹⁷⁸ GAO, *Strengthening Oversight*, *supra* note 247, at 24.

¹⁹⁷⁹ 41 C.F.R. § 60-1.26(a).

¹⁹⁸⁰ . § 60-1.26(b).

¹⁹⁸¹ DOL OFCCP, Directive 2018-04, *supra* note 1882.

¹⁹⁸² Farrah N.W. Rifelj and Maryelena Zaccardelli, “OFCCP Notice of Significant Change in Compliance Review Procedures,” *Lexology*, Aug. 14, 2018, <https://www.lexology.com/library/detail.aspx?g=d6c905cf-f5da-482e-8c85-5deee98a0474> [hereinafter Rifelj *et al.*, “OFCCP Notice of Significant Change in Compliance Review Procedures”]. See also Leen Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 26-27.

make the information publicly available.¹⁹⁸³ The Directive did not specify how many focused reviews OFCCP would conduct starting in 2019.¹⁹⁸⁴ However, the scheduling list that OFCCP issued on March 25, 2019, indicates that the agency planned to conduct 500 focused reviews.¹⁹⁸⁵

In FY 2016, OFCCP scheduled 1,048 supply and service compliance reviews and 137 construction compliance reviews for a total of 1,185 scheduled compliance reviews.¹⁹⁸⁶ In that same fiscal year, OFCCP completed 1,522 supply and service compliance reviews and 174 construction compliance reviews for a total of 1,696 completed compliance reviews.¹⁹⁸⁷ In FY 2017, OFCCP scheduled 735 supply and service compliance reviews and 110 construction compliance reviews for a total of 845 scheduled compliance reviews.¹⁹⁸⁸ In that same fiscal year, OFCCP completed 1,036 supply and service compliance reviews and 106 construction compliance reviews for a total of 1,142 completed compliance reviews.¹⁹⁸⁹ In FY 2018, OFCCP scheduled 785 supply and service compliance reviews and 43 construction compliance reviews for a total of 828 scheduled compliance reviews.¹⁹⁹⁰ In that same fiscal year, OFCCP completed 713 supply and service compliance reviews and 99 construction compliance reviews for a total of 812 completed compliance reviews.¹⁹⁹¹ See Table 6.3.

¹⁹⁸³ DOL OFCCP, Directive 2018-04, *supra* note 1882.

¹⁹⁸⁴ Rifej *et al.*, “OFCCP Notice of Significant Change in Compliance Review Procedures,” *supra* note 1982.

¹⁹⁸⁵ DOL, “OFCCP has released the FY2019 Supply & Service Scheduling List,” *supra* note 288.

¹⁹⁸⁶ U.S. Department of Labor, “OFCCP By the Numbers,” <https://www.dol.gov/ofccp/BTN/index.html>.

¹⁹⁸⁷ *Ibid.*

¹⁹⁸⁸ *Ibid.*

¹⁹⁸⁹ *Ibid.*

¹⁹⁹⁰ *Ibid.*

¹⁹⁹¹ *Ibid.*

Table 6.3: OFCCP Supply and Service and Construction Compliance Evaluations, FY 2016 to FY 2018

	Supply and Service Compliance Evaluations			Construction Compliance Evaluations		
	FY 2016	FY 2017	FY 2018	FY 2016	FY 2017	FY 2018
Scheduled*	1,048	735	785	137	110	43
Completed*	1,522	1,036	713	174	106	99
Associated with a Mega Construction Project	-	-	-	86	84	89
	-	-	-	49.4%	79.2%	89.9%
Conciliation Agreement or Consent Decree	275	202	115	83	60	53
	18.1%	19.5%	16.1%	47.7%	56.6%	53.5%
EO 11246 Violation	258	195	127	82	59	53
	17.0%	18.8%	17.8%	47.1%	55.7%	53.5%
Section 503 Violation	99	71	36	20	20	12
	6.5%	6.9%	5.0%	11.5%	18.9%	12.1%
Section 4212 Violation	140	96	45	24	26	14
	9.2%	9.3%	6.3%	13.8%	24.5%	14.1%
Discrimination Violation	38	40	47	1	1	1
	2.5%	3.9%	6.6%	0.6%	0.9%	1.0%
Number of Workers in Facilities Reviewed	1,038,542	732,235	850,443	16,332	11,855	13,913

Source: U.S. Department of Labor, "OFCCP By the Numbers," <https://www.dol.gov/ofccp/BTN/index.html>.

Note: The numbers do not add up to the Completed total and the percentages do not add to 100% because cases with no violations are not summarized and the completion types are not mutually exclusive.

*Does not include administrative closures.

Transparency Initiative

In September 2018, OFCCP issued Directive 2018-08,¹⁹⁹² extending its so-called transparency initiative to every stage of the compliance evaluation process.¹⁹⁹³ The Directive lays out specific procedures on how compliance evaluations will proceed and includes instruction that OFCCP staff

¹⁹⁹² U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Directive 2018-08, Transparency in OFCCP Compliance Activities (Sep. 19, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_08.html [hereinafter DOL OFCCP, Directive 2018-08].

¹⁹⁹³ Pamela Wolf, "What Federal Contractors Need To Know About The OFCCP's Latest Directives," *Walters Kluwer*, Sep. 20, 2018, <http://www.employmentlawdaily.com/index.php/2018/09/20/what-federal-contractors-need-to-know-about-the-ofccp-latest-directives/> [hereinafter Wolf, "What Federal Contractors Need To Know About The OFCCP's Latest Directives"].

should work to close reviews quickly, within 45 days, if there are no indications of discrimination from initial submissions.¹⁹⁹⁴ The Directive specifically notes “[s]upplemental information requests must include the basis for the request, be reasonably tailored to the areas of concern, and allow for a reasonable time to respond,” indicating the agency’s priority with this Directive is contractor certainty.¹⁹⁹⁵

Voluntary Enterprise-wide Review Program

OFCCP is developing a Voluntary Enterprise-wide Review Program (VERP) that facilitates and confirms enterprise-wide (corporate-wide) compliance by high-performing federal contractors.¹⁹⁹⁶ OFCCP reports to the Commission that the VERP will “officially recognize the outstanding efforts of top-performing contractor participants, and remove VERP participants from the pool of contractors scheduled for compliance evaluations.”¹⁹⁹⁷

Early Resolution Procedures

OFCCP now encourages Early Resolution Procedures (ERP) to promote early and efficient compliance by supply-and-service contractors.¹⁹⁹⁸ OFCCP maintains that these procedures will help contractors and OFCCP achieve their mutual goal of equal employment opportunity in federal contracting and reduce the length of compliance evaluations by resolving problems expeditiously. According to OFCCP, ERP also allows OFCCP and contractors with multiple establishments to more efficiently promote corporate-wide compliance with OFCCP’s requirements.

CRC

In order to determine the ability of grant applicants to comply with nondiscrimination and equal opportunity provisions of the laws, orders, and regulations, OCAP (formerly part of CRC) conducted pre-approval compliance reviews.¹⁹⁹⁹ OCAP also conducted post-approval compliance reviews.²⁰⁰⁰ These reviews “may focus on specific programs or activities, or one or more issues within a program or activity.”²⁰⁰¹ OCAP also reviewed Nondiscrimination Plans required of states under WIOA/WIA, which must be established and implemented by the Governor and “designed to give a reasonable guarantee that all State Program recipients will comply . . . with the nondiscrimination and equal opportunity provisions of WIOA.”²⁰⁰² Furthermore, OCAP

¹⁹⁹⁴ Ibid.

¹⁹⁹⁵ DOL OFCCP, Directive 2018-08, *supra* note 1992, at (7)(d)(ii); Wolf, “What Federal Contractors Need To Know About The OFCCP’s Latest Directives,” *supra* note 1993.

¹⁹⁹⁶ DOL, Voluntary Enterprise-wide Review Program, *supra* note 291.

¹⁹⁹⁷ U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

¹⁹⁹⁸ DOL, Early Resolution Procedures, *supra* note 290.

¹⁹⁹⁹ U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 2, at 2.

²⁰⁰⁰ Ibid.

²⁰⁰¹ Ibid.

²⁰⁰² Ibid., 2-3.

previously provided training and technical assistance for stakeholders and other interested parties.²⁰⁰³

CRC indicated that under all statutes, it will monitor the activities of the respondent after a Conciliation Agreement or settlement agreement has been negotiated and executed. Ongoing monitoring of entities receiving federal financial assistance under the laws enforced by CRC (outside of the context of a complaint investigation or compliance review conducted by CRC) is primarily the responsibility of State Governors through their Equal Opportunity Officers (to whom training and technical assistance is provided).²⁰⁰⁴

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

OFCCP

DOL's strategic plan for 2018-2022 indicates that one way to meet its strategic goal of "promot[ing] fair and diverse workplaces for America's federal contractor employees" is to "expand compliance assistance and stakeholder engagement."²⁰⁰⁵ Written guidance is contained in large part in the Federal Contract Compliance Manual.²⁰⁰⁶ OFCCP also provides information to contractors about its enforcement methods, priorities, and legal understandings through the use of Directives.²⁰⁰⁷ DOL's strategic plan elaborates:

OFCCP will support voluntary contractor compliance through compliance assistance tools, resources, and incentives; assisting contractors in locating victims of discrimination that are due financial or other remedies resulting from contractors entering into a conciliation agreement (CA) with OFCCP; and creating a comprehensive digital outreach strategy for improving engagement with three types of contractors and other stakeholders, including new and small contractors, construction contractors, and supply and service contractors.

OFCCP strategically engages external stakeholders to educate and empower workers to make informed decisions about exercising their employment rights. OFCCP's outreach strategy emphasizes increased community engagement and establishing meaningful relationships with stakeholders to reach workers most at risk of experiencing workplace discrimination. These stakeholders include community-based organizations, advocacy groups, employee resource groups, job

²⁰⁰³ Ibid., 3.

²⁰⁰⁴ Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 5, at 6.

²⁰⁰⁵ DOL, *FY 2018-2022 Strategic Plan*, *supra* note 1922, at 27.

²⁰⁰⁶ DOL OFCCP, Federal Contract Compliance Manual, *supra* note 1973.

²⁰⁰⁷ U.S. Dep't of Labor, "Directives," <https://www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm> [hereinafter DOL, "Directives"].

placement providers, unions, and state and local government and intergovernmental agencies.²⁰⁰⁸

In addition, OFCCP published a press release in August 2018 to announce its new guidance, discussed above, as “part of the Department’s efforts to maximize the effectiveness of compliance assistance outreach.”²⁰⁰⁹

OFCCP actively provides technical assistance to its contractors. OFCCP maintains a website that aims to provide contractors with “clear and easy-to-access information on how to comply with federal employment laws” and provides links to various resources, as well as law-specific compliance assistance for the laws that OFCCP enforces.²⁰¹⁰ OFCCP’s compliance assistance includes technical assistance guides, which it is in the process of updating to reflect changes to OFCCP regulations.²⁰¹¹ OFCCP reported to the Commission that by the end of FY 2019, OFCCP plans to issue three technical assistance guides relevant to specific types of contractors: Construction, Supply & Service, and Academic Institutions.²⁰¹² In addition, OFCCP’s Federal Contract Compliance Manual indicates that its compliance officers who conduct OFCCP’s enforcement work are responsible for providing technical assistance during compliance reviews to “clarify the contractor’s obligations and the compliance evaluation process” if any questions arise at any point during the process.²⁰¹³ GAO, however, found that since 2012, OFCCP’s compliance assistance activities have decreased for federal contractors and other stakeholders, and contractors and stakeholders both felt that OFCCP guidance could be clearer to help them understand their responsibilities under the law.²⁰¹⁴

OFCCP maintains a website that “provide[s] the public with a list of any documents that are determined to be ‘significant guidance documents.’”²⁰¹⁵ That page indicates that OFCCP has not published any significant guidance documents since 2007.²⁰¹⁶ OFCCP does actively issue directives, considered to be “interpretative guidance,” and maintain a website that publicizes these directives.²⁰¹⁷ During FY 2016-2018, OFCCP issued seven directives covering a variety of policy topics, including focused reviews of contractor compliance with EO 11,246, religious exemption

²⁰⁰⁸ Ibid.

²⁰⁰⁹ U.S. Dep’t of Labor, “U.S. Department of Labor’s Office of Federal Contract Compliance Programs Announces New Policies” (Aug. 24, 2018), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20180824>.

²⁰¹⁰ U.S. Dep’t of Labor, “Compliance Assistance,” <https://www.dol.gov/ofccp/regs/compliance/ofcpcomp.htm>.

²⁰¹¹ U.S. Dep’t of Labor, OFCCP, Response to Document Request No. 5, at 6.

²⁰¹² U.S. Dep’t of Labor, Response to USCCR Affected Agency Review (Jul. 1, 2019) (on file).

²⁰¹³ DOL OFCCP, Federal Contract Compliance Manual, *supra* note 1973, at 14.

²⁰¹⁴ GAO, *Strengthening Oversight*, *supra* note 247, at GAO Highlights.

²⁰¹⁵ U.S. Dep’t of Labor, “OFCCP Guidance Documents,”

https://www.dol.gov/ofccp/TAGuides/OFCCP_SGD_Information.htm.

²⁰¹⁶ Ibid. This page indicates that “significant guidance documents” are subject to Executive Order 12,866 as amended by Executive Order 13,422 (Jan. 18, 2007) and the Bulletin for Agency Good Guidance Practices, adopted by the Office of Management and Budget. Since then, Executive Order 13,497 was issued which revoked Executive Order 13,422. *See* Revocation of Certain Executive Orders Concerning Regulatory Planning and Review, Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Feb. 4, 2009).

²⁰¹⁷ DOL, “Directives,” *supra* note 2007.

for EO 11,246 § 204(c), and affirmative action program verification.²⁰¹⁸ In addition, OFCCP has issued and made public its Federal Contract Compliance Manual, which “provides new and experienced compliance officers the procedural framework for executing compliance evaluations and complaint investigations,” and “provides procedural and technical guidance on compliance issues based on current agency procedures and processes, and improves consistency across the agency’s regional and field offices,” but notes that “it does not establish substantive agency policy” and “if there is an inconsistency between material in the [manual] and other OFCCP policies and its implementing regulations, the latter are controlling.”²⁰¹⁹

Religious Freedom Directive

On August 10, 2018, OFCCP issued a press release to announce the implementation of new policies to ensure equal employment opportunity and protect religious freedom.²⁰²⁰ OFCCP issued two new policy directives, which include an equal employment opportunity directive to ensure federal contractor compliance with federal anti-discrimination laws, and a religious freedom directive to protect the rights of religious-affiliated organizations and groups.²⁰²¹

OFCCP states in Directive 2018-03 that “OFCCP staff are instructed to take these [recent Supreme Court] legal developments into account in all their relevant activities, including when providing compliance assistance, processing complaints, and enforcing the requirements of E.O. 11246.”²⁰²² The Directive further states that OFCCP intends to include the changes incorporated in Directive 2018-03 in its next round of regulatory rulemaking.²⁰²³

OFCCP’s Directive 2018-03 serves as further assurance to government contractors and subcontractors that the government will not discriminate against them because of their religious character.²⁰²⁴

Legal analysts have pointed out that Directive 2018-03 merely instructs OFCCP staff to consider recent Supreme Court decisions and Executive Orders when reviewing government contractor

²⁰¹⁸ Ibid.

²⁰¹⁹ DOL OFCCP, Federal Contract Compliance Manual, *supra* note 1973.

²⁰²⁰ U.S. Dep’t of Labor, “U.S. Department of Labor Announces New Policies to Ensure Equal Employment Opportunity and Protect Religious Freedom,” Aug. 10, 2018, <https://www.dol.gov/newsroom/releases/ofccp/ofccp20180810>.

²⁰²¹ Ibid.

²⁰²² U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, Directive 2018-03 (Aug. 10, 2018), <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf> [hereinafter DOL OFCCP, Directive 2018-03]. *See also* Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 1250-AA09 (Fall 2018), <https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=Religious-Organization+Exemption+>.

²⁰²³ Ibid.

²⁰²⁴ Susan Schaecher, “OFCCP Issues 2 Directives Affecting Federal Contract Compliance Reviews,” Fisher & Phillips, LLP, Aug. 21, 2018, <https://www.fisherphillips.com/resources-alerts-ofccp-issues-2-directives-affecting-federal-contract>.

compliance.²⁰²⁵ The Directive on its face does not provide any process or means by which government contractors may claim a religious exemption.²⁰²⁶ However, Directive 2018-03 does indicate that it supersedes any previous guidance that does not reflect those legal developments, including the section in *Frequently Asked Questions: Sexual Orientation and Gender Identity* that previously addressed “Religious Employers and Religious Exemption.”²⁰²⁷

OFCCP prioritized the issuance of this religious freedom directive and proposed this rule despite the fact that it does not typically contract with a large number of religious organizations. Craig Leen, Acting Director of OFCCP, in his testimony before the Commission, indicated that OFCCP “doesn’t have a lot of religious organizations that are Government contractors, but we have some,” and indicated that “we would like to have more, because we want all companies to feel like they can participate in procurement and they will not be discriminated against.”²⁰²⁸

Critics of the religious freedom Directive believe that in practice, it is likely to expand the number of contractors exempt from nondiscrimination requirements for religious reasons,²⁰²⁹ and may give license to discriminate to religious organizations seeking federal contracts.²⁰³⁰ A large group of civil rights organizations stated their opposition to the Directive on the basis that the Directive undermines the executive order OFCCP has the obligation to enforce, which explicitly states religious organizations are not exempt from nondiscrimination requirements on bases other than religion.²⁰³¹

On August 15, 2019, OFCCP proposed a rule that would allow federal contractors to cite religious objections as a valid reason to discriminate against employees on the basis of LGBT status, sex, race, ethnicity, national origin, and other characteristics.²⁰³² The proposed rule would apply to all

²⁰²⁵ Annette Tyman, Lawrence Z. Lorber, and Michael L. Childers, “OFCCP Winds Down Summer By Issuing New Guidance on Religious Discrimination and Announcing New Focused Review Process,” *Seyfarth Shaw, LLP*, Aug. 16, 2018, <https://www.laborandemploymentlawcounsel.com/2018/08/ofccp-winds-down-summer-by-issuing-new-guidance-on-religious-discrimination-and-announcing-new-focused-review-process/>.

²⁰²⁶ DOL OFCCP, Directive 2018-03, *supra* note 2022.

²⁰²⁷ *Ibid.*; *see generally*, U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, “Frequently Asked Questions: Sexual Orientation and Gender Identity,” https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#content.

²⁰²⁹ Scott T. Allen, “OFCCP Signals Emphasis on “Religious Liberty” in Federal Contractor Compliance,” *Foley & Lardner LLP*, Aug. 20, 2018, <https://www.laboremploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>.

²⁰²⁹ Scott T. Allen, “OFCCP Signals Emphasis on “Religious Liberty” in Federal Contractor Compliance,” *Foley & Lardner LLP*, Aug. 20, 2018, <https://www.laboremploymentperspectives.com/2018/08/20/ofccp-signals-emphasis-on-religious-liberty-in-federal-contractor-compliance/>.

²⁰³⁰ Dominic Holden, “Trump Is Giving Federal Contractors A ‘Religious Exemption’ For Discrimination,” *Buzzfeed*, Aug. 17, 2018, <https://www.buzzfeednews.com/amphtml/dominicholden/trump-loophole-lgbt-discrimination>.

²⁰³¹ Coalition Letter Opposing the Elimination of OFCCP, *supra* note 1913.

²⁰³² Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 84 Fed. Reg. 41,677 (proposed Aug. 15, 2019) (comments period to close Sept. 16, 2019); Dominic Holden, “Trump’s Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More,” *BuzzfeedNews*, Aug. 14, 2019, <https://www.buzzfeednews.com/article/dominicholden/trumps-latest-proposal-would-let-businesses-discriminate> [hereinafter Holden, Trump’s Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More”].

religious organizations, including for-profit corporations, with federal contracts provided that they claim a “religious purpose”.²⁰³³ This proposed rule conflicts with a 2014 executive order that prohibited discrimination based on sexual orientation and gender identity by federal contractors.²⁰³⁴

This new rule would allow federal contractors to fire or refuse to hire an individual because of the person’s sexual orientation, gender identity, status as a pregnant woman or parent, or race, so long as the contractor obtained a religious exemption.²⁰³⁵ In response, employees would be able to take their employers to court over such actions, but currently there is no federal law explicitly protecting LGBT workers from discrimination.²⁰³⁶

Pay Equity Directive

In August 2018, OFCCP rescinded Directive 2013-03 (previously referred to as Directive 307) on pay discrimination, replacing it with Directive 2018-05, allowing contractors a greater role in how OFCCP analyzes their compensation systems.²⁰³⁷ The rescinded directive had required OFCCP to conduct its own analysis of which employees should be considered comparable for the purpose of determining discrimination in pay practices. Under the new directive, OFCCP will attempt, where possible, to use the employer’s own compensation system groupings to compare employees. It also now more specifically identifies the statistical methodology it will use to evaluate contractors (a point of contention under the prior directive), where Directive 2013-03 used a more open-ended, case-by-case approach to determining pay discrimination.²⁰³⁸ Criticism of the rollback of Directive 2013-03 claims OFCCP needed the tools in that directive to choose which workers to compare so that it could determine, for example, if white and male employees are more likely to get promoted

²⁰³³ Holden, “Trump’s Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More,” *supra* note 2032. (The Trump administration has stated that the corporation needn’t focus entirely on religion to qualify, but that “The contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor’s only purpose.”)

²⁰³⁴ Implementation of Executive Order 13,672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985 (41 CFR 60).

²⁰³⁵ National Center for Transgender Equality, “Department of Labor Proposes New Plan to Let Employers Discriminate Against Transgender People Using Taxpayer Dollars,” (Aug. 14, 2019), <https://transequality.org/press/releases/departement-of-labor-proposes-new-plan-to-let-employers-discriminate-against>.

²⁰³⁶ Holden, “Trump’s Latest Proposal Would Let Businesses Discriminate Based on LGBTQ Status, Race, Religion, And More,” *supra* note 2032.

²⁰³⁷ U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, Directive 2018-05, Analysis of Contractor Compensation Practices During a Compliance Evaluation (Aug. 24, 2018), <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-05-ESQA508c.pdf>.

²⁰³⁸ Ben Penn and Porter Wells, “Labor Dept. to Relax Obama Pay Bias Policy, Hand Reins to Businesses,” *Bloomberg News*, Apr. 19, 2018, <https://news.bloomberglaw.com/daily-labor-report/labor-dept-to-relax-obama-pay-bias-policy-hand-reins-to-businesses>; David Goldstein and Meridith Shoop, “OFCCP Reins in Compensation Analysis by Rescinding Directive 307 and Issuing New Guidance,” *JDSupra*, Aug. 28, 2018, <https://www.jdsupra.com/legalnews/ofccp-reins-in-compensation-analysis-by-44726/> (accessed Dec. 19, 2019).

or receive advantageous job assignments.²⁰³⁹ Prior to rescinding the directive, OFCCP settled two large pay discrimination cases against State Street Corp. (\$5 million settlement) and Humana (\$2.5 million settlement) for gender and race disparities in pay.²⁰⁴⁰

CRC

CRC has specific legal authority to issue guidance and provide technical assistance to entities that receive federal financial assistance.²⁰⁴¹ CRC maintains a webpage that provides training and compliance assistance information about how to comply with the federal equal opportunity and nondiscrimination laws that it enforces.²⁰⁴² This webpage lists a variety of compliance information, including CRC directives that provide guidance about compliance.²⁰⁴³

Effectiveness of Interaction and Coordination with External Agencies and Organizations

OFCCP

OFCCP has a Memorandum of Understanding (MOU) with EEOC regarding the processing of complaints of employment discrimination between the two agencies.²⁰⁴⁴ This MOU seeks to streamline enforcement by facilitating the exchange of information between the two agencies and reducing duplication of compliance activities, and specifies:

- Prior to the investigation of a charge filed against a contractor, EEOC will contact OFCCP to “(a) determine whether the contractor has been subjected to a compliance review within the past ninety (90) days, and (b) obtain and review copies of any documents relevant to EEOC's investigation which have been secured by the contracting agency in previous compliance reviews.”²⁰⁴⁵
- Prior to conducting a compliance review or a complaint investigation against a contractor, OFCCP will contact EEOC to “(a) determine whether EEOC has processed similar or identical charges against the contractor, (b) determine whether EEOC has information from prior investigations, if any, which may have a bearing on the contractor's compliance with

²⁰³⁹ Alexia Fernández Campbell, “The Trump Administration Wants To Make It Easier For Federal Contractors To Hide Pay Discrimination,” *Vox*, Apr. 24, 2018, <https://www.vox.com/2018/4/24/17262592/trump-labor-department-gender-pay-gap> (accessed Dec. 19, 2019).

²⁰⁴⁰ *Ibid.*

²⁰⁴¹ *See supra* notes 1853, 1855.

²⁰⁴² U.S. Dep’t of Labor, “Training & Compliance Assistance Tools,” <https://www.dol.gov/agencies/oasam/civil-rights-center/external/compliance-assistance>.

²⁰⁴³ *Ibid.*

²⁰⁴⁴ Memorandum of Understanding, U.S. Dep’t of Labor, Office of Federal Contract Compliance and Equal Employment Opportunity Commission Concerning the Process of Complaints of Employment Discrimination as Between the Two Agencies, <https://www.eeoc.gov/eeoc/history/35th/thelaw/mou-ofcc.html> [hereinafter DOL and EEOC Memo Re: Processing Complaints of Employment Discrimination].

²⁰⁴⁵ *Ibid.*

Executive Order 11,246, as amended, and (c) obtain and review any pertinent documents.”²⁰⁴⁶

The MOU indicates that frequent communication between the two agencies should be utilized in order to effectively coordinate these enforcement efforts.²⁰⁴⁷ The MOU establishes certain procedures that both agencies will need to adhere to in order to facilitate this cooperation, such as establishing notification procedures, referral procedures, and “provides that the OFCCP will act as the EEOC’s agent for purposes of receiving complaints and charges under Title VII and states that all complaints received by the OFCCP that allege race, color, religion, sex, or national origin discrimination or retaliation will be received as dual-filed complaints under Title VII.”²⁰⁴⁸ Additionally, this MOU emphasizes that both agencies will “increase their efforts to investigate and remedy systemic or class-based discrimination and confirm that the EEOC will remain the primary investigator of individual discrimination claims.”²⁰⁴⁹

EEOC and OFCCP also work together as OFCCP only has coordinating authority under the Americans with Disabilities Act; EEOC handles any specific complaints of contractor discrimination on the basis of disability under the ADA.²⁰⁵⁰

CRC

CRC’s regulations implementing Section 188 of WIOA require regulated state, local or nongovernmental agencies to designate Equal Opportunity (EO) officers, who are generally charged with “coordinating recipient and state-level compliance with the regulations, with state-level EO Officers being appointed by and reporting directly to the Governor.”²⁰⁵¹ Among the EO Officer responsibilities is “[s]erving as a recipient’s liaison with CRC.”²⁰⁵² CRC also works directly with DOJ’s Civil Rights Division, engaging with its Federal Coordination and Compliance Section (FCCS) and the Disability Rights Section, and the U.S. Department of Education.²⁰⁵³ For one specific systemic discrimination case over which both agencies had jurisdiction, CRC entered into a Memorandum of Agreement with FCCS to “investigate and resolve” the case.²⁰⁵⁴ CRC is required to refer certain cases to other federal agencies under certain circumstances and must refer

²⁰⁴⁶ Ibid.

²⁰⁴⁷ Ibid.

²⁰⁴⁸ Carmen Couden, “Revised Memorandum of Understanding Warns Employers About Coordinated Enforcement Efforts of the OFCCP and EEOC,” *Local Job Network*, Apr. 16, 2012, <https://www.localjobnetwork.com/articles/title/Revised-Memorandum-of-Understanding-Warns-Employers-About-Coordinated-Enforcement-Efforts-of-the-OFCCP-and-EEOC/6182/479> [hereinafter Couden, “Revised Memorandum of Understanding Warns Employers About Coordinated Enforcement Efforts of the OFCCP and EEOC”].

²⁰⁴⁹ Ibid.

²⁰⁵⁰ 41 C.F.R. § 60.742; *see also* U.S. Dep’t of Labor, “The Americans with Disabilities Act of 1990, as amended (ADA),” https://www.dol.gov/ofccp/regs/compliance/ca_ada.htm.

²⁰⁵¹ U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 4, at 4.

²⁰⁵² *See* 29 C.F.R. 38.31(a).

²⁰⁵³ U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 4, at 4.

²⁰⁵⁴ Ibid.

certain cases to EEOC or to a federal grantmaking agency.²⁰⁵⁵ In addition, CRC participates in interagency working groups established by DOJ's FCCS.²⁰⁵⁶

Research, Data Collection and Reporting

DOL awards labor research and evaluation grants, for which the purpose is “to build evidence around issues of importance to the Department of Labor and American public, including critical issues related to worker protection, safety and human capital development.”²⁰⁵⁷ While the Commission is unaware of whether OFCCP or CRC specifically conduct their own independent research, DOL awards research grants for a variety of different labor-related research, including research surrounding civil rights violations under various laws that OFCCP and CRC enforce.²⁰⁵⁸ Some recent examples of awarded grants during the period from January 2017 to January 2019 include research about the “Initial Impact of Section 503 Rules: Understanding Good Employer Practices and the Trends in Disability Violations Among Federal Contractors” and “Analyzing Sexual Orientation and Gender Identity Discrimination in Federal Contracts.”²⁰⁵⁹

OFCCP

OFCCP uses an internal case management system called the Office of Contract Compliance Programs Case Management System (OFCMS), which includes two subsystems:

- The Case Management System, which is the data collection portion of the case management system
- The Executive Information System, which is the reporting part of the system²⁰⁶⁰

In 2014, OFCCP proposed a rule requiring government contractors to report summary data on employee compensation “by sex, race, ethnicity, and specified job categories, as well as other relevant data points such as hours worked, and the number of employees.”²⁰⁶¹ The rule indicated that the summary compensation data “is a critical tool for eradicating compensation discrimination” and would enable OFCCP to “direct its enforcement resources toward entities for which reported data suggest potential pay violations, and not toward entities for which there is no evidence of potential pay violations,” ultimately seeking to enhance greater voluntary compliance and greater deterrence of noncompliant behaviors by contractors and subcontractors.²⁰⁶² The Commission does not have any evidence that OFCCP has implemented this rule.

²⁰⁵⁵ *Ibid.* See, e.g., 29 CFR § 35.32(a); 29 CFR § 38.81(b) and (c).

²⁰⁵⁶ U.S. Dep’t of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 4, at 4.

²⁰⁵⁷ U.S. Dep’t of Labor, “Labor Research and Evaluation Grants,”

<https://www.dol.gov/agencies/oasp/evaluation/currentstudies/Labor-Research-and-Evaluation-Grants>.

²⁰⁵⁸ *Ibid.*

²⁰⁵⁹ *Ibid.*

²⁰⁶⁰ U.S. Dep’t of Labor, OFCCP, Response to USCCR Interrogatory No. 4, at 4.

²⁰⁶¹ Government Contractors, Requirement To Report Summary Data on Employee Compensation, 79 Fed. Reg. 46,561 (Aug. 8, 2014).

²⁰⁶² *Id.*

CRC

CRC has a formal intake process and gathers information pertinent to processing a complaint.²⁰⁶³ CRC has noted that it does not disaggregate data for racial/ethnic data with regard to the complaints it receives.²⁰⁶⁴

²⁰⁶³ U.S. Dep't of Labor, Civil Rights Center, Response to USCCR Interrogatory No. 14, at 17-18.

²⁰⁶⁴ *Ibid.*, 18.

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Chapter 7: U.S. Equal Employment Opportunity Commission

Legal Authority and Responsibility

Congress established the U.S. Equal Employment Opportunity Commission (EEOC) as part of Title VII of the Civil Rights Act of 1964 (Title VII), and EEOC began operating on July 2, 1965.²⁰⁶⁵ EEOC is a bipartisan, independent, presidentially appointed Commission, currently led by Chair Janet Dhillon, with five total members including the Chair, Vice Chair and three other Commissioners (see Figure 7.2).²⁰⁶⁶ EEOC reports that its mission is to “[p]revent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.”²⁰⁶⁷ EEOC is responsible for enforcing federal laws that prohibit discrimination against a job applicant or an employee²⁰⁶⁸ on the basis of race, color, religion,²⁰⁶⁹ sex²⁰⁷⁰ (including pregnancy,²⁰⁷¹ gender identity,²⁰⁷² and sexual orientation²⁰⁷³), national origin,²⁰⁷⁴ age (40 or older),²⁰⁷⁵ disability,²⁰⁷⁶ or genetic information.²⁰⁷⁷ In addition, EEOC protects against discrimination based on retaliation against individuals who complained about discrimination, filed a charge of discrimination, or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.²⁰⁷⁸

Since its creation in 1964, the EEOC’s jurisdiction has grown and now includes the following areas:

²⁰⁶⁵ 42 U.S.C. § 2000e-4; U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 1.

²⁰⁶⁶ U.S. Equal Employment Opportunity Comm’n, “The Commission and the General Counsel,” <https://www.eeoc.gov/eeoc/commission.cfm> [hereinafter EEOC, “The Commission and the General Counsel”].

²⁰⁶⁷ EEOC, *FY 2018-2022 Strategic Plan*, *supra* note 198, at 8.

²⁰⁶⁸ 42 U.S.C. §§ 12112, 12114, 2000e, 2000ff; 29 U.S.C. § 791; Pub. L. 95–555 and relevant guidelines at 29 C.F.R. § 1604.10; Pub. L. 93-112, 87 Stat. 355 (1973) and implementing regulations at 29 C.F.R. Parts 1615 and Part 1640; 29 U.S.C. § 621-634 and relevant guidelines at 29 C.F.R. Parts 1625, 1626 and 1627.

²⁰⁶⁹ 42 U.S.C. § 2000e-16(a)(1).

²⁰⁷⁰ *Id.* § 2000e-16(a)(1); Pub. L. 88–38 and relevant guidelines at 29 C.F.R. Parts 1620 and 1621.

²⁰⁷¹ Pub. L. 95–555 and relevant guidelines at 29 C.F.R. § 1604.10.

²⁰⁷² 42 U.S.C. § 2000e-16(a)(1); *see also* U.S. Equal Employment Opportunity Comm’n, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,”

https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm [hereinafter EEOC, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers”] (noting that “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation”).

²⁰⁷³ 42 U.S.C. § 2000e-16(a)(1); *see also* EEOC, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,” *supra* note 2072 (noting that “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation”).

²⁰⁷⁴ 42 U.S.C. § 2000e-16(a)(1).

²⁰⁷⁵ 29 U.S.C. § 633(a); 42 U.S.C. § 2000e-16(a)(2).

²⁰⁷⁶ 29 U.S.C. § 791; 42 U.S.C. §§ 12112, 12114, 2000e-16(a)(3); Pub. L. 93-112, 87 Stat. 355 (1973) and implementing regulations at 29 C.F.R. Parts 1615 and Part 1640.

²⁰⁷⁷ 42 U.S.C. § 2000ff.

²⁰⁷⁸ *Id.* § 2000e-3(a).

- **Title VII of the Civil Rights Act of 1964 (Title VII)**, as amended, prohibits employment discrimination based on race, color, religion, sex, and national origin.²⁰⁷⁹
- **The Age Discrimination in Employment Act of 1967 (ADEA)**, as amended, prohibits employment discrimination against workers age 40 and older.²⁰⁸⁰
- **The Pregnancy Discrimination Act of 1978 (PDA)** amended Title VII to clarify that discrimination based on pregnancy, childbirth, or related medical conditions constitutes sex discrimination and requires employers to treat women affected by pregnancy and pregnancy-related medical conditions the same as any other employees with temporary disabilities with respect to terms and conditions of employment, including health benefits.²⁰⁸¹
- **The Equal Pay Act of 1963 (included in the Fair Labor Standards Act)**, as amended, prohibits sex discrimination in the payment of wages to men and women performing substantially equal work in the same establishment.²⁰⁸²
- **Titles I and V of the Americans with Disabilities Act of 1990 (ADA)**, as amended, prohibit employment discrimination based on disability by private and state and local government employers. Section 501 and 505 of the Rehabilitation Act of 1973 provide the same protections for federal employees and applicants for federal employment.²⁰⁸³
- **Sections 102 and 103 of the Civil Rights Act of 1991**, which amends Title VII and the ADA to permit jury trials, as well as compensatory and punitive damage awards in intentional discrimination cases (unless the respondent is a government, government agency or political subdivision).²⁰⁸⁴
- **Sections 501 and 505 of the Rehabilitation Act of 1973**, which prohibits discrimination based on disability in the workplace. The law also requires that employers provide reasonable accommodations for employees with disabilities when there is no undue hardship on the employer.²⁰⁸⁵
- **Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA)**, prohibits employment discrimination based on an applicant's or employee's genetic information (including family medical history).²⁰⁸⁶
- **Executive Order 11,478**, providing for equal employment opportunity in the federal government.²⁰⁸⁷

²⁰⁷⁹ *Id.* § 2000e and relevant guidelines at 29 C.F.R. Parts 1602, 1604, 1605, 1606, 1608, and 1614.

²⁰⁸⁰ 29 U.S.C. § 621-634 and relevant guidelines at 29 C.F.R. Parts 1625, 1626 and 1627.

²⁰⁸¹ Pregnancy Discrimination Act, Pub. L. 95-555 and relevant guidelines at 29 C.F.R. § 1604.10.

²⁰⁸² Equal Pay Act, Pub. L. 88-38 and relevant guidelines at 29 C.F.R. Parts 1620 and 1621.

²⁰⁸³ 42 U.S.C. § 12101 and implementing regulations at 29 C.F.R. Parts 1630 and 1640.

²⁰⁸⁴ Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991).

²⁰⁸⁵ Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (1973) and implementing regulations at 29 C.F.R. Parts 1615 and Part 1640.

²⁰⁸⁶ Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 881 (2008) and implementing regulations at 20 C.F.R. Part 1635.

²⁰⁸⁷ Exec Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 12, 1969).

- **Executive Order 12,067**, providing for coordination of federal equal employment opportunity programs.²⁰⁸⁸
- **Executive Order 13,164**, which requires federal agencies to establish procedures to facilitate the provision of reasonable accommodations.²⁰⁸⁹

These laws protect individuals from discrimination in employment based on race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age, disability, and genetic information.²⁰⁹⁰ They also protect against harassment, and prohibit retaliation against a person for opposing employment discrimination, filing a charge of discrimination, or participating in an investigation or lawsuit regarding employment discrimination.²⁰⁹¹ Furthermore, provisions in the ADA, the Rehabilitation Act, and GINA provide limitations on covered entities obtaining health-related information from applicants and employees and require any health-related information obtained to be kept confidential.²⁰⁹²

Generally, most of these laws cover the following entities (with some exceptions):

- Private, state and local government employers with 15 or more employees²⁰⁹³
- Labor organizations
- Employment agencies
- Federal government²⁰⁹⁴

Enforcement Tools

Unlike most of the agencies reviewed in this report, many of which have distinct specific missions, EEOC's primary function is the enforcement of civil rights laws. EEOC's authority covers private sector employers, as well as the federal sector (federal agencies), and also covers the administration of its own internal EEO program for employees. This chapter focuses on its private sector enforcement efforts and tools; there may be certain enforcement tools that are used only in the

²⁰⁸⁸ Exec Order No. 12,067, 43 Fed. Reg. 28,967 (Jun. 30, 1978) and implementing regulations at 29 C.F.R. §§ 1690.101-1690.107.

²⁰⁸⁹ Exec. Order No. 13,164, 82 Fed. Reg. 654 (Jan. 3, 2017).

²⁰⁹⁰ See *supra* notes 2079-89; see also U.S. Equal Employment Opportunity Comm'n, "Prohibited Employment Policies/Practices," <https://www.eeoc.gov/laws/practices/index.cfm> [hereinafter EEOC, "Prohibited Employment Policies/Practices"].

²⁰⁹¹ See *supra* notes 2079-89; EEOC, "Prohibited Employment Policies/Practices," *supra* note 2090.

²⁰⁹² 29 U.S.C. § 705(2); 42 U.S.C. § 12112(d); 42 U.S.C. §§ 2000ff-1(b), 42 U.S.C. § 2000ff-5.

²⁰⁹³ 29 U.S.C. § 206(d); 42 U.S.C. §§ 2000e(b), 2000e(e); 42 U.S.C. § 12111(5)(A); 42 U.S.C. § 2000ff(2)(B), 2000ff(2)(C), 2000ff(2)(D); 29 U.S.C. § 630(b); U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file) (noting that "The ADEA applies to private employers with 20 or more employees, and to state and local government employers of all sizes," and "There is no minimum employee requirement under the Equal Pay Act").

²⁰⁹⁴ 29 U.S.C. § 203(d); 29 U.S.C. § 206(d); 29 U.S.C. §§ 630(b), 630(c), 630(d), 630(e); 42 U.S.C. §§ 2000e; 42 U.S.C. § 12111(2); 42 U.S.C. §§ 2000ff(2)(B), 2000ff(2)(C), 2000ff(2)(D); U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2; Title VII and Executive Order 12,067 also authorize the EEOC to coordinate and lead the federal government's efforts to combat workplace discrimination.

federal sector, and therefore not explored fully in the text below. Though focused on the private sector, some of the data below may include activities that overlap with the federal sector (such as outreach activities) and are not necessarily disaggregated.

The agency enforcement tools EEOC has specific legal authority to use are:

- Complaint Resolution²⁰⁹⁵
- Agency-Initiated Charges²⁰⁹⁶
- Litigation²⁰⁹⁷
- Issuance of Regulations²⁰⁹⁸
- Technical Assistance²⁰⁹⁹
- Publicity²¹⁰⁰
- Community outreach to stakeholders²¹⁰¹
- Data collection, research, and reporting²¹⁰²
- Collaboration with states/local agencies²¹⁰³
- Collaboration with other federal agencies²¹⁰⁴
- Strategic Plan²¹⁰⁵

²⁰⁹⁵ 29 C.F.R. Part 1601 Subpart B, Part 1614; § 1615.170, Part 1626, § 1635.10, Part 1640, Part 1641, Part 1691.

²⁰⁹⁶ *Id.* §§ 1601.11, 1601.27.

²⁰⁹⁷ 42 U.S.C. 2000e-5(f) (If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge); 29 C.F.R. §§ 1601.27, 1620.30(a)(6), 1620.30(b), 1626.15(d), and 1626.19; *see also* U.S. Equal Employment Opportunity Comm'n, *Office of General Counsel, Fiscal Year 2018 Annual Report*, <https://www.eeoc.gov/eeoc/litigation/reports/upload/18annrpt.pdf>. In addition to initiating its own litigation, EEOC also has the ability to file amicus briefs in any lower court, including U.S. Courts of Appeal, federal district courts, state courts, and administrative courts. *See* U.S. Equal Employment Opportunity Comm'n, *Response to USCCR Affected Agency Review* (Jul. 3, 2019) (on file).

²⁰⁹⁸ 42 U.S.C. § 2000e-12(a) and implementing regulations 29 C.F.R. Part 1601; 28 C.F.R. § 42.403.

²⁰⁹⁹ 42 U.S.C. §§ 2000e-4(g)(3), (j) and (k); 29 C.F.R. § 1626.15; *see also* U.S. Equal Employment Opportunity Comm'n, *Congressional Budget Justification Fiscal Year 2019*, pp. 51-59, <https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf> [hereinafter EEOC, *FY 2019 Budget Justification*].

²¹⁰⁰ 28 C.F.R. § 42.405.

²¹⁰¹ 42 U.S.C. 200e-4(h)(2); *see also* EEOC, *FY 2019 Budget Justification*, *supra* note 2099, at 51-59.

²¹⁰² 42 U.S.C. § 2000e-4(e) (stating that “The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken and the moneys it has disbursed . . . It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable”) and (g)(5) (stating that “The Commission shall have power . . . to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public”); 29 C.F.R. § 1602; 28 C.F.R. § 42.406; EEOC, *FY 2018-2022 Strategic Plan*, *supra* note 198, at 18.

²¹⁰³ 42 U.S.C. § 2000e-4(g)(1) (stating that “The Commission shall have power . . . to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals”); 29 C.F.R. § 1601.13 and Subpart G; 29 C.F.R. § 1626.10; EEOC, *FY 2018-2022 Strategic Plan*, *supra* note 198, at 6.

²¹⁰⁴ 29 C.F.R. Part 1690; 28 C.F.R. § 42.413.

²¹⁰⁵ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

- Annual Reports²¹⁰⁶

While EEOC does not have specific legal authority for other tools identified by the Commission, nothing prohibits EEOC from, for example, issuing policy guidance, as described in further detail below.

With respect to EEOC's enforcement authority, EEOC utilizes an administrative process to investigate and resolve charges of discrimination, which is just one of the enforcement tools that it utilizes.²¹⁰⁷ Olatunde Johnson, Professor of Law at Columbia Law School noted that "EEOC lacks adjudicative capacity, but does have the ability to investigate claims and seek conciliation agreements between parties."²¹⁰⁸ However, EEOC has the authority to sue private employers in court under Title VII if the employer is "not a government, governmental agency or political subdivision."²¹⁰⁹ It has the power to litigate against private and governmental employers under ADEA and EPA,²¹¹⁰ and it has the capacity to file amicus briefs under any statute under its jurisdiction, and it primarily files them in the U.S. Court of Appeals; however it will not file them in cases against a federal defendant.²¹¹¹ Under Title VII, EEOC also has the statutory authority to "issue, amend, or rescind suitable procedural regulations."²¹¹² However, Johnson explained that "The EEOC . . . lacks substantive rulemaking power. Title VII . . . grants the EEOC power to issue procedural regulations but not the power to issue substantive regulations defining the ambit of Title VII."²¹¹³ Under other statutes that it enforces though, EEOC does appear to have substantive rulemaking power.²¹¹⁴

Budget and Staffing

For FY 2016, the President's Budget requested \$373.1 million for EEOC,²¹¹⁵ and Congress appropriated \$364.5 million.²¹¹⁶ The President's Budget requested \$376.6 million for EEOC in FY

²¹⁰⁶ 42 U.S.C. § 2000e-4(e); see, e.g., EEOC, *FY 2019 Budget Justification*, supra note 2099, at 51-59.

²¹⁰⁷ 29 C.F.R. Part 1601 Subpart B.

²¹⁰⁸ Johnson, *Beyond the Private Attorney General*, supra note 36.

²¹⁰⁹ 42 U.S.C. 2000e-5(f)(1); 29 C.F.R. § 1601.27.

²¹¹⁰ See supra note 2097.

²¹¹¹ U.S. Equal Employment Opportunity Comm'n, "Amicus Curiae Program,"

<https://www.eeoc.gov/eeoc/litigation/amicus.cfm>.

²¹¹² 42 U.S.C. § 2000e-12.

²¹¹³ Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 *Duke Law Journal* (2017), p. 1784, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3531&context=faculty_scholarship.

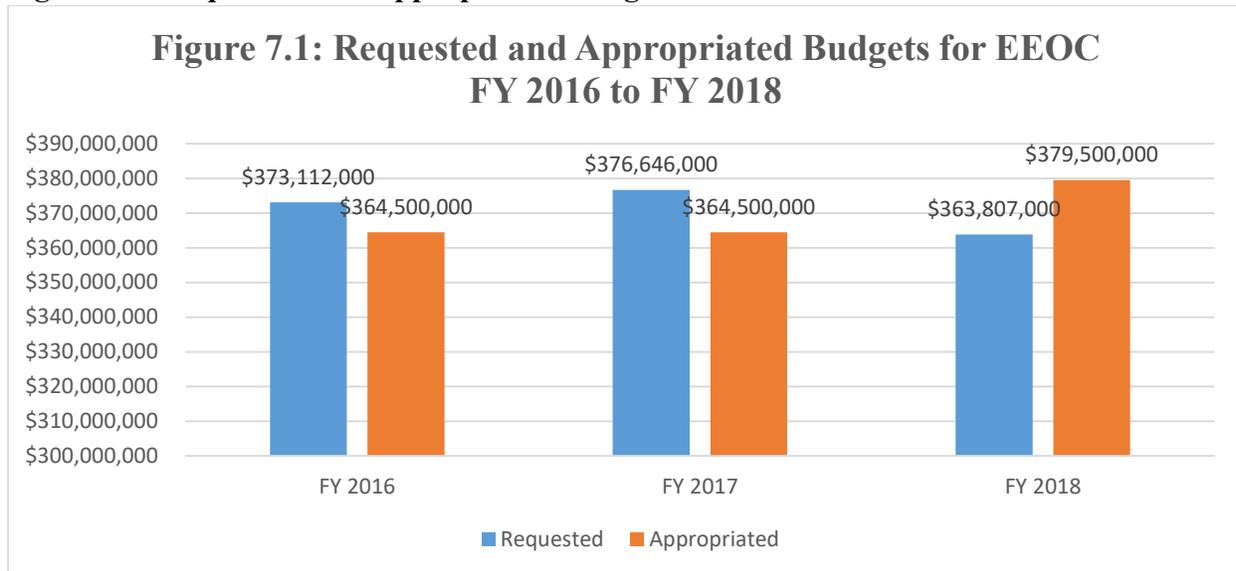
²¹¹⁴ 42 U.S.C. § 2000ff-10; 26 U.S.C. § 628.

²¹¹⁵ U.S. Equal Employment Opportunity Comm'n, *Congressional Budget Justification Fiscal Year 2016*, February 2015, p. 12, <https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>.

²¹¹⁶ U.S. Equal Employment Opportunity Comm'n, *Congressional Budget Justification Fiscal Year 2018*, May 2017, p. 10, <https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf> [hereinafter EEOC, *FY 2018 Budget Justification*].

2017,²¹¹⁷ and Congress appropriated \$364.5 million,²¹¹⁸ which was equal to the amount of EEOC's FY 2016 appropriated budget. In FY 2018, the President's Budget requested \$363.8 million for EEOC,²¹¹⁹ a decrease of approximately \$12.8 million from what was requested for FY 2017,²¹²⁰ and Congress appropriated \$379.5 million for FY 2018.²¹²¹ Between FY 2016 and FY 2018, EEOC's appropriated budget increased by \$15 million. See Figure 7.1.

Figure 7.1: Requested and Appropriated Budgets for EEOC



Source: U.S. Equal Employment Opportunity Commission, *Congressional Budget Justification Fiscal Year 2016*, February 2015, p. 12, <https://www.eeoc.gov/eeoc/plan/upload/2016budget.pdf>; U.S. Equal Employment Opportunity Commission, *Congressional Budget Justification Fiscal Year 2017*, p. 14, February 2016, <https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf>; U.S. Equal Employment Opportunity Commission, *Congressional Budget Justification Fiscal Year 2018*, May 2017, p. 10, <https://www.eeoc.gov/eeoc/plan/upload/2018budget.pdf>; U.S. Equal Employment Opportunity Commission, *Congressional Budget Justification Fiscal Year 2019*, February 2018, p. 12, <https://www.eeoc.gov/eeoc/plan/upload/2019budget.pdf>; U.S. Equal Employment Opportunity Commission, *Congressional Budget Justification Fiscal Year 2020*, March 2019, p. 14, <https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>.

Proposed Merger with DOL

As mentioned in Chapter 4, in May 2017, the Trump Administration proposed merging DOL's OFCCP into EEOC.²¹²² While EEOC and OFCCP cover similar areas, they have separate jurisdictions and play different roles, raising concerns for critics of the proposed merger.²¹²³

²¹¹⁷ U.S. Equal Employment Opportunity Comm'n, *Congressional Budget Justification Fiscal Year 2017*, p. 14, February 2016, <https://www.eeoc.gov/eeoc/plan/upload/2017budget.pdf> [hereinafter EEOC, *FY 2017 Budget Justification*].

²¹¹⁸ EEOC, *FY 2019 Budget Justification*, *supra* note 2099, at 12.

²¹¹⁹ EEOC, *FY 2018 Budget Justification*, *supra* note 2116, at 10.

²¹²⁰ EEOC, *FY 2017 Budget Justification*, *supra* note 2117, at 14; EEOC, *FY 2018 Budget Justification*, *supra* note 2116, at 10.

²¹²¹ EEOC, *FY 2020 Budget Justification*, *supra* note 260, at 14.

²¹²² See *supra* note 1904-14 (discussing DOL OFCCP merger with EEOC).

²¹²³ Casuga *et al.*, "Idea to Merge EEOC, Contracting Watchdog Not Well-Received," *supra* note 1906; Coalition Letter Opposing the Elimination of OFCCP, *supra* note 1913.

Ultimately, this proposal fell flat during the budget process, and Congress allocated EEOC and OFCCP funds separately, preempting any merger.²¹²⁴

Staffing

In FY 2016, EEOC had 2,202 FTE employees.²¹²⁵ The number of FTE employees in FY 2017 dropped slightly to 2,082,²¹²⁶ and further dropped to 1,968 FTE employees in FY 2018.²¹²⁷ EEOC reported that it had 33 contractors “providing services through our Office of Information Technology,” as of April 2018.²¹²⁸ EEOC noted in its interrogatories to the Commission that “all EEOC employees and contractors have some role in ‘work[ing] on ... enforcement of the relevant civil rights statutes.’”²¹²⁹

EEOC leadership is comprised of five Commissioners, as well as the agency’s General Counsel.²¹³⁰ Commissioners serve staggered five-year terms, and no more than three Commissioners can be affiliated with the same party.²¹³¹ The Chair is responsible for policy administration and implementation, financial management, and organizational development of the Commission.²¹³² The Vice Chair and the Commissioners also participate in developing and approving Commission policies, as well as issuing charges of discrimination, and authorizing the filing of lawsuits.²¹³³ The General Counsel supports the Commission to provide direction, coordination, and supervision to EEOC's litigation program.²¹³⁴ See Figure 7.2.

²¹²⁴ Casuga, “Senate Funding Bill Rejects Merger of EEOC, Contractor Watchdog,” *supra* note 1906; Eastman, “President Trump’s Proposed FY 2019 Budget Abandons OFCCP/EEOC Merger Plan, While Slashing Agencies’ Funding,” *supra* note 1907; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018).

²¹²⁵ EEOC, *FY 2018 Budget Justification*, *supra* note 2116, at 10.

²¹²⁶ EEOC, *FY 2019 Budget Justification*, *supra* note 2099, at 12.

²¹²⁷ EEOC, *FY 2020 Budget Justification*, *supra* note 260, at 14.

²¹²⁸ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatory No. 9, at 10.

²¹²⁹ *Ibid.*

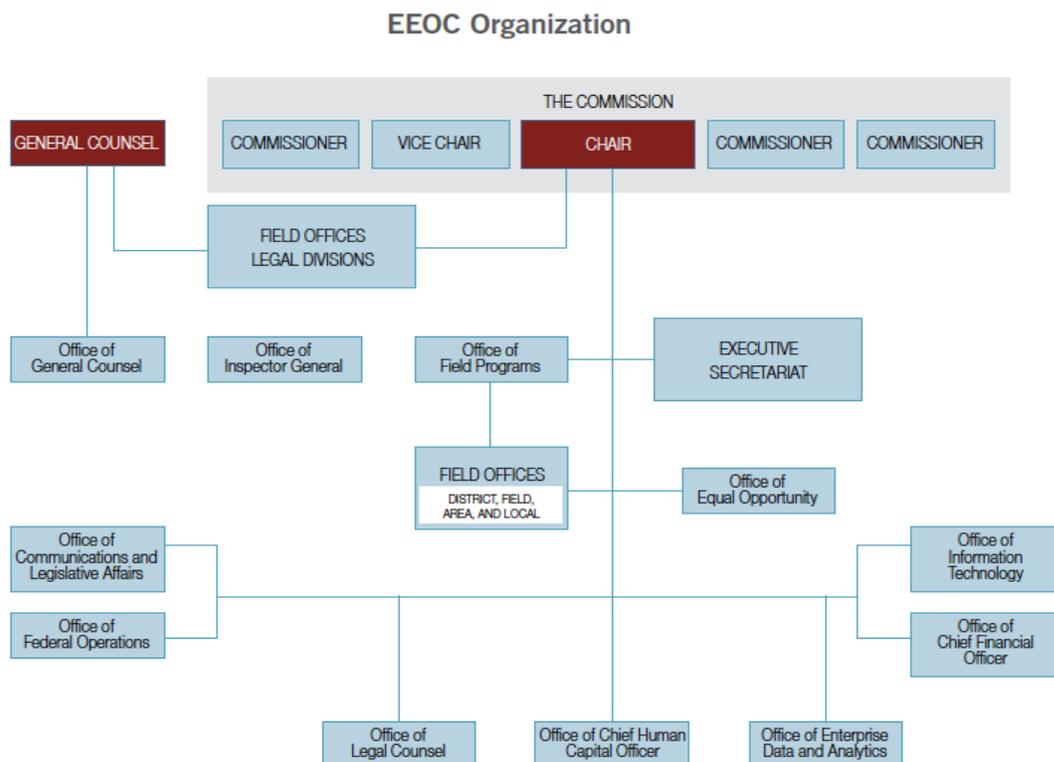
²¹³⁰ 42 U.S.C. §§ 2000e-4(a) and 2000e-4(b)(1); EEOC, “The Commission and the General Counsel,” *supra* note 2066.

²¹³¹ 42 U.S.C. § 2000e-4(a); U.S. Equal Employment Opportunity Comm’n, *Performance and Accountability Report, Fiscal Year 2017*, p. 10, <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf> [hereinafter EEOC, *FY 2017 Performance and Accountability Report*].

²¹³² EEOC, *FY 2017 Performance and Accountability Report*, *supra* note 2131, at 10.

²¹³³ *Ibid.*

²¹³⁴ 42 U.S.C. § 2000e-4(b)(1); U.S. EEOC, *FY 2017 Performance and Accountability Report*, *supra* note 2131, at 10.

Figure 7.2: EEOC Organizational Chart

Source: U.S. Equal Employment Opportunity Commission, *Performance and Accountability Report, Fiscal Year 2018*, p. 11, <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>.

Assessment

Prioritization of Civil Rights Agency-Wide

The EEOC is an independent Commission, without an agency reporting structure parallel to agency civil rights enforcement offices. The Commissioners are the head of the agency. Currently, there are two vacant Commissioner positions at EEOC, and the General Counsel position is currently vacant as well.²¹³⁵ Prior to that, in January 2019, there were three Commissioner positions vacant at EEOC, which meant that there were not enough Commissioners for a quorum.²¹³⁶ The lack of quorum was due to a hold on all pending EEOC nominees because Senator Mike Lee (R-Utah) objected to the reappointment of now-former Commissioner Chai Feldblum, the first openly LGBT person to sit on the Commission; his opposition was based on what he

²¹³⁵ EEOC, “The Commission and the General Counsel,” *supra* note 2066.

²¹³⁶ Paige Smith, “Lacking Quorum, Civil Rights Agency Awaits Renominations,” *Bloomberg News*, Jan. 3, 2019, <https://news.bloomberglaw.com/daily-labor-report/lacking-quorum-civil-rights-agency-awaits-renominations>.

termed her “radical views on marriage.”²¹³⁷ Some argued that this lack of quorum hindered EEOC’s ability to effectively enforce the employment antidiscrimination laws,²¹³⁸ as generally decisions on big ticket lawsuits, significant spending, and other policy decisions cannot be made without a quorum.²¹³⁹ However, then Acting Chair Victoria Lipnic stated, “[t]here are a lot of responsibilities delegated that are related to the normal functioning operations of the EEOC: taking in charges, investigating them, and issuing charge determinations,” and has added that “[a]ll of that will continue.”²¹⁴⁰ On May 15, 2019, Janet Dhillon was sworn in as the Chair of the EEOC, after President Trump nominated her on June 29, 2017 and the Senate confirmed her on May 8, 2019.²¹⁴¹ The confirmation of Dhillon as Chair restored a quorum at EEOC.²¹⁴²

Although in the context of federal EEO programs, which are not the subject of this report, Dexter Brooks testified to the Commission that most of EEOC’s work is to address “bad actions” that have already happened, but that it would be “ideal for us to be able to have access to data and trends” to identify problem areas.²¹⁴³

According to its website, EEOC has placed a high priority on the enforcement of systemic discrimination, as “a strong nationwide program is critical to fulfilling its mission of eradicating discrimination in the workplace.”²¹⁴⁴

Strategic Planning and Self-Evaluation

EEOC’s strategic planning process requires its leadership to “reflect upon the statutory mission of the agency, reassess prior goals and objectives, and identify any new goals and objectives that will

²¹³⁷ Tim Fitzsimons, “GOP senator blocks reappointment of EEOC’s only LGBTQ commissioner,” *NBC News*, Dec. 19, 2018, <https://www.nbcnews.com/feature/nbc-out/gop-senator-holding-reappointment-eeoc-s-only-lgbtq-commissioner-n949611> [hereinafter Fitzsimons, “GOP senator blocks reappointment of EEOC’s only LGBTQ commissioner”]; see also Mike Lee, U.S. Sen., “Press Release: A Threat to Marriage from the EEOC,” Feb. 9, 2018, <https://www.lee.senate.gov/public/index.cfm/2018/2/a-threat-to-marriage-from-the-eeoc> (discussing Senator Lee’s view that “Feldblum is no typical Democrat . . . [h]er radical views on marriage and the appropriate use of government power place her far outside even the liberal mainstream,” and his recommendation that “President Trump and Senate Democrats should reject Chai Feldblum’s divisive agenda by finding a more mainstream candidate for the EEOC, one who respects the institution of marriage and religious freedom for all Americans.”).

²¹³⁸ Fitzsimons, “GOP senator blocks reappointment of EEOC’s only LGBTQ commissioner,” *supra* note 2137 (quoting a statement from Sunu Chandy, Legal Director at the National Women’s Law Center, “[n]ot having a full commission to lead this work will hamper important civil rights efforts that are currently underway, especially in this #metoo era.”).

²¹³⁹ Joshua Roberts, “EEOC Delegated Duties to Work Around Lack of Quorum,” *Bloomberg Law*, Jan. 16, 2019, <https://news.bloomberglaw.com/daily-labor-report/eeoc-delegated-duties-to-work-around-lack-of-quorum-1>.

²¹⁴⁰ Chris Opfer, “LGBT Debate Shackles Trump Harassment Police,” Dec. 3, 2018, <https://news.bloomberglaw.com/daily-labor-report/lgbt-debate-shackles-trump-harassment-police>.

²¹⁴¹ U.S. Equal Employment Opportunity Comm’n, “Janet Dhillon Becomes Chair of the Equal Employment Opportunity Commission” (May 15, 2019).

²¹⁴² Patricia Barnes, “The EEOC Is Back In Business, At The Urging Of Business,” *Forbes*, May 31, 2019, <https://www.forbes.com/sites/patriciabarnes/2019/05/31/the-eeoc-is-back-in-business-at-the-urging-of-business/#76101060438d>.

²¹⁴³ Brooks Testimony, *Sexual Harassment in Government Workplaces Briefing*, p. 8.

²¹⁴⁴ U.S. Equal Employment Opportunity Comm’n, “Systemic Discrimination,” <https://www.eeoc.gov/eeoc/systemic/>.

enable the agency to meet its statutory mission,” which is useful to Congress and stakeholders to identify key external factors that “may affect the agency’s ability to carry out its mandate.”²¹⁴⁵ In producing the plan, the EEOC “solicited and received comments from a wide range of stakeholders and the public.”²¹⁴⁶ EEOC’s current strategic plan aligns its policy priorities with its Strategic Enforcement Plan, which “do not materially differ” from EEOC’s current agency policy priorities.²¹⁴⁷ EEOC’s *Strategic Plan for Fiscal years 2018-2022* outlines two strategic objectives and one management objective relevant to civil rights enforcement, which are:

- Combat and prevent employment discrimination through the strategic application of EEOC’s law enforcement authorities;
- Prevent employment discrimination and promote inclusive workplaces through education and outreach; and
- Achieve organizational excellence.²¹⁴⁸

These strategic objectives have not substantively changed from those outlined in EEOC’s *Strategic Plan for Fiscal years 2012-2016*.²¹⁴⁹ With respect to its first Strategic Objective of judiciously utilizing its law enforcement authority, EEOC’s outcome goals strive to remedy and prevent discriminatory employment practices through the strategic application of EEOC’s law enforcement authorities.²¹⁵⁰ According to its strategic plan, in order to measure the success of this first Strategic Objective, EEOC assesses its performance by setting benchmarks for a “significant proportion” of EEOC and FEPA’s resolutions containing “targeted, equitable relief; by resolving at least 9 percent of enforcement lawsuits each year; by reporting its efforts to identify and resolve systemic discrimination; by setting benchmarks for a “significant proportion” of federal agencies to improve their fair employment practices based on EEOC’s oversight and recommendations; and to maintain a high quality standard for investigations, conciliations, hearings, and appeals based on established criteria.²¹⁵¹ With respect to its education and outreach Strategic Objective, EEOC strives for members of the public to understand employment discrimination laws and know their rights under the laws, and strives for employers, unions, and other covered entities to prevent discrimination, address EEO issues, and achieve more inclusive work environments.²¹⁵² In order to measure its success under this objective, EEOC will expand its use of technology for education and outreach; leverage collaborations with partner organizations to “assist in breaking employment barriers;” and update guidance and other educational materials to be more user-friendly resources for information.²¹⁵³ With respect to its Management Objective of achieving organizational

²¹⁴⁵ EEOC, *FY 2018-2022 Strategic Plan*, *supra* note 198, at 3.

²¹⁴⁶ *Ibid.*, 1.

²¹⁴⁷ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatory No. 3, at 8.

²¹⁴⁸ EEOC, *FY 2018-2022 Strategic Plan*, *supra* note 198, at 9.

²¹⁴⁹ U.S. Equal Employment Opportunity Comm’n, *Strategic Plan for Fiscal years 2012-2016*, p. 11, https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf.

²¹⁵⁰ EEOC, *FY 2018-2022 Strategic Plan*, *supra* note 198, at 9; U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

²¹⁵¹ EEOC, *FY 2018-2022 Strategic Plan*, *supra* note 198, at 10.

²¹⁵² *Ibid.*, 9.

²¹⁵³ *Ibid.*

excellence, EEOC strives to cultivate a “skilled and committed” workforce, improve the organization through advancing performance management, advance diversity and inclusion in the workplace, foster constructive employee and labor management relations, strive to implement quality practices in all programs, and model the practices it promotes.²¹⁵⁴ In order to measure its success under this objective, EEOC assesses its performance by measuring performance improvement with respect to employee engagement and inclusiveness, utilizing survey data to provide baseline measures of the effectiveness of EEOC services, making yearly progress on the modernization of its case management systems for program offices, and budgeting to prioritize funding to achieve EEOC’s strategic goals.²¹⁵⁵

Under its statute, EEOC is required to submit a report to Congress and the President after each fiscal year detailing any actions it has taken and any money it has disbursed.²¹⁵⁶ It also must make “further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.”²¹⁵⁷ In all fiscal years in question (FY 2016-FY 2018), EEOC reported that it met or exceeded the majority of its performance measures as set forth in the strategic plan.²¹⁵⁸

In its FY 2018 Performance and Accountability Report, the EEOC Inspector General’s statement indicated that EEOC has had some management challenges, having met less of its Management Objective performance measures as compared to its other strategic objectives’ performance measures.²¹⁵⁹ The Inspector General noted, “EEOC faces barriers to significantly advance its mission to ‘prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace,’” identifying strategic performance management, data analytics, and human capital as the specific challenges.²¹⁶⁰ It indicated that in FY 2018, EEOC had improved its management of data analytics, and was working on “improving its human capital processes to correct serious and long-standing performance management inadequacies.”²¹⁶¹ The Inspector General went on to say that the agency “continues to face serious challenges in managing strategic performance, particularly in strategic planning and performance measurement.”²¹⁶² The Inspector General went on to state that EEOC’s current performance measures were geared to measure activity rather than outcomes, and recommended that EEOC institute measures to “quantify the effectiveness of EEOC’s efforts.”²¹⁶³

²¹⁵⁴ *Ibid.*, 9.

²¹⁵⁵ *Ibid.*

²¹⁵⁶ 42 U.S.C. § 2000e-4(e).

²¹⁵⁷ *Id.*

²¹⁵⁸ U.S. Equal Employment Opportunity Comm’n, *Fiscal Year 2016 Performance and Accountability Report*, p. 18, <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>; EEOC, *FY 2017 Performance and Accountability Report*, *supra* note 2131, at 19.

²¹⁵⁹ U.S. Equal Employment Opportunity Comm’n, *Fiscal Year 2018 Performance and Accountability Report*, pp. 26-30, <https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf>.

²¹⁶⁰ *Ibid.*, 52.

²¹⁶¹ *Ibid.*, 52.

²¹⁶² *Ibid.*, 52.

²¹⁶³ *Ibid.*, 52.

In addition to its strategic plan, EEOC issues a specific strategic plan for enforcement, “to set forth its continued commitment to focus efforts on those activities likely to have strategic impact [defined as “a significant effect on the development of the law or on promoting compliance across a large organization, community, or industry”] advancing equal opportunity and freedom from discrimination in the workplace.”²¹⁶⁴ EEOC outlined certain national priority areas in its Strategic Enforcement Plan FY 2017 – FY 2021, which are:

- Eliminating Barriers in Recruitment and Hiring
- Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination
- Addressing Selected Emerging and Developing Issues
- Ensuring Equal Pay Protections for All Workers
- Preserving Access to the Legal System
- Preventing Systemic Harassment²¹⁶⁵

These priority areas have not changed significantly²¹⁶⁶ from EEOC’s previous strategic enforcement plan.²¹⁶⁷

In 2005, the EEOC formed a task force to examine EEOC’s efforts to address systemic discrimination; the task force ultimately recommended action items for initiating operational reforms, enhancing expertise, creating incentives, improving technology, staffing, and additional investments to address systemic trends.²¹⁶⁸ According to EEOC’s 2016 self-evaluation, *A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*, since 2005,²¹⁶⁹ EEOC has “made considerable progress in achieving a truly nationwide, coordinated, and strategic systemic program.”²¹⁷⁰ The report found:

- EEOC has built its capacity so that it is able to undertake systemic investigations and litigation in all of its districts, and each district has initiated systemic investigations and lawsuits.
- Coordination of systemic investigations has significantly increased, with increased information sharing and partnership across offices.

²¹⁶⁴ U.S. Equal Employment Opportunity Comm’n, *Strategic Enforcement Plan FY 2017 – FY 2021*, p. 1, <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf> [hereinafter EEOC, *FY 2017-2021 Strategic Enforcement Plan*].

²¹⁶⁵ *Ibid.*, 6-9.

²¹⁶⁶ For changes to the EEOC’s substantive priority areas see *Ibid.*, p. 2.

²¹⁶⁷ See U.S. Equal Employment Opportunity Comm’n, *Strategic Enforcement Plan FY 2013 – FY 2016*, pp. 9-10, <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>.

²¹⁶⁸ U.S. Equal Employment Opportunity Comm’n, *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission*, March 2006, pp. iv-v, https://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf.

²¹⁶⁹ EEOC, *A Review of the Systemic Program*, *supra* note 213, at iv.

²¹⁷⁰ *Ibid.*

- EEOC has bolstered its enforcement staff numbers and training resources for staff, which has ultimately led to a 250 percent increase in systemic investigations since 2011.
- Over 80 percent of systemic resolutions raised identified national priority issues in FY 2015.
- Through the voluntary resolution process, the conciliation success rate has tripled since 2007, from 21 percent in 2007 to 64 percent in 2015.
- The systemic litigation program has achieved a 10-year success rate of 94 percent for systemic lawsuits.
- From 2011 through 2015, EEOC has tripled the amount of monetary relief for victims, compared to the monetary relief recovered in the first five years after the Systemic Task Force Report (2006).²¹⁷¹

Complaint Processing, Agency-Initiated Charges, and Litigation

EEOC is responsible for enforcing federal laws that prohibit employment discrimination on protected bases.²¹⁷² In order to carry out its mission, EEOC has two major enforcement mechanisms available: administrative enforcement and litigation.²¹⁷³ EEOC uses the administrative enforcement process when an individual or a Commissioner files a charge of discrimination, and EEOC may initiate an investigation and potentially a conciliation process in order to resolve the charge (including through resolution of systemic discrimination).²¹⁷⁴ EEOC can also initiate directed investigations under the EPA and ADEA.²¹⁷⁵ EEOC may initiate litigation when it believes that an entity (including an individual, class, and/or group) has violated one or more federal antidiscrimination law or laws that EEOC enforces, if other enforcement efforts failed to resolve the violation.²¹⁷⁶ This applies if the respondent is a private employer; otherwise the U.S. Attorney General (DOJ) is authorized to litigate if the respondent is a state or local government employers under Title VII, the ADA, or GINA.²¹⁷⁷ The EEOC Office of General Counsel (OGC) conducts litigation on behalf of EEOC.²¹⁷⁸

²¹⁷¹ Ibid., iv-v.

²¹⁷² See *supra* notes 2079-89.

²¹⁷³ See *supra* notes 2095, 2097; U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2.

²¹⁷⁴ 29 C.F.R. Part 1601 Subpart B, Part 1614; § 1615.170, Part 1626, § 1635.10, Part 1640, Part 1641, Part 1691; U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2.

²¹⁷⁵ U.S. Equal Employment Opportunity Comm'n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file); EEOC, *A Review of the Systemic Program*, *supra* note 213, at 4 (noting in footnote no. 22 that "Directed investigations are initiated by EEOC field office directors under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. (1967), and the Equal Pay Act (EPA), 29 U.S.C. §206(d) (1963), under the provisions of Section 11 of the Fair Labor Standards Act, 29 U.S.C. §211.")

²¹⁷⁶ 42 U.S.C. 2000e-5(f) (If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge); U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatories, Introduction, at 2.

²¹⁷⁷ See *supra*, notes 2097.

²¹⁷⁸ U.S. Equal Employment Opportunity Comm'n, "Litigation," <https://www.eeoc.gov/eeoc/litigation/index.cfm>.

An individual may file a private workplace discrimination lawsuit against a covered entity, but before going to court, that individual must first file a charge of discrimination with the EEOC,²¹⁷⁹ in order to allow EEOC the opportunity to determine if there is a reasonable cause to believe that discrimination occurred and provide for a voluntary resolution when possible and appropriate.²¹⁸⁰ Commissioners can also file a charge of discrimination on behalf of an aggrieved individual working in a covered entity, at their discretion.²¹⁸¹ EEOC reported to the Commission that EEOC Commissioners filing a charge typically is done only in cases in which the alleged discrimination is systemic “or of a different nature than an individual charge alleges.”²¹⁸² EEOC notes that in the past five years, approximately 75 percent of Commissioner charges have focused on discrimination in hiring, as “victims typically lack information about a discriminatory hiring policy or practice.”²¹⁸³

During an investigation or after EEOC determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, EEOC is required to offer alternative dispute resolution to help private sector parties resolve charges of discrimination,²¹⁸⁴ with mediation being a common form of alternate dispute resolution that EEOC offers.²¹⁸⁵ EEOC reported to the Commission that:

EEOC offers an alternative dispute resolution process to resolve certain charges prior to the [continuation] of any investigation. The respondent and charging party are invited to voluntarily mediate these charges. During mediation, the focus of attention is not on whether the law has been violated, but rather, whether the issue can be resolved to the parties’ mutual satisfaction. Charges not resolved in mediation are investigated to determine if there is reasonable cause to believe that discrimination has occurred.²¹⁸⁶

²¹⁷⁹ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). EEOC noted that this is true for all laws it enforces, with the exception of the Equal Pay Act (EPA). EEOC indicated that under the EPA, an individual doesn’t need to file a charge with the EEOC first before filing an EPA lawsuit in District Court. *See also* U.S. Equal Employment Opportunity Comm’n, “Filing A Charge of Discrimination,” <https://www.eeoc.gov/employees/charge.cfm>.

²¹⁸⁰ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2.

²¹⁸¹ 29 C.F.R. § 1601.11.

²¹⁸² U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2; EEOC, *A Review of the Systemic Program*, *supra* note 213, at 16-17.

²¹⁸³ *Ibid.*

²¹⁸⁴ 29 C.F.R. §§ 1601.20 (settlement prior to issuance of a determination), 1601.24 (mediation after issuance of a reasonable cause determination), 1691.9(a).

²¹⁸⁵ This option is also available, upon request, at later points in the process. *See*, U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2; U.S. Equal Employment Opportunity Comm’n, “Alternative Dispute Resolution (ADR),” https://www.eeoc.gov/federal/fed_employees/adr.cfm; U.S. Equal Employment Opportunity Comm’n, “Questions and Answers About Mediation,” <https://www.eeoc.gov/eeoc/mediation/qanda.cfm> [hereinafter EEOC, “Questions and Answers About Mediation”].

²¹⁸⁶ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019)(on file).

Whether EEOC offers mediation under Title VII in complaints brought against private employers will depend on a range of factors, including the nature of the case, the relationship between the parties, the case's size and complexity, and the relief sought by the charging party.²¹⁸⁷ Both parties must voluntarily opt to mediate the charges in hopes of coming to a negotiated agreement.²¹⁸⁸

In private sector cases, if mediation is not an effective method of obtaining a resolution then EEOC will initiate an investigation to determine if there is reasonable cause to believe discrimination occurred, and if so, will utilize conciliation as a means of remedying the alleged discriminatory practice.²¹⁸⁹ If conciliation is not effective, then EEOC is authorized to bring a civil action against the respondent in federal court.²¹⁹⁰

EEOC also has formalized agreements with state and local Fair Employment Practices Agencies (FEPAs), who administer state or local fair employment laws, to handle administrative enforcement (investigations, conciliation, etc.) on the state and local level.²¹⁹¹ EEOC currently has agreements with 92 state and local FEPAs, which have resolved over 36,000 employment discrimination charges since FY 2016.²¹⁹² EEOC also contracts with approximately 64 Tribal Employment Rights Organizations (TEROs) responsible for advocating for Native American employment issues with employers on reservations or other Native American lands.²¹⁹³

EEOC has several remedies for employment discrimination. When discrimination is discovered, “the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred.”²¹⁹⁴ The remedy will depend on the nature and severity of the discriminatory act and effect on the victim, however the employer will need to cease its discriminatory practices and ensure that discriminatory acts are prevented in the future.²¹⁹⁵ Depending on the case, victims may be awarded remedies that include:

- *Targeted Equitable Relief*. This is non-monetary and non-generic relief that explicitly addresses the employment discrimination at issue in the case. Targeted equitable relief can

²¹⁸⁷ EEOC, “Questions and Answers About Mediation,” *supra* note 2185.

²¹⁸⁸ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2; EEOC, “Questions and Answers About Mediation,” *supra* note 2185.

²¹⁸⁹ 29 C.F.R. § 1601.24(a); 29 C.F.R. § 1691(a); U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2-3.

²¹⁹⁰ 29 C.F.R. § 1601.27; 29 C.F.R. § 1691(b)(3); U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 2; U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file). EEOC noted: “As noted in our interrogatories, there are exceptions to this statement. If the respondent is a state or local employer and the case is under Title VII, the ADA, or GINA, the U.S. Attorney General is authorized to sue.” *Ibid*.

²¹⁹¹ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatories, Introduction, at 3.

²¹⁹² *Ibid*.

²¹⁹³ *Ibid*.

²¹⁹⁴ U.S. Equal Employment Opportunity Comm’n, “Remedies For Employment Discrimination,” <https://www.eeoc.gov/employees/remedies.cfm> [hereinafter EEOC, “Remedies For Employment Discrimination”].

²¹⁹⁵ *Ibid*.; *see also* 29 C.F.R. § 1614.501 (remedies for complaints filed against federal sector employers).

include training of employees and supervisors, development of policies and practices to prevent future incidents, and external monitoring of employer actions.²¹⁹⁶

- Recovery of attorney’s fees, expert witness fees, and court costs.²¹⁹⁷
- *Compensatory and Punitive Damages.* These damages may be awarded in private sector cases when intentional unlawful discrimination has been discovered in cases involving race, color, national origin, sex, religion, disability, or genetic information. This includes Title VII cases involving intentional wage-based sex discrimination.²¹⁹⁸ They can compensate for out-of-pocket expenses incurred or emotional harm suffered from the discrimination and can punish an employer for particularly malicious acts of discrimination.²¹⁹⁹
- *Liquidated Damages.* Cases involving intentional age discrimination or intentional sex-based wage discrimination under the EPA cannot collect compensatory or punitive damages, but may be entitled to collect liquidated damages, which can be used to punish particularly malicious acts of discrimination.²²⁰⁰

There are limits on the amount of compensatory and punitive damages that can be awarded, based on the size of the employer.²²⁰¹ The amount of liquidated damages awarded can be equal to the amount of back pay awarded to the victim.²²⁰²

With regard to EEOC’s private sector enforcement (not including charges filed with state or local FEPAs), in FY 2016, EEOC processed 91,503 new charges, and resolved a total of 97,443 charges (which includes charges from the pending inventory from previous fiscal years).²²⁰³ The number of new charges processed in FY 2017 decreased to 84,254, however while the total number of charges EEOC resolved in FY 2017 increased to 99,109.²²⁰⁴ In FY 2018, EEOC processed 76,418 new charges and resolved 90,558 charges (again including pending inventory from previous years).²²⁰⁵ The pending inventory decreased from 73,508 in FY 2016 to 61,621 in FY 2017, and now stands at 49,067 for FY 2018.²²⁰⁶ See Figure 7.3.

²¹⁹⁶ By 2022, the EEOC intends that a “significant proportion of EEOC and FEPA’s resolutions contain targeted equitable relief.” EEOC, *FY 2018-2022 Strategic Plan*, *supra* note 198, at 10 and 14.

²¹⁹⁷ EEOC, “Remedies For Employment Discrimination,” *supra* note 2194.

²¹⁹⁸ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

²¹⁹⁹ EEOC, “Remedies For Employment Discrimination,” *supra* note 2194.

²²⁰⁰ *Ibid.*

²²⁰¹ *Ibid.* A limit of \$50,000 is imposed for employers with 15-100 employees; a limit of \$100,000 is imposed for employers with 101-200 employees; a limit of \$200,000 is imposed for employers with 201-00 employees; and a limit of \$300,000 is imposed for employers with more than 500 employees.

²²⁰² EEOC, “Remedies For Employment Discrimination,” *supra* note 2194.

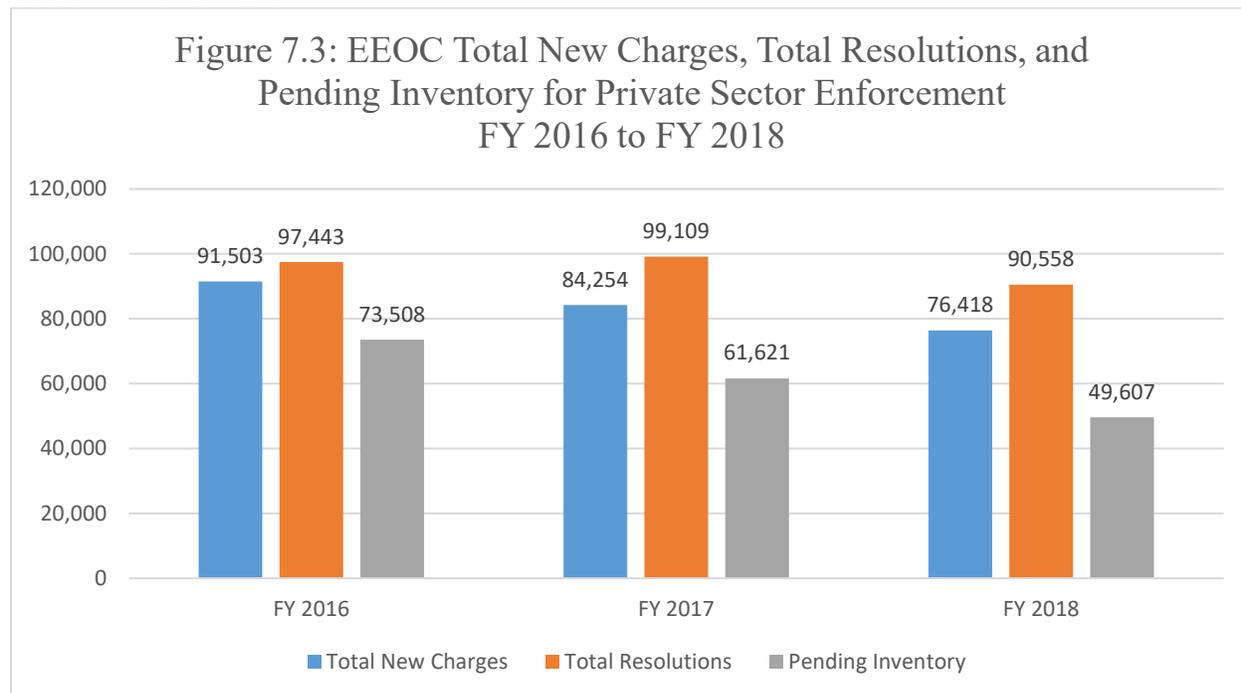
²²⁰³ EEOC, *FY 2020 Budget Justification*, *supra* note 260, at 34.

²²⁰⁴ *Ibid.*

²²⁰⁵ *Ibid.*

²²⁰⁶ *Ibid.*

Figure 7.3: EEOC Total New Charges, Total Resolutions, and Pending Inventory for Private Sector Enforcement



Source: U.S. Equal Employment Opportunity Commission, *Congressional Budget Justification, Fiscal Year 2020*, p. 34, <https://www.eeoc.gov/eeoc/plan/upload/2020budget.pdf>.

*Pending beginning inventory adjusted to reflect charge activity spanning fiscal years.

Regarding its workload, EEOC noted:

With focused attention on reducing our pending inventory, the results for FY 2017 reflect a dramatic decline of 16.2 percent, to 61,612 [pending] charges. In FY 2018, we maintained the trend of resolving more charges than our receipt levels, resulting in a 19.5 percent drop in our pending inventory, to 49,607. As a result, we project a continued decline in inventory to 43,851 charges in FY 2019. Through the leadership of [then] Acting Chair Victoria Lipnic, the EEOC has prioritized reductions in its inventory in order to build a more effective enforcement program. The focused priority of the Acting Chair led to the reductions realized in FY 2017 and FY 2018.²²⁰⁷

EEOC stated that it would contemplate other strategies to reduce the current workload, including renewed attention on intake interviews to “help sharpen issues” to assist the agency in evaluating the charge.²²⁰⁸

EEOC, however, went on to project significant concern about management of its future workload, stating that:

²²⁰⁷ Ibid., 31.

²²⁰⁸ Ibid., 31-32.

without any hiring of investigators and mediators or the ability to backfill vacancies starting in FY 2019, the agency will return to a cycle of an increasing pending inventory, growing to 44,426 in FY 2020, 45,740 in FY 2021 and 47,055 in FY 2022. This will reverse the current trend, and by FY 2020, the EEOC will be receiving more charges than it resolves. The budget levels requested in FY 2020 will yield a loss of 50 investigators and mediator staffing will remain stagnant after three successive years of losses of a combined 19 positions.²²⁰⁹

The majority of charges in FY 2016, FY 2017, and FY 2018 resulted in a No Reasonable Cause determination (67.6 percent, 70.2 percent and 70.6 percent of all resolutions respectively). Only a small percentage of charges in FY 2016, FY 2017 and FY 2018 resulted in Reasonable Cause determinations (3.2 percent, 2.9 percent and 3.5 percent respectively). Many charges over the same period resulted in Administrative Closures (16.1 percent, 15.0 percent and 14.2 percent respectively). A slightly lower percentage of cases during the years in question led to Merit Resolutions, which are outcomes favorable for the charging party or charges with meritorious allegations (16.2 percent, 14.8 percent and 15.2 percent respectively). Settlements, withdrawals with benefits, and successful or unsuccessful conciliations fall under the rubric of Merit Resolutions, which are an important part of the EEOCs enforcement activities.²²¹⁰ Successful conciliations constituted 1.4 percent, 1.2 percent and 1.4 percent of all outcomes for FY 2016, 2017, and 2018 respectively. Settlements constituted 7.4 percent, 6.4 percent and 6.1 percent of all outcomes during the same period. See Table 7.1.

Table 7.1 – EEOC Charge Resolutions by Type (all statutes) FY 2016 to FY 2017

	FY 2016 Number	FY 2016 Percentage	FY 2017 Number	FY 2017 Percentage	FY 2018 Number	FY 2018 Percentage
Total Resolutions	97,443		99,109		90,558	
Settlements	7,193	7.4%	6,357	6.4%	5,554	6.1%
Withdrawals w/Benefits	5,526	5.7%	5,376	5.4%	5,090	5.6%
Administrative Closures	15,729	16.1%	14,884	15.0%	12,860	14.2%
No Reasonable Cause	65,882	67.6%	69,583	70.2%	63,921	70.6%
Reasonable Cause	3,113	3.2%	2,909	2.9%	3,133	3.5%
Successful Conciliations	1,359	1.4%	1,152	1.2%	1,289	1.4%
Unsuccessful Conciliations	1,754	1.8%	1,757	1.8%	1,844	2.0%
Merit Resolutions	15,832	16.2%	14,642	14.8%	13,777	15.2%
Monetary Benefits (Millions)	\$348.0		\$355.6		\$353.9	

Source: U.S. Equal Employment Opportunity Commission, “All Statutes (Charges filed with EEOC) FY 1997 – FY 2018,” <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

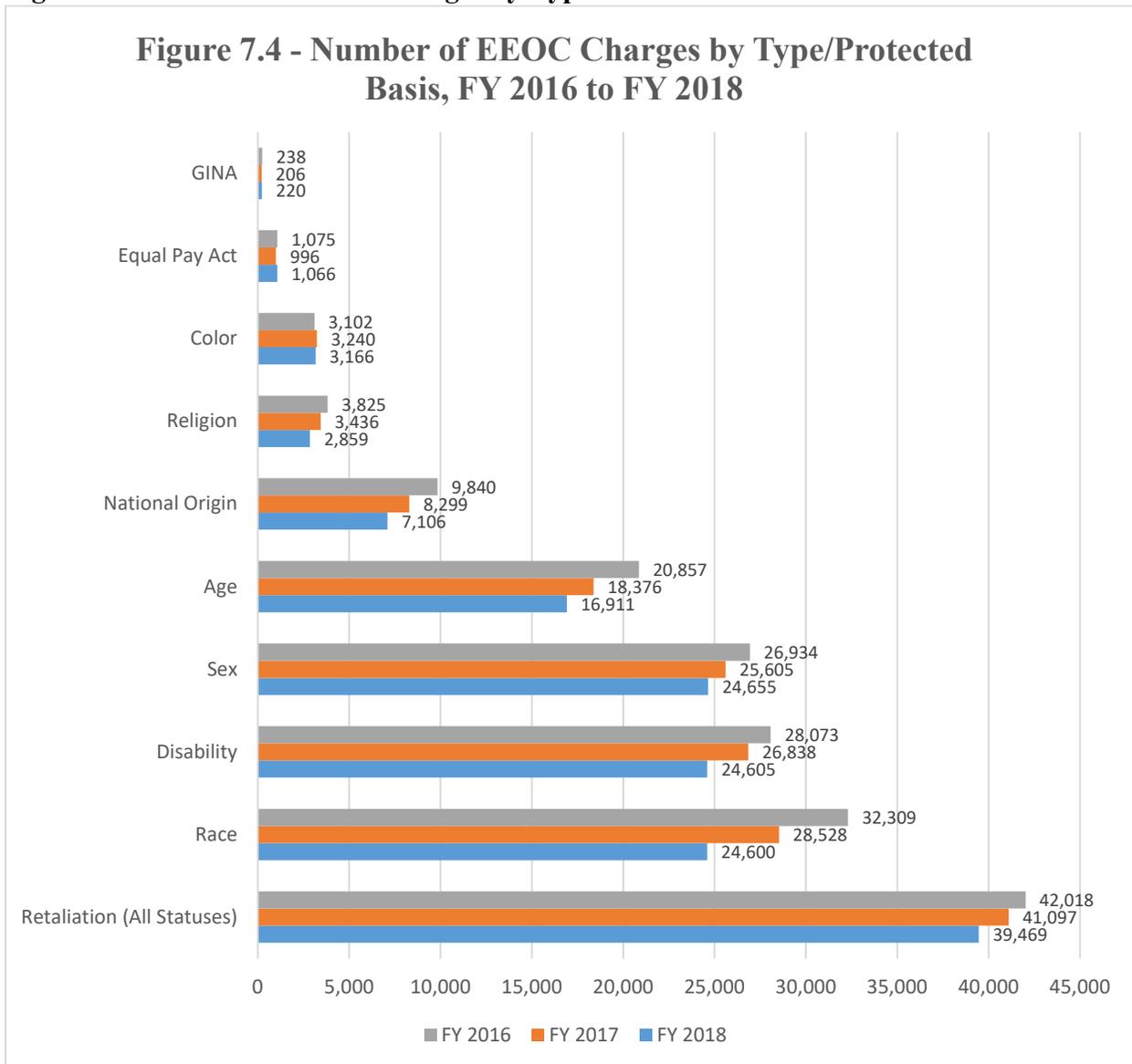
²²⁰⁹ Ibid., 31.

²²¹⁰ See U.S. Equal Employment Opportunity Comm’n, “Definitions of Terms,” <https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm>.

The EEOC achieved 7,989 successful mediations out of a total 10,461 conducted (76 percent) in FY 2016, 7,218 successful mediations out of a total 9,476 conducted in FY 2017 (76 percent), and 6,754 successful mediation out of a total of 9,437 in FY 2018 (71.5 percent).²²¹¹ The time to completion and monetary benefit resulting varied only slightly over the period. For FY 2016, EEOC completed mediations in an average of 97 days resulting in over \$163 million in benefits, in FY 2017 EEOC averaged 105 days to completion resulting in roughly the same amount (\$163 million) in benefits, and in FY 2018 EEOC averaged 99 days to completion with nearly \$166 million in benefits.²²¹²

²²¹¹ EEOC, *FY 2019 Budget Justification*, *supra* note 2099, at 36; EEOC, *FY 2020 Budget Justification*, *supra* note 260, at 36.

²²¹² EEOC, *FY 2019 Budget Justification*, *supra* note 2099, at 36; EEOC, *FY 2020 Budget Justification*, *supra* note 260, at 36.

Figure 7.4: Number of EEOC Charges by Type/Protected Basis

Source: U.S. Equal Employment Opportunity Commission, “Charge Statistics (Charges filed with EEOC FY 1997 Through FY 2017),” <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

*2018 data has been updated on the “Charge Statistics” website, even though the title still reflects data through only FY 2017

The largest category of EEOC private sector charges filed are based on retaliation, with 41,097 retaliation charges filed in FY 2016, 42,018 in FY 2017 and 39,469 in FY 2018.²²¹³ For those fiscal years, race, disability, and sex topped the list of protected bases for which charges were filed under the private sector enforcement program. See Figure 7.4.

²²¹³ U.S. Equal Employment Opportunity Comm’n, “Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017),” <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

In FY 2018 EEOC filed 41 workplace sexual harassment lawsuits.²²¹⁴ This is a 50 percent increase over the number of suits concerning sexual harassment filed by EEOC in FY 2017.²²¹⁵ During the same time frame, the number of charges filed with EEOC alleging sexual harassment rose by 13.6 percent, and EEOC has recovered nearly \$70 million for the victims of sexual harassment through its enforcement work, an increase of \$47.5 million in that time period.²²¹⁶ In appeals of cases involving sexual harassment of federal employees, monetary recovery increased even more dramatically during this period, by 180 percent for a total of \$443,066.²²¹⁷ EEOC has also increased their efforts in addressing workplace harassment more generally in FY 2018: in addition to the 41 sexual harassment suits, EEOC filed an additional 25 workplace harassment lawsuits focusing primarily on racial and national origin harassment; reasonable cause findings for charges alleging workplace harassment rose by 23.6 percent, and successful conciliated charges alleging workplace harassment rose by 43 percent.²²¹⁸

In addition to the above mentioned EEOC charges, state and local FEPAs processed 39,129 new charges in FY 2016, 37,234 new charges in FY 2017, and 31,887 in FY 2018.²²¹⁹ State and local FEPAs resolved a total of 38,794 charges in FY 2016, 37,849 in FY 2017 and 37,138 in FY 2018, while continuing to reduce the pending inventory over those fiscal years.²²²⁰

Carol Miaskoff, Associate Legal Counsel at EEOC, testified before the Commission that oversight is important with regard to enforcement strategies and efforts in order to achieve consistency and results across the various EEOC regional offices. She noted that quarterly meetings take place between EEOC Commissioners and office directors “about the kinds of cases that they’re bringing, what they’re finding, what the results are, progress on these priorities, and what needs to be addressed and what isn’t being addressed adequately.”²²²¹ She also noted that a certain percentage of litigation from each district that is aligned with agency priorities goes to the EEOC for review.²²²² Under EEOC delegation agreements, the General Counsel has delegated authority (from EEOC Commissioners) to decide to commence or intervene in litigation, excepting a subset that go to the full EEOC for review, which are:

- Cases that may involve a major expenditure of agency resources, including staffing and staff time, and/or expenses associated with extensive discovery or expert witnesses. This category is expected to include many systemic, pattern or-practice or EEOC Commissioner charge cases;

²²¹⁴ U.S. Equal Employment Opportunity Comm’n, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment,” <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> [hereinafter EEOC, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment”].

²²¹⁵ Ibid.

²²¹⁶ Ibid.

²²¹⁷ Ibid.

²²¹⁸ Ibid.

²²¹⁹ EEOC, *FY 2020 Budget Justification*, *supra* note 260, at 39.

²²²⁰ Ibid.

²²²¹ Carol Miaskoff Testimony, *Federal Civil Rights Enforcement Briefing*, p. 71.

²²²² Ibid.

- Cases that present issues in a developing area of law where the EEOC has not adopted a position through regulation, policy guidance, EEOC decision, or compliance manuals, or where the EEOC has only recently adopted a position;
- Cases that the General Counsel reasonably believes to be appropriate for submission for EEOC consideration, for example, because of their likelihood for public controversy or otherwise;
- All recommendations in favor of EEOC participation as *amicus curiae*.²²²³

Proactive Compliance Evaluations

The EEOC does not have specific authority that authorizes it to conduct compliance reviews with respect to private sector employment.

However, EEOC and OFCCP entered into a Memorandum of Understanding (MOU) regarding the processing of complaints of employment discrimination between the two agencies that aims to “reduce duplication of compliance activities” and “facilitate information exchange.”²²²⁴ EEOC and OFCCP will exchange information about compliance reviews or charges filed against a contractor in hopes of streamlining enforcement.²²²⁵ While the MOU does not specifically address whether EEOC has any authority to conduct compliance reviews, it does infer that OFCCP is taking the lead with the proactive compliance reviews conducted for federal contractors.

Dissemination of Policy through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity

EEOC has the legal authority to disseminate policy through regulations,²²²⁶ technical assistance,²²²⁷ education/outreach,²²²⁸ and publicity.²²²⁹ EEOC disseminates policy to employers and employees through a variety of means. EEOC is obligated to conduct education and outreach activities under Title VII – including the provision of training and technical assistance – to those with rights and responsibilities under antidiscrimination laws.²²³⁰ Title VII of the Civil Rights Act of 1964 also authorizes the EEOC to provide training and technical assistance for those federal agencies with rights and responsibilities under employment antidiscrimination laws.²²³¹ EEOC adopted an outreach strategy through a multi-year nationwide communications and outreach plan, which consisted of collaboration with state and local Fair Employment Practice Agencies, support

²²²³ EEOC, *FY 2017-2021 Strategic Enforcement Plan*, *supra* note 2164, at 19-20.

²²²⁴ DOL and EEOC Memo Re: Processing Complaints of Employment Discrimination, *supra* note 2044.

²²²⁵ *Ibid*.

²²²⁶ 42 U.S.C. § 2000e-12(a) and implementing regulations 29 C.F.R. Part 1601; 28 C.F.R. § 42.403.

²²²⁷ 42 U.S.C. §§ 2000e-4(g)(3), (j) and (k); 29 C.F.R. § 1626.15.

²²²⁸ 42 U.S.C. 200e-4(h)(2).

²²²⁹ 28 C.F.R. § 42.405.

²²³⁰ 42 U.S.C. 200e-4(h)(2); EEOC, *FY 2019 Budget Justification*, *supra* note 2099, at 51.

²²³¹ 42 U.S.C. §§ 2000e-4(g)(3), (j) and (k); 29 C.F.R. § 1626.15; EEOC, *FY 2018 Budget Justification*, *supra* note 2116, at 16; EEOC, *FY 2019 Budget Justification*, *supra* note 2099, at 47-49.

of private enforcement of the federal anti-discrimination laws, collaboration with other agencies, and an integration of research and data.²²³²

EEOC offers free and fee-based education and training.²²³³ The EEOC Training Institute holds seminars around the country for employers, employees, human resource professionals, attorneys, state and local officials and union officials.²²³⁴ EEOC focuses private sector education and outreach efforts on traditionally underserved communities and new or small businesses (which are unlikely to have human resources staff).²²³⁵ The commission directs approximately 32 percent of its private sector outreach towards vulnerable communities, with a particular focus on immigrants and farm workers.²²³⁶ On-site training is available to interested parties.²²³⁷

Overall, in FY 2017 EEOC provided free training to over 317,000 individuals through over 4,000 events around the country and served over 17,000 fee-paying individuals through over 430 events conducted by the Training Institute.²²³⁸ In FY 2018, the EEOC launched a new training program entitled, “Respectful Workplaces,” to address pervasive workplace harassment.²²³⁹

The EEOC reports that it is committed to improving the efficacy of its outreach and education efforts through digital technology and social media.²²⁴⁰ The use of technology in outreach efforts receives significant attention in EEOC’s most recent *Strategic Plan*, which sets the design and implementation of a technology plan for outreach and education as a goal for FY 2018.²²⁴¹ EEOC posts regular updates about new and ongoing cases on its website.²²⁴² In addition, EEOC issues press releases about its enforcement work, including reporting updates on charges/complaints and litigation, data collection, and policy updates.²²⁴³

EEOC indicates that it issues subregulatory guidance documents that provide policy updates and “are used to explain how the laws and regulations apply to specific workplace situations.”²²⁴⁴ These documents, which are approved by the majority of the EEOC’s Commissioners, are listed

²²³² EEOC, *FY 2017-2021 Strategic Enforcement Plan*, *supra* note 2164, at 16-17.

²²³³ U.S. Equal Employment Opportunity Comm’n, “Federal Training and Outreach,” <https://www.eeoc.gov/federal/training/index.cfm>; U.S. Equal Employment Opportunity Comm’n, “Outreach, Education and Technical Assistance,” <https://www.eeoc.gov/eeoc/outreach/index.cfm>.

²²³⁴ U.S. Equal Employment Opportunity Comm’n Training Institute, “EEO Seminars,” <https://eeotraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=info>.

²²³⁵ EEOC, *FY 2019 Budget Justification*, *supra* note 2099, at 56.

²²³⁶ *Ibid.*

²²³⁷ U.S. Equal Employment Opportunity Comm’n Training Institute, “On-site Training,” <https://eeotraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547b105&varPage=activity>.

²²³⁸ EEOC, *FY 2019 Budget Justification*, *supra* note 2099, at 54-55.

²²³⁹ *Ibid.*, 51-52.

²²⁴⁰ *Ibid.*, 52.

²²⁴¹ EEOC, *FY 2018-2022 Strategic Plan*, *supra* note 198, at 19-20; EEOC, *FY 2017-2021 Strategic Enforcement Plan*, *supra* note 2164.

²²⁴² U.S. Equal Employment Opportunity Comm’n, “Newsroom,” <https://www.eeoc.gov/eeoc/newsroom/>.

²²⁴³ U.S. Equal Employment Opportunity Comm’n, “EEOC Press Releases,” <https://www.eeoc.gov/eeoc/newsroom/release/>.

²²⁴⁴ U.S. Equal Opportunity Employment Comm’n, “EEOC Subregulatory Guidance,” <https://www.eeoc.gov/laws/guidance/index.cfm>.

on EEOC's website, and fall under two formats relevant to the private sector:²²⁴⁵ the Compliance Manual, which "advises staff on substantive matters of law for use during investigations and in making reasonable cause determinations;"²²⁴⁶ and enforcement guidance, which "communicate [EEOC's] position on important legal issues."²²⁴⁷ EEOC also lists its proposed subregulatory policy documents on its website, indicating that these documents "are approved by a majority of the Commissioners for the purpose of seeking public input, but they do not establish Commission policy until the Commission approves the final version by a majority vote."²²⁴⁸

Workplace Harassment

Over the past few years and in the era of the #MeToo movement,²²⁴⁹ EEOC has ramped up its enforcement of workplace harassment, which includes a priority on preventing sexual harassment, though its enforcement efforts long predate this public focus.²²⁵⁰ In 1986, in *Meritor Savings Bank v. Vinson*, the Supreme Court affirmed that sexual harassment that is "sufficiently severe or pervasive" that creates "a hostile or abusive work environment" violates Title VII of the Civil Rights Act of 1964,²²⁵¹ even if the unwelcome acts are not linked to employee benefits.²²⁵² This decision effectively affirmed prior EEOC policy guidelines on the matter.²²⁵³

In testimony to the Commission, EEOC Associate Legal Counsel Carol Miaskoff stated that then-Acting Chair Lipnic was "frankly horrified" at the EEOC's docket, "to see the pervasiveness of harassment of all kinds, including sexual harassment in the workplace."²²⁵⁴

On January 10, 2017, after the issuance of a 2016 report from the EEOC's Select Task Force's on workplace harassment,²²⁵⁵ EEOC issued another proposed guidance and sought public comment on said guidance on the issue of harassment in the workplace.²²⁵⁶ This guidance included a definition of protections against discrimination on the basis of sex, which included gender identity, defined as follows:

²²⁴⁵ Ibid.

²²⁴⁶ U.S. Equal Opportunity Employment Comm'n, "Compliance Manual," <https://www.eeoc.gov/laws/guidance/compliance.cfm>.

²²⁴⁷ U.S. Equal Opportunity Employment Comm'n, "Enforcement Guidances and Related Documents," https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm.

²²⁴⁸ U.S. Equal Opportunity Employment Comm'n, "Proposed Subregulatory Guidance Documents," <https://www.eeoc.gov/laws/guidance/proposed.cfm>.

²²⁴⁹ See Cassandra Santiago and Doug Criss, "An activist, a little girl and the heartbreaking origin of 'Me too,'" *CNN.com*, Oct. 17, 2017, <https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html>.

²²⁵⁰ EEOC, "What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment," *supra* note 2214.

²²⁵¹ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

²²⁵² 477 U.S. at 68, 73 ("hostile environment" theory of sexual harassment is actionable).

²²⁵³ 477 U.S. at 65.

²²⁵⁴ Miaskoff Testimony, *Federal Civil Rights Enforcement Briefing*, p. 33.

²²⁵⁵ See *infra* notes 2294-2296.

²²⁵⁶ U.S. Equal Employment Opportunity Comm'n, Proposed Enforcement Guidance on Unlawful Harassment, Jan. 10, 2017, <https://www.regulations.gov/docket?D=EEOC-2016-0009>; U.S. Equal Employment Opportunity Comm'n, "EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment," Jan. 10, 2017, <https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm>.

Sex-based harassment includes harassment based on gender identity. This includes harassment based on an individual's transgender status or the individual's intent to transition. It also includes using a name or pronoun inconsistent with the individual's gender identity in a persistent or offensive manner.²²⁵⁷

The definition also included sexual orientation, defined as:

Sex-based harassment includes harassment because an individual is lesbian, gay, bisexual, or heterosexual.²²⁵⁸

Since the change in presidential administrations, the new guidance has not been issued, and there are news reports that the Trump Administration objects to its implementation.²²⁵⁹ National Women's Law Center's Fatima Goss Graves noted in written and oral testimony before the Commission that the Office of Management and Budget (OMB) has blocked publication of updated EEOC sexual harassment guidance, without public explanation. She testified that as of July 2019, over two years after its proposal, the guidance remains stalled at the review stage, with no information available about its status.²²⁶⁰ However, EEOC Associate Legal Counsel Carol Miaskoff testified in November 2018 that the guidance is still under review with OMB.²²⁶¹ As Goss Graves explained:

²²⁵⁷ U.S. Equal Employment Opportunity Comm'n, Proposed Enforcement Guidance on Unlawful Harassment, Jan. 10, 2017, 7-8, <https://www.regulations.gov/docket?D=EEOC-2016-0009>; See, e.g., *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (stating that intentional misuse of transgender employee's new name or pronoun may constitute sex-based harassment).

²²⁵⁸ U.S. Equal Employment Opportunity Comm'n, Proposed Enforcement Guidance on Unlawful Harassment, Jan. 10, 2017, 8, <https://www.regulations.gov/docket?D=EEOC-2016-0009>; *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (Oct. 27, 2015) (indicating that sexual orientation discrimination claim "necessarily state[s] a claim of discrimination on the basis of sex [because] it involve[s] treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex"). See also *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007, at *4 (W.D. Wash. Sept. 22, 2014); *Boutillier v. Hartford Pub. Sch.*, No. 3:13-cv-01303-WWE, 2016 WL 6818348, at *7-11 (D. Conn. Nov. 17, 2016); *EEOC v. Scott Med. Health Ctr.*, No. 16-225, 2016 WL 6569233, at *5-7 (W.D. Pa. Nov. 4, 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159-61 (C.D. Cal. 2015); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015). But see *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-cv-1791, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015) (stating that Title VII does not prohibit sexual orientation discrimination), aff'd, 830 F.3d 698 (7th Cir. 2016), as amended (Aug. 3, 2016), *reh'g en banc granted and opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016); see also *Bostock v. Clayton County Board of Commissioners*, 2018 WL 2149179 (11th Cir. May 10, 2018) cert. granted; *Altitude Express, Inc. v. Zarda*, 139 S.Ct. 1599 (2019); *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107 S. Ct. (2019).

²²⁵⁹ Chris Opfer, "White House Leaves Harassment Guidance in Limbo," *Bloomberg Law*, Jun. 13, 2018, <https://news.bloomberglaw.com/daily-labor-report/lgbt-debate-shackles-trump-harassment-police>.

²²⁶⁰ See Chris Opfer, "Gag Orders in Job Misconduct Probes Ok, Labor Prosecutor Says," *Bloomberg Law*, Mar. 20, 2019, <https://news.bloomberglaw.com/daily-labor-report/gag-orders-in-job-misconduct-probes-ok-labor-prosecutor-says>; David Dayen, "Neomi Rao, Nominee To Replace Brett Kavanaugh, Heads Agency That's Been Stalling Sexual Harassment Guidance," *The Intercept*, Feb. 4, 2019, <https://theintercept.com/2019/02/04/neomi-rao-hearing-oir-a-brett-kavanaugh/>.

²²⁶¹ Miaskoff Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 64-66.

In the area of sex discrimination . . . this administration has put itself at a disadvantage in enforcing the existing complaints that it is getting. And so by doing things like changing the compliance manual that make it easier to wholesale dismiss whole categories of complaints that you're receiving – so these are individuals who are trying to find their way oftentimes by themselves and who have been told for many years we're open for business, come to us if you have a civil rights concern, and then they get what looks like to them a form letter saying that your concern is unimportant. . . . you got to undo the things that are basically barriers for people who are trying to come forward.”²²⁶²

But on the subject of EEOC's enforcement, Goss Graves stated: “The one area where I think you're seeing efforts to have meaningful enforcement in the area of harassment right now that is responsive to the need is at the EEOC where they have the highest number of charges.”²²⁶³ As noted above, the EEOC has increased its enforcement efforts significantly.²²⁶⁴ Goss Graves pointed to one cause for this uptick in charges “tied to the cultural movement,” but testified that she “also believe[s] it's tied to them sending messages that they're taking this issue seriously.”²²⁶⁵

Interaction and Coordination with External Agencies and Organizations

EEOC has entered into agreements with 92 state and local FEPAs and 64 TEROs, as described earlier in this chapter.²²⁶⁶ EEOC has also entered into Memoranda of Understanding with several federal agencies that detail procedures on how agencies should cooperate when there is overlap in enforcement responsibilities.²²⁶⁷ EEOC also has entered into Memoranda of Understanding with several foreign embassies and consulates, which enhance cooperation in instances of employment discrimination involving foreign nationals working in the U.S.²²⁶⁸

At the Commission's briefing Associate Legal Counsel Carol Miaskoff said that EEOC's Office of Legal Counsel has a Coordination Division which is responsible for working with other federal agencies to see what their workplace regulations are and whether they “clash” with civil rights laws.²²⁶⁹

EEOC and OFCCP have entered into a Memoranda of Understanding (MOU) regarding the processing of complaints of employment discrimination between the two agencies.²²⁷⁰ This MOU

²²⁶² *Ibid.*, 202.

²²⁶³ *Ibid.*, 202-03.

²²⁶⁴ *See supra* notes 2203-2220.

²²⁶⁵ Goss Graves Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 203-204.

²²⁶⁶ U.S. Equal Employment Opportunity Comm'n, Response to USCCR Interrogatory No. 4, at 8.

²²⁶⁷ *Ibid.*

²²⁶⁸ *Ibid.*

²²⁶⁹ Miaskoff Testimony, *Federal Civil Rights Enforcement Briefing*, p. 82; *see also* Ch. 2, DOJ CRT, Federal Coordination and Compliance Section.

²²⁷⁰ DOL and EEOC Memo Re: Processing Complaints of Employment Discrimination, *supra* note 2044.

seeks to “reduce duplication of compliance activities” and “facilitate information exchange” between EEOC and OFCCP, and specifies that:

Prior to investigation of charges filed against Government contractors subject to Executive Order 11,246, as amended, EEOC will contact OFCC to (a) determine whether the contractor has been subjected to a compliance review within the past ninety (90) days, and (b) obtain and review copies of any documents relevant to EEOC's investigation which have been secured by the contracting agency in previous compliance reviews.

Prior to conducting compliance reviews or investigations of complaints against Government contractors, OFCC will contact EEOC to (a) determine whether EEOC has processed similar or identical charges against the contractor, (b) determine whether EEOC has information from prior investigations, if any, which may have a bearing on the contractor's compliance with Executive Order 11,246, as amended, and (c) obtain and review any pertinent documents.

It is anticipated that these contacts will be made routinely between EEOC regional offices and regional offices of OFCC.²²⁷¹

The MOU establishes Compliance Coordination Committees, designates a Coordination Advocate, and establishes standard notice and consultation procedures.²²⁷² The MOU “clarifies the complaint and charge referral procedures for complaints filed with each agency” and “provides that the OFCCP will act as the EEOC's agent for purposes of receiving complaints and charges under Title VII and states that all complaints received by the OFCCP that allege race, color, religion, sex, or national origin discrimination or retaliation will be received as dual-filed complaints under Title VII.”²²⁷³ Additionally, “the processes and procedures outlined in the MOU emphasize that both agencies will increase their efforts to investigate and remedy systemic or class-based discrimination and confirm that the EEOC will remain the primary investigator of individual discrimination claims.”²²⁷⁴

Research, Data Collection, and Reporting

Regarding data collection, EEOC reported to the Commission that during the complaint intake process, EEOC staff gathers relevant information about the allegations, including what happened, when the incident occurred, names of witnesses, information about the respondents, etc.²²⁷⁵ EEOC collects the contact information from the complainant (name, address, phone number, email

²²⁷¹ Ibid.

²²⁷² Couden, “Revised Memorandum of Understanding Warns Employers About Coordinated Enforcement Efforts of the OFCCP and EEOC,” *supra* note 2048.

²²⁷³ Ibid.

²²⁷⁴ Ibid.

²²⁷⁵ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Interrogatory No. 14, at 14.

address) and requests demographic information pertaining to the age, disability status, race/ethnicity, national origin/ancestry, and gender of the complainant.²²⁷⁶ EEOC reported that in FY 2011, it expanded the national origin categories for individuals who self-identify as Asian, in accordance with E.O. 13515, and disaggregates its data for the following Asian national origins: Cambodian, Chinese, Filipino, Hmong, Indian, Japanese, Korean, Laotian, Pakistani, Thai, Taiwanese and Vietnamese.²²⁷⁷ This data is not publicly reported.

EEOC has electronic systems in place to assist individuals who wish to file complaints or wish to inquire about the status a complaint that has already been filed.²²⁷⁸ In March 2016, EEOC launched its Online Charge Status System, which enables individuals who have filed a charge to check the status online, and in November 2017, EEOC launched its Public Portal to enable individuals to make inquiries and appointments to file discrimination charges.²²⁷⁹ In addition, EEOC launched its Respondent Portal in January 2016, which enables respondents to “receive an electronic notice of the charge to view online, submit documents, select options to mediate, and designate representatives.”²²⁸⁰ EEOC continues to develop its capabilities in this area and is currently working to extend the access of its public portal to federal employees and agencies who utilize the federal sector EEO complaint process.²²⁸¹

The EEOC’s Strategic Enforcement Plan for 2012-2016 requires EEOC to “develop and approve” a multi-year Research and Data Plan, which was established for the years 2016-2019.²²⁸² This plan establishes guidelines for keeping an inventory of existing EEOC data, modifications/additions to EEOC’s survey collection system, and for tracking and reporting data, in addition to establishing a plan for using data for EEOC responsibilities, and outlining certain long-term research projects.²²⁸³

EEOC has begun collecting data on pay and hours worked from employers, including federal contractors.²²⁸⁴ Specifically, EEOC collects this data from all employers with 100 or more employees and federal contractors with 50 or more employees “reflecting how much the employers paid workers of different sexes, races and ethnicities.”²²⁸⁵ This data collection was originally adopted during the Obama Administration, intending to “root out gender- and race-based pay

²²⁷⁶ Ibid.

²²⁷⁷ Ibid.

²²⁷⁸ Ibid.

²²⁷⁹ Ibid.

²²⁸⁰ Ibid.

²²⁸¹ U.S. Equal Employment Opportunity Comm’n, Response to USCCR Affected Agency Review (Jul. 3, 2019) (on file).

²²⁸² U.S. Equal Employment Opportunity Comm’n, “Research and Data Plan for 2016-2019,”

https://www.eeoc.gov/eeoc/plan/research_data_plan.cfm.

²²⁸³ Ibid.

²²⁸⁴ U.S. Equal Employment Opportunity Comm’n, “EEOC Opens Calendar Years 2017 and 2018 Pay Data Collection,” <https://www.eeoc.gov/employers/eo1survey/index.cfm>.

²²⁸⁵ Melanie M. Hamilton and Jonathan Stoler, “Employers Must Provide Pay Data to EEOC by September 30,” *The National Review*, Apr. 27, 2019, <https://www.natlawreview.com/article/employers-must-provide-pay-data-to-eeoc-september-30>.

gaps,” but was rolled back during the Trump administration²²⁸⁶ and was the subject of litigation.²²⁸⁷ However, EEOC has now begun the collection of 2017 and 2018 W-2 wage data and hours worked for employees within 12 specified pay bands and demographic data on race, gender and ethnicity.²²⁸⁸ EEOC collects its data via various survey forms, which employers can access via EEOC’s website.²²⁸⁹

EEOC has a specific legal authority to conduct research and produce reports on its technical studies.²²⁹⁰ Since combating workplace harassment is a policy priority for EEOC over the past several years,²²⁹¹ in 2015, EEOC created a Select Task Force on the Study of Harassment in the Workplace with members from academia, legal scholars and practitioners, employers and employee advocacy groups, and organized labor.²²⁹² Hearing testimony from over 30 witnesses and receiving numerous public comments, this Select Task Force focused on prevention of workplace harassment, and sought to examine not just actionable forms of workplace harassment, but other non-actionable conduct and behaviors that may “set the stage for unlawful harassment.”²²⁹³

²²⁸⁶ Ibid.

²²⁸⁷ Melanie M. Hamilton and Jonathan Stoler, “EEOC Announces Decision to Collect 2017 Employee Pay Data, in Addition to 2018 Pay Data, by September 30, 2019,” *The National Review*, May 6, 2019, <https://www.natlawreview.com/article/eec-announces-decision-to-collect-2017-employee-pay-data-addition-to-2018-pay-data>. The article notes that:

On April 25, 2019, the district court ordered the EEOC to collect a second year of pay data from select employers, giving the EEOC until May 3, 2019 to advise whether it would collect 2017 or 2019 data.

Employers have until September 30, 2019 to report 2017 and 2018 W-2 wage data and hours worked for employees within 12 specified pay bands. The EEOC has announced that it expects to begin accepting data submissions in mid-July, to facilitate compliance with the court-mandated deadline.

In the meantime, employers must still submit Component 1 demographic data on race, gender and ethnicity by May 31, 2019.)

Ibid.

²²⁸⁸ Ibid.

²²⁸⁹ U.S. Equal Employment Opportunity Comm’n, “EEO Reports / Surveys,” <https://www.eeoc.gov/employers/reporting.cfm>.

²²⁹⁰ 42 U.S.C. § 2000e-4(g)(5) (stating that “The Commission shall have power ... to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public”).

²²⁹¹ See *supra* notes 2249-65.

²²⁹² U.S. Equal Employment Opportunity Comm’n, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria Lipnic, Executive Summary and Recommendations*, Jun. 2016, p. 1, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report_summary.pdf [hereinafter EEOC, *Study of Harassment in the Workplace*].

²²⁹³ Ibid.

As a result of the Select Task Force on the Study of Harassment in the Workplace,²²⁹⁴ EEOC issued a report in June 2016 with the findings of the Select Task Force, which reported:

- Workplace harassment often goes unreported, as roughly three out of four individuals who experience harassment will not report the incident to a supervisor or union representative
- Stopping and preventing workplace harassment is good business, as legal costs can be steep for businesses accused of misconduct, emotional costs are high for victims, and all employees will be affected by “decreased productivity, increased turnover, and reputational harm”
- Leadership and accountability are critical to preventing workplace harassment
- Training must change to be more effective, should be tailored to the specific workplace, and new approaches to training should be explored
- It’s on us to prevent workplace harassment, and everyone plays a role in combating workplace harassment²²⁹⁵

The report also issued a number of recommendations around the prevalence of harassment in the workplace, workplace leadership and accountability, policies and procedures to prevent workplace harassment, anti-harassment compliance training, workplace civility and bystander intervention training, outreach and targeted outreach to youth, and the launch of an “It’s On Us” campaign in which “co-workers, supervisors, clients, and customers all have roles to play in stopping [] harassment.”²²⁹⁶

²²⁹⁴ EEOC, *Study of Harassment in the Workplace*, *supra* note 2292.

²²⁹⁵ *Ibid.*, 1-3.

²²⁹⁶ *Ibid.*, 4-8.

Chapter 8: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties

In addition to the authority to review nondiscrimination compliance of DHS funding recipients, Congress provided the Office for Civil Rights and Civil Liberties (CRCL) of the U.S. Department of Homeland Security (DHS) broad jurisdiction to advise the DHS Secretary regarding all agency policies, to review complaints about civil rights matters, and to provide public information about them.²²⁹⁷ Notwithstanding this broad jurisdiction with respect to agency programs, Congress did not assign this civil rights office authority to enforce its views of the law or to review policies before they are implemented. At the Commission’s briefing, several panelists as well as various public commenters expressed concerns with alleged civil rights violations that fall under the jurisdiction of CRCL.²²⁹⁸

Legal Authority and Responsibility

Congress established the DHS as a federal executive agency with broad duties and authorities, as part of the Homeland Security Act of 2002.²²⁹⁹ The Act combined several other federal agencies, such as the Immigration and Nationality Service (INS), which was formerly an agency of the U.S. Department of Justice, and put them under the umbrella of DHS authority.²³⁰⁰ Created in the wake of 9/11, the DHS’s mission is to prevent terrorism, as well as to “carry out all the functions of entities transferred to the Department [such as FEMA and the INS]; ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected...;”²³⁰¹ and to “ensure that the civil rights and civil

²²⁹⁷ See *infra* notes 2305-2306.

²²⁹⁸ See Lopez Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 186-191; Yang Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 182-188. The Commission also received written public comments expressing concern about current DHS policies from South Asian Americans Leading Together, the National LGBTQ Task Force, YMCA, and others. See *supra* notes 320-26. The Commission received similar concerns during the Commission’s recent briefing on hate crimes. See Chief Terrence Cunningham, Deputy Executive Director, International Association of Chiefs of Police, testimony, *Hate Crimes Briefing*, p. 69 (regarding his concerns about the Administration’s anti-immigrant rhetoric and policies); Suman Raghunathan, Executive Director of South Asian Americans Leading Together, testimony, *Hate Crimes Briefing*, p. 96-101, 130 (stating that: “South Asian, Muslim, Sikh, Hindu, and Middle Eastern communities are existing in a moment where we are the targets of hate that are actively spurred by the anti-immigrant, anti-Muslim, anti-people of color *policies* advanced by the current administration[.]” *Ibid.* at 97) (emphasis added); Melissa Garlick, Civil Rights National Counsel at the Anti-Defamation League, *Hate Crimes Briefing*, p. 103 (that: “The federal administration *policies and positions* defending such actions, such as a tax on so-called sanctuary cities, the Muslim ban, the transgender military ban, they all raise legitimate fears in schools and communities across the country, encourage hate, and have created an environment in which victims are afraid to report crimes or come forward as witnesses, including crimes[.]”) (emphasis added).

²²⁹⁹ 6 U.S.C. § 111(a); Pub. L. 107-296, Title I, § 101 (Nov. 25, 2002).

²³⁰⁰ Exec. Order No. 13,286, Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security, (Feb. 28, 2003), 68 FR 10619, 2003 WL 24028002 (Pres.).

²³⁰¹ 6 U.S.C. § 111(b)(1)(A) – (E).

liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland[.]”²³⁰²

DHS is one of the largest federal agencies, and currently has “more than 240,000 employees in jobs that range from aviation and border security to emergency response[.]”²³⁰³

According to DHS, CRCL’s main duties are to “investigate complaints, provide policy advice to Department leadership and components on civil rights and civil liberties issues, and communicate with the public about CRCL and its activities. The statute also requires coordination with the Privacy Office and Inspector General, and directs CRCL to submit an annual report to Congress.”²³⁰⁴ These three duties – to investigate complaints, provide policy advice, and provide public information – are found in the statutory language below.

Congress provided that the Officer of Civil Rights and Civil Liberties (CRCL) “shall:

- (1) review and assess information concerning abuses of civil rights, civil liberties, and profiling on the bases of race, ethnicity, or religion, by employees or officials of the Department;
- (2) make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer;
- (3) assist the Secretary, directorates, and offices of the Department to develop, implement, and periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities;
- (4) oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department;
- (5) coordinate with the Privacy Officer to ensure that—
 - (A) programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and
 - (B) Congress receive appropriate reports regarding such programs, policies, and procedures; and
- (6) investigate complaints and information indicating possible abuses of civil rights and civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General.”²³⁰⁵

²³⁰² *Id.* § 111(b)(1)(G).

²³⁰³ U.S. Dep’t of Homeland Security, “About DHS,” <https://www.dhs.gov/about-dhs> (accessed Nov. 27, 2018).

²³⁰⁴ 6 U.S.C. § 345.

²³⁰⁵ *Id.* (emphasis added); see also Daniel Sutherland, Homeland Security Office for Civil Rights and Civil Liberties: A One-Year Review, The Heritage Foundation, Aug. 10, 2004, <https://www.heritage.org/homeland-security/report/homeland-security-office-civil-rights-and-civil-liberties-one-year-review> (explaining that DHS CRCL “primarily has an internal function—assisting the senior leadership to develop policies in ways that protect and enhance our civil liberties”).

According to CRCL's answers to the Commission's interrogatories,²³⁰⁶ applicable civil rights statutes include the Religious Freedom and Restoration Act,²³⁰⁷ the Architectural Barriers Act of 1968,²³⁰⁸ Rehabilitation Act of 1973,²³⁰⁹ the Genetic Information Nondiscrimination Act of 2008,²³¹⁰ and the Prison Rape Elimination Act.²³¹¹ Statutes and regulations that apply to recipients of DHS financial assistance include these same statutes, as well as Title VI of the Civil Rights Act of 1964,²³¹² Title IX of the Education Amendments of 1972,²³¹³ the Age Discrimination Act of 1975,²³¹⁴ and the Implementing Regulations of the 9/11 Commission Act of 2007, which require that CRCL provide training to state and local agencies.²³¹⁵ A series of 13 executive orders, covering issues ranging from language access rights,²³¹⁶ the rights of persons with disabilities,²³¹⁷ and working with faith-based organizations,²³¹⁸ are also under the purview of CRCL's compliance activities with regard to federal grantees.²³¹⁹

Under the statutory provision directing CRCL to "review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion"²³²⁰ and to "oversee compliance with constitutional, statutory, regulatory, policy or other requirements relating to... civil rights and civil liberties,"²³²¹ CRCL's subject matter jurisdiction is much broader than the above list of statutes, as it encompasses all of "civil rights and civil liberties."²³²² For example, CRCL is active in international human rights matters.²³²³

Its statutory authority is also unique in that it includes high level policy review. At the Commission's briefing, Deputy CRCL Officer Veronica Venture provided written testimony stating that:

²³⁰⁶ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 1, at 1-3.

²³⁰⁷ 42 U.S.C. § 2000bb *et seq.*

²³⁰⁸ *Id.* § 4151 *et seq.*

²³⁰⁹ 29 U.S.C. § 701 *et seq.*

²³¹⁰ 42 U.S.C. 2000ff *et seq.*

²³¹¹ 34 U.S.C. § 30301 *et seq.*

²³¹² This includes implementing regulations at 6 C.F.R. Part 21 and, for FEMA grantees, at 44 C.F.R. Part 7, Subpart A. U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 1, at 1-3.

²³¹³ This includes implementing regulations at 6 C.F.R. Part 17 and, for FEMA grantees, at 44 C.F.R. Part 19. *Ibid.*

²³¹⁴ With implementing regulations for FEMA grantees at 44 C.F.R. Part 7, Subpart E. *Ibid.*

²³¹⁵ *See* Title VIII, Privacy and Civil Liberties, Implementing Regulations of the 9/11 Commission Act of 2007, P.L. 110-53 (Aug. 3, 2007).

²³¹⁶ Exec. Order No. 13,166, 50 Fed. Reg. 159, 50,121.

²³¹⁷ Exec. Order No. 13,347, 69 Fed. Reg. 142, 44,573 (Jul. 26, 2004).

²³¹⁸ Exec. Order No. 13,279, 67 Fed. Reg. 241, 77,141 (Dec. 16, 2016).

²³¹⁹ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 1, at 3.

²³²⁰ 6 U.S.C. § 345(a)(1).

²³²¹ *Id.* § 345(a)(3).

²³²² *Id.* § 345(a)(3).

²³²³ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 2(b), at 5 ("DHS works closely with the Department of State and other agencies to respond to questions, prepare reports, and testify before international bodies that oversee compliance with human rights treaties, many of which have a substantial overlap with domestic civil rights law, including the International Covenant on Civil and Political Rights and the Convention Against Torture, as well as the United Nations' Universal Periodic Review. CRCL serves as the Department's point of contact office for human rights treaty compliance.")

CRCL is a unique civil rights office... CRCL carries out the Department's unique mission "to ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland." (6 USC 111(b)(1)(G).) No other agency has a statutory mission like that.²³²⁴

She went on to emphasize that:

Where our office is unique is in all the work we do regarding DHS's own enormous workforce and contractors to ensure compliance with the Constitution, civil rights and civil liberties laws, and our extensive policies making those broad concepts clear for our operators in the field. Consider... all the places DHS makes contact with the public: passenger screening when boarding a flight, or entering the country by land, sea, or air; immigration benefits interviews; ICE or Border Patrol apprehensions; FEMA benefits in a disaster; and even Secret Service protective activities.²³²⁵

University of Michigan Law Professor and former CRCL Officer Margo Schlanger, presented similar testimony, asserting that:

It's a very unusual office, because, unlike most Offices of Civil Rights (OCRs), its chief assignment is to address potential and actual civil rights violations by DHS itself... DHS's CRCL is different: it seeks to move DHS and its components to themselves respect the civil rights of the millions of people DHS's own activities touch—their beneficiaries, [law enforcement] targets, and everyone in between.²³²⁶

Enforcement Tools

The agency enforcement tools CRCL has specific legal authority to use are:

- Complaint Resolution²³²⁷
 - Agency-Initiated Charges²³²⁸
 - Proactive Compliance Evaluations²³²⁹

²³²⁴ Veronica Venture, Deputy Officer, Office for Civil Rights and Civil Liberties, U.S. Dep't of Homeland Security, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm'n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter Venture Statement].

²³²⁵ Venture Statement, at 2.

²³²⁶ Schlanger Statement, at 1; *but C.f.* [other agency CROs that also have this goal/any authority].

²³²⁷ 6 U.S.C. § 345(a)(6); 6 C.F.R. § 21.11(b). Note that DHS CRCL's ability to resolve complaints is limited to the complaints they receive under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act.

²³²⁸ 6 C.F.R. § 21.11(a) and (c).

²³²⁹ 6 C.F.R. § 15.70 (for Section 504 only); Title VI and Title IX enforcement fall under the Secretary. 6 C.F.R. § 21.9 – 17 (Title VI) and 6 C.F.R. § 17.605.

- Guidance or Other Policy Documents²³³⁰
- Regulations²³³¹
- Technical Assistance²³³²
- Publicity²³³³
- Outreach to Regulated Community/Potential Victims²³³⁴
- Research, Data Collection and Reporting²³³⁵
- Collaboration/Partnership with State/Local Agencies²³³⁶
- Collaboration/Partnership with Other Federal Agencies²³³⁷
- Strategic Plan²³³⁸
- Annual Reports²³³⁹

While DHS CRCL does not have specific legal authority for other tools identified by the Commission, nothing prohibits DHS CRCL from, for example, engaging in observation, as described in further detail below.

²³³⁰ 6 U.S.C. § 345(a)(3) – (5) (evaluation of CRCL’s use of this enforcement tool is discussed in the Prioritization of Civil Rights Section, *infra* notes 2360-2342 (discussing family separation and Muslim ban policies); 6 C.F.R. § 21.9(a).

²³³¹ 6 U.S.C. § 112(e)(Secretary authorized to prescribe regulations); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations).

²³³² CRCL’s authority and focus on internal agency policy is clear in the legislative history and statutory language of the PATRIOT Act, enabling it to issue written technical assistance. *See* 6 U.S.C. § 345(a)(3) – (4).

²³³³ The PATRIOT Act requires that the CRCL Officer “shall - make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer.” 6 U.S.C. § 345(a)(2); *see also* 28 C.F.R. § 42.405 (Public dissemination of title VI information).

²³³⁴ 6 U.S.C. § 345(a)(2).

²³³⁵ CRCL must “coordinate with the Privacy Officer to ensure that—

- (A) programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and
- (B) Congress receives appropriate reports regarding such programs, policies, and procedures.” 6 U.S.C. § 345(a)(5).

CRCL also reports through the Secretary of Homeland Security, who is required to:

submit to the President of the Senate, the Speaker of the House of Representatives, and the appropriate committees and subcommittees of Congress on an annual basis a report on the implementation of this section [Establishment of Officer for CRCL], including the use of funds appropriated to carry out this section, and detailing any allegations of abuses described under subsection (a)(1) and any actions taken by the Department in response to such allegations. 6 U.S.C. § 345(b.); *see also* 28 C.F.R. § 42.406 (regarding data collection and information sharing).

²³³⁶ *See* Title VIII, Privacy and Civil Liberties, Implementing Regulations of the 9/11 Commission Act of 2007, P.L. 110-53 (Aug. 3, 2007) (implementing regulations requiring that CRCL provide training to state and local law enforcement).

²³³⁷ 42 U.S.C. § 2000ee; Exec. Order No. 13,636, 78 Fed. Reg. 11,737 (Feb. 19, 2013), § 5; 28 C.F.R. § 42.413.

²³³⁸ 5 U.S.C. § 306(a) (2017) (agency Strategic Plan required).

²³³⁹ 6 U.S.C. § 345(b) (annual report required under PATRIOT Act); 42 U.S.C. § 2000ee-1(f) (semiannual report required under 9/11 Commission Act implementing regulations); *see also* U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, “CRCL Semiannual Reports,” <https://www.dhs.gov/publication/crcl-quarterly-reports> [hereinafter DHS, “CRCL Semiannual Reports”].

Staffing and Budget

CRCL's staffing and budget increased during the fiscal years studied, indicating Congressional support for the office's potential role in advancing civil rights.

Deputy CRCL Officer Venture testified that Congress authorized 95 personnel for CRCL with additional civil rights staff in several DHS components for Fiscal Year 2019.²³⁴⁰ The office had 85 full-time staff in FY 2016, 86 in FY 2017, and 93 in FY 2018.²³⁴¹

According to Deputy Venture, CRCL's work is split into three categories, each of which occupies about one-third of CRCL's workforce. CRCL's EEO and Diversity branch reviews personnel complaints by DHS employees,²³⁴² which are not the subject of the Commission's investigation. CRCL's compliance work entails accepting and investigating "complaints from the public, from Congress, from detainees, nongovernmental organizations, and other avenues, such as issues we see in the press."²³⁴³ In addition, CRCL's

[p]rograms work, which is the final (roughly) third of the office, involves both subject-matter-specific policy experts (security, information sharing, immigration, language access, disability policy, compliance with Title VI of the Civil Rights Act, disaster preparedness, response, and recovery) and particular modes of addressing those policy areas (community engagement and training, including state and local homeland security partners).²³⁴⁴

During the past three fiscal years, Congress has allocated more than CRCL has proposed through the President's budget. That is, "CRCL has typically been assigned a President's Budget (proposed) funding level below the actual budget allocated (enacted) after the final approval of a continuing resolution or an appropriation bill."²³⁴⁵ In FY 16, the President's budget proposed \$20.954 million and Congress allocated to CRCL \$21.80 million; in FY 17, the President's budget requested \$21.403 million and Congress allocated \$22.571 million; and in FY 18, the President's budget requested \$21.967 million and Congress allocated \$23.571 million.²³⁴⁶ But CRCL stated that "those increases have been unpredictable and have impacted CRCL's ability to hire critical new positions. This is due to the uncertainty that CRCL will be able to continue to fund the positions in future years."²³⁴⁷

²³⁴⁰ Venture Statement, at 2; U.S. Dep't of Homeland Security, *FY 2020 Budget in Brief*, p. 76, https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf.

²³⁴¹ Ibid.

²³⁴² Venture Statement, at 2.

²³⁴³ Ibid., 3.

²³⁴⁴ Ibid.

²³⁴⁵ Ibid., 13.

²³⁴⁶ Ibid., 13.

²³⁴⁷ Ibid., 13.

CRCL does not track allocated funds by program area, so it could not tell the Commission exactly how much funding was allocated for external civil rights enforcement; however, it calculated Salary and Benefits, which comprise about 70 percent of actual costs, in the relevant program areas, as follows:

Fiscal Year	FY 2016	FY 2017	FY 2018*
Program Branch	\$4,126,773	\$5,083,527	\$5,302,052
Compliance Branch	\$2,819,421	\$3,216,156	\$3,263,002

*Projected through end of FY 2018²³⁴⁸

In response to the Commission's interrogatories, CRCL stated that it did not have sufficient resources:

For the external civil rights and civil liberties complaints, although CRCL has been able to effectively manage complaints with the current workforce, as evidenced by opening and closing a similar amount each fiscal year, CRCL does not currently have sufficient staffing to support opening more investigations of complaints from the general public, or having more intensive and encompassing investigations of such allegations. The allegations CRCL has received are increasingly complex, and in many cases, are the result of reports requesting very large issues be thoroughly reviewed through a civil rights lens. CRCL presently only has the resources to do a few of these a year.²³⁴⁹

Assessment

Prioritization for Civil Rights Agency-wide

CRCL is headed by a presidentially appointed Officer for Civil Rights and Civil Liberties,²³⁵⁰ who “shall report” directly to the Secretary (the agency head).²³⁵¹ The position does not require Senate confirmation.²³⁵² The DHS’s governing statute does not provide CRCL sufficient enforcement power to ensure agency prioritization of civil rights. The Homeland Security Act specifically provides that part of the primary mission of DHS is to “ensure that civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland.”²³⁵³

CRCL’s authority within DHS depends on the will of other components. For example, the statute gives the Office of Inspector General (OIG) the right of first refusal to “investigate complaints and

²³⁴⁸ Ibid., 12.

²³⁴⁹ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 6, at 14.

²³⁵⁰ 6 U.S.C. § 113.

²³⁵¹ *Id.* § 345(1).

²³⁵² See Schlanger, *Offices of Goodness*, *supra* note 78, at 53, 58.

²³⁵³ 6 U.S.C. § 111(g).

information indicating possible abuses of civil rights or civil liberties.”²³⁵⁴ CRCL only has this authority “unless” the OIG determines that it should investigate the complaint or information.²³⁵⁵ However, the statutory language also clearly provides that the CRCL Officer “shall - review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of the Department,”²³⁵⁶ and in fact, thousands of civil rights complaints are handled by CRCL (*See* Complaints Processing, *infra*).²³⁵⁷ According to a former CRCL official, complaints or information about potential civil rights abuses may be first vetted through DHS’ General Counsel’s Office, and CRCL no longer has its own Chief Counsel, whereas other components such as CBP, ICE, and USCIS do.²³⁵⁸ Similarly, former CRCL Officer Schlanger submitted written testimony urging that each federal civil rights office should have its own Chief Counsel, “otherwise the office is significantly disadvantaged in any intra-agency arm-wrestle.”²³⁵⁹

The statute also prioritizes civil rights by giving the CRCL authority to review agency policy “to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities.”²³⁶⁰ The statute specifically provides that the Officer for CRCL “shall:”

- “assist the Secretary, directorates, and offices of the Department to develop, implement, and periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities;”²³⁶¹

²³⁵⁴ 6 U.S.C. § 345(1)(f).

²³⁵⁵ *Id.*

²³⁵⁶ *Id.* § 345(1)(a).

²³⁵⁷ *See infra* notes 2462-2503.

²³⁵⁸ Scott Shuchart, *Building Meaningful Civil Rights and Liberties Oversight at the Department of Homeland Security*, Center for American Progress, April 2009, at notes 54-56,

<https://www.americanprogress.org/issues/immigration/reports/2019/04/02/467776/building-meaningful-civil-rights-liberties-oversight-u-s-department-homeland-security/> [hereinafter Shuchart, *Building Meaningful Civil Rights and Liberties Oversight at the Department of Homeland Security*] (at note 54, the author states: “Curiously, under a DHS directive issued shortly after DHS was formed, CRCL did have its own chief counsel, who worked within CRCL but reported to the general counsel. While that directive is still posted on DHS’s website, the author is aware, from prior experience in CRCL, that there is no longer such a position. U.S. Department of Homeland Security, Management Directive 3500: Operational Roles and Responsibilities of the Officer for Civil Rights and Civil Liberties & the Office of Chief Counsel (2004), <https://www.dhs.gov/sites/default/files/publications/crcl-directive-3500.pdf>).

²³⁵⁹ Schlanger Statement, at 4 (“*Attorney Staffing*. Within each watchdog OCR, it’s vital, as well, that there be assigned—and senior—counsel who consider the OCR their client. Otherwise the office is significantly disadvantaged in any intra-agency arm-wrestle. This was not a situation I observed first-hand: when I ran CRCL, the office had appropriate attorney support. But I’m told it has been a grave problem since, and one that CRCL cannot solve because it cannot hire someone into the Office of General Counsel, and certainly not someone with the appropriate rank.”).

²³⁶⁰ 6 U.S.C. § 345(a)(3).

²³⁶¹ *Id.* § 345(a)(3) (emphasis added).

- “oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department;”²³⁶² and
- “coordinate with the Privacy Officer to ensure that—programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner[.]”²³⁶³

According to the legislative history, these authorities are statutory protections that Congress put into the Homeland Security Act to recognize the importance of protecting civil rights and liberties in conjunction with defending the nation.²³⁶⁴

Professor Schlanger also emphasized that under federal statutory authority that applies to DHS as well as other agencies such as DOJ, HHS, and Treasury, if and when they are involved in national security, “Congress has already required the Secretary of Homeland Security to ensure that the CRCL Officer:

- (1) has the information, material, and resources necessary to fulfill the functions of such officer;
- (2) is advised of proposed policy changes;
- (3) is consulted by decision makers; and
- (4) is given access to material and personnel the officer determines to be necessary to carry out the function of such officer.”²³⁶⁵

²³⁶² *Id.* § 345(a)(4).

²³⁶³ *Id.* § 345(a)(5).

²³⁶⁴ See S. REP. 108-350, at 2-3 (2004) (proposing the need to enumerate the role of the CRCL given that their proposals effect the day-to-day life of individuals and their law-enforcement like character); 148 CONG. REC. E2145-01 (daily ed. Dec. 16, 2002) (statement of Rep. Richard K. Arme) (acknowledging the Department must fulfill its duties while protecting civil liberties); *U.S. Rep. Dick Arme (R-TX) Holds Hearing on Homeland Security: Hearing on H.R. 5005 Before the H. Comm. On Homeland Sec.*, 107th Cong. (2002) (statement of Bob Menendez) (reiterating that we cannot protect our country without also defending our constitutional civil liberties).

²³⁶⁵ Schlanger Statement, at 2, citing 42 U.S.C. § 2000ee-1(d), which provides in relevant part that:

The Attorney General, the Secretary of Defense, the Secretary of State, the Secretary of the Treasury, the Secretary of Health and Human Services, the Secretary of Homeland Security, the Director of National Intelligence, the Director of the Central Intelligence Agency, the Director of the National Security Agency, the Director of the Federal Bureau of Investigation, and the head of any other department, agency, or element of the executive branch designated by the Privacy and Civil Liberties Oversight Board under section 2000ee of this title to be appropriate for coverage under this section shall designate not less than 1 senior officer to serve as the principal advisor to—

- (1) assist the head of such department, agency, or element and other officials of such department, agency, or element in appropriately considering privacy and civil liberties concerns when such officials are proposing, developing, or implementing laws, regulations, policies, procedures, or guidelines related to efforts to protect the Nation against terrorism[.]

But although CRCL has fairly unique mission-level authority under the above statute as well as its foundational statutory language under the Homeland Security Act to make policy recommendations “to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities,” it lacks authority to enforce them, as there is no statutory or regulatory requirement that new policies be reviewed by CRCL prior to implementation.²³⁶⁶ The office can be effective if it is consulted and its advice is respected. A former CRCL Senior Advisor describes CRCL’s oversight process as follows:

Policy development is generally owned by one part of an agency, but other elements with appropriate technical knowledge will be brought in to consult and advise ... Congress’ innovation with CRCL was to set up a dedicated office that, in an ordinary policy development process at the DHS, would be included wherever a policy could touch on civil rights and civil liberties issues such as racial profiling, humane detention standards, or free expression. While this process is often carried out behind the scenes, it regularly comes into view in a final policy document. In 2017, for example, the DHS implemented a new legislative requirement to allow DHS entities to capitalize on DOD training missions. Recognizing the potential for civil liberties concerns, CRCL coordinated with other DHS offices to ensure that each such training mission would be subject to a civil rights and civil liberties review, with CRCL available to provide ongoing expert assistance.²³⁶⁷

This section summarizes some of CRCL’s major proactive policy work from FY 2016-2018, and analyzes how that work has or has not been effectively prioritized by the agency.

*Zero Tolerance and Family Separation*²³⁶⁸

At the Commission’s briefing, CRCL Deputy Venture testified that her office was not consulted prior to DHS’ implementation of the Administration’s zero tolerance policy that resulted in separation of thousands of migrant children from their parents, because it “came down very quickly from the White House... across DHS, there was not a lot of time for anyone to really dig into it

²³⁶⁶ See 6 U.S.C. § 345(a), *passim*, and see Schlanger Statement, at 4.

²³⁶⁷ Shuchart, *Building Meaningful Civil Rights and Liberties Oversight at the Department of Homeland Security*, *supra* note 2358, at 5.

²³⁶⁸ In parallel with the Commission’s work on this report, the Commission formed a bipartisan subcommittee to re-open the Commission’s 2015 report on immigration detention; the subcommittee was to examine the circumstances and impact of zero tolerance and family separation, as well as conditions of immigration detention. The Commission’s follow-up report, *Trauma at the Border: The Human Cost of Inhumane Immigration Policies*, which was adopted by majority vote of the Commission on August 29, 2019, addresses similar issues to those discussed in this chapter, and some of the text that appears here also appears in *Trauma at the Border*. See U.S. Comm’n on Civil Rights, *Trauma at the Border*, Oct. 24, 2019, <https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf> [hereinafter *Trauma at the Border*] (discussing family separation, conditions of detention, CRCL policy and complaints processing, and other civil rights related issues).

before it was put into place, no.”²³⁶⁹ In October 2018, the GAO reported that previously, only a small number of migrant children were separated from their parents, and this only occurred in cases in which the relationship could not be confirmed, or if the parents were a threat to the safety of the child.²³⁷⁰ On April 6, 2018, then-Attorney General Sessions issued a new “zero tolerance policy” requiring that all federal prosecutors, in conjunction with DHS, seek criminal prosecution of all adult persons crossing the border without authorization, even if they were seeking asylum.²³⁷¹ Under the revised policy, federal prosecutors were directed to work in conjunction with DHS to criminally prosecute all border crossers apprehended between U.S. ports of entry as criminal misdemeanors rather than civil violations, and charge them for “improper entry” under 8 U.S.C. §1325(a).²³⁷² By requiring that all federal prosecutors pursue criminal charges resulting in the

²³⁶⁹ Venture Testimony, *Federal Civil Rights Enforcement Briefing*, p. 132 (When asked if CRCL was consulted in advance of the Administration formulating its policies on separations of families at the border, Venture responded: “So no, partly because it came down very quickly from the White House. So you know across DHS, there was not a lot of time for anyone to really dig into it before it was put into place, no.”).

²³⁷⁰ GAO, *Unaccompanied Children*, *supra* note 1437 (“Prior to the Attorney General’s April 2018 memo, according to DHS officials, accompanied children at the border were generally held with their parents in CBP custody for a limited time before being transferred to ICE and released pending removal proceedings in immigration court. However, according to DHS and HHS officials, DHS has historically separated a small number of children from accompanying adults at the border and transferred them to ORR custody for reasons such as if the parental relationship could not be confirmed, there was reason to believe the adult was participating in human trafficking or otherwise a threat to the safety of the child, or if the child crossed the border with other family members such as grandparents without proof of legal guardianship. ORR has traditionally treated these children the same as other UAC [Unaccompanied Minors].”)

²³⁷¹ *Ibid.* 1-3; and see Preliminary Injunction, *Ms. L. v. ICE*, No. 18-0428, 1-2 (S.D. Cal. June 26, 2018) (hereinafter “Preliminary Injunction”), *citing see* U.S. Atty. Gen., “Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration” (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>; Order, *Ms. L. v. ICE*, No. 18-56151 (9th Cir. Oct. 11, 201) (staying appeal until Nov. 26, 2019 while district court proceedings continue). In the Preliminary Injunction, the federal court noted that persons crossing the border without legal authorization who are seeking asylum are not crossing illegally. *Id.* at 3-4. See also Order Granting Plaintiff’s Motion to Modify Class Definition, *Ms. L. v. ICE*, 333 F.R.D. 284, 392 (S.D. Cal. Mar. 8, 2019) (granting expansion of class definition based on new information from DHS Office of Inspector General report that family separation was occurring in 2017, prior to official announcement of the policy, and that potentially thousands more migrant children had been separated from their parents).

²³⁷² DOJ, Zero-Tolerance Memorandum, *supra* note 843. The Attorney General’s memorandum “direct[ed] each United States Attorney’s Office along the Southwest Border to the extent practicable, and in consultation with DHS - adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 8 U.S.C. § 1325(a). This zero-tolerance policy shall supersede any existing policies.” DOJ, Zero-Tolerance Memorandum, *supra* note 843. Congress made improper entry, i.e., not at a port of entry, a misdemeanor offense in 8 U.S.C. § 1325. Moreover, shortly thereafter, at the news conference in San Diego, California near the Southern border with Tijuana, Mexico, then-Attorney General Sessions acknowledged that the “zero tolerance” policy does not have exceptions for those seeking asylum or accompanying minors:

I have put in place a “zero tolerance” policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It’s that simple. ... I have no doubt that many of those crossing our border illegally are leaving difficult situations. But we cannot take everyone on Earth who is in a difficult situation.” U.S. Dep’t of Justice, Justice News, “Attorney General Sessions Delivers Remarks Discussing the Immigration Actions of the Trump Administration,” San Diego, CA, May 7, 2018, (hereinafter DOJ, “Attorney General Session Remarks.”), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.

detention of parents, the memo would force DHS to separate them from their children.²³⁷³ On April 23, Border Patrol, USCIS and ICE asked for guidance from the Secretary “regarding various approaches for implementing DOJ’s April 2018 memo.”²³⁷⁴ The Secretary of Homeland Security approved DOJ’s recommended policy on May 4, and subsequently issued it in a memo on May 11, 2018, implementing the family separation policy.²³⁷⁵

This impacted thousands of families who had fled dangerous conditions in Central America and wanted to apply for asylum, which is a right under U.S. law no matter where a person enters.²³⁷⁶ The Administration’s new policy of “metering,” or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings.²³⁷⁷ Under the new zero tolerance policy, any unauthorized crossings resulted in taking children from their parents and detaining them separately, often in other states or across the country.²³⁷⁸ Some parents were not provided with clear notice that their children were being taken from them, and some were deported without them, making reunification extremely difficult.²³⁷⁹

DHS officials told GAO that they did not find out about the policy until it was announced publicly by the Attorney General on May 7, 2018.²³⁸⁰ However, GAO found that during 2017, Office of Refugee Rights (ORR) officials noticed an increase of children sent to their shelters who had been separated from their parents, and had approached DHS officials about this trend.²³⁸¹ Similarly, some DHS officials that GAO interviewed had noticed a similar trend in 2017.²³⁸² But according to testimony, CRCL was not consulted.²³⁸³

GAO found that DHS officials were making relevant policy recommendations and issuing directives to implement the new policy in May 2018.²³⁸⁴ Clearly, CRCL should have been consulted, as DHS’ separation of migrant children from their parents at the Southern border

²³⁷³ GAO, *Unaccompanied Children*, *supra* note 1437, at 7.

²³⁷⁴ *Ibid.*

²³⁷⁵ *Ibid.*

²³⁷⁶ Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1).

²³⁷⁷ U.S. Dep’t of Homeland Security, Office of the Inspector General, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, OIG-18-84, September 2018, pp. 5-7, <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> [hereinafter DHS OIG, *Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*].

²³⁷⁸ See “Where Are the Migrant Children Facilities? Scattered Across America,” *The Washington Post*, Jun. 25, 2018, https://www.washingtonpost.com/graphics/2018/national/migrant-child-shelters/?utm_term=.1ab942dfb597.

²³⁷⁹ DHS OIG, *Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, *supra* note 2377, at 12-15.

²³⁸⁰ *Ibid.*; see also GAO, *Unaccompanied Children*, *supra* note 1437, at 7 (“According to DHS and HHS officials we [GAO] interviewed, the departments did not take specific steps in advance of the April 2018 memo to plan for the separation of parents and children or potential increase in the number of children who would be referred to ORR. DHS and HHS officials told us that the agencies did not take specific planning steps because they did not have advance notice of the Attorney General’s April 2018 memo. Specifically, CBP, ICE, and ORR officials we interviewed stated that they became aware of the April 2018 memo when it was announced publicly.”).

²³⁸¹ GAO, *Unaccompanied Children*, *supra* note 1437, at 13.

²³⁸² *Ibid.*

²³⁸³ Venture Testimony, *Federal Civil Rights Enforcement Briefing*, p. 132.

²³⁸⁴ GAO, *Unaccompanied Children*, *supra* note 1437, at 16.

(hereinafter “border”)²³⁸⁵ raised serious civil rights concerns. The overwhelming majority of persons crossing that border are persons of color, primarily from Latin America.²³⁸⁶ For example, CBP data about Border Patrol arrests along both the southern (with Mexico) and northern border (with Canada) from FY 2015-2018 show that of a total 837,518 arrests, the great majority were made along the southern border.²³⁸⁷ Data from the top five countries of origin shows that of those people arrested by the Border Patrol, 537,650 (64.2%) people were from Mexico, 110,802 (13.2%) were from Guatemala, 72,402 (8.6%) were from El Salvador, 68,088 (8.1%) were from Honduras, and 11,600 (0.01%) were from India.²³⁸⁸ Those detained have been disparaged by the President’s xenophobic comments, exacerbating a long-standing and recent history of discrimination against Latino immigrants,²³⁸⁹ and implicating equal protection based on national origin.²³⁹⁰ Their rights to family integrity are also at stake.²³⁹¹ Moreover, a humanitarian crisis emerged due to thousands

²³⁸⁵ Although the United States also has a border with Canada, hereinafter, “border” will be used to signify the Southern border of the United States, with Mexico.

²³⁸⁶ From 2010-2014, 71% of unauthorized immigrants in the U.S. were from Mexico and Central America, and 4% were from South America, such that 75% were from Latin American countries. Jie Zong, Jeanne Batalova, and Jeffrey Hallock, *Frequently Requested Statistics on Immigrants and Immigration in the United States, Unauthorized Immigrants*, Migration Policy Institute, Feb. 8, 2018, <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized>. See also Dara Sharif, “Haitians and Africans Are Increasingly Among Those Stranded Among US – Mexico Border by Trump Immigration Policies,” *The Root*, Jul. 9, 2019, <https://www.theroot.com/haitians-and-africans-are-increasingly-among-those-stranded-1836201429>.

²³⁸⁷ Transactional Records Access Clearinghouse, Syracuse Univ., “TRAC Immigration, Border Patrol Arrests, Border Patrol Sector,” <https://trac.syr.edu/phptools/immigration/cbparrest/> (last accessed Jul. 11, 2019)(noting that: “The data currently begin in October 2014 and track Border Patrol apprehensions through April 2018. (Data for two months - August and September 2017 - has not as yet been received.) Additional FOIA requests are currently outstanding for more recent time periods. As more data become available, the App will continue to be updated.”).

²³⁸⁸ *Ibid.*

²³⁸⁹ See U.S. Comm’n on Civil Rights, Texas Advisory Committee, *Holding Up the Mirror 50 Years Later: Mexican Americans in Texas: 1968-2018, Reports and Recommendations to the U.S. Commission on Civil Rights*, Nov. 17, 2018, Ch. 3: Civil Rights and Immigration: Fifty Years of Failed Policy; and see *infra* note 2438 (citing recent federal civil rights litigation and that “some of these claims are based upon statements by President Trump regarding immigration policy calling Mexicans “rapists,” and immigrants “animals[.]”). see also *Trauma at the Border*, *supra* note 2368, at notes 98-102.

²³⁹⁰ “National origin” means “the country where a person was born, or, more broadly, the country from which plaintiff’s ancestors came.” *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88-89 (1973). U.S. Department of Justice, in guidance for federal law enforcement, defines national origin as “an individual’s, or his or her ancestor’s, country of birth or origin, or an individual’s possession of the physical, cultural or linguistic characteristics commonly associated with a particular country,” and discrimination based on national origin happens when people are singled out and denied equal opportunity because “they or their family are from another country[.]” U.S. Dept. of Justice, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, Nat’l Origin, Religion, Sexual Orientation, or Gender Identity, (December 2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf> [hereinafter DOJ, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, Nat’l Origin, Religion, Sexual Orientation, or Gender Identity]. The Department of Justice’s Civil Rights Division defines national origin as someone’s “birthplace, ancestry, culture, or language.” U.S. Dept. of Justice, Civil Rights Division, Federal Protections Against National Origin Discrimination, (August, 2010), <http://www.justice.gov/sites/default/files/crt/legacy/2011/04/07/natorigin2.pdf>.

²³⁹¹ See *infra* notes 2403-07, discussing federal reports and the class action litigation of *Ms. L. v. U.S. Immigration and Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). These claims fall under the Commission’s statutory duty to submit “at least one report annually that monitors Federal civil rights enforcement efforts in the U.S.” 42 USC 1975a(c)(1).

of migrant children, including infants and toddlers, being separated from their parents and held in shelters for 6-8 months, or more, and some are still being held in government shelters.²³⁹²

The separation of these families raises issues under the broad jurisdiction of CRCL to assist the Secretary and “oversee compliance with constitutional, statutory, regulatory, policy, and other requirements related to the civil rights and civil liberties of individuals affected by the programs and activities of the Department.”²³⁹³ Recently, news reports emerged about thousands of Border Patrol officials being members of a Facebook page that included posts with anti-immigrant rhetoric (including reportedly “racist, sexist and violent images”) that disparaged the Latinx families being separated and the migrants who have died in the agency’s custody.²³⁹⁴ CBP officials reportedly knew about this Facebook page and its contents for “as many as three years,” and their investigation took into account members’ First Amendment and privacy rights.²³⁹⁵ However, if the officers’ statements were to be connected with an overall policy or official actions against Latin American migrants, the statements on the Facebook page implicate civil rights issues.²³⁹⁶ (This may also fall under CRCL’s jurisdiction to review trends in complaints received by DHS Components.²³⁹⁷)

A 60 Minutes investigation reported that former CRCL attorney “Scott Shuchart was surprised by the new policy even though he worked at Homeland Security headquarters at the Office for Civil Rights and Civil Liberties. He told us the order was so abrupt it bypassed the usual review.”²³⁹⁸ After site visits, the DHS OIG issued a report finding that lack of preparation and lack of reliable information systems had led to parents being unable to contact or locate their children.²³⁹⁹ A Congressional hearing as well as reports from an internist and psychiatrist who investigate detention facilities for DHS also showed that the agency knew in advance that that traumatic damage that would be caused by taking children from their parents.²⁴⁰⁰ These two DHS medical

²³⁹² See *infra* notes 2408 (discussing Feb. 2019 reports) and see *Trauma at the Border*, *supra* note 2368, at 25-6 (discussing reports and testimony from the Commission Subcommittee’s May 13, 2019 Public Comment Session); Miriam Jordan, “No More Family Separations, Except These 900,” *New York Times*, July 30, 2019, <https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html>.

²³⁹³ 6 U.S.C. § 345(a)(3) and (4).

²³⁹⁴ See, e.g., Reis Thebault and Nick Miroff, “CBP Officials Knew About Derogatory Facebook Group Years Ago and Have Investigated Posts From It Before,” *The Washington Post*, Jul. 5, 2019, https://www.washingtonpost.com/nation/2019/07/06/cbp-officials-knew-about-derogatory-facebook-group-years-ago-have-investigated-posts-it-before/?utm_term=.704be7a3727d.

²³⁹⁵ *Ibid.*

²³⁹⁶ See DOJ, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, Nat’l Origin, Religion, Sexual Orientation, or Gender Identity, *supra* note 2390.

²³⁹⁷ See *infra* note 2408.

²³⁹⁸ Scott Pelley, “The Chaos Behind Donald Trump’s Policy of Family Separation at the Border,” *60 Minutes*, Nov. 26, 2019, <https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/> [hereinafter [Pelley, “The Chaos Behind Donald Trump’s Policy of Family Separation at the Border”]].

²³⁹⁹ DHS OIG, *Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, *supra* note 2378, at 9-12.

²⁴⁰⁰ PBS, “What we learned from congressional hearing on family separations,” *supra* note 1439; see also Pelley, “The Chaos Behind Donald Trump’s Policy of Family Separation at the Border,” *supra* note 2398 (interviews with Psychiatrist Dr. Pam McPherson and Internist Dr. Scott Allen).

consultants had reported their findings of “watching in horror” as children experienced the trauma of being separated, with a “high risk of harm” to the children and their parents, and inadequate water, food and medical care resulting in issues such as extreme weight loss and children becoming depressed due to being detained without their parents in prison-like conditions.²⁴⁰¹ They stated that: “In our professional opinion, there is no amount of programming that can ameliorate the harms created by the very act of confining children to detention centers.”²⁴⁰² A federal court later documented evidence that in many cases, this also compounded trauma from the dangerous conditions that migrant families had fled from in Central America.²⁴⁰³ If CRCL was able to access the Secretary and mission-level influence envisioned in the Homeland Security Act, and subsequent amendments,²⁴⁰⁴ it should have been able to stop the family separation policy before it harmed the children.

Instead, litigation by private parties was needed, and on June 26, 2018, a federal court issued a preliminary injunction ordering that migrant children who were separated be reunited with their parents within 14 or 30 days.²⁴⁰⁵ The court also required that the policy of family separation be halted, finding the policy to be “egregious,” “outrageous,” “brutal” and “offensive.”²⁴⁰⁶ The court’s decision also demonstrates the negative impact of ineffective federal civil rights enforcement for thousands of families of color, especially Central American children, finding that:

Children are at risk of suffering great emotional harm when they are removed from their loved ones. And children who have traveled from afar and made their way to this country to seek asylum are especially at risk of suffering irreversible psychological harm when wrested from the custody of the parent or caregiver with whom they traveled to the United States.²⁴⁰⁷

Numerous religious, civil rights, immigrant rights and community service groups, as well as Members of Congress and the media, responded to the ensuing crisis through contributions, legal

²⁴⁰¹ Miriam Jordan, “Whistle-blowers Say Detaining Migrant Families Poses ‘High Risk of Harm,’” *The New York Times*, Jul. 18, 2018, <https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html>.

²⁴⁰² *Ibid.*

²⁴⁰³ *See Ms. L. v. U.S. Immigration & Customs Enf’t*, 302 F. Supp. 3d 1149, 1166 (S.D. Cal. Jun. 6, 2018) (discussing expert testimony); and *see infra* notes 2405-2407 for further discussion of the litigation; and *see* Pelley, “The Chaos Behind Donald Trump’s Policy of Family Separation at the Border,” *supra* note 2398.

²⁴⁰⁴ *See supra* notes 2361-64; *cf. supra* notes 2365-2367.

²⁴⁰⁵ Preliminary Injunction, *Ms. L. v. U.S. Immigration and Customs Enf’t*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (Ordering that children under 5 years of age be reunited with their parents within 14 days, and children over 5, within 30 days).

²⁴⁰⁶ 310 F. Supp. 3d at 1145-46, *citing* several Supreme Court cases (internal citations omitted).

²⁴⁰⁷ 310 F. Supp. 3d at 1147 (quoting expert testimony of Martin Guggenheim, the Fiorello LaGuardia Professor of Clinical Law at New York University School of Law and Founding Member of the Center for Family Representation).

assistance, and investigations of the conditions and impact of family separation, which were publicly available.²⁴⁰⁸

On June 15, 2018, the Commission majority sent a letter to the Departments of Justice and Homeland Security, urging the ending of separating families at the border and the zero tolerance policy.²⁴⁰⁹ The zero tolerance policy, the Commission noted, coerced parents into withdrawing valid asylum applications and impaired their legal immigration proceedings for fear of what would happen to their children if they did not comply.²⁴¹⁰ The Commission emphasized its concern that these policies, directed at Mexican and Central American immigrants coming to the U.S. through the border, raised questions of unwarranted discrimination on the basis of national origin.²⁴¹¹ In addition, the Commission noted that the policy disregarded that many of those individuals coming to the U.S. are fleeing dangerous situations in their home countries and are seeking asylum within the parameters of our nation's immigration laws.²⁴¹² On June 26, 2018, the Commission voted to reopen its 2015 Report *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*,²⁴¹³ and formed a bipartisan subcommittee to facilitate discovery associated with reopening the report.²⁴¹⁴

DHS initially implemented this policy of separating children from their parents with “no reunification plan in place,”²⁴¹⁵ and without review by DHS' CRCL.²⁴¹⁶ As discussed, the Homeland Security Act, as amended requires that CRCL's mission be part of the mission of the DHS, that the CRCL Officer have access to the agency head, and that CRCL “review and assess information concerning civil rights” and “periodically review Department policies and procedures to ensure . . . the protection of civil rights.”²⁴¹⁷ At the Commission's briefing, Deputy Venture was asked whether CRCL was consulted on zero tolerance and family separation, and she said no.²⁴¹⁸

²⁴⁰⁸ Alan Gomez, “Democrats grill Trump administration officials over family separation policy on the border,” *USA Today*, Feb. 7, 2019 <https://www.usatoday.com/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/>; Refugee and Immigrant Center for Education and Legal Services, “CREW and RAICES Sue DHS Over Continued Family Separation Failures,” Dec. 14, 2018, <https://www.raicestexas.org/2018/12/14/crew-and-raices-sue-dhs-over-continued-family-separation-failures/>; Presbyterian Disaster Assistance, “Separated Families and U.S./Mexico Border Update,” Aug. 14, 2018, <https://www.presbyterianmission.org/pda-blog/2018/08/14/separated-families-and-u-s-mexico-border-update/>.

²⁴⁰⁹ Letter from the USCCR to former Atty General Sessions and former DHS Sec'y Nielsen (Jun. 15, 2018), <https://www.usccr.gov/press/2018/06-15-18-letter.pdf>.

²⁴¹⁰ *Ibid.*, 1.

²⁴¹¹ *Ibid.*, 1-2.

²⁴¹² *Ibid.*, 2.

²⁴¹³ U.S. Comm'n on Civil Rights, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*, September 2015, https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf.

²⁴¹⁴ U.S. Comm'n on Civil Rights, Jun. 26, 2018 Business Meeting Transcript, at 17 ln. 18-21.

²⁴¹⁵ 310 F. Supp. 3d at 1142 (“[I]t is undisputed ‘ICE has no plans or procedures in place to reunify the parent with the child other than arranging for them to be deported together after the parent's immigration case is concluded.’”).

²⁴¹⁶ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 80 (emphasis added).

²⁴¹⁷ See *supra* notes 2304-2305 (discussing 6 U.S.C. §§ 345(1)(a)-(c)).

²⁴¹⁸ Venture Testimony, *Federal Civil Rights Enforcement Briefing*, p. 132.

She stated that the matter was an ongoing investigation, so she was not at liberty to comment about whether, if had CRCL been notified, the policy would have raised civil rights concerns.²⁴¹⁹

On June 19, 2019, the Commission received correspondence from CRCL stating that the Commission's draft report "did not accurately capture CRCL's efforts to shape DHS policy," adding that:

CRCL's Programs Branch provides policy advice to the Department on civil rights and civil liberties issues in the policy development process, as well as in implementation after announcement of a new policy. That means that much of our policy work is most effective either on issues that have not yet entered public view, where incremental improvement is possible in an area that is not high profile enough to have triggered litigation, or where we are helping the department to address issues after litigation has clarified difficult legal issues. In whichever case, much of this proactive policy work is part of the deliberative process and, therefore, shielded from public view...

Specifically with respect to the zero tolerance policy (family separation), CRCL was not involved in the early development of the policy; however, CRCL's Compliance Branch investigated family separations and made recommendations to U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). As far back as 2016, CRCL processed complaints and voiced concerns regarding the impact of family separation on children. The [CRCL] Programs Branch, in coordination with the [CRCL] Compliance Branch, also raised concerns with the civil rights and civil liberties issues with the zero tolerance policy and the resulting family separations, as the Department of Justice and DHS were implementing the policy. Finally, CRCL is currently completing complaint investigations related to family separation by CBP.

We want to emphasize that CRCL raises concerns with DHS policies and activities that impact civil rights and civil liberties issues, even if CRCL was not included in the initial policy development. Unfortunately—due to the above-referenced structural limitations—CRCL often cannot share the details of its work with the public.²⁴²⁰

The Commission's research shows jurisdictional issues have impeded CRCL's ability to assist in evaluating and influencing the policy of family separation. They were apparently not fully included in the advance development of the policy and while CRCL has since been participating in making policy regarding DHS' treatment of minor children and families, and it is involved in drafting regulations that the Administration recently issued to replace the *Flores* Settlement Agreement

²⁴¹⁹ Ibid., 133.

²⁴²⁰ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

that protects the civil rights of migrant children and families in federal detention, it is unclear the extent to which their recommendations are being implemented. In another comment, on the Commission's draft report, CRCL stated:

Unaccompanied children are in custody of HHS/ORR, so outside of CRCL's jurisdiction. Additionally, CRCL has been involved in the Department's efforts to draft regulations on detention of children, which would replace the *Flores* Settlement Agreement.²⁴²¹ Further, CRCL has been involved for many years in reviewing the ICE Family Residential Centers that house family units.²⁴²²

However, the reported conditions of migrant children and their families in DHS custody show that CRCL has not been effective in preventing systemic civil rights violations.²⁴²³ At minimum they were not consulted in the early critical stages of planning that resulted in the disastrous decision to separate even preverbal toddlers from their parents with no plans on how they would be tracked and reunited. This contrasts with the statutory requirement that CRCL must "periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities."²⁴²⁴ The statutory framework does not include sufficient requirement that CRCL must review every policy change, nor that review occur prior to a new policy being implemented, nor is there any specific authority to ensure that the agency takes CRCL's advice into account.²⁴²⁵

Muslim Ban

Deputy Venture testified that CRCL had not been consulted before introduction of the Muslim ban, clarifying that: "These are policies that were pushed out from the White House and [about which they] said to do it."²⁴²⁶ The Commission majority has expressed deep concern about the civil rights implications of the Administration's policy of banning the entrance or visas for

²⁴²¹ For more information on the *Flores* Settlement Agreement, which prohibits detention of migrant children for more than 72 hours and otherwise protects their rights to appropriate care, see *infra* note 2521 and *Trauma at the Border*, *supra* note 2368, at notes 277-90.

²⁴²² Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 73.

²⁴²³ See *supra* notes 2404-2407 (discussing *Ms. L* litigation).

²⁴²⁴ 6 U.S.C. § 345(a)(3).

²⁴²⁵ *Id.* § 345, *passim*.

²⁴²⁶ Venture, *Federal Civil Rights Enforcement Briefing*, p. 132.

immigrants from majority Muslim countries.²⁴²⁷ In particular, the Commission voted to decry not only the discriminatory impact of these policies, but also the rhetoric behind them, targeting persons based upon their religion.²⁴²⁸ The policy was first introduced through an executive order on January 27, 2017, which banned the entry of foreign nationals from seven predominantly Muslim countries, suspended the entry of Syrian refugees indefinitely, and prohibited the entrance of any refugees from any country for 120 days.²⁴²⁹ Widespread protests by U.S. citizens at airports across the country met the first two iterations of the policy, and more importantly, federal courts swiftly struck down both iterations of the ban in three separate lawsuits on the grounds that the bans were discriminatory and unconstitutional.²⁴³⁰ The Commission received public comments from State Attorneys General who had litigated against the Muslim ban. Virginia Attorney General Mark Herring submitted the following public comment: “One of President Trump’s first executive orders attempted to enact a Muslim ban that violated the constitutional rights of many living in our nation and raised fear among American Muslims and other minority communities that they could find themselves the next target of government sanctioned and mandated discrimination.”²⁴³¹ After the litigation, the President issued a third, amended and limited version of the policy that the Supreme Court deemed constitutional, in June 2018.²⁴³²

The White House issued these policies through the executive orders discussed above, as well as through an Agency Memo to DHS, the U.S. Department of State and the Director of National Intelligence (DNI).²⁴³³ As DHS implemented them, refugees were not allowed to enter the country,

²⁴²⁷ See U.S. Comm’n on Civil Rights, U.S. Comm’n on Civil Rights Expresses Concern Over Executive Orders Promoting Religious and National Origin Discrimination (Feb. 24, 2017), <https://www.usccr.gov/press/2017/statement-02-24-17-EO.pdf> (“Executive Order 13,769 sets out different treatment for persons coming to the United States from specified, Muslim-majority countries without any lawful justification or basis for that different treatment. By singling out seven overwhelmingly Muslim majority countries for exclusion, the Executive Order itself raises the specter of government endorsement of religious and possibly national origin discrimination. This infirmity is compounded by the Executive Order’s prioritization of refugees who claim religious persecution, so long as they belong to “a minority religion” in their home country. Moreover, as courts have already recognized, extrinsic evidence also suggests that the EO was motivated by prohibited bias, inconsistent with the Nation’s antidiscrimination principles.”)

²⁴²⁸ See Exec. Order No. 13,769, 82 Fed. Reg. 20, 8,977 (Jan. 27, 2017); see also U.S. Comm’n on Civil Rights, U.S. Commission on Civil Rights Decries Supreme Court Decision in Muslim Ban Case (July 13, 2018), <https://www.usccr.gov/press/2018/07-13-18-Statement.pdf> (majority of Commission agrees with Justice Sotomayor that the “repackaging [of the policy] does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created.”).

²⁴²⁹ Exec. Order No. 13,769, 82 Fed. Reg. 20, 8,977 (Jan. 27, 2017) (banning entrance for persons from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.).

²⁴³⁰ See, e.g., *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 259-60 (4th Cir. 2018); *State v. Trump*, 871 F.3d 646, 654 (9th Cir. 2017); *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (dismissing government’s motion for emergency stay pending appeal).

²⁴³¹ Mark Herring, Atty General of Virginia, testimony, *Federal Civil Rights Enforcement Briefing*, pp. 339-340.

²⁴³² *Trump v. Hawaii*, No. 17–965, 2018 WL 3116337, at *24, 188 S.Ct. 2320-21 (U.S. Jun. 26, 2018) (under rational basis standard of review, “[i]t cannot be said that it is impossible to ‘discern a relationship to legitimate state interests’ or that the policy is ‘inexplicable by anything but animus. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security interests, quite apart from any religious hostility, we must accept that independent justification.”).

²⁴³³ Findings of Fact, Conclusions of Law, and Order Issuing Preliminary Injunction, *Doe v. Trump*, 284 F. Supp. 3d 1182, 1184-85 (W.D. Wash. 2018).

and Muslim Americans with family members from the countries at issue have been forced to endure separation from their loved ones.²⁴³⁴

Although this litigation is ongoing, it illustrates that CRCL should have been involved as the new policies raised substantive civil rights concerns. While these policies originated from the White House, DHS' CRCL should have been consulted prior to implementation, per CRCL's statutory authority.²⁴³⁵

Other Civil Rights Policy Issues Apparently Not Addressed by CRCL

Other major policy changes that have resulted in civil rights concerns during FY 2016-2018 include the Administration's retraction of Deferred Action for Childhood Arrivals ("DACA"), and claims pending in federal courts now regarding racially discriminatory animus and due process issues.²⁴³⁶ Federal courts are also hearing a series of allegations regarding retraction of Temporary Protective Status ("TPS") from African, Haitian and Central American immigrants, which also implicate substantive due process and equal protection concerns, including allegations that the retraction of TPS has been motivated by racial animus.²⁴³⁷ Some of these claims of racial animus are based upon statements by President Trump calling Mexicans "rapists" and immigrants "animals," and characterizing countries from which his Administration retracted TPS status "s***hole countries."²⁴³⁸

²⁴³⁴ *Id.*

²⁴³⁵ 6 U.S.C. § 345(a)(3).

²⁴³⁶ Compare *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 514-15 (9th Cir. 2018) (holding that because USCIS retained ultimate discretionary authority over protections granted by DACA, illegal immigrants did not possess a liberty or property interest protected by due process; but upholding plaintiff's equal protection claim given that the recession of DACA was motivated by discriminatory animus) and *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 274 (E.D.N.Y. 2018) (denying a motion to dismiss plaintiff's equal protection claims where DACA can reasonably be shown to be motivated by racially discriminatory animus against Latinos and in particular, Mexicans and a due process claim for extension applicants) with *Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 773-74 (D. Md. 2018) (finding that the rescission of DACA did not create entitlement to any benefits protected by procedural due process, did not "shock the conscious" to violate substantive due process rights, and did not violate the Fifth Amendment's Equal Protection Clause); see also *NAACP v. Trump*, 298 F. Supp. 3d 209, 222 (D.D.C. 2018) (granting motion to dismiss plaintiff's information sharing claim and deferring ruling on plaintiff's constitutional claims, finding that the recession of DACA violated the APA).

²⁴³⁷ See, e.g., *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1100 (N.D. Cal. 2018) (finding plaintiffs demonstrate serious questions on the merits of an equal protection claim and granting a preliminary injunction); *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 412 (D. Mass. 2018) (finding that TPS recipients adequately alleged that the change in TPS policy raised a serious question of equal protection and due process); *Saget v. Trump*, 345 F. Supp. 3d 287, 303 (E.D.N.Y. 2018) (denying defendant's motion to dismiss as the Haitian nationals sufficiently alleged that DHS's termination of Haitian TPS violated their equal protection rights); *Casa de Maryland, Inc. v. Trump*, No. GJH-18-845, slip op. at *1 (D. Md. Apr. 25, 2018) (finding Salvadoran nationals plausibly alleged that the decision to end El Salvador TPS designation violated substantive due process); and see Complaint, *African Communities Together, et. al. v. Trump*, No. 4:19-cv-10432-TSH (D. Mass., Mar. 8, 2019); and First Motion for Preliminary Injunction (Mar. 12, 2019) (requesting expedited hearing). The hearing is set for March 28. *Id.*, Electronic Notice Setting Motion Hearing (Mar. 13, 2019).

²⁴³⁸ *Id.*; and see, e.g., Jayashri Srikantiah & Shirin Sinnar, *White Nationalism As Immigration Policy*, 71 *Stanford L. Rev.* (Mar. 2019), <https://www.stanfordlawreview.org/online/white-nationalism-as-immigration-policy>:

Regarding the Trump Administration's controversial policy of separation of children from their parents at the border, Cecilia Muñoz, former Director of Domestic Policy for President Obama, commented that, "They issued an order without consulting with the agencies who were responsible for carrying out that order... [The harm to migrant children was] because these decisions were clearly made at the top and pushed down to the agencies without thinking through the ramifications and without thinking through the potential harm."²⁴³⁹ This concern underscores the weakness in the statutory design of DHS CRCL, challenging its capacity to fulfill an expected civil rights agency role to ensure civil rights compliance. Deputy Venture vividly testified to this statutory weakness:

There are [structural challenges] in the sense that we don't have the ability to enforce. We make recommendations to say CBP or ICE. So I was talking to staffers on the Hill about their looking into possibly giving CRCL the ability to enforce more strongly, if these are not recommendations; these are here what it's going to be. And so of course that means a legislative fix.²⁴⁴⁰

CRCL's new Deputy Officer for Programs and Compliance Peter Mina has noted that "CRCL welcomes the opportunity to work with DHS leadership and Congress to expand statutory authorities and increase the office's funding level."²⁴⁴¹

Professor Schlanger made some recommendations to improve DHS CRCL's ability to review new DHS policies in advance of implementation, but she added that:

[I]n the current climate, it is not clear to me that any of this will work. I just want to be clear about that. This [CRCL] is an internal office. If there is a department that is insisting on orphaning children at the border, if there is a department that is insisting on engaging in Islamophobia... That is insisting on Islamophobic

With respect to immigration, Trump has repeatedly disparaged various groups of nonwhite immigrants. He began his presidential campaign by denouncing Mexican migrants as "rapists." He allegedly commented that Haitian immigrants "all have AIDS" and that Nigerian immigrants would never "go back to their huts" after seeing the U.S. He repeatedly conflated Middle Eastern and Muslim immigrants with terrorists and falsely claimed that most people convicted of terrorism in the U.S. came from abroad. In addition, Trump has trafficked in age-old racist tropes, portraying immigrants as criminals, invaders, threats to women, and even subhuman. On one occasion, Trump described unauthorized immigrants as "animals;" on another, he conjured images of vermin in describing immigrants as threatening to "pour into and infest our Country." Perhaps most infamously, he reportedly railed against immigration from "shithole countries"—an apparent reference to Haiti, El Salvador, and African nations—and asked why the U.S. couldn't get more people from countries like Norway. *Id.* at § I.A (citing sources).

²⁴³⁹ Pelley, "The Chaos Behind Donald Trump's Policy of Family Separation at the Border," *supra* note 2398; *see also infra* notes 2369-2426 (discussing zero tolerance and the resulting family separation policy, and related civil rights issues).

²⁴⁴⁰ Venture Testimony, *Federal Civil Rights Enforcement Briefing*, p. 135.

²⁴⁴¹ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 90.

screening protocols, if there is a department where violations of civil rights are at the core of what it sees as its role, then an internal civil rights office... might be able to slow that down, might be able to make it more embarrassing, but it is not going to be able to reverse it.”²⁴⁴²

Strategic Planning and Self-Evaluation

Regarding performance, CRCL’s statute requires that the agency Secretary provide an annual report about implementation of the duties of CRCL, including details of allegations concerning abuse of civil rights by employees and officials of the Department.²⁴⁴³ As required by the Implementing Regulations of the 9/11 Commission Act of 2007, CRCL also provides semi-annual reports to Congress.²⁴⁴⁴ That statute requires that the semi-annual reports include: “(A) information on the number and type of reviews undertaken; (B) the type of advice provided and the response given to such advice; (C) the number and nature of complaints received by the department, agency, or element concerned for alleged violations; and (D) a summary of the disposition of such complaints, the reviews and inquiries conducted, and the impact of the activities[.]”²⁴⁴⁵ The 9/11 Commission Act also requires that these reports to Congress be made “available to the public; and otherwise inform the public of the activities of such [Civil Liberties] officer,” as long as consistent with protection of classified information and applicable law.²⁴⁴⁶

CRCL semiannual reports can be found on their website and include fairly comprehensive information about investigations opened, the allegations, and the DHS Component involved.²⁴⁴⁷ Some information, such as the resolution of investigations, including CRCL review of agency policies and funding recipients, is not provided but would be useful to help evaluate the efficacy of the work of the CRCL.²⁴⁴⁸ This information would also be useful to impacted community members as well as federal, state and local officials who are concerned about protecting civil rights, to understand how CRCL is working to protect and advance civil rights and so the regulated community – such as recipients of DHS financial assistance – act in a manner consistent with federal civil rights protections.²⁴⁴⁹

Though the semiannual report does provide CRCL with one direct reporting channel to Congress, the scope and content of these semiannual reports is limited. Other components of DHS, such as the DHS Privacy Office and the Citizenship and Immigration Service Ombudsman, have direct reporting lines to Congress that provide an important level of independence, requiring that they

²⁴⁴² Schlanger Testimony, *Federal Civil Rights Enforcement Briefing*, p. 252.

²⁴⁴³ 6 U.S.C. § 345(b).

²⁴⁴⁴ 42 U.S.C. § 2000ee-1(f); *see also* DHS, “CRCL Semiannual Reports,” *supra* note 2339.

²⁴⁴⁵ 42 U.S.C. § 2000ee-1(f)(2).

²⁴⁴⁶ *Id.* § 2000ee-1(g).

²⁴⁴⁷ *See* DHS, “CRCL Semiannual Reports,” *supra* note 2339.

²⁴⁴⁸ *Ibid.*, *passim*. *See also*, e.g., U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, *Semiannual Report to Congress, Third and Fourth Quarters, FY 2018*, May 31, 2018, <https://www.dhs.gov/sites/default/files/publications/fy-2018-q3-q4-semiannual-report.pdf>.

²⁴⁴⁹ *See*, e.g., Schlanger Statement, at 3.

“submit reports directly to Congress.... without any prior comment or amendment by the Secretary, Deputy Secretary, or any other officer or employee of the Department or the Office of Management and Budget.”²⁴⁵⁰

The agency’s strategic plan only includes mention of “rigorously protecting privacy and civil rights and civil liberties,” in relation to “integrating critical data sources, such as those for biometric data, by consolidating or federating screening and vetting processes,”²⁴⁵¹ and in relation to cybersecurity or intelligence data.²⁴⁵² In terms of CRCL’s strategic planning, the civil rights office told the Commission that:

DHS has not engaged in formal prioritization of planning with respect to civil rights and civil rights enforcement during the years in question. Rather, prioritization is constantly evolving based on identified needs and emerging areas. During the years in question, principal priority enforcement areas have been:

- Use of social media and biometric data in intelligence, vetting, and law enforcement;
- Ensuring language access in Department activities and programs;
- Access to programs and activities for individuals with disabilities encountered and served by DHS Components, and particularly during FEMA emergencies;
- Accommodation of disabilities in immigration enforcement, including credible fear screenings and immigration detention;
- Community engagement on fast-moving changes in immigration and security policies;
- Creation of the National Vetting Center;
- Building civil rights and civil liberties protections into big data and information sharing projects.²⁴⁵³

CRCL also identifies areas for proactive policy development through assessing the Department’s interest. CRCL stated that former Deputy Secretary Mayorkas took an interest in immigration detention, and that the office “made support of his efforts a priority,” and that “there has not been the same leadership interest in that subject [since his departure in November 2016], though it remains a substantial part of CRCL’s work.”²⁴⁵⁴ Similarly, “following a mass shooting in San Bernardino, California, in December 2015, the Department took a substantial interest in the way social media is used in law enforcement and security, and CRCL made support of these efforts and appropriate civil rights and civil liberties policy a priority.”²⁴⁵⁵

²⁴⁵⁰ 6 U.S.C. § 142(e) and § 272(e)(2).

²⁴⁵¹ U.S. Dep’t of Homeland Security, *Fiscal Year 2014 – 2018 Strategic Plan*, 16, https://www.dhs.gov/sites/default/files/publications/FY14-18%20Strategic%20Plan_0_0.PDF.

²⁴⁵² *Ibid.*, 29, 33 and 41.

²⁴⁵³ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 3, at 7.

²⁴⁵⁴ *Ibid.*

²⁴⁵⁵ *Ibid.*

To more precisely review what civil rights matters CRCL has prioritized during FY 2016-18, the Commission asked about the office's policy priorities. In response, CRCL provided a list of 10 examples of "enforcement through proactive policy development."²⁴⁵⁶ In addition, responding to how it enforces civil rights law, CRCL's written testimony included information about 15 "current priorities and pressing areas in recent years."²⁴⁵⁷

To compare the current "pressing areas" with what has resulted in proactive policy development, the table below summarizes this information side-by-side. The data shows some level of compatibility between "current priorities and pressing areas;" however, the data also shows that some current priorities are not precisely matched with proactive policy development, and some policies have been developed based on other priorities. This may be because DHS policy changes quickly, such that CRCL is in a responsive rather than proactive position.²⁴⁵⁸

²⁴⁵⁶ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 2, at 4-5.

²⁴⁵⁷ Venture Statement, at 4-5.

²⁴⁵⁸ CRCL commented that: "CRCL notes that in a fast-moving policy environment this kind of attempt to match current priorities with proactive policy development may be overly simplistic. For example, CRCL's work may result in policy not being issued or ameliorated in a way that, due to the deliberative policy-making process, cannot be shared with the public. As the process of developing priorities lacks the benefit of hindsight and cannot account for many factors beyond CRCL's control, we would caution against this type of comparison." Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 58.

Table 8.1: Comparison of CRCL Current Policies and Pressing Areas vs. Stated Areas of Proactive Policy Development

CRCL “Current Priorities and Pressing Areas”	CRCL “Areas of Proactive Policy Development”
Review and auditing classified DHS intelligence products to ensure civil rights and civil liberties (CRCL) protections.	Promulgation of a privacy and civil liberties protection policy for the Information Sharing Environment (ISE).)
Use of social media and biometrics data in intelligence, vetting, and law enforcement.	Recognition of civil rights issues through CRCL participation in policy on subjects including social media, computer data matching, the use of military training, watchlisting, vetting, and immigration enforcement during disasters and evacuations.
Support for state and local law enforcement CRCL policy development regarding: license plate readers, facial recognition, audit of fusion center privacy/civil liberties policies, use of open source data in intelligence analysis, and use of biometric data.	Working with the DOJ Global Justice Information Sharing Initiative’s Criminal Intelligence Coordinating Council (CICC) to develop policy guidance and templates for state and local law enforcement and justice entities on license plate readers, facial recognition, audit of fusion center privacy/civil liberties policies, use of open source data in intelligence analysis, and use of biometric data.
“Community engagement on fast-moving changes in immigration and security policies.””	Strategic community engagement initiatives by which DHS Senior Policy Advisors facilitate Quarterly Roundtables in 17 cities, and issue-specific community meetings, “to share timely, credible information; receive imperative feedback by individuals potentially impacted by Department activities; and to build trusted public/private partnerships between DHS and all levels of government, law enforcement, and the community.”
Development of CRCL training for state and local law enforcement on the issue of preventing terrorism via community partnerships.	CRCL worked with the Federal Law Enforcement Training Centers (FLETC) to develop a national training program, the Law Enforcement Awareness Briefing (LAB) on Terrorism Prevention Partnerships, which was launched in 2019 and is awaiting resources for rollout.
Investigations into family separation and family reunification; family detention by ICE and detention of other vulnerable populations; treatment of unaccompanied children in CBP custody; and processing of asylum seekers by CBP.	CRCL has investigated family separation issues that are not the subject to ongoing litigation, and recommendations have been issued to both CBP and ICE.
Development of appropriate standards for search, transportation, and detention of arrestees and detainees, including policies on prevention of sexual assault.	Development of appropriate standards for search, transportation, and detention of arrestees and detainees, including policies on prevention of sexual assault.

Ensuring language access in DHS programs and activities; development of a DHS language access program, working group, and component-specific language access plans.	Development of a DHS language access program, working group, component-specific language access plans, training, and compliance review.
Access to programs and activities for persons with disabilities, particularly during FEMA emergencies.	CRCL, working with FEMA, conducted listening sessions to hear from the public after disasters in 2018, including Hurricane Maria. CRCL compiled feedback and developed recommendations for FEMA's consideration.
Accommodation of disabilities in immigration enforcement.	Collaboration with Immigration and Customs Enforcement on development of new comprehensive policies related to accommodating individuals with disabilities in detention. CRCL Compliance has also reviewed numerous individual claims of disability discrimination many of which resulted in a finding or resolution that included a reasonable accommodation, such as the provision of a sign language interpreter.
Updating the Privacy and Civil Liberties Policy for State and Major Urban Areas Fusion Centers; technical assistance on integration of privacy and CRCL protections in state and local intelligence products.	<p>This was completed in March 2019 under the auspices of the Criminal Intelligence Coordinating Council (CICC), a group under the U.S. Department of Justice's (DOJ) Global Justice Information Sharing Initiative (Global) which is an advisory body to the U.S. Attorney General. CRCL was a part of the working group that updated the Privacy and Civil Liberties Policy for State and Major Urban Area Fusion Centers - a requirement for fusion center recipients of DHS funding.</p> <p>CRCL also plans to respond to requests for technical assistance from the national fusion center network on appropriate integration of the new policy template into existing privacy, civil rights, and civil liberties policies when resources become available.</p>
Incorporating CRCL protections in the National Vetting Center (NVC). ²⁴⁵⁹	The NVC is administered by DHS through U.S. Customs and Border Protection and governed by an interagency National Vetting Governance Board (NVGB). The NVGB is supported by a Legal Working Group and a separate Privacy, Civil Rights, and Civil Liberties (P-CRCL) Working Group which will review all activities of the NVC to ensure they comply with law and

²⁴⁵⁹ The National Vetting Center was established by a National Security Presidential Memorandum in February 2018, to coordinate Federal Government vetting efforts of persons entering or seeking to remain in the country, to "improve the Government's ability to identify terrorists, criminals, and other nefarious actors, including those who seek a visa, visa waiver, or an immigration benefit, or a protected status; attempt to enter the United States; or are subject to an immigration removal proceedings." U.S. Dep't of Homeland Security, "The National Vetting Center," Feb. 6, 2018, <https://www.dhs.gov/news/2018/02/06/national-vetting-center>.

	<p>policy and protect individuals' privacy, civil rights, and civil liberties, in accordance with U.S. law. CRCL co-chairs the P-CRCL Working Group. Further, DHS published a Privacy Impact Assessment (PIA) assessing the risks to privacy, civil rights, and civil liberties presented by the NVC and the vetting programs that will operate using the NVC. The PIA can be found at https://www.dhs.gov/publication/dhsallpia-072-national-vetting-center-nvc.</p>
Improving training and processes for all DHS employees regarding the Department's zero tolerance policy for harassment.	
"Ensuring religious liberty protections, following issuance of the Attorney General's memorandum on 'Federal Law Protections for Religious Liberty.'"	Issuance of a Department policy for accommodating religious beliefs when collecting photographs or fingerprints
"[D]uring the summer and fall of 2017, when several hurricanes and wildfires impacted large regions of the United States and its territories, CRCL and FEMA worked to address potential civil rights issues facing individuals with disabilities, individuals with limited English proficiency, immigrant communities, and members of racially and ethnically diverse communities. DHS coordinated with civil rights partners within other key agencies to issue and disseminate updated guidance reminding recipients of federal financial assistance of their civil rights obligations. CRCL and FEMA initiated a multi-state listening tour to hear directly from impacted communities regarding concerns emerging from the disasters. And CRCL has taken a lead role in engaging an interdepartmental working group for better coordination of improvement civil rights in disaster planning and execution."	Began development of recommendations to state, local, territorial, and tribal emergency managers to improve the delivery of disaster assistance to disaster survivors with disabilities. CRCL issued these recommendations in March 2019 in advance of the 2019 hurricane season.
	Re-stating Department policy on the use of race, ethnicity, and other characteristics in law enforcement and screening

SOURCE: CRCL Testimony and Answers to Interrogatories

These data show current and pressing priorities ranging from intelligence gathering, immigration policy, family separation and reunification, detention policies, language access, access for persons with disabilities, training of state and local entities involved with DHS, internal policies against harassment, ensuring religious liberty, and access to Federal Emergency Management Association benefits. Examples of proactive policy work provided by CRCL address some, but not all, of these pressing issues. For example, CRCL did not provide information about proactive policy work

regarding family separation, and also did not answer questions about the policy, citing an ongoing investigation.²⁴⁶⁰ In addition, other proactive policy has been developed without necessarily being listed as a “current” or “pressing” area. Examples include updated policies regarding racial profiling issued by CRCL.²⁴⁶¹

Complaint Processing, Agency-Initiated Charges and Litigation

According to the DHS authorizing statute, the Officer for CRCL must “investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General.”²⁴⁶² CRCL told the Commission that:

This does not take into account a number of additional individual remedial compliant avenues for the public that are at the DHS Component level, such as DHS TRIP, which receives and seeks resolution regarding difficulties experienced during travel screening at transportation hubs (airports) or crossing U.S. borders.

CRCL, in addition to responding to allegations filed with our office, also reviews complaints made to Component[s] for trends.²⁴⁶³

But as former Officer Margo Schlanger has explained, “CRCL lacks authority either to prosecute or to discipline.”²⁴⁶⁴ Congress charged DHS CRCL with “oversee[ing] compliance” for the agency with civil rights principles but did not give the office authority to require other offices within the agency to change practices consistent with that oversight,²⁴⁶⁵ except with respect to recipients of DHS funding, under Title VI and Section 504.²⁴⁶⁶ Apart from that, CRCL only has advisory authority to negotiate compliance where it cannot require it.

CRCL generally has not been effective in assuring civil rights compliance throughout DHS during the Fiscal Years studied. For example, multiple federal courts have ruled that DHS committed constitutional and civil rights violations when detaining and separating immigrant children from their parents.²⁴⁶⁷ Deputy Venture testified that CRCL received thousands of complaints about

²⁴⁶⁰ Venture, *Federal Civil Rights Enforcement Briefing*, p. 133.

²⁴⁶¹ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 2, at 4.

²⁴⁶² 6 U.S.C. § 345(a)(6).

²⁴⁶³ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 73.

²⁴⁶⁴ Schlanger, *Offices of Goodness*, *supra* note 78, at 54, 98.

²⁴⁶⁵ *Ibid.*

²⁴⁶⁶ *See infra* notes 2567-75.

²⁴⁶⁷ *See Ms. L v. United States Immigration and Customs and Immigration Enft’t*, 302 F. Supp. 3d 1149, 1166 (S.D. Cal. 2018) (finding plaintiff set forth sufficient facts and legal basis to state a claim that separation from their children while contesting removal violates due process); *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 118, 121 (D.D.C. 2018) (finding a mother separated from her child was likely to succeed on a due process claim and would suffer irreparable harm in the absence of an injunction); Petition for Habeas Corpus and Complaint for Declaratory, Injunctive, and Monetary Relief, *Mejia-Mejia v. United States Customs and Immigration Enft’t*, No. 1:18-cv-01445-PLF (D.D.C. 2018) (alleging Fifth Amendment due Due process violations).

immigrant family separation and detention, but due to resource constraints, CRCL is investigating only a small portion (23 out of over 3,000).²⁴⁶⁸ This number investigated amounts to only 0.77 percent of the total complaints filed.²⁴⁶⁹ Moreover, as discussed above, at the Commission's briefing, Deputy Venture testified that the CRCL Officer was not consulted prior to the Trump Administration's introduction and implementation of family separation.²⁴⁷⁰

After reviewing the draft report, another CRCL official told the Commission that:

Providing the percentage does not capture that these complaints covered the full range of issues raised. Based on these complaints and the ensuing investigation, CRCL has issued recommendations to both ICE and CBP relating to family separation that encompass and address the full range of issues raised in numerous allegations, far more than the 23 officially opened. Also, CRCL has numerous other complaints open related to family separation that support other investigations and cover specific issues, such as the care of children, the use of criteria to separate families, and coercion in separation or reunification.²⁴⁷¹

But CRCL receives over 4,000 complaints per year from the public, Congress, DOJ, detainees, nonprofit groups and the press.²⁴⁷² These complaints detail very high stakes matters, often “concerning civil rights and civil liberties abuses by DHS employees—including...alleged “profiling on the basis of race, ethnicity, or religion,””²⁴⁷³ and in addition to being possibly systemic, they are likely to be about issues that are currently negatively impacting the “persons” and “individuals” who are to be protected by CRCL's statute.²⁴⁷⁴ CRCL's responses to the Commission's Interrogatories and Deputy Venture's testimony both indicate a significant lack of resources impacting CRCL's ability to address most complaints. CRCL is clearly not able to investigate all the complaints it receives.²⁴⁷⁵ It reported to the Commission that:

CRCL does not currently have sufficient staffing to support opening more investigations of complaints from the general public, or having more intensive and encompassing investigations of such allegations. The allegations CRCL has received are increasingly complex, and in many cases, are the result of reports

²⁴⁶⁸ Venture Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 125-26.

²⁴⁶⁹ $23/3,000 = 0.00767$.

²⁴⁷⁰ Venture Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 132-33; *see also supra* notes 2368-2435 (discussing the Muslim ban and family separation).

²⁴⁷¹ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

²⁴⁷² Venture Statement, at 3; U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 19; Venture Testimony, *Federal Civil Rights Enforcement Briefing*, p. 125.

²⁴⁷³ Schlanger, *Offices of Goodness*, *supra* note 78, at 54, 62.

²⁴⁷⁴ *See, e.g. infra* notes 2531-36 (complaint about babies at Dilley; complaint about migrants being held outside under a bridge); *Cf.* 6 U.S.C. § 345(a).

²⁴⁷⁵ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 9, at 19.

requesting very large issues be thoroughly reviewed through a civil rights lens. CRCL presently only has the resources to do a few of these each year.²⁴⁷⁶

Deputy Venture testified that her office receives “over 4,000 complaints in from or allegations from the general public [annually]... We do not have the resources to actually investigate 4,000 allegations.”²⁴⁷⁷ CRCL later clarified that it “investigates approximately 25 percent of what we receive as allegations.”²⁴⁷⁸ At the Commission’s briefing, Deputy Venture testified that her office prioritizes how they address the complaints, and they do so through an “information layer.”²⁴⁷⁹ She stated that family separation was a “perfect example”²⁴⁸⁰ of that practice, and that:

We got over 3,000 complaints of family separation. We weren’t going to open 3,000 complaints. So we are looking through the database... We took a representative sample, for instance, if a person is saying I’m coming with my child, or it’s an unaccompanied child, or whatever category it was. So of the 3,000, we took 23 complaints and opened that as an investigation. That is representative of the whole. So that’s one way that we are actually using our resources properly.²⁴⁸¹

She stated that these types of investigations lead to “recommendations to CBP or to ICE about their policies and practices,”²⁴⁸² based on whether CRCL is seeing violations of law, or whether the subject-matter experts they use to review conditions of detention see lack of medical care or issues with treatment of juveniles.²⁴⁸³ Venture testified that, “[W]e are using the resources as wisely as we can but, in the sense we can’t do everything, we just have to be a bit more representational about the complaints that we’re looking into.”²⁴⁸⁴

CRCL told the Commission that its intake process is as follows: “CRCL meets weekly to discuss recently received allegations and decide whether they should be opened as complaints or entered into the database ‘information layer.’”²⁴⁸⁵ CRCL continued: “Generally, CRCL opens allegations that raise systemic, egregious, or novel civil rights or civil liberties issues, or allegations that do not appear to have been adequately addressed in another complaint redress forum (such as a Component or Office of Inspector General inquiry).”²⁴⁸⁶ CRCL does not directly open as complaints the matters placed in the information layer; rather, CRCL uses the information layer to “identify potential patterns of civil rights or civil liberties allegations that may result in later CRCL

²⁴⁷⁶ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 6, at 14.

²⁴⁷⁷ Venture Testimony, *Federal Civil Rights Enforcement Briefing*, p. 125.

²⁴⁷⁸ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 68.

²⁴⁷⁹ *Ibid.*

²⁴⁸⁰ *Ibid.*

²⁴⁸¹ *Ibid.*, 126.

²⁴⁸² *Ibid.*

²⁴⁸³ *Ibid.*

²⁴⁸⁴ *Ibid.*

²⁴⁸⁵ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 9, at 19.

²⁴⁸⁶ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 68.

review or investigation.”²⁴⁸⁷ After being reviewed, CRCL did not open 2,427 allegations (21 percent) as complaints for further investigation in FY 2016, 2,963 (16 percent) in FY 2017, and 1,256 (15 percent) in FY 2018 (up until April 11).²⁴⁸⁸

Furthermore, in FY 2016, CRCL opened 639 complaint investigations.²⁴⁸⁹ In this fiscal year, the office “opened more complaints...than in any year before or since.”²⁴⁹⁰ In FY 2017, CRCL opened 560.²⁴⁹¹ In FY 2018, CRCL opened 743 and closed 749 out of 4,201 pieces of correspondence.²⁴⁹² The DHS Office of Inspector General (OIG) has the right of first refusal,²⁴⁹³ and retained 19 of the 743 complaint investigations opened by CRCL in FY 2018.²⁴⁹⁴ During the first half of FY 2018, up until April 11, CRCL received 221 complaints.²⁴⁹⁵ As of this date, “CRCL is on pace to open a similar number of complaints in FY 2018 as it did in FY 2017.”²⁴⁹⁶ The bases of all the complaints received during the Fiscal Years studied are documented numerically in Table 8.2 below, and illustrated in the following bar graph in Figure 8.1, produced by Commission staff:

²⁴⁸⁷ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 9, at 19.

²⁴⁸⁸ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 7, at 15

²⁴⁸⁹ *Ibid.*, 15-17.

²⁴⁹⁰ *Ibid.*, 15-17.

²⁴⁹¹ *Ibid.*, 15-17.

²⁴⁹² Venture Statement, at 3.

²⁴⁹³ 6 U.S.C. § 345(a)(6).

²⁴⁹⁴ Venture Statement, at 3; U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 10, at 22-26.

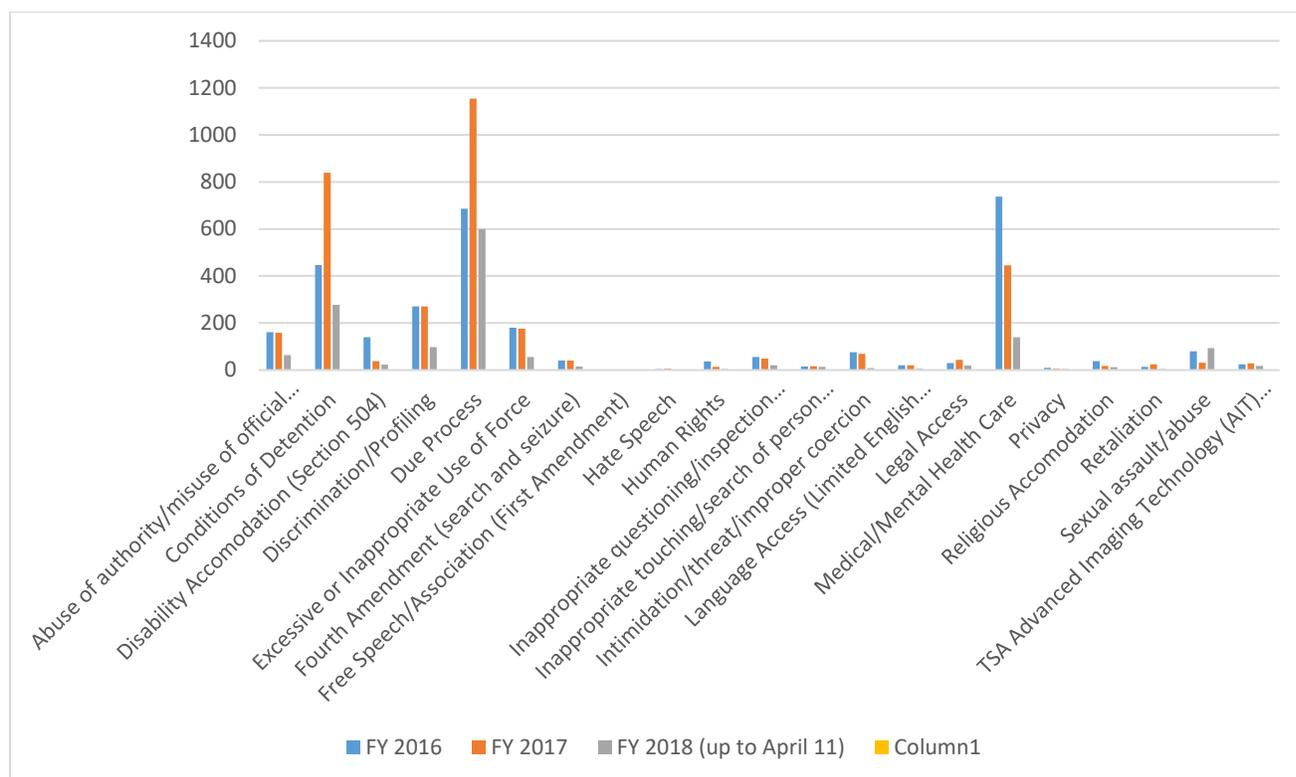
²⁴⁹⁵ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 7, at 15-17.

²⁴⁹⁶ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 10, at 22.

Table 8.2: Number Complaints Received by DHS CRCL by Bases for FY 2016-18

Primary Issue of Complaint	FY 2016	FY 2017	FY 2018 (up to April 11)
Abuse of authority/misuse of official position	161	159	64
Conditions of Detention	447	839	278
Disability Accommodation (Section 504)	140	38	23
Discrimination/Profiling	271	271	98
Due Process	686	1154	599
Excessive or Inappropriate Use of Force	180	176	56
Fourth Amendment (search and seizure)	41	41	15
Free Speech/Association (First Amendment)	2	1	2
Hate Speech	4	5	2
Human Rights	36	14	4
Inappropriate questioning/inspection conditions (Non-TSA)	56		49 20
Inappropriate touching/search of person (Non-TSA)	15		17 14
Intimidation/threat/improper coercion	76		69 8
Language Access (Limited English Proficiency)	20		21 5
Legal Access	30		44 19
Medical/Mental Health Care	738		446 139
Privacy	9		6 4
Religious Accommodation		38	18 12
Retaliation		13	24 4
Sexual assault/abuse		80	31 93
TSA Advanced Imaging Technology (AIT) and TSA pat-downs		24	29 18
Total		3067	3523 1477

SOURCE: CRCL Responses to USCCR Interrogatory 10.c.

Figure 8.1: Bases of CRCL Complaints Received FY 2016-18

SOURCE: CRCL Response to USCCR Interrogatory 10.c.

The data shows a fairly consistent pattern, with higher levels of complaints received about conditions of detention, discrimination/profiling, due process, and medical/mental health care issues. Moreover, although CRCL received more complaints in 2017, it opened more complaints in 2016.²⁴⁹⁷

The Commission received a public comment from South Asian Americans Leading Together (SAALT), arguing that CRCL “must have more power and resources,” pointing to a complaint it filed in 2015 “regarding the treatment of more than 50 South Asian asylum seekers detained in the El Paso County Detention Facilities who were on hunger strike for a week after waiting for years for hearings even after passing credible fear tests.”²⁴⁹⁸ According to SAALT, CRCL conducted an investigation and provided its findings and recommendations to ICE, where the investigation has remained since at least 2016.²⁴⁹⁹ CRCL later commented, “CRCL closed this investigation in June 2017, after issuing recommendations to ICE. CRCL is seeking to increase transparency in complaint investigation results going forward.”²⁵⁰⁰ SAALT recommends “an independent

²⁴⁹⁷ U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 10, at 22.

²⁴⁹⁸ South Asian Americans Leading Together, Written Statement, Written Statement for the Are Rights a Reality? Evaluating Federal Civil Rights Enforcement Briefing before the U.S. Comm’n on Civil Rights, Nov. 2, 2018, at 2 [hereinafter SAALT Statement].

²⁴⁹⁹ SAALT Statement, at 2.

²⁵⁰⁰ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 66.

ombudsperson position be created to liaison between communities and CRCL to move such complaints through a transparent process and ensure the civil rights of all detainees are enforced.”²⁵⁰¹

CRCL told the Commission that “the majority of complaints are investigated and closed without the issuance of recommendations.”²⁵⁰² This usually occurs because either (1) the allegations detailed within the complaint are unsubstantiated, (2) the existing policy, training, and practices already in place are deemed satisfactory, or (3) the issues identified by CRCL’s investigation have already been acknowledged by the Component.”²⁵⁰³ In FY 2016, CRCL closed 147 investigations with recommendations.²⁵⁰⁴ That number was 43 in FY 2017, and was only 10 in FY 2018 (up until April 11).²⁵⁰⁵

After receiving and reviewing allegations, the following steps occur:

If CRCL keeps the complaint for investigation, CRCL requests information from the [DHS] Component and conducts its own factual investigation... Recommendations made as a result of an investigation are generally made confidentially to the effected Component, however CRCL notifies complainants of the general results whenever possible and provides summaries of its recommendations in its annual and semiannual public report.²⁵⁰⁶

The Components must have an opportunity to review CRCL recommendations, and “each recommendation requires a written response, concurring or non-concurring, within a defined timeframe, and evidence of implementation of any concurred-with recommendations.”²⁵⁰⁷ If a Component non-concurs, it must also provide an explanation, which CRCL reviews.”²⁵⁰⁸ CRCL then determines whether to continue discussions with the Component “or consider raising to leadership.”²⁵⁰⁹

DHS regulations involving federally conducted programs and activities state that all types of discrimination complaints on the basis of disability must be processed with an answer to the individual within 180 days.²⁵¹⁰ The agency regulations incorporate Title VI and Title IX processing

²⁵⁰¹ SAALT Statement, at 2.

²⁵⁰² U.S. Dep’t of Homeland Security, Response to USCCR Interrogatory No. 9, at 20-21.

²⁵⁰³ Ibid.

²⁵⁰⁴ Ibid.

²⁵⁰⁵ Ibid.

²⁵⁰⁶ Ibid.

²⁵⁰⁷ Ibid.

²⁵⁰⁸ Ibid.

²⁵⁰⁹ Ibid.

²⁵¹⁰ 6 C.F.R. § 15.70(g). [there is an exception for 504 EEOC procedures – this exception does not apply to CRCL’s external enforcement]

times for claims of discrimination based on sex, race or national origin; CRCL asserts there are no processing deadlines for these types of claims.²⁵¹¹

The average length of time between the date complaints are received and the date closed is as follows (see Table 8.3):

Table 8.3: Average Processing Time for CRCL Complaints, FY 2016-2018

FY 2016	FY 2017	FY 2018 (until April 11)
460 days	379 days	343 days

SOURCE: DHS Response to USCCR Interrogatory 7.e.

In reviewing this information, CRCL pointed out Section 504 of the Rehabilitation Act is the only type of complaint that CRCL receives that is subject to a strict timeline, that Section 504 complaints represent only one percent of complaints they receive, and that 60 percent of complaints are opened and closed within one year.²⁵¹² They added that: “Complaints where recommendations are issued often take longer as CRCL must wait for the Component to respond and begin implementation. Additionally, a small percentage are held in abeyance due to pending litigation or because the OIG has retained the matter.”²⁵¹³

But after an individual filed a complaint about discrimination under Section 504, the D.C. District Court found that CRCL’s 2.75 year delay in processing a civil rights complaint was “unreasonable” where DHS and TSA offered “no justification or explanation.”²⁵¹⁴ The court also noted that, “As a basic matter, and as the Agency Defendants concede, they have failed for almost three years to process an administrative complaint that, by regulation, they were required to have processed in 180 days.”²⁵¹⁵ DHS’ Section 504 regulations clearly state that “all types of allegations on the basis of disability” must be processed by the unit that receives them (whether the Office of Inspector General or CRCL or another unit) within 180 days:

(1) Not later than 180 days from the receipt of a complete complaint over which it has jurisdiction, the Department shall notify the complainant of the results of the investigation in a letter containing:

- (i) Findings of fact and conclusions of law;
- (ii) A description of a remedy for each violation found; and
- (iii) A notice of the right to appeal.²⁵¹⁶

The volume of complaints and complexity of civil rights issues may also impact CRCL’s efficacy.

²⁵¹¹ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 67.

²⁵¹² *Ibid.*

²⁵¹³ *Ibid.*

²⁵¹⁴ *SAI v. Dep’t of Homeland Sec.*, 149 F. Supp. 3d 99, 120 (D.D.C. 2015).

²⁵¹⁵ *Id.* at 120.

²⁵¹⁶ 6 C.F.R. § 15.70(g).

As discussed above, CRCL's responses to the Commission's interrogatories as well as their testimony during the briefing indicate that DHS processed 7.6 percent of 3,000 complaints about family separation.²⁵¹⁷ During the briefing, CRCL stated they could not answer any questions about whether they had provided any recommendations about family separation, due to it still being an open investigation.²⁵¹⁸ CRCL later added that they investigate 25 percent of allegations, and that the family separation issue is also subject to ongoing litigation, "CRCL stated that it, "CRCL "investigated complaints representative of the range of issues presented in the family separation allegations received," and "CRCL received numerous complaints regarding family separation, conducted an investigation, and has made recommendations."²⁵¹⁹ The only specific information provided was as follows: "CRCL promptly provided information to CBP on specific instances of separation so that reunification could happen more quickly."²⁵²⁰

Another example of CRCL's complaint processing abilities is its management of cases that regard DHS's family separation policy. On March 13, 2019, The Refugee and Immigrant Center for Education and Legal Services (RAICES) sent a complaint to CRCL alleging that despite its announcement to the contrary, DHS was still holding children separated from their parents for more than 20 days and taking other actions contrary to the rules of the *Flores* agreement upheld by federal courts to govern conditions of migrant child detention.²⁵²¹ RAICES documented that at Karnes Detention Center in Texas, children, the youngest of whom was 5, were being held "between 41-58 days with no word from ICE about their release [to their parents]."²⁵²² In discussing the *Flores* settlement and subsequent court rulings about it, RAICES states that 20 days is the maximum time that children may be held under extenuating circumstances, and that it does

²⁵¹⁷ See *supra* notes 2468-81.

²⁵¹⁸ Venture Testimony, *Federal Civil Rights Enforcement Briefing*, p. 133.

²⁵¹⁹ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 84

²⁵²⁰ *Ibid.*

²⁵²¹ See generally Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Dec. 7, 2001) (Settling as enforceable law, in 1997 and updated in 2001 by the federal government, that migrant children may not be held more than 20 days, and the conditions of their detention must be safe and appropriate, including proper medical care and an education plan. Furthermore, settles that the DHS should make every attempt to locate the parents, and children should be released to their parents (or other guardians if parents cannot be located); see generally DHS & HHS, Proposed Rule: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied (DHS proposing to modify the agreement; the proposed rules have been subject to public comment but a final rule has not been issued); see generally Abbey Gruwell, "Unaccompanied Minors and the Flores Settlement Agreement: What to Know," *National Conference of State Legislatures*, Oct. 30, 2018, <http://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know.aspx> (reporting that the new rules would permit migrant children to be held indefinitely, and exempt federal facilities from state licensing agreements.); see generally Caitlin Dickerson, "Trump Administration Moves to Sidestep Restrictions on Detaining Migrant Children," *New York Times*, Sep. 6, 2018, <https://www.nytimes.com/2018/09/06/us/trump-flores-settlement-regulations.html> (reporting the Trump Administration's proposed withdrawal from the agreement).

²⁵²² RAICES of Texas, Complaint Letter to DHS CRCL Officer Cameron Quinn (Mar. 13, 2019) (on behalf of several fathers and their children detained at Karnes Detention Center), https://www.raicestexas.org/2019/03/13/raices-urges-ice-to-release-families-currently-detained-in-violation-of-flores-agreement/?ms=raices_tw_hungerstrike.

not believe that ongoing border crossings by Central American families seeking asylum qualify as “extenuating circumstances.”²⁵²³ Citing the American Academy of Pediatrics, their current Complaint to CRCL emphasizes that:

Expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children.... there is no evidence indicating that any time in detention is safe for children.” Clinical evidence from the study of detention of unaccompanied, asylum-seeking minors shows “forced detention is associated with a high risk of posttraumatic stress disorder, anxiety disorder, depression, aggression, psychosomatic complaints, and suicidal ideation.”²⁵²⁴

RAICES therefore asks CRCL “to compel ICE to follow its obligations under *Flores* and release these children to their fathers expeditiously;” and “to investigate other past and present violations of the *Flores* norm of releasing children and parents within 20 days at the Karnes Detention Center,” and to “review any written decisions by the U.S. Department of Homeland Security to continue detention despite the existing *Flores* requirements and any records documenting changes in DHS policy in adhering to *Flores*.”²⁵²⁵ These issues continue to fall under the jurisdiction of CRCL.²⁵²⁶ CRCL commented that, “CRCL cannot compel ICE to take action.”²⁵²⁷

As discussed in the previous section on prioritization of civil rights, if CRCL had been able to weigh in on this policy before it was implemented, as is contemplated under their statutory authority, federal civil rights protections may have led to a different policy more aligned with the principles of family unity – as a federal court has now ordered – and thousands of migrant children

²⁵²³ *Ibid.*, note 1 (“RAICES does not concede that *Flores* allows DHS to detain children at the Karnes Detention Center for 20 days. Rather, RAICES uses 20 days as a benchmark because this is a timeframe Judge Gee found may be acceptable under *Flores*, specifically when DHS acts under extenuating circumstances, in good faith, and with due diligence. *See Flores v. Lynch*, Case No. CV 85-04544 DMG (Ex), 10-11 (C.D. Cal. Aug. 21, 2015) <https://www.aila.org/File/Related/14111359p.pdf> (Order re Response to Order to Show Cause) (“At a given time and under extenuating circumstances, if 20 days is as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear, then the recently-implemented DHS polic[i]es may fall within the parameters of Paragraph 12A of the Agreement.”) (emphasis added); *see also Flores v. Reno*, Case No. CV 85-4544-RJK. (Px), Stipulated Settlement Agreement, Jan. 17, 1997, https://cliniclegal.org/sites/default/files/attachments/flores_v_reno_settlement_agreement_1.pdf and *Flores v. Reno*, Case No. CV 85-4544-RJK (Px), Stipulation Extending Settlement Agreement and for Other Purposes; and Order Thereon, December 7, 2001 (providing guidance on the care and custody of minor non-citizens in government custody); *see also Flores v. Sessions*, No. 85-cv-04544-DMG-AGR, 2017 WL 6060252 (C.D. Cal. June 27, 2017) (Order Re Plaintiffs’ Motion to Enforce and Appoint a Special Monitor), <https://www.aila.org/File/Related/14111359v.pdf> (“Collectively, RAICES refers to these sources of law as the ‘FSA.’ It is not RAICES’ position that the arrival of asylum-seeking families at the southern border is an ‘extenuating circumstance’ that requires the detention of families.”).

²⁵²⁴ *Ibid.*, 3.

²⁵²⁵ *Ibid.*, 7.

²⁵²⁶ 6 U.S.C. § 345(a); *see also* Venture Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 124-125, 136-137 (discussing CRCL’s handling of similar complaints about the family separation policy).

²⁵²⁷ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 70.

may not have been subjected to the trauma of separation from their parents. Moreover, although the policy of family separation has been officially retracted by the White House, evidence shows that it is continuing, and at the time of this writing, it is not clear what role CRCL has in providing their recommendations about the related civil rights issues under their jurisdiction. After reviewing the Commission's draft report, on June 19, 2019, CRCL stated that: "CRCL is continuing its work investigating and making policy recommendations in response to complaints regarding family separation. Additionally, CRCL is in the process of finalizing an investigation into the care and treatment of children under five and children with disabilities which will result in recommendations being issued to the Components."²⁵²⁸

As previously described, CRCL has the capacity to review a mere fraction of the complaints submitted regarding the family separation policy, and to date, there is no known public information about how these complaints have been handled with regard to the children and families impacted or what CRCL has advised DHS components or leadership about the related policies.²⁵²⁹ On June 19, 2019, CRCL commented that: "CRCL is working to increase transparency by posting its reports. It has started posting closing memos to complaint investigations resulting in recommendations and is looking to expand to other recommendation-type documents. Such public transparency is only appropriate after conclusion of our investigation and issuance of recommendations."²⁵³⁰

On February 28, 2019, the American Immigration Council (AIC) reported that there were at least nine infants under one year of age detained by DHS in Dilley, Texas where there was an alleged lack of access to medical care.²⁵³¹ AIC and other immigrant rights groups wrote to the CRCL and the Inspector General of the DHS, voicing "grave concerns about the lack of specialized medical care available in Dilley for this vulnerable population,"²⁵³² and "long documented . . . limited access to adequate medical care in family detention centers."²⁵³³ A few days later, ICE confirmed there were sixteen babies in DHS custody at Dilley, and that twelve had been released.²⁵³⁴ But ICE also reported that there was another baby detained at the Texas Karnes detention center, which is also about an hour from the nearest hospital, and that the status of the four babies remaining in

²⁵²⁸ Ibid.

²⁵²⁹ See *supra* notes 2468-81.

²⁵³⁰ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 70.

²⁵³¹ Letter from American Immigration Council to Ms. Cameron Quinn, Office for Civil Rights and Civil Liberties, Department of Homeland Security and Mr. John V. Kelly, Acting Inspector General, Department of Homeland Security (Feb. 28, 2019),

http://americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_urges_immediate_release_of_infants_from_immigration_detention.pdf#link=%7B%22role%22:%22standard%22,%22href%22:%22http://americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_urges_immediate_release_of_infants_from_immigration_detention.pdf%22,%22target%22:%22%22,%22absolute%22:%22%22,%22linkText%22:%22%20new%20letter%20%22%7D.

²⁵³² Ibid., 1.

²⁵³³ Ibid.

²⁵³⁴ Kate Smith, "12 Detained Babies Have Been Released From ICE Custody in Dilley, Texas," *CBS News*, Mar. 4, 2019, <https://www.cbsnews.com/news/immigrant-children-detained-12-babies-released-from-ice-custody-detention-center-dilley-texas-2019-03-04/>.

custody at Dilley was unclear.²⁵³⁵ Upon reviewing the Commission's draft, CRCL commented, "CRCL has conducted multiple inspections of the ICE Family Residential Centers, including Dilley. Generally, our external subject matter experts found the facilities to provide adequate or better medical care."²⁵³⁶

Examining the complaints regarding the conditions to which many asylum-seekers are subject shows that complaints may lead to policy changes, but it is not possible to track corrective policy changes back to CRCL. During the last week of March 2019, reports emerged that the Border Patrol was holding asylum-seekers who sought to cross legally in a pen under a highway bridge near the legal border crossing.²⁵³⁷ Over 1,000 migrants, including babies and children, had been held under the bridge surrounded by a chain-link fence and forced to sleep outside in the cold, on gravel with bird droppings and dust falling on them at night.²⁵³⁸ The ACLU of Texas filed a complaint with DHS' CRCL and its Office of Inspector General, stating that in addition to keeping families and children outside in the cold sleeping on gravel, there were reports of verbal and physical abuse, lack of clean water, lack of clean toilets and lack of soap, lack of access to medical care, and sleep deprivation as officials woke the families every few hours and many were unable to sleep in the cold on the gravel.²⁵³⁹ ACLU alleged that:

The detention of migrants for multiple nights in outdoor detention pens is an unprecedented and extreme violation. Although CBP has long violated the rights of migrants in its custody, the agency's decision to detain migrants, including children, in caged dirt filled outdoor areas is an escalation of this administration's cruelty. CBP has an obligation, under its own standards, to ensure that migrants are treated humanely, with dignity, and consistent with U.S. and international law.²⁵⁴⁰

After the complaint as well as media exposure including photographs of the conditions, CBP closed the migrant detention area under the bridge.²⁵⁴¹ On March 31, federal officials reportedly cleared out the enclosure, and the hundreds of families of asylum seekers were moved to other places, but the New York Times reported that they were still using a tent under another site under the bridge.²⁵⁴² In their review of the Commission's draft report, on June 19, 2019, CRCL stated

²⁵³⁵ Ibid.

²⁵³⁶ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 82.

²⁵³⁷ See Alfredo Corchado, "Border Patrol Closes Ramshackle Migrant Holding Pen Near Where Trump Official Declared Crisis," *Dallas News*, Mar. 31, 2019.

²⁵³⁸ Ibid.

²⁵³⁹ ACLU, Letter to John V. Kelly (Acting Inspector General, DHS), Cameron Quinn (CRCL Officer) and Matthew Klein (Assistant Commissioner for Office of Professional Responsibility), Regarding Abusive Conditions in Makeshift Border Patrol Holding Facilities at Paso del Norte Port of Entry (Mar. 30, 2019), https://www.aclutx.org/sites/default/files/pdn_border_patrol_abuse_oig_complaint.pdf.

²⁵⁴⁰ Ibid., 1.

²⁵⁴¹ Simon Romero, "Migrants Moved Out of Holding Pen Under El Paso Bridge," *The New York Times*, Mar. 31, 2019, <https://www.nytimes.com/2019/03/31/us/el-paso-bridge-migrants.html>.

²⁵⁴² Ibid.

that it had received the ACLU complaint and “has an open and ongoing investigation into the incident.”²⁵⁴³

DHS’ Office of Inspector General, and not CRCL, is investigating deaths in DHS custody.²⁵⁴⁴ In December 2018, two young Guatemalan children, Jakelín Caal Maquín and eight-year-old Felipe Gomez Alonso, passed away in Border Patrol custody.²⁵⁴⁵ The CBP Commissioner stated that the border facilities where these children were intercepted with their fathers and detained for days were “not built for that group that’s crossing today.”²⁵⁴⁶ Moreover, both families speak Mayan languages, but the fathers were reportedly questioned about their children’s health in Spanish, which they do not fully understand, and signed forms asking about their children’s health in English, which they also do not understand.²⁵⁴⁷ In both cases, when their children became violently ill, Border Patrol brought them to hospitals that were over 30 miles away, but it was too late to save them.²⁵⁴⁸ In 2019, three more Guatemalan minors died while in DHS custody.²⁵⁴⁹ In April 2019, sixteen-year-old Juan de León Gutiérrez fell ill with a rare condition and died several days later after being transferred to a hospital roughly 160 miles from the migrant shelter.²⁵⁵⁰ In May, a two-year-old, detained with his mother, died after about a month of hospitalization, and another sixteen-year-old, Carlos Gregorio Hernandez Vasquez, passed away after becoming sick while in U.S. custody.²⁵⁵¹ Carlos was confined for twice as long as federal law ordinarily allows, and was moved to a different holding facility after a diagnosis of the flu.²⁵⁵² It has been more than a decade since a “child pass[ed] away anywhere in a CBP process.”²⁵⁵³ According to relevant civil rights standards under CRCL’s jurisdiction, migrant children should not be held in detention for long

²⁵⁴³ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 71.

²⁵⁴⁴ *Ibid.*, 83.

²⁵⁴⁵ Miriam Jordan, “‘A Breaking Point’: Second Child’s Death Prompts New Procedures for Border Agency,” *New York Times*, Dec. 26, 2018, <https://www.nytimes.com/2018/12/26/us/felipe-alonzo-gomez-customs-border-patrol.html>.

²⁵⁴⁶ *Ibid.*

²⁵⁴⁷ Simon Romero, “Father of Migrant Girl Who Died in U.S. Custody Disputes Border Patrol Account,” *New York Times*, Dec. 15, 2018, <https://www.nytimes.com/2018/12/15/us/migrant-girl-border-patrol-jakelin.html> (father speaks Q’eqchi’ and did not fully understand Spanish or English); Maria Sacchetti, “Official: Guatemalan Boy Who Died in U.S. Custody Tested Positive for Influenza B, Final Cause of Death Remains Under Investigation,” *The Washington Post*, Dec. 28, 2018, https://www.washingtonpost.com/local/immigration/father-whose-son-died-in-custody-knew-bringing-him-would-ease-entry-into-us/2018/12/27/4c210bfc-0a1d-11e9-85b6-41c0fe0c5b8f_story.html?utm_term=.21b9eacc3dac (father speaks only the Mayan language Chuj).

²⁵⁴⁸ *Ibid.*

²⁵⁴⁹ Nooman Merchant, “5th migrant child dies after detention by US border agents,” *Associated Press*, May. 20, 2019, <https://www.apnews.com/5a49d65213b54043825acc282830b139> [hereinafter Merchant, “5th migrant child dies after detention by US border agents”].

²⁵⁵⁰ Nomaan Merchant & Sonia Pérez D., “US won’t answer new questions about migrant teen’s death,” *The Washington Post*, May. 9, 2019, https://www.washingtonpost.com/national/energy-environment/teens-death-raises-new-questions-about-us-care-of-migrants/2019/05/09/869cd7c0-720f-11e9-9331-30bc5836f48e_story.html?utm_term=.d21494bb10a9.

²⁵⁵¹ Merchant, “5th migrant child dies after detention by US border agents,” *supra* note 2549.

²⁵⁵² *Ibid.*

²⁵⁵³ “‘We need a different approach,’ says border protection chief after 2nd migrant child dies in U.S. custody,” *CBS News*, Dec. 26, 2018, <https://www.cbsnews.com/news/customs-and-border-protection-chief-kevin-mcaleenan-on-migrant-child-death/>.

periods, or subject to abusive conditions, or without proper care, including medical treatment.²⁵⁵⁴ CRCL also has authority to work on language access issues that might have helped the Mayan children.²⁵⁵⁵ However, the inability to process most complaints in a timely manner,²⁵⁵⁶ CRCL's practice of only processing some but not all complaints dealing with family separation and other issues,²⁵⁵⁷ and the overall inability to effectively exercise its statutory power to influence rapidly-developing policies and related civil rights challenges,²⁵⁵⁸ have likely hampered the agency's ability to protect civil rights during its operations.²⁵⁵⁹

It was not clear from the record whether DHS CRCL received complaints about the Muslim ban. In its Congressional reports, CRCL categorizes its complaints by defined categories that include "Religious accommodation," but there is no category of discrimination based on religion.²⁵⁶⁰ CRCL has clarified to the Commission that it had opened 38 complaints related to the travel ban, and that on June 19, 2019, all but one (relating to an individual in CBP custody) was closed.²⁵⁶¹ As of the time of the Commission's vote on this report, the CRCL website does not currently include information about how those complaints were resolved.²⁵⁶²

However, although the statute does not specify exactly how CRCL is to review policy to ensure civil rights protections, for it to be effective in preventing discrimination, CRCL should have been consulted prior to DHS implementation.²⁵⁶³

Evaluating Compliance of Funding Recipients

The DHS administers several billion dollars in financial assistance to other entities, governmental and nongovernmental. As a condition of any award, recipients of DHS funding are prohibited from discriminating on the basis of race, color, national origin, disability, sex, or age in the

²⁵⁵⁴ See, e.g., *supra* notes 2521 and 2521-2527 (discussion of *Flores* agreement); and see *Trauma at the Border*, *supra* note 2368, at notes 340-62 and page 123, § J (further deaths of Central American children in custody).

²⁵⁵⁵ See, e.g. U.S. Dep't of Homeland Security, Response to USCCR Interrogatories Nos. 2.b and 4.

²⁵⁵⁶ See *supra* notes 2510-16 (quoting testimony and responses to the Commission's Interrogatories).

²⁵⁵⁷ See *supra* notes 2458 (CRCL comments that DHS policy develops quickly), 2472-85 and 2521-24 (quoting testimony and responses to the Commission's Interrogatories).

²⁵⁵⁸ See *supra* notes 2367-70, 2399-2402 and 2440-43 (discussing CRCL testimony and responses to the Commission's Interrogatories).

²⁵⁵⁹ See *supra* notes 2436-41 (discussing serious and urgent emerging civil rights issues).

²⁵⁶⁰ See U.S. Dep't. of Homeland Security Office for Civil Rights and Civil Liberties, *Semiannual Report to Congress, First and Second Quarters, FY 2017*, Table 2, Investigations Opened 1Q and 2Q 2017, Mar. 31, 2017, <https://www.dhs.gov/sites/default/files/publications/fy-2017-q1-q2-semiannual-report.pdf>.

²⁵⁶¹ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), 71.

²⁵⁶² U.S. Dep't of Homeland Security, "Office for Civil Rights and Civil Liberties," <https://www.dhs.gov/office-civil-rights-and-civil-liberties>, *passim*. (accessed Nov. 1, 2019).

²⁵⁶³ See *supra* notes 2366-67.

administration of their programs and activities.²⁵⁶⁴ DHS may suspend or terminate a grant of financial assistance if it determines it is not compliant, but this is not always done through CRCL.

CRCL's statute requires that it "oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department."²⁵⁶⁵ However, as Acting Director Venture testified to the Commission, "CRCL's work is typically not remedial; an exception relates to Section 504 of the Rehabilitation Act, which prohibits discrimination against people with disabilities in programs that receive federal financial assistance."²⁵⁶⁶ Complaints regarding Section 504 are to be sent to the CRCL, which is also "responsible for coordinating implementation of this section."²⁵⁶⁷

Under DHS' Title VI regulations, compliance information, investigations, hearings, and decisions are all handled by the Secretary.²⁵⁶⁸ DHS' Title IX regulations similarly state that the same procedures from Title VI apply to the agency's enforcing compliance with Title IX.²⁵⁶⁹ Under these regulations, CRCL may be asked to participate in DHS enforcement of Title VI and Title IX, but it is not required to do so.

In its Annual Report to Congress, CRCL stated that it developed the civil rights data collection tool and a related review process, to "effectively and consistently enforce nondiscrimination requirements in federally assisted programs across DHS."²⁵⁷⁰ CRCL clarified that the evaluation tool is a technical assistance tool developed by CRCL that has been "made a part of the DHS Standard Terms and Conditions which apply to federal financial assistance awards from DHS to non-federal entities."²⁵⁷¹ The Commission's research shows that the Civil Rights Evaluation Tool is a 2-page form that was issued in February 2018 and expires in January 2021.²⁵⁷² Page one lists applicable law and states that compliance is a condition of receiving federal funding,²⁵⁷³ and page two requires recipients of federal financial assistance to provide information about:

²⁵⁶⁴ See U.S. Dept. of Homeland Security, Office for Civil Rights and Civil Liberties, *Fiscal Year 2017 Annual Report to Congress*, Dec. 6, 2017, p. 8, https://www.dhs.gov/sites/default/files/publications/crcl-fy-2017-annual-report_0.pdf [hereinafter DHS CRCL, *Fiscal Year 2017 Annual Report to Congress*]; see also *supra* notes 2306-23 (discussing relevant civil rights statutes and regulations under CRCL's jurisdiction).

²⁵⁶⁵ 6 U.S.C. § 345(a)(4).

²⁵⁶⁶ Venture Statement, at 3; see also Schlanger, *Offices of Goodness*, *supra* note 78, at 54, 98.

²⁵⁶⁷ 6 C.F.R. § 15.70.

²⁵⁶⁸ *Id.* § 21.9 (compliance information), § 21.11 (investigations), § 21.13 (procedures for effecting compliance, including DOJ referral), § 21.15 (hearings) and § 21.17 (decisions).

²⁵⁶⁹ 6 C.F.R. § 17.605.

²⁵⁷⁰ DHS CRCL, *Fiscal Year 2017 Annual Report to Congress*, *supra* note 2564, at 8.

²⁵⁷¹ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep't of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), at 72.

²⁵⁷² U.S. Dep't of Homeland Security, Civil Rights Evaluation Tool, OMB Control No. 1601-0024, DHS Form 3095 (2/18), <https://www.dhs.gov/sites/default/files/publications/dhs-civil-rights-evaluation-tool.pdf>.

²⁵⁷³ *Ibid.*, 1, § 3. This form provides that:

As a condition of receipt of Federal financial assistance, the recipient is required to comply with applicable provisions of laws and policies prohibiting discrimination, including but not limited to:

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin (including limited English proficiency).
- Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on disability.

- (1) total number of complaints, with their status (pending, closed with findings, closed with no findings) and bases (the form specifies “race, color; national origin, including limited English proficiency; sex; age; disability; religion”²⁵⁷⁴);
- (2) any civil rights compliance reviews during the two years prior to the DHS award of federal funding;
- (3) a statement that staff has been designated to coordinate and carry out civil rights compliance, and a description of their responsibilities;
- (4) the recipient’s nondiscrimination policy regarding Title VI, Section 504, Title IX, the Age Discrimination Act of 1975, and DHS regulations prohibiting discrimination based on religion in social service programs;
- (5) the complaint process;
- (6) plan to ensure compliance in sub-recipient programs, including process for review;
- (7) policies and procedures to ensure nondiscrimination and equal opportunity for persons with disabilities; and
- (8) policies and procedures regarding “the requirement to provide meaningful access to programs and services to individuals with limited English proficiency (LEP).”²⁵⁷⁵

CRCL told the Commission that:

CRCL may conduct complaint investigations, compliance inspections, or other enforcement actions, with or without an allegation of wrongdoing. For example, in 2017, CRCL initiated a compliance review of recipients of federal funding in FEMA’s Chemical Stockpile Emergency Preparedness Program to ensure compliance with Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and other civil rights authorities.²⁵⁷⁶

However, the compliance review for FEMA’s program was done in conjunction with the FEMA Office of Equal Rights.²⁵⁷⁷ Because DHS uses a decentralized model of civil rights enforcement, it is not CRCL that obtains assurances from grantees, as that is done by the awarding offices.²⁵⁷⁸

One area where CRCL has broader duties is in the area of protections against sexual abuse of detainees. CRCL coordinates audits under the Prison Rape Elimination Act (PREA) for DHS immigration detention and holding facilities, which must occur every three years, although CRCL

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- Title IX of the Education Amendments Act of 1972, which prohibits discrimination based on sex in education programs or activities.
 - Age Discrimination Act of 1975, which prohibits discrimination based on age.
 - U.S. Department of Homeland Security regulation 6 C.F.R. Part 19, which prohibits discrimination based on religion in social service programs.

²⁵⁷⁴ *Ibid.*, § 4.1.

²⁵⁷⁵ *Ibid.*, § 4.

²⁵⁷⁶ U.S. Dep’t of Homeland Security, Responses to Interrogatory No. 2, at 5.

²⁵⁷⁷ *Ibid.* and *see* DHS CRCL, *Fiscal Year 2017 Annual Report to Congress*, *supra* note 2564, at 29.

²⁵⁷⁸ Email of Peter E. Mina, Deputy Officer for Programs and Compliance, U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file), 72.

may also “request an expedited audit if it has reason to believe that an expedited audit is appropriate.”²⁵⁷⁹ CRCL is further charged with developing the external auditing instrument.²⁵⁸⁰ DHS’ PREA regulations require that every immigration holding detention facility, including private facilities, take measures to ensure against sexual assault and harassment of detainees.²⁵⁸¹ Because DHS did not issue PREA regulations until 2014, ICE did not begin PREA audits until 2017.²⁵⁸² CBP and ICE are both required to submit annual reports about PREA compliance.²⁵⁸³ The most recent CBP PREA annual report, from 2017, mentions that detainees may file complaints about sexual abuse with CRCL, but does not mention any further collaboration.²⁵⁸⁴ As discussed above, if a complaint is filed, CRCL may only make recommendations.²⁵⁸⁵

As will be discussed below, CRCL, in collaboration with five other agencies, has also issued new Title VI regulations regarding language access rights during the Fiscal Years studied by the Commission. CRCL also sent these new regulations to recipients of FEMA funding.²⁵⁸⁶

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity

The Antidiscrimination Group of CRCL engages in policy work designed to ensure fair and equitable treatment of all individuals in DHS programs and activities, and it states that one of its main duties is “providing technical assistance to DHS Components and recipients of DHS financial assistance on meeting their obligations under these federal civil rights laws.”²⁵⁸⁷

In its responses to the Commission’s interrogatories, CRCL also stated that:

DHS provides technical assistance to grantees to ensure they are able to achieve compliance through individual correspondence and systemic guidance. For example, the Department has issued guidance on grantee obligations to ensure access for persons with limited English proficiency and on implementation of the

²⁵⁷⁹ 6 C.F.R. § 115.93 and § 115.193.

²⁵⁸⁰ *Id.* § 115.201.

²⁵⁸¹ *Id.* § 115.12 and § 115.112.

²⁵⁸² See U.S. Dep’t of Homeland Security, Immigration and Customs Enforcement, “PREA, Facility Implementation,” <https://www.ice.gov/prea>.

²⁵⁸³ 6 C.F.R. § 115.88 and § 115.188.

²⁵⁸⁴ U.S. Dep’t of Homeland Security, Customs and Border Protection, *Annual Report Assessing CBP Efforts to Prevent, Detect and Respond to Sexual Abuse in Holding Facilities, Fiscal Year 2017*, p. 11, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Feb/CBP%20PREA%20Annual%20Report%202017.pdf>.

²⁵⁸⁵ See *supra* notes 2554-59.

²⁵⁸⁶ U.S. Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, Notice to Recipients on Nondiscrimination During Disasters (May. 10, 2018), p. 1, <https://www.dhs.gov/sites/default/files/publications/notice-nondiscrimination-during-disasters.pdf>.

²⁵⁸⁷ U.S. Dep’t of Homeland Security, “CRCL Antidiscrimination Group,” <https://www.dhs.gov/antidiscrimination-group> (accessed Jun. 20, 2019).

Department's regulation on participation of faith-based organizations in DHS social service programs.²⁵⁸⁸

CRCL may be called upon to assist DHS Components in developing their policies, but it has no mechanism to force its review or to force compliance with its expressed views.²⁵⁸⁹ For example, in 2017, ICE issued updated Performance Based National Detention Standards that were developed in conjunction with agency stakeholders and CRCL, with major revisions including: "full implementation of the DHS standards, disability accommodation, language access and communication assistance, disciplinary system and special management units, suicide prevention, detainees with serious mental illness, tracking and reporting assaults, identification and monitoring of pregnant detainees, religious meals, and use of force at detention facilities."²⁵⁹⁰ However, other DHS policies have been issued without CRCL participation.²⁵⁹¹

On August 16, 2016, the Departments of Homeland Security, Justice, Housing and Urban Development, Health and Human Services, and Transportation issued guidance for disaster-management agencies that are the recipients of federal funding.²⁵⁹² The guidance provided instruction on how these agencies could ensure that their emergency-relief programs do not discriminate against any individual or community on the basis of race or ethnicity in violation of Title VI of the Civil Rights Act, which states: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."²⁵⁹³ The guidance encouraged these agencies to adopt five practices that would prepare them to react to an emergency under the requirements set out in Title VI while also effectively responding to community needs: "(A) Reaffirm Commitment to Nondiscrimination Protections... (B) Engage with and include Diverse Racial, Ethnic, and Limited English Proficient Populations...(C) Provide Meaningful Access to LEP Individuals...(D) Include Immigrant Communities in Preparedness, Response, Mitigation, and Recovery Efforts...(E) Collect and Analyze Data."²⁵⁹⁴ For each of these practices, the guidance recommended tangible strategies that could be implemented in order to achieve them.²⁵⁹⁵

Regarding technical assistance, CRCL reports that it provides technical assistance to the national fusion center network on appropriate integration of privacy, civil rights, and civil liberties

²⁵⁸⁸ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 2, at 5.

²⁵⁸⁹ See *supra* notes 2360-67 and 2440-41.

²⁵⁹⁰ U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Progress in Implementing PRNDS Standards and DHS PREA Requirements at Detention Facilities, Fiscal Year 2017 Report to Congress*, p. 3, https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBND%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf.

²⁵⁹¹ See *supra* notes 2368-2438.

²⁵⁹² See *infra* notes 2612-13 (list of Title VI guidance issued during FY 2016-2018).

²⁵⁹³ *Ibid.*

²⁵⁹⁴ *Ibid.*

²⁵⁹⁵ *Ibid.*

protections in state and local intelligence products and other fusion center activities.²⁵⁹⁶ CRCL also reports that it works to improve cultural competency and awareness of Department personnel through training resources on Sikh, Arab, and Muslim cultures.²⁵⁹⁷

One of CRCL's main statutory duties is public outreach "through the Internet, radio, television, or newspaper advertisements on the responsibilities and functions of, and how to contact, the [CRCL] Officer."²⁵⁹⁸ CRCL also performs outreach for DHS through routine stakeholder roundtable meetings in cities across the U.S., distinct town halls on current issues, and subject-specific events focusing on DHS priorities. CRCL also reports that it convenes national Incident Community Coordination Team (ICCT) calls with stakeholder and relevant government leadership in the immediate aftermath of homeland security incidents.²⁵⁹⁹

CRCL explains that it consults with communities through public town hall meetings and listening sessions to hear the communities' concerns and suggestions. CRCL reports that these consultations have offered valuable input to DHS policy and have helped to develop a guide on appropriate terminology to use when describing a terrorist threat.²⁶⁰⁰ The CRCL Immigration Section engages with the public about civil and human rights implications of Department immigration programs, policies, procedures, and operations.²⁶⁰¹ CRCL also reported that "in 2014, the Department began a Southern Border Initiative (SBI). In light of heightened civil rights concerns, CRCL expanded its community engagement roundtables and other related activity into additional communities along the border most impacted by the SBI."²⁶⁰²

And "during the summer and fall of 2017, several unprecedented hurricanes and wildfires impacted large regions of the United States and its territories," after which "CRCL and FEMA initiated a multi-state listening tour to hear directly from impacted communities regarding concerns emerging from the disasters."²⁶⁰³

Effectiveness of Interaction and Coordination with Other Agencies and Stakeholders

CRCL reports that its Immigration Section attempts to facilitate dialogue among government agencies and immigration and civil rights organizations.²⁶⁰⁴ CRCL also facilitates a training

²⁵⁹⁶ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 2, at 4.

²⁵⁹⁷ U.S. Dep't of Homeland Security, "Community Engagement," <https://www.dhs.gov/community-engagement> (Jun. 20, 2019).

²⁵⁹⁸ 6 U.S.C. § 345(a)(2).

²⁵⁹⁹ U.S. Dep't of Homeland Security, "Office for Civil Rights and Civil Liberties Handout," p. 2, https://www.dhs.gov/sites/default/files/publications/CRCL%20Handout_Updated%208-18-17.pdf.

²⁶⁰⁰ U.S. Dep't of Homeland Security, "Community Engagement," <https://www.dhs.gov/community-engagement> (accessed Jun. 20, 2019) [hereinafter DHS, "Community Engagement"].

²⁶⁰¹ U.S. Dep't of Homeland Security, "CRCL Immigration Section," <https://www.dhs.gov/crcl-immigration-section> (accessed Jun. 20, 2019).

²⁶⁰² U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 3, at 7.

²⁶⁰³ *Ibid.*, 8.

²⁶⁰⁴ U.S. Dep't of Homeland Security, "CRCL Immigration Section," <https://www.dhs.gov/crcl-immigration-section> (accessed Jun. 20, 2019).

program for federal, state, and local law enforcement, which encourages collaboration between officers and the communities they serve.²⁶⁰⁵ CRCL “partners with the DHS Privacy Office and the DOJ’s Bureau of Justice Assistance to provide training at state and major urban areas fusion centers,” and “maintains a website with resources and training materials that address civil rights, civil liberties, and privacy.”²⁶⁰⁶

CRCL also works with the federal Privacy and Civil Liberties Oversight Board that is statutorily required to:

- (1) analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and
- (2) ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism.²⁶⁰⁷

Federal agencies involved in PCLOB include the DHS, U.S. Department of State, Central Intelligence Agency, DOJ, Treasury and HHS.²⁶⁰⁸

The lack of DHS interaction and coordination with other governmental agencies has, however, compounded civil rights issues arising from DHS’ separation of migrant children from their parents. While DHS implemented the separation of thousands of children from their parents, children were placed with the Office of Refugee Resettlement of HHS. Reviewing the process, GAO issued a scathing report showing that the lack of coordination between DHS and HHS regarding the identities of the children and the identities and locations of their parents resulted in a substantial information deficit that made it difficult to reunite children with their parents.²⁶⁰⁹ In January 2019, the Office of the Inspector General of the U.S. Department of Health and Human Services released a report showing that “thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court, and HHS has faced challenges in identifying separated children.”²⁶¹⁰ In the time since the separation of these thousands of children came to light, no official numbers have been released by DHS due to the “lack of a coordinated formal tracking system between the Office of Refugee Resettlement . . . and the Department of Homeland Security.”²⁶¹¹

²⁶⁰⁵ DHS, “Community Engagement,” *supra* note 2600.

²⁶⁰⁶ U.S. Dep’t of Homeland Security, “Civil Rights and Civil Liberties, Civil Rights and Civil Liberties Training at Fusion Centers,” <https://www.dhs.gov/civil-rights-and-civil-liberties-institute> (accessed Jul. 11, 2019).

²⁶⁰⁷ 42 U.S.C. § 2000ee(c).

²⁶⁰⁸ *Id.*

²⁶⁰⁹ GAO, *Unaccompanied Children*, *supra* note 1437, at 17-26.

²⁶¹⁰ U.S. Department of Health & Human Services, Office of Inspector General, *Separated Children Place in Office of Refugee Resettlement Care*, OEI-BL-00511, January 2019, p. 1, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.

²⁶¹¹ Miriam Jordan, “Family Separation May Have Hit Thousands More Migrant Children Than Reported,” *New York Times*, Jan. 17, 2019, <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>.

Following DHS' joint issuance of guidance with DOJ, HUD, HHS, and DOT regarding guarding against discrimination in emergency relief programs that receive federal financial assistance,²⁶¹² CRCL reported to the Commission that during the summer and fall of 2017:

CRCL and FEMA worked within the coordinated federal response to address potential civil rights related issues facing individuals with disabilities, individuals with limited English proficiency, immigrant communities, and members of racially and ethnically diverse communities. DHS coordinated with civil rights partners within other key agencies including the Department of Justice and the Department of Health and Human Services to issue and disseminate updated guidance reminding recipients of federal financial assistance of their civil rights obligations... And CRCL has taken a lead role in engaging an interdepartmental working group for better coordination of improvement civil rights in disaster planning and execution.²⁶¹³

Use of Research, Data Collecting, and Reporting

Aside from the reporting requirements the Homeland Security Act imposes on CRCL and the Implementing Regulations of the 9/11 Commission Act, which require some data collection and reporting about CRCL's activities in annual and semiannual reports,²⁶¹⁴ DHS CRCL has also issued policy documents and public information about civil rights issues,²⁶¹⁵ and training documents for fusion centers.²⁶¹⁶

The Commission notes that information about the thousands of complaints received by CRCL may be limited, because "CRCL does not require or collect data from complainants related to any specific information in order to file a complaint."²⁶¹⁷ The data is reported by type of complaint and DHS Component, rather than race, national origin, gender, or other similar information about status.²⁶¹⁸

²⁶¹² See *supra* notes 2592-95.

²⁶¹³ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 3, at 8.

²⁶¹⁴ See *supra* notes 2443-46.

²⁶¹⁵ See *supra* notes 2456-58 and 2597-2603.

²⁶¹⁶ See *supra* notes 2456-58 and 2606.

²⁶¹⁷ U.S. Dep't of Homeland Security, Response to USCCR Interrogatory No. 11, at 27.

²⁶¹⁸ See U.S. Dept. of Homeland Security, Office for Civil Rights and Civil Liberties, *Fiscal Year 2017 Annual Report to Congress*, *supra* note 2565, at Table 2.

Chapter 9: U.S. Environmental Protection Agency, External Civil Rights Compliance Office

Congress established the U.S. Environmental Protection Agency (EPA) in 1970 as a result of President Richard Nixon's 37-point directive regarding the environment, which responded to growing public concerns about deteriorating city air, natural areas littered with debris, and urban water supplies contaminated with dangerous impurities.²⁶¹⁹

EPA states that its mission is “to protect human health and the environment”²⁶²⁰ by ensuring that:

- Americans have clean air, land and water;
- National efforts to reduce environmental risks are based on the best available scientific information;
- Federal laws protecting human health and the environment are administered and enforced fairly, effectively and as Congress intended;
- Environmental stewardship is integral to U.S. policies concerning natural resources, human health, economic growth, energy, transportation, agriculture, industry, and international trade, and these factors are similarly considered in establishing environmental policy;
- All parts of society--communities, individuals, businesses, and state, local and tribal governments--have access to accurate information sufficient to effectively participate in managing human health and environmental risks;
- Contaminated lands and toxic sites are cleaned up by potentially responsible parties and revitalized; and
- Chemicals in the marketplace are reviewed for safety.²⁶²¹

Legal Authority and Responsibility

This mission is impacted by Executive Order 12,898 of 1994, which established federal regulations requiring that Environmental Impact Statements include that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.”²⁶²²

²⁶¹⁹ See U.S. Environmental Protection Agency, “The Origins of EPA,” <https://www.epa.gov/history/origins-epa>; Reorganization Plan No. 3, 35 Fed. Reg. 15,623, 84 Stat. 2086 (1970) (presidential directive establishing the EPA and submitted to and approved by Congress), *codified at* 42 U.S.C.A. § 4231; *see also* *Immigration and Naturalization Service v. Chandha*, 462 U.S. 919 (1983) (confirming EPA's legality).

²⁶²⁰ U.S. Environmental Protection Agency, “Our Mission and What We Do,” <https://www.epa.gov/aboutepa/our-mission-and-what-we-do>.

²⁶²¹ *Ibid.*

²⁶²² Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, 59 Fed. Reg. 7,629, 1994 WL 16189208, Executive Order 12898, § 1-101.

The External Civil Rights Compliance Office (ECRCO), located within the Office of the General Counsel at EPA, reports that it strives to advance EPA's mission by enforcing federal civil rights laws that prohibit discrimination by applicants for recipients of federal financial assistance "through complaint investigations, compliance reviews, technical assistance, community engagement, and policy formulation."²⁶²³ The federal civil rights laws that EPA enforces and implements through EPA's external nondiscrimination regulations at 40 C.F.R. Parts 5 and 7, which prohibit nondiscrimination by recipients of EPA funding,²⁶²⁴ include:

- Title VI of the Civil Rights Act of 1964²⁶²⁵
- Title IX of the Education Amendments of 1972²⁶²⁶
- Section 504 of the Rehabilitation Act of 1973²⁶²⁷
- Age Discrimination Act of 1975²⁶²⁸
- Section 13 of the Federal Water Pollution Control Act Amendments of 1972²⁶²⁹

Enforcement Tools

The agency enforcement tools ECRCO has specific legal authority to use are:²⁶³⁰

- Complaint Resolution²⁶³¹
- Agency-Initiated Charges²⁶³²
- Proactive Compliance Evaluations²⁶³³
- Issuance of Policy Guidance²⁶³⁴
- Issuance of Regulations²⁶³⁵

²⁶²³ U.S. Environmental Protection Agency, Response to USCCR Interrogatories No. 1 and No. 2, at 1.

²⁶²⁴ 40 C.F.R. Parts 5 and 7.

²⁶²⁵ 42 U.S.C. §§ 2000d *et seq.*; 40 C.F.R. Part 7. *See also* 28 C.F.R. Part 42 and 29 C.F.R. Part 1691 for procedures consistent with employment coordinating regulations.

²⁶²⁶ 20 U.S.C. §§ 1681 *et seq.*; 40 C.F.R. Part 5. *See also* 28 C.F.R. Part 42 and 29 C.F.R. Part 1691 for procedures consistent with employment coordinating regulations.

²⁶²⁷ 29 U.S.C. § 794; 40 C.F.R. Part 7. *See also* 28 C.F.R. Part 37 and 29 C.F.R. Part 1640 for procedures consistent with employment coordinating regulations.

²⁶²⁸ 42 U.S.C. §§ 6101 *et seq.*; 40 C.F.R. Part 7, Subpart F. *See also* 28 C.F.R. Part 42 and 29 C.F.R. Part 1626 for procedures consistent with age coordinating regulations.

²⁶²⁹ 33 U.S.C. § 1251; 40 C.F.R. Part 7.

²⁶³⁰ 40 C.F.R. Part 5; 40 C.F.R. Part 7; 28 C.F.R. Part 42 Subpart F; 29 C.F.R. Part 1626; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 2, at 1.

²⁶³¹ 40 C.F.R. Part 7, Subpart E; 40 C.F.R. § 5.605; *see generally* U.S. Environmental Protection Agency, Case Resolution Manual (January 2017), https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf [hereinafter EPA, Case Resolution Manual].

²⁶³² 40 C.F.R. §§ 7.110(c) and 7.115.

²⁶³³ *Id.* § 7.20 ("EPA's Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request").

²⁶³⁴ 28 C.F.R. § 42.405; 40 C.F.R. § 7.20.

²⁶³⁵ 28 C.F.R. § 42.403 (agency duty to issue Title VI regulations).

- Technical Assistance²⁶³⁶
- Publicity²⁶³⁷
- Data collection, research and reporting²⁶³⁸
- Collaboration with states/local agencies²⁶³⁹
- Collaboration with other federal agencies²⁶⁴⁰
- Strategic Plan²⁶⁴¹
- Annual Reports²⁶⁴²

While EPA ECRCO does not have specific legal authority for other tools identified by the Commission, nothing prohibits EPA ECRCO from, for example, engaging in outreach to stakeholders, as described in further detail below.

Budget and Staffing

ECRCO currently is housed within the Office of the General Counsel (OGC), and it operates under the direction of Lilian Dorka, Director.²⁶⁴³

In FY 2016, ECRCO maintained 11.5 FTEs, which included two detailees from other EPA offices (each working half time).²⁶⁴⁴ This staffing level did not greatly fluctuate, increasing only slightly in FY 2017 to 12.5 FTEs, and decreasing only slightly in FY 2018 to 12 FTEs.²⁶⁴⁵

ECRCO reported that it receives programmatic assistance from an average of 4 attorneys from OGC's Civil Rights and Finance Law Office on a part-time basis over the fiscal years 2016 to 2018.²⁶⁴⁶ In addition, although it does not track this assistance, ECRCO has noted that it frequently

²⁶³⁶ 40 C.F.R. § 7.105; 40 C.F.R. § 7.20 (“EPA's Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request”); 40 C.F.R. § 5.605; 28 C.F.R. § 42.405.

²⁶³⁷ 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information).

²⁶³⁸ 28 C.F.R. § 42.406 (regarding data and information collection); 28 C.F.R. § 42.406 *passim* (regarding research and reporting); 40 C.F.R. Part 5 *passim* (regarding research and reporting); 40 C.F.R. Part 7 *passim* (regarding research and reporting).

²⁶³⁹ 40 C.F.R. § 7.20 (“EPA's Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request”); 40 C.F.R. § 7.125; 40 C.F.R. § 5.605.

²⁶⁴⁰ 40 C.F.R. § 7.125; 40 C.F.R. § 5.605; 28 C.F.R. § 42.413.

²⁶⁴¹ 40 C.F.R. Part 5 *passim*; 40 C.F.R. Part 7 *passim*; GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

²⁶⁴² 40 C.F.R. Part 5 *passim*; 40 C.F.R. Part 7 *passim*; GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

²⁶⁴³ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3.

²⁶⁴⁴ U.S. Environmental Protection Agency, Response to USCCR Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018), at 1. (A detailee is a federal employee who is on temporary detail from another office.)

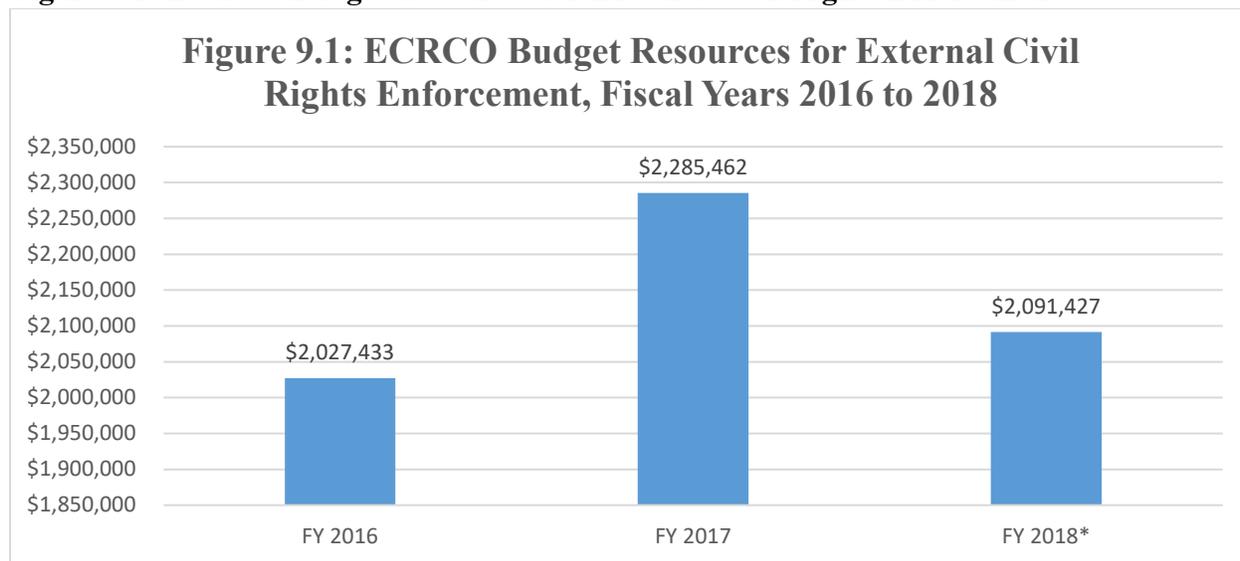
²⁶⁴⁵ *Id.*

²⁶⁴⁶ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 5, at 4.

engages with staff at program and regional offices in its enforcement activities, and receives support from Deputy Civil Rights Officers (DCROs) to help carry out its civil rights mission.²⁶⁴⁷

ECRCO's total allocated budget for FY 2016 was \$2.02 million, which rose to \$2.28 million in FY 2017, and was projected to decrease slightly to \$2.09 million in FY 2018.²⁶⁴⁸ See Figure 9.1.

Figure 9.1: ECRCO Budget Resources for External Civil Rights Enforcement



Source: U.S. Environmental Protection Agency, Response to Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018).

*FY 2018 amounts are projected as of June 18, 2019.

ECRCO indicated that its budget “is not itemized in such a way as to identify funds allocated for processing and responding to complaints,” but rather is itemized according to personnel, travel, general expenses, contracts, Working Capital Fund, and grants.²⁶⁴⁹ The budget numbers reflected above are the total of the aforementioned budget line items.²⁶⁵⁰

Despite the reduction in funding from FY 2017 to FY 2018, ECRCO indicated that it has “received funding to support its budget request,” and “has had sufficient staffing to effectively manage its caseload for the fiscal years [2016-2018] in question.”²⁶⁵¹ External sources, including a federal court opinion, call that assessment into question, as discussed further below.

²⁶⁴⁷ Ibid

²⁶⁴⁸ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 5-6, 21.

²⁶⁴⁹ Ibid., 5.

²⁶⁵⁰ See U.S. Environmental Protection Agency, Response to USCCR Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018), at 1.

²⁶⁵¹ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 6.

Assessment

Prioritization for Civil Rights Agency-Wide

In 2016, EPA restructured the functions of the former Office of Civil Rights in an effort to strengthen its ability to conduct its external civil rights enforcement work, which is now carried out by ECRCO.²⁶⁵² ECRCO noted that during FY 2016 through FY 2018, “ECRCO has and continues to carry out the same federally mandated responsibilities to enforce several civil rights laws which, together, prohibit discrimination on the basis of race, color, or national origin (including on the basis of limited English proficiency); sex, disability and age by applicants for and recipients of financial assistance from EPA.”²⁶⁵³ This restructuring followed the Commission’s 2016 statutory report that was critical of EPA, finding that “EPA’s inability to proactively ensure that recipients of financial assistance comply with Title VI is exacerbated by its lack of resources and small staff levels.”²⁶⁵⁴ The Commission, in a 2002 evaluation of federal civil rights enforcement across multiple agencies, found that federal civil rights programs “were often void of clear authority, responsibility, and accountability.”²⁶⁵⁵

The Commission has recommended that federal agencies “should ensure that civil rights enforcement is given priority through the organizational structure for civil rights, allocation of resources and staffing, and efforts to integrate civil rights into every component of the agency.”²⁶⁵⁶ ECRCO reported that: “In December 2016, EPA took steps to strengthen the agency’s ability to carry out its external civil rights enforcement responsibilities by reorganizing the functions of the Office of Civil Rights (OCR) with respect to its former External Compliance and Complaints Program. The external civil rights enforcement function now resides organizationally within ECRCO, which is in EPA’s OGC [Office of General Counsel].”²⁶⁵⁷ In contrast, the internal functions of the EPA’s OCR, which reviews staff complaints and internal functions, is still located in the Office of the EPA Administrator (the agency head).²⁶⁵⁸ This restructuring of the external functions of the Office of Civil Rights, particularly in the wake of the Commission’s critical 2016 report, runs counter to the previous Commission finding that the efficacy of external civil rights enforcement offices may be impaired by a lack of a direct line of authority to the agency head.²⁶⁵⁹

In 2012, EPA recommended the creation of Deputy Civil Rights Officials (DCROs), comprised of senior-level officials who are responsible for ensuring accountability for civil rights compliance

²⁶⁵² U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3.

²⁶⁵³ U.S. Environmental Protection Agency, “External Civil Rights Compliance Office (Title VI), <https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi>; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3.

²⁶⁵⁴ USCCR, *Environmental Justice*, *supra* note 250, at 90.

²⁶⁵⁵ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 47.

²⁶⁵⁶ *Ibid.*

²⁶⁵⁷ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 4, at 3.

²⁶⁵⁸ See U.S. Environmental Protection Agency, Office of Civil Rights, <https://www.epa.gov/aboutepa/about-office-civil-rights-ocr> (accessed Jun. 9, 2019).

²⁶⁵⁹ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 47.

across the agency.²⁶⁶⁰ DCROs exist in regional offices and national programs—including environmental justice initiatives—and are charged to provide “prompt programmatic, regulatory, analytical, scientific, and technical expertise” which would ultimately assist programs in meeting EPA’s civil rights responsibilities.²⁶⁶¹ DCROs were formally established under EPA Orders 4700 and 4701 in 2013, to support its civil rights enforcement efforts.²⁶⁶² Lilian Dorka, Director of ECRCO, spoke to this issue during her testimony to the Commission:

[T]hese two orders basically require the different regional offices within EPA, as well as the program offices, to identify high level, sort of at the SES level, high level persons that will coordinate with the civil rights program to ensure that civil rights is integrated throughout the agency and also to ensure that we have additional resources. ... there is what we call the Deputy Civil Rights Official, the DCROs within each regional office or program office and I can call on them when I need cooperation, or collaboration, or to know what is going on[,] on the ground. ... So those Orders, which are in fact reflected in our Case Resolution Manual and how we will work with the regional offices and different programs, pretty much put at our disposal a cadre of very, very highly skilled and trained environmental professionals that we can call on for assistance on individual cases.²⁶⁶³

According to ECRCO’s Case Resolution Manual, DCROs are described as, “a critical resource in support of EPA’s civil rights program ... who serve as civil rights champions throughout the EPA, and who provide prompt programmatic, regulatory, analytical, scientific, and technical expertise and support in addition to their vast network of critical stakeholder contacts at a regional level and in specific program areas.”²⁶⁶⁴ The Manual goes on to clarify that these positions utilize “EPA’s preexisting, in-house expertise” which enables EPA to “rel[y] less on developing redundant competencies in ECRCO or us[e] costly contracts to fill gaps in ECRCO’s technical and scientific expertise to effectively investigate and resolve environmental civil rights cases consistent with the agency’s commitment to sound science and civil rights law.”²⁶⁶⁵

Professor Marianne Engelman Lado notes: “From the get-go, however, DCROs were a designation with responsibility, not a new hire or additional position within each region.”²⁶⁶⁶ Lado points out: “In almost all cases, DCROs were deputy regional administrators or assistant regional administrators, with the additional responsibilities attendant to these titles.” These positions,

²⁶⁶⁰ EPA, Case Resolution Manual, *supra* note 2631, at 3.

²⁶⁶¹ *Ibid.*

²⁶⁶² U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 5, at 4; *see also* EPA, Case Resolution Manual, *supra* note 2631, at 3.

²⁶⁶³ Lilian Dorka, Director, External Civil Rights Compliance Office, U.S. Environmental Protection Agency, Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 148-149.

²⁶⁶⁴ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 5, at 4; *see also* EPA, Case Resolution Manual, *supra* note 2631, at 3.

²⁶⁶⁵ *Ibid.*; *see also* EPA, Case Resolution Manual, *supra* note 2631, at 3.

²⁶⁶⁶ Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 Pa. J.L. & Soc. Change 281, 302 (2019) [hereinafter Lado, *No More Excuses*].

therefore, do not add additional people with full time availability for civil rights enforcement; as Director Dorka testified to the Commission, these DCROs were not among her employees.²⁶⁶⁷

As explained earlier in this chapter, ECRCO noted in its response to the Commission that it had “received funding to support its budget request” for FY 2016 to FY 2018, and “commensurate with ECRCO’s budget allocations, ECRCO has had sufficient staffing to effectively manage its caseload for the fiscal years in question.”²⁶⁶⁸ ECRCO experienced a slight overall increase in its budget allocations from FY 2016 to FY 2018, and its staffing levels appear to have increased commensurate to those budget allocations, rising from 11.5 to 12 FTEs for the fiscal years in question.²⁶⁶⁹ Therefore, when examining its overall resources, ECRCO’s capacity to manage its civil rights enforcement caseload has slightly increased over FY 2016 to FY 2018.

Strategic Planning and Self-Evaluation

Prior to EPA’s restructuring the external civil rights enforcement functions of the former Office of Civil Rights within ECRCO, EPA issued a strategic plan solely dedicated to its external civil rights enforcement work goals for the fiscal years 2015-2020 (which was subsequently updated in January 2017, after this restructuring).²⁶⁷⁰ In the *External Civil Rights Compliance Office Strategic Plan Fiscal Year 2015-2020*, ECRCO outlines three key strategic goals:

- Goal 1: Enhance Strategic Docket Management
- Goal 2: Develop a Proactive Compliance Program
- Goal 3: Strengthen ECRCO’s Workforce to Promote a High-Performing Organization²⁶⁷¹

According to ECRCO, these measurable goals will help improve complaint management, enhance ECRCO’s external compliance program, and strengthen ECRCO’s workforce.²⁶⁷² Lilian Dorka, Director of ECRCO, noted that all of these priorities are critical in advancing ECRCO’s mission, and ECRCO has made efforts to strengthen its own staff capacity to accomplish its mission, including the development of an ECRCO Competency Framework and Individualized Development Plans.²⁶⁷³ Director Dorka testified that issuing a Complaint Resolution Manual and a Strategic Plan has increased ECRCO’s ability to focus its resources on reducing its complaint docket of unresolved and over-aged complaints.²⁶⁷⁴ ECRCO has indicated that these priorities have not significantly changed “in content or focus” from FY 2016 through FY 2018, however some

²⁶⁶⁷ Dorka Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 148-149.

²⁶⁶⁸ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 6, at 6.

²⁶⁶⁹ U.S. Environmental Protection Agency, Response to USCCR Interrogatories, Exhibit A: ECRCO FTE and Budget Chart (Updated 6-1-2018), at 1.

²⁶⁷⁰ U.S. Environmental Protection Agency, *External Civil Rights Compliance Office Strategic Plan Fiscal Year 2015-2020*, January 2017 (final draft), https://www.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf [hereinafter EPA, *ECRCO Strategic Plan*].

²⁶⁷¹ *Ibid.*, 5; U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2.

²⁶⁷² EPA, *ECRCO Strategic Plan*, *supra* note 2670, at 6.

²⁶⁷³ Dorka Testimony, *Federal Civil Rights Enforcement Briefing*, p. 122-123.

²⁶⁷⁴ *Ibid.*, 94-96.

initiatives have been implemented to enhance the effectiveness of these policy priorities.²⁶⁷⁵ ECRCO has indicated that when EPA funding recipients experience a “lack of foundational nondiscrimination programs including procedural safeguards required by EPA’s regulations, as well as policies and procedures to ensure meaningful access to applicants’ and recipients’ programs and activities for persons with disabilities and limited-English proficiency,”²⁶⁷⁶ that absence can impact funding recipients’ ability to comply with their federal civil rights obligations. Additionally, ECRCO has described its proactive efforts to make improvements in this area of “strategic significance” by “the routine integration of procedural safeguard and access requirements into the resolution of all pending complaints,” and has indicated that these measures help to address issues of strategic significance in civil rights areas and provide an efficient and effective vehicle for providing states and other recipients with important compliance information and assistance,” similar to compliance reviews.²⁶⁷⁷

In line with its legal responsibility, EPA issues an annual performance report.²⁶⁷⁸ EPA’s FY 2016 and FY 2017 Annual Performance Reports indicated a goal of “protecting human health and the environment by enforcing laws and assuring compliance,” noting that its environmental justice program contributed to that goal,²⁶⁷⁹ and noted that “EPA continued to promote environmental justice (EJ) by targeting noncomplying facilities for their disproportionate impacts on low-income and minority communities.”²⁶⁸⁰ EPA’s FY 2018 Annual Performance Report did not indicate a similar goal, nor did it mention civil rights enforcement at all.²⁶⁸¹

The Commission is not aware of any annual performance reports that are issued and made public by ECRCO specifically.

Complaint Processing, Agency-Initiated Charges, and Litigation

The foundation for EPA’s civil rights complaint resolution process is EPA’s nondiscrimination regulation.²⁶⁸² Based upon that regulation, ECRCO developed a Case Resolution Manual in 2015 (updated in January 2017), which “provides procedural guidance to ECRCO case managers to ensure EPA’s prompt, effective, and efficient resolution of civil rights cases consistent with federal

²⁶⁷⁵ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2.

²⁶⁷⁶ Ibid.

²⁶⁷⁷ Ibid.

²⁶⁷⁸ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

²⁶⁷⁹ U.S. Environmental Protection Agency, *FY 2019 Justification of Appropriation Estimates for the Committee on Appropriations/FY 2017 Annual Performance Report*, p. 719, <https://www.epa.gov/sites/production/files/2018-03/documents/fy19-cj-14-program-performance.pdf>.

²⁶⁸⁰ U.S. Environmental Protection Agency, *FY 2018 Justification of Appropriation Estimates for the Committee on Appropriations/FY 2016 Annual Performance Report*, p. 548, <https://www.epa.gov/sites/production/files/2017-06/documents/fy18-cj-14-program-performance.pdf>.

²⁶⁸¹ U.S. Environmental Protection Agency, *FY 2020 Justification of Appropriation Estimates for the Committee on Appropriations/FY 2018 Annual Performance Report*, <https://www.epa.gov/sites/production/files/2019-04/documents/fy20-cj-14-program-performance.pdf>.

²⁶⁸² 40 C.F.R. Parts 5 and 7. The Commission notes that the agency uses the term “nondiscrimination regulation” rather than the plural, for these regulations. U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 1, at 1.

civil rights law.”²⁶⁸³ In a public comment submitted to the Commission in 2018, Marianne Engelman-Lado, Lecturer at Yale Schools of Public Health and Forestry & Environmental Studies, commended EPA for the issuance of this Case Resolution Manual, which she believes “helped to fill the need for greater uniformity, clarity, and transparency related to the EPA’s handling of complaints filed under civil rights laws.”²⁶⁸⁴

As per ECRCO’s Case Resolution Manual, when ECRCO receives correspondence, ECRCO “will” formally acknowledge receipt, develop a strategic case management plan to “achieve prompt, effective, and efficient processing of cases,” and conduct a review of correspondence it receives to determine whether it constitutes a complaint.²⁶⁸⁵ ECRCO should also notify DCROs of incoming correspondence and the review process within the first 10 days after receipt of said correspondence.²⁶⁸⁶ However, the manual also states that “[a]ll target timeframes in this document are aspirational. They represent goals ECRCO will aim to achieve in the majority of cases.”²⁶⁸⁷ ECRCO’s case manual also reports review of correspondence will take into consideration a number of factors (e.g., subject matter and personal jurisdiction, timely allegations, and if the correspondence is in writing²⁶⁸⁸), and will help ECRCO determine whether to accept or reject the complaint.²⁶⁸⁹ This review (which includes the jurisdictional review) should take place within the first 20 days after acknowledgement of receipt of the complaint.²⁶⁹⁰

EPA regulations require that ECRCO notify the complainant and recipient of its preliminary findings within 180 days of receiving the complaint.²⁶⁹¹ The regulations have been interpreted by a federal court to require EPA to issue preliminary findings even if it has determined that a violation *has not* occurred, rather than only issuing preliminary findings if it has determined that a violation *has* occurred.²⁶⁹²

If a complaint is accepted for investigation, ECRCO’s case manual states that it will issue a letter of acceptance and the assigned Case Manager will begin to draft an Investigative Plan, which will include an identification of an applicable legal theory (disparate/different treatment, disparate impact/effects, or retaliation).²⁶⁹³ The early stages of the investigation will take certain criteria into account, and if the complaint does not meet said criteria, then the complaint could be subject to

²⁶⁸³ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 9, at 12.

²⁶⁸⁴ Lado, *No More Excuses*, *supra* note 2666, at 303.

²⁶⁸⁵ EPA, Case Resolution Manual, *supra* note 2631, at 6.

²⁶⁸⁶ *Ibid.*, 39.

²⁶⁸⁷ *Ibid.*, 39, n. 1.

²⁶⁸⁸ *Ibid.*, 7. The Case Resolution Manual notes that a complaint does not have to be written in English, as ECRCO “will take all the necessary steps to ensure that persons who have limited English proficiency can participate meaningfully in its complaint process.” *Ibid.*

²⁶⁸⁹ *Ibid.*

²⁶⁹⁰ *See* 40 C.F.R. § 7.120(d)(1)(i).

²⁶⁹¹ 40 C.F.R. § 7.115; 40 C.F.R. § 7.120.

²⁶⁹² *Californians for Renewable Energy v. United States Environmental Protection Agency*, 2018 WL 1586211 (N.D. Cal. 2018).

²⁶⁹³ EPA, Case Resolution Manual, *supra* note 2631, at 15.

administrative closure.²⁶⁹⁴ Early Complaint Resolution could be used to resolve a complaint in the early stages of investigation, and provides an opportunity for the complainant and the recipient to reach a mutually acceptable agreement, which will be monitored for compliance.²⁶⁹⁵ Alternative Dispute Resolution is another method used to resolve complaints, involving a more formal mediation process between complainant(s) and recipient(s) involved to reach a mutually agreeable resolution.²⁶⁹⁶ Additionally, an Informal Resolution Agreement between the recipient and ECRCO could be reached.²⁶⁹⁷ If no resolution can be achieved during this stage of the investigative process, then ECRCO's investigation will continue.²⁶⁹⁸

After the investigation is complete, ECRCO says it will make an investigative determination and will issue a letter of findings, in which ECRCO will either determine there is insufficient evidence or there are preliminary findings of non-compliance.²⁶⁹⁹ If ECRCO finds non-compliance, at this stage a respondent can enter into a Voluntary Compliance Agreement with ECRCO, which outlines action steps that a respondent can take to voluntarily remedy discrimination and achieve compliance.²⁷⁰⁰ If a respondent will not enter into a Voluntary Compliance Agreement, ECRCO may initiate administrative proceedings to “suspend, terminate, or refuse to grant or continue and defer financial assistance from the recipient,” refer the case to DOJ for judicial proceedings, or use “other means authorized by law” (e.g., litigation, etc.).²⁷⁰¹

As set forth in EPA's nondiscrimination regulation, ECRCO must utilize informal or voluntary methods of resolution to resolve complaints of discrimination prior to initiating an enforcement action.²⁷⁰² In testimony to the Commission for this investigation, Director of ECRCO Lilian Dorka described ECRCO's use of informal complaint resolution methods, expressing: “We have refined our skills in crafting Informal Resolution Agreements that produce results and benefits for recipients and communities alike, while effectively resolving the civil rights issues raised through complaints, without the need for formal findings which attribute blame and often require resource intensive and time-consuming investigations.”²⁷⁰³

ECRCO has reported to the Commission that it received 31 complaints in FY 2016, 25 complaints in FY 2017, and 15 complaints in FY 2018.²⁷⁰⁴ Of those complaints received, ECRCO accepted 8 complaints for investigation in FY 2016, 10 complaints in FY 2017, and 2 complaints in FY

²⁶⁹⁴ *Ibid.*, 17.

²⁶⁹⁵ *Ibid.*, 18.

²⁶⁹⁶ *Ibid.*, 21.

²⁶⁹⁷ *Ibid.*, 22.

²⁶⁹⁸ *Ibid.*, 24.

²⁶⁹⁹ See 40 C.F.R. §§ 7.115(c) - (f); 7.130; EPA, Case Resolution Manual, *supra* note 2631, at 29.

²⁷⁰⁰ See 40 C.F.R. §§ 7.115(c) - (f); 7.130; EPA, Case Resolution Manual, *supra* note 2631, at 30.

²⁷⁰¹ See 40 C.F.R. §§ 7.115(c) - (f); 7.130; U.S. EPA, Case Resolution Manual, *supra* note 2631, at 37.

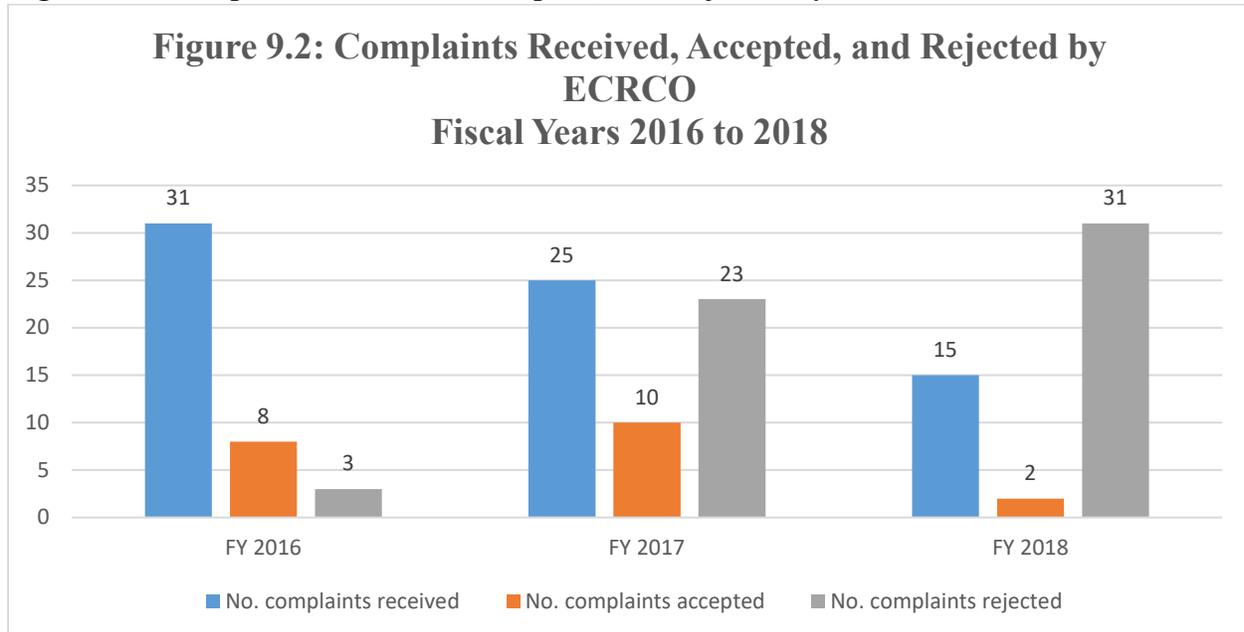
²⁷⁰² 40 C.F.R. § 7.120(d)(2); 28 C.F.R. § 42.411(a); 28 C.F.R. § 50.3 I.C.

²⁷⁰³ Dorka Statement, at 3.

²⁷⁰⁴ U.S. Environmental Protection Agency, Updated Response to Interrogatory No. 7, provided in the Response to USCCR Affected Agency Review (Jun. 18, 2019); see also U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 7, at 7. ECRCO has specified that EPA interprets “open” cases to be the number of cases received during the fiscal years in question. *Ibid.*

2018.²⁷⁰⁵ Furthermore, ECRCO rejected 3 complaints for investigation at the jurisdictional review stage in FY 2016, while it rejected 23 complaints in FY 2017, and rejected 31 complaints in FY 2018.²⁷⁰⁶ See Figure 9.2.

Figure 9.2: Complaints Received, Accepted, and Rejected by ECRCO



Source: U.S. Environmental Protection Agency, Updated Response to USCCR Interrogatory No. 7, provided in the Response to USCCR Affected Agency Review (Jun. 18, 2019).

ECRCO also noted that the number of complaints identified above that are accepted or rejected for investigation in a given fiscal year “were not necessarily received in the same fiscal year.”²⁷⁰⁷

During FY 2016 to FY 2018, ECRCO received 46 complaints on the basis of race/national origin discrimination; 17 complaints on the basis of disability discrimination; 17 complaints where there was no identified basis of discrimination; and 1 complaint on the basis of sex discrimination.²⁷⁰⁸ ECRCO further noted that some complaints allege multiple bases of discrimination.²⁷⁰⁹

In 2016, the Commission examined the EPA’s compliance with and enforcement of Title VI and Executive Order 12,898 in order to advance environmental justice.²⁷¹⁰ The Commission reported at that time that since its creation, EPA’s Office of Civil Rights²⁷¹¹ “has never made a formal

²⁷⁰⁵ Ibid.

²⁷⁰⁶ Ibid.

²⁷⁰⁷ Ibid.

²⁷⁰⁸ Ibid.

²⁷⁰⁹ Ibid.

²⁷¹⁰ USCCR, *Environmental Justice*, *supra* note 250, at 40.

²⁷¹¹ Cross reference to current note 578 (note # may change) that reads, “In 2016, the functions of the former Office of Civil Rights were restructured to strengthen its ability to conduct its external civil rights enforcement work, which is now carried out by ECRCO.”

finding of discrimination.”²⁷¹² As discussed further below, since that report, EPA ECRCO has found at least two violations of Title VI, and in one case secured corrective action to remedy the violation.

The Commission’s report explained the EPA received over 350 Title VI complaints between 1993 and 2016, which were “broad in scope and raise a variety of environmental issues that disproportionately impact communities of color and low-income communities.”²⁷¹³ The report highlighted criticisms of EPA’s civil rights office not meeting regulatory timelines for processing these complaints, and cited multiple lawsuits filed against EPA concerning this issue.²⁷¹⁴

In 2015, five environmental groups sued EPA based on a claim that EPA had ignored a decade’s worth of Title VI complaints between 1995 and 2005 concerning the discriminatory nature of approvals for environmentally hazardous facilities to operate in predominantly minority communities in Michigan, California, Texas, New Mexico, and Alabama.²⁷¹⁵ According to federal regulations, EPA had 180 days to issue initial findings and recommendations for reaching compliance (if appropriate) after a complaint was received.²⁷¹⁶ However, the plaintiffs claimed that EPA did not issue any preliminary findings during this time frame, and sought an order to “compel agency action unlawfully withheld or unreasonably delayed.”²⁷¹⁷ Citing several prior cases, the district court judge noted that:

It is well documented that the EPA has been sued repeatedly for failing to investigate Title VI complaints in a timely manner. The EPA often takes years to act on a complaint—and even then, acts only after a lawsuit has been filed. The Ninth Circuit has strongly criticized the EPA for such delays.

Despite the prior litigation involving its failures to resolve Title VI complaints in a timely manner and this Circuit’s criticism of those delays, the EPA has allowed Plaintiffs’ complaints to languish for decades. It was only during the pendency of this action that the EPA resolved each of Plaintiffs’ administrative complaints.²⁷¹⁸

The court then found that “EPA’s failure to issue preliminary findings or recommendations and any recommendations for voluntary compliance constitutes agency action unlawfully

²⁷¹² USCCR, *Environmental Justice*, *supra* note 250, at 40. Note: since the issuance of the Commission’s report, EPA ECRCO has issued at least two Title VI findings of violation.

²⁷¹³ USCCR, *Environmental Justice*, *supra* note 250, at 25 (discussing how at the time the Commission’s report was published, it was reported that EPA received 290 Title VI complaints between 1993 and 2014, 33 new complaints in 2015, and 35 new complaints in 2016).

²⁷¹⁴ *Ibid.*, 25-26.

²⁷¹⁵ *Californians for Renewable Energy v. U.S. Department of Environmental Protection*, No. 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018); Iovino, “Judge Rules EPA Improperly Delayed Racial Bias Probes,” *supra* note 251.

²⁷¹⁶ 40 C.F.R. § 7.115.

²⁷¹⁷ *Californians for Renewable Energy v. U.S. Department of Environmental Protection*, No. 15-3292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018).

²⁷¹⁸ *Id.* at *15 (internal citations omitted).

withheld.”²⁷¹⁹ The final Judgment the court entered in June 2018 requires EPA to timely process any pending and future Title VI complaints submitted by those specific Plaintiffs in the CARE litigation *and* accepted by EPA for investigation for a period of five years from the date of the Judgment.²⁷²⁰

ECRCO reported to the Commission that it “is dedicated to consistently and appropriately managing its administrative complaint docket to ensure prompt, effective, and efficient complaint resolution.”²⁷²¹ ECRCO cited its strategic plan, noting that Goal 1 is to enhance strategic docket management.²⁷²² ECRCO indicated that during FY 2016 to FY 2018, “ECRCO has focused its office resources on reducing its complaint docket and case processing times,” which has “yielded positive results.”²⁷²³ As of the beginning of FY 2017, ECRCO had 25 complaints that were accepted and under investigation, and 39 complaints at the jurisdictional review stage, for a total of 64 complaints that were being processed during that fiscal year.²⁷²⁴ Of the 25 accepted complaints under investigation, a total of 15 were resolved (3 resolved with informal resolution agreements, 2 resolved with settlement agreements through the alternative dispute resolution process, and 10 due to administrative closure or insufficient evidence letters of findings) and 10 are still open and under investigation.²⁷²⁵ Of the 39 complaints under jurisdictional review, 22 were rejected for investigation, 9 were accepted for investigation, and 8 remained under jurisdictional review.²⁷²⁶ Additionally, ECRCO received 24 new complaints during FY 2017, 21 of which ECRCO rejected for investigation, 3 of which ECRCO accepted for investigation, and 4 of which are currently at the jurisdictional review stage.²⁷²⁷ As of the end of FY 2018, ECRCO reported that it had 26 complaints in its inventory (17 complaints under investigation and 9 under jurisdictional review), indicating a “significant reduction” from 64 total complaints at the beginning of FY 2017.²⁷²⁸ ECRCO further noted its goal of processing complaints within the 20-day allotted time frame pursuant to EPA’s nondiscrimination regulation (40 C.F.R. Part 7), and that 9 of the 15 complaints it received in FY 2018 “were processed within the 20 days allotted by regulation to accept, reject, or refer complaints.”²⁷²⁹ As of June 2019, all complaints filed in 2018 have been resolved.²⁷³⁰

²⁷¹⁹ *Id.*

²⁷²⁰ Judgment, *Californians for Renewable Energy v. U.S. Department of Environmental Protection*, No. 15-3292, 2 (N.D. Cal. June 13, 2018). In its review of the Commission’s draft report, EPA noted that “the Court ruled in favor of EPA on Plaintiffs’ ‘pattern and practice’ claim.” *Californians for Renewable Energy v. U.S. Department of Environmental Protection*, No. 15-3292, 2018 WL 1586211, *19 (N.D. Cal. Mar. 30, 2018). However, plaintiffs won their motion for summary judgement on their other five claims. *Id.* at *20.

²⁷²¹ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 7, at 8.

²⁷²² *Ibid.*

²⁷²³ *Ibid.*

²⁷²⁴ *Ibid.*

²⁷²⁵ *Ibid.*

²⁷²⁶ *Ibid.*

²⁷²⁷ *Ibid.*, 9.

²⁷²⁸ *Ibid.*

²⁷²⁹ *Ibid.*, 9; see 40 C.F.R. § 7.120(d)(1)(i).

²⁷³⁰ U.S. Environmental Protection Agency, Updated Response to USCCR Interrogatory No. 7, provided in the Response to USCCR Affected Agency Review (Jun. 18, 2019).

Environmental justice groups recently criticized EPA ECRCO for dismissing a civil rights complaint in 2018 that was filed against the Alabama Department of Environmental Management (ADEM), alleging that ADEM lacked adequate policies for processing civil rights complaints, which would be a violation of Title VI.²⁷³¹ The complaint was filed after ADEM rescinded its policies for accepting civil rights complaints, following a lawsuit that was filed against ADEM alleging racial discrimination due to the reissuing of a landfill permit in a community predominantly inhabited by African American residents in Tallassee, Alabama.²⁷³² In July 2018, EPA ECRCO issued a letter in response to the complaint filed, indicating that it would investigate “[w]hether ADEM has adopted grievance procedures that assure the prompt and fair resolution of complaints which allege violation of the regulation [40 C.F.R. Part 7.90(a)].”²⁷³³ EPA ECRCO proceeded to dismiss the complaint in December 2018.²⁷³⁴ In the letter of resolution and closure, issued on December 3, 2018, EPA ECRCO indicated that it had found “insufficient evidence of current noncompliance with Title VI and EPA’s implementing regulations at 40 C.F.R. Parts 5 and 7,” noting that EPA ECRCO had “provided technical assistance to ADEM and in response ADEM updated and posted on its website, in English and other appropriate languages, grievance procedures that meet the regulatory nondiscrimination requirements.”²⁷³⁵

With regard to the complaint against ADEM alleging racial discrimination against the predominantly African American residents of Tallassee, Alabama, EPA ECRCO, found “insufficient evidence of discrimination under Title VI and EPA’s nondiscrimination regulation” with respect to differential treatment and disparate impact against the African American residents on the basis of race.²⁷³⁶ Environmental advocates have argued that “EPA’s failure to take action reflects a persistent pattern” when it comes to enforcing civil rights, and that “EPA has yet again used any possible excuse to avoid finding a violation of civil rights law.”²⁷³⁷ Similarly, in March 2018, EPA closed a complaint regarding the distribution of coal ash in Uniontown, Alabama, without a finding of racial discrimination.²⁷³⁸ The Commission criticized the EPA for this complaint closure, indicating that EPA’s decision to allow the movement and storage of coal ash

²⁷³¹ Dennis Pillion, “EPA dismisses civil rights complaint against Alabama environmental agency,” *Al.com*, Dec. 5, 2018, <https://www.al.com/news/2018/12/epa-dismisses-civil-rights-complaint-against-alabama-environmental-agency.html> [hereinafter Pillion, “EPA dismisses civil rights complaint against Alabama environmental agency”].

²⁷³² *Ibid.*

²⁷³³ U.S. Environmental Protection Agency, Letter to David Ludder re: Notification of Acceptance of Administrative Complaint (Jul. 2, 2018), p. 1, http://www.enviro-lawyer.com/2018.07.02_EPA_Acceptance_Complaint.pdf.

²⁷³⁴ Pillion, “EPA dismisses civil rights complaint against Alabama environmental agency,” *supra* note 2731.

²⁷³⁵ U.S. Environmental Protection Agency, Letter to Lance R. LeFleur, Director of Alabama Department of Environmental Management re: Resolution and Closure of EPA Administrative Complaint No. 03R-18-R4 (Dec. 3, 2018), pp. 3-4, <https://www.epa.gov/sites/production/files/2018-12/documents/resolution-and-closure-letter-administrative-complaint-no-03r-18-r4.pdf>.

²⁷³⁶ *Ibid.*, 21.

²⁷³⁷ Jeronimo Nisa, “EPA Slams Door to Justice on Historic Black Community,” *Earthjustice*, Dec. 12, 2018, <https://earthjustice.org/news/press/2018/epa-slams-door-to-justice-on-historic-black-community>.

²⁷³⁸ Adam Dodson, “EPA closes Uniontown investigations,” *Selma Times-Journal*, Mar. 10, 2018, <https://www.selmatimesjournal.com/2018/03/10/epa-closes-uniontown-investigations/>.

in Uniontown “has adversely impacted the surrounding community” and it perpetuates “the environmental injustice the Uniontown community must endure.”²⁷³⁹

On January 19, 2017, on the last day of the Obama administration, ECRCO issued a letter that made a first-ever final finding of discrimination, after failed attempts to achieve informal resolution,²⁷⁴⁰ in a case that alleged the Michigan Department of Environmental Quality (MDEQ) treated African American residents of Flint in a discriminatory manner when permitting a power plant over 20 years ago.²⁷⁴¹ The letter, signed by the current Director of ECRCO Lilian Dorka and sent to the complainant Father Phil Schmitter of the St. Francis Prayer Center in Flint, indicated evidence that “African Americans were treated less favorably than non-African Americans,” and noted that a “preponderance of the evidence in EPA’s record would lead a reasonable person to conclude that race discrimination was more likely than not the reason.”²⁷⁴² EPA issued a finding of discriminatory treatment by MDEQ in the public participation process for the permit at issue. EPA also raised additional and current serious concerns about public participation and MDEQ’s nondiscrimination program, among other things, that are being examined in the context of another EPA civil rights investigation involving MDEQ.²⁷⁴³

On the same day, ECRCO also announced that it entered into an Informal Resolution Agreement with the New Mexico Environment Department (NMED) after a complaint that alleged discrimination based on race and national origin relating to NMED’s issuance of a storage and disposal permit without ensuring that limited-English proficient (LEP) Spanish-speaking residents were provided “a meaningful opportunity for effective public participation” or considering the possible disparate impacts on these individuals.²⁷⁴⁴ As part of the resolution, NMED agreed to take specific remedial and future actions to address the concerns of the complaint and ensure compliance with all regulations and civil rights statutes to ensure that all people have “meaningful access to all of NMED’s programs and activities.”²⁷⁴⁵

The Center for Public Integrity noted these two developments, stating that “EPA’s findings in the Michigan and New Mexico cases represent an uptick in activity by a civil-rights office – recently

²⁷³⁹ U.S. Comm’n on Civil Rights, Statement Regarding EPA Decision on Uniontown, Alabama (Mar. 16, 2018), p. 1, <https://www.usccr.gov/press/2018/03-16-statement-EPA.pdf>.

²⁷⁴⁰ U.S. Environmental Protection Agency, Letter to Father Phil Schmitter (Jan. 19, 2017), p. 29, <https://www.documentcloud.org/documents/3410925-FINAL-Letter-to-Genesee-Case-Complainant-Father.html> [hereinafter EPA, “Letter to Father Phil Schmitter”].

²⁷⁴¹ Ibid., 3; Talia Buford, “Rare Discrimination Finding by EPA Civil Rights Office,” *Center for Public Integrity*, Jan. 25, 2017, <https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/> [hereinafter Buford, “Rare Discrimination Finding by EPA Civil Rights Office”].

²⁷⁴² EPA, Letter to Father Phil Schmitter, *supra* note 2740.

²⁷⁴³ U.S. Environmental Protection Agency, Response to USCCR Affected Agency Review (Jun. 18, 2019); *see* U.S. Environmental Protection Agency, Letter to Heidi Grether, Director of the Michigan Dep’t of Environmental Quality (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>.

²⁷⁴⁴ U.S. Environmental Protection Agency, Letter to Butch Tongate, Secretary-Designate of the New Mexico Environment Department (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-resolution-letter-and-agreement-triassic-park-recipinet-1-19-2017.pdf>.

²⁷⁴⁵ Ibid., 12.

moved into the agency's Office of General Counsel – long criticized for failing to act on complaints alleging Title VI violations.”²⁷⁴⁶

Proactive Compliance Evaluation

ECRCO is responsible for carrying out its compliance work through a variety of means, including agency-initiated compliance reviews.²⁷⁴⁷ ECRCO's Case Processing Manual indicates that “to address issues of strategic significance in civil rights areas, ECRCO will identify, plan, and implement a docket of compliance reviews in consultation with the appropriate DCROs,” and considers “a number of factors, including statistical data, prior complaints, complaints that do not meet certain jurisdictional requirements, reports by other EPA offices, information shared by other federal agencies, and other specific and reliable information from communities and/or sources, which further our strategic goals. ECRCO's objective will be to engage early and often with recipients of federal assistance to collaboratively identify resolution approaches.”²⁷⁴⁸

Director Dorka indicated that ECRCO has a “proactive compliance” program “to address issues of strategic significance in civil rights areas and provide an efficient and effective vehicle for providing states and other recipients with important compliance information and assistance.”²⁷⁴⁹ She also noted that many recipients lack focus on what she terms “foundational nondiscrimination programs,” which include “procedural safeguards required by EPA regulations,” such as “the continuing notice of nondiscrimination; grievance procedures that assure the prompt and fair resolution of complaints which allege a violation of EPA's nondiscrimination regulation; and the designation of at least one person to coordinate its efforts to comply with its nondiscrimination obligations.”²⁷⁵⁰ Dorka added that:

Having in place a foundational nondiscrimination program would assist recipients' ability to comply with Title VI, Section 504 and other civil rights laws by having policies and procedures to ensure meaningful access to applicants' and recipients' programs and activities for persons with disabilities and limited-English proficiency, as well as an effective public participation policy and process.²⁷⁵¹

ECRCO has noted that although these proactive initiatives “are not labeled as ‘compliance reviews,’ ECRCO considers that they accomplish the same proactive goal as do compliance reviews: to address issues of strategic significance in civil rights areas and provide an efficient and effective vehicle for providing states and other recipients with important compliance information

²⁷⁴⁶ Buford, “Rare Discrimination Finding by EPA Civil Rights Office,” *supra* note 2741; *see supra* notes 2656-2659.

²⁷⁴⁷ EPA, Case Resolution Manual, *supra* note 2631, at i; *see* 28 C.F.R. § 42.407(c); *see also* 40 C.F.R. §§ 7.110, 7.115; *see also* 40 C.F.R. § 5.605.

²⁷⁴⁸ EPA, Case Resolution Manual, *supra* note 2631, at 33.

²⁷⁴⁹ Dorka Statement, at 6.

²⁷⁵⁰ *Ibid.*, 5.

²⁷⁵¹ *Ibid.*, 6.

and assistance.”²⁷⁵² In 2002, the Commission noted the importance of monitoring compliance, recommending that “Federal agencies should acquire a large portion of their reviews of funding recipients by imposing annual (or even quarterly) reporting requirements that allow an evaluation of the equality among the recipients’ program participants and beneficiaries.”²⁷⁵³ If ECRCO is missing basic data about whether recipients are providing appropriate notice, grievance procedures and having a designated coordinator as required under federal civil rights law, then collecting this basic data would be aligned with the Commission’s recommendations. These data would also be helpful to ensure that recipients of EPA funding need to take steps to come into compliance.

Dissemination of Policy through Guidance, Regulations, Technical Assistance, Education, Outreach and Publicity

ECRCO utilizes various methods to disseminate policy to funding recipients and the general public. As stated in both its Strategic Plan and its Case Resolution Manual, ECRCO provides technical assistance to its funding recipients as part of its proactive compliance program.²⁷⁵⁴ Director Dorka testified to the Commission that providing information and compliance assistance to states and other recipients is a key part of this proactive compliance program, to “ensure meaningful access to applicants’ and recipients’ programs and activities for persons with disabilities and limited-English proficiency, as well as an effective public participation policy and process.”²⁷⁵⁵

ECRCO is also issuing guidance. In January 2017, ECRCO issued guidance through a “Dear Colleague” letter to introduce Chapter 1 of the U.S. EPA’s External Civil Rights Compliance Office Toolkit, which is “a clarification of existing law and policy intended to provide guidance to promote and support EPA recipients’ compliance with federal civil rights laws.”²⁷⁵⁶ The letter indicated that ECRCO is planning to issue additional chapters of the Toolkit that address other civil rights compliance areas.²⁷⁵⁷

ECRCO’s Case Resolution Manual indicates that ECRCO is “responsible for carrying out compliance with these federal nondiscrimination statutes through a variety of means,” which includes outreach activities.²⁷⁵⁸ In its efforts to develop its proactive compliance program, ECRCO had indicated in its Strategic Plan that it plans to conduct various outreach activities, and specifically will “coordinate with DCROs to bring technical assistance, training, and community

²⁷⁵² *Ibid.*, 6.

²⁷⁵³ USCCR, *Ten-Year Check Up Vol. 1: A Blueprint*, *supra* note 1, at 41.

²⁷⁵⁴ EPA, Case Resolution Manual, *supra* note 2631, at I, 26, 36; EPA, *ECRCO Strategic Plan*, *supra* note 2670, at 2, 10-12, 14.

²⁷⁵⁵ Dorka Statement, at 6.

²⁷⁵⁶ U.S. Environmental Protection Agency, Dear Colleague Letter Re: EPA’s External Civil Rights Compliance Office Toolkit (Jan. 18, 2017), p. 1, https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf.

²⁷⁵⁷ *Ibid.*, 3.

²⁷⁵⁸ EPA, Case Resolution Manual, *supra* note 2631, at i.

outreach and engagement to stakeholders.”²⁷⁵⁹ In addition, ECRCO’s Strategic Plan indicated that ECRCO will “develop an outreach and communication plan that will strategically outline engagement with critical external partnerships and stakeholders,” develop technical assistance and training materials to “allow DCROs and other regional staff [] assist ECRCO in outreach to maximize the number of recipients and communities reached,” and “improve its training and outreach with all stakeholder communities by making more strategic use of [ECRCO’s] website, training videos, webinars, and social media.”²⁷⁶⁰ ECRCO’s Case Resolution Manual also notes that in the early stages of case planning, Case Managers are responsible for determining whether a “Communications and Outreach Plan” is necessary “in order to assist in handling public or media inquiries.”²⁷⁶¹

ECRCO maintains a webpage that is devoted to highlighting and publicizing ECRCO’s civil rights compliance work.²⁷⁶² This webpage largely reports on ECRCO’s casework, particularly when it has achieved a resolution to a complaint.²⁷⁶³ However, it also reports updates on policy guidance,²⁷⁶⁴ rulemaking,²⁷⁶⁵ and other pertinent updates from ECRCO.²⁷⁶⁶

Effectiveness of Interaction and Coordination with External Agencies and Organizations

ECRCO’s Cooperative Federalism initiative is a pilot project to initiate partnerships with EPA Regional Offices to “engage the regional states in building a collaborative relationship that would produce robust and effective civil rights programs that other states could model.”²⁷⁶⁷ ECRCO believes that once these programs are in place and effectively implemented at the state level, “many civil rights complaints and concerns that otherwise would be elevated to EPA at the federal level, would be handled by the states through their civil rights programs.”²⁷⁶⁸ EPA’s description of the Cooperative Federalism initiative notes that “EPA is more effective in its protection of human health and the environment when it works together with states and tribes and engages local communities from a foundation of trust, transparency, and collaboration.”²⁷⁶⁹

²⁷⁵⁹ EPA, *ECRCO Strategic Plan*, *supra* note 2670, at 11.

²⁷⁶⁰ *Ibid.*, 12.

²⁷⁶¹ EPA, Case Resolution Manual, *supra* note 2631, at 15.

²⁷⁶² U.S. Environmental Protection Agency, “External Civil Rights Compliance Office – New Developments!” <https://www.epa.gov/ogc/external-civil-rights-compliance-office-new-developments> [hereinafter EPA, “ECRCO – New Developments!”].

²⁷⁶³ *Ibid.*

²⁷⁶⁴ *Ibid.* (reporting that on January 19, 2017, ECRCO issued Chapter 1 of its Compliance Toolkit).

²⁷⁶⁵ *Ibid.* (reporting that on January 1, 2017, ECRCO sent notice to the Federal Register of the withdrawal of a proposed rule to amend EPA’s nondiscrimination regulation). *See also* Nondiscrimination in Programs or Activities Receiving Federal Assistance From the Environmental Protection Agency, 82 Fed. Reg. 2,294 (Jan. 9, 2017).

²⁷⁶⁶ *See, e.g.*, EPA, “ECRCO – New Developments!” *supra* note 2762 (reporting an update on February 26, 2016 to a planned public meeting on March 1, 2016).

²⁷⁶⁷ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 3, at 2.

²⁷⁶⁸ *Ibid.*

²⁷⁶⁹ U.S. Environmental Protection Agency, “Cooperative Federalism at EPA,” <https://www.epa.gov/home/cooperative-federalism-epa>.

ECRCO participates in the Federal Interagency Working Group on Environmental Justice,²⁷⁷⁰ which strives to “advance environmental justice principle across the federal government, to engage and support local communities in addressing environmental and human health impacts, and to promote and implement comprehensive solutions to environmental justice concerns.”²⁷⁷¹ The Federal Interagency Working Group on Environmental Justice was established by Executive Order 12,898,²⁷⁷² and in 2011, the group signed the Memorandum of Understanding on Environmental Justice and Executive Order 12,898,²⁷⁷³ which formally recommitted the participating federal agencies to “addressing environmental justice through a more collaborative, comprehensive and efficient process.”²⁷⁷⁴ ECRCO’s Case Resolution Manual indicates that it “does not investigate alleged noncompliance with Executive Order 12,898.”²⁷⁷⁵ ECRCO indicated in its strategic plan that it “will continue its regular participation in the federal Interagency Working Group on Environmental Justice [] and the federal Interagency Working Group on Title VI of the Civil Rights Act.”²⁷⁷⁶

Research, Data Collection, and Reporting

ECRCO indicated that it “does not have policy guidance and/or procedures for data collection,” however, it “collects information from complainants as necessary to determine ECRCO’s jurisdiction over the subject matter of a complaint or when requesting information from complainants for purposes of investigating a complaint.”²⁷⁷⁷ ECRCO has also indicated that it “does not collect information from individuals as a matter of routine or for general data collection purposes.”²⁷⁷⁸

²⁷⁷⁰ EPA, *ECRCO Strategic Plan*, *supra* note 2670, at 11; U.S. Dep’t of Transportation, “Environmental Justice Strategy,” <https://www.transportation.gov/civil-rights/civil-rights-awareness-enforcement/environmental-justice-strategy> [hereinafter DOT, “Environmental Justice Strategy”]; *see also* Federal Interagency Working Group on Environmental Justice, “Fact Sheet,” https://www.epa.gov/sites/production/files/2017-04/documents/factsheet_for_the_federal_interagency_working_group_on_environmental_justice_0.pdf [hereinafter Federal Interagency Working Group on Environmental Justice, “Fact Sheet”]. Note that this report focuses on the civil rights enforcement of ECRCO and does not fully explore the efforts of the Office of Environmental Justice, which also provides a civil rights function, and has been the target of dramatic funding reductions in recent budget proposals. *See* U.S. Environmental Protection Agency, *FY 2020 Budget in Brief*, p. 62, <https://www.epa.gov/sites/production/files/2019-03/documents/fy-2020-epa-bib.pdf>.

²⁷⁷¹ Federal Interagency Working Group on Environmental Justice, “Fact Sheet,” *supra* note 2770, at 1.

²⁷⁷² Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629.

²⁷⁷³ U.S. Dep’t of Justice, U.S. Dep’t of the Interior, U.S. Dep’t of Agriculture, U.S. Dep’t of Labor, U.S. Dep’t of Health and Human Servs., U.S. Dep’t of Hous. and Urban Dev., U.S. Dep’t of Transportation, U.S. Dep’t of Energy, U.S. Dep’t of Environmental Protection Agency, U.S. Dep’t of Commerce, and the U.S. Dep’t of Defense, Memorandum of Understanding on Environmental Justice and Executive Order 12,898 (2011), <https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf> [hereinafter Memorandum of Understanding on Environmental Justice and Executive Order 12,898].

²⁷⁷⁴ U.S. Environmental Protection Agency, “Overview of the EJ IWG,” <https://www.epa.gov/environmentaljustice/overview-ej-iwg> [hereinafter EPA, “Overview of the EJ IWG”].

²⁷⁷⁵ EPA, Case Resolution Manual, *supra* note 2631, at 11.

²⁷⁷⁶ EPA, *ECRCO Strategic Plan*, *supra* note 2760.

²⁷⁷⁷ U.S. Environmental Protection Agency, Response to USCCR Interrogatory No. 11, at 14-15.

²⁷⁷⁸ *Ibid.*

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Chapter 10: U.S. Department of Transportation, Departmental Office of Civil Rights

Legal Authority and Responsibility

Congress established the U.S. Department of Transportation (DOT) on October 15, 1966²⁷⁷⁹ and DOT began operation on April 1, 1967.²⁷⁸⁰ Currently, DOT is led by Secretary Elaine L. Chao, who was sworn into office as the 18th Secretary of Transportation on January 31, 2017.²⁷⁸¹ DOT states that its mission is to “serve the United States by ensuring a fast, safe, efficient, accessible and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people, today and into the future.”²⁷⁸² To uphold their mission, DOT is responsible for enforcing and implementing federal regulations that ensure the safety of all persons travelling on land, through air, or by sea.²⁷⁸³

Housed within DOT’s Office of the Secretary, which oversees and establishes policy for transportation programs administered by its Operating Administrations (OAs),²⁷⁸⁴ federal regulations provide that the Departmental Office of Civil Rights (DOCR) “serves as principal advisor” and also “periodically reviews and evaluates the civil rights programs of the Operating Administrations to ensure that recipients of financial assistance meet applicable civil rights requirements.”²⁷⁸⁵ This jurisdiction covers laws and regulations that prohibit discrimination on the basis of race, color, national origin, sex, disability, religion, age, genetic information, equal pay compensation, and reprisal in employment and the provision of government services.²⁷⁸⁶ DOCR has two main jobs: (1) resolving internal civil rights complaints affecting DOT employees and applicants for employment and (2) resolving external civil right complaints relating to the recipients and potential recipients of transportation programs that receive funding through

²⁷⁷⁹ Department of Transportation Act of 1966, Pub. L. 89-670, 80 Stat. 931.

²⁷⁸⁰ U.S. Dep’t of Transportation, “About DOT,” <https://www.transportation.gov/about> (accessed Jun. 17, 2016) [hereinafter DOT, “About DOT”].

²⁷⁸¹ U.S. Dep’t of Transportation, “Meet Key Officials,” <https://www.transportation.gov/key-officials> (accessed Jan. 18, 2019).

²⁷⁸² U.S. Dep’t of Transportation, “About DOT,” *supra* note 2780.

²⁷⁸³ AllGov, “Department of Transportation (DOT),” <http://www.allgov.com/departments/department-of-transportation?detailsDepartmentID=578#>.

²⁷⁸⁴ The Operating Administrations at DOT include: the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the National Highway Traffic Safety Administration, the Federal Transit Administration, the Saint Lawrence Seaway Development Corporation, the Maritime Administration, the Federal Motor Carrier Safety Administration, and the Pipeline and Hazardous Materials Safety Administration. *See* U.S. Dep’t of Transportation, External Civil Rights Complaint Processing Manual (September 2007), p. 7, https://www.transportation.gov/sites/dot.gov/files/docs/externalcomplaintmanual-final_1.pdf [hereinafter DOT, Complaint Processing Manual].

²⁷⁸⁵ 49 C.F.R. § 1.40.

²⁷⁸⁶ *Id.*; U.S. Dep’t of Transportation, “Office of Civil Rights,” <https://www.transportation.gov/civil-rights> [hereinafter DOT, “Office of Civil Rights”].

DOT.²⁷⁸⁷ Through DOOCR, DOT enforces the following federal civil rights laws, as per its nondiscrimination regulation at 49 C.F.R. Part 21:²⁷⁸⁸

- Title VI and Title VII of the Civil Rights Act of 1964, as amended;²⁷⁸⁹
- Americans with Disabilities Act of 1990;²⁷⁹⁰
- Civil Rights Act of 1991;²⁷⁹¹
- Section 504 of the Rehabilitation Act of 1973, as amended;²⁷⁹²
- Section 508 of the Rehabilitation Act of 1973, as amended;²⁷⁹³
- The Age Discrimination Act of 1975;²⁷⁹⁴
- Disadvantaged Business Enterprise Program;²⁷⁹⁵
- Executive Order 12,250 (Leadership and Coordination of Nondiscrimination Laws);²⁷⁹⁶
- Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations);²⁷⁹⁷
- Executive Order 13,166 (Improving Access to Services for Persons with Limited English Proficiency);²⁷⁹⁸
- Executive Order 13,217 (Community-Based Alternatives for Individuals with Disabilities);²⁷⁹⁹
- DOT Order 1000.12, Implementation of the Department of Transportation Title VI Program;²⁸⁰⁰
- DOT Order 1000.12A, the U.S. Department of Transportation Title VI Program;²⁸⁰¹
- DOT Order 1000.18, External Civil Rights Complaint Processing Manual;²⁸⁰²
- DOT Order 1050.2A, DOT Standard Title VI Assurances and Non-Discrimination Provisions;²⁸⁰³

²⁷⁸⁷ DOT, “Office of Civil Rights,” *supra* note 2786.

²⁷⁸⁸ 49 C.F.R. Part 21; DOT, “About DOOCR,” *supra* note 101; U.S. Dep’t of Transportation, “DOT Discrimination Policy – Complaint Process,” <https://www.transportation.gov/civil-rights/complaint-resolution/complaint-process> (accessed Oct. 4, 2016).

²⁷⁸⁹ 42 U.S.C. § 2000d; 49 C.F.R. Part 21 (DOT implementing regulations); 28 C.F.R. Part 42 (DOJ implementing and coordinating regulations).

²⁷⁹⁰ 42 U.S.C. § 12101; 28 C.F.R. Part 35; and 49 C.F.R. Parts 27, 37, 38.

²⁷⁹¹ 42 U.S.C. § 1981.

²⁷⁹² 29 U.S.C. § 794.

²⁷⁹³ *Id.* § 794d.

²⁷⁹⁴ 42 U.S.C. § 6101.

²⁷⁹⁵ 49 C.F.R. Parts 23 and 26.

²⁷⁹⁶ Leadership and Coordination of Nondiscrimination Laws, Executive Order 12,250, 45 Fed. Reg. 72,995.

²⁷⁹⁷ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629.

²⁷⁹⁸ Improving Access to Services for Persons with Limited English Proficiency, Exec. Order No. 13,166, 65 Fed. Reg. 50,121.

²⁷⁹⁹ Community-Based Alternatives for Individuals with Disabilities, Executive Order 13,217, 66 Fed. Reg. 33,155 (Jun. 18, 2001).

²⁸⁰⁰ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 1, at 2.

²⁸⁰¹ *Ibid.*

²⁸⁰² *Ibid.*

²⁸⁰³ *Ibid.*

- DOT Order 1 101 .62B, Department of Transportation Organization Manual-Departmental Office of Civil Rights;²⁸⁰⁴
- DOT Order 2100.5, Policies and Procedures for Simplification, Analysis, and Review of Regulations;²⁸⁰⁵
- Additional Civil Rights Authorities, as cited in DOT Order 1000.18, Chap. 1-2;²⁸⁰⁶

In addition, each OA has its own Office of Civil Rights or certain designated official(s) that are responsible for ensuring civil rights compliance for their respective organization and program.²⁸⁰⁷ OAs' approaches to external civil rights enforcement within the offices varies, because OAs operate and fund different types of programs, however the Complaint Processing Manual states that all offices strive "to ensure that all civil rights laws, regulations, and executive orders for which the Department is responsible are implemented and enforced consistently, correctly, and expeditiously."²⁸⁰⁸

Enforcement Tools

The agency enforcement tools DOCR and DOT's OAs have specific legal authority to use are:

- Complaint Resolution²⁸⁰⁹
- Agency-initiated charges²⁸¹⁰
- Proactive Compliance Evaluations²⁸¹¹
- Issuance of Policy Guidance²⁸¹²
- Issuance of Regulations²⁸¹³
- Technical Assistance²⁸¹⁴
- Publicity²⁸¹⁵
- Data collection, research and reporting²⁸¹⁶
- Collaboration with state/local agencies²⁸¹⁷

²⁸⁰⁴ Ibid.

²⁸⁰⁵ Ibid.

²⁸⁰⁶ Ibid.

²⁸⁰⁷ DOT, Complaint Processing Manual, *supra* note 2784, at 1.

²⁸⁰⁸ Ibid.

²⁸⁰⁹ 49 C.F.R. §§ 21.11, 28.170, 25.605, and 27.123.

²⁸¹⁰ *Id.* § 21.11(a) and (c).

²⁸¹¹ *Id.* §§ 21.9, 21.11 (a), 28.170, 25.605, 27.121, and 27.123.

²⁸¹² *Id.* §§ 21.9(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"), 25.605, and 27.121(a).

²⁸¹³ *Id.* § 5.1(b).

²⁸¹⁴ *Id.* § 21.9 (a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part"); 49 CFR §§ 25.605 and 27.121(a).

²⁸¹⁵ 28 C.F.R. § 42.405.

²⁸¹⁶ *Id.* § 42.406.

²⁸¹⁷ 49 C.F.R. § 21.9 (a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

- Collaboration with other federal agencies²⁸¹⁸
- Strategic Plan²⁸¹⁹
- Annual Reports²⁸²⁰

Budget and Staffing

DOT reports that it uses its budget to “carry out an affirmative civil rights program that investigates, reviews, researches, and consults on matters in which it proactively advances equal opportunities.”²⁸²¹ For FY 2016, DOT requested \$9.67 million for DOCR²⁸²² and Congress allocated \$9.67 million to DOCR.²⁸²³ For FY 2017, DOT requested \$9.75 million for DOCR,²⁸²⁴ and Congress allocated \$9.75 million to DOCR.²⁸²⁵ For FY 2018, DOT requested \$9.50 million for DOCR,²⁸²⁶ and Congress allocated \$9.50 million to DOCR.²⁸²⁷ See Figure 10.1.

²⁸¹⁸ 28 C.F.R. § 42.413.

²⁸¹⁹ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 306(a)(1-8) (2010).

²⁸²⁰ *Id.* § 1115(b).

²⁸²¹ U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2017*, p. 188, <https://www.transportation.gov/sites/dot.gov/files/docs/OST-FY-2017-CJ.pdf> [hereinafter DOT, *2017 Budget Estimates*].

²⁸²² U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2016*, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>.

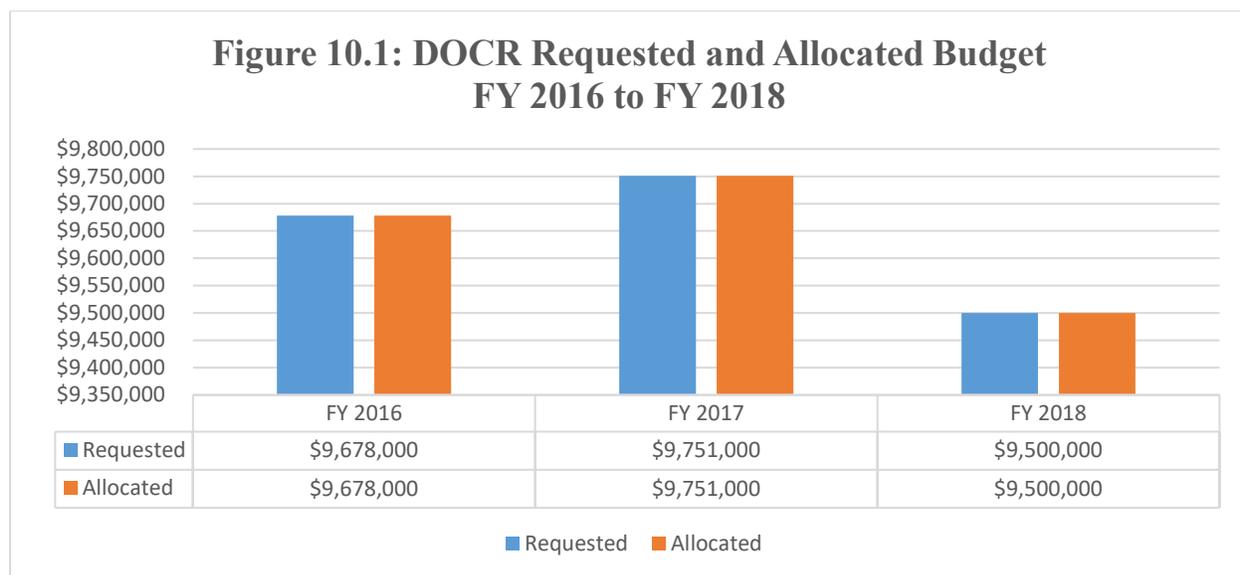
²⁸²³ U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2018*, p. OCR-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf> [hereinafter DOT, *2018 Budget Estimates*].

²⁸²⁴ DOT, *2017 Budget Estimates*, *supra* note 2821, at Sec. 2-1.

²⁸²⁵ U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2019*, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>.

²⁸²⁶ DOT, *2018 Budget Estimates*, *supra* note 2823, at OCR-1.

²⁸²⁷ U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2020*, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>.

Figure 10.1: DOCR Requested and Allocated Budget

Source: U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2016*, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-OST.pdf>; U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2017*, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/OST-FY-2017-CJ.pdf>; U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2018*, p. OCR-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281156/ost-fy-2018-cj-budget-5-24-17.pdf>; U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2019*, p. Sec. 2-1, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/304536/ost-fy-2019-cj.pdf>; U.S. Dep’t of Transportation, *Budget Estimates Fiscal Year 2020*, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/334281/fy-2020-ost-congressional-budget-justification.pdf>.

DOCR’s overall budget rose slightly from FY 2016 to FY 2017 and decreased to its lowest level in FY 2018 in comparison to the other fiscal years. From FY 2016 to FY 2018, DOCR was allocated 100 percent of the funds it requested each year.

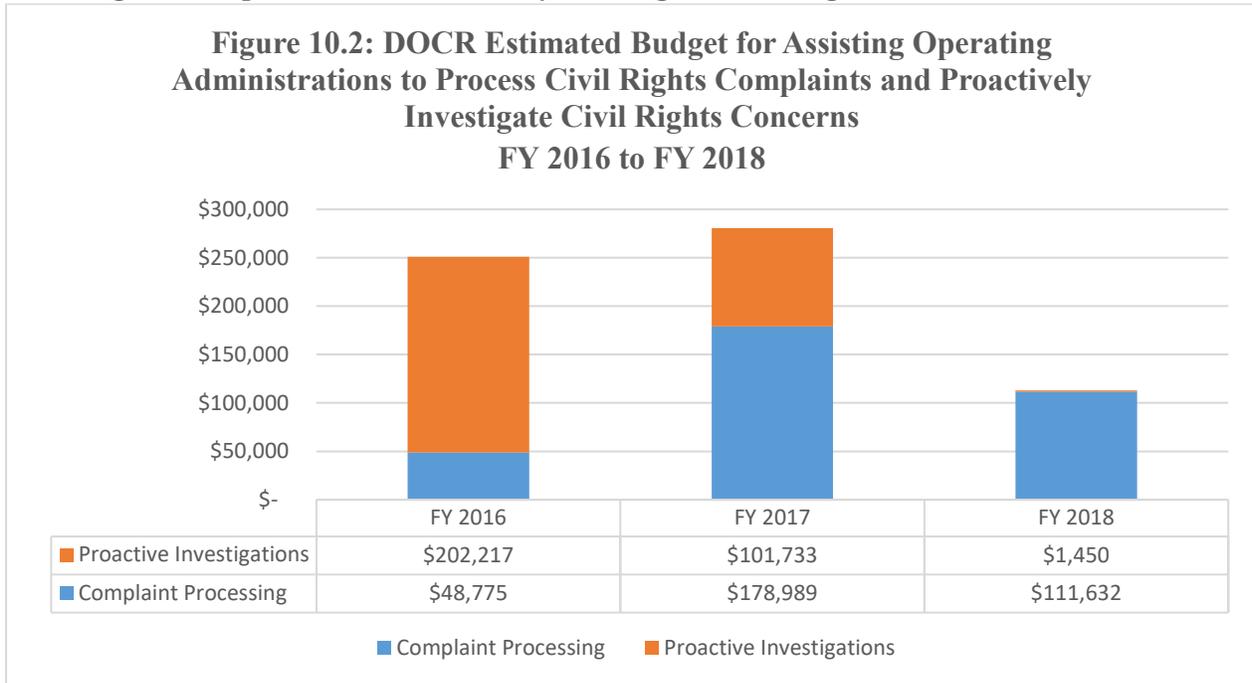
Because DOT’s OAs are principally responsible for complaint investigation and processing, DOCR “investigates and processes complaints only to assist the OAs when the circumstances warrant.”²⁸²⁸ Consequently, DOCR does not typically process complaints and “DOCR’s budget does not allocate a specific amount for processing and responding to civil rights complaints.”²⁸²⁹ However, DOT provided estimates of funds expended for assisting OAs respond to and process complaints, and funds expended by DOCR for helping the OAs with proactively investigating civil rights concerns.²⁸³⁰ See Figure 10.2.

²⁸²⁸ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 6, at 6.

²⁸²⁹ Ibid.

²⁸³⁰ Ibid.

Figure 10.2: DOCR Estimated Budget for Assisting Operating Administrations to Process Civil Rights Complaints and Proactively Investigate Civil Rights Concerns



Source: U.S. Department of Transportation, Response to Interrogatory No. 6a and 6b, at 6.

DOT estimates that for assisting OAs with processing civil rights complaints, DOCR expended \$48,775 in FY 2016, \$178,989 in FY 2017, and \$111,632 in FY 2018.²⁸³¹ For assisting Operating Administrations with proactively investigating civil rights concerns, DOT estimates that DOCR expended \$202,217 in FY 2016, \$101,733, and only \$1,450 in FY 2018.²⁸³² Since DOCR assists OAs only when the circumstances warrant, DOT clarified that DOCR funds are only expended when DOCR assistance is necessary.²⁸³³ Therefore, if DOCR assistance is not necessary, there will be no DOCR expenditures.²⁸³⁴

Organizational Structure

DOCR resides within DOT's Office of the Secretary (OST).²⁸³⁵ The Director of the Departmental Office of Civil Rights is the head of DOCR and acts as the "designated advisor to the Secretary on matters relating to civil rights in the Department of Transportation."²⁸³⁶ The current Director of DOCR is Charles E. James, Sr.²⁸³⁷

²⁸³¹ Ibid.

²⁸³² Ibid.

²⁸³³ U.S. Dep't of Transportation, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

²⁸³⁴ Ibid.

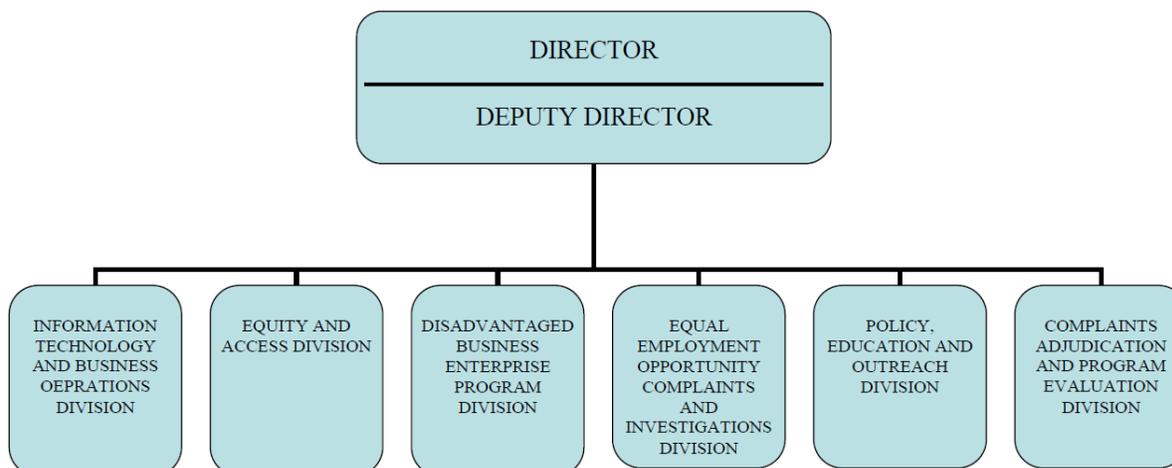
²⁸³⁵ DOT, "About DOCR," *supra* note 101.

²⁸³⁶ Ibid.

²⁸³⁷ U.S. Dep't of Transportation, "Director," <https://www.transportation.gov/civil-rights/about-docr/director>.

See Figure 10.3. The Disadvantaged Business Enterprise Program Division, formerly known as the External Civil Rights Programs Division, is the office within DOCR that supports OAs' civil rights offices in handling DOT's external civil rights enforcement work.²⁸³⁸ DOCR indicated that its roles and responsibilities have not changed between FY 2016 and FY 2018.²⁸³⁹

Figure 10.3: Organizational Structure of DOCR



Source: U.S. Department of Transportation, Department of Transportation Organizational Manual, Departmental Office of Civil Rights, DOT 1101.62B, DOT000153.

The agency's Organizational Manual states that the mission of the Disadvantaged Business Enterprise Program Division is to "ensure compliance with acceptable civil rights policies, regulations, statutes, guidelines, and procedures by external entities receiving Federal financial assistance from DOT."²⁸⁴⁰ This Division helps to develop external civil rights regulations and/or policies and communicates them to other Operating Administrations (e.g., Federal Aviation Administration) within DOT or external customers; provides technical assistance; coordinates with other government agencies to ensure uniform implementation of civil rights laws; makes "legally binding appeals decisions concerning denial of certification or improper certification under the Disadvantaged Business Enterprise Program;" and coordinates/interacts with other divisions, administrations, federal/state/local agencies, legislators, advocacy organizations, and others pertaining to civil rights programs and compliance with the relevant civil rights laws that DOT enforces.²⁸⁴¹

DOT reported that in 2018 154 employees worked full-time within DOT on enforcement of relevant civil rights statutes, executive orders, and regulations.²⁸⁴² Of those 154 employees, 30

²⁸³⁸ U.S. Department of Transportation, Departmental Office of Civil Rights, DOT 1101.62B, DOT000152, Department of Transportation Organizational Manual, p. DOT000152 [hereinafter DOT, Organizational Manual].

²⁸³⁹ U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 4, at 4.

²⁸⁴⁰ DOT, Organizational Manual, *supra* note 2838, at DOT000156.

²⁸⁴¹ *Ibid.*, DOT000156.

²⁸⁴² U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 5, at 4.

worked full-time for DOCR.²⁸⁴³ A total of eight employees within DOT worked part-time on enforcement of the relevant civil rights statutes, executive orders, and regulations.²⁸⁴⁴ There were four full-time contractors who worked on civil rights enforcement for DOCR and two contractors who worked part-time on civil rights enforcement for the Federal Aviation Administration.²⁸⁴⁵ DOT also reported that staffing within DOCR remained the same between FY 2016 and FY 2018.²⁸⁴⁶ However, they noted that during this time, “16 employees departed DOCR and 11 employees were hired.”²⁸⁴⁷ Also, in FY 2018 gained one civil rights enforcement employee and the Federal Aviation Administration lost four civil rights enforcement employees.²⁸⁴⁸

DOCR did not specify how many of the aforementioned employees were allocated to the Disadvantaged Business Enterprise Program Division.

Assessment

Prioritization of Civil Rights Agency-Wide

As noted earlier, DOCR is the principle civil rights advisor to the Secretary, as well as for Secretarial Officers, OAs, and senior-level DOT officials.²⁸⁴⁹ DOCR explained to the Commission that it “provides oversight, leadership, guidance, technical assistance, and training to the OAs to ensure proper and effective administration of the programs.”²⁸⁵⁰ Additionally, DOCR “refers and monitors complaints of discrimination by members of the public to the OA civil rights offices and serves as the primary liaison with external and internal stakeholders concerning civil rights matters.”²⁸⁵¹

The authority and responsibility for civil rights enforcement activities at DOT is decentralized and is shared among DOCR and the civil rights offices in the various OAs across DOT.²⁸⁵² This is counter to the Commission’s 2002 recommendations regarding civil rights enforcement offices. In 2002, the Commission stated that “the implementation, compliance, and enforcement of civil rights programs should be directed by an office and staff that are separate from the office and staff responsible for internal (EEO) civil rights functions” and “these offices and staff should be provided with separate budgets so that each and every civil rights statute is properly enforced without resources being taken from one to enforce another.”²⁸⁵³

²⁸⁴³ Ibid.

²⁸⁴⁴ Ibid., 5.

²⁸⁴⁵ Ibid., 5.

²⁸⁴⁶ Ibid., 5.

²⁸⁴⁷ Ibid., 5.

²⁸⁴⁸ Ibid., 5.

²⁸⁴⁹ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 1, at 2.

²⁸⁵⁰ Ibid.

²⁸⁵¹ Ibid.

²⁸⁵² See *supra* notes 2784-2787, 2807-2808, and 2828-2830.

²⁸⁵³ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 47.

DOCR has both internal (EEO) and external functions, and has noted that its budget “does not allocate a specific amount for civil rights enforcement.”²⁸⁵⁴ Furthermore, it appears that in some cases, the civil rights offices of DOT’s OAs are set up similarly to handle both internal (EEO) and external functions,²⁸⁵⁵ and in some cases their budgets do not break out internal and external enforcement line items.²⁸⁵⁶ But given that the data about external civil rights enforcement is not available, it is difficult to assess the level of prioritization of external civil rights enforcement in this agency that in FY 2018 reportedly distributed more than \$63 billion in transportation investments and \$1.6 billion in discretionary funds, amounting to approximately 80% of DOT’s annual budget.²⁸⁵⁷

Strategic Planning and Self-Evaluation

DOT indicated that its civil rights policy priority is to “enforce the civil rights laws, regulations, and executive orders for which it is responsible so as to eliminate discrimination on a prohibited basis and ensure that all communities are provided with equal access to the programs and activities that receive financial assistance from DOT.”²⁸⁵⁸ During FY 2016-2018, DOT issued three strategic plans: for FY 2012-2016,²⁸⁵⁹ FY 2014-2018,²⁸⁶⁰ and FY 2018-2022.²⁸⁶¹ DOT’s strategic plan for FY 2012-2016 specifically included information about civil rights enforcement, which identified a strategic goal to “promote transportation policies and investments that bring lasting and equitable economic benefits to the nation and its citizens,” and indicates that DOT will “investigate and resolve civil rights-related complaints made by air travelers in a timely manner,” as a strategy for meeting this goal for its aviation program.²⁸⁶² In its strategic plan for FY 2014-2018, DOT identified strategies to increase access for persons with disabilities to meet its goal of fostering improved quality of life in communities, and indicated that it would “enforce the ADA through rigorous compliance reviews, ADA Transition Plans, and regular engagement with federally-funded transportation recipients to address transportation policies and programs that adversely

²⁸⁵⁴ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 6, at 6.

²⁸⁵⁵ See, e.g., U.S. Dep’t of Transportation, Federal Aviation Administration, “Office of Civil Rights (ACR),” https://www.faa.gov/about/office_org/headquarters_offices/acr/.

²⁸⁵⁶ See, e.g., U.S. Dep’t of Transportation, Federal Aviation Administration, *Budget Estimates Fiscal Year 2018*, pp. 11-12, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281191/faa-fy-2018-cj-final.pdf>.

²⁸⁵⁷ U.S. Dep’t of Transportation, “U.S. DOT Provides More Than \$63 Billion to Major Transportation Infrastructure Investments Across America in 2018,” <https://www.transportation.gov/briefing-room/dot6718>; “Department of Transportation Appropriations: FY 2019,” EveryCRSReport.com, at Notes (Sep. 25, 2018), <https://www.everycrsreport.com/reports/R45321.html>.

²⁸⁵⁸ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 3, at 3.

²⁸⁵⁹ U.S. Dep’t of Transportation, *Transportation for a New Generation: Strategic Plan Fiscal Years 2012-2016*, https://www.transportation.gov/sites/dot.gov/files/docs/990_355_DOT_StrategicPlan_508lowres.pdf [hereinafter DOT, *Strategic Plan 2012-2016*].

²⁸⁶⁰ U.S. Dep’t of Transportation, *Transportation for a New Generation: Strategic Plan Fiscal Years 2014-2018*, https://www.transportation.gov/sites/dot.gov/files/docs/2014-2018-strategic-plan_0.pdf [hereinafter DOT, *Strategic Plan 2014-2018*].

²⁸⁶¹ U.S. Dep’t of Transportation, *Strategic Plan for FY 2018-2022*, February 2018, <https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-policy/304866/dot-strategic-planfy2018-2022508.pdf> [hereinafter DOT, *Strategic Plan 2018-2022*].

²⁸⁶² DOT, *Strategic Plan 2012-2016*, *supra* note 2859, at 37.

impact the accessibility of transportation systems for individuals with disabilities.”²⁸⁶³ In its strategic plan for FY 2018-2022, DOT did not discuss external civil rights enforcement directly. DOT indicated that its first strategic goal for infrastructure is “Project Delivery, Planning, Environment, Funding, and Finance” and outlined a strategy to achieve that goal is to streamline the environmental review process, noting that DOT “remains committed to ensuring that all communities, including minority populations, low-income populations, and the disability community, have meaningful input into the transportation planning and decision-making processes, and that transportation projects avoid or minimize impacts to communities and the environment to the greatest extent possible.”²⁸⁶⁴

For all of these strategic plans, it appears that any mentions of civil rights priorities, objectives, or strategies fall under other more broad strategic goals and/or strategies that concern the agency’s programs generally, not just the agency’s civil rights enforcement program.

Per the Government Performance and Results Act of 1993 (GPRA),²⁸⁶⁵ DOT is required to publish agency-wide annual Performance and Accountability Reports (PARs), however none are currently publicly available on their website for the fiscal years in question (FY 2016-2018).²⁸⁶⁶ DOT also issues agency-wide annual performance plans.²⁸⁶⁷ While external civil rights enforcement has not been a specific area of focus for the fiscal years in question, the FY 2016 and FY 2017 performance plans have indicated expanding access and choice to improve the quality of life in communities as a strategic goal, specifically to ensure that “all programs, activities, and services are examined to identify barriers to access for persons with disabilities.”²⁸⁶⁸ The Commission is not aware of any specific PARs or performance plans that have been issued specifically by DOCR, however some OAs do issue their own PARs.²⁸⁶⁹ For example, FAA publishes annual PARs,²⁸⁷⁰ and also has published a business plan for its civil rights office, with outlines a series of targets and goals for external enforcement, compliance, and technical assistance.²⁸⁷¹

²⁸⁶³ DOT, *Strategic Plan 2014-2018*, *supra* note 2860.

²⁸⁶⁴ DOT, *Strategic Plan 2018-2022*, *supra* note 2861, at 20.

²⁸⁶⁵ Government Performance and Results Act of 1993 (GPRA), Pub. L. 103-62 (1993); U.S. Dep’t of Transportation, “DOT Budget and Performance Documents,” <https://www.transportation.gov/mission/budget/dot-budget-and-performance-documents> [hereinafter DOT, “Budget and Performance Documents”].

²⁸⁶⁶ See DOT, “Budget and Performance Documents,” *supra* note 2865.

²⁸⁶⁷ *Ibid.*

²⁸⁶⁸ U.S. Dep’t of Transportation, *FY-2015 Annual Performance Report / FY-2017 Annual Performance Plan*, [pages not numbered], <https://www.transportation.gov/sites/dot.gov/files/docs/FY15-PerformanceReport-FY17-PerformancePlan-508.pdf>; U.S. Dep’t of Transportation, *FY-2014 Annual Performance Report/FY-2016 Annual Performance Plan*, p. 100, https://www.transportation.gov/sites/dot.gov/files/docs/FY_2016_DOT_Performance_Report_FY_2014_Plan_0.pdf.

²⁸⁶⁹ See, e.g., U.S. Dep’t of Transportation, Federal Aviation Administration, “Plans and Reports,” https://www.faa.gov/about/plans_reports/.

²⁸⁷⁰ *Ibid.*

²⁸⁷¹ U.S. Dep’t of Transportation, *Federal Aviation Administration, FY2018 ACR Business Plan*, https://www.faa.gov/about/plans_reports/media/2018/acr_business_plan.pdf.

Complaint Processing, Agency-Initiated Charges, and Litigation

DOCR and DOT's OAs have the ability to resolve complaints through a variety of means, including alternative dispute resolution (formal mediation),²⁸⁷² investigation,²⁸⁷³ or administrative proceedings.²⁸⁷⁴ Any of these processes may result in informal resolutions (prior to issuance of a finding),²⁸⁷⁵ compliance monitoring,²⁸⁷⁶ voluntary compliance agreements (settlements),²⁸⁷⁷ withholding or termination of funds,²⁸⁷⁸ or referral to DOJ for litigation.²⁸⁷⁹

DOT's nondiscrimination regulations authorize DOT to enforce civil rights laws with regard to funding recipients.²⁸⁸⁰ DOT has stated that it enforces civil rights laws "primarily through the administration of transportation-related programs designed to eliminate prohibited discrimination by recipients of federal financial assistance from DOT."²⁸⁸¹ The OAs charged with administering the pertinent programs are principally responsible for investigating and responding to complaints.²⁸⁸² DOCR "investigates and processes complaints only to assist the OAs when the circumstances warrant."²⁸⁸³ The process DOT (specifically DOCR or the OAs) utilizes to investigate and process complaints as per its Complaint Processing Manual is as follows:²⁸⁸⁴

Public complainants who believe they have been discriminated against by DOT or a DOT funding recipient can report the allegation to either the civil rights office within an OA or DOCR.²⁸⁸⁵ Complaints are defined as "a written or electronic statement concerning an allegation of discrimination that contains a request for the receiving office to take action"²⁸⁸⁶ and must be written and filed within 180 days of the alleged act of discrimination in order to be investigated by DOT.²⁸⁸⁷

²⁸⁷² 49 C.F.R. §§ 21.11 (d)(1), 25.605, and 27.123(d); DOT, Complaint Processing Manual, *supra* note 2784, at 5, 36-37.

²⁸⁷³ 49 C.F.R. §§ 21.11 (c), 25.605, and 27.123(c); DOT, Complaint Processing Manual, *supra* note 2784, at 21-35.

²⁸⁷⁴ 49 C.F.R. §§ 21.13, and 25.605; DOT, Complaint Processing Manual, *supra* note 2784, at 44-47.

²⁸⁷⁵ 49 C.F.R. §§ 21.11 (d)(1), 25.605, and 27.123(d); DOT, Complaint Processing Manual, *supra* note 2784, at 36.

²⁸⁷⁶ 49 C.F.R. §§ 21.11 (a), 25.605, and 27.123(a); DOT, Complaint Processing Manual, *supra* note 2784, at 42-43.

²⁸⁷⁷ 49 C.F.R. §§ 21.11 (d)(1), 25.605, and 27.123(d); DOT, Complaint Processing Manual, *supra* note 2784, at 42-43, 42.

²⁸⁷⁸ 49 C.F.R. §§ 21.13 (c), 25.605, and 27.125(b); DOT, Complaint Processing Manual, *supra* note 2784, at 45.

²⁸⁷⁹ 49 C.F.R. §§ 21.13 (a), 25.605, and 27.125(a)(1); DOT, Complaint Processing Manual, *supra* note 2784, at 44-45.

²⁸⁸⁰ 49 C.F.R. § 21.11, 28.170, 25.605, and 27.123.

²⁸⁸¹ U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 2, at 3.

²⁸⁸² *Ibid.*

²⁸⁸³ U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 6, at 6.

²⁸⁸⁴ The Commission is reviewing DOCR specifically, however, when references are made to "DOT" in this section, it applies primarily to the OAs, but also to DOCR. DOCR has noted that the OAs' civil rights offices are the primary entities that process complaints and conduct other enforcement work, and DOCR only investigates and processes complaints to assist the OAs in certain circumstances.

²⁸⁸⁵ U.S. Dep't of Transportation, "Public Complaint Process," <https://www.transportation.gov/civil-rights/complaint-resolution/public-complaint-process> (accessed Jan., 14 2016) [hereinafter DOT, "Public Complaint Process"].

²⁸⁸⁶ DOT, Complaint Processing Manual, *supra* note 2784, at 9.

²⁸⁸⁷ DOT, "Public Complaint Process," *supra* note 2885.

If DOT determines that the complaint falls under DOT's jurisdiction, then DOT reports that it sends the complainant a letter within 10 days of DOT receiving the complaint stating "that the complaint will be evaluated to determine whether DOT will investigate the allegations and that further communications about the complaint will occur in the future."²⁸⁸⁸ If DOT determines the complaint is within the jurisdiction of another agency, then DOT reports that it sends the complainant a "dismissal" letter stating that the complaint was referred to another agency.²⁸⁸⁹ Complaints DOT accepts are then checked for completion.²⁸⁹⁰ A complaint DOT deems complete includes the following information:

- "Sufficient information to understand the facts that led the complainant to believe discrimination occurred and when the discrimination took place
- A way to contact the complainant (a mailing address, and if applicable, a telephone number and e-mail address)
- Identification of the person or group injured by the alleged discrimination
- Identification of the person or organization alleged to have discriminated
- The basis for the alleged discrimination, e.g., race, national origin, or disability."²⁸⁹¹

If DOT determines the complaint is incomplete, DOT reports that it contacts the complainant for more information.²⁸⁹² If the information is not provided to DOT within 30 days of it being requested, DOT reports that it then closes the case.²⁸⁹³

If DOT determines the complaint is to be investigated, then it notifies the complainant and draws up an Investigative Plan that depends on the complexity and elements of the case.²⁸⁹⁴ DOT reports that it then collects data to answer the following questions:

1. What happened?
2. Why did it happen?²⁸⁹⁵

DOT collects this data through interviews, on-site visits, and requested information.²⁸⁹⁶ Once the investigation is complete, staff prepare an Investigative Report, also known as an Investigative Summary, and use the data to recommend "corrective or remedial action."²⁸⁹⁷ The findings of the investigation are sent as a letter to the complainant and the recipient.²⁸⁹⁸ Then, the complainant

²⁸⁸⁸ DOT, Complaint Processing Manual, *supra* note 2784, at 11.

²⁸⁸⁹ *Ibid.*, 11-12.

²⁸⁹⁰ *Ibid.*, 12.

²⁸⁹¹ DOT, "Public Complaint Process" *supra* note 2885.

²⁸⁹² DOT, Complaint Processing Manual, *supra* note 2784, at 12-13.

²⁸⁹³ *Ibid.*

²⁸⁹⁴ *Ibid.*, 22-23.

²⁸⁹⁵ *Ibid.*, 25.

²⁸⁹⁶ *Ibid.*, 27.

²⁸⁹⁷ *Ibid.*, 34.

²⁸⁹⁸ *Ibid.*, 37-40.

and recipient may negotiate a Settlement Agreement, which must be approved and signed by a DOT representative, and DOT determines monitoring practices of the recipient (if applicable).²⁸⁹⁹ DOT staff aim to resolve complaints within 180 days, unless extenuating circumstances arise during the investigation.²⁹⁰⁰ If the recipient does not comply with the terms of the agreement or cannot agree on a settlement, then DOT reports that it will “initiate administrative enforcement proceedings, or pursue other means authorized by law, including referral to the Department of Justice with a recommendation that appropriate enforcement proceedings be brought.”²⁹⁰¹

Also, in response to the Commission’s interrogatories, DOCR noted that because it does not typically investigate and process complaints, it was only able to provide information contained within its agency-wide complaint tracking platform for complaints investigated and processed during FY 2016 to FY 2018.²⁹⁰²

DOCR reported to the Commission that in FY 2016, DOT opened 342 external civil rights complaints, closed 255 complaints, and kept open 54 cases at the end of the fiscal year.²⁹⁰³ In FY 2017, DOT opened 288 complaints, closed 272 complaints, and kept open 47 cases by the end of the fiscal year.²⁹⁰⁴ And in FY 2018, DOT opened 332 complaints, closed 253 complaints, and kept open 170 cases at the end of the fiscal year.²⁹⁰⁵ See Table 10.1.

Table 10.1: Number of External Civil Rights Complaints Opened and Closed between FY 2016 and FY 2018

	FY 2016	FY 2017	FY 2018
Number of Complaints Opened	342	288	332
Number of Complaints Closed	255	272	253
Number of Cases that Remained Open at the End of the Fiscal Year	54	47	170

Source: U.S. Department of Transportation, Response to Interrogatories 7a, 7f, and 7h, at 7-9.

In FY 2016, DOT closed 189 of the complaints that were opened within 180 days, with 74.12% of complaint closures meeting the 180 day requirement.²⁹⁰⁶ In FY 2017, DOT closed 163 of the complaints opened within 180 days, with 59.93% of complaint closures meeting the 180 day requirement.²⁹⁰⁷ And in FY 2018, DOT closed 138 of the complaints that were opened during FY 2018 within 180 days, with 54.55% of complaint closures meeting the 180 day requirement.²⁹⁰⁸ The rate in which DOT is able to close complaints within a 180 day timeframe decreased by approximately 20 percent from FY 2016 to FY 2018.

²⁸⁹⁹ Ibid., 42-43.

²⁹⁰⁰ Ibid., 35.

²⁹⁰¹ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 2, at 3.

²⁹⁰² U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 7, at 7.

²⁹⁰³ Ibid., 8-9.

²⁹⁰⁴ Ibid.

²⁹⁰⁵ Ibid.

²⁹⁰⁶ Ibid.

²⁹⁰⁷ Ibid.

²⁹⁰⁸ Ibid.

Table 10.2: Types of External Civil Rights Complaints Opened between FY 2016 and FY 2018

	FY 2016	FY 2017	FY 2018
ADA/504	301	260	301
Title VI	26	18	9
Disadvantaged Business Enterprise (DBE)	10	8	14
External EEO	2	1	8
Unknown/Other	3	1	-
Age Discrimination Act	-	-	-

Source: U.S. Department of Transportation, Response to Interrogatory 7c, at 7.

See Table 10.2 above. The majority of complaints DOT receives are ADA or Section 504 disability-related complaints, with 88 percent, 90 percent, and 90 percent of complaints opened being ADA/Section 504 complaints for FY 2016, FY 2017, and FY 2018 respectively. Behind ADA/Section 504 complaints, DOT frequently receives Title VI complaints and Disadvantaged Business Enterprise (DBE) complaints. DBE complaints fall under the set of federal transportation regulations governing recipients of federal funding, which are designed to provide opportunity to groups that have been historically disadvantaged in the sector, including women and other socially and economically disadvantaged individuals.²⁹⁰⁹

²⁹⁰⁹ See 49 C.F.R. Part 23 and 49 C.F.R. Part 26.

Table 10.3: Outcomes for External Civil Rights Complaints Closed between FY 2016 and FY 2018

	FY 2016	FY 2017	FY 2018
Administrative Closure	81	110	80
Administrative Closure – Compliance Review	17	14	38
Administrative Closure – Complainant Not Responsive	21	34	27
Administrative Closure – Untimely	3	4	2
Administrative Closure – Litigation	3	1	1
Violation Letter of Finding	11	10	7
Violation Letter of Finding – Corrective Action Monitoring	2	5	2
Violation Letter – Corrective Action Monitoring Ongoing	14	10	10
No Violation Letter of Finding	46	36	43
No Violation Letter of Finding – But Concerns or Recommendations Made in Letter of Finding	14	15	6
Resolved Before Issuing Letter of Finding	20	21	27

Source: U.S. Department of Transportation, Response to Interrogatory 7d, at 8.

See Table 10.3 above. DOT administratively closed the majority of complaints during FY 2016, FY 2017, and FY 2018 (53.8 percent, 62.6 percent, and 60.9 percent respectively), due to several reasons including the unresponsiveness of the complainant, the initiation of a compliance review, lack of complaint timeliness, initiation of related litigation, or for other unspecified reasons.²⁹¹⁰ DOT closed a significant number of complaints with a No Violation Letter of Finding (46 complaints in FY 2016, 36 complaints in FY 2017, and 43 complaints in FY 2018), or resolved them before issuing a Letter of Finding (20 complaints in FY 2016, 21 complaints in FY 2017, and 27 complaints in FY 2018).²⁹¹¹ DOT closed a smaller number of complaints with a No Violation Letter of Finding – But Concerns or Recommendations Made in Letter of Finding (14 complaints in FY 2016, 15 complaints in FY 2017, and 6 complaints in FY 2018), with a Violation Letter of Finding – Corrective Action Monitoring Ongoing (14 complaints in FY 2016, and 10 complaints each in FY 2017 and FY 2018), with a Violation Letter of Finding (11 complaints in FY 2016, 10 complaints in FY 2017, and 7 complaints in FY 2018), or with a Violation Letter of Finding – Corrective Action (2 complaints in FY 2016, 5 complaints in FY 2017, and 2 complaints in FY 2018).²⁹¹²

Proactive Compliance Evaluation

DOCR and DOTs OAs have federal regulatory authority to periodically conduct reviews of a funding recipient's programs or activities to determine and/or ensure that that recipient is in

²⁹¹⁰ U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 7, at 8.

²⁹¹¹ Ibid.

²⁹¹² Ibid.

compliance with the applicable nondiscrimination laws that it enforces.²⁹¹³ In its responses to the Commission’s interrogatories, DOCR stated that OAs charged with administering the pertinent programs are responsible for conducting post-award compliance audits.²⁹¹⁴ DOCR indicated in its External Civil Rights Complaint Processing Manual that the guidelines that apply for the complete investigation of a discrimination complaint also should be followed when conducting a compliance review.²⁹¹⁵

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

DOCR told the Commission that as the “principal civil rights advisor to the Secretary, Secretarial Officers, OAs, and senior level DOT officials, [DOCR] provides oversight, leadership, guidance, technical assistance, and training to the OAs to [ensure the proper and effective administration of the programs].”²⁹¹⁶ DOCR’s website also indicates that it “[p]rovide[s] guidance, expertise, and technical assistance on civil rights issues identified through Departmental policy, programming, or procedure,” and “conducts extensive outreach to civil rights stakeholders throughout the country to ensure that communities protected by civil rights laws and impacted by transportation infrastructure decisions have meaningful engagement in the decision-making process.”²⁹¹⁷

DOCR issued an External Civil Rights Complaint Processing Manual, which is “designed to provide guidance on processing discrimination complaints against U.S. Department of Transportation (DOT) Federal financial assistance recipients.”²⁹¹⁸ While the manual indicates that it is “for internal agency use,” DOCR has made it public via a link to its website.²⁹¹⁹

DOT established its Civil Rights Learning Center, a collective initiative of the civil rights offices at DOT, to “foster continuous learning of the highest quality for DOT employees, recipients of DOT financial assistance, contractors, and stakeholders.”²⁹²⁰ The Civil Rights Learning Center “assists stakeholders with exploring, integrating, and applying civil rights learning to their work and their community,” with the goal of “provid[ing] resources that will aid learners in effectively responding to evolving needs and issues regarding civil rights administration and application.”²⁹²¹ DOCR’s website also lists a number of “learning resources” on its website for external civil rights, including audiocasts, podcasts, videos, learning hubs, online training modules, and guidance for

²⁹¹³ 49 C.F.R. § 21.11(a); DOT, Complaint Processing Manual, *supra* note 2784, at 21.

²⁹¹⁴ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 2, at 3.

²⁹¹⁵ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 11, at 12; DOT, Complaint Processing Manual, *supra* note 2784, at 22.

²⁹¹⁶ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 1, at 2.

²⁹¹⁷ DOT, “Understanding the Departmental Office of Civil Rights (DOCR),” <https://www.transportation.gov/transition/%E2%80%8Bcivil-rights/office-civil-rights> [hereinafter DOT, “Understanding DOCR”].

²⁹¹⁸ DOT, Complaint Processing Manual, *supra* note 2784, at i.

²⁹¹⁹ U.S. Dep’t of Transportation, “External Civil Rights Processing Manual,” <https://www.transportation.gov/civil-rights/civil-rights-library/external-civil-rights-processing-manual> (accessed Nov. 5, 2019).

²⁹²⁰ DOT, “Civil Rights Learning Center,” *supra* note 327.

²⁹²¹ *Ibid.*

funding recipients from DOT and its OAs.²⁹²² In addition, DOCR has a Civil Rights Library resource, which is a legal tool to assist “grant recipients and people who utilize transportation services funded through [DOT] grants.”²⁹²³ The Civil Rights Library lists legal resources including civil rights laws (U.S. Codes, federal regulations, and public laws), executive orders, and policies that are enforced by DOCR and the civil rights offices in DOT’s OAs.²⁹²⁴

The Commission is not aware of whether DOCR or DOT’s OAs publicize the resolution of their enforcement efforts (complaints, compliance reviews, litigation, etc.) as a method of disseminating policy.

Interaction and Coordination with External Agencies and Organizations

DOCR’s website indicates that it “coordinate[s] with federal agencies to collaborate on joint policy and to address intersecting enforcement and compliance efforts.”²⁹²⁵ DOCR lists its civil rights partners on its website,²⁹²⁶ including DOT’s Center for Alternative Dispute Resolution (housed in the Office of the General Counsel),²⁹²⁷ DOT’s Disability Resource Center,²⁹²⁸ the U.S. Department of Veterans Affairs’ Office of Small and Disadvantaged Business Utilization,²⁹²⁹ and the General Services Administration Advantage program.²⁹³⁰

DOT also participates in the Federal Interagency Working Group on Environmental Justice,²⁹³¹ which strives to “advance environmental justice principle across the federal government, to engage and support local communities in addressing environmental and human health impacts, and to promote and implement comprehensive solutions to environmental justice concerns.”²⁹³² The Federal Interagency Working Group on Environmental Justice was established by Executive Order 12,898,²⁹³³ and in 2011, the group signed the Memorandum of Understanding on Environmental Justice and Executive Order 12,898 (that DOCR enforces),²⁹³⁴ which formally recommitted the

²⁹²² DOT, “Learning Resources,” *supra* note 328.

²⁹²³ U.S. Dep’t of Transportation, “Civil Rights Library,” <https://www.transportation.gov/civil-rights/civil-rights-library/civil-rights-library>.

²⁹²⁴ *Ibid.*; U.S. Dep’t of Transportation, “Policies,” <https://www.transportation.gov/civil-rights/civil-rights-library/policies>.

²⁹²⁵ DOT, “Understanding DOCR,” *supra* note 2917.

²⁹²⁶ U.S. Dep’t of Transportation, “Civil Rights Offices and Partners,” <https://cms.dot.gov/civil-rights/civil-rights-learning-center/civil-rights-offices-and-partners>.

²⁹²⁷ U.S. Dep’t of Transportation, “Office of the General Counsel, Center for Alternative Dispute Resolution,” <https://www.transportation.gov/CADR>.

²⁹²⁸ U.S. Dep’t of Transportation, “Disability Resource Center,” <https://www.transportation.gov/drc/disability-resource-center>.

²⁹²⁹ U.S. Department of Veterans Affairs, “Office of Small and Disadvantaged Business Utilization,” <https://www.va.gov/osdbu/>.

²⁹³⁰ General Services Administration, “Advantage!,” https://www.gsaadvantage.gov/advantage/main/start_page.do.

²⁹³¹ DOT, “Environmental Justice Strategy,” *supra* note 2770; *see also* Federal Interagency Working Group on Environmental Justice, “Fact Sheet,” *supra* note 2770.

²⁹³² Federal Interagency Working Group on Environmental Justice, “Fact Sheet,” *supra* note 2770, at 1.

²⁹³³ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629.

²⁹³⁴ Memorandum of Understanding on Environmental Justice and Executive Order 12,898, *supra* note 2773.

participating federal agencies to “addressing environmental justice through a more collaborative, comprehensive and efficient process.”²⁹³⁵

Many of DOT’s grantees are State Transportation Agencies, and DOCR or the civil rights offices of the OAs interact with them to enforce federal civil rights law. For example:

The Disadvantaged Business Enterprise Program (DBE) is a legislatively mandated [DOT] program that applies to Federal-aid highway dollars expended on federally-assisted contracts issued by [DOT] recipients such as State Transportation Agencies (STAs). The U.S. Congress established the DBE program in 1982 to:

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts;
- Help remove barriers to the participation of DBEs in DOT-assisted contracts, and
- Assist the development of firms that can compete successfully in the marketplace outside of the DBE program.

The DBE program ensures that federally assisted contracts for highway, transit and aviation projects are made available for small business concerns owned and controlled by socially and economically disadvantaged individuals... Every three years, STAs are required to set an overall DBE goal that they must either meet, or show that they used good faith efforts to meet, annually. This goal is in the form of a percentage of federal funds apportioned annually to each STA and is calculated based upon the relative availability of DBE firms as compared to all firms in the relevant geographic market area. STAs that do not meet their goal in any given year, must submit a document to their operating administrations, such as [the Federal Highway Administration], identifying and analyzing the reasons why the goal was not met and creating specific steps to correct the problems going forward.²⁹³⁶

Research, Data Collection, and Reporting

DOCR indicated that when DOCR directly receives a complaint, it collects “all relevant information necessary to resolve any compliance issues raised by the complainant, ascertained from the information provided by the complainant, or discovered during the investigation.”²⁹³⁷ This information includes demographic data, among other items such as the basis for the complaint, the complainant’s contact information, and pertinent facts about the discrimination that occurred.²⁹³⁸ DOCR indicated that it disaggregates demographic data concerning racial and ethnic populations, including Asian American and Pacific Islander populations, in accordance with E.O. 13,515 (which requires that federal programs strive to “work to advance relevant evidence-based research, data collection, and analysis” for Asian American and Pacific Islander populations and

²⁹³⁵ EPA, “Overview of the EJ IWG,” *supra* note 2774.

²⁹³⁶ U.S. Department of Transportation, Federal Highway Administration, Civil Rights, “Disadvantaged Business Enterprise Program (DBE) Program,” <https://www.fhwa.dot.gov/civilrights/programs/dbe/> (accessed Jul. 11, 2019).

²⁹³⁷ U.S. Dep’t of Transportation, Response to USCCR Interrogatory No. 11, at 12.

²⁹³⁸ *Ibid.*

subpopulations)²⁹³⁹ when collecting and analyzing this data.²⁹⁴⁰ DOCR also requests disaggregated data from its funding recipients, when available (for items including public transportation ridership, driver licensing program transactions, and others), and utilizes disaggregated data to determine the extent to which certain racial and ethnic populations may access programs/projects conducted by its funding recipients, and the extent to which a DOT-funded program/project may have a disparate impact upon certain racial/ethnic populations.²⁹⁴¹

DOCR indicated there were no changes in policy guidance surrounding data collection during FY 2016-2018.²⁹⁴²

²⁹³⁹ Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order 13,515, 74 Fed. Reg. 53,635 (Oct. 19, 2009).

²⁹⁴⁰ U.S. Dep't of Transportation, Response to USCCR Interrogatory No. 11, at 12.

²⁹⁴¹ *Ibid.*, 13.

²⁹⁴² *Ibid.*

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Chapter 11: U.S. Department of Veterans Affairs, Office of Resolution Management

Legal Authority and Responsibility

President Hoover established the U.S. Department of Veterans Affairs (VA) on July 21, 1930 as an independent agency under Executive Order 5,398 and, on March 15, 1989, Congress redesignated the agency as an executive department in the Cabinet.²⁹⁴³ VA describes its mission as “to fulfill President Lincoln's promise ‘to care for him who shall have borne the battle, and for his widow, and his orphan’ by serving and honoring the men and women who are America’s veterans.”²⁹⁴⁴

To uphold its mission, VA provides America’s Veterans and their families with benefits and services such as compensation, veteran’s pension, survivor’s benefits, rehabilitation and employment assistance, education assistance, home loan guaranties, life insurance coverage, vocational rehabilitation and employment services, healthcare, and final resting places to commemorate those who have fallen while serving their country.²⁹⁴⁵

With over 350,000 employees, VA is the second largest federal agency.²⁹⁴⁶

VA’s Office of Resolution Management (ORM) is responsible for enforcing civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age for veterans and their families.²⁹⁴⁷ The three major administrations at VA that deliver programs for veterans include the Veterans Health Administration (VHA), the Veterans Benefits Administration (VBA) and the National Cemetery Administration (NCA).²⁹⁴⁸ ORM works with the external civil rights offices at these three VA administrations, as well as other VA administration offices, to facilitate the enforcement of civil rights.²⁹⁴⁹

²⁹⁴³ U.S. Dep’t of Veterans Affairs Act of 1988, Pub. L. 100-527, 102 Stat. 2635 (codified as amended at 38 U.S.C. §301).

²⁹⁴⁴ U.S. Dep’t of Veterans Affairs, “About VA,” https://www.va.gov/ABOUT_VA/index.asp (accessed Mar. 22, 2018).

²⁹⁴⁵ U.S. Dep’t of Veterans Affairs, “Veterans Benefits Administration,” <https://benefits.va.gov/benefits/> (accessed Feb. 4, 2019).

²⁹⁴⁶ U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 3; Note: According to VA’s Response VA’s response to USCCR Interrogatory No. 5b-5e, at 10-11 Staffing levels for the offices and administrations listed have not changed and VA does not employ contractors or part-time workers on enforcement of civil rights statutes, executive orders, and regulations.

²⁹⁴⁷ 42 U.S.C. §§2000d-2000d-7 and implementing regulations at 38 C.F.R § 18; 20 U.S.C. § 1681-88 and implementing regulations at 38 C.F.R § 23 subpart A; 29 U.S.C. § 794 and implementing regulations at 38 C.F.R § 15; 42 U.S.C. §§ 6101 et seq.; U.S. Dep’t of Veterans Affairs, “Office of Resolution Management (ORM),” <https://www.va.gov/ORM/>.

²⁹⁴⁸ U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 3-4; U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9. ORM noted that “[u]nder 38 C.F.R. § 18.1 the authority for “obtaining evidence of voluntary compliance,” is also delegated to VBA and VHA. Ibid.

²⁹⁴⁹ 38 U.S.C. § 308(b)(7); U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 2, at 9.

ORM's Resolution Support Center (RSC) is a primary resource for Veterans and their families regarding any complaints of discrimination and unfair treatment in VA benefits and services,²⁹⁵⁰ but investigations are handled by other offices within the VA administrations. ORM's RSC oversees the initial processing of external complaints that it receives, and is responsible for forwarding these complaints to the appropriate administration for processing, depending on the basis of the complaint.²⁹⁵¹ According to ORM's External Complaints Standard Operating Procedures, it is the responsibility of these administrations (VHA, VBA, and NCA) to investigate civil rights complaints that are referred to them.²⁹⁵² In addition, VA's Office of the General Counsel (OGC) is responsible for providing legal guidance to ORM and VA's administrations as needed on matters concerning external civil rights enforcement.²⁹⁵³

With respect to schools, hospitals, and health care and other facilities' programs or activities under the purview of VA's nondiscrimination regulations,²⁹⁵⁴ ORM is responsible for ensuring that recipients of federal funding²⁹⁵⁵ comply with the following civil rights statutes, executive orders, and regulations:²⁹⁵⁶

- Title VI of the Civil Rights Act of 1964;²⁹⁵⁷
- Age Discrimination Act of 1975;²⁹⁵⁸
- Section 504 of the Rehabilitation Act of 1973;²⁹⁵⁹
- Title IX of the Education Amendments of 1972;²⁹⁶⁰
- Executive Order 12,250 (Leadership and Coordination of Nondiscrimination Laws);²⁹⁶¹
- Executive Order 13,160 (Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs);²⁹⁶²
- Executive Order 11,246 (Equal Employment Opportunity);²⁹⁶³
- Executive Order 11,063 (Equal Opportunity in Housing);²⁹⁶⁴

²⁹⁵⁰ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 5.

²⁹⁵¹ U.S. Dep't of Veterans Affairs, *External Complaints Processing Standard Operating Procedure*, Jun. 2014, p. 3-5 (on file) [hereinafter VA, *External Complaints Processing SOP*].

²⁹⁵² U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 3, at 10 (updated Jun. 19, 2019).

²⁹⁵³ *Ibid.*

²⁹⁵⁴ 38 C.F.R. § 18.1 Subparts A-E; U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9.

²⁹⁵⁵ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9.

²⁹⁵⁶ *Ibid.*, 10 (indicating that this authority is delegated by the Secretary of Veterans Affairs).

²⁹⁵⁷ 42 U.S.C. §§2000d-2000d-7 and implementing regulations at 38 C.F.R § 18.

²⁹⁵⁸ 42 U.S.C. §§ 6101 et seq.

²⁹⁵⁹ 29 U.S.C. § 794 and implementing regulations at 38 C.F.R § 15.

²⁹⁶⁰ 20 U.S.C. §§ 1681 and implementing regulations at 38 C.F.R § 23 subpart A.

²⁹⁶¹ Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995.

²⁹⁶² Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, Exec. Order No. 13,160, 65 Fed. Reg. 39,775.

²⁹⁶³ Equal Employment Opportunity, Exec. Order No. 11,246, 30 Fed. Reg. 12,319.

²⁹⁶⁴ Equal Opportunity in Hous., Exec. Order No. 11,063, 27 Fed. Reg. 11,527.

- Executive Order 12,892, as amended (Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing);²⁹⁶⁵
- Executive Order 12,898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations);²⁹⁶⁶
- Executive Order 13,166 (Improving Access to Services for Persons with Limited English Proficiency);²⁹⁶⁷
- Executive Order 13,217 (Community-Based Alternatives for Individuals with Disabilities);²⁹⁶⁸
- Executive Orders 11,478 (Equal Employment Opportunity in the Federal Government)²⁹⁶⁹;
- Executive Order 13,087 (Equal Employment Opportunity in the Federal Government);²⁹⁷⁰
- Executive Order 13,152 (Equal Employment Opportunity in the Federal Government)²⁹⁷¹;
- Executive Order 13,163 (Increasing the Opportunity for Individuals With Disabilities To Be Employed in the Federal Government);²⁹⁷²
- Executive Order 13,164 (Establishing Procedures to Facilitate the Provision of Reasonable Accommodation);²⁹⁷³
- Executive Order 13,145 (To Prohibit Discrimination in Federal Employment Based on Genetic Information);²⁹⁷⁴
- Executive Order 10,925 (Establishing the President's Committee on Equal Employment Opportunity);²⁹⁷⁵
- Executive Order 11,625 (Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise);²⁹⁷⁶
- Executive Order 11,701 (Employment of Veterans by Federal Agencies and Government Contractors and Subcontractors);²⁹⁷⁷
- Executive Order 12,067 (Providing for Coordination of Federal Equal Employment Opportunity Programs);²⁹⁷⁸

²⁹⁶⁵ Exec. Order No. 12,892, 59 Fed. Reg. 2,939.

²⁹⁶⁶ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629.

²⁹⁶⁷ Improving Access to Services for Persons with Limited English Proficiency, Exec. Order No. 13,166, 65 Fed. Reg. 50,121.

²⁹⁶⁸ Community-Based Alternatives for Individuals with Disabilities, Exec. Order No. 13,217, 66 Fed. Reg. 33,155

²⁹⁶⁹ Equal Employment Opportunity in the Federal Government, Exec. Order No. 11,478, 34 Fed. Reg. 12,937 amended by Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (Jun. 2, 1998) and further amended by Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 4, 2000).

²⁹⁷⁰ Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (Jun. 2, 1998).

²⁹⁷¹ Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 4, 2000).

²⁹⁷² Increasing the Opportunity for Individuals With Disabilities To Be Employed in the Federal Government, Exec. Order No. 13,163, 65 Fed. Reg. 46,563 (Jul. 28, 2000).

²⁹⁷³ Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Exec. Order No. 13,164, 65 Fed. Reg. 46,565 (Jul. 28, 2000).

²⁹⁷⁴ Exec. Order No. 13,145, 65 Fed. Reg. 6,877 (Feb. 10, 2000).

²⁹⁷⁵ Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 8, 1961).

²⁹⁷⁶ Exec. Order No. 11,625, 36 Fed. Reg. 19,967 (Oct. 14, 1971).

²⁹⁷⁷ Exec. Order No. 11,701, 38 Fed. Reg. 2,675 (Jan. 29, 1973).

²⁹⁷⁸ Exec. Order No. 12,067, 43 Fed. Reg. 28,967.

- Executive Order 12,106 (Transfer of certain equal employment enforcement functions);²⁹⁷⁹
- Executive Order 13,078 (Increasing Employment of Adults with Disabilities);²⁹⁸⁰
- Executive Order 13,125 (Increasing Participants of Asian Americans and Pacific Islanders in Federal Programs);²⁹⁸¹
- Executive Order 13,162 (Federal Career Intern Program);²⁹⁸²
- Executive Order 13,171 (Hispanic Employment in the Federal Government);²⁹⁸³
- Executive Order 13,175 (Consultation and Coordination with Indian Tribal Governments);²⁹⁸⁴
- Executive Order 13,187 (The President's Disability Employment Partnership Board);²⁹⁸⁵
- Executive Order 13,199 (Establishment of White House Office of Faith-Based and Community Initiatives);²⁹⁸⁶
- Executive Order 13,216, addendum to Executive Order 13,125 (Increasing Opportunity and Improving Quality of life of Asian Americans and Pacific Islanders);²⁹⁸⁷
- Executive Order 13,230 (President's Advisory Commission on Educational Excellence for Hispanic Americans);²⁹⁸⁸
- Executive Order 13,256 (Presidents Board of Advisors on Historically Black Colleges and Universities);²⁹⁸⁹
- Executive Order 13,592 (Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities);²⁹⁹⁰
- Executive Order 13,339 (Increasing Economic Opportunity and Business Participation of Asian Americans and Pacific Islanders);²⁹⁹¹

²⁹⁷⁹ Exec. Order No. 12,106, 44 Fed. Reg. 1,053 (Jan. 3, 1979).

²⁹⁸⁰ Increasing Employment of Adults with Disabilities, Exec. Order No. 13,078, 63 Fed. Reg. 13,111 (Mar. 18, 1998).

²⁹⁸¹ Increasing Participants of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,125, 64 Fed. Reg. 31,105 (Jun. 10, 1999).

²⁹⁸² Federal Career Intern Program, Exec. Order No. 13,162, 65 Fed. Reg. 43,211 (Jul. 12, 2000).

²⁹⁸³ Hispanic Employment in the Federal Government, Exec. Order No. 13,171, 65 Fed. Reg. 61,251 (Oct. 16, 2000).

²⁹⁸⁴ Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

²⁹⁸⁵ The President's Disability Employment Partnership Board, Exec. Order No. 13,187, 66 Fed. Reg. 3,857 (Jan. 17, 2001).

²⁹⁸⁶ Establishment of White House Office of Faith-Based and Community Initiatives, Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 31, 2001).

²⁹⁸⁷ Increasing Opportunity and Improving Quality of life of Asian Americans and Pacific Islanders, Exec. Order No. 13,216, 66 Fed. Reg. 31,373 (Jun. 11, 2001).

²⁹⁸⁸ President's Advisory Commission on Educational Excellence for Hispanic Americans, Exec. Order No. 13,230, 66 Fed. Reg. 52,841 (Oct. 17, 2001).

²⁹⁸⁹ Presidents Board of Advisors on Historically Black Colleges and Universities, Exec. Order No. 13,256, 67 Fed. Reg. 6,823 (Feb. 14, 2002). (This Exec. Order was revoked by: White House Initiative on Historically Black Colleges and Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities, Exec. Order No. 13,532, 75 Fed. Reg. 9,749 (Mar. 3, 2010).)

²⁹⁹⁰ Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities, Exec. Order No. 13,592, 76 Fed. Reg. 76,603 (Dec. 8, 2011).

²⁹⁹¹ Increasing Economic Opportunity and Business Participation of Asian Americans and Pacific Islanders, Exec. Order, Exec. Order No. 13,339, 69 Fed. Reg. 28,037 (May 17, 2004).

- Executive Order 13,342 (Responsibilities of the Departments of Commerce and Veterans Affairs and the Small Business Administration With Respect to Faith-Based and Community Initiatives);²⁹⁹²
- Executive Order 13,403 (Amendments to Executive Orders 11,030, 13,279, 13,339, 13,381, and 13,389, and Revocation of Executive Order 13,011);²⁹⁹³
- Executive Order 13,569 (Amendments to Executive Orders 12,824, 12,835, 12,859, and 13,532, Reestablishment Pursuant to Executive Order 13,498, and Revocation of Executive Order 13,507);²⁹⁹⁴
- Executive Order 13,511 (Continuance of Certain Federal Advisory Committees);²⁹⁹⁵
- Executive Order 13,515 (Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs);²⁹⁹⁶
- Executive Order 13,518 (Employment of Veterans in the Federal Government);²⁹⁹⁷
- Executive Order 13,522 (Creating Labor-Management Forums to Improve Delivery of Government Services);²⁹⁹⁸
- Executive Order 13,548 (Increasing Federal Employment of Individuals with Disabilities);²⁹⁹⁹
- Executive Order 13,532 (White House Initiative on Historically Black Colleges and Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities);³⁰⁰⁰
- Executive Order 13,555 (White House Initiative on Educational Excellence for Hispanics);³⁰⁰¹
- Executive Order 13,562 (Recruiting and Hiring Students and Recent Graduates);³⁰⁰²

²⁹⁹² Responsibilities of the Departments of Commerce and Veterans Affairs and the Small Business Administration With Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (Jun. 3, 2004).

²⁹⁹³ Exec. Order No. 13,403, 71 Fed. Reg. 28,543 (May 16, 2006).

²⁹⁹⁴ Amendments to Executive Orders 12,824, 12,835, 12,859, and 13,532, Reestablishment Pursuant to Executive Order 13498, and Revocation of Executive Order 13,507, Exec. Order No. 13,569, 76 Fed. Reg. 19,891 (Apr. 8, 2011).

²⁹⁹⁵ Continuance of Certain Federal Advisory Committees, Exec. Order No. 13,511, 74 Fed. Reg. 50,909 (Oct. 1, 2009).

²⁹⁹⁶ Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs, Exec. Order No. 13,515, 74 Fed. Reg. 53,635 (Oct. 19, 2009).

²⁹⁹⁷ Employment of Veterans in the Federal Government, Exec. Order No. 13,518, 74 Fed. Reg. 58,533 (Nov. 13, 2009).

²⁹⁹⁸ Creating Labor-Management Forums to Improve Delivery of Government Services, Exec. Order No. 13,522, 74 Fed. Reg. 66,203 (Dec. 14, 2009).

²⁹⁹⁹ Increasing Federal Employment of Individuals with Disabilities, Exec. Order No. 13,548, 75 Fed. Reg. 45,039 (Jul. 30, 2010).

³⁰⁰⁰ White House Initiative on Historically Black Colleges and Universities, Promoting Excellence, Innovation and Sustainability at Historically Black Colleges and Universities, Exec. Order No. 13,532, 75 Fed. Reg. 9,749 (Mar. 3, 2010).

³⁰⁰¹ White House Initiative on Educational Excellence for Hispanics, Exec. Order No. 13,555, 75 Fed. Reg. 65,417 (Oct. 22, 2010).

³⁰⁰² Recruiting and Hiring Students and Recent Graduates, Exec. Order No. 13,562, 75 Fed. Reg. 82,585 (Dec. 30, 2010).

- Executive Order 13,583 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce);³⁰⁰³
- Executive Order 13,592 (Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities).³⁰⁰⁴

Enforcement Tools

The agency enforcement tools ORM, in conjunction with the various civil rights offices housed within VA's administrations, has specific legal authority to use are:³⁰⁰⁵

- Complaint Resolution³⁰⁰⁶
- Agency-Initiated Charges³⁰⁰⁷
- Proactive Compliance Evaluations³⁰⁰⁸
- Issuance of Policy Guidance³⁰⁰⁹
- Issuance of Regulations³⁰¹⁰
- Technical Assistance³⁰¹¹
- Publicity³⁰¹²
- Data collection, research and reported³⁰¹³
- Collaboration with states/local agencies³⁰¹⁴
- Collaboration with other federal agencies³⁰¹⁵

³⁰⁰³ Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce, Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 23, 2011).

³⁰⁰⁴ Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities, Exec. Order No. 13,592, 76 Fed. Reg. 76,603 (Dec. 8, 2011).

³⁰⁰⁵ 38 C.F.R. Part 18; 38 C.F.R. § 23.605; 28 C.F.R. Part 42 Subpart F.

³⁰⁰⁶ 38 C.F.R. §§ 18.7(b), 18.542, and 23.605.

³⁰⁰⁷ *Id.* §§ 18.7(a) and (c).

³⁰⁰⁸ 38 C.F.R. §§ 18.7(a), 18.405(e)(2), 18.541, and 23.605.

³⁰⁰⁹ *Id.* §§ 18.6 (This is required as follows: "Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part."), and 23.605 ("The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) ("Title VI") are hereby adopted and applied to these Title IX regulations. These procedures may be found at 38 CFR 18.6 through 18.11.").

³⁰¹⁰ 28 C.F.R. § 42.403 ("Any federal agency subject to title VI which has not issued a regulation implementing title VI shall do so as promptly as possible and, no later than the effective date of this subpart, shall submit a proposed regulation to the Assistant Attorney General pursuant to paragraph (c) of this section."); 38 C.F.R. § 23.605.

³⁰¹¹ 38 C.F.R. §§ 18.6 ("Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.") and 23.605.

³⁰¹² *Id.* § 18.7(a); 28 C.F.R. § 42.405 (requirement for public dissemination of Title VI information).

³⁰¹³ 28 C.F.R. § 42.406.

³⁰¹⁴ 38 C.F.R. § 18.6(a) ("Each responsible agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.").

³⁰¹⁵ 28 C.F.R. § 42.413.

- Strategic Plan³⁰¹⁶
- Annual Reports³⁰¹⁷

Budget and Staffing

ORM's budget for external civil rights enforcement as well as federal EEO functions are combined,³⁰¹⁸ and therefore does not break down specific allocations for external civil rights enforcement. In FY 2016, ORM had an allocated budget of \$43.70 million, which rose to \$47.67 million in FY 2017 and \$47.66 million in FY 2018.³⁰¹⁹ In FY 2016 and FY 2017, ORM's allocated budget was in line with its requested budget, having requested \$43.70 million in FY 2016 and \$47.68 million in FY 2017.³⁰²⁰ ORM's budget request in FY 2018 was \$0, as VA requested that the office's activities be moved to the Office of Accountability and Whistleblower Protection, however it received an allocation equal to its FY 2017 allocation and the restructuring did not occur.³⁰²¹ See Figure 11.1.

³⁰¹⁶ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

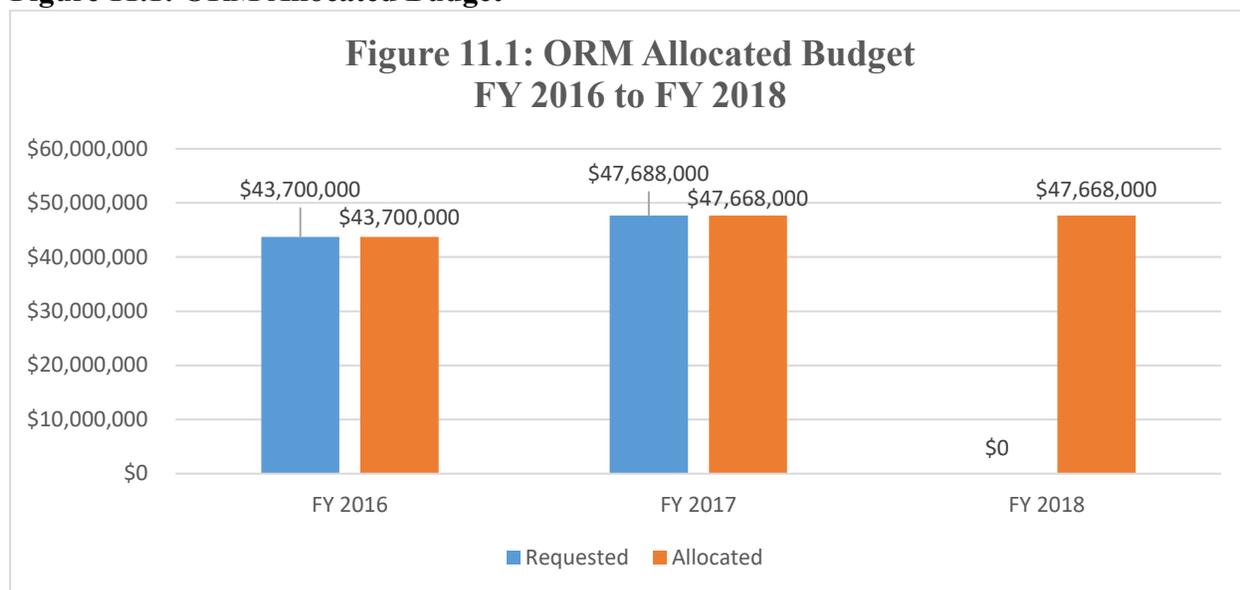
³⁰¹⁷ 38 U.S.C. §§ 527, 529.

³⁰¹⁸ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 6, at 11 (updated Jun. 19, 2019).

³⁰¹⁹ U.S. Dep't of Veterans Affairs, *FY2017 Budget Submission: Benefits and Burial Programs and Departmental Administration*, Vol. 3 of 4, February 2016, p. GenAd-329 [hereinafter VA, *FY2017 Budget Submission*]; U.S. Dep't of Veterans Affairs, *FY2018 Budget Submission: Benefits and Burial Programs and Departmental Administration*, Vol. 3 of 4, May 2017, p. GenAd-355 [hereinafter VA, *FY2018 Budget Submission*]; U.S. Dep't of Veterans Affairs, *FY2019 Budget Submission: Benefits and Burial Programs and Departmental Administration*, Vol. 3 of 4, February 2018, p. GenAd-317 [hereinafter VA, *FY2019 Budget Submission*]; U.S. Dep't of Veterans Affairs, "Office of Budget, Annual Budget Submission," <https://www.va.gov/budget/products.asp>; U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 6, at 12 (updated Jun. 19, 2019).

³⁰²⁰ U.S. Dep't of Veterans Affairs, *FY2016 Budget Submission: Benefits and Burial Programs and Departmental Administration*, Vol. 3 of 4, p. GenAd-323; VA, *FY2017 Budget Submission*, *supra* note 3019, at GenAd-329.

³⁰²¹ VA, *FY2018 Budget Submission*, *supra* note 3019, at GenAd-355; U.S. Dep't of Veterans Affairs, *FY2019 Budget Submission*, *supra* note 3019, at GenAd-317.

Figure 11.1: ORM Allocated Budget

Source: U.S. Dep't of Veterans Affairs, FY2016 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, p. GenAd-323; U.S. Dep't of Veterans Affairs, FY2017 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2016, p. GenAd-329; U.S. Dep't of Veterans Affairs, FY2018 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, May 2017, p. GenAd-355; U.S. Dep't of Veterans Affairs, FY2019 Budget Submission: Benefits and Burial Programs and Departmental Administration, Vol. 3 of 4, February 2018, p. GenAd-317; U.S. Dep't of Veterans Affairs, "Office of Budget, Annual Budget Submission," <https://www.va.gov/budget/products.asp>; U.S. Dep't of Veterans Affairs, Interrogatory No. 6, p. 12 (updated Jun. 19, 2019).

During FY 2016 to FY 2018, ORM employed a total of 296 FTEs who specifically work on civil rights enforcement.³⁰²² ORM indicated that the staffing levels have not changed during the fiscal years in question, despite slight fluctuations in its funding levels.³⁰²³

ORM also identified staffing levels at VBA, VHA, and NCA—the three major administrations at VA—for FTEs who specifically work on civil rights enforcement, which is broken down as follows:

- 66 FTEs at VBA
- 220 FTEs at VHA
- 3 FTEs at NCA³⁰²⁴

ORM is headed by Deputy Assistant Secretary and Acting Executive Director for the Office of Diversity and Inclusion at the U.S. Department of Veterans Affairs, Harvey Johnson.³⁰²⁵ ORM's organizational structure did not change between FY 2016 and FY 2018.³⁰²⁶ See Figure 11.2.

³⁰²² U.S. Dep't of Veterans Affairs, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

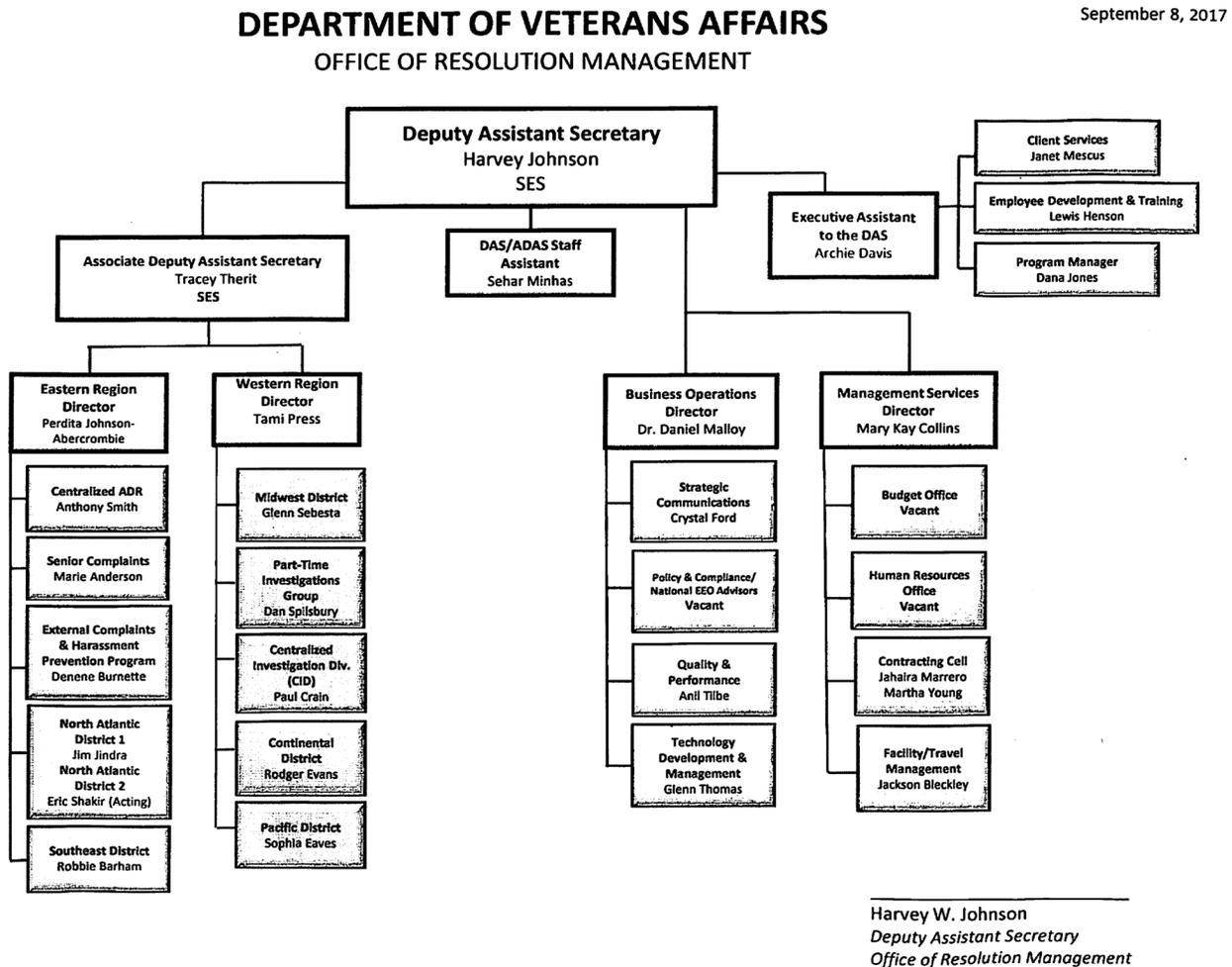
³⁰²³ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 5, at 11 (updated Jun. 19, 2019).

³⁰²⁴ *Ibid.*, Exhibit 1, at 93-95.

³⁰²⁵ U.S. Dep't of Veterans Affairs, "About ORM", <https://www.va.gov/ORM/index.asp>; U.S. Dep't of Veterans Affairs, "Department of Veterans Affairs senior executive Biography," https://www.va.gov/ORM/docs/BIO_DAS ORM Harvey Johnson 12 18 2.pdf.

³⁰²⁶ U.S. Dep't of Veterans Affairs, response to USCCR Interrogatories, Executive Summary, at 3.

Figure 11.2: ORM Organizational Chart



Source: U.S. Dep't of Veterans Affairs, Response to Interrogatories, Exhibit 5.

ORM reported to the Commission that it provides “general oversight, coordination, and liaison activities for the external civil rights program,” and VA has staff responsible for investigating external civil rights complaints in its administrations and staff offices, including VBA, VHA, and the National Cemetery Administration (NCA).³⁰²⁷ VA noted that it “does not maintain a separate external civil rights office” similar to some other federal agencies, and “external civil rights functions and Federal EEO functions are managed jointly by ORM and within the applicable NCA, VBA, or VHA components.”³⁰²⁸ ORM also noted that VA’s Office of the General Counsel “will provide as needed legal guidance to ORM as well as other VA administrations or entities on external civil rights related issues.”³⁰²⁹

³⁰²⁷ U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 4, at 10.

³⁰²⁸ Ibid.

³⁰²⁹ Ibid.

Assessment

Prioritization of Civil Rights Agency-Wide

As noted earlier, ORM is VA's liaison with DOJ, to which it refers complaints for litigation if needed, and "is responsible for receiving external complaints, forwarding these complaints to the proper [VA] administration for investigation."³⁰³⁰ Similar to DOT, the authority and responsibility for civil rights enforcement activities at VA is decentralized, and is shared among ORM and the major administrations (VHA, VBA, and NCA) and various administrations offices across VA. Counter to Commission recommendations, noting that "the implementation, compliance, and enforcement of civil rights programs should be directed by an office and staff that are separate from the office and staff responsible for internal (EEO) civil rights functions" and "these offices and staff should be provided with separate budgets so that each and every civil rights statute is properly enforced without resources being taken from one to enforce another,"³⁰³¹ ORM has both internal (EEO) and external functions, and has noted that "VA's Civil Rights and Federal EEO functions and programs are jointly combined and funded."³⁰³²

Strategic Planning and Self-Evaluation

VA has issued two agency-wide strategic plans during the fiscal years in question, one for FY 2014-2020, and one for FY 2018-2024.³⁰³³ In these strategic plans, there are no civil rights-specific strategic goals outlined, however the strategic plan for FY 2014-2020 indicated that VA would "increase support to our Veterans with disabilities," as a strategy for meeting its strategic objective of improving veteran wellness and economic security.³⁰³⁴ The Commission is not aware of any existing VA agency-wide strategic plans or strategic plans published by ORM that specifically have civil rights-related strategic goals or objectives, as per the recommendations of the Commission.³⁰³⁵

VHA, VBA, and NCA each have issued individual strategic plans.³⁰³⁶ In its strategic plan for FY 2013-2018, the VHA indicated that it would "provide veterans personalized, proactive, patient-driven health care" as one of its goals and objectives, specifically with "quality and equity" to

³⁰³⁰ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9.

³⁰³¹ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 47.

³⁰³² U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 6, at 11 (updated Jun. 19, 2019).

³⁰³³ U.S. Dep't of Veterans Affairs, *FY 2014-2020 Strategic Plan*, https://www.jcs.mil/Portals/36/Documents/Doctrine/Interorganizational_Documents/va_sp_fy14-20.pdf [hereinafter VA, *FY 2014-2020 Strategic Plan*]; U.S. Dep't of Veterans Affairs, *FY 2018-2024 Strategic Plan*, May 31, 2019, <https://www.va.gov/oci/docs/VA2018-2024strategicPlan.pdf>.

³⁰³⁴ VA, *FY 2014-2020 Strategic Plan*, *supra* note 3033.

³⁰³⁵ USCCR, *Ten-Year Check-Up Vol. I: A Blueprint*, *supra* note 1, at 47. Although the VA was not one of the 11 agencies reviewed by the Commission in its research leading up to its 2002 report, the Commission believes that the recommendations are applicable to all federal agencies. *Ibid.*, 2 (Methodology).

³⁰³⁶ U.S. Dep't of Veterans Affairs, Veterans Health Administration, *VHA Strategic Plan FY 2013-2018*, https://www.ea.oit.va.gov/EAOIT/docs/May_2015-Release_Documents/VHA-STRATEGIC-PLAN_FY-2013-2018-2.pdf;

allow veterans to “receive timely, high quality, personalized, safe effective and equitable health care, irrespective of geography, gender, race, age, culture or sexual orientation.”³⁰³⁷ Neither VBA’s strategic plan for FY 2014-2020 nor NCA’s strategic plan for FY 2018-2022 mention any specific civil rights enforcement-related goals or objectives.

VA is required to submit an annual report to Congress that provides a financial accounting of funds received and expended during the fiscal year and reports on programmatic activities, which is to be made public.³⁰³⁸ VA issues an annual performance plan and report to chart the agency’s progress, however the reports for the fiscal years in question do not specifically discuss activities related to external civil rights enforcement.³⁰³⁹

Complaint Processing, Agency-Initiated Charges, and Litigation

VA regulations authorize ORM and other VA administrations that handle civil rights complaints to receive and investigate complaints, as well as perform periodic compliance reviews.³⁰⁴⁰ According to the VA’s External Complaints Processing Standard Operating Procedures, ORM’s RSC is responsible for overseeing the processing of external complaints, and receives all written or phone complaints, and is responsible for referring complaints to the various VA administrations, depending on the basis of the complaint.³⁰⁴¹ VHA, VBA, and NCA all have dedicated staff “who are responsible for investigating external civil rights complaints” that are referred to them.³⁰⁴² VA’s OGC is to provide “legal guidance as well as other VA administrations or entities on external civil rights related issues.”³⁰⁴³

VA regulations require that if an investigation “indicates a failure to comply ... the matter will be resolved by informal means whenever possible.”³⁰⁴⁴ VA ORM stated that it prioritizes “commitment to a comprehensive and collaborative approach to civil rights.”³⁰⁴⁵ Additionally, when informal resolution is unattainable, ORM indicated in its interrogatory responses that VA effectuates compliance as per the procedure outlined under 38 C.F.R. § 18.8.³⁰⁴⁶ This procedure for effectuating compliance may involve the “suspension or termination of or refusal to grant or

³⁰³⁷ Ibid., 2.

³⁰³⁸ 38 U.S.C. §§ 527, 529.

³⁰³⁹ U.S. Dep’t of Veterans Affairs, *FY 2018/FY2016 Annual Performance Plan and Report*, May 2017, <https://www.va.gov/budget/docs/VAapprFY2018.pdf>; U.S. Dep’t of Veterans Affairs, *FY 2019/FY2017 Annual Performance Plan and Report*, February 2018, https://www.ea.oit.va.gov/EAOIT/docs/Oct2018/20180704_VA-Annual-Performance-Plan-and-Report-FY2019-FY2017.pdf; U.S. Dep’t of Veterans Affairs, *FY 2020/FY2018 Annual Performance Plan and Report*, March 2019, <https://www.va.gov/oci/docs/VA2020appr.PDF>.

³⁰⁴⁰ 38 C.F.R. § 18.7; 38 C.F.R. § 18.542; 38 C.F.R. § 23.605.

³⁰⁴¹ VA, *External Complaints Processing SOP*, *supra* note 2951, at 3-5.

³⁰⁴² U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 2, at 10 (Updated Jun. 19, 2019).

³⁰⁴³ Ibid.

³⁰⁴⁴ 38 C.F.R. § 18.7(d).

³⁰⁴⁵ Harvey Johnson, Deputy Ass’t Sec’y, Office of Resolution Management & Diversity and Inclusion, Dep’t of Veteran Affairs, Written Statement for the U.S. Comm’n on Civil Rights, at p. 3.

³⁰⁴⁶ 38 C.F.R. § 18.8; U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 3, at 10 (Updated Jun. 19, 2019).

continue Federal financial assistance or by any other means authorized by law,” which may include referral to DOJ for litigation, or “any applicable proceeding under State or local law.”³⁰⁴⁷

During FY 2016-2018, VBA, VHA, and NCA processed 127 external civil rights complaints.³⁰⁴⁸ See Table 11.1. In FY 2016, VA administrations processed 36 total external complaints, 23 of which were referred to VHA, 13 were referred to VBA, and 0 were referred to NCA for processing.³⁰⁴⁹ In FY 2017, VA administrations processed a total of 63 complaints, 38 of which were referred to VHA, 24 referred to VBA, and 1 referred to NCA for processing.³⁰⁵⁰ In FY 2018, VA administrations processed a total of 28 complaints, 5 of which were referred to VHA, 23 referred to VBA, and 0 referred to NCA for processing.³⁰⁵¹ ORM did not directly process any complaints during FY 2016-2018.³⁰⁵²

Table 11.1: External Civil Rights Complaint Referrals to VA Administrations, FY 2016 to FY 2018

Fiscal Year	ORM	VHA	VBA	NCA	Total Referrals for FY
2016	0	23	13	0	36
2017	0	38	24	1	63
2018	0	5	23	0	28
Total	0	66	60	1	127

Source: U.S. Dep’t of Veterans Affairs, Corrections submitted during agency review, Jun. 19, 2019.

Of the total number of complaints processed by VHA, VBA, and NCA, the highest number of complaints were filed on the basis of disability.³⁰⁵³ Although VA’s complaint data is not fully disaggregated, it shows a consistent level of complaints filed on the basis of sex during FY 2016-2018.³⁰⁵⁴

At the briefing before the Commission, Harvey Johnson, Deputy Assistant Secretary, ORM at VA testified to the measures the VA ORM has taken to uphold civil rights. Deputy Assistant Secretary Johnson also said during his testimony that ORM received 87 external complaints in the past year, none of which resulted in a finding that discrimination had occurred.³⁰⁵⁵ He further stated that his office’s budget grew in the past year and is slated to be increased again after the next round of

³⁰⁴⁷ 38 C.F.R. § 18.8(a).

³⁰⁴⁸ U.S. Dep’t of Veterans Affairs, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

³⁰⁴⁹ *Ibid.*

³⁰⁵⁰ *Ibid.*

³⁰⁵¹ *Ibid.*

³⁰⁵² *Ibid.*

³⁰⁵³ U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Exhibit 3, at 96-103 (updated Jun. 19, 2019).

³⁰⁵⁴ *Id.*

³⁰⁵⁵ *Id.* at 102-03; U.S. Dep’t of Veterans Affairs, Response to USCCR Affected Agency Review (Jun. 19, 2019), at 2 (noting that the total number of complaints referenced by Director Johnson should be 91 instead of 87, accounting for the addition of FY 2018 complaints, as Mr. Johnson was just referring to FY 2016-2017 complaints in his testimony).

appropriations.³⁰⁵⁶ He attributed the growth in his budget to the “business case” he has made for civil rights enforcement.³⁰⁵⁷

From FY 2016 – FY 2018, the Veterans Health Administration opened a total of 66 cases based on complaints, of which 22 included sex as one of the bases of the complaint.³⁰⁵⁸ Sixty-two of the cases had been closed as of time of the VA’s response. The complaint was resolved in 5 out of the 62 cases. In the remaining cases, there was no evidence to support the claim of discrimination, the complainant failed to respond, or the complainant withdrew.³⁰⁵⁹

In 2018, the VA’s Inspector General issued a report describing how veterans are routinely denied benefits related to claims for posttraumatic stress disorder related to military sexual trauma.³⁰⁶⁰ The report found that the VA incorrectly processed approximately 49% of denied claims related to military sexual trauma between April 2017 and September 2017.³⁰⁶¹ According to the annual report required under the Prison Rape Elimination Act (PREA), of the sexual assaults in the military reported in FY 2018, “the Department estimates 20,500 Service members, representing about 13,000 women and 7,500 men, experienced some kind of contact or penetrative sexual assault in 2018, up from approximately 14,900 in 2016.”³⁰⁶² The Inspector General’s report recommended that the VA implement protections and additional levels of review to ensure that claims are properly evaluated.³⁰⁶³

Effective Use of Enforcement Tools: Proactive Compliance Evaluation

ORM indicated that pursuant to 38 U.S.C. § 308(b)(7), ORM works with the VA administrations (VHA, VBA, and NCA) as well as other administration offices “to facilitate the enforcement of Civil Rights statutes, executive orders, and regulations,” and indicated that the use of compliance reviews is a tool for enforcement.³⁰⁶⁴ ORM also stated that it forwards external civil rights complaints to VA administrations to investigate.³⁰⁶⁵

³⁰⁵⁶ Johnson Testimony, *Federal Civil Rights Enforcement Briefing*, p. 127.

³⁰⁵⁷ Ibid. Note that Johnson, at the Commission’s briefing, stated that he expected his budget to increase in the coming year because of this business case. This appears to be in contradiction with the budget request that was made by the Trump Administration for the office, which was for a budget of \$0.

³⁰⁵⁸ U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Exhibit 3, at 96 (updated Jun. 19, 2019).

³⁰⁵⁹ *Id.* at 100.

³⁰⁶⁰ U.S. Dep’t. of Veterans Affairs, Office of Inspector General, *Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma, Report #17-05248-241*, pp. i-ii (Aug. 21, 2018), <https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf>.

³⁰⁶¹ Ibid.

³⁰⁶² U.S. Dep’t of Defense, *Annual Report on Sexual Assault in the Military, Fiscal Year 2018*, p. 3, https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

³⁰⁶³ Ibid., 14.

³⁰⁶⁴ See 38 U.S.C. § 308(b)(7); U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatory No. 2, at 9 (updated Jun. 19, 2019); see also *supra* note 3008.

³⁰⁶⁵ See *supra* note 3030.

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

ORM has statutory authority to so issue guidance and regulations.³⁰⁶⁶

In his testimony before the Commission, Director Johnson stated that ORM has recently adopted the “It’s on Us” campaign³⁰⁶⁷ as part of its effort to combat sexual harassment within the VA’s programs, and introduced both conscious and unconscious bias training.³⁰⁶⁸ The VA has struggled with addressing “an entrenched, sexist culture at many veterans [sic] hospitals” and other medical treatment centers as the agency is adapting to the needs of an increasing number of female veterans.³⁰⁶⁹ Some female veterans have stated that rather than face harassment at VA medical centers, they have sought treatment at private medical facilities, often at their own expense.³⁰⁷⁰ During the decade between 2005 and 2015, the percentage of female veterans seeking treatment at VA facilities has increased from 31.2% of female veterans to 41.1%.³⁰⁷¹ Additionally, LGBT women seeking treatment at VA facilities have reported harassment at higher rates than non-LGBT women veterans.³⁰⁷² ORM informed the Commission that VA’s Secretary received a letter from the House of Representatives Committee on Veterans Affairs in May 2019, inquiring as to VA’s progress on implementation of the “End Harassment” campaign “to ensure a safe and welcoming environment for both veterans and employees.”³⁰⁷³

The Center for Minority Veterans conducts outreach activities with minority Veteran stakeholders and coordinates outreach activities.³⁰⁷⁴ This outreach includes engaging with communities with a high-minority Veteran population, consulting with key representatives from major Veteran Service Organization, local agencies, and other Federal Agencies to increase outreach activities to designated minority Veteran groups.³⁰⁷⁵ Likewise, the Center for Women Veterans monitors outreach efforts targeting women veterans, other stakeholders, and Federal/state/community partners.³⁰⁷⁶ This includes ensuring that outreach material portray and target women veterans with inclusive images, messages, and branding in the media.³⁰⁷⁷

³⁰⁶⁶ 38 C.F.R. § 18.6; 38 C.F.R. § 23.605.

³⁰⁶⁷ It’s On Us, <https://www.itsonus.org/>.

³⁰⁶⁸ Johnson Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 101-02.

³⁰⁶⁹ Jennifer Steinhauer, “Treated Like a ‘Piece of Meat’: Female Veterans Endure Harassment at the V.A.,” *The New York Times*, Mar. 12, 2019, <https://www.nytimes.com/2019/03/12/us/politics/women-veterans-harassment.html>.

³⁰⁷⁰ Richard Sisk, “VA Struggles to Curb Harassment of Female Veterans at Medical Centers,” *Military.com*, Mar. 10, 2019, <https://www.military.com/daily-news/2019/03/10/va-struggles-curb-harassment-female-veterans-medical-centers.html>.

³⁰⁷¹ *Ibid.*

³⁰⁷² *Ibid.*

³⁰⁷³ Letter to Robert Wilkie, Secretary of Veterans Affairs, Re: Implementation of “End Harassment” campaign (May 10, 2019), p. 1 [hereinafter Letter to Wilkie Re: “End Harassment”].

³⁰⁷⁴ U.S. Dep’t of Veterans Affairs, Response to USCCR Interrogatories, Section VIII, Veterans Civil Rights Related Centers, Offices and Programs, at 62.

³⁰⁷⁵ *Ibid.*

³⁰⁷⁶ *Ibid.*, 63.

³⁰⁷⁷ *Ibid.*, 63.

ORM indicated that VA provides cultural competency, unconscious bias/implicit association, diversity and inclusion training to the VA workforce, including training focused on Veteran, disability, LGBT issues, generational issues, and emerging diversity and inclusion issues.³⁰⁷⁸ The VA also has launched education campaigns about civil rights issues. For example, the VA recently launched a new education campaign to raise awareness about sexual harassment, which involved VA facilities putting up posters reminding staff and other veterans using the facility that certain words or phrases constitute harassment.³⁰⁷⁹

Effectiveness of Interaction and Coordination with External Agencies and Organizations

ORM is VA's liaison with DOJ for external civil rights complaints received under the various civil rights laws it enforces.³⁰⁸⁰ As the liaison, ORM "is responsible for receiving external complaints, forwarding these complaints to the proper administration for investigation based on the nature of the complaint, and ensuring complaints in some cases are resolved by informal means."³⁰⁸¹

ORM indicated that VA's Office of Diversity and Inclusion runs Special Emphasis Programs intended "to ensure that agencies take affirmative steps to provide equal opportunity to minorities, women, and people with disabilities in all areas of employment" through internal and external initiatives.³⁰⁸² In addition, VA's Centers for Minority Veterans and Women Veterans have federal, state, and community partners that help conduct education and outreach to minority and women veterans.³⁰⁸³

Research, Data Collection, and Reporting

ORM receives data on discrimination that does not necessarily result in a formal complaint from surveys that are distributed to every person who received services at a VA facility.³⁰⁸⁴ At the Commission's briefing, Director Johnson emphasized that even if someone does not file a formal complaint, the person may write about an issue on that survey. The agency collects that data, and Johnson's office has access to that data. The office will use that data to anticipate where they may be issues bubbling up before "a gross violation."³⁰⁸⁵

VA reported that complaint information is tracked via an Excel spreadsheet/SharePoint case tracking system.³⁰⁸⁶ Information and data is collected, including name, contact information, basis

³⁰⁷⁸ *Ibid.*, Section IXI, VA Diversity and Inclusion (D&I) Strategic Plan FY 2017-2020, at 74.

³⁰⁷⁹ *See supra* note 3073.

³⁰⁸⁰ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 5.

³⁰⁸¹ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 1, at 9.

³⁰⁸² U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatories, Executive Summary, at 6 (updated Jun. 19, 2019).

³⁰⁸³ *See supra* notes 3074-3077.

³⁰⁸⁴ Johnson Testimony, *Federal Civil Rights Enforcement Briefing*, pp. 153-156.

³⁰⁸⁵ *Ibid.*

³⁰⁸⁶ U.S. Dep't of Veterans Affairs, Response to USCCR Interrogatory No. 11, at 17.

for complaint, issues, witnesses who can support the allegation(s), and remedy sought to resolve issue(s) or allegation(s).³⁰⁸⁷ VA reported that racial and ethnic data collected from complainants is not disaggregated.³⁰⁸⁸ VA also reported that its data collection procedures and case management protocol did not change over the fiscal years in question (FY 2016-2018).³⁰⁸⁹

The VA has an Office of Research and Development, which conducts research that aims to improve Veterans' health and wellbeing, to help develop effective care solutions for Veterans, among other things.³⁰⁹⁰

In February 2019, VA issued the results of a research study it had funded on the prevalence of harassment of women veterans at VA medical centers, also examining the impacts of delayed or missed care.³⁰⁹¹ The study found that a high level of harassment, and that “[w]omen who reported harassment in the current study were more likely to feel unwelcome at VA, a measure that has been associated in prior research with unmet health care need,”³⁰⁹² but it only covered 12 locations in its randomized sample.³⁰⁹³ The House of Representatives Committee on Veterans Affairs applauded recent published research that VA funded,³⁰⁹⁴ examining the prevalence of harassment on women veterans and the impacts on their medical care, and recognized VA for its swift response with the initial implementation of its “End Harassment” campaign.³⁰⁹⁵ However, the House Committee letter pointed out that “training regarding harassment of or by veterans is not mandatory, and that it is possible there are employees across VA that have been untouched by direct intervention programs,” and “[f]urthermore, because all reporting is done locally, there is no accountability regarding facilities that continue to fail to respond to sexual harassment.”³⁰⁹⁶

³⁰⁸⁷ Ibid., 18.

³⁰⁸⁸ Ibid., 18.

³⁰⁸⁹ Ibid., 18.

³⁰⁹⁰ VA, “About the Office of Research & Development,” <https://www.research.va.gov/about/default.cfm>.

³⁰⁹¹ Ruth Klap, PhD, Jill E. Darling, MSHS, Alison B. Hamilton, PhD, MPH, Danielle E. Rose, PhD, MPH, Karen Dyer, PhD, MPH, Ismelda Canelo, MPA, Sally Haskell, MD, Elizabeth M. Yano, PhD, MSPH, *Prevalence of Stranger Harassment of Women Veterans at Veterans Affairs Medical Centers and Impacts on Delayed and Missed Care*, Women's Health Issues 29-2 (2019), pp. 107-115, [https://www.whijournal.com/article/S1049-3867\(18\)30194-4/pdf](https://www.whijournal.com/article/S1049-3867(18)30194-4/pdf).

³⁰⁹² Ibid. 113.

³⁰⁹³ Ibid., *passim*.

³⁰⁹⁴ See *supra* note 3073.

³⁰⁹⁵ Letter to Wilkie Re: “End Harassment,” *supra* note 3073, at 1.

³⁰⁹⁶ Ibid., 1-2.

Chapter 12: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights

Legal Authority and Responsibility

Congress established the U.S. Department of Agriculture (USDA) in 1862³⁰⁹⁷ with the mission to:

[A]cquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human nutrition, in the most general and comprehensive sense of those terms, and to procure, propagate, and distribute among the people new and valuable seeds and plants.³⁰⁹⁸

In 1994, Congress created the position of Assistant Secretary of Agriculture for Civil Rights within USDA, and delegated to the Assistant Secretary responsibility for:

- (1) ensuring compliance with all civil rights and related laws by all agencies and under all programs of the Department;
- (2) coordinating administration of civil rights laws (including regulations) within the Department for employees of, and participants in, programs of the Department; and
- (3) ensuring that necessary and appropriate civil rights components are properly incorporated into all strategic planning initiatives of the Department and agencies of the Department.³⁰⁹⁹

USDA is currently led by Secretary Sonny Perdue, who was sworn into office on April 25, 2017.³¹⁰⁰ The Office of the Assistant Secretary for Civil Rights (OASCR) provides guidance for USDA's civil rights programs and enforces laws and regulations that prohibit discrimination on the bases of race, color, national origin, sex, disability, religion, age, genetic information, equal pay compensation, and reprisal in employment and the provision of government services.³¹⁰¹

³⁰⁹⁷ 7 U.S.C. §2201, Pub. L. 92-419, 12 Stat. 387, U.S. Dep't of Agriculture, "USDA Celebrates 150 Years," <https://www.usda.gov/our-agency/about-usda/history>.

³⁰⁹⁸ 7 U.S.C. §2201.

³⁰⁹⁹ *Id.* § 6918(c), Pub. L. 103-354, 108 Stat. 3212 (1994).

³¹⁰⁰ 7 U.S.C. § 2202, 25 Stat. 659 (1889) (establishing the Dep't of Agriculture and the position of Secretary of Agriculture); U.S. Dep't of Agriculture, "Sonny Sworn in as 31st U.S. Secretary of Agriculture," <https://www.usda.gov/media/press-releases/2017/04/25/sonny-perdue-sworn-31st-us-secretary-agriculture>.

³¹⁰¹ 7 U.S.C. § 6918, PUB. L. 107-171, 116 STAT. 518 (2002).

Through OASCR, USDA enforces the following regulations, executive orders, and statutes:³¹⁰²

- Title VI of the Civil Rights Act of 1964, as amended³¹⁰³
- Title VII of the Civil Rights Act of 1964³¹⁰⁴
- Section 504 of the Rehabilitation Act of 1973³¹⁰⁵
- Americans With Disabilities Act of 1990³¹⁰⁶
- The Age Discrimination Act of 1975³¹⁰⁷
- Title IX of the Education Amendments Act of 1972³¹⁰⁸
- Civil Rights Restoration Act of 1987, as amended³¹⁰⁹
- Title VIII of the Civil Rights Act of 1968, as amended³¹¹⁰
- Food Stamp Act of 1977, as amended³¹¹¹
- Equal Credit Opportunity Act of 1974³¹¹²
- Title VII of the Consumer Protection Act of 1974³¹¹³
- 7 C.F.R. § 2, Subpart C, Section 2.25 – Delegations of Authority by the Secretary of Agriculture to the Assistant Secretary for Civil Rights
- 7 C.F.R. § 2, Subpart P, Delegation of Authority by the Assistant Secretary of Agriculture
- 7 C.F.R. § 15, Nondiscrimination
- 7 C.F.R. § 15a, Education Programs or Activities Receiving Federal or Benefitting From Federal Financial Assistance
- 7 C.F.R. § 15b, Nondiscrimination on the Basis of Handicap in the Programs and Activities Receiving Federal Financial Assistance
- 7 C.F.R. § 15c, Nondiscrimination on the Basis of Age in Programs and Activities Receiving Federal Financial Assistance
- 7 C.F.R. § 15d, Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture

³¹⁰² U.S. Dep't of Agriculture, Office of Civil Rights, Departmental Regulation No. 4330-002, Nondiscrimination in Programs and Activities Receiving Federal Financial Assistance From USDA, (Mar. 3, 1999), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4330-002.htm>; U.S. Dep't of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4330-003, Nondiscrimination in USDA-Conducted Programs and Activities, (Oct. 5, 2015), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204330-003%20Nondiscrimination%20in%20USDA%20Conducted%20Programs%20and%20Activities.pdf> [hereinafter USDA OASCR, Departmental Regulation No. 4330-003].

³¹⁰³ 42 U.S.C. §§ 2000d – 2000d-7 and implementing regulations at 7 C.F.R. Part 15.

³¹⁰⁴ 42 U.S.C. § 2000e *et. seq.* and implementing regulations at 29 C.F.R. Part 1601.

³¹⁰⁵ 29 U.S.C. § 794 and implementing regulations at 7 C.F.R. Part 15b.

³¹⁰⁶ 42 U.S.C. § 12101 *et. seq.*

³¹⁰⁷ *Id.* § 6101 *et seq.* and implementing regulations at C.F.R. Part 15c.

³¹⁰⁸ 20 U.S.C. §§ 1681-88 and implementing regulations at 7 C.F.R. Part 15a.

³¹⁰⁹ Pub. L. 100-259, as amended by the Civil Rights Restoration Act of 1991, Pub. L. 102-166.

³¹¹⁰ 42 U.S.C. § 3601 *et. seq.*

³¹¹¹ 7 U.S.C. § 2011 *et. seq.*

³¹¹² 15 U.S.C. § 1691 *et. seq.* and implementing regulations at 12 C.F.R. Part 1002

³¹¹³ 15 U.S.C. §§ 1691-1691f.

- 7 C.F.R. § 15e, Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the United States Department of Agriculture
- 12 C.F.R. § 1002, Equal Credit Opportunity Regulation B
- 45 C.F.R. § 90 – Nondiscrimination on the Basis of Age in Programs and Activities Receiving Federal Financial Assistance
- 28 C.F.R. § 42, Subpart F – Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs
- 28 C.F.R. § 50.3 – Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964
- 28 C.F.R. § 35 – Nondiscrimination on the Basis of Disability in State and Local Government Services
- 29 C.F.R. § 1691; 28 C.F.R. § 42, Subpart H – Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance
- 28 C.F.R. § 1640 – Procedures for Coordinating the Investigation of Complaints or charges of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973
- 28 C.F.R. § 41 – Implementation of Executive Order 12,550, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs
- 28 C.F.R. § 35, Subpart F – Compliance Procedures
- Executive Order 12,250, Leadership and Coordination of Nondiscrimination Laws³¹¹⁴
Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations³¹¹⁵
- Executive Order 13,216, Amendment to Executive Order 13,125, Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs.³¹¹⁶
- Executive Order 13,160, Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs³¹¹⁷
- Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency.³¹¹⁸

Enforcement Tools

The agency enforcement tools OASCR has specific legal authority to use are:

- Complaint resolution³¹¹⁹
- Agency-initiated charges³¹²⁰

³¹¹⁴ Exec. Order No. 12,250, 45 Fed. Reg. 72,995 and implementing regulations at 28 C.F.R. Part 41.

³¹¹⁵ Exec. Order No. 12,898, 59 Fed. Reg. 7,629.

³¹¹⁶ Exec. Order No. 13,216, 66 Fed. Reg. 31,373.

³¹¹⁷ Exec. Order No. 13,160, 65 Fed. Reg. 39,775.

³¹¹⁸ Exec. Order No. 13,166, Fed. Reg. 50,121.

³¹¹⁹ 7 C.F.R. §§ 15.6, 15.8(a) 15a.605, 15b.42, 15c.7(e), 15d.5, 15e.17(d).

³¹²⁰ *Id.* § 15.8(a).

- Proactive compliance evaluations³¹²¹
- Guidance or other policy documents³¹²²
- Regulations³¹²³
- Technical assistance³¹²⁴
- Publicity³¹²⁵
- Research, data collection, and reporting³¹²⁶
- Collaboration/partnership with state/local agencies³¹²⁷
- Collaboration/partnership with other federal agencies³¹²⁸
- Strategic Planning³¹²⁹
- Annual Reports³¹³⁰

While USDA OASCR does not have specific legal authority for other tools identified by the Commission, nothing prohibits USDA OASCR from, for example, engaging in outreach to stakeholders, as described in further detail below.

Budget and Staffing

Budget

USDA's federal budget documents include funding requests for the "Office of Civil Rights (OCR)" at USDA, which indicate that "OCR seeks innovative methods to make progress towards meeting the regulatory standards for processing the Department's Equal Employment Opportunity (EEO) and program complaints."³¹³¹ USDA's budget documents did not break down the amount of funds dedicated specifically to the processing of external complaints. However, testimony indicates that in 2018, 36 out of approximately 126 OASCR employees were dedicated to external civil rights enforcement (or "program complaints"),³¹³² indicating that perhaps up to 30 percent of the budget below may be spent on external enforcement.

³¹²¹ *Id.* §§ 15.5, 15b.42, 15c.5, 15d.4, 15a.605.

³¹²² *Id.* § 15.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

³¹²³ 7 U.S.C. § 6918(c); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations).

³¹²⁴ 7 C.F.R. § 15.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

³¹²⁵ 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information).

³¹²⁶ 7 C.F.R. § 15d.4(b); 28 C.F.R. § 42.406 (regarding data collection and information sharing)

³¹²⁷ 7 C.F.R. § 15.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

³¹²⁸ 28 C.F.R. § 42.413

³¹²⁹ GPRA Modernization Act of 2010, H.R. 2142, 11th Cong. § 1115(b).

³¹³⁰ 7 U.S.C. § 2207.

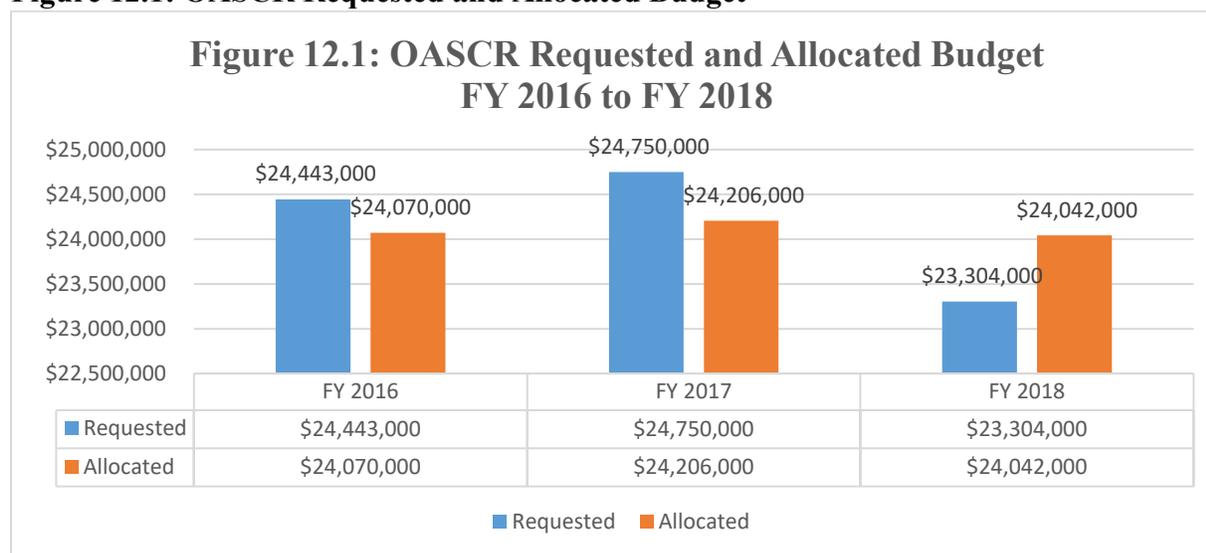
³¹³¹ U.S. Dep't of Agriculture, *2018 President's Budget, Office of Civil Rights*, p. 11-1, <https://www.obpa.usda.gov/11ocrexnotes2018.pdf> [hereinafter USDA, *2018 President's Budget*].

³¹³² See *infra* note 3136 (discussing testimony of Associate Asst. Secretary for Civil Rights Winona Lake Scott regarding 36 employees dedicated to "program" complaints processing and related issues); Cf. *infra* notes 3133-3136.

As of September 30, 2016, OASCR had 131 FTEs, all located in Washington, DC.³¹³³ As of September 30, 2017, this number was 133 FTEs.³¹³⁴ The number of FTEs for FY 2018 was projected to decrease slightly to 126.³¹³⁵ In her testimony before the Commission, Associate Assistant Secretary for Civil Rights Winona Lake Scott indicated in November 2018 that OASCR had 36 employees devoted to external or program enforcement activities, “ensuring compliance with civil rights statutes, executive orders, and regulations through our core enforcement functions, such as complaint processing, civil rights impact analyses, compliance reviews, and training.”³¹³⁶

As illustrated in Figure 12.1, in FY 2016, OASCR requested \$24.44 million,³¹³⁷ which increased slightly in FY 2017 to \$24.75 million,³¹³⁸ and fell to \$23.30 million in FY 2018.³¹³⁹ In FY 2016, Congress allocated OASCR \$24.07 million,³¹⁴⁰ which rose slightly to \$24.20 million in FY 2017,³¹⁴¹ and Congress allocated an estimated \$24.04 million in FY 2018 through the annualized continuing resolution.³¹⁴²

Figure 12.1: OASCR Requested and Allocated Budget



Source: Dep’t of Agriculture, FY 2016 Explanatory Notes, Office of Civil Rights, 11-3, <https://www.obpa.usda.gov/11ocr2016notes.pdf>; Dep’t of Agriculture, FY 2017 President’s Budget Office of Civil Rights, 11-4, <https://www.obpa.usda.gov/11ocr2017notes.pdf>; Dep’t of Agriculture, FY 2018 President’s Budget Office of Civil Rights, 11-3, <https://www.obpa.usda.gov/11ocrexnotes2018.pdf>; Dep’t of Agriculture, FY 2019 President’s Budget Office of Civil Rights, 11-4, <https://www.obpa.usda.gov/11ocr2019notes.pdf>.

³¹³³ USDA, *2018 President’s Budget*, *supra* note 3131, at 11-1.

³¹³⁴ U.S. Dep’t of Agriculture, *2019 President’s Budget, Office of Civil Rights*, p. 11-1, <https://www.obpa.usda.gov/11ocr2019notes.pdf> [hereinafter USDA, *2019 President’s Budget*].

³¹³⁵ *Ibid.*

³¹³⁶ Scott Testimony, *Federal Civil Rights Enforcement Briefing*, p. 107.

³¹³⁷ USDA, *2018 President’s Budget*, *supra* note 3131, at 11-3.

³¹³⁸ *Ibid.*, 11-4.

³¹³⁹ *Ibid.*, 11-3.

³¹⁴⁰ USDA, *2019 President’s Budget*, *supra* note 3134, at 11-4.

³¹⁴¹ *Ibid.*

³¹⁴² *Ibid.*

During fiscal years 2016 and 2017, OASCR requested more than it was allocated (\$24,443,000 vs. \$24,070,000 in FY 2016 and \$24,750,000 vs. \$24,206,000 in FY 2017).³¹⁴³ In response to Commission interrogatories, OASCR indicated that it believes it has sufficient budget and staffing levels to manage its caseload, and that its allocated budget has not deviated significantly from the requested budget for the agency.³¹⁴⁴

Assessment

Prioritization of Civil Rights Agency-wide

USDA Departmental Regulation No. 4330-003 indicates that “OASCR shall provide the overall leadership, coordination, and direction in USDA’s civil rights programs,” which includes cooperation with the various divisions of the agency to investigate complaints and resolving any other issues of noncompliance.³¹⁴⁵

Congress created the position of Assistant Secretary of Agriculture for Civil Rights by passing the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994.³¹⁴⁶ On January 28, 2019, Secretary Perdue appointed Naomi Earp as Deputy Assistant Secretary for Civil Rights, a position that does not require Senate confirmation,³¹⁴⁷ and she was sworn in as Deputy Assistant Secretary for Civil Rights on February 6, 2019.³¹⁴⁸ Ms. Earp now leads OASCR in her capacity as Deputy Assistant Secretary, as no Assistant Secretary has been confirmed by the Senate.³¹⁴⁹ Because an Assistant Secretary has not been confirmed, OASCR communicates through the Deputy Assistant Secretary directly to the Secretary of USDA.³¹⁵⁰ As will be discussed herein, after proposing shutting down the office altogether, the Trump Administration instead reorganized OASCR effective October 1, 2018.³¹⁵¹ The memorandum announcing the reorganization included an updated OASCR organizational chart, which does not include the appointed position of Deputy Assistant Secretary for Civil Rights, the position that Ms. Earp, the most senior official at OASCR, currently holds.³¹⁵²

³¹⁴³ See *supra* notes 3137-3142.

³¹⁴⁴ U.S. Dep’t of Agriculture, Response to USCCR Interrogatories, at 5.

³¹⁴⁵ USDA OASCR, Departmental Regulation No. 4330-003, *supra* note 3102, at 4-5.

³¹⁴⁶ 7 U.S.C. § 6918, Pub. L. 103-354, 108 Stat. 3212 (1994).

³¹⁴⁷ U.S. Dep’t of Agriculture, “Purdue Selects Three Senior Leaders at USDA,” <https://www.usda.gov/media/press-releases/2019/01/28/perdue-selects-three-senior-leaders-usda>.

³¹⁴⁸ U.S. Dep’t of Agriculture, <https://www.ascr.usda.gov/>; see also Dan Flynn, “Brashears, Earp, Hutchins start work today at USDA,” *Food Safety News*, Jan. 29, 2019, <https://www.foodsafetynews.com/2019/01/brashears-earp-hutchins-start-work-today-at-usda/>.

³¹⁴⁹ U.S. Dep’t of Agriculture, “OASCR Leadership and Organization,” <https://www.ascr.usda.gov/oascr-leadership-and-organization> (accessed Jun. 17, 2019).

³¹⁵⁰ U.S. Dep’t of Agriculture, “USDA Organization Chart,” <https://www.usda.gov/sites/default/files/documents/usda-organization-chart.pdf>.

³¹⁵¹ U.S. Dep’t of Agriculture, Memorandum Re: Office of the Assistant Secretary for Civil Rights Reorganization (Nov. 8, 2018), <https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf> [hereinafter USDA, OASCR Reorganization Memorandum]; see also *infra* notes 3153-3169.

³¹⁵² USDA, OASCR Reorganization Memorandum, *supra* note 3151.

In March 2018, USDA solicited formal comments on a proposed realignment of the OASCR, with the professed objective to “improve customer service, better align functions within the organization, and ensure improved consistency, resource management, and strategic decision-making.”³¹⁵³ USDA indicated that this proposal was in line with Executive Order 13,781, the Comprehensive Plan for Reorganizing the Executive Branch,³¹⁵⁴ and uses the authority of the Secretary to reorganize.³¹⁵⁵ The reorganization plan, which ultimately was not adopted in full, proposed redistributing OASCR’s civil rights duties to various departments throughout the agency, including the Office of the Inspector General (OIG).³¹⁵⁶ This proposed action would have eliminated the Deputy Assistant Secretary for Civil Rights, the Policy Division, the Training and Cultural Transformation Division, and the Early Resolution and Complaint Division. It would have reclassified the Senior Executive Service (SES) Director for the Office of Adjudication as the SES Executive Director for Civil Rights Enforcement who would have been responsible for additional tasks beyond civil rights complaint management, such as budget, contracting and procurement, human resources management, facilities management, strategic planning, and Continuity of Operations.³¹⁵⁷

Some critics of this reorganization raised concerns that USDA was proposing to eliminate a number of positions, but had not done a thorough assessment of need, making the elimination of positions premature.³¹⁵⁸ Some critics are concerned that USDA did not adequately justify why certain positions or departments are being eliminated or consolidated. The USDA Inspector General submitted comments regarding this restructuring, encouraging USDA to keep in mind “OIG’s unique mission and independence” when considering this realignment, and indicated that OIG will continue to examine “the effectiveness of this realignment as part of our future audit planning process.”³¹⁵⁹

OASCR was reorganized effective October 1, 2018.³¹⁶⁰ Figure 12.2 displays OASCR’s previous organizational structure, prior to October 1, 2018, and figure 12.3 displays what has changed with the reorganization. Notably, the reorganization did not include the proposed dilution of OASCR’s enforcement authority.³¹⁶¹ The reorganization also elevated the civil rights enforcement functions of OASCR, indicating a prioritization of complaint investigation and enforcement. According to a memorandum from Winona Lake Scott, Acting Deputy Assistant Secretary for Civil Rights, to the Subcabinet Officials, the reorganization was meant to “meet Secretary Perdue’s vision for a more

³¹⁵³ Strengthening Civil Rights Management, 83 Fed. Reg. 10,825.

³¹⁵⁴ Executive Order 13,781, Comprehensive Plan for Reorganizing the Executive Branch, 82 Fed. Reg. 13,959 (Mar. 16, 2017).

³¹⁵⁵ Reorganization Plan No. 2 of 1953 § 4(a), as amended, Pub. L. 103–354, title II, §218(e)(1), 108 Stat. 3213 (Oct. 13, 1994).

³¹⁵⁶ Strengthening Civil Rights Management, 83 Fed. Reg. 10,825.

³¹⁵⁷ *Id.*

³¹⁵⁸ David Lipsetz, Housing Assistance Council, Comments on “Strengthening Civil Rights Management” Request for Information, 83 Fed. Reg. 10,825 (Mar. 24, 2018).

³¹⁵⁹ Phyllis K. Fong, USDA Inspector General, Comments on “Strengthening Civil Rights Management” Request for Information, 83 Fed. Reg. 10,825 (Mar. 23, 2018).

³¹⁶⁰ USDA, OASCR Reorganization Memorandum, *supra* note 3151.

³¹⁶¹ 7 U.S.C. § 6918.

efficient and effective business operation” and “streamline the delivery of equal employment opportunity and program complaint services at the Mission Area level and ensure USDA projects a unified voice on civil rights issue which touch program recipients, customers, applicants and employees.”³¹⁶² The memorandum further explains that the 2018 restructuring was meant to target the following eight priorities:

- 1) Elevating the USDA Agency reporting structure of civil rights functions to the mission area-level;
- 2) Strengthening OASCR's role in providing leadership to the mission area civil rights functions;
- 3) Implementing a timely, fair, transparent and consistent approach to addressing all complaints;
- 4) Directing effective, robust and compliant mandatory civil rights training;
- 5) Monitoring and evaluating the implementation of reasonable accommodation throughout the Department;
- 6) Collaborating with Human Resources on appropriate issues affecting civil rights;
- 7) Determining optimum staffing levels to implement civil rights functions department-wide; and
- 8) Empowering mission areas and staff offices to implement civil rights mandates.³¹⁶³

After the October 2018 reorganization, OASCR consists of five divisions:³¹⁶⁴

- Conflict Complaints Division (CCD)³¹⁶⁵
- Center for Civil Rights Enforcement (CCRE);³¹⁶⁶
- Center for Civil Rights Operations (CCRO);³¹⁶⁷
- Data and Records Management (DRMD);³¹⁶⁸
- Program Planning and Accountability (PPAD).³¹⁶⁹

³¹⁶² U.S. Dep’t of Agriculture, “Office of the Assistant Secretary for Civil Rights,”

<https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>.

³¹⁶³ Ibid.

³¹⁶⁴ U.S. Dep’t of Agriculture Response to USCCR Affected Agency Review (Jul. 8, 2019) (on file).

³¹⁶⁵ CCD monitors agreement compliance; manages and administers the EEO complaint process only for conflict of interest complaints filed against the Office of the Secretary and other senior leaders; drafts Final Agency Decisions (FAD) and Civil Rights Impact Analyses (CRIA); supports EEOC Management Directive; provide guidance to the office. See U.S. Dep’t of Agriculture, “Conflict Complaints Division,” <https://www.ascr.usda.gov/conflict-complaints-division>.

³¹⁶⁶ CCRE manages the Employment Complaints Division (ECD), the Employment Investigation Division (EID), the Program Complaints Division (PCD), and the Program Adjudication Division (PAD).

³¹⁶⁷ “CCRO provides policy, compliance, training and data and record management services and manages the Compliance Division, Policy Division, and Training Division.

³¹⁶⁸ DRMD oversees the Civil Rights Enterprise System (CRES) which tracks all employment and program complaints of discrimination, fields all email and telephonic requests for status updates on complaints, and serves as the repository for all electronic and paper files in OASCR.

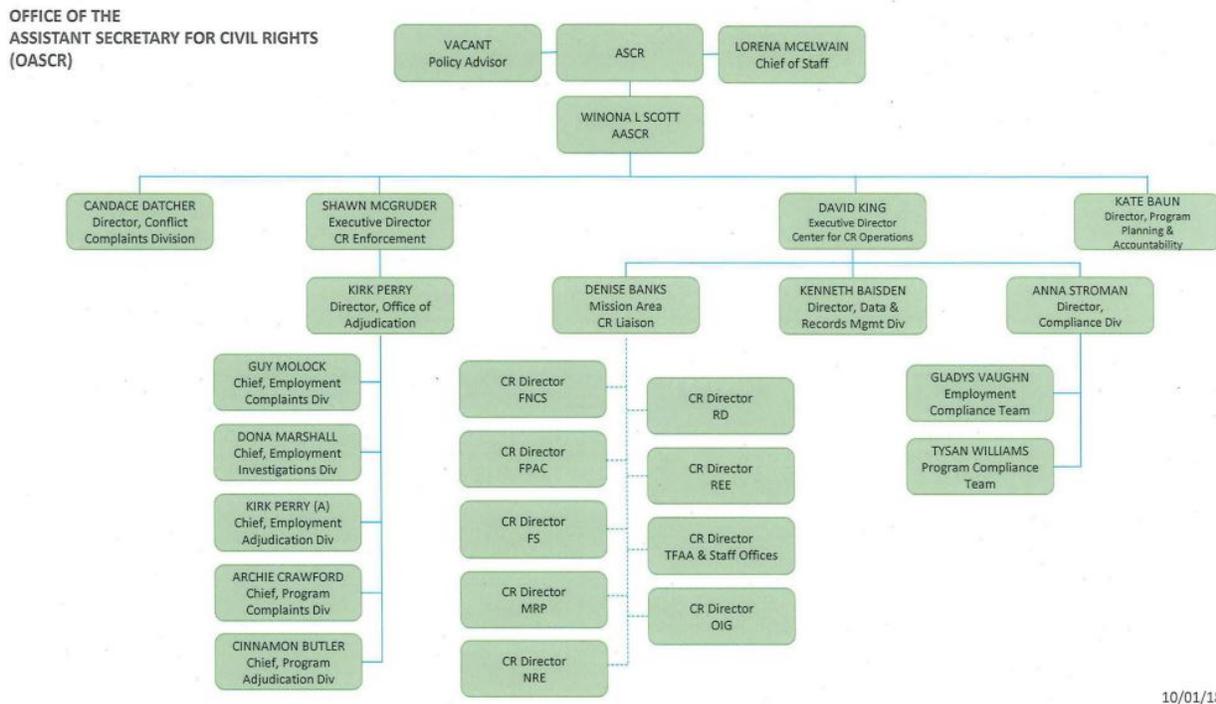
³¹⁶⁹ PPAD is responsible for coordinating all OIG and GAO audits and performs human resources functions.

Figure 12.2: OASCR Organizational Structure Prior to October 1, 2018



Source: U.S. Department of Agriculture, “OASCR Organizational Chart,” https://www.ascr.usda.gov/sites/default/files/OASCR-Off_Organization_Chart_7-31-15_508.pdf.

Figure 12.3: OASCR Organizational Structure Effective October 1, 2018



Source: U.S. Dep’t of Agriculture, “Office of the Assistant Secretary for Civil Rights,” 2, <https://www.ascr.usda.gov/sites/default/files/OASCR-Reorganization.pdf>.

As discussed below, OASCR has had mixed success in prioritizing civil rights enforcement throughout USDA over the years, as evidenced by civil rights class action lawsuits brought against USDA, resulting during the Obama Administration in over one billion dollars paid out to farmers and ranchers whom USDA discriminated against in various programs.³¹⁷⁰

Commission reports published in 1965, 1982, and 1990 found discrimination in both program delivery and employment at USDA, and “that civil rights abuses at the USDA were actively contributing to the decline in minority farm ownership.”³¹⁷¹ USDA itself published a pamphlet noting that:

For decades, the United States Department of Agriculture had an unfortunate and checkered history with regards to civil rights. Reports going as far back as the 1960s have found discrimination at USDA in both program delivery and the treatment of employees, and we are the subject of a number of lawsuits brought by minority farmers and ranchers alleging discrimination.³¹⁷²

USDA added that “between 2001 and 2008, the [George W.] Bush Administration OASCR found merit to only one complaint of program discrimination” out of more than 14,000 civil rights program complaints filed at USDA during that same time period.³¹⁷³

The George W. Bush Administration ended field investigations of discrimination complaints in favor of conducting investigations solely over the phone.³¹⁷⁴ This change, in part, contributed to most pending administrative complaints being dropped by USDA due to the statute of limitations expiring.³¹⁷⁵ In April of 2009, GAO testified before Congress regarding recommendations to the new administration to address long-standing civil rights issues at USDA.³¹⁷⁶ The testimony, and a report on the same topic issued by GAO in October of 2008, recommended that OASCR better manage strategic planning, with an emphasis on more stakeholder input and linking funding to

³¹⁷⁰ See *infra* notes 3171-3172.

³¹⁷¹ “Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration,” p. 11, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_011689.pdf [hereinafter “Civil Rights at USDA: A Backgrounder of Efforts by the Obama Administration”]. For discussion of contemporary effects of this longstanding race discrimination perpetrated by USDA without mitigation from its civil rights office, see also Vann R. Newkirk II, “The Great Land Robbery,” *The Atlantic*, September 2019, <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/> [hereinafter Newkirk, “The Great Land Robbery”].

³¹⁷² “Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration,” *supra* note 3171, at 1.

³¹⁷³ *Ibid.*, 2.

³¹⁷⁴ *Ibid.*, 11.

³¹⁷⁵ *Ibid.*, 11.

³¹⁷⁶ U.S. Government Accountability Office, *Testimony as prepared Before the Subcommittee on Department Operations, Oversight, Nutrition and Forestry, Committee on Agriculture, House of Representatives: U.S. Department of Agriculture Recommendations and Options Available to the New Administration and Congress to Address Long-Standing Civil Rights Issues*, Apr. 29, 2009, <https://www.gao.gov/assets/130/122370.pdf>.

anticipated civil rights results.³¹⁷⁷ The report also recommended that Congress take action by implementing a statutory performance agreement that would require OASCR to meet certain performance goals by law.³¹⁷⁸ GAO suggested that Congress provide for an oversight board to oversee performance of USDA civil rights activities.³¹⁷⁹ Finally, the GAO report recommended that the Secretary of USDA explore appointing an ombudsman to address external and internal civil rights concerns.³¹⁸⁰

During the Obama Administration, in response to long-standing civil rights deficiencies at USDA, then-Secretary Vilsack commissioned a separate, independent civil rights assessment of USDA which was published in 2011.³¹⁸¹ After receiving the results of the independent assessment, USDA took several steps to improve its civil rights programs, including upgrading OASCR's complaint tracking and processing system, and reducing the number of open civil rights complaints at OASCR.³¹⁸²

During the Obama Administration, USDA settled several long-standing class action lawsuits brought by women, black, Latino, and Native American farmers in an effort to remedy some of the longstanding discriminatory practices at USDA.³¹⁸³ The 2010 Keepseagle consent decree made \$680 million available to over 3,600 Native American farmers, who alleged that they had been unfairly denied loans by the USDA.³¹⁸⁴ The agreement addressed discrimination claims made between 1981 and 1999, and contained a number of substantive requirements USDA must fulfill, including creating a debt forgiveness policy, establishing moratoria on foreclosures of claimants' farms, and implementing a range of programmatic relief measures.³¹⁸⁵

Also in 2010, USDA entered into the Pigford II (*In re Black Farmers Discrimination Litigation*) court-ordered settlement agreement, which totaled \$1.25 billion, including payments of \$870

³¹⁷⁷ U.S. Government Accountability Office, *Report to Congressional Requesters: U.S. Department of Agriculture, Recommendations and Options to Address Management Deficiencies in the Office of the Assistant Secretary for Civil Rights*, October 2008, pp. 5-6, <https://www.gao.gov/assets/290/282835.pdf>.

³¹⁷⁸ *Ibid.*, 6-7.

³¹⁷⁹ *Ibid.*, 7.

³¹⁸⁰ *Ibid.*, 7.

³¹⁸¹ U.S. Department of Agriculture, *Independent Assessment of the Delivery of Technical and Financial Assistance Civil Rights Assessment*, Mar. 31, 2011, http://www.federationsoutherncoop.com/pigford/research/Civil_Rights_Assessment_Executive_Summary.pdf.

³¹⁸² Tom Vilsack, "The People's Department: A New Era for Civil Rights at USDA," *Medium*, Aug. 2, 2016, <https://medium.com/usda-results/https-medium-com-usda-results-chapter-8-b57f91b64d49> [hereinafter Vilsack, "The People's Department"]; "Civil Rights at USDA: A Background on Efforts by the Obama Administration," *supra* note 3171, at 3.

³¹⁸³ Vilsack, "The People's Department," *supra* note 3182.

³¹⁸⁴ Order on Plaintiffs' Motion for Final Approval of Settlement, *Keepseagle v. Vilsack*, No. 99-3119 (D.D.C. filed April 28, 2011); Bill Chappell, "U.S. Reaches \$680M Deal With Native American Farmers," *NPR*, Oct. 19, 2010, <https://www.npr.org/sections/thetwo-way/2010/10/19/130678317/u-s-reaches-deal-with-native-american-farmers>.

³¹⁸⁵ U.S. Dep't of Justice, Office of Public Affairs, "Attorney General Holder and Agriculture Secretary Vilsack Announce Settlement Agreement with Native American Farmers Claiming Discrimination by USDA," (Oct. 19, 2010) <https://www.justice.gov/opa/pr/attorney-general-holder-and-agriculture-secretary-vilsack-announce-settlement-agreement>.

million to 18,310 black farmers and ranchers.³¹⁸⁶ When eligible farmers did not meet the claims deadline of the settlement agreement of *Pigford I* (*Pigford v. Glickman*³¹⁸⁷), which compensated black farmers for USDA's discrimination against them in the 1980s and 1990s, Congress extended relief for claimants who had submitted a late-filing request and had not yet received a merits determination.³¹⁸⁸ These individuals were grouped into a new, single class and became the Plaintiffs of *Pigford II*.³¹⁸⁹ In addition to the \$1.25 billion compensation scheme, the agreement required a moratorium on foreclosures of claimants' farms.³¹⁹⁰ In 2011, USDA entered into a third settlement, addressing discrimination claims of Latino and women farmers and ranchers, and paying out over \$195 million to 3,144 claimants.³¹⁹¹ The settlement required establishment of a loan forgiveness program for successful claimants, among other terms.³¹⁹² Pursuant to the settlement agreement *In re: Black Farmers Discrimination Litigation*, USDA established an Office of the Ombudsperson dedicated to helping identify systemic issues related to farmers and ranchers for USDA programs,³¹⁹³ however the office sunset³¹⁹⁴ on April 26, 2019, after final disbursements in the case were approved in 2013, and does not appear to be active at the time of this report's writing.³¹⁹⁵

USDA's civil rights policy statement has changed dramatically in recent years. During the Obama Administration, then-Secretary Vilsack updated the USDA Civil Rights Policy Statement to include gender identity and gender expression stating, "Our non-discrimination regulation for our conducted programs now adds protection from discrimination with respect to two new protected

³¹⁸⁶ Order, *In re Black Farmers Discrimination Litigation*, No. 08-mc-0511 (D.D.C. filed Aug. 8, 2008), http://blackfarmercase.com/sites/default/files/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf; see also, Congressional Research Service, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, prepared by Tadlock Cowan and Jody Feder, May 29, 2013, <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf> [hereinafter CRS, *The Pigford Cases*].

³¹⁸⁷ *Pigford v. Glickman*, No. 98-1693 (D.D.C. 1999).

³¹⁸⁸ CRS, *The Pigford Cases*, *supra* note 3186; U.S. Dep't of Justice, Office of Public Affairs, "Department of Justice and USDA Announce Historic Settlement in Lawsuit by Black Farmers Claiming Discrimination by USDA," (Feb. 18, 2010) <https://www.justice.gov/opa/pr/department-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>.

³¹⁸⁹ CRS, *The Pigford Cases*, *supra* note 3186.

³¹⁹⁰ U.S. Dep't of Justice, Office of Public Affairs, "Press Release: Department of Justice and USDA Announce Historic Settlement in Lawsuit by Black Farmers Claiming Discrimination by USDA," Feb. 18, 2010, <https://www.justice.gov/opa/pr/department-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming>.

³¹⁹¹ Vilsack, "The People's Department," *supra* note 3182; U.S. Dep't of Agriculture, "Press Release: "Agriculture Secretary Vilsack and Assistant Attorney General West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers," Feb. 25, 2011.

³¹⁹² *Ibid*.

³¹⁹³ Settlement Agreement, *In re: Black Farmers Discrimination Litigation*, 1:08-mc-00511 at *32 (Filed May 13, 2011) <https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>.

³¹⁹⁴ A sunset provision establishes a date on which an agency or office will expire absent specific reauthorization.

³¹⁹⁵ Settlement Agreement, *In re: Black Farmers Discrimination Litigation*, 1:08-mc-00511 (Filed May 13, 2011) <https://www.blackfarmercase.com/Documents/SettlementAgreement.pdf>; U.S. Dep't of Agriculture, "Office of the Ombudsperson," <https://www.usda.gov/our-agency/staff-offices/office-ombudsperson> (accessed Jun. 17, 2019).

bases: political beliefs and gender identity.”³¹⁹⁶ The current USDA Civil Rights Policy Statement does not specifically include those terms, instead committing that “Doing right means treating all people equally, regardless of race, religion, gender, national origin, or any other characteristic.”³¹⁹⁷

However, after Obama-era changes were implemented at OASCR, the office still reportedly faced allegations of ongoing discrimination in programs and employment. Even after making strides in reducing the backlog of complaints at OASCR, the U.S. Office of the Special Counsel in a May 2015 letter to President Obama expressed concern over “serious mismanagement” at OASCR.³¹⁹⁸

A former USDA employee testified before Congress in December of 2016 that “[d]iscrimination, sexual harassment, abuse and mismanagement of civil rights complaints have been pervasive at the Agriculture Department for decades.”³¹⁹⁹ Furthermore, a 2019 report published by the Center for American Progress found that systemic racism at USDA has denied black farmers equal access to credit and crop insurance, continuing the trend identified by the Commission in 1982 of black farmers being virtually eliminated from the farming industry.³²⁰⁰

At the Commission’s briefing, Associate Assistant Secretary for Civil Rights Winona Lake Scott described some of the recent “proactive measures” of her office, including “civil rights impact analyses on regulations that are put out by the Department.”³²⁰¹ In FY 2017, OASCR received “over 56 civil rights impact analyses.”³²⁰² In its response to the Commission’s interrogatories, OASCR reported that it has been completing 100 percent of requests for Civil Rights Impact Analyses of proposed regulations within seven days.³²⁰³

Strategic Planning & Self-Evaluation

³¹⁹⁶ U.S. Dep’t of Agriculture, Civil Rights Policy Statement (Nov. 12, 2014), <https://www.fsis.usda.gov/wps/wcm/connect/ca7d3107-5679-4ec9-af18-aea3f6129be2/Secretarys-CR-Policy-Statement.pdf?MOD=AJPERES>.

³¹⁹⁷ U.S. Dep’t of Agriculture, USDA Civil Rights Policy Statement (Feb. 12, 2018), <https://www.ascr.usda.gov/sites/default/files/USDACivilRightsPolicyStatement2018.pdf>.

³¹⁹⁸ Letter from U.S. Office of the Special Counsel to President Barack Obama (May 18, 2015) <https://osc.gov/PublicFiles/FY2015/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001%20Letter%20to%20the%20President.pdf>; Helena Bottemiller Evich and Catherine Boudreau, “Former USDA official: Discrimination ‘systemic and institutionalized,’” *Politico*, Dec. 1, 2016, <https://www.politico.com/tipsheets/morning-agriculture/2016/12/former-usda-official-discrimination-systemic-and-institutionalized-217644> [hereinafter Evich *et al.*, “Discrimination ‘systemic and institutionalized’”].

³¹⁹⁹ Evich *et al.*, “Discrimination ‘systemic and institutionalized,’” *supra* note 3198.

³²⁰⁰ Abril Castro and Zoe Willingham, *Progressive Governance Can Turn the Tide for Black Farmers*, Center for American Progress, Apr. 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>; U.S. Comm’n on Civil Rights, *The Decline of Black Farming in America*, February 1982, <https://files.eric.ed.gov/fulltext/ED222604.pdf>; *see also* Newkirk, “The Great Land Robbery,” *supra* note 3171, (arguing that black farmers have been virtually eliminated from farming).

³²⁰¹ Scott Testimony, *Federal Civil Rights Enforcement Briefing*, p. 108.

³²⁰² *Ibid.*

³²⁰³ U.S. Dep’t of Agriculture, Response to USCCR Interrogatories.

USDA publishes a strategic plan every four years pursuant to the Government Performance and Results Modernization Act of 2010 which requires every federal government agency to publish a strategic report every four years.³²⁰⁴ USDA's most recent strategic plan covers fiscal years 2018-2022.³²⁰⁵ Neither the 2018-2022 strategic plan, nor the 2014-2018 strategic plan makes specific mention of civil rights or OASCR.³²⁰⁶ However, OASCR did publish its own strategic plan in 2015, covering fiscal years 2016-2020.³²⁰⁷ The strategic plan identifies three goals:

1. Improve civil rights complaints processing for internal and external customers in keeping with Federal laws, mandates, and Departmental Regulations and guidelines.
2. Engage leadership in preventing workplace conflict and support conflict management at the earliest stage possible.
3. Demonstrate effective engagement within USDA by ensuring all USDA employees have the necessary resources to support the civil rights of all employees and customers of USDA.³²⁰⁸

USDA stated its commitment to integrating environmental justice strategies with its enforcement responsibilities under Title VI, with the goal of resolving discrimination issues and complaints and working with environmental justice communities.³²⁰⁹

The Secretary of Agriculture is required to make an annual general report to the President and Congress, and also must make special reports on particular subjects whenever required to do so by the President or by either House of Congress or at his own discretion.³²¹⁰ In addition to this general report, the Secretary is required to submit a report to Congress "on the amounts obligated and expended by the Department during that fiscal year for the procurement of advisory and assistance services."³²¹¹

In USDA's FY 2017 and 2018 annual reports to Congress, the agency identified as one of its goals the need to conduct more outreach to "new and beginning farmers and ranchers, local and regional food producers, minorities, women, and veterans."³²¹² USDA acknowledges that outreach must

³²⁰⁴ 5 U.S.C. § 306(a), Pub. L. 111-352, 124 Stat. 3866.

³²⁰⁵ U.S. Dep't of Agriculture, *USDA Strategic Plan FY 2018-2022*, <https://www.usda.gov/sites/default/files/documents/usda-strategic-plan-2018-2022.pdf>.

³²⁰⁶ U.S. Dep't of Agriculture, *USDA Strategic Plan FY 2014-2018*, <https://www.ocfo.usda.gov/docs/usda-strategic-plan-fy-2014-2018.pdf>.

³²⁰⁷ U.S. Dep't of Agriculture, *Office of the Assistant Secretary for Civil Rights FY 2016 – 2020 Strategic Plan*, <https://www.ascr.usda.gov/sites/default/files/2016-2020StrategicPlan.pdf>

³²⁰⁸ *Ibid.*

³²⁰⁹ U.S. Department of Agriculture, *Environmental Justice Strategic Plan 2016-2020*, pp. 20, 28, <https://www.dm.usda.gov/emd/responserestoration/docs/USDA%20EJ%20StrategicPlan%202016%202020%208162572%20signed.pdf>.

³²¹⁰ 7 U.S.C. § 2207.

³²¹¹ *Id.* § 2207a.

³²¹² U.S. Dep't of Agriculture, *2018 Agency Financial Report*, p. 159, Nov. 14, 2018, <https://www.usda.gov/sites/default/files/documents/usda-fy18-agency-financial-report.pdf> [hereinafter USDA, *2018 Agency Financial Report*]; U.S. Dep't of Agriculture, *2017 Agency Financial Report*, p. 148, Nov. 14, 2017, <https://www.usda.gov/sites/default/files/documents/usda-fy17-agency-financial-report.pdf>.

include improvements in working with communities to address past civil rights issues, and to support underrepresented groups in their agribusiness endeavors.³²¹³

USDA is also required by Section 14010 of the Food, Conservation, and Energy Act of 2008 to publish an annual report detailing:

- a. The number of civil rights complaints filed that relate to USDA, including whether a complaint is a program complaint or an employment complaint;
- b. The length of time USDA took to process each civil rights complaint;
- c. The number of proceedings brought against USDA, including the number of complaints described in Section 14010 (1) that were resolved with a finding of discrimination; and
- d. The number and type of personnel actions taken by USDA following resolution of civil rights complaints.³²¹⁴

The most recent publicly available report available on OASCR's website covers FY 2016, and highlights changes in complaint volume and resolutions over the previous three fiscal years.³²¹⁵ USDA OASCR has not filed the requisite report for either FY 2017 or FY 2018.

Proactive Compliance Evaluation

According to its Departmental Manual, OASCR conducts compliance reviews, to ensure that “all programs and activities for which they are responsible are conducted, managed, and administered in a nondiscriminatory manner.”³²¹⁶ In conducting these compliance reviews, OASCR establishes the criteria by which OASCR will decide whether to review an agency or agency-operated program; establishes the criteria for the conduct of the reviews; manages the implementation of negotiated Compliance Action Plans when agencies are found to be noncompliant; and may provide technical assistance and training when applicable.³²¹⁷

The manual goes on to state that agencies are required to be notified at least 60 days in advance of their compliance review about the scope, required information, and deadlines.³²¹⁸ Also, it states that OASCR must complete the compliance review within 180 days from the receipt of the requested data and information subject to review, and that OASCR will provide an initial report to the agency Director within 30 days of completion of the review, which may initiate voluntary compliance efforts at this time.³²¹⁹ Furthermore, a final compliance review report should be issued,

³²¹³ USDA, *2018 Agency Financial Report*, *supra* note 3212, at 159.

³²¹⁴ 7 U.S.C. § 2279–2(1), Pub. L. 110-234, 122 Stat. 1447 (2008).

³²¹⁵ U.S. Dep't of Agriculture, *Food, Conservation, and Energy Act of 2008 Section 14010 Report of Civil Rights Complaints, Resolutions, and Actions for Fiscal Year 2016*, April 2017, https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report_4-26-2017_Final.pdf; *see infra* notes 3246-3253.

³²¹⁶ 7 C.F.R. § 15.5; *see* USDA, Departmental Manual No. 4330-001, *supra* note 3217.

³²¹⁷ USDA, Departmental Manual No. 4330-001, *supra* note 3217.

³²¹⁸ *Ibid.*

³²¹⁹ *Ibid.*

which will also address any agreed-upon resolution (if applicable) or will request a proposed Compliance Action Plan within 30 days.³²²⁰

Compliance reviews may consist of a desk audit, where an agency submits documentation to OASCR to review, or an onsite visit.³²²¹ Compliance reviews will look at civil rights resources; training for civil rights staff/officials; public notification of outreach; data collection systems; complaint processing in conducted programs; program availability and accessibility to persons with disabilities; and service to LEP persons.³²²²

Complaint Processing, Agency-Initiated Changes, & Litigation

As former federal civil rights official Margo Schlanger has explained, “USDA’s civil rights office is . . . uniquely empowered, among federal civil rights offices. Its operative regulation . . . granted the USDA Office of the Assistant Secretary not just the authority to adjudicate complaints, but also to make ‘final determinations . . . as to the corrective actions required to resolve program complain[t]s.’”³²²³

Complaint Processing

According to OASCR’s Procedures for Processing Discrimination Complaints and Conducting Compliance Reviews in USDA Conducted Programs and Activities, when OASCR receives a complaint, the intake process must not take longer than 30 days from the date of receipt.³²²⁴ In order for OASCR to process the complaint, the complainant must have filed within 180 days from the date of the alleged discrimination, unless OASCR determines that the discrimination was continuing or ongoing, or OASCR waives the 180 day requirement.³²²⁵ OASCR will then determine if it has jurisdiction to process the complaint, based on an evaluation of:

- The regulatory basis for the alleged discrimination;
- The subject matter of the allegations;
- The timeliness of the complaint.³²²⁶

³²²⁰ Ibid.

³²²¹ Ibid.; 15 C.F.R. § 15.60 *et seq.*

³²²² 15 C.F.R. § 15.60 *et seq.*; USDA, Departmental Manual No. 4330-001, *supra* note 3217.

³²²³ Schlanger, *Offices of Goodness*, *supra* note 78, at 53, 85. See 7 C.F.R. §§ 15d.4(b) and 288(a)(13).

³²²⁴ 7 C.F.R. § 15.60 *et seq.*; U.S. Dep’t of Agriculture, Departmental Manual No. 4330-001, Procedures for Processing Discrimination Complaints and Conducting Compliance Reviews in USDA Conducted Programs and Activities, page not numbered (Oct. 18, 2000) <https://www.ocio.usda.gov/sites/default/files/docs/2012/DM4330-001%5B1%5D.pdf> [hereinafter USDA, Departmental Manual No. 4330-001];

³²²⁵ 7 C.F.R. 15d(5)(a); USDA, Departmental Manual No. 4330-001, *supra* note 3217.

³²²⁶ USDA, Departmental Manual No. 4330-001, *supra* note 3217.

If OASCR does not have jurisdiction, it will, if appropriate, refer the complaint to the agency with jurisdiction. OASCR will then administratively close the complaint and provide a closure letter to the complainant.³²²⁷

The manual also states that for complaints that are complete, OASCR will send a letter of acknowledgement to the complainant with relevant reference information about the complaint.³²²⁸ Simultaneously, OASCR will send an Agency Transmittal Memorandum to the identified USDA agency, requesting an Agency Position Statement (APS) be submitted to OASCR within 15 days from the date of the request.³²²⁹ If a complaint is incomplete, OASCR will send a letter to the complainant requesting additional information, and providing notice that absent being provided the requested information within 15 days, the complaint may be closed.³²³⁰

The manual also states that under certain circumstances, OASCR may close a complaint prior to an investigation.³²³¹ Factors that trigger early closure in some circumstances include: an ongoing systemic investigation, withdrawal of the complaint, voluntary resolution, or a determination that the complaint is frivolous.³²³² In these cases, the complainant will be notified of the pre-investigation closure.³²³³

Federal regulations require that if OASCR investigates a complaint involving allegations of discrimination based on disability status, the investigation must be completed within 180 days from the date the intake is completed.³²³⁴ The manual states that an investigator will be assigned to the complaint, who will collect, preserve, and analyze all evidence relevant to the complaint; have direct contact with both parties, witnesses, and other informants; produce findings of fact; and make recommendations for disposition or closure of the case.³²³⁵

The manual clarifies that complaints can be closed for a number of reasons, such as through a voluntary withdrawal of the complaint; a resolution agreement; lack of jurisdiction or timeliness; if litigation has commenced; or other reasons determined by the Director of OASCR.³²³⁶ For complaints that are not closed, Final Agency Decisions (FADs) will be issued, based on the merits of the complainant's allegations, and are considered administratively final.³²³⁷ FAD outcomes include:

- Finding of No Violation – if no discrimination occurred

³²²⁷ Ibid.

³²²⁸ Ibid.

³²²⁹ Ibid.

³²³⁰ Ibid.

³²³¹ Ibid.

³²³² Ibid.

³²³³ Ibid.

³²³⁴ Ibid.; 7 C.F.R. § 15e.170(g).

³²³⁵ USDA, Departmental Manual No. 4330-001, *supra* note 3217.

³²³⁶ Ibid.

³²³⁷ Ibid.

- Corrected Violation Finding – if discrimination occurred, but the entity took steps to resolve the violation prior to the issuance of the FAD, the FAD will acknowledge voluntary compliance
- Violation Finding with Requirement for Remedial Action – if there is a finding of noncompliance, a Corrective Action Plan will be developed to ensure compliance³²³⁸

Once the FAD has been issued, settlement negotiations can proceed to agree on awarded damages or remedial actions to ensure compliance.³²³⁹ If necessary, a monitor may be assigned to track implementation of settlement agreements to ensure compliance.³²⁴⁰

According to a 2013 OASCR memo, after September 20, 2013, OASCR would process program complaints within 540 days, or 18 working months, from the date it accepted the complaint.³²⁴¹ Within this time frame, the Program Intake Division had up to 60 days, the Early Resolution and Conciliation Division had up to 75 days, the Program Investigation Division had up to 270 days, and the Program Adjudication Division (PAD) had up to 135 days to process a complaint.³²⁴² This memo could potentially conflict with the 180 day deadline to complete investigations of claims involving discrimination based on disability status.³²⁴³

However, USDA reported to the Commission that in FY 2016, the Program Intake Division accepted 222 complaints and took an average 31 days to process complaints overall.³²⁴⁴ Further, on average it took 31 days to process accepted complaints.³²⁴⁵ That year, the Program Intake Division processed 122 complaints within 31-60 days.³²⁴⁶ In FY 2017, the Program Intake Division converted 208 complaints into acceptances and took on average 32 days to process complaints overall.³²⁴⁷ Further, on average it took 27 days to process accepted complaints.³²⁴⁸ That year, the Program Intake Division processed 208 complaints within 60 days.³²⁴⁹ In FY 2018, the Program Intake Division converted 162 complaints into acceptances and took on average 24 days to process complaints overall.³²⁵⁰ Further, on average it took 27 days to process accepted complaints.³²⁵¹ That year, the Program Intake Division processed 163 complaints within 60 days.³²⁵²

³²³⁸ Ibid.

³²³⁹ Ibid.

³²⁴⁰ Ibid.

³²⁴¹ U.S. Dep't of Agriculture, response to USCCR Document Request, OASCR Policy Memorandum.

³²⁴² Ibid.

³²⁴³ See *supra* note 3227.

³²⁴⁴ U.S. Dep't of Agriculture, Response to USCCR Document Request, Number of Program Discrimination Complaints FY2016-2018.

³²⁴⁵ Ibid.

³²⁴⁶ Ibid.

³²⁴⁷ Ibid.

³²⁴⁸ Ibid.

³²⁴⁹ Ibid.

³²⁵⁰ Ibid.

³²⁵¹ Ibid.

³²⁵² Ibid.

Table 12.1: Number of Program Discrimination Complaints for the Program Intake Division between FY 2016 to FY 2018

Referrals	FY 2016	FY 2017	FY 2018
OASCR Data Management and Records Division (DMRD) Referrals	4201	5010	1366
Food and Nutrition Service (FNS) Referrals	6392	8834	3660
Intake Processing	FY 2016	FY 2017	FY 2018
Intake Correspondence Beginning Inventory	N/A	2	39
Correspondence Entered in PCMS	413	403	405
Programmatic Referrals	140	115	102
Converted to Complaint/(Acceptances)	122	178	162
Closures (All Other)	95	119	161
Intake Correspondence Inventory (Current)	27	39	19
Convert to Complaint Processing	FY 2016	FY 2017	FY 2018
RD MOU Referrals	105	72	78
Acceptance Letters – Sent to ADR	117	136	85
Total Convert to Complaint Acceptances	222	208	163
Average Processing Time Overall (Days)	31	32	27
Average Processing Time (Acceptances)	31	27	24
Number and Percentage of Complaints Processed within 60 Days	122 100%	208 100%	163 100%

Source: U.S. Department of Agriculture

In FY 2016, the Program Investigation Division processed and/or closed 112 complaints.³²⁵³ On average, it took the Program Investigation Division 450 days to complete Reports of Investigation (ROI), and 19 of 50 ROIs were processed within 270 days.³²⁵⁴ On average, it took 328 days to complete all processing actions.³²⁵⁵ In FY 2017, the Program Investigation Division took on average 322 days to complete ROIs, and 39 of 90 ROIs were processed within 270 days.³²⁵⁶ On average, it took 315 days to complete all processing actions.³²⁵⁷ In FY 2018, the Program Investigation Division processed and/or closed 93 complaints.³²⁵⁸ On average, it took the Program Investigation Division 259 days to complete ROI investigations, and 16 of 34 ROIs were processed within 270 days.³²⁵⁹ On average, it took 245 days to complete all processing actions.³²⁶⁰

³²⁵³ Ibid.³²⁵⁴ Ibid.³²⁵⁵ Ibid.³²⁵⁶ Ibid.³²⁵⁷ Ibid.³²⁵⁸ Ibid.³²⁵⁹ Ibid.³²⁶⁰ Ibid.

Table 12.2: Number of Program Discrimination Complaints for the Program Investigation Division between FY 2016 to FY 2018

	FY 2016	FY 2017	FY 2018
Beginning Inventory	207	257	153
Open Complaints/Prior Year Ending Inventory	207	257	153
New Requests for Investigation	157	187	131
ROI's Transmitted to PAD	50	90	105
PID Closures	27	23	21
Transmitted to PAD Closures	35	100	61
Closed Expired ECOA (Sunset Acres)			12
Total Processed/Closures	112		199
Ending Inventory	257	153	85
Average Processing Time for ROI Investigations	450	322	378
Number and percent for ROIs processed within 270 days	19 (38%)	39 (43%)	43 (41%)
Average Age of Cases in Inventory	446	515	552
Average Processing Time for All Actions	328	315	292

Source: U.S. Department of Agriculture

In FY 2016, PAD issued 51 FADs, issued 36 complaint closures, received 4 Food and Nutrition Service (FNS) appeals and 1 disability appeal, and issued 17 FNS appeal decisions and 1 disability appeal decision.³²⁶¹ That same year PAD took an average of 135 days to process FADs; 45/51 FADs were processed within 135 days.³²⁶² On average, PAD took 104 days to process all decisions issued.³²⁶³ In FY 2017, PAD issued 40 FADs, issued 102 complaint closures, received 6 FNS appeals, and issued 5 FNS appeal decisions.³²⁶⁴ That same year PAD took an average of 103 days to process FADs; 33/40 FADs were processed within 135 days.³²⁶⁵ On average, PAD took 42 days to process all decisions issued.³²⁶⁶ In FY 2018, PAD issued 55 FADs, issued 54 complaint closures, and received 4 FNS appeals.³²⁶⁷ That same year PAD took an average of 175 days to process FADs; 4/55 FADs were processed within 135 days.³²⁶⁸ On average, PAD took 80 days to process all decisions issued.³²⁶⁹

³²⁶¹ Ibid.

³²⁶² Ibid.

³²⁶³ Ibid.

³²⁶⁴ Ibid.

³²⁶⁵ Ibid.

³²⁶⁶ Ibid.

³²⁶⁷ Ibid.

³²⁶⁸ Ibid.

³²⁶⁹ Ibid.

Table 12.3: Number of Program Discrimination Complaints for the Program Adjudication Division between FY 2016 to FY 2018

	FY 2016	FY 2017	FY 2018
Beginning Inventory	94	88	140
FADs issued	51	40	103
1. FAD (Finding)	3	2	1
2. FAD (No Finding)	48	38	102
Closures Issued	36	102	79
Ending Inventory	88	140	138
Beginning Inventory of Appeals	19	6	9
FNS Appeals Received	4	6	11
FNS Appeal decisions Issued	17	5	9
Disability Appeals Received	1		
Disability Appeal Decisions Issued	1		
Ending Appeal Inventory	6	6	8
Beginning Inventory of Noncompliance	0		
Requests for Decision on Noncompliance Claims	0		
Decisions Issued on Noncompliance Claims	0		
Ending Inventory of Noncompliance Claims	0		
Transmittals from PCD	84	190	180
Requests for Closures	DNR	100	63
ROIs Received from Investigations	DNR	90	117
Average Processing Time	FY 2016	FY 2017	FY 2018
Average Processing Time for FADs (days)	135	103	196
Number and Percentage of FADs Processed in 135 Days	45 (88%)	33 (83%)	12 (15%)
Average Processing Time for Appellate Decisions (days)	0	82	0
Number and Percentage of Appellate Decisions (days)	0	0	0
Average Processing Time for Noncompliance Decisions	0	0	0
Number and Percentage of Noncompliance Decisions Issued Within 60 Days	0	0	0
Average Processing Time for All Decisions Issued (days)	104	42	118

Source: U.S. Department of Agriculture

In her testimony before the Commission, Associate Assistant Secretary Winona Lake Scott indicated that between FY 2016 and FY 2018, the number of complaints filed per year decreased from 364 to 271.³²⁷⁰ During this time, discrimination on the basis of disability was alleged in 32 percent of complaints, race in 25 percent of complaints, age in 20 percent of complaints, color in

³²⁷⁰ Scott Testimony, *Federal Civil Rights Enforcement Briefing*, p. 107.

12 percent of complaints, and sex in 11 percent of complaints.³²⁷¹ Associate Assistant Secretary Scott noted that the time taken to process complaints also decreased significantly during this time frame, dropping from an average of 450 days to 292 days, thus increasing in timeliness by 65 percent.³²⁷²

These improvements in process times appear to be necessary as the USDA civil rights office has a long history of failing to process discrimination complaints within its jurisdiction. In 2011, in the *Black Farmers Discrimination Litigation*, a federal judge issued an Opinion and Order approving a settlement agreement to “resolve the pending claims of approximately 40,000 plaintiffs and compensate thousands of victims of race discrimination whose complaints have gone unanswered for decades.”³²⁷³ In 1997, the original complaint alleged that “the USDA discriminated on the basis of race in allotting benefits under various federal agricultural programs, denying African-American farmers loans and other benefits that were freely granted to similarly situated white farmers.”³²⁷⁴ The complaint also explained,

[the] history of discrimination in the administration of USDA farm programs, combined with the agency’s long-standing refusal to investigate and remedy specific instances of discrimination, deprived countless farmers of desperately needed credit and payments under various federal aid programs, with the result that many farmers suffered severe financial losses and even, in many cases, lost title to their farms.³²⁷⁵

³²⁷¹ *Ibid.*, 107.

³²⁷² *Ibid.*, 107-108.

³²⁷³ Opinion, *Black Farmers Discrimination Litigation*, No. 08-0511 (D.D.C. Oct. 27, 2011), at 1, <https://www.blackfarmerscase.com/Documents/Opinion%20Approving%20Settlement.pdf>.

³²⁷⁴ *Id.* at 3.

³²⁷⁵ *Id.*

Table 12.4: OASCR Performance Measures 2017-2020

Performance Measures	2017 Actual	2018 Enacted	2019 Estimate	2020 Estimate
Initial allegations of employment discrimination (EEO informal complaints) received by the OCR, Corporate Services Division (Conflict of Interest cases).	86	80	90	90
Average number of days to issue a written notice of acceptance or dismissal of a formal complaint of employment discrimination.	38	15	15	16
Average number of days to complete an employment discrimination investigation given regulatory timeframe requirements to complete investigations (e.g. 180 days).	142	159	155	153
Average processing time to adjudicate an employment discrimination case (60-day regulatory requirement).	107	56	55	58
Percent of Civil Rights Impact Analyses (CRIAs) for regulatory actions reviewed within seven (7) business days.	100%	100%	100%	95%
Average processing days to complete the intake of a program discrimination (external) complaint based on the internal requirement to complete intake within 60 days.	21	15	25	21
Average number of days to investigate a program discrimination complaint and issue a report of investigation.	322	270	320	326
Average number of days to issue a final agency decision (adjudicate) of a program discrimination complaint.	140	120	170	168

Source: U.S. Department of Agriculture

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

OASCR may publish guidance and technical assistance in the form of USDA Civil Rights Directives. During the fiscal years studied in this report, OASCR published four directives, advising USDA employees and program participants of their civil rights and obligations under the law,³²⁷⁶ establishing USDA civil rights impact analysis policy and procedures,³²⁷⁷ advising USDA employees and applicants of the employment discrimination complaint process,³²⁷⁸ and establishing an annual civil rights training policy for all USDA employees and administered programs.³²⁷⁹

³²⁷⁶ U.S. Dep't of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4300-010: Civil Rights Accountability Policy and Procedures, (Dec. 28, 2016), https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204300-010%20Civil%20Rights%20Accountability%20and%20Procedures-Final_20170103.pdf.

³²⁷⁷ U.S. Dep't of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4300-004: Civil Rights Impact Analysis (Oct. 17, 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/CRIA%20DR%204300-004-final.pdf>.

³²⁷⁸ U.S. Dep't of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4300-007: Processing Equal Employment Opportunity (EEO) Complaints of Discrimination (Jul. 12, 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR-4300-007%20Processing%20Equal%20Employment%20Opportunity.pdf>.

³²⁷⁹ U.S. Dep't of Agriculture, Office of the Assistant Secretary for Civil Rights, Departmental Regulation No. 4120-001: Annual Departmental Civil Rights Training (Jun. 14, 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204120-001%20Annual%20Departmental%20Civil%20Rights%20Training.pdf>.

OASCR has a website with access to information about filing a programmatic civil rights complaint.³²⁸⁰

A “Reports” page includes downloadable versions the division’s “Report on Civil Rights Complaints, Resolutions, and Actions,” most recently from 2016, which includes data about the number of program complaints filed and resolved.³²⁸¹ Finally, a list of civil rights directives and implementing regulations, with links to full text versions of each, is also available to the public.³²⁸² There is no detailed information available about current or past program access cases or settlements, other than the material in the annual reports (the most recent of which was from 2016).

Interaction and Coordination with External Agencies and Organizations

The Departmental Manual states that if OASCR determines that it does not have jurisdiction over a complaint filed with the office, OASCR will refer complaints received to the proper agency. For example, all complaints concerning employment will be referred to the EEOC.³²⁸³ Similarly, if a complainant wishes to have his or her complaint processed under the ADA, OASCR will transfer the case to the appropriate federal agency.³²⁸⁴ Furthermore, if OASCR finds a violation of civil or criminal laws not under OASCR’s jurisdiction in the course of an otherwise jurisdictional investigation, OASCR will refer the ancillary matter to the appropriate federal or state agency.³²⁸⁵

Research, Data Collections, and Reporting

As required by statute and regulation, USDA OASCR collects data from federal funding recipients for the purposes of conducting oversight and evaluation.³²⁸⁶ During the Obama administration, USDA upgraded its reporting database, which allows OASCR to track internally, in real time the number and types of complaints filed, helping OASCR identify trends in civil rights enforcement.³²⁸⁷

³²⁸⁰ See U.S. Dep’t of Agriculture, Office of the Assistant Secretary for Civil Rights, <https://www.ascr.usda.gov>.

³²⁸¹ “Reports,” <https://www.ascr.usda.gov/reports>; see “Report on Civil Rights Complaints, Resolutions, and Actions – Fiscal Year 2016,” https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report_4-26-2017_Final.pdf.

³²⁸² U.S. Dep’t of Agriculture, “Directives and Regulations,” <https://www.ascr.usda.gov/directives-and-regulations>.

³²⁸³ 7 C.F.R. § 15.60 *et seq.*; USDA, Departmental Manual No. 4330-001, *supra* note 3217.

³²⁸⁴ 7 C.F.R. § 15.60 *et seq.*; USDA, Departmental Manual No. 4330-001, *supra* note 3217.

³²⁸⁵ 7 C.F.R. § 15.60 *et seq.*; USDA, Departmental Manual No. 4330-001, *supra* note 3217.

³²⁸⁶ 7 U.S.C. § 2279-1(a) – (d); 7 C.F.R. § 15d.4(b); U.S. Dep’t of Agriculture, Departmental Regulation No. 4370-001, Collection of race, ethnicity, and gender data for civil rights compliance and other purposes in regard to participation in the programs administered by the Farm Service Agency, the Natural Resources Conservation Service, the Risk Management Agency, the Rural Business Service, the Rural Housing Service, and the Rural Utilities Service (Oct. 11, 2011), <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4370-001%5B1%5D.pdf>.

³²⁸⁷ “Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration,” *supra* note 3171, at 3.

Chapter 13: U.S. Department of the Treasury, Office of Civil Rights and Diversity

Legal Authority and Responsibility

Congress established the U.S. Treasury Department (Treasury) in 1789, in the First Session of Congress.³²⁸⁸ Currently, Treasury is led by Secretary Steven Terner Mnuchin, who was sworn in as the 77th Secretary of Treasury in February 2017.³²⁸⁹ Treasury states that its mission is “to maintain a strong economy and create economic and job opportunities by promoting the conditions that enable economic growth and stability at home and abroad, strengthen national security by combating threats and protecting the integrity of the financial system, and manage the U.S. Government’s finances and resources effectively.”³²⁹⁰ Treasury’s primary function is to manage money resources, through actions such as regulating national banks, collecting taxes, issuing securities, reporting the government’s daily financial transactions, and printing money.³²⁹¹ Equal access to credit and other financial issues can involve critical civil rights issues.³²⁹²

Within Treasury, the Office of Civil Rights and Diversity (OCRD) is responsible for enforcing external civil rights.³²⁹³ Regarding nondiscrimination provisions, OCRD has indicated the following:

Nondiscrimination provisions apply to all programs and activities of recipients and sub-recipients of federal financial assistance. In programs that receive financial assistance from the Department of the Treasury, discrimination is prohibited on the bases of race, color, national origin, age, sex, disability, or limited English proficiency. Reprisal actions against individuals for their prior civil rights activity are prohibited.

Additionally, in Department of the Treasury programs and activities, discrimination is prohibited on the bases of disability, and limited English proficiency.³²⁹⁴

³²⁸⁸ 31 U.S.C. § 301, An Act to Establish the Treasury Department, 1 Stat. 65 (1789); U.S. Dep’t of the Treasury, “Department of the Treasury,” 2006, [https://www.treasury.gov/about/education/Documents/brochure%20\(1\).pdf](https://www.treasury.gov/about/education/Documents/brochure%20(1).pdf) [hereinafter Treasury, “Department of the Treasury”].

³²⁸⁹ 31 U.S.C. § 301(b); U.S. Dep’t of the Treasury, “The Secretary”, <https://home.treasury.gov/about/general-information/the-secretary>, (accessed Jun. 17, 2019).

³²⁹⁰ U.S. Dep’t of the Treasury, “Role of the Treasury”, <https://home.treasury.gov/about/general-information/role-of-the-treasury>, (accessed Jun. 17, 2019).

³²⁹¹ 31 U.S.C. § 321; Treasury, “Department of the Treasury,” *supra* note 3288.

³²⁹² See, e.g., U.S. Consumer Financial Protection Bureau, “Promoting Fair, Equitable, and Nondiscriminatory Access to Credit: 2017 Fair Lending Report,” Dec. 2018, <https://www.consumerfinance.gov/about-us/blog/promoting-fair-equitable-and-nondiscriminatory-access-credit-2017-fair-lending-report/>.

³²⁹³ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 1 and No. 2, at 1-8.

³²⁹⁴ U.S. Dep’t of the Treasury, “About: Office of Civil Rights and Diversity,” <https://www.treasury.gov/about/organizational-structure/offices/Mgt/Pages/beneficiaries.aspx> (accessed Jun. 17, 2019) [hereinafter Treasury, “About: Office of Civil Rights and Diversity”].

OCRd enforces the following civil rights statutes and executive orders as part of its external civil rights enforcement program:

- Title VI of the Civil Rights Act of 1964;³²⁹⁵
- Title IX of the Education Amendments Act of 1972;³²⁹⁶
- Section 504 of the Rehabilitation Act of 1973;³²⁹⁷
- Section 508 of the Rehabilitation Act;³²⁹⁸
- The Age Discrimination Act of 1975;³²⁹⁹
- American with Disabilities Act Amendments Act of 2008;³³⁰⁰
- Executive Order 13,166 (Improving Access to Services for Persons with Limited English Proficiency);³³⁰¹
- Executive Order 13,160 (Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs)³³⁰²

OCRd additionally has the delegated authority to enforce the following Equal Opportunity Employment civil rights laws:

- Title VII of the Civil Rights Act of 1964;³³⁰³
- Section 501 of the Rehabilitation Act of 1973;³³⁰⁴
- The Genetic Information Nondiscrimination Act of 2008;³³⁰⁵
- The Age Discrimination in Employment Act of 1967;³³⁰⁶
- The Equal Pay Act of 1963;³³⁰⁷
- The Pregnancy Discrimination Act of 1978;³³⁰⁸
- The Notification and Federal Employees Antidiscrimination and Retaliation (No FEAR) Act of 2002;³³⁰⁹
- The Lilly Ledbetter Fair Pay Act of 2009.³³¹⁰

³²⁹⁵ 42 U.S.C. § 2000d – 2000d-7.

³²⁹⁶ 20 U.S.C. §§ 1681 – 1688.

³²⁹⁷ 29 U.S.C. § 794.

³²⁹⁸ *Id.* § 794d.

³²⁹⁹ 42 U.S.C. §§ 6101 – 6107.

³³⁰⁰ *Id.* § 12101.

³³⁰¹ Exec. Order No. 13,166, 65 Fed. Reg. 50,121.

³³⁰² Exec. Order No. 13,160, 65 Fed. Reg. 39,775.

³³⁰³ 42 U.S.C. § 2000e.

³³⁰⁴ 29 U.S.C. § 701.

³³⁰⁵ 42 U.S.C. § 2000ff.

³³⁰⁶ 29 U.S.C. §§ 621-634.

³³⁰⁷ *Id.* 206(d).

³³⁰⁸ 42 U.S.C. § 2000e.

³³⁰⁹ 5 U.S.C. § 2301.

³³¹⁰ Pub. L. No. 111-2, 123 Stat. 5.

Two other bureaus within Treasury, the Office of the Comptroller of the Currency (OCC), and the Internal Revenue Service (IRS), have specific responsibilities for enforcing nondiscrimination laws. The IRS is required to ensure that all taxpayers, taxpayer representatives, and employees are being treated fairly and equitably regardless of race, color, national origin, age, sex, or disability through enforcement of the nondiscrimination provisions of Section 1203 of the IRS Restructuring and Reform Act of 1998.³³¹¹ OCC is charged by law with “assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.”³³¹² OCC has a statutory obligation to regulate national banks, federal branches and agencies of foreign banks, and federal savings associations.³³¹³ OCC is charged with assuring that banks comply with laws and regulations and that their customers are have fair access to financial services.³³¹⁴ As of September 30, 2017, OCC supervised 1,347 banks.³³¹⁵ OCC reviews banks under its jurisdiction for compliance with the following laws:

- The Fair Housing Act;³³¹⁶
- The Equal Credit Opportunity Act;³³¹⁷
- The Servicemembers Civil Relief Act.³³¹⁸

Enforcement Tools

The agency enforcement tools that OCRD has specific legal authority to use are:

- Complaint resolution³³¹⁹
- Agency-initiated charges³³²⁰
- Proactive compliance evaluations³³²¹
- Guidance or other policy documents³³²²

³³¹¹ 26 U.S.C. § 7804, note, Pub. L. 105-206, 112 Stat. 720; U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 1, at 3.

³³¹² 12 U.S.C. § 1(a).

³³¹³ *Id.* § 1.

³³¹⁴ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 1, at 2.

³³¹⁵ *Ibid.*

³³¹⁶ 42 U.S.C. § 3601 *et seq.*

³³¹⁷ 15 U.S.C. § 1691 *et seq.*

³³¹⁸ 50 U.S.C. § 3901 *et seq.*

³³¹⁹ 31 C.F.R. §§ 17.170, 22.7, 28.610.

³³²⁰ *Id.* §22.7 (a) and (c).

³³²¹ *Id.* §§ 22.6 (compliance information required), 22.7(a)(periodic compliance reviews)(“The designated Agency official shall from time to time review the practices of recipients to determine whether they are complying with this part.”), 28.605 (procedures for effecting compliance).

³³²² 31 C.F.R. §§ 22.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”); 31 C.F.R. § 28.605(a) (“The designated agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with these Title IX regulations and shall provide assistance and guidance to recipients to help them comply voluntarily with these Title IX regulations”).

- Regulations³³²³
- Technical assistance³³²⁴
- Publicity³³²⁵
- Research, data collection, and reporting³³²⁶
- Collaboration/partnership with state/local agencies³³²⁷
- Collaboration/partnership with other federal agencies³³²⁸
- Strategic Plans³³²⁹
- Annual Reports³³³⁰

Budget and Staffing

According to Treasury, “OCRCD’s budget does not have non-salary amounts allocated for the exclusive use of the external civil rights program.”³³³¹ Treasury dispersed \$5 - \$6 billion in federal financial assistance during the Fiscal Years studied.³³³² The following are the consolidated amounts OCRD was allocated and requested for FY 2016 to FY 2018. See Figure 13.1. For FY 2016, OCRD was allocated \$279,491.³³³³ For FY 2017, OCRD was allocated \$446,317.³³³⁴ Treasury forecasted that OCRD would require \$514,165 for FY 2018.³³³⁵

³³²³ 31 U.S.C. § 321(b)(1)-(2); 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations).

³³²⁴ 31 C.F.R. §§ 22.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”); 31 C.F.R. § 28.605(a) (“The designated agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with these Title IX regulations and shall provide assistance and guidance to recipients to help them comply voluntarily with these Title IX regulations”).

³³²⁵ 28 C.F.R. § 42.405 (requirements for public dissemination of Title VI information).

³³²⁶ *Id.* § 42.406 (regarding data collection and information sharing)

³³²⁷ 31 C.F.R. §§ 22.6(a) (responsible Department official “shall provide assistance and guidance to recipients to help them comply voluntarily with this part”); 31 C.F.R. § 28.605(a) (“The designated agency official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with these Title IX regulations and shall provide assistance and guidance to recipients to help them comply voluntarily with these Title IX regulations”).

³³²⁸ 28 C.F.R. § 42.413.

³³²⁹ GPRA Modernization Act of 2010, H.R. 2142, 111th Cong. § 1115(b).

³³³⁰ 12 U.S.C. § 14 (requirement that OCC issue an annual report); 31 U.S.C. § 331(a) (requirement that Treasury issue an annual report).

³³³¹ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 6, at 12.

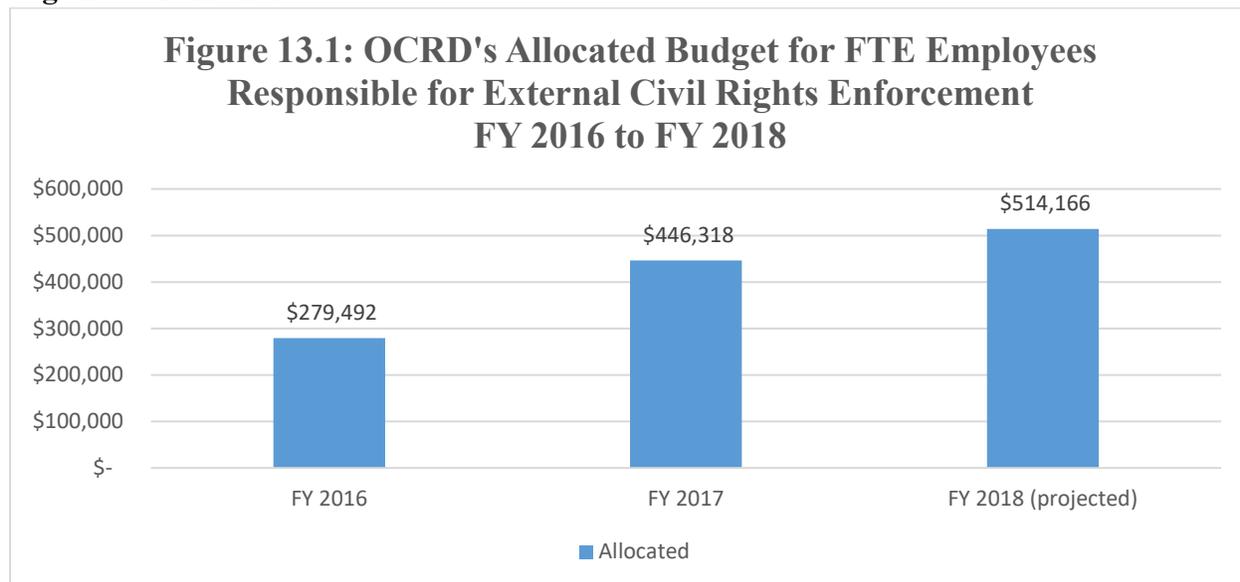
³³³² *See supra* Table 1.5.

³³³³ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 6, at 12.

³³³⁴ *Ibid.*

³³³⁵ *Ibid.*

Figure 13.1: OCRD's Allocated Budget for FTE Employees Responsible for External Civil Rights Enforcement

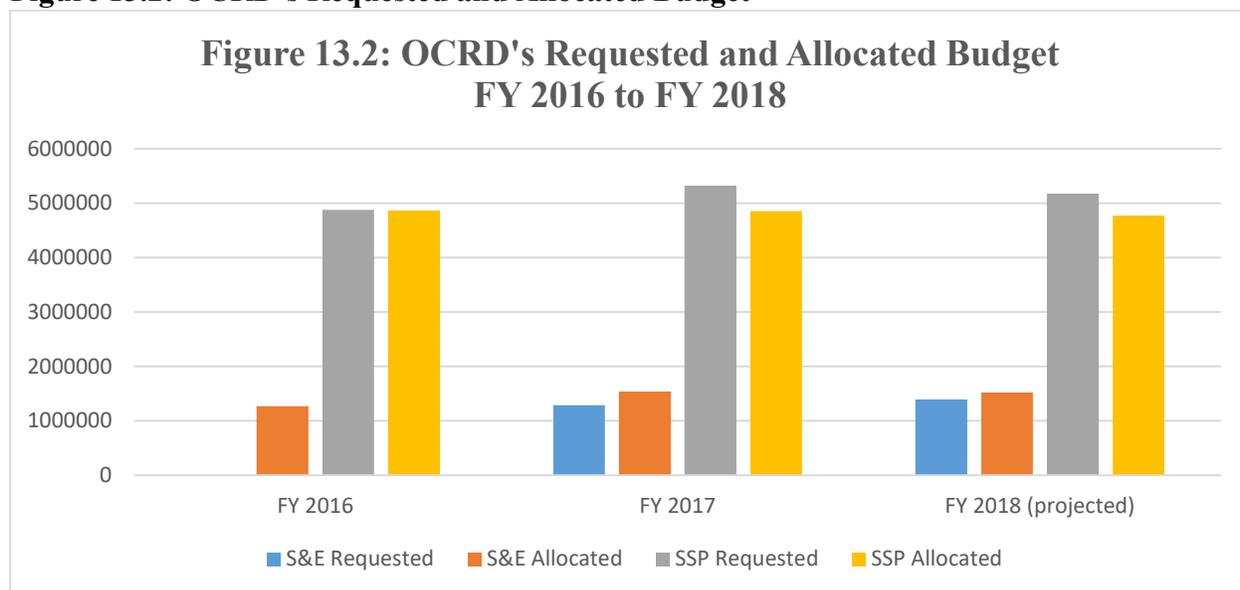


Source: Department of Treasury, Response to Interrogatory 6, at 12.

Note: OCRD indicated that "OCRD's budget does not have non-salary amounts allocated for the exclusive use of the external civil rights program," and the figures above show costs for three FTE employees dedicated to work on external civil rights complaints.

In FY 2016, OCRD received a total of \$1.27 million for Salaries and Expenses (S&E),³³³⁶ requested \$4.87 million through Treasury's Shared Service Program Budget (SSP), and was allocated \$4.85 million through SSP. In FY 2017, OCRD requested a total of \$1.29 million for S&E, was allocated \$1.53 million for S&E, requested \$5.31 million through SSP, and was allocated \$4.85 through SSP. For FY 2018, OCRD requested \$1.35 million for S&E and \$5.17 million through SSP, and projects that it will be allocated \$1.52 million for S&E and \$4.76 million through SSP. See Figure 13.2.

³³³⁶ Treasury indicated that since OCRD was still a part of the Office of the Deputy Secretary for Human Resources and Chief Human Capital Officer during their budget formulation, they did not have a budget request for Salaries and Expenses for FY 2016. U.S. Dep't of the Treas. Response to USCCR Interrogatory No. 6(d) at 13.

Figure 13.2: OCRD's Requested and Allocated Budget

Source: Department of Treasury, Response to Interrogatory 6, at 13-14.

Note: "S&E" refers to Salaries and Expenses, and "SSP" refers to Treasury's Shared Service Program Budget. Treasury indicated that since OCRD was still a part of the Office of the Deputy Secretary for Human Resources and Chief Human Capital Officer during their budget formulation, they did not have a budget request for Salaries and Expenses for FY 2016.

Unlike OCRD and the IRS, which are funded through Congressional appropriations, the Office of the Comptroller of the Currency, which regulates banks, is funded through assessments, fees paid by banks, and interest charged to regulated institutions; therefore, OCC is not included in the President's budget proposal sent to Congress, and is not part of the appropriations process.³³³⁷ In FY 2018 OCC reported revenue of \$1,247.4 million, which reflects a \$42.1 million, or 3.5 percent, increase from FY 2017 revenue of \$1,205.3 million.³³³⁸ In response to the Commission's interrogatories, Treasury also noted that "OCRD's budget did not have non-salary amounts dedicated exclusively to the external civil rights program."³³³⁹

Currently, there are a total of 26 employees within OCRD.³³⁴⁰ Of these, there are only three OCRD full-time positions dedicated to work on external civil rights complaints (a senior level Civil Rights Program Manager and two Equal Employment Opportunity Specialists).³³⁴¹ Treasury reports that several other managers and front office assistants are also involved in supporting external as well as the greater volume of internal enforcement work.³³⁴² As noted above, Treasury does not have

³³³⁷ 12 U.S.C. § 482, ("The Comptroller of the Currency may impose and collect assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the office"). See also, U.S. Dep't of the Treasury, Office of the Comptroller of the Currency, *2018 Annual Report*, 2018, pp. 33-34, <https://www.occ.gov/annual-report/download-the-full-report/2018-annual-report.pdf> [hereinafter Treasury OCC, *2018 Annual Report*].

³³³⁸ Treasury OCC, *2018 Annual Report*, *supra* note 3337, at 34.

³³³⁹ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 6, at 13.

³³⁴⁰ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 4, at 10.

³³⁴¹ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 5, and No. 6, at 11-12. OCRD does not employ any part-time staff or full-time/part-time contractors to enforce civil rights. Treasury's Response to USCCR Interrogatory No. 5b-5d at 11-12. The Civil Rights Program Manager is a GS-15 level federal employee. *Ibid.*

³³⁴² U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 4, at 10.

any non-staff resources dedicated exclusively to external civil rights enforcement.³³⁴³ Moreover, the organizational chart and other information submitted by the U.S. Department of the Treasury to the Commission indicates that external and internal civil rights enforcement are essentially combined in the OCRD.³³⁴⁴ The 2016 organizational chart had some division between external and internal civil rights enforcement as follows:

Figure 13.3 Organizational Structure of OCRD FY 2016



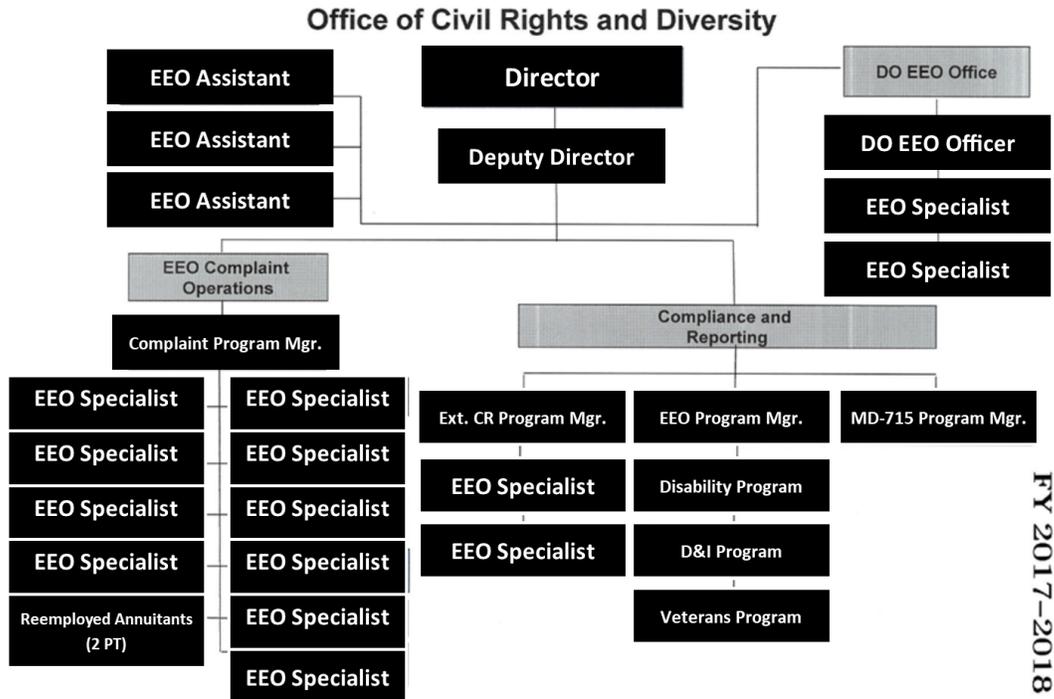
Source: U.S. Department of the Treasury

The FY 2017-2018 organizational chart shows that External Civil Rights is no longer a separately-titled office, and is now under Compliance and Reporting.

³³⁴³ See *supra* note 3332.

³³⁴⁴ U.S. Dep't of the Treasury, Response to USCCR Document Request No. 2, at 21 (referencing their attachment of this chart).

Figure 13.4 Organizational Structure of OCRD FY 2017-2018³³⁴⁵



Source: U.S. Department of the Treasury

Treasury also reported to the Commission that staffing levels for OCRD have been relatively consistent between FY 2016 and FY 2018, though there was an additional Equal Opportunity Specialist hired in March 2017.³³⁴⁶ This hire occurred because OCRD “did not believe it had sufficient staff to effectively manage the caseload and other external civil rights enforcement work during FY 2016 and FY 2017.”³³⁴⁷ The agency added, “We are constantly assessing our resources and will make adjustments if our compliance and enforcement needs increase.”³³⁴⁸

³³⁴⁵ Ibid.

³³⁴⁶ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 5, at 12.

³³⁴⁷ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 6, at 14.

³³⁴⁸ Ibid.

Assessment

Prioritization for Civil Rights Agency-wide

Treasury does not structure its offices such that civil rights enforcement is part of the agency wide leadership team. OCRD is an office within the Departmental Offices of the Office of the Assistant Secretary for Management.³³⁴⁹ OCRD defines its mission as to “ensure that equality, fairness and diversity in employment are realized for all U.S. Department of the Treasury employees and applicants for employment.”³³⁵⁰ The head and Director of the Office of Civil Rights and Diversity is Mariam Harvey;³³⁵¹ she reports directly to the Assistant Secretary for Management and is given authority by the Secretary of the U.S. Department of the Treasury.³³⁵² This organizational structure at OCRD runs counter to a previous Commission finding that the efficacy of external civil rights enforcement offices may be impaired by a lack a direct line of authority to the agency head.³³⁵³

Strategic Planning & Self-Evaluation

Treasury released its most recent strategic plan in 2018, covering fiscal years 2018-2022.³³⁵⁴ Neither the 2018 strategic plan, nor the previous strategic plan issued for fiscal years 2014-2017 specifically mention OCRD or civil rights.³³⁵⁵

Both OCC and the IRS issue their own strategic plans, separate from Treasury’s plan. In connection with the function of bank regulation, the OCC’s current strategic plan states that OCC seeks to “Promote financial inclusion and economic opportunity through fair access to financial access services and fair treatment of bank customers and communities.”³³⁵⁶ The IRS’ strategic plan does not mention civil rights.³³⁵⁷

³³⁴⁹ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 4, at 10.

³³⁵⁰ Treasury, “About: Office of Civil Rights and Diversity,” *supra* note 3295.

³³⁵¹ *Ibid.*

³³⁵² U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 4, at 10.

³³⁵³ USCCR, *Ten-Year Check-Up Vol. 1: A Blueprint*, *supra* note 1, at 47.

³³⁵⁴ U.S. Dep’t of the Treasury, *Treasury Strategic Plan 2018-2022*, 2018, https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/Treasury_Strategic_Plan_web_2018_version.pdf.

³³⁵⁵ *Ibid.*; see U.S. Dep’t of the Treasury, *Department of the Treasury FY 2014-2017 Strategic Plan*, 2014, https://www.treasury.gov/about/budget-performance/strategic-plan/Documents/2014-2017_US_TreasuryStrategicPlan.pdf.

³³⁵⁶ U.S. Dep’t of the Treasury, *Office of the Comptroller of the Currency, The OCC Strategic Plan: Fiscal Years 2019-2023*, September 2018, p. 4, <https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/pub-occ-strategic-plan-2019-2023.pdf>. The OCC’s prior plan sought to “ensure that regulated entities provide consumers fair access to financial services and treat them fairly.” U.S. Dep’t of the Treasury, *Office of the Comptroller of the Currency, The OCC Strategic Plan Fiscal Years 2015-2019*, September 2014, p. 8, <https://www.occ.treas.gov/publications-and-resources/publications/banker-education/files/occ-strategic-plan-2015-2019.pdf>.

³³⁵⁷ U.S. Dep’t of the Treasury, *Internal Revenue Service, Strategic Plan FY 2018-2022*, 2018, <https://www.irs.gov/pub/irs-pdf/p3744.pdf>.

The Secretary of the Treasury also has the obligation to submit annual financial reports to Congress, which include statements on all public receipts and expenditures, contracts, appropriations, and payments made.³³⁵⁸ The Secretary must also report to Congress in person or in writing on matters referred to the Secretary by Congress.³³⁵⁹ Treasury's 2018 annual report does not specifically mention civil rights, nor does it evaluate the performance of OCRD over the past year.³³⁶⁰ However, Treasury, through OCRD, has at times issued a purportedly annual EEO, Diversity, and Civil Rights Report that highlights OCRD's accomplishments over the previous fiscal year. The most recent report publicly available was published in 2016, and the report notes with regard to external civil rights enforcement that in FY 2016, Treasury received 31 complaints of discrimination, and provided technical assistance to two Treasury assisted programs.³³⁶¹ Treasury has not made an EEO, Diversity, and Civil Rights Report publicly available on its website since 2016.

OCC is required to submit its own annual report to Congress.³³⁶² OCC's FY 2018 annual report explains OCC's supervisory responsibilities, and provides data on supervisory actions taken during the fiscal year, however the report does not provide specific data on supervisory actions initiated due to civil rights violations by OCC regulated entities.³³⁶³

Complaint Processing, Agency-Initiated Changes, & Litigation

Complaint Processing

In its *Civil Rights Directive: External Civil Rights Responsibilities and Complaint Process*, the U.S. Department of the Treasury has outlined its formal process of receiving and investigating complaints, which is also governed by federal regulations.³³⁶⁴ OCRD is directed to receive and process complaints from any individual who "believes that he or she has been subjected to

³³⁵⁸ 31 U.S.C. § 331(a).

³³⁵⁹ *Id.* § 331(d).

³³⁶⁰ U.S. Dep't of the Treasury, *Agency Financial Report Fiscal Year 2018*, Nov. 15, 2018, https://home.treasury.gov/system/files/236/AFR_Full%20111518_clean_508.pdf.

³³⁶¹ U.S. Dep't of the Treasury, *Annual EEO, Diversity and Civil Rights Report FY 2016*, 2016, <https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/FY%202016%20Annual%20Report.pdf> [hereinafter Treasury, *FY 2016 EEO, Diversity and Civil Rights Report*].

³³⁶² 12 U.S.C. § 14; Treasury OCC, *2018 Annual Report*, *supra* note 3337.

³³⁶³ Treasury OCC, *2018 Annual Report*, *supra* note 3337, at 23.

³³⁶⁴ U.S. Dep't of the Treasury, Civil Rights Directive CRD-006: External Civil Rights Responsibilities and Complaint Process (Sep. 5, 2017), <https://www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/External%20Civil%20Rights%20Responsibilities%20and%20Complaint%20Processing.pdf> [hereinafter Treasury, *External Civil Rights Responsibilities and Complaint Process*]. (Office of Civil Rights and Diversity has indicated in this memo that the following relevant statutes, regulations, Executive Orders, and Treasury Orders apply to this complaint process: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794-794e; Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7; Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; 31 C.F.R. Part 17, 31 C.F.R. Part 22, 31 C.F.R. Part 28; Executive Orders 13160 and 13166; and Treasury Order 102-02.)

unlawful discrimination,” or an individual who is a member of a class who “believes that any specific class of persons has been subjected to discrimination.”³³⁶⁵ Complaints must be filed within 180 days of the alleged act of discrimination, however this time frame can be extended by the OCRD Director if there is “good cause.”³³⁶⁶

The Treasury *Civil Rights Directive* also states that OCRD should be referred any complaints that have been filed directly with any bureau for intake and tracking.³³⁶⁷ When a complaint has been accepted, having been submitted in a timely manner and falling within OCRD’s jurisdiction, Treasury reports that it will then refer the complaint to the relevant bureau for investigation, for which the bureau must submit a report to detail the investigation and provide an agency position statement on the complaint.³³⁶⁸ Treasury states that typically, the investigation will entail interviews with the complainant, the recipient and/or recipient’s staff, agency staff, and other witnesses; and a review of the recipient’s relevant records, agency records, and building facilities; and consideration of any information or evidence gathered, and defenses asserted.³³⁶⁹ Further, once OCRD reviews the report, it will issue a decision “on the merits of the complainant’s allegations,” and will notify the complainant via a letter containing “findings of fact, and conclusions of law,” a description of the remedy for each violation found, and a notice of the right to appeal (if applicable).³³⁷⁰ Treasury reports that it will require cooperation from any agency employee who needs to participate in the investigative process, as part of the employee’s official agency duties.³³⁷¹ Complaints can be resolved informally via a settlement agreement, which Treasury states will be documented in writing and will be added to the complaint file, with a copy provided to the complainant.³³⁷² The settlement agreement must describe the subject matter of the complaint and the terms that each party has agreed to, and all settlement agreements must be approved by the Office of the General Counsel or appropriate bureau counsel.³³⁷³ If appropriate, an appeal may be filed within 60 days of the receipt of the letter of findings, and this time frame may be extended with “good cause.” The Assistant Secretary of Management or a designee is directed to make all final decisions on timely appeals.³³⁷⁴

³³⁶⁵ Treasury, External Civil Rights Responsibilities and Complaint Process, *supra* note 3364.

³³⁶⁶ 31 C.F.R. § 22.7(b); Treasury, External Civil Rights Responsibilities and Complaint Process, *supra* note 3364.

³³⁶⁷ Treasury, External Civil Rights Responsibilities and Complaint Process, *supra* note 3364, at 2.

³³⁶⁸ *Ibid.*, 2.

³³⁶⁹ *Ibid.*, 2-3.

³³⁷⁰ *Ibid.*, 3.

³³⁷¹ *Ibid.*, 3.

³³⁷² *Ibid.*, 3.

³³⁷³ *Ibid.*, 3.

³³⁷⁴ *Ibid.*, 3.

Table 13.1: Number of Complaints Opened, Closed, and Received by OCRD³³⁷⁵

OCRD Complaints	FY 2016	FY 2017	FY 2018 (as of 3/09/2018)*
Number of complaints/cases received	31	30	18
Number of Complaints/Cases Investigated/Not Investigated			
Number of complaints/cases investigated	5	12	0
Number of complaints/cases not investigated	26	18	0 ³³⁷⁶
Complaint/Case Findings and Outcomes			
Complaint/case found evidence of discrimination	2	2	0
Complaint/case found no evidence of discrimination	2	5	0
Complaint/case withdrawn	1	0	0
Number of Complaints/Cases Closures			
Closures	31	25	8
Cases pending final decision	0	4	0
Complaints pending investigation	0	1	0
Cases/complaints in Intake Review	0	0	7
Reason and Method for Complaint/Case Closure			
Merits	5	7	0
Reason for Complaint			
Disability	31	29	18
Disability and age	0	1	0

Source: U.S. Department of the Treasury

* No complaints were accepted for investigation at the time of data collection

In FY 2016, OCRD received 31 complaints of discrimination, all of which were based on alleged discrimination against persons with disabilities.³³⁷⁷ Of the 31 complaints received, OCRD investigated five and did not investigate 26.³³⁷⁸ OCRD found evidence of discrimination in two of the five cases it investigated and no evidence in two of the five cases.³³⁷⁹ The remaining complaint was withdrawn.³³⁸⁰ In FY 2016, OCRD took between 77 to 326 days to resolve a case or complaint.³³⁸¹

³³⁷⁵ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 7, at 14-15.

³³⁷⁶ OCRD had not yet accepted any complaints for investigation during FY 2018 at the time OCRD submitted their data to the Commission on March 9, 2018.

³³⁷⁷ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 7, at 14-15.

³³⁷⁸ Ibid.

³³⁷⁹ Ibid.

³³⁸⁰ Ibid.

³³⁸¹ Ibid.

In FY 2017, OCRD received 30 complaints of discrimination; 29 of the complaints were on the basis of disability and one was on the basis of disability and age.³³⁸² Of those 30 complaints/cases, OCRD investigated 12 and did not investigate 18.³³⁸³ OCRD found evidence of discrimination in two cases it investigated, did not find evidence of discrimination in five of the 12 cases, 4 of the 12 cases were pending final decision when Treasury submitted their interrogatory responses to the Commission, and one of the 12 complaints was pending investigation as of that time.³³⁸⁴ In FY 2017, cases and complaints were resolved between 73 and 156 days.³³⁸⁵ At the point of data collection, Treasury reported that during FY 2018 OCRD had received 18 complaints/cases.³³⁸⁶ Each claimed disability discrimination, and OCRD had not accepted any for investigation when Treasury submitted their interrogatory responses to the Commission.³³⁸⁷ OCRD had closed 8 of the 18 complaints/cases.³³⁸⁸ OCRD closes cases because of a lack of jurisdiction or failure to pursue by the complainant. Seven of the 18 complaints/cases were awaiting Intake Review.³³⁸⁹ In FY 2018, OCRD received 32 complaints, two of which OCRD determined to be jurisdictional.³³⁹⁰ OCRD did not issue any findings of discrimination resulting from complaints in FY 2018.³³⁹¹ During FY 2016-2018, OCRD indicated that it did not receive any complaints filed on the basis of sex or race.³³⁹²

Proactive Compliance Evaluation

OCRD has federal regulatory responsibility to undertake proactive and periodic compliance investigations.³³⁹³ Its Title VI regulations state that, “The designated Agency official shall from time to time review the practices of recipients to determine whether they are complying with this part.”³³⁹⁴ OCRD has the authority to enforce compliance with nondiscrimination laws through administrative hearings and withholding of funds from recipients of federal funding.³³⁹⁵ OCRD stated that it takes a proactive role in preventing discrimination through compliance and accessibility reviews and audits of recipients of federal funding through Treasury programs.³³⁹⁶ In Treasury’s FY 2016 annual civil rights report, Treasury indicated that OCRD was in the process of establishing memoranda of understanding with two recipients of federal financial assistance, however Treasury did not indicate whether these memoranda resulted from complaints or

³³⁸² Ibid.; U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 10, at 18.

³³⁸³ U.S. Dep’t of the Treasury’s Response to USCCR Interrogatory No. 7, at 14-15.

³³⁸⁴ Ibid.

³³⁸⁵ Ibid.

³³⁸⁶ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 10, at 17.

³³⁸⁷ Ibid., 18.

³³⁸⁸ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 7, at 14-15.

³³⁸⁹ Ibid.

³³⁹⁰ U.S. Dep’t of the Treasury, Response to USCCR Affected Agency Review (Jun. 19, 2019) (on file).

³³⁹¹ Ibid.

³³⁹² U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 10, at 18.

³³⁹³ 31 C.F.R. § 22.8(a).

³³⁹⁴ *Id.* § 22.7(a).

³³⁹⁵ *Id.* §§ 17.170, 22.8, 23.41, 23.46, 28.600, 28.620; U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 9, at 16-17.

³³⁹⁶ U.S. Dep’t of the Treasury, Response to USCCR Interrogatory No. 2, at 3.

compliance reviews.³³⁹⁷ Commission staff were unable to find data regarding OCRD external compliance reviews for FY 2017 and FY 2018.

OCC has the power to supervise banks' compliance with fair lending laws and regulations and performs fair lending risk assessments and examinations.³³⁹⁸ OCC has the authority to monitor all banks for compliance with the Fair Housing Act.³³⁹⁹ If OCC determines that a violation of the Fair Housing Act has occurred, it will refer the matter to HUD for further administrative action.³⁴⁰⁰ Similarly, OCC monitors compliance with the Equal Credit Opportunity Act (ECOA) for banks under the ECOA's jurisdiction. According to OCC, banks will be referred to DOJ for further action whenever the OCC has reason to believe that one or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit.³⁴⁰¹ OCC will refer the matter to HUD if OCC believes that both ECOA and the Fair Housing Act have been violated.³⁴⁰²

IRS similarly has the authority to review the recipients of financial assistance under its jurisdiction for compliance with the applicable civil rights statutes.³⁴⁰³

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

OCRD is required by regulation to provide assistance and guidance to recipients of federal funding of compliance requirements under the law.³⁴⁰⁴

OCRD stated that it focused on the following regulatory changes during the Fiscal Years 2016-2018:

During FY 2016 and 2017, the main priority was to issue regulations implementing the requirements of Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act, and the Age Discrimination Act. During FY 2017, the Department started the drafting and clearance process to issue a Title VI Guidance for Recipients, ensuring Treasury recipients of financial assistance have clear guidance of the compliance requirements. The Department's goal for FY 2018, is to complete the internal clearance of the draft Title VI guidance and submitting it for clearance by DOJ as required by Executive Order 12,250.³⁴⁰⁵

³³⁹⁷ Treasury, *FY 2016 EEO, Diversity and Civil Rights Report*, *supra* note 3361, at 25.

³³⁹⁸ 12 U.S.C. § 1818; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 1, at 4-5.

³³⁹⁹ 12 C.F.R. § 128; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 4.

³⁴⁰⁰ 42 U.S.C. § 3601 *et seq.*; U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 4.

³⁴⁰¹ 5 U.S.C. § 1691 *et seq.*; *see also*, U.S. Dep't of the Treasury, Comptroller of the Currency, *Comptroller's Handbook: Fair Lending*, p. 9, January 2018, <https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/fair-lending/pub-ch-fair-lending.pdf> (accessed Jul. 30, 2019) [Treasury OCC, *Comptroller's Handbook: Fair Lending*].

³⁴⁰² Exec. Order No. 12,892, 59 Fed. Reg. 2,939; Treasury OCC, *Comptroller's Handbook: Fair Lending*, *supra* note 3401, at 9.

³⁴⁰³ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 2, at 3-4.

³⁴⁰⁴ 31 C.F.R. §§ 22.6, 28.605.

³⁴⁰⁵ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 3, at 9.

Treasury published a notice of proposed rulemaking on January 7, 2017, that would add regulatory protections for persons with disabilities in programs or activities receiving federal financial assistance from Treasury.³⁴⁰⁶ In Fiscal Year 2017, Treasury also issued final rules on nondiscrimination on the basis of age and race, color, or national origin in programs or activities receiving federal financial assistance from the department.³⁴⁰⁷

Additionally, in 2017, as described above OCRD issued guidance in the form of a Civil Rights Directive to establish OCRD's complaint processing procedures.³⁴⁰⁸ The Directive explains OCRD's complaint process for individuals and furthermore, it notifies entities receiving financial assistance through Treasury programs of their obligations under the law.³⁴⁰⁹

In August of 2018, OCC issued new guidance regarding the use of evidence of discriminatory practices in Community Reinvestment Act ratings used by OCC.³⁴¹⁰ The new guidance advises that evidence of discriminatory or other illegal practices will lead to OCC considering lowering the financial institution's score only if there is a "logical nexus" between the discriminatory practices and the bank's lending activities.³⁴¹¹ The guidance advises examiners as to how they should evaluate discriminatory credit practices along these lines, and also clarifies that even if there is a logical nexus showing that the discriminatory practice impacted lending activities, there may be mitigating factors and "[f]ull consideration is given to the remedial actions taken by the bank."³⁴¹² The guidance cites to federal regulations.³⁴¹³

Interaction and Coordination with External Agencies and Organizations

Executive Order 12,892, which encourages cooperation in implementing the Fair Housing Act across federal agencies, requires Treasury's OCC to notify HUD of facts or information suggesting a violation of the Fair Housing Act, and to notify DOJ if such facts or information indicate a possible pattern or practice of discrimination in violation of the Act.³⁴¹⁴ OCC also has an MOU

³⁴⁰⁶ Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance From the Department of the Treasury, 82 Fed. Reg. 67 (The proposed rule will be codified as 31 C.F.R. Part 40)

³⁴⁰⁷ Treasury affected agency review; *see* Nondiscrimination on the Basis of Age in Programs and Activities Receiving Federal Financial Assistance From the Department of the Treasury, Oct. 11, 2017, <https://www.federalregister.gov/documents/2017/10/11/2017-21905/nondiscrimination-on-the-basis-of-age-in-programs-and-activities-receiving-federal-financial>; Nondiscrimination on the Basis of race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance from the Department of the Treasury, Dec. 13, 2016, <https://www.federalregister.gov/documents/2016/12/13/2016-29629/regulation-regarding-nondiscrimination-on-the-basis-of-race-color-or-national-origin-in-programs-or->

³⁴⁰⁸ Treasury, External Civil Rights Responsibilities and Complaint Process, *supra* note 3364, at 3.

³⁴⁰⁹ *Ibid.*

³⁴¹⁰ U.S. Dep't of the Treasury, Office of the Comptroller of the Currency, PPM 5000-43, Impact of Evidence of Discriminatory or Other Illegal Credit Practices on Community Reinvestment Act Ratings (Aug. 15, 2018), <https://www.occ.gov/publications/publications-by-type/other-publications-reports/ppms/ppm-5000-43.pdf>

³⁴¹¹ *Ibid.*

³⁴¹² *Ibid.*, 4.

³⁴¹³ *Ibid.*, *passim*.

³⁴¹⁴ Exec. Order No. 12,892, 59 Fed. Reg. 2,939.

with HUD under which OCC will refer complaints that allege potential violations of the Fair Housing Act to HUD.³⁴¹⁵

Additionally, OCC must notify DOJ of suspected fair lending violations under ECOA.³⁴¹⁶

Similarly, OCRD has the ability to refer litigation to DOJ as one of its enforcement tools for a violation or threatened violation of civil rights protections under Title VI and Title IX.³⁴¹⁷

Research, Data Collections, and Reporting

OCRD collects data regarding the types of discrimination alleged in complaints filed with OCRD.³⁴¹⁸ OCRD does not collect racial and ethnic data from beneficiaries of Treasury programs.³⁴¹⁹ OCRD is not required by law to collect data on civil rights issues; however Treasury stated that it plans to issue guidance to all recipients of federal funding requiring them to collect data on race and national origin.³⁴²⁰

³⁴¹⁵ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 1, at 6.

³⁴¹⁶ 5 U.S.C. § 1691 *et seq.*

³⁴¹⁷ *See* 31 C.F.R. §§ 22.8(a)(1) ("If there appears to be a failure or threatened failure to comply with this [Treasury Title VI regulation]" OCRD may refer the matter to DOJ), 28.615(a)(1) ("If there appears to be a failure or threatened failure to comply with [Treasury's] Title IX regulations" OCRD may refer the matter to DOJ).

³⁴¹⁸ U.S. Dep't of the Treasury, Response to USCCR Interrogatory No. 11, at 19.

³⁴¹⁹ *Ibid.*

³⁴²⁰ *Ibid.*

Chapter 14: U.S. Department of the Interior, Office of Civil Rights

Legal Authority and Responsibility

Congress established the U.S. Department of the Interior (DOI) in 1849.³⁴²¹ Currently, DOI's Secretary is David Bernhardt, who was sworn in on April 11, 2019. Secretary Bernhardt replaced Ryan Zinke, who served as President Trump's Secretary of the Interior from 2017 until December 2018.³⁴²²

According to federal regulations, the Office of Civil Rights (DOI OCR) within DOI is responsible for protecting individuals from discrimination based on race, national origin, age, sex, or disability under any program or activity funded by DOI.³⁴²³ DOI's website clarifies that: "Discrimination includes: denial of services, aids, or benefits; provision of different service or in a different manner; and segregation or separate treatment. In addition, sex discrimination is prohibited in Federally assisted educational programs."³⁴²⁴ Under federal law and regulations, DOI is obligated to process civil rights complaints, and is specifically required to provide assistance and guidance, in the course of implementing civil rights laws and regulations to ensure recipients of federal financial assistance administered by DOI do not discriminate on the basis of race, national origin, gender, or disability, and with regard to DOI funded educational and training activities, on the basis of sex, sexual orientation, or status as a parent.³⁴²⁵ Its jurisdiction also includes environmental justice.³⁴²⁶ Furthermore, DOI has designated civil rights coordinators in the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Safety and Environmental Enforcement, National Park Service, Office of Surface Mining, Reclamation and Enforcement, U.S. Fish and Wildlife Service, and U.S. Geological Survey.³⁴²⁷ These officials are responsible for processing and investigating civil rights complaints, including those against bureau conducted programs and bureau federally assisted

³⁴²¹ 43 U.S.C. § 1451, R. S. § 437, 9 Stat. 395 (1849).

³⁴²² 43 U.S.C. § 1451; U.S. Dep't of the Interior, "David Bernhardt – Secretary of the Interior," <https://www.doi.gov/whoweare/asbernhardt>.

³⁴²³ See generally, 43 C.F.R. §§ 17 (Title VI), 27 (Trans-Alaska Pipeline Authorization Act implementation of civil rights protections), 41 (Title IX); U.S. Dep't of the Interior, "Public Civil Rights," <https://www.doi.gov/pmb/eeo/public-civil-rights> [hereinafter DOI, "Public Civil Rights"].

³⁴²⁴ DOI, "Public Civil Rights," *supra* note 3423.

³⁴²⁵ 20 U.S.C. § 1681; 29 U.S.C. § 701 *et seq.*; 42 U.S.C. 2000d *et seq.*; see generally, 43 C.F.R. §§ 17, 27, 41; U.S. Dep't of the Interior, Civil Rights Directive 2011-01: Public Civil Rights Complaint Procedures (Mar. 14, 2011) https://www.doi.gov/sites/doi.gov/files/migrated/pmb/eeo/directives/upload/Civil-Rights-Directive-2011-01CProcedures-11_5_2010-wk.pdf [hereinafter DOI, Public Civil Rights Complaint Procedures]; Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, Exec. Order No. 13,160, 65 Fed. Reg. 39,775.

³⁴²⁶ Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629.

³⁴²⁷ See *infra* notes 3467-3477.

programs.³⁴²⁸ DOI issues millions in federal funding. In FY 2016, DOI issued over \$763 million in over 18,000 cooperative agreements.³⁴²⁹

DOI OCR has indicated that it externally enforces the following civil rights statutes, regulations, and executive orders:³⁴³⁰

- Title VI of the Civil Rights Act of 1964³⁴³¹
- The Architectural Barriers Act of 1968;³⁴³²
- Title IX of the Education Amendments of 1972;³⁴³³
- Section 504 of the Rehabilitation Act of 1973, as amended;³⁴³⁴
- Section 508 of the Rehabilitation Act of 1973, as amended;³⁴³⁵
- Age Discrimination Act of 1975, as amended;³⁴³⁶
- Civil Rights Restoration Act of 1987, as amended;³⁴³⁷
- Telecommunications Accessibility Enhancement Act of 1988;³⁴³⁸
- Americans with Disabilities Act of 1990;³⁴³⁹
- Architectural Barriers Act Accessibility Standards;³⁴⁴⁰
- Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations;³⁴⁴¹

³⁴²⁸ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425.

³⁴²⁹ See, e.g., Michael Doyle, “U.S. Interior Department to Put Academic, Nonprofit Grants Through Political Review,” *Science Magazine*, Jan. 9, 2018, <https://www.sciencemag.org/news/2018/01/us-interior-department-put-academic-nonprofit-grants-through-political-review> [hereinafter Doyle, “U.S. Interior Department to Put Academic, Nonprofit Grants Through Political Review”].

³⁴³⁰ U.S. Dep’t of the Interior, Response to USCCR Interrogatory 1, at 1-2.

³⁴³¹ 42 U.S.C. § 2000d *et seq.*

³⁴³² 42 U.S.C. § 4151, Pub. L. 90-480 and implementing regulations at 43 C.F.R. §§ 17.550-551 and 17.570(f).

³⁴³³ 20 U.S.C. §§ 1681-1688, Pub. L. 92-318; 86 Stat. 235; 373; 20 U.S.C. 1681-1688 as amended by Pub. L. 93-568; 88 Stat. 1855; except sections 904 and 906 of those Amendments; U.S. Dep’t of the Interior, Response to USCCR Interrogatory No. 1, at 1. The Interrogatory response notes that this law “is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution.” *Id.*

³⁴³⁴ 29 U.S.C. § 794, Pub. L. 93-112; 87 Stat. 394; as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516; 88 Stat. 1617; as also amended by the Rehabilitation, Comprehensive Service, and Developmental Disabilities Act of 1978, Pub. L. 95-602; 92 Stat. 2955 and implementing regulations at 43 C.F.R. Subpart B.

³⁴³⁵ 29 U.S.C. § 794d; as amended by the Workforce Investment Act of 1998, Pub. L. 105-220; 112 Stat. 936 and implementing regulations at 29 C.F.R. Part 1615.

³⁴³⁶ 42 U.S.C. § 6101 *et seq.*, Pub. L. 94-135; Title III.

³⁴³⁷ 42 U.S.C. § 2000d, Pub. L. 100-259; 102 Stat. 28; as amended by the Civil Rights Restoration Act of 1991, Pub. L. 102-166.

³⁴³⁸ 40 U.S.C. § 762 a-d, Pub. L. 100-542; 102 Stat. 2721.

³⁴³⁹ 42 U.S.C. § 12101 *et seq.*, Pub. L. 101-336; and implementing regulations at 28 CFR § 35 and 29 C.F.R. § 1630.

³⁴⁴⁰ 41 C.F.R. §§ 102-76.60, .70, .75, .80, .85, .90, .95 are GSA-ABA Accessibility Standards in which GSA adopts appendices C and D to 36 CFR § 1191 (ABA Chapters 1 and 2, and Chapters 3-10).

³⁴⁴¹ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7,629.

- Executive Order 13,160, Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs;³⁴⁴²
- Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency;³⁴⁴³

Furthermore, the following are mentioned in DOI's Departmental Manual as being under the external enforcement jurisdiction of DOI OCR:

- Title VII of the Civil Rights Act of 1964, as amended;³⁴⁴⁴
- The Civil Rights Act of 1991, as amended;³⁴⁴⁵
- Age Discrimination in Employment Act, as amended;³⁴⁴⁶
- Americans with Disabilities Act Amendments Act of 2008;³⁴⁴⁷
- Equal Pay Act of 1963;³⁴⁴⁸
- The Notification of Federal Employee Anti-discrimination and Retaliation Act (No FEAR Act of 2002);³⁴⁴⁹
- Genetic Information Nondiscrimination Act of 2008;³⁴⁵⁰
- Lilly Ledbetter Fair Pay Act of 2009;³⁴⁵¹
- Title II of the Trans-Alaska Pipeline Authorization Act;³⁴⁵²
- Executive Order 11,478, Equal Employment Opportunity in the Federal Government;³⁴⁵³
- Other "Federal statutes and regulations that prohibit discrimination on the basis of race, color, national origin, religion, sex, age, disability, sexual orientation, and genetic information, and that promote equal employment opportunity through a continuing affirmative program."³⁴⁵⁴

³⁴⁴² Exec. Order No. 13,160, Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs, 66 Fed. Reg. 5,397.

³⁴⁴³ Executive Order 13,166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121.

³⁴⁴⁴ 42 U.S.C. §§ 2000d-1-2000d-4; as amended, Pub. L. 92-261; 42 U.S.C. § 2000e *et seq.* and implementing regulations at 29 C.F.R. § 1606.

³⁴⁴⁵ Pub. L. 102-166; as amended, 42 U.S.C. 2000e *et seq.*; Pub. L. 92-261.

³⁴⁴⁶ Pub. L. 93-259; 29 U.S.C. §§ 621-634 and implementing regulations at 43 C.F.R. Subpart C; § 2 of Reorganization Plan No. 1 of 1978, Exec. Order No. 12,106 § 1-101.

³⁴⁴⁷ Pub. L. 110-325; 42 U.S.C. § 12101 and implementing regulations at 29 C.F.R. § 1630.

³⁴⁴⁸ Pub. L. 88-38; 29 U.S.C. 206(d); Reorganization Plan No. 1 of 1978 and implementing regulations at 29 C.F.R. §§ 1620-1621.

³⁴⁴⁹ Pub. L. 107-174; 5 U.S.C § 2301 and implementing regulations at 29 C.F.R. Subpart G.

³⁴⁵⁰ Pub. L. 110-233; 42 U.S.C. § 2000ff *et seq.* and implementing regulations at 29 C.F.R. § 1635.

³⁴⁵¹ Pub. L. 111-2; 123 Stat. 5.

³⁴⁵² 43 U.S.C. § 1651, Pub. L. 93-153; 87 Stat. 576 and implementing regulations 43 C.F.R. § 27.

³⁴⁵³ Exec. Order No. 11,478, Equal Employment Opportunity in the Federal Government, 34 Fed. Reg. 12,985.

³⁴⁵⁴ U.S. Dep't of the Interior, Departmental Manual, Part 12, Chapter 19, pp. 1-5.

Enforcement Tools

The agency enforcement tools the DOI OCR has specific legal authority to use are:

- Complaint resolution³⁴⁵⁵
- Agency-initiated charges³⁴⁵⁶
- Proactive compliance evaluations³⁴⁵⁷
- Guidance or other policy documents³⁴⁵⁸
- Regulations³⁴⁵⁹
- Technical assistance³⁴⁶⁰
- Publicity³⁴⁶¹
- Research, data collection, and reporting³⁴⁶²
- Collaboration/partnership with state/local agencies³⁴⁶³
- Collaboration/partnership with other federal agencies³⁴⁶⁴
- Strategic Plans³⁴⁶⁵
- Annual Reports³⁴⁶⁶

Budget and Staffing

DOI OCR noted that from FY 2016 to FY 2017, DOI OCR's Public Civil Rights budget consisted of salaries of three FTE employees assigned to the Public Civil Rights Division.³⁴⁶⁷ After one FTE employee left in FY 2017, DOI OCR's Public Civil Rights budget consisted of salaries of just two FTE employees assigned to the Public Civil Rights Division in FY 2018.³⁴⁶⁸ These FTE employees "provide oversight and technical assistance to bureau Public Civil Rights employees in processing and responding to civil rights complaints, in addition to processing and responding to some cases by the DOI OCR Public Civil Rights Division employees directly."³⁴⁶⁹

³⁴⁵⁵ 43 C.F.R. §§ 17.6, 17.7, 17.280, 27.8, 27.9, 41.605

³⁴⁵⁶ *Id.* § 17.6(a) and (c).

³⁴⁵⁷ *Id.* §§ 27.7, 27.8(b), 41.605, 17.5, 17.6(a), 17.280, 17.320, 17.330(a) (conduct of investigations).

³⁴⁵⁸ *Id.* §§ 17.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

³⁴⁵⁹ 28 C.F.R. § 42.403 (Agency duty to issue Title VI regulations).

³⁴⁶⁰ 43 C.F.R. § 17.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

³⁴⁶¹ 28 C.F.R. § 42.405 (requirements for Public dissemination of Title VI information).

³⁴⁶² *Id.* § 42.406 (regarding data collection and information sharing).

³⁴⁶³ 43 C.F.R. § 17.5(a) (responsible Department official "shall provide assistance and guidance to recipients to help them comply voluntarily with this part").

³⁴⁶⁴ 28 C.F.R. § 42.413.

³⁴⁶⁵ GPRA Modernization Act of 2010, H.R. 2142, 111th Cong. § 1115(b).

³⁴⁶⁶ 43 U.S.C. § 1465.

³⁴⁶⁷ U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 6, at 5.

³⁴⁶⁸ *Ibid.*

³⁴⁶⁹ *Ibid.*

DOI OCR requires funds in order to carry out its duties as the “focal point for policy development and administration of equal opportunity and public access civil rights programs for the Department of Interior.”³⁴⁷⁰ These duties include developing policies and procedures related to civil rights programs, managing the public civil rights complaints processing system, managing the equal employment complaints processing and reporting system, and evaluating program civil rights compliance.³⁴⁷¹ DOI OCR requested \$3.418 million for FY 2016.³⁴⁷² DOI OCR was allocated \$3.453 million for FY 2016, and \$3.378 million went to Departmental Operations and \$75,000 went to Working Capital Funds, namely the EEO Complaints Tracking System and Special Emphasis Program.³⁴⁷³ For FY 2017, DOI OCR requested \$3.481 million to fund their operations.³⁴⁷⁴

DOI OCR indicated that there are currently two staff members who work on external complaints, however, this number is down from three full-time staff members, as one person left the Department in 2017.³⁴⁷⁵ These two full-time employees are focused on external civil rights enforcement. DOI OCR reports that it plans to initiate a workforce planning exercise in FY 2019 to “determine appropriate organizational design, staffing levels, identify employee development and competency gaps, and division of workload.”³⁴⁷⁶

DOI OCR also indicated other DOI staff outside of DOI OCR who work on civil rights enforcement, including:

- One full-time EEO Specialist at the Bureau of Land Management
- One full-time EEO Specialist at the National Park Service
- One full-time EEO Specialist at the Office of Surface Mining Reclamation
- Seven full-time Regional Accessibility Coordinators in the Public Civil Rights Program at the U.S. Fish and Wildlife Service
- One full-time Civil Rights Analyst at the Bureau of Reclamation
- Two quarter-time staff members (one EEO Specialist and one Supervisory EEO Manager) at the National Park Service, and in FY 2017 and FY 2018 only, three quarter-time

³⁴⁷⁰ U.S. Dep’t of the Interior, *The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2018*, p. 48,

https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_os_budget_justification.pdf.

³⁴⁷¹ *Ibid.*, 48-49; see U.S. Dep’t of the Interior, *The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2019*,

https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_os_budget_justification.pdf.

³⁴⁷² U.S. Dep’t of the Interior, *The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2016*,

https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2016/upload/FY2016_OS_Greenbook.pdf.

³⁴⁷³ U.S. Dep’t of the Interior, *The United States Department of the Interior Budget Justifications and Performance Information Fiscal Year 2017*,

https://www.doi.gov/sites/doi.gov/files/uploads/FY2017_OS_Budget_Justification.pdf.

³⁴⁷⁴ *Ibid.*

³⁴⁷⁵ U.S. Dep’t of the Interior, Response to USCCR Interrogatory No. 5, at 4-5.

³⁴⁷⁶ U.S. Dep’t of the Interior, Response to USCCR Interrogatory No. 6, at 6.

Supervisory EEO Managers and six quarter-time EEO Specialists at the National Park Service

- One half-time Complaints Manager and EEO Specialist; three quarter-time Regional Chiefs, Office of Diversity and Inclusion; one quarter-time Diversity Outreach Specialist; and one quarter-time EEO Specialist at the Fish and Wildlife Service³⁴⁷⁷

Assessment

Prioritization of Civil Rights Agency-wide

DOI's agency-wide mission and self-identified priorities do not directly identify civil rights enforcement.³⁴⁷⁸

When asked about its current civil rights policy priorities, DOI OCR indicated that its main priority is “to ensure that the public is not discriminated against based [o]n all of its federally conducted and federally assisted programs and activities.”³⁴⁷⁹ DOI OCR also pointed to Secretarial Order No. 3366, *Increasing Recreational Opportunities on Lands and Waters Managed by the U.S. Department of the Interior*, which initiates a new effort that aims to, in part, “proactively serve people with disabilities with respect to recreational opportunities at the Department.”³⁴⁸⁰

DOI OCR does not have a direct line of authority to the agency head. DOI OCR reports directly to the Deputy Secretary of Interior, and ultimately to the Secretary.³⁴⁸¹

During the fiscal years examined, the number of cases that DOI OCR closed declined from 34 in FY 2016 to 7 in FY 2018.³⁴⁸²

³⁴⁷⁷ U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 5, at 4. It was unclear from OCR's responses to USCCR's Interrogatories whether these positions were devoted to strictly internal civil rights enforcement, or if some of these positions worked on external civil rights enforcement.

³⁴⁷⁸ U.S. Dep't of the Interior, “About”, <https://www.doi.gov/whoweare>. The Commission notes that this includes specific civil rights protections for Native Americans. *See, e.g.*, USCCR, *Broken Promises*, *supra* note 341, at 12-18 (describing treaty-based and other civil rights obligations of the federal government towards Native Americans).

³⁴⁷⁹ U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 3, at 3.

³⁴⁸⁰ U.S. Dep't of the Interior, Order No. 3366, *Increasing Recreational Opportunities on Lands and Waters Managed by the U.S. Department of the Interior* (April 18, 2018), https://www.doi.gov/sites/doi.gov/files/uploads/so_recreation_opps.pdf; *see also* U.S. Dep't of the Interior, “Press Release: Zinke Signs Secretarial Orders to Increase Recreational Opportunities on Public Lands and Waters,” Apr. 18, 2018, <https://www.doi.gov/pressreleases/zinke-signs-secretarial-orders-increase-recreational-opportunities-public-lands-and>.

³⁴⁸¹ U.S. Dep't of the Interior, *Strategic Plan for Fiscal Years 2018-2022*, 2018, p. 6, <https://www.doi.gov/sites/doi.gov/files/uploads/fy2018-2022-strategic-plan.pdf> [hereinafter DOI, *Strategic Plan FY 2018-2022*].

³⁴⁸² U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 7, at 6.

In January 2018, DOI began requiring that its funding agreements for grants over \$50,000 align with the Secretary's priorities.³⁴⁸³ These priorities include to “actively support efforts to secure our southern border” and “utilizing our natural resources” for mining and other financial benefits, but except for listing “tribal self-determination, self-governance and sovereignty,” they do not directly mention civil rights.³⁴⁸⁴ As discussed above, civil rights compliance is handled by a small staff.³⁴⁸⁵

Organizational Structure

DOI OCR is located within the DOI Office of Policy, Management and Budget.³⁴⁸⁶ Tyvonnia Ward is the head and Acting Director of the Office of Civil Rights.³⁴⁸⁷ See Figure 14.1 for DOI OCR's Organizational Chart. DOI OCR has indicated that its “organizational structure and general civil rights-related roles/responsibilities have not changed over the fiscal years in question.”³⁴⁸⁸ DOI OCR is “the focal point for all civil rights, equal opportunity programs, and affirmative employment,” in DOI, and works to “develop and enforce civil rights and equal opportunity programs pursuant to existing laws, executive orders and regulations and to ensure equal opportunity for all Departmental employees and federally assisted programs by the Department.”³⁴⁸⁹ DOI OCR's Public Civil Rights Division states that it handles external complaints of discrimination on the grounds of race, national origin, age or disability under “any program or activity conducted by or which receives Federal financial assistance from the Department of the Interior,” and it states that: “Sex discrimination is prohibited in federally assisted educational programs.”³⁴⁹⁰ DOI regulations also require that recipients of federal funding not discriminate on the basis of parental or marital status.³⁴⁹¹ Sloan Farrell is the Chief of the Public Civil Rights Division, and reports to the Acting Director of DOI OCR.

³⁴⁸³ See U.S. Dep't of Interior, Office of the Secretary, Memorandum to All Assistant Secretaries, Guidance for Financial Assistance Actions Effective Fiscal Year 2018 (Dec. 28, 2017), <http://apps.washingtonpost.com/g/documents/national/interior-guidance-for-fiscal-2018-grants/2698/>. See also Doyle, U.S. Interior Department to Put Academic, Nonprofit Grants Through Political Review,” *supra* note 3429 (grants over \$50,000 will be reviewed to determine if aligned with priorities such as “actively support[ing] efforts to secure our southern border,” ensuring “American energy is available to meet our security and economic needs,” employing more veterans, and shifting “the balance toward providing greater public access to public lands over restrictions to access,” according to accompanying memo).

³⁴⁸⁴ See “Interior's Priorities for FY 2018 Grants,” *The Washington Post*, Jan. 9, 2018 (attaching U.S. Dep't of Interior, Office of Secretary Memorandum, Attachment: Priorities for Financial Assistance), <https://apps.washingtonpost.com/g/documents/national/interiors-priorities-for-fiscal-2018-grants/2699/>.

³⁴⁸⁵ See *supra* notes 3467-3477.

³⁴⁸⁶ U.S. Dep't of the Interior, “Organization Chart,” <https://www.doi.gov/ibc/about-us/org-chart>.

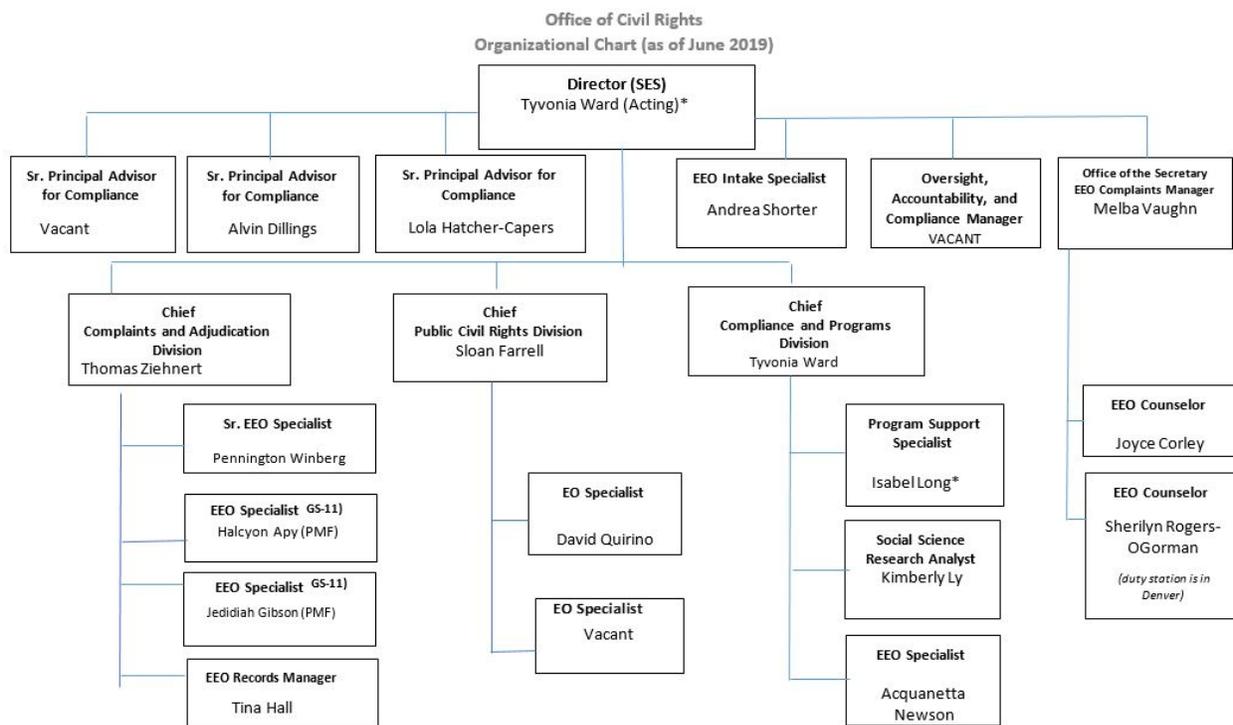
³⁴⁸⁷ U.S. Dep't of the Interior, “Contact Us,” <https://www.doi.gov/pmb/eo/contact-us/>.

³⁴⁸⁸ U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 4, at 3-4.

³⁴⁸⁹ U.S. Dep't of the Interior, “Office of Civil Rights and Chief Diversity Officer,” <https://www.doi.gov/pmb/eo>.

³⁴⁹⁰ DOI, “Public Civil Rights,” *supra* note 3423.

³⁴⁹¹ 43 C.F.R. § 41.445.

Figure 14.1: DOI OCR Organizational Chart

* On detail to OCR.

Source: U.S. Department of the Interior,

Strategic Planning & Self-Evaluation

DOI produces a strategic plan every four fiscal years as required by the Government Performance and Results Act Modernization Act of 2010.³⁴⁹² During the time period studied, Interior operated under three strategic plans: the FY 2011 – 2016 Strategic Plan,³⁴⁹³ FY 2014-2018 Strategic Plan,³⁴⁹⁴ and the 2018-2022 Strategic Plan.³⁴⁹⁵ While none of the three plans specifically mention protection of civil rights, all plans discuss protection of Indian territorial and water rights.³⁴⁹⁶ Additionally, the 2011 Plan prioritized protecting Indian treaty and subsistence rights,³⁴⁹⁷ and the

³⁴⁹² 5 U.S.C. § 306(a), Pub. L. 111-352, 124 Stat. 3866.

³⁴⁹³ U.S. Dep't of the Interior, *United States Department of the Interior Strategic Plan for Fiscal Years 2011 – 2016*, https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/DOI_FY2011-FY2016_StrategicPlan.pdf [hereinafter DOI, *Strategic Plan FY 2011-2016*].

³⁴⁹⁴ U.S. Dep't of the Interior, *Strategic Plan FY 2014-2018*, 2014, <https://www.doi.gov/sites/doi.gov/files/migrated/pmb/ppp/upload/DOI-Strategic-Plan-for-FY-2014-2018-POSTED-ON-WEBSITE-4.pdf> [hereinafter DOI, *Strategic Plan FY 2014-2018*].

³⁴⁹⁵ DOI, *Strategic Plan FY 2018-2022*, *supra* note 3481.

³⁴⁹⁶ *Ibid.*, 19; DOI, *Strategic Plan FY 2014-2018*, *supra* note 3494, at 19; DOI, *Strategic Plan FY 2011 – 2016*, *supra* note 3493, at 27.

³⁴⁹⁷ DOI, *Strategic Plan FY 2011 – 2016*, *supra* note 3493, at 23.

2014 Strategic Plan prioritized the strengthening of Tribal Nations and insular communities.³⁴⁹⁸ The FY 2018-2022 strategic plan prioritizes strengthening tribal self-determination, fulfilling U.S. government fiduciary obligations to Tribal Nations, and strengthening tribal economic and health capacities.³⁴⁹⁹

The U.S. Department of the Interior is required to submit an annual report to Congress, with the only statutory requirement being that the report “not exceed a total of one thousand two hundred and fifty pages.”³⁵⁰⁰ DOI’s most recent annual report covering FY 2018 makes no specific mention of civil rights, nor does it establish any goals or achievements for DOI OCR.³⁵⁰¹

Complaint Processing, Agency-Initiated Changes, & Litigation

Complaints

DOI OCR accepts external civil rights complaints that allege discrimination on the basis of race, color, national origin, gender, disability, religion, sexual orientation, or status as a parent.³⁵⁰²

DOI OCR reported that it “investigated and resolved civil rights complaints in accordance with relevant statutes, regulations and policies to include DOI OCR civil rights directives and the Departmental Manuals.”³⁵⁰³ Depending on the outcome of the investigation, this letter could be a Letter of Resolution (when the respondent has volunteered to take action to comply with the law), A Violation Letter of No Findings (when the respondent is found to be in compliance with the law), a Violation Letter of Findings (when the respondent is found to be in non-compliance with the law and pre-findings voluntary compliance cannot be achieved), or a Letter of Concern (when there is insufficient evidence of a violation, but there are certain matters of concern with the respondent).³⁵⁰⁴

DOI OCR is responsible for setting DOI civil rights complaint policies and standardizing complaint processing procedures across all DOI bureaus.³⁵⁰⁵ For all civil rights complaints received by any bureau of DOI, a bureau EEO officer or designee is responsible for processing the complaint.³⁵⁰⁶ Complaints filed that do not fall under the jurisdiction of a specific DOI bureau will

³⁴⁹⁸ DOI, *Strategic Plan FY 2014-2018*, *supra* note 3494, at 31.

³⁴⁹⁹ U.S. Dep’t of the Interior, *Strategic Plan FY 2018-2022*, *supra* note 3481, at 32-34.

³⁵⁰⁰ 43 U.S.C. § 1465.

³⁵⁰¹ U.S. Dep’t of the Interior, *2019/2020 Annual Performance Plan & 2018 Report (APP&R)*, Mar. 19, 2019, https://www.doi.gov/sites/doi.gov/files/uploads/doi_final_appr_2019-2020.pdf.

³⁵⁰² 43 C.F.R. § 17 *et seq.*; DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 5.

³⁵⁰³ U.S. Dep’t of the Interior, Response to USCCR Interrogatory No. 7, at 6.

³⁵⁰⁴ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 13-14.

³⁵⁰⁵ U.S. Dep’t of the Interior, Civil Rights Directive 2009-01: Policy for Implementing a Public Civil Rights Program (Jun. 25, 2009), pp. 1, 6-7 [hereinafter DOI, Policy for Implementing a Public Civil Rights Program].

³⁵⁰⁶ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 4; DOI bureaus with dedicated complaint processing staff include: the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Safety and Environmental Enforcement, National Park Service, Office of Surface Mining, Reclamation and Enforcement, U.S. Fish and Wildlife Service, and U.S. Geological Survey; *see supra* notes 3475-3477.

be processed by DOI OCR.³⁵⁰⁷ The process is also set forth in internal directives regarding the public civil rights complaints process, which provide that upon initial receipt of a complaint, the bureau that receives the complaint must date stamp all incoming correspondence in order to “ensure the complainant’s ability to seek redress of the alleged discrimination in a timely manner.”³⁵⁰⁸ The bureau then sends a letter acknowledging receipt of the complaint that informs the complainant that the matter is being reviewed.³⁵⁰⁹ If a received complaint is filed on behalf of another individual, the bureau will contact that individual to confirm that they would like to pursue the allegations, and will either continue reviewing the complaint or close the matter, depending on the individual’s response.³⁵¹⁰

The internal directives state that the bureau that received the complaint will then review the complaint to determine whether it has jurisdiction to pursue an investigation and will either assign a case number when appropriate jurisdiction is determined, or will refer the complaint to the appropriate agency when there is no jurisdiction.³⁵¹¹ And according to federal regulations, for the bureau to have jurisdiction, the complaint must allege discrimination on one of the protected bases; it must allege discrimination that occurred in a program or activity that is federally funded or receives federal financial assistance; it must be covered by one or more of the statutes that Interior is responsible for enforcing; and the complaint must be filed in a timely manner.³⁵¹² DOI OCR will be notified if the bureau determines that they do not have the appropriate jurisdiction to accept and pursue a complaint investigation.³⁵¹³ Complaints must be filed within 180 days from the last date of the alleged discrimination.³⁵¹⁴

Internal directives provide that the bureau must also determine whether the complaint is complete, with a signed written explanation of what happened with sufficient information to understand the facts, a method of contacting the complainant, the basis of the complaint, the respondent information.³⁵¹⁵ The bureau must also identify the specific practice or service involved in the alleged discrimination to determine if there is a difference in the quality of service being provided; segregation or separate treatment in any part of the program; any restriction of the program benefits; different standards or requirements for participation; a failure to provide language assistance for LEP individuals; or the use of criteria or methods of administration that would “defeat or substantially impair the accomplishment of program objectives or would impact more heavily on members of a protected group.”³⁵¹⁶

³⁵⁰⁷ DOI, Policy for Implementing a Public Civil Rights Program, *supra* note 3505, at 9.

³⁵⁰⁸ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 5.

³⁵⁰⁹ *Ibid.*, 5.

³⁵¹⁰ *Ibid.*, 5.

³⁵¹¹ *Ibid.*, 6.

³⁵¹² 43 C.F.R. §§ 17.6, 17.570, 41.605; DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 7.

³⁵¹³ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 6.

³⁵¹⁴ 43 C.F.R. §§ 17.6, 17.570, 41.605; DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 6.

³⁵¹⁵ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 6.

³⁵¹⁶ *Ibid.*, 8; 43 C.F.R. §§ 17.6, 17.570, 41.605.

DOI reports that it will initiate an investigation if the bureau has completed this initial review and determined that the complaint is complete, the bureau has jurisdiction, and the complaint is timely.³⁵¹⁷ If, during this initial review, the bureau finds that a complaint does not have merit; if the same allegations/issues of the complaint have already been addressed in a recently closed investigation or court case; if there is a refusal to cooperate on the part of the complainant or if the death of a complainant makes it impossible to investigate; or if the complaint is referred to another agency for investigation, then the complaint will undergo a Pre-investigative Administrative Closure.³⁵¹⁸

A complaint resolution can be negotiated at any time, even prior to an investigation taking place.³⁵¹⁹ Particularly, Alternative Dispute Resolutions can be used when appropriate, after considering “the allegations, number of persons affected, type and extent of relief involved, cooperation of the respondent, and other factors.”³⁵²⁰ Internal directives also provide that a complaint can be reopened at any time, if the respondent has not complied with the terms of the resolution agreement.³⁵²¹

Once the investigation is completed, a letter will be issued to close the complaint.³⁵²² Depending on the outcome of the investigation, this letter could be a Letter of Resolution, A Violation Letter of No Findings, a Violation Letter of Findings, or a Letter of Concern.³⁵²³

DOI OCR provided the following information about complaints during FY 2016 to FY 2018:

Table 14.1: Number of DOI OCR Complaints Opened, Investigated, and Processed for FY 2016 to FY 2018

	No. of Complaints Opened	No. Complaints Investigated	No. Complaints Closed
FY 2016	47	47	34
FY 2017	24	24	13
FY 2018	20	20	8

Source: Dep’t of the Interior, Response to Interrogatory 7, at 6.

DOI OCR received 47 complaints in FY 2016, 24 in FY 2017, and 20 complaints in FY 2018. For all three fiscal years, OCR reported that 100 percent of the complaints opened were investigated. In FY 2016, FY 2017, and FY 2018, OCR closed 34, 13, and 8 complaints respectively. It is not clear why the number of complaints received declined so dramatically. In its 2002 report, the Commission noted that building trust with impacted communities is essential for effective civil

³⁵¹⁷ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 8.

³⁵¹⁸ *Ibid.*

³⁵¹⁹ *Ibid.*, 9; 43 C.F.R. §§ 17.6, 17.570, 41.605.

³⁵²⁰ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425, at 9.

³⁵²¹ *Ibid.*

³⁵²² *Ibid.*, 13.

³⁵²³ *Ibid.*, 13-14. For further description of these outcomes, *see supra* notes 3503-3504.

rights enforcement, and that at times, increasing awareness may lead to an increased number of complaints, which may be a sign of increasing efficacies.³⁵²⁴

DOI OCR also indicated that DOI bureaus and offices process external complaints under OCR as per its civil rights directives. OCR provided the following data to document these other agencies' complaints:

Table 14.2: Number of Non-DOI OCR Complaints Opened, Investigated, and Processed for FY 2016 to FY 2018, by Bureau

	FY 2016			FY 2017			FY 2018		
	Opened	Invest.	Closed	Opened	Invest.	Closed	Opened	Invest.	Closed
National Park Service	21	21	20	49	49	33	33	33	22
Fish and Wildlife Service	21	21	21	19	19	18	21	21	14
Bureau of Land Management	10	10	9	12	12	12	14	14	4
Office of Surface Mining Reclamation and Enforcement	5	5	4	4	4	3	3	3	2
Bureau of Indian Affairs	2	2	0	2	2	0	4	4	0
Bureau of Reclamation	2	2	2	0	0	0	3	3	0
Bureau of Safety and Environmental Enforcement/Bureau of Ocean Energy Management	4	4	1	2	2	0	1	1	0

Source: U.S. Dep't of the Interior, Response to Interrogatory 7, at 7-9.

Table 14.2 (see above) displays the number of opened, investigated, and closed complaints for all the identified non- DOI OCR agencies that process civil rights complaints for the FY 2016 to FY 2018.

³⁵²⁴ See *supra* Ch. 1.

Table 14.3: Total Number of Complaints by Type (Basis), FY 2016 to FY 2018

Basis	Number of Complaints	Percentage of Total
Age	1	0.3%
Sec. 504 Federally Conducted	74	22.5%
ADA	245	74.6%
Title VI	6	1.8%
Title VII	1	0.3%
EO 13160	1	0.3%

Source: U.S. Dep't of the Interior, Response to Interrogatory 7, at 7-9.

See Table 14.3. DOI OCR reported that the highest number of complaints received over FY 2016 to FY 2018 from DOI OCR and non-DOI OCR agencies were ADA complaints, with a total of 227 ADA complaints opened or approximately 75 percent of all complaints. The second highest number of complaints received over the fiscal years in question were Section 504 complaints, with a total of 66 complaints opened or approximately 22 percent of all complaints. All other types of complaints made up approximately 3 percent of the total number of complaints.

Proactive Compliance Evaluations

Federal regulations provide that DOI OCR may initiate compliance reviews for entities that receive funding from the U.S. Department of Interior.³⁵²⁵ Recipients of federal funding may be subject to a pre-award compliance review conducted by DOI OCR, prior to the approval of any financial assistance, and a post-award compliance review for new awardees.³⁵²⁶ Specifically, DOI OCR can perform the following pre- or post-award compliance reviews:

- Onsite (“to provide the reviewer with a greater opportunity to assess compliance on a more objective basis”)
- Desk audit (offsite, to assess compliance with civil rights policies and practices)
- Follow-up (a subsequent review to determine whether the recipient has “resolved outstanding conditions of noncompliance uncovered in previous reviews”)
- Unannounced (without prior notification to the program officials)³⁵²⁷

According to internal directives, DOI OCR will select recipients to be reviewed based on criteria such as whether the recipient has ever been formally reviewed; evidence of a violation; frequency of complaints against the recipient or of violations from previous compliance reviews; or the size of the federally assisted program or amount of federal assistance provided to the recipient.³⁵²⁸ Then DOI OCR will undergo a pre-review preparation, to consult with other federal agencies, analyze other civil rights compliance reviews or complaints involving the recipient, assess statistical data

³⁵²⁵ 43 C.F.R. § 17.330; U.S. Dep't of the Interior, Civil Rights Directive 2011-02: Public Civil Rights Compliance Reviews (Mar. 14, 2011), p. 2 [hereinafter DOI, Public Civil Rights Compliance Reviews].

³⁵²⁶ 43 C.F.R. § 17.330; DOI, Public Civil Rights Compliance Reviews, *supra* note 3525, at 2.

³⁵²⁷ 43 C.F.R. § 17, *passim.*; DOI, Public Civil Rights Compliance Reviews, *supra* note 3525, at 5-6.

³⁵²⁸ DOI, Public Civil Rights Compliance Reviews, *supra* note 3525, at 6.

relevant to program participation, develop a plan for the review, and notifying the recipient and any other entities involved.³⁵²⁹ The recipient will receive a notification letter approximately 60 days in advance of the scheduled review, which will let the recipient know the purpose and scope of the review, the date of the review, and will request an appropriate meeting location as well as any pertinent information prior to the review.³⁵³⁰ DOI OCR will then conduct an entrance conference with the recipient's executive officer or designee, which occurs prior to the formal review.³⁵³¹ During the course of the review, DOI OCR will request and analyze the recipient's records regarding their program participation, marketing/media/training materials, personnel policies, or other civil rights related plans.³⁵³² DOI OCR will also conduct a series of interviews with the recipient and community contacts, to ascertain information about the program operations.³⁵³³ DOI OCR may also conduct random site inspections at the recipient's place of business.³⁵³⁴ When the review comes to a close, a closing conference will be held with the recipient to report findings, allow the recipient to comment on the findings, strive to obtain voluntary compliance, and inform the recipient of any reporting obligations.³⁵³⁵ A final report will be issued to the recipient, after which it will have 45 days to formally respond to the reviewing authority "on actions taken and planned along with timeframes to correct compliance violations."³⁵³⁶

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

DOI OCR has a specific regulatory mandate to provide assistance and guidance to recipients of federal funding to assist in voluntary compliance with civil rights laws.³⁵³⁷ Prior to FY 2016-2018, DOI OCR issued guidance documents in the form of civil rights directives designed to inform recipients of federal funding of their obligations under the law,³⁵³⁸ and to establish uniform procedures for processing complaints filed with DOI OCR.³⁵³⁹ DOI OCR did not issue any guidance documents during the fiscal years studied in this report.³⁵⁴⁰

DOI OCR is a subset of the Office of Policy, Management and Budget, and its website cannot be reached directly from the DOI homepage.³⁵⁴¹ DOI OCR makes contact information for all of its

³⁵²⁹ Ibid., 6-7.

³⁵³⁰ Ibid., 7.

³⁵³¹ Ibid., 7.

³⁵³² Ibid., 8.

³⁵³³ Ibid., 8-9.

³⁵³⁴ Ibid., 9.

³⁵³⁵ Ibid., 9-10.

³⁵³⁶ Ibid., 10.

³⁵³⁷ 43 C.F.R. § 17.5(a).

³⁵³⁸ DOI, Policy for Implementing a Public Civil Rights Program, *supra* note 3505.

³⁵³⁹ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425.

³⁵⁴⁰ U.S. Dep't of the Interior, Response to USCCR Interrogatories, at Exs. A, B, C.

³⁵⁴¹ From <https://www.doi.gov>, one would need to navigate to the "Office of Policy, Management & Budget" page, found under the "Bureaus & Offices" tab, then select "Civil Rights" under the "Offices" tab to arrive at the webpage for the Office for Civil Rights and Chief Diversity Officer.

public civil rights coordinators available on its website.³⁵⁴² The Public Civil Rights program page provides information about the public civil rights enforcement and DOI OCR's complaint process.³⁵⁴³ DOI OCR only accepts public civil rights complaints in writing. The Public Civil Rights program is involved in education about as well as prevention of civil rights violations, so it may have some outreach and policy dissemination program, though none is visible online.³⁵⁴⁴

Interaction and Coordination with External Agencies and Organizations

As a government office that enforces Section 504 of the Rehabilitation Act, DOI OCR may receive advice from the Interagency Disability Coordinating Council.³⁵⁴⁵ Section 504 of the Rehabilitation Act established the Interagency Disability Coordinating Council, composed of the “Secretary of Education, the Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Assistant Secretary of the Interior for Indian Affairs, the Attorney General, the Director of the Office of Personnel Management, the Chairperson of the Equal Employment Opportunity Commission, the Chairperson of the Architectural and Transportation Barriers Compliance Board, the Chairperson of the National Council on Disability, and such other officials as may be designated by the President.”³⁵⁴⁶ This interagency council is responsible for “development and implementing agreements, policies, and practices” of federal agencies with responsibilities to effectuate the Act itself as well as with responsibilities “for promoting the full integration into society, independence, and productivity of individuals with disabilities.”³⁵⁴⁷

Furthermore, all agencies that have enforcement authority under Title VI are part of the Federal Interagency Working Group on Title VI, which seeks to facilitate collaboration across key areas of Title VI enforcement and compliance.³⁵⁴⁸ The Interagency Working group also seeks to resolve jurisdictional issues when a Title VI complaint may be filed with multiple agencies.³⁵⁴⁹

DOI has the statutory authority to enter into cooperative agreements with a state or political subdivision thereof;³⁵⁵⁰ however the Commission is unaware of collaborations, cooperation, or partnerships that DOI OCR has with state or local entities that specifically concern the enforcement

³⁵⁴² U.S. Dep't of the Interior, “Public Civil Rights Coordinators,” <https://www.doi.gov/pmb/ceo/public-civil-rights-coordinators> (accessed Jul. 15, 2019).

³⁵⁴³ DOI, Public Civil Rights Complaint Procedures, *supra* note 3425.

³⁵⁴⁴ DOI, “Public Civil Rights,” *supra* note 3423 *passim*.

³⁵⁴⁵ 29 U.S.C. § 794c(b).

³⁵⁴⁶ *Id.* § 794c(a).

³⁵⁴⁷ *Id.* § 794c(b).

³⁵⁴⁸ Exec. Order No. 12,250, Leadership and Coordination of Non-discrimination Laws, 45 Fed. Reg. 72,995; 28 C.F.R. § 42 *et seq.*; U.S. Dep't of Justice, Memorandum: Title VI Interagency Coordination (May 20, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/07/15/AAG_Perez_Coordination_memo_5_20_13.pdf [hereinafter DOJ, Memo: Title VI Interagency Coordination].

³⁵⁴⁹ DOJ, Memo: Title VI Interagency Coordination, *supra* note 3548.

³⁵⁵⁰ 43 U.S.C. § 1457b.

of civil rights. If state or local jurisdictions receive DOI funding, they are subject to OCR's jurisdiction.³⁵⁵¹

Research, Data Collection, and Reporting

DOI OCR collects data as part of the complaint process and compliance reviews of recipients of federal funding.³⁵⁵² The data collected through the complaint and compliance processes are not publicly available.

The Commission is unaware of any additional civil rights issue research, data collections, or reporting that DOI OCR conducts.

³⁵⁵¹ 43 C.F.R. § 17.2.

³⁵⁵² U.S. Dep't of the Interior, Response to USCCR Interrogatory No. 3, at Exs. A, B.

Findings and Recommendations

Findings

Overarching

Congress has for six decades mandated that the federal government actively enforce federal civil rights laws, expanding this federal role with each major piece of civil rights legislation enacted during that time. Civil rights laws specifically authorize the federal government to take action with respect to discrimination on the bases of race, color, national origin, sex, religion, ability status, age, and other protected characteristics.

As documented in this report, the extraordinary volume of complaints filed with federal civil rights agencies and findings and resolutions from these agencies underscore the reality that, today, the nation still has not reached a time when recognition of and protection for core civil rights promises is the norm for all Americans. The Commission heard compelling bipartisan testimony regarding ongoing widespread civil rights harms that underscore the need for strong federal agency enforcement of federal civil rights laws.

Federal enforcement of civil rights laws is subject to changes in presidential administrations and their different priorities, such that civil rights are enforced inconsistently by the Executive branch.

The Commission's conclusion in 2002 in our Blueprint for Civil Rights Enforcement continues to hold true today: in order to meet basic efficacy standards, federal agencies must prioritize civil rights; sufficiently fund and staff their civil rights offices; implement civil rights planning; issue policy guidance and regulations; provide technical assistance, education, and outreach; institute a complaint and case processing system; manage a compliance review system for federal funding recipients; and provide staff training.

In evaluating data across 13 agencies, the Commission found agencies generally lack adequate resources to investigate and resolve discrimination allegations within their jurisdiction, leaving allegations of civil rights violations unredressed.

Enforcement Tools

Across the 13 agencies evaluated, the Commission found that agencies use enforcement tools that can be preventative (i.e., offering advice, training, or technical assistance), responsive (i.e., program/operational review or complaint investigation), or boundary-spanning (i.e., outreach, document generation, or Congressional reporting).

These federal civil rights offices vary in their statutory and regulatory authorization to use enforcement tools and in their effectiveness in using tools they have.

As agency regulations have long required, agencies first must attempt to secure voluntary compliance as distinct from mandatory resolution. Agency emphasis of reliance on voluntary compliance, ignoring or denigrating compulsory enforcement as an available tool, can send a message that an agency will not use all of the tools at the agency's disposal if necessary to secure compliance.

Prioritization for Civil Rights Agency-Wide

Essential conditions to support effective federal civil rights enforcement involve agency-wide prioritization of civil rights, including through: structuring the agency such that the civil rights office operates in a centralized manner and the head of the civil rights office has a direct line of communication with the head of the agency; prioritizing resource allocation and staffing dedicated to external civil rights enforcement; and integrating civil rights into every component of the agency.

Federal civil rights office budgets generally are currently, and have been over time, insufficient to allow for effective enforcement of their full statutory authorities.

This finding of budget insufficiency for civil rights agencies is a persistent one in the Commission's federal civil rights enforcement evaluations over years. Nearly 10 percent of the Commission's 1,100 recommendations to agencies between 1992 and 2000 were to increase funding and resources. In 2002, the Commission found that the greatest hindrances to fulfilling federal agency civil rights obligations over the prior decade were insufficient funding and inefficient, thus ineffective, use of available funds.

The civil rights offices of some agencies (DOL CRC, DHS CRCL, EPA ECRCO, DOT DOCR, VA ORM, Treasury OCRD, and DOI OCR as well as EEOC) do not have specific staff or budgets dedicated solely to external enforcement of civil rights laws. Some of these offices have other responsibilities, for example, handling internal equal employment opportunity claims, without a clear delineation between the staff working on internal and external claims. The lack of distinction between these duties shows a lack of prioritization for external enforcement, and makes it difficult to evaluate the agency's enforcement efficacy, except with respect to EEOC, which is exclusively a civil rights enforcement agency.

Generally civil rights office staffing levels fall below any reasonable bare minimum appropriate staffing for civil rights enforcement. These staffing levels have decreased overall, and in some civil rights offices precipitously, during the three fiscal years evaluated. From FY 2016 to FY 2018, the number of staff members in federal civil rights enforcement offices dropped from 5,155.5 to 4,816. This drop of more than 300 dedicated employees represents a 6% reduction in staffing for federal civil rights enforcement across the 13 agencies evaluated.

In some civil rights offices the reduction in staff has been even more stark. DOL OFCCP lost 13% of its staff and in that same time period, HHS OCR staffing decreased by more than 10% in its direct enforcement offices.

Bipartisan and bicameral Congressional consensus has persisted over six decades that federal civil rights enforcement should be prioritized. Even in contemporary very challenging budgetary conditions there is a consensus from the legislative branch that holds the power of the purse that federal civil rights budgets should be protected: Despite consistent Trump Administration requests to decrease funding, Congress has maintained nearly level or increased funding for federal civil rights enforcement during the three fiscal years the Commission investigated.

Only some federal agencies prioritize civil rights such that their civil rights office executives report directly to the agency secretary or head of the agency. The head of DOJ CRT does not report directly to the Attorney General, the head of EPA ECRCO does not report directly to the EPA Administrator, and the heads of HUD FHEO, DOL CRC, VA ORM, Treasury OCRD, and DOI OCR do not report directly to their respective agency Secretaries.

The heads of ED OCR, HHS OCR, DHS CRCL, DOT DOCR, and USDA OASCR report directly to their respective agency Secretaries.

Some agencies, such as DOJ CRT, HHS OCR, ED OCR, and EEOC, have dedicated counsel for civil rights enforcement matters. In the remaining agencies, the civil rights office must secure the agency's general counsel approval for enforcement actions, diminishing authority of the civil rights office.

Strategic Planning and Self Evaluation

Agency strategic plans are shared with the public, and the inclusion of civil rights goals and objectives in agency strategic plans are a transparent way for an agency to demonstrate its commitment to and prioritization of civil rights enforcement. Civil rights goals or performance was evaluated between FY 16 to FY 18 in the agencywide strategic plans of DOJ , ED, HHS, HUD, DOL (for OFCCP), EEOC, DHS, EPA, and DOT. The agencywide strategic plans of DOL (for CRC), VA, USDA, Treasury, and DOI did not reference particular civil rights objectives.

Separate and apart from agency wide strategic plans, civil rights office strategic planning can be an important management and evaluation tool for enhancing satisfaction of the congressional charge to the civil rights office. Agency civil rights offices did not consistently engage in public-facing strategic planning.

Civil rights offices do not use a standard metric to measure efficacy. Some civil rights offices, including ED OCR and HUD FHEO, use case closure rates, or resolution times, to evaluate employees. Other civil rights offices, including DOL OFCCP, use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed

of closure. Some civil rights offices, such as EEOC, include their civil rights enforcement priorities in their employment evaluation metrics.

Only some agency authorizing statutes require agencies to report to Congress or the public about the effectiveness of their civil rights office enforcement practices. Currently, Congress explicitly requires some agencies, including ED, HUD, USDA, and DHS, to report to Congress on the work of their civil rights enforcement offices and whether these offices have met their statutory responsibilities. Other agencies, such as DOJ and EEOC, report on their civil rights office enforcement practices as a part of their agency's annual performance reports. Other agencies, such as Treasury OCRD, have published annual reports but not pursuant to a particular Congressional requirement.

Over the fiscal years evaluated, even when required to file annual reports with Congress, civil rights offices have failed to submit their reports in a timely fashion. Of the agencies statutorily required to submit a report to Congress, including ED, HUD, USDA, and DHS, neither ED OCR nor USDA OASCR have filed reports since FY 2016.

Complaint Processing, Agency-Initiated Charges, and Litigation

Variations in rates of case openings, investigations, and case closures between federal administrations suggest that a civil rights office uses different policies under different administrations to decide whether a civil rights claim merits an investigation.

Insufficient resources can cause civil rights offices to decide to prioritize responding to particular civil rights complaints rather than responding to or investigating every allegation, even when investigation of every allegation is required under the relevant statute or regulation.

Some civil rights offices, including ED OCR, HHS OCR, HUD FHEO, DOL OFCCP, and EEOC, utilize regional offices located throughout the country to process and investigate complaints or violations in those jurisdictions. Some civil rights offices, including HUD FHEO and EEOC, utilize outside entities, such as state and local government agencies or non-profit organizations, to handle enforcement responsibilities. Some agencies, such as DOT, VA, and DOI, have a decentralized model, where the agency's civil rights office primarily or solely coordinates or provides recommendations for civil rights offices of subagencies or bureaus of the cabinet agency.

All of the agencies evaluated in this report have the ability to open their own affirmative investigations without a complaint prompting the opening of a case.

Proactive Compliance Evaluation

The 13 agencies evaluated distribute trillions of dollars in federal funding to support programs and activities in many sectors of society; all of these funding recipients are subject to specific nondiscrimination laws.

For some agencies, including USDA OASCR and DOL OFCCP, a compliance evaluation can entail an assessment of a funding recipient's program, including review of applicable civil rights policies, without investigating a particular instance of alleged discrimination.

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

Policy regulations and guidance documents, education, technical assistance, outreach, and publicity are all necessary tools for recipients of federal funding and other members of the regulated community to understand their legal obligations under federal civil rights laws. Such dissemination also helps the general public to know their rights and understand the civil rights office's role in enforcing these rights.

Policy guidance documents do not change the underlying law. Without guidance from federal agencies on how they will enforce relevant laws, the laws still apply but the regulated community is left without an understanding of how civil rights offices apply the law to particular facts to protect the rights of impacted individuals.

Several civil rights offices during the Trump Administration, including DOJ, HHS OCR, and DOL OFCCP, have stated policies or issued guidance favoring religious freedom over other civil rights.

Unlike in the Obama Administration, in the Trump Administration several civil rights offices have acted to interpret statutory and regulatory language to not protect against discrimination on the basis of gender identity and to treat sex as exclusively assigned at birth.

Enforcement of unlawful racially disparate impact is a required federal agency analytical tool, following longstanding Commission recommendation for its use, and it is critical to ensuring ongoing, prospective nondiscrimination.

Interaction and Coordination with External Agencies and Organizations

Among all the agencies, DOJ has the most significant mandatory role in coordination of federal civil rights law enforcement. DOJ's Assistant Attorney General for Civil Rights coordinates the federal enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, as amended, and all other statutes that prohibit discrimination against protected classes by federal agencies and funding recipients.

Federal enforcement of civil rights laws is more effective when the agencies that enforce the same laws coordinate with each other to ensure comprehensive and consistent enforcement.

Research, Data Collection, and Reporting

The Commission has repeatedly found through its various investigations that data collection and reporting is essential to effective civil rights enforcement.

The agencies that conduct research, data collection, and reporting on discrimination or disparities in relevant programs areas, such as ED OCR, which operates the Civil Rights Data Collection, and EEOC, are able to utilize this work to inform effective civil rights enforcement work.

Few agencies engage in the type of public data collection, research and reporting needed to understand potential civil rights concerns, to inform effective civil rights enforcement work.

Agency-Specific Findings*Department of Justice, Civil Rights Division*

The cases DOJ CRT litigates are generally systemic. Only a small fraction of the hundreds of cases resolved by CRT during Fiscal Years 2016-2018 involved remedies that were only applicable to an individual.

DOJ CRT resolved 143 total cases in FY16, followed by 136.5 cases in FY17, followed by 109 cases in FY18. Those resolution numbers represent a nearly 25% drop between FY16 and FY18. The drop was not consistent across the different subsections of CRT; the most significant drops were in the sections on Educational Opportunities, Housing, and Special Litigation.

DOJ CRT lacks uniformity and transparency in how it decides to investigate and enforce civil rights protections.

DOJ's current strategy disfavoring resolution of cases by court-ordered consent decrees, as expressed via memo from the Attorney General in November 2018, negatively impacts effective enforcement of civil rights by minimizing the availability of an important mechanism for case resolution.

Department of Education, Office for Civil Rights

During the period of the Commission's review, specifically from FY 2017 and FY 2018, ED OCR has dramatically changed its practices in nearly every domain, functionally discontinuing issuance of guidance, reducing the scope and number of investigations conducted, and seeking to curtail its budget capacity significantly.

During the time period studied in this report, ED OCR resolved thousands of cases pertaining to discrimination on the basis of race, national origin, sex, disability, and retaliation.

ED OCR measures its efficacy, and the efficacy of its employees, by the speed with which it resolves cases (within or exceeding a timeline of 180 days). In FY 2016, it resolved 78% of cases within 180 days, and in FY 2017 it resolved 80% of cases within 180 days. ED OCR does not currently self-evaluate based on effectiveness of the results it achieves, compared against its statutory and regulatory mandate.

ED OCR has, during the time period studied, become faster in its resolutions and narrower in the scope of its resolutions, significantly increasing the number of administrative closures without substantive change in school practices.

ED OCR issued 11 guidance documents in the Obama Administration between Fiscal Years 2016 - 2017, while the Trump Administration's only guidance activity through Fiscal Year 2018 has been to rescind guidance and in one instance replace prior administration guidance documents with interim, explicitly temporary guidance.

Department of Health and Human Services, Office of Civil Rights

Under the Trump Administration, HHS OCR has restructured its office and staffing in a manner to prioritize religious liberty over other civil rights protections.

HHS OCR opened more cases and closed more cases (either with or without investigation) in FY 2018 than in FY 2017, which was also an increase from the rate of case openings and closures from FY 2016.

HHS OCR has reduced the amount of time it takes to close a case (with or without investigation) since FY 2016. In FY 2016, the average number of days HHS OCR took to close a case after an investigation was 705 days. In FY 2017 and FY 2018, the average number of days taken to close a case after an investigation plummeted to 324 days and 269 days, respectively. In FY 2016, the average number of days HHS OCR took to close a case without an investigation was 102 days. In FY 2017 and FY 2018, the average number of days taken to close a case without an investigation dropped to 65 days and 89 days, respectively.

HHS OCR's direct enforcement work is primarily devoted to HIPAA compliance and enforcement; only 25% of the office's enforcement work is devoted to enforcing the civil rights laws under its jurisdiction.

From FY 2016 to FY 2018, HHS OCR's request for funds decreased by approximately \$6 million from its nearly \$40 million budget; in addition to shifting funds to the newly created Conscience and Religious Freedom Division, in FY 2018, HHS OCR also asked to increase the budget for its policy development office and decrease funds for its enforcement offices. Notwithstanding these requests, Congress' allocation to HHS OCR remained constant at \$38.8 million.

Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity

Of the fair housing cases that are filed under federal fair housing laws, approximately 77% are handled by state and local agencies, with oversight and funding from HUD FHEO. HUD reliance, in part, on outside entities for compliance assurance requires coordination to ensure consistent enforcement results.

HUD FHEO has the ability to bring its own Secretary-initiated investigations, where it can take action without a precipitating complaint. Historically, this power has been used to handle systemic issues.

Unlike in previous years, HUD's agency-wide strategic plan no longer includes specific prioritization of fair housing, reflecting a change in civil rights prioritization at the agency.

HUD has issued no civil rights policy guidance since 2016, although HUD testimony to the Commission identified guidance as one of five current civil rights enforcement priorities for HUD FHEO and HUD is required by regulation to provide guidance to help the community comply with civil rights law.

HUD has proposed a new regulation that would increase the burden of proof for disparate impact discrimination in housing, significantly narrowing the application of the enforcement tool to reduce discrimination.

Department of Labor

DOL OFCCP sets an office-wide target goal of handling a certain number of systemic cases. OFCCP used to measure employee performance by case closure rates, but in the Trump Administration has switched to examining the scope of each case as a key component of evaluation rather than merely counting all cases equally.

DOL OFCCP only has staff capacity to audit, per year, one to two percent of contractors over whom the office has jurisdiction. Nonetheless, DOL OFCCP requested a more than \$26 million budget reduction in FY 2018, seeking to reduce its total budget to \$88 million.

The primary enforcement mechanism OFCCP uses is proactive compliance investigation, not driven by complaints filed with the agency, and OFCCP prioritizes identifying systemic discrimination in these compliance reviews.

Equal Employment Opportunity Commission

Like the U.S. Commission on Civil Rights, EEOC is independent and bipartisan, and does not operate at the direction of any particular presidential administration.

EEOC conducts strategic planning and self-evaluation around its work, with specific strategic planning focused on enforcement priorities. EEOC strategic goals include targeting enforcement on an individual and systemic level.

EEOC evaluates its employees on the basis of resolving individual complaints as well as identifying and resolving systemic discrimination.

During FY 16-18, EEOC has conducted extensive research and outreach, including holding several hearings, to draft new guidance on workplace harassment.

In an important and necessary effort to evaluate the possibility of pay discrimination, EEOC is beginning to collect pay data from employers, disaggregated by sex, race, and ethnicity.

EEOC increased their efforts in addressing workplace harassment more generally in FY 2018: in addition to 41 sexual harassment suits, EEOC filed an additional 25 workplace harassment lawsuits focusing primarily on racial and national origin harassment; reasonable cause findings for charges alleging workplace harassment rose by 23.6 percent, and successful conciliated charges alleging workplace harassment rose by 43 percent.

EEOC reliance, in part, on outside entities for compliance assurance requires coordination to ensure consistent enforcement results.

Department of Homeland Security, Office for Civil Rights and Civil Liberties

Weakness in the statutory design of DHS CRCL challenges its capacity to fulfill an expected civil rights agency role to ensure civil rights compliance. Congress charged DHS CRCL with advising DHS internally on DHS policies' satisfaction of civil rights principles. This responsibility is solely advisory and CRCL does not have the ability, except with respect to disability rights enforcement, to compel resolution to address specific violations or to discipline violators.

DHS CRCL lacks the explicit authority to report directly to Congress without the Secretary's approval.

DHS CRCL receives thousands of individual complaints in a year. Based on the issues raised in the complaints, DHS CRCL identifies potential patterns of civil rights or civil liberties allegations to determine which policy issues to prioritize. DHS CRCL does not individually investigate each complaint received.

DHS CRCL reports that the allegations CRCL has received are increasingly complex and that CRCL does not have sufficient resources to respond to all of them.

Environmental Protection Agency, External Civil Rights Compliance Office

In 2016, EPA moved its external civil rights enforcement function to a suboffice within the Office of General Counsel, rendering the office authority more diffuse and more removed from the Secretary than it had in the past been.

EPA ECRCO has a maximum of 13 full time equivalent staff members to enforce all federal civil rights within its jurisdiction.

EPA ECRCO has, in the history of the office and during the specific time period studied for this report, issued only a handful of findings of civil rights violations and in one case secured corrective action to remedy the violation. During the time period studied for this report has come under federal court jurisdiction for continuous failure to timely resolve investigations it opens.

During the time period the Commission reviewed, ECRCO has taken steps to strengthen staff capacity to enforce and to systematize its enforcement reviews to maximize consistent results.

Department of Transportation, Departmental Office of Civil Rights

DOT's Departmental Office of Civil Rights does not itself investigate or resolve external civil rights complaints, but instead processes cases for further handling by enforcement offices specific to the subagency with relevant jurisdiction.

Department of Veterans Affairs, Office of Resolution Management

VA collects data via survey of all individuals who interact with the VA's programs and facilities. VA ORM reviews that survey data to determine whether there are discriminatory issues arising even in the absence of a formal complaint.

VA's annual reports to Congress do not specifically discuss activities related to external civil rights enforcement.

Department of Agriculture, Office of the Assistant Secretary for Civil Rights

In 2018, USDA OASCR reorganized its office, with the goal of elevating the civil rights functions to the agency mission level. The reorganization did not, as initially proposed, dismantle the central civil rights office or shift its enforcement responsibilities to the agency's Inspector General.

The reorganization of the office was also prompted by longstanding concerns about USDA's civil rights office, which failed to remedy discrimination in USDA programs, as USDA itself acknowledged during the time period evaluated, characterizing its record as "unfortunate and checkered . . . with regards to civil rights."

While the office has seen some improvement, such as in the time it takes to complete complaint intake/processing and investigation, the office has increased the amount of time it takes to adjudicate a complaint, and the case backlog continues to increase in the fiscal years reviewed.

USDA OASCR has not filed required annual report reports to Congress detailing civil rights enforcement for either FY 2017 or FY 2018.

Department of Treasury, Office of Civil Rights and Diversity

Treasury OCRD does not have any policy guidance in place to assist its grant recipients on how to comply with Title VI's antidiscrimination protections, though it is currently working on drafting such guidance.

Treasury OCRD has three employees, an increase from two employees in FY 2016, to handle complaints regarding nondiscrimination compliance for recipients of the more than \$5 billion of financial assistance awarded annually by the agency.

The data provided to the Commission shows that Treasury's civil rights office seems to focus exclusively on complaints about discrimination against individuals with disabilities, although its jurisdiction extends to a broader range of civil rights protections including protections against race, national origin and sex-based discrimination in lending.

Treasury is required by regulation to conduct periodic compliance investigations. The Commission's review does not indicate that Treasury has conducted such investigations during the time period investigated.

Department of Interior, Office of Civil Rights

DOI OCR has two employees, a decrease from the three employees it had in FY 2016 and 2017, to handle complaints regarding nondiscrimination compliance for recipients of the more than \$9 billion of financial assistance awarded by the agency; DOI's external civil rights enforcement is decentralized and also partially handled by bureau employees.

Recommendations

Enforcement Tools

Civil rights offices should use enforcement where necessary to secure rights violated within their jurisdictions. Civil rights offices should communicate their preparedness to use compulsory enforcement where required voluntary resolution efforts fail.

Congress should give DHS CRCL the authority to require that relief and remedies be granted after finding violations of any of the civil rights laws under its jurisdiction. In addition, CRCL should have the power to require affected component agencies to provide a timely and concrete response to its recommendations and the ability to escalate disagreements with component agency leadership for ultimate resolution by the DHS Secretary. CRCL's reporting to Congress should be independent and not issued with the approval of the DHS secretary, agency general counsel, or OMB. Congress should apply the statutory independent reporting language that the DHS Privacy Office and Office of the Citizenship and Immigration Services Ombudsman have to CRCL as well. The role of CRCL chief legal counsel should be revived with operational independence from the Office of the General Counsel at DHS headquarters and be as independent as the chief counsels of the operational components.

Prioritization for Civil Rights Agency-Wide

Cabinet agencies of which civil rights offices are part should ensure that civil rights offices are incorporated into agency policy decision making and grant fund decision making, in addition to civil rights enforcement or watchdog responsibilities.

Congress should exercise oversight authority to evaluate baseline staffing necessary for federal agency civil rights offices to be able to fulfill their civil rights enforcement functions. Any determination of the requisite staffing necessary to fulfill an agency's external civil rights enforcement function should include evaluation of the amount of federal funding distributed, and the staffing necessary to conduct proactive compliance reviews of those funding recipients.

Congress should continue to prioritize civil rights office capacity through budget appropriations, specifically increasing their staff capacity to fulfill the jurisdictional authorities Congress has given them and in so doing to maximize their capacity to protect civil rights for all Americans.

Congress should authorize all civil rights offices, not merely, for example, DOJ CRT, HHS OCR, ED OCR, and EEOC, to staff agency counsel with authority to make civil rights enforcement decisions, reporting through the civil rights office head and the agency secretary or executive. This authority can speed federal civil rights enforcement and ensure appropriate civil rights expertise and dedication within agency counsel.

Strategic Planning and Self Evaluation

Whether annually or on a timeline coordinated with agency strategic planning, civil rights enforcement offices should engage in strategic planning to set annual and long-term objectives.

For those civil rights offices that do not operate under a requirement to report their civil rights enforcement practices directly to Congress, Congress should enact a requirement that the offices do so. Such reporting should not require clearance or amendment from the Department or OMB, and the reports should include, where relevant, failure of other within-agency components to respond timely to advice or reports from civil rights offices.

Given the importance of agency reports to public understanding of agency priorities and practices and of the status of civil rights satisfaction, Congress should impose a fund withholding and hearing oversight penalty from agency appropriations if agencies fail to submit annual (and, where required in statute, quarterly) reports regarding civil rights enforcement practices.

Congress should hold at least annual public oversight hearings specific to each civil rights office to review and assess the effectiveness of civil rights office satisfaction of the jurisdictional charges Congress has given them.

Agencies should review employee performance plans to ensure points evaluated are the points agencies want staff to prioritize for civil rights enforcement. These employee evaluations should use a metric that takes into account the size or impact of a case, rather than merely counting the number of cases closed or the speed of closure and should include civil rights enforcement priorities in evaluation metrics.

Complaint Processing, Agency-Initiated Charges, and Litigation

Congress should give civil rights offices, including civil rights offices that now lack them, the authority to compel resolution from noncompliant entities within an agency's jurisdiction, to allow for efficient investigation of allegations of civil rights harms.

Agencies, especially those that operate regional offices, should take steps to ensure consistent enforcement results. Likewise, agencies that utilize state, local, or private organization partnerships to enforce civil rights laws under their jurisdiction (as in the case of HUD, with its FHAP program, and EEOC, with its FEPA program), should identify ways to manage to ensure consistent results and Congress should fund these civil rights offices sufficiently to be able to manage that work.

All agencies should publish their guidance for case selection and investigation, to ensure internal consistency and promote public trust in federal civil rights enforcement. Such transparency could also guard against undue political influence in the decision to open or how to conduct a particular civil rights investigation.

No agency should prioritize enforcement of one civil rights protection over another.

Proactive Compliance Evaluation

All agencies with the authority to do so should engage in proactive compliance evaluations to ensure that funding recipients, and other entities subject to the agency's jurisdiction, are in compliance with nondiscrimination laws.

Dissemination of Policy Through Guidance, Regulations, Technical Assistance, Education, Outreach, and Publicity

Agencies should not reregulate to withdraw disparate impact as an analytical tool. As the Commission first recommended in the 1960s, disparate impact analysis helps root out discrimination and equalize opportunity for all Americans.

Agencies should recognize that federal antidiscrimination protections based on sex include discrimination based on sexual orientation and gender identity, and enforce accordingly.

Agencies should issue guidance informing their regulated communities what the law is, how to comply with it, and how the agencies enforce it.

Research, Data Collection, and Reporting

Congress should appropriate funds for civil rights offices to engage in the public data collection, research and reporting necessary to understand where discrimination might be occurring in the program areas under the agency's jurisdiction, and to inform effective civil rights enforcement work. Such data collection, research, and reporting should include demographic data on the populations they serve, and require covered entities to collect detailed data as well. Data should be disaggregated and analyzed on multiple demographic variables to highlight where particular issues might impact individuals across identity characteristics.

All agency civil rights offices should collect and publish enforcement and complaint data disaggregated by race, ethnicity, sex, ability status, religion, sexual orientation, gender identity, age.

Commissioners' Statements, Dissents, and Rebuttals

Statement of Chair Catherine E. Lhamon

For six decades Congress has promised the nation what President Kennedy termed the “simple justice”¹ that federal funds would not support discrimination, first on the basis of race and over time on the additional statutory bases of sex, disability, religion, and age, among other protected identity characteristics.² Over that time, this Commission has repeatedly decried insufficient dollar resources appropriated to the federal agencies statutorily responsible for enforcing that simple justice. Based on documentation of these insufficiencies, the Commission called on Congress to provide additional funds to the agencies while also calling on the agencies themselves to better manage and deploy their resources to effectuate justice. In this report, the Commission returns to that effort, collecting current information about the staggering rates at which Americans believe themselves to be subject to discrimination, the devastating incidence and facts surrounding discrimination confirmed by federal agency investigations, the persistent federal failure to systematize or fully fund nondiscrimination efforts despite the prevalence of discrimination nationwide, and the human consequences of our nation’s failure to fulfill our equity promises. No report could adequately capture the human toll, in lost potential and severed dreams, of unfulfilled equity promise. This report nonetheless details what it can: dollar insufficiency, staff number inadequacy, complaints uninvestigated, and systematic decision-making – when it occurs, as it does now – deliberately to minimize civil rights enforcement efficacy.

Here, in addition, is what I know from experience: federal career employees in civil rights enforcement offices are overburdened and hamstrung in capacity to do their best work. Many of them stay anyway, in the hope to do as much as they can and succeed in mitigating harms in important ways across presidential administrations. I am grateful to them every day for what they do and I am grateful for having had the privilege to work among and meet so many of them during the three and a half years I enforced federal civil rights laws in schools in the Obama Administration. I made it a priority to highlight the need to add to their number to do the work Congress charged them to do and I am grateful to see that Congress continues to recognize those needs and increase funds for these critical efforts.

The Commission heard compelling bipartisan testimony from current and former federal officials from both sides of the aisle, serving in Administrations of both Republican and Democratic presidents, about the significant practical impact of federal messages regarding civil rights and the

¹ See U.S. Department of Justice, Civil Rights Division, Title VI of the Civil Rights Act of 1964, <https://www.justice.gov/crt/fcs/TitleVI> (quoting President John F. Kennedy in 1963 as stating, “Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination.”) (last visited Oct. 1, 2019).

² Not all agencies have the same enforcement authority to enforcement against discrimination on the basis of each identity characteristic. The U.S. Department of Education’s Office for Civil Rights, for example, lacks statutory jurisdiction to enforce against discrimination on the basis of religion.

value of strong, consistent results in federal civil rights enforcement. We heard bipartisan agreement about the need for an affirmative civil rights agenda, and the positive impact that can result from incorporating civil rights compliance into other agency work, ensuring that it is prioritized at a mission level for the agency.³

In addition, I know, from having reviewed case files in federal government, from having advocated as a litigator in nonprofit civil rights practice, and now from reviewing testimony the Commission receives: discrimination persists in both predictable and unpredictable ways. The harm it wields is uncompensable and incalculable and projects a social underbelly in which I am deeply ashamed to be an unwilling participant. I am committed, as I have been for the entirety of my professional life, to eradicating discrimination, recognizing the urgency and enormity of that task. I also know the unique power – and therefore responsibility – the federal government has to battle against inequities.

I view this Commission report as crucially important toward that end: it collects data and evidence about what we are not doing to live up to our national commitments, and about how much hurt follows from that failure. This data and evidence forms the basis for my colleagues' and my call on Congress and our nation to right these wrongs. Each data point in the report reflects lives lived and harms redressed, or not. Having excavated the current status of federal civil rights enforcement, I am recommitted to the importance of and necessity for a federal civil rights backstop against harm. I remain deeply concerned about the prevalence of discrimination that persists and will persist absent an expectation and reality of meaningful law enforcement.

I hope very much that this report forms a record against which to measure our federal civil rights enforcement successes and from which to evaluate what more Congress needs to do, to appropriate civil rights enforcement funds, to facilitate civil rights enforcement transparency in practices, and to support meaningful oversight to ensure agencies satisfy their congressional charges.

³ See, e.g., Arne Duncan, Former Sec'y of Educ., Dep't of Educ., Written Statement for the U.S. Comm'n on Civil Rights, at p. 1; Robert Driscoll, Former Deputy Assistant Attorney General at the Civil Rights Division at the U.S. Department of Justice and current member at McGlinchey Stafford, Briefing Transcript, unedited, at 146; Arne Duncan, Former U.S. Secretary of Education, Current Managing Partner of Emerson Collective, Briefing Transcript, unedited, at 76; Craig Leen, Director of the OFCCP, U.S. Dep't of Labor, Briefing Transcript, unedited, pp. 56-57; Kendrick Testimony, Briefing Transcript, pp. 266-67, 274-75; Briefing Transcript at 44-45 (Testimony of former CRT Deputy Assistant Attorney General Leon Rodriguez); Margo Schlanger, Professor of Law, University of Michigan Law School, Briefing Transcript, Nov. 2, 2018, p. 247. See also Robert N. Driscoll, "This Is What a Trump Civil-Rights Agenda Should Look Like," National Review, Nov. 30, 2016, <https://www.nationalreview.com/2016/11/trump-civil-rights-agenda-heres-plan/>.

Statement of Commissioner Karen K. Narasaki

Our¹ country's record on civil rights is not one of linear progress. Each step forward has often generated backlash and regression. In 1776, the Declaration of Independence declared "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." That was followed by a Constitution that condoned the ownership, sale, and enslavement of Black men, women, and children for over 200 years and laws that reduced indigenous peoples to second class citizens on their own lands and kept immigrants from Asia from becoming citizens at all. The Civil War brought reconstruction but then decades of Jim Crow segregation enforced by state and federal courts. In 2008, we made history in electing a Black man to be president and eight years later elected a president whose administration is trampling civil rights protections and empowering white Supremacists, homophobes and chauvinists. In 2015, the Supreme Court declared that same sex couples have a right to marry and in 2019 it is debating whether they can be fired for it.²

The report is a robust evaluation of the civil rights enforcement activities of over a dozen federal agencies. These agencies consist of thousands of federal employees who swear an oath of office to support and defend the Constitution.³ They are further subject to standards of ethical conduct that remind oath-takers that "public service is a public trust."⁴ The Department of Justice's Standards of Conduct define that public trust obligation, stating that "the decisions and actions that federal employees take must be made in the best interests of the American people." It is these public servants who work to ensure that our laws are fairly enforced regardless of the political bent of a particular administration.

Elections have consequences, and it is no surprise that any change in Administration brings about different priorities and strategies. But the changes I've watched unfold since 2016 are truly unprecedented in the nearly 30 years I have worked in the nation's Capital. This Administration is not just shifting enforcement priorities, they are undoing decades of civil and human rights progress. The extremity is evident in the amount of litigation successfully challenging many of these efforts in court and in the fact that Congress refused to support some of these changes, even

¹ I would like to thank the Commission staff for their work researching, drafting, and revising this massive report. I would also like to thank my law clerk Erin Drolet from George Washington University Law School for her work on this report and statement, as well as my former special assistant Jason Lagria and my current special assistant Peach Soltis.

² Bill Chappell, "Supreme Court Will Hear Cases On LGBTQ Discrimination Protections For Employees," *NPR News*, April 22, 2019. <https://www.npr.org/2019/04/22/716010002/supreme-court-will-hear-cases-on-lgbtq-discrimination-protections-for-employees>.

³ 5 USC § 3331 "Oath of Office. An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

⁴ 5 CFR § 2635.101(a).

when the President's party controlled both the House and Senate.⁵ Further, the radical departure from decades of well accepted civil rights norms has put civil servants in the unenviable position of weighing directives from a new boss in conflict with the obligations of their oaths of office.

As our report documents, this Administration's effort to undermine civil rights enforcement is multi-pronged. First, the Administration has made strategic, process-related decisions that are intentionally designed to make federal enforcement less effective— primarily by proposing to basically eliminate some civil rights enforcement offices, or proposing dramatic budget cuts for others⁶, along with changes in procedures that sideline important enforcement tools. Second, the Administration has aggressively taken actions that allow the views of individual religious sects to supersede the civil and human rights of LGBTQ people, and has terminated the government's efforts to protect voting rights of vulnerable minority citizens in service of naked partisan election interests. These partisan political interests went so far as to attempt to manipulate the count of minorities in the decennial census,⁷ a function so important to our democracy that it is outlined in Article 1 of our Constitution.

These actions undermine the morale of hard working federal civil rights attorneys and staff. For example, in its last budget proposal, the Administration called for the elimination of EPA's Office of Environmental Justice. This office supports efforts meant to remedy the impacts of environmental racism on historically marginalized communities.⁸ Though ultimately unsuccessful in eliminating the office through the budgetary process, the move prompted a senior official and long-term civil servant from that office, Mustafa Ali, to resign.⁹ The Administration's budget also proposed eliminating OFCCP at DOL, claiming that its duties could be performed by another existing agency.¹⁰ In so doing, the Administration sends the message to hundreds of civil servants, and consequently the thousands of Americans benefitting from their work and to their employers who seek to skirt the law, that the protection of civil rights is not a priority.

An example of this Administration's efforts to intentionally tie the hands of federal civil rights attorneys through changes in procedure is DOJ's newly adopted position limiting the use of consent decrees.¹¹ The memorandum outlining the new policy, authorized by former Attorney

⁵ Fred Barbash, "Litigation against executive branch by coalitions of states grows in response to unilateral actions by president and gridlocked Congress," *The Washington Post*, August 24, 2019.

⁶ Report at 34.

⁷ Robert Barnes and Ann E. Marimow, "Supreme Court puts census citizenship question on hold," *The Washington Post*, June 27, 2019.

⁸ Because it lacks enforcement authority, it is not discussed at length in this report.

⁹ Brady Dennis. EPA environmental justice leader resigns, amid White House Plans to dismantle program. *Washington Post*. March 9, 2017.

¹⁰ Report at 283. The Republican-controlled Senate Appropriations committee issued report language squarely dismissing the idea, stating "The Committee rejects the budget's proposal to begin plans to merge the OFCCP with the Equal Employment Opportunity Commission." Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2018, Report at 30.

<https://www.appropriations.senate.gov/imo/media/doc/FY2018%20Labor%20HHS%20Education%20Appropriations%20-%20Report%20115-150.pdf>

¹¹ See Report at 93; Sessions Memo at n. 2 ("As used in this memorandum, the term 'consent decree' means a negotiated agreement that is entered as a court order and is enforceable through a motion for contempt.").

General Jeff Sessions, makes clear that DOJ leadership will view requests to sign off on consent decrees, and the use of monitors, with skepticism. This effective abandonment of consent decrees is important because they are such a powerful tool for civil rights enforcement—they are carefully negotiated, can remain effective as long as is necessary to remedy the violation (including through changes in political leadership), and they utilize the oversight authority of federal courts. They bind the parties to their obligations in the same way contracts do. Consent decrees have been used particularly successfully in cases involving law enforcement agencies and environmental violations. Publicly announcing a policy change disfavoring consent decrees will deeply undermine the negotiating position of DOJ attorneys—it sends a message to state and local governments that DOJ attorneys have little leverage to compel compliance for violations.¹²

A further example is the recent rulemaking undertaken by the Department of Housing and Urban Development, limiting the ability of federal civil rights attorneys to effectively pursue disparate impact claims under the Fair Housing Act. The proposed rule, issued in August 2019, significantly raises the standard required for pleading a “disparate impact” case, a necessary tool to challenge facially neutral housing policies or practices that have a discriminatory impact on people of color, people with disabilities, or other protected groups.¹³ The proposed rule will require that challenges preemptively address and rebut possible defenses in initial pleadings, and will also provide defendants with a “safe harbor” to protect themselves from liability even if they are using discriminatory algorithms developed by a third party.¹⁴ “They have elevated the bar so high that it is virtually insurmountable,” Lisa Rice, president and chief executive of the National Fair Housing Alliance, said of the requirements proposed in the rule.¹⁵

In addition to using the budget and other processes to undermine civil rights enforcement, the Administration has also changed course in many substantive civil rights policy areas. An obvious example is this Administration’s rollback of efforts to combat LGBTQ discrimination. One strategy the Administration has used is the elimination of data collection on LGBTQ status.¹⁶ Most troubling is that the Administration pursues this agenda under the stated rationale of promoting of religious liberty—but its inconsistent application gives away that the true motivation is curbing LGBTQ protections.

¹² Sari Horwitz, “In one of his final actions as attorney general, Sessions moves to restrict police reform agreements,” *The Washington Post*, November 9, 2018. https://www.washingtonpost.com/world/national-security/in-one-of-his-final-actions-as-attorney-general-sessions-moves-to-restrict-police-reform-agreements/2018/11/09/76a64e5c-e437-11e8-8f5f-a55347f48762_story.html

¹³ Federal Register, “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,” August 19, 2019. <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>

¹⁴ Tracy Jan, “HUD raises the bar for bringing discrimination claims” *The Washington Post*, August 16, 2019. <https://www.washingtonpost.com/business/2019/08/16/hud-raises-bar-bringing-discrimination-claims/>

¹⁵ *Id.*

¹⁶ Matt Sedensky, “Federal surveys trim LGBT questions, alarming advocates,” *AP News*, March 20, 2017. <https://apnews.com/8443749ce29947f3b57f5e86e6c038e9>

The Administration has encouraged federal agencies to focus on protections for religious freedom, leading multiple agencies to issue memoranda and new policies that follow suit.¹⁷ One example is DOJ's "Principles of Religious Liberty."¹⁸ Its stated premise: "Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith, and complying with the law." DOJ has used their authority to support the rights of a bakery owner refusing to sell a wedding cake to a same sex couple¹⁹ and the rights of a student group at a public university to discriminate against gay students.²⁰ Yet DOJ offered no assistance to the Standing Rock Sioux Tribe when they objected to a pipeline likely to pollute a sacred waterway.²¹ Even more revealing is the federal prosecution of Scott Warren, who argued that his religion compelled him to offer life-saving water and aid to undocumented immigrants, but which DOJ labeled a felony. His recent case ended in a hung jury.²²

Similarly, DOJ did not intervene in a Supreme Court stay of execution request involving a Muslim death row inmate asking that an imam be present at his execution, rather than the Christian chaplain on staff generally available to other inmates. The Supreme Court denied the stay and he was executed without the presence of an imam.²³ Most recently, the Department of Justice unsuccessfully sought to convince the Equal Employment Opportunity Commission, the principle federal employment civil rights enforcement agency, to change its position and join DOJ's Supreme Court brief arguing that businesses can discriminate against transgender employees.²⁴

¹⁷ Report at 137. (In 2017, DOJ issued a memorandum detailing twenty principles of religious liberty and how other agencies can implement these principles into their own practices, HHS announced a new, similar focus on religious protections, and DOL implemented new policy directives in response to Supreme Court decisions and Executive Orders about religious freedoms.)

¹⁸ Attorney General Jeff Sessions, Department of Justice Memorandum, "Principles of Religious Liberty," October 6, 2017. <https://www.justice.gov/opa/press-release/file/1001891/download>

¹⁹ Robert Barnes, "In major Supreme Court case, Justice Dept. sides with baker who refused to make wedding cake for gay couple," *The Washington Post*, September 7, 2017. https://www.washingtonpost.com/politics/courts_law/in-major-supreme-court-case-justice-dept-sides-with-baker-who-refused-to-make-wedding-cake-for-gay-couple/2017/09/07/fb84f116-93f0-11e7-89fa-bb822a46da5b_story.html

²⁰ Justice Department backs Christian group in U. Iowa dispute. *AP News*. December 21, 2018. <https://www.apnews.com/09b0dbaa7a554ec2b9df66a0705de333>

²¹ Jenni Monet, "For Native 'water protectors, Standing Rock protest has become fight for religious freedom, human rights." *PBS NewsHour*. November 3, 2016. The protests and litigation began during the Obama administration. On November 2 2017, President Obama announced an intention to explore ways to reroute the pipeline, but in January 2017, the new Administration issued an executive order to halt the inquiry into alternatives and to expedite implementation of the original plan, despite continued protests and litigation.

²² Miriam Jordan, "An Arizona Teacher Helped Migrants. Jurors Couldn't Decide if It Was a Crime." *The New York Times*, June 11, 2019.

²³ Matthew S. Schwartz, "Justices Let Alabama Execute Death Row Inmate Who Wanted Imam By His Side," *NPR News*, February 8, 2019. <https://www.npr.org/2019/02/08/692605056/supreme-court-lets-alabama-execute-muslim-murderer-without-imam-by-his-side>. Contrast this decision to one decided by the Court seven weeks later, granting a stay of execution to a Buddhist inmate to accommodate his request for the presence of his Buddhist spiritual advisor, without a clear explanation for the differing outcomes. Nina Totenberg, "Supreme Court Sees 2 Similar Death Penalty Questions Very Differently," *NPR News*, March 30, 2019.

²⁴ EEOC won a discrimination claim on behalf of the plaintiff in the Sixth Circuit in 2018. "Justice Department Urges Civil Rights Agency to Flip LGBT Stance," *Bloomberg Law*, August 13, 2019. <https://news.bloomberglaw.com/daily-labor-report/justice-department-urges-civil-rights-agency-to-flip-lgbt-stance>

DOJ's brief to the Supreme Court argued that Title VII didn't protect a transgender employee from being fired from her job at a funeral home, where her boss justified the firing based on his Christian faith.²⁵ In addition, LGBTQ advocates are concerned about a recent rule issued by the Department of Health and Human Services that expands the circumstances under which health care workers can object to providing health care services based on religious or moral grounds.²⁶ There is particular concern around providing treatment to transgender and HIV-positive patients, as well as a lack of clarity regarding the obligation of workers to provide life-saving care in an emergency. So while this administration uses religion to legitimize the discriminatory treatment of the LGBTQ community, they arbitrarily ignore these purported principles when the religious liberty invoked falls outside their own views against disfavored minorities.

The Commission examined these questions of balance in its report entitled "Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties."²⁷ The report concluded that "Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires." In a democracy, one person's religion cannot be used to inflict harm against those who do not share that belief and one religion cannot be favored over others.

A second example of this Administration's fundamental policy shift is the extent of its efforts to limit voting rights access, which has exacerbated the impact of the Supreme Court's gutting of Section 5 of the Voting Rights Act in *Shelby County v. Holder*.²⁸ Removing Section 5 gave jurisdictions with a history of voter discrimination the ability to make changes to voting procedures without permission from the DOJ. Because of this, jurisdictions previously covered by Section 5 saw an increase in racial discrimination in voting and significantly higher purge rates.²⁹

The DOJ under this Administration has taken a position of silence towards rectifying these issues, and in some cases, has come to support voter purges. In 2017, in anticipation of *Husted v. A Philip Randolph Institute* in the Supreme Court, the DOJ filed an amicus brief which supported allowing the state of Ohio to implement a system that would remove voters from the voter roll because of

²⁵ *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, Brief for the Federal Respondent Supporting Reversal, p. 3. https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf

²⁶ "What the new religious exemptions law means for your health care," *PBS NewsHour*, May 3, 2019.

<https://www.pbs.org/newshour/health/what-the-new-religious-exemptions-law-means-for-your-health-care>

²⁷ U.S. Commission on Civil Rights, "Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties," September 2016, p. 26. Available at <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF>

²⁸ Report at 158.

²⁹ U.S. Commission on Civil Rights, "An Assessment of Voting Rights Access in the United States," September 2018, at 45; Report at 121; Joe Davidson, "Almost 16 million voters were removed from the rolls. We should be alarmed," *The Washington Post*, May 15, 2019, https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd.

their failure to vote.³⁰ Their only cited reason for changing their position was the change in administration.³¹ And despite the increase in voter purges since the ruling in *Shelby*, as of May 2019, the Civil Rights Division of the DOJ had not filed any lawsuits to prevent voting discrimination based on Section 2 of the Voting Rights Act, the section that prohibits voting procedures that discriminate based on race.³²

The proposed budget cuts, the self-defeating enforcement strategies, and the dramatic policy shifts—many likely in contravention of an agency’s stated mission— have no doubt played a role in the accelerated departure of career staff since 2016.³³ The federal government was already losing institutional expertise, relationships, and memory because of a growing waive of retirements. The current Administration has accelerated the brain drain as career staff have been pushed out, in part because they are not being permitted to pursue the mission of the agency and in fact may be asked to act contrary to the historic mission of the agency.³⁴ These departures will have a detrimental impact on the effectiveness of federal agencies and their abilities to manage their civil rights caseloads.³⁵ Having a robust and functioning career staff, in any federal agency, ensures a level of consistency and experience across administration changes.

The past few years have been a dark time at many federal agencies as public servants grapple with these conflicts. There are career employees who have worked hard over the past decade to advance the rights of LGBTQ people, but are suddenly being directed to carry out “religious liberty” interests at the expense of this community must surely feel like a violation of their oath of office. But as people are forced to confront these conflicts head on, many are holding true to their commitment to their agencies missions. As one civil servant stated in a recent interview, “A lot of us are banding together, not to do some ‘deep state’ takeover. . . we’re just trying to make sure all the functions of the agency that are being neglected at least continue in some form.”³⁶

History is replete with examples of courageous civil servants who worked to fulfill their oaths of office. Federal workers who sought to help the Jewish people being tortured and murdered by the

³⁰ U.S. Comm’n on Civil Rights, “The U.S. Commission on Civil Rights Raises Concern about Reversal of Department of Justice Position in Key Voting Rights Case,” Aug. 18, 2017.

³¹ *Id.*

³² Joe Davidson, “Almost 16 million voters were removed from the rolls. We should be alarmed,” *The Washington Post*, May 15, 2019, https://www.washingtonpost.com/politics/almost-16-million-voters-were-removed-from-the-rolls-we-should-be-alarmed/2019/05/15/f3de396a-7682-11e9-bd25-c989555e7766_story.html?utm_term=.83e4849795fd.

³³ Report at 30-32.

³⁴ Report at 318; Brian Naylor, “Why the Federal Workforce Morale Is at an All-Time Low,” *NPR*, Jan. 29, 2018, <https://www.npr.org/2018/01/29/581674922/why-the-federal-workforce-moral-is-at-an-all-time-low>.

³⁵ Report at 35, 164.

³⁶ Rachel M. Cohen, “‘I Fully Intend to Outlast These People’: 18 Federal Workers on What It’s Really Like to Work for the Trump Administration,” *The Washingtonian*, April 7, 2019.

Nazis.³⁷ Federal workers who risked their lives³⁸ to enforce the Voting Rights Act of 1965 in the Deep South where lynchings were once so routine that white southerners brought their kids and picnic baskets.³⁹ Federal workers who became whistle blowers in the interest of protecting the American people.

I had the opportunity to visit the Equal Justice Institute's Legacy Museum and the Memorial for Peace and Justice in Montgomery, Alabama. The museum and the memorial powerfully document the hundreds of thousands of Black people who were enslaved and the thousands who were lynched and murdered by whites through 1950. I recommend that all Americans visit both. Unfortunately, our dark days are not behind us and the legacy of slavery, Jim Crow, and current racism, xenophobia, sexism, bigotry and homophobia are still present and require vigorous government intervention. As Dr. Martin Luther King, Jr. once observed, "It may be true that the law cannot change the heart but it can restrain the heartless. It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important."⁴⁰

³⁷ The United States Holocaust Memorial Museum, online exhibit "Americans and the Holocaust," featuring stories of Henry Morgenthau Jr., Raymond Geist, Hiram Bingham Jr., and Frances Perkins.

<https://exhibitions.ushmm.org/americans-and-the-holocaust/stories/americans-who-dared>

³⁸ Steven H. Wright, "Voter Discrimination Just Got Easier," *NYR Daily*, July 29, 2014. "For almost fifty years, the US government has had an especially effective tool for ensuring fair elections: sending teams of federal observers to polling stations across the country. Though relatively little known, the program has been crucial in dismantling the discriminatory practices that disenfranchised voters of color. In the program's early days, federal monitors risked their lives to collect evidence courts needed to outlaw the electoral mechanisms of Jim Crow."

³⁹ "Lynching In America: Confronting the Legacy of Racial Terror," Equal Justice Initiative, fn 163.

<https://lynchinginamerica.eji.org/report/>

⁴⁰ Martin Luther King, Jr., excerpt from speech at Western Michigan University, December 18, 1963.

<https://wmich.edu/sites/default/files/attachments/MLK.pdf>

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Statement of Commissioner Michael Yaki

President Trump and his Administration have pursued and permitted actions that have sought to restrict or deny the hard won and hard fought civil liberties of lesbian, gay, bisexual, and transgender (LGBT) people.

As recently as August 2019, after garnering his first endorsement from the Log Cabin Republican group,¹ Trump shared his belief that “I’ve done very well with [the LGBT] community and some of my biggest supporters are of that community, and I talk to them a lot about it. I think I’ve done really very well with that community.”²

Despite this curious self-perception, seemingly no other President has so blatantly and deliberately targeted the rights of the LGBT community. In his apparent zeal to appease an intolerant segment of his supporters, his Administration has trotted out a familiar attack on the LGBT community couched in a dubious First Amendment wrap -- the elevation of “religious freedoms” over other civil liberties.³ The families, careers, and, in fact, actual lives of the LGBT community are at stake.

The Commission’s FY 2019 Statutory Enforcement Report examines a number of civil rights issues, all of which are subject to federal agency oversight, and many of which are of critical importance to LGBT people.⁴ Further, the Enforcement Report exposes President Trump’s

¹ NBC News, *Trump Ducks LGBTQ Discrimination Question, Says Gays “Like the Job I’m Doing,”* August 20, 2019, <https://www.nbcnews.com/feature/nbc-out/trump-ducks-lgbtq-discrimination-question-says-gays-job-i-m-n1044611>.

² Washington Blade, *Trump: “I’ve Done Very Well” With LGBT Community,* August 20, 2019, <https://www.washingtonblade.com/2019/08/20/trump-ive-done-very-well-with-lgbt-community/>.

³ For the Commission’s recent investigation, findings and recommendations about religious freedom vis-à-vis other civil rights, see U.S. Commission on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Rights*, September 2016, <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF> (“Peaceful Coexistence”).

⁴ These include

immigrant rights, rights to asylum, equal access health care, protections against sexual assault during detention, access to HIV treatment in the justice systems, protections against law enforcement abuses, and protections against sexual assault and discrimination based on gender identity in educational settings, and protections against employment discrimination and discrimination in public housing—documenting a relevant Trump Administration policy change leading to each of these concerns. [original footnotes omitted.]

U.S. Commission on Civil Rights, *Are Rights Reality? Federal Civil Rights Enforcement: A Study of Thirteen Agencies from FY 2016 – FY 2018*, November 2019, p. 59 (“USCCR Enforcement Report”).

The Commission correctly emphasizes that

[o]ver the past few years, the Trump Administration ... made a concerted effort to roll back data collection from LGBT communities. Federal agencies across the Trump Administration have deleted proposed or existing survey questions relating to LGBT population numbers, older adults, foster youth and parents, crime victimization, and disease prevention. [original footnotes omitted.]

Department of Justice’s Civil Rights Division for “removing priorities to protect the rights of ... LGBT individuals from discrimination, harassment, and violence.”⁵

Meeting the goals of the President’s ultra-conservative followers is a common theme among these issues, be it expressed implicitly or explicitly.⁶ Among these many concerns, those which specifically invoke religious freedoms as a justification for limiting LGBT rights merit special attention.

For example, the Administration has announced plans to allow adoption agencies, including those which receive federal funding, to stand under the umbrella of religious liberties to discriminate against prospective adoptive parents based upon the prospective parents’ sexual orientation or gender identity.⁷ This is an issue about which I have previously written some years back. There, I cited the scientific consensus that same-sex couples are as fit and suited for adoption as heterosexual couples.⁸ There is no rationale based on the best interests of a child that merit such

Ibid., p. 66.

⁵ Ibid., p. 82.

⁶ Overall,

Trump and his aides have issued a wave of regulations, executive orders, legal briefs and personnel appointments aimed at reversing large parts of the Obama administration’s civil rights agenda, winning plaudits from religious conservatives who form the bedrock of Trump’s political support. ... The Trump administration has sided against LGBT activists on a host of issues over the past two years, including banning transgender troops from serving in the military and arguing in court that civil rights laws do not protect employees from discrimination based on sexual orientation or gender identity.

The Washington Post, *Trump, Who Cast Himself as Pro-LGBT, is Now Under Fire From Democrats for Rolling Back Protections*, May 31, 2019, https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html.

The National Center for Transgender Equality has compiled a comprehensive and disturbing list of anti-LGBT actions by President Trump and his Administration from February 22, 2017 forward. See National Center for Transgender Equality, *Trump’s Record of Action Against Transgender People: Anti-Transgender and Anti-LGBTQ Actions*, <https://transequality.org/the-discrimination-administration>. GLAAD has maintained a similarly informative compilation. See GLAAD, *Donald Trump: President of the United States, Presidency*, <https://www.glaad.org/tap/donald-trump>.

⁷ Axios, *Scoop: Trump’s Plan to Let Adoption Agencies Reject Same-Sex Parents*, May 24, 2019, <https://www.axios.com/trump-lgbtq-adoption-rules-religious-exemption-85f5fb22-d76d-4536-b275-0b279e904933.html>.

⁸ For a detailed history and explication of the history of barriers to the adoption of foster children by same-sex couples in the U.S., see U.S. Commission on Civil Rights, *The Multiethnic Placement Act: Minorities in Foster Care, Statement of Commissioner Yaki (Rebuttal)*, July 2010, p. 148, https://www.usccr.gov/pubs/docs/MEPABriefingFinal_07-01-10.pdf.

Regarding the immediate needs large number of foster children awaiting adoption by loving parents, I stated that

a policy change by the Administration. There is only a rationale based on phobia that deprives innocent children of a chance at a family life.⁹

President Trump also has prioritized the reversal and curbing of employment protections for LGBT people. The rights of LGBT people to be protected from animus-based discrimination in the workplace are not secure except where states and localities have chosen to provide legal protections and in limited jurisdictions by judicial decision.¹⁰ The Enforcement Report discusses in detail President Trump's August 2019 proposed rule seeking to allow federal contractors to discriminate against LGBT employees and job applicants solely on the basis of sexual orientation under the rubric of religious freedom.¹¹ Again, with no apparent rationale tied to business

[t]ime does not stand still for children, and we have a duty to recruit and explore all appropriate alternatives for these children. The United States Department of Health and Human Services should assist in this effort by developing education and outreach programs targeted at helping adoption agencies which want to recruit prospective families headed by lesbians and gay men. Politicians and bureaucrats may have the luxury of time in which to dither and waffle. For children whose development is benefited by having caring, supportive, and permanent families [including LGBT parents], time is not a luxury they can afford.

⁹ The American Civil Liberties Union filed a pre-emptive lawsuit in May 2019. *See* American Civil Liberties Union, *Trump's Anti-LGBTQ Agenda Will Keep Foster Children From Having a Loving Home*, May 30, 2019, <https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/trumps-anti-lgbtq-agenda-will-keep-foster-children-having-loving>.

¹⁰ In the first instance, LGBT people are not explicitly protected by the U.S. Civil Rights Act of 1964. *See* P.Law 88-352, 78 Stat. 241.

However, Title VII of the Civil Rights Act does protect people from discrimination based upon sex. Therefore, in recent years, the U.S. Equal Employment Opportunity Commission has determined that Title VII protects LGBT people from workplace discrimination. A number of courts have followed this interpretation and held that Title VII of the U.S. Civil Rights Act protects LGBT people from workplace discrimination. For a full discussion of these issues as of 2017, including the EEOC's relevant actions, *see* U.S. Commission on Civil Rights, *Working for Inclusion*, November 2017, "USCCR Working Report," https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf.

More recently, the U.S. Solicitor General is seeking to reverse progress by asking the United States Supreme Court to rule that the protections against sex discrimination afforded by Title VII of the Civil Rights Act of 1964 pertain to "biological sex" only and do not include sexual orientation or gender identity discrimination. *See, e.g., R.G & G.R. Harris Funeral Homes, Inc., v. Equal Employment Opportunity Commission, et al., Brief for the Federal Respondent Supporting Reversal*, https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf; *Gerald Lynn Bostock c. Clayton County, Georgia and Altitude Express, Inc. et al v. Melissa Zarda, et al. Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623*, https://www.supremecourt.gov/DocketPDF/17/17-1618/113417/20190823143040818_17-1618bsacUnitedStates.pdf; and *The New York Times, Can Someone Be Fired for Being Gay? The Supreme Court Will Decide.*, September 23, 2019, <https://www.nytimes.com/2019/09/23/us/politics/supreme-court-fired-gay.html?action=click&module=Top%20Stories&pgtype=Homepage>.

¹¹ USCCR Enforcement Report, p. 300. For the Commission's recent investigation, findings and recommendations about religious freedom vis-à-vis other civil rights, *see* *Peaceful Coexistence*, *supra* note 3.

In addition to what the Enforcement Report presents,

necessity other than providing a justification for discrimination, the use of federal authority to turn back the clock on federal rights is a well-used implement in the Administration's anti-LGBTB toolbox.

President Trump's Department of Justice also may be initiating a pattern of involvement in individual anti-LGBT religious freedom discrimination cases in state courts. As recently as September 27, 2019, the Administration filed a "United States Statement of Interest" in an Indiana state court case involving a gay teacher fired by a Catholic school. Here, the Administration expressed its "interest" in ensuring that religious freedom is held above civil rights for LGBT people.¹² This follows the Administration's prior intervention in the Colorado bakery case, where

[t]he Department of Labor said the rule is proposed in order to provide "the broadest protection of religious exercise, for companies that compete for federal contracts. ... The proposal is expansively written and makes clear that the 'religious exemption covers not just churches but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose,'" and also makes clear that "employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases."

And, crucially, the proposed rule relies on an array of legal opinions to construct a new, national legal test of whether a company is "religious." The company need not be primarily religion-oriented. It need only to declare itself to be, for instance, religious "in response to inquiries from a member of the public or a government entity."

NBC News, *Labor Dept. Proposes Expanding "Religious Exemption" in Hiring*, August 14, 2019, <https://www.nbcnews.com/feature/nbc-out/proposed-rule-trump-administration-would-allow-more-businesses-discriminate-n1042416>. See also American Civil Liberties Union, *ACLU comment on Department of Labor Proposal to License Discrimination in The Name of Religion*, August 14, 2019, <https://www.aclu.org/press-releases/aclu-comment-department-labor-proposal-license-discrimination-name-religion>.

¹² U.S. Department of Justice, *Justice Department Files Statement of Interest in Indiana Lawsuit Brought by Former Teacher Against Archdiocese*, September 27, 2019, <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-indiana-lawsuit-brought-former-teacher-against>. See also United States Department of Justice, *The United States' Statement of Interest, In the Marion Superior Court, Civil Division #1, State of Indiana, County of Marion, Joshua Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc., Cause No. 49D01-1907-PL-027728*, September 27, 2019, <https://www.justice.gov/opa/press-release/file/1205506/download>.

Historical context regarding the federal government's treatment of LGBT employees is critical here. The actions of the Administration represent a conscious step backwards to the virulently anti-LGBT component of the repressive McCarthy Era. Although the Executive Order did not specifically bar LGBT people from federal employment, it banned any persons deemed to be at risk of blackmail. See Executive Order 10450, *Security Requirements for Government Employment*, 18 FR 2489, 3 CFR 1949-1953 Comp., p. 936, August 23, 1957, <https://www.archives.gov/federal-register/codification/executive-order/10450.html>. The painful irony here is that President Eisenhower created this very United States Commission on Civil Rights by signing the Civil Rights Act of 1957, Public Law 85-315, 71 Stat. 634, see <https://www.govinfo.gov/content/pkg/STATUTE-71/pdf/STATUTE-71-Pg634.pdf>, in August of that year, a mere four months after he signed Executive Order 10450 and thereby sparked the fire that became known as "the Lavender Scare."

Due to criminalization and severe societal stigma of non-heterosexual orientations at the time of Executive Order 10450's issuance, the concern about susceptibility to blackmail was interpreted to include LGBT people. The history is lengthy and complex, and the resultant "Lavender Scare" is estimated to have purged thousands of federal workers, forced outings, ruined careers, and driving some people to suicide. *See, e.g.,* David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in The Federal Government*, The University of Chicago Press Books, 2004. *See also* David Carter, *Stonewall at 50: The Movement for LGBT Civil Rights, Remarks Before the U.S. Commission on Civil Rights*, June 7, 2019, <https://www.c-span.org/video/?461522-2/1969-stonewall-riots-lgbtq-civil-rights>. Decades later, in 2017, U.S. Secretary of State John Kerry apologized for his department's discrimination against LGBT diplomats during the period of the Lavender Scare. *See* Secretary of State John Kerry, *Apology for Past Discrimination Toward Employees and Applicants Based on Sexual Orientation*, January 9, 2017, <https://2009-2017.state.gov/secretary/remarks/2017/01/266711.htm>.

The President and his Administration are seeking to limit LGBT rights in addition to those to which it explicitly ties religious freedom. For example, the issue of public bathroom use by transgender people which remains politically contentious, first took a seat in the national political area in 2015. *See, e.g.,* Time, *Everything You Need to Know About the Debate Over Transgender People and Bathrooms*, July 28, 2015, <https://time.com/3974186/transgender-bathroom-debate/>. In 2016, while referring to the anti-transgender North Carolina legislation known as HB2, Candidate Trump opined that everyone should be able to "use the bathroom they feel is appropriate." ABC News, *Trump Administration Reverses Transgender Bathroom Guidance*, February 22, 2017, <https://abcnews.go.com/Politics/trump-administration-issue-guidance-transgender-bathrooms/story?id=45663275>.

In 2017, however, President Trump's Department of Education "rescinded a guidance issued to schools by the Obama administration to allow students to use bathrooms that match their gender identity rather than the sex indicated on their birth certificate." *See, e.g.,* ABC News, *Donald Trump's Past Statements About LGBT Rights*, July 26, 2017, <https://abcnews.go.com/Politics/donald-trumps-past-statements-lgbt-rights/story?id=48858527>. The Department's guidance, or "Dear Colleague letter," may be found at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

The President and his Administration have also put significant effort into excluding transgender people from serving in the U.S. Military. In 2000, now-President Trump voiced support for the end of the U.S. military's ban on service by openly or outed LGBT people, commonly known as "Don't Ask, Don't Tell." ABC News, *Donald Trump's Past Statements About LGBT Rights, supra*.

However, on July 26, 2017, the President tweeted:

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow....."Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming....."victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]

Donald J. Trump (@realDonaldTrump), Twitter, July 26, 2017, https://twitter.com/realDonaldTrump/status/890193981585444864?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E890193981585444864&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F; https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E890196164313833472&ref_url=https%3A%2F%2Fwww.theatlantic.com%2Fpolitics%2Farchive%2F2019%2F01%2Fdonald-trump-tweets-transgender-military-service-ban%2F579655%2F; and https://twitter.com/realDonaldTrump/status/890197095151546369?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E890197095151546369&ref_url=https%3A%2F%2Fabcnews.go.com%2FPolitics%2Feffect-us-military-ban-transgender-troops-remains%2Fstory%3Fid%3D48858128.

the Solicitor General argued that the bakery owner could be required to serve a gay couple because his First Amendment rights were violated “where a public accommodation law compels someone

The future of this policy remains unsettled. After federal court lawsuits across the nation sought to prevent its implementation, the U.S. Supreme Court ruled in January 2019 that “the Trump administration [could] go ahead, for now, with its plan to ban transgender military service.” NBC News, *Supreme Court Allows Trump Administration to Enforce Transgender Military Ban*, January 22, 2019, <https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-take-daca-transgender-cases-n961196>. The military began enforcing the ban on April 12, 2019, pending further action by the U.S. Supreme Court. The Washington Post, *Military to Begin Enforcing Trump’s Restrictions on Transgender Troops*, March 13, 2019, https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html.

A May 2019 Department of Health and Human Services (DHS) memorandum let it be known in May 2019 that the President intends to issue a proposed rule, Centers for Medicare & Medicaid Services, *Nondiscrimination in Health and Health Education Programs or Activities*, Federal Register, June 14, 2019, <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>, to undo a DHS regulation facilitating health care access for transgender people. The Washington Post, *Trump, Who Cast Himself as Pro-LGBT, is Now Under Fire From Democrats for Rolling Back Protections*, *supra* note 5. See also National Public Radio, *Trump Administration Proposes Rule to Reverse Protections for Transgender Patients*, May 24, 2019, <https://www.npr.org/sections/health-shots/2019/05/24/726552816/trump-administration-proposes-rule-to-reverse-protections-for-transgender-patien>. In other words, homophobic or transphobic physicians will be able, without recourse, to limit the health decisions of transgender individuals. “The proposal is part of a broader effort by religious conservatives in the Trump administration to define gender restrictively. The result has been a weakening of protections for transgender people.” The Washington Post, *New Trump Administration Rule Would Weaken Protections for Transgender People in Health Care*, May 24, 2019, <https://www.washingtonpost.com/health/2019/05/24/new-trump-administration-rule-would-weaken-protections-transgender-people-health-care/>. See also PBS News Hour, *Trump Administration Moves to Revoke Transgender Health Protection*, May 24, 2019, <https://www.pbs.org/newshour/health/trump-administration-moves-to-revoke-transgender-health-protection> and USA TODAY, *Trump Plan Would Hamper LGBTQ Health Care Access. This is Cruel and Dangerous*, August 2, 2019, <https://www.usatoday.com/story/opinion/2019/08/02/trump-obamacare-change-puts-gay-transgender-health-at-risk-column/1877926001/>.

On another anti-LGBT policy, in October 2018, President Trump announced via his Department of State that G-4, or “family,” visas are no longer available to same-sex couples in which one partner is a diplomat or employee of an international organization such as the United Nations. “Same-sex domestic partners of diplomats and workers who already have a G family visa must submit proof of marriage by the end of the year to qualify for a renewal. . . . If a couple cannot submit proof of marriage, the partner will have to leave the United States within 30 days of the year-end deadline. . . .” *The New York Times*, *U.S. Bans Diplomatic Visas for Foreign Same-Sex Domestic Partners*, October 2, 2018, <https://www.nytimes.com/2018/10/02/us/politics/visa-ban-same-sex-partners-diplomats.html>. If the ostensible rationale behind this policy change is to put same-sex couples on perceived equal footing with opposite-sex couples to whom only spousal, but not family, visas, have been available since 2009, United Nations Secretariat, *Information Circular re: G-4 Visas for Domestic Partners*, September 13, 2018, <https://int.nyt.com/data/documenthelper/354-un-memo-visas-same-sex-partners/5c27557e49d0476a678f/optimized/full.pdf#page=1>, the reasoning is flawed and portends dangerous outcomes. Opposite-sex couples, as a class, are relatively freely able to marry around the globe without significant negative personal consequences. Requiring same-sex marriages in this context is to force the outing of people from all over the world who may need to choose between accompanying their partners to the United States or staying closeted and separated in their home countries. Yes, perhaps same-sex couples from nations which refuse to marry them could get married upon arrival in the United States and request spousal visas. However, this policy, either by design or by ignorance, completely ignores the dangers attached to forced outing. These couples will likely be returning to their possibly-hostile home countries one day. The dangers appurtenant to forced outing under these global circumstances could result in LGBT people being jailed, corporally punished, or even executed in their home countries.

to create expression for a particular person or entity and to participate, literally or figuratively in a ceremony....”¹³

This President’s use of religious freedom to cloak the obstruction and withdrawal of LGBT rights is of immediate concern not only for LGBT people, but for all who value equality before the law. Religious freedom, as the Commission has already investigated and discussed at length, can be balanced with other civil rights.¹⁴

The irony of the President’s policy of stripping the LGBT community of rights in base obeisance to a community that is steeped in homophobia and transphobia is that, abroad, the President has a so-called “global campaign to decriminalize homosexuality.” This campaign, cynically viewed, is no more than an attempt to utilize a wedge issue against Iran. One news source reported that “[n]arrowly focused on criminalization, rather than broader LGBT issues like same-sex marriage, the campaign was conceived partly in response to the recent reported execution by hanging of a young gay man in Iran, the Trump administration’s top geopolitical foe.”¹⁵ Indeed, there is some speculation that the “campaign” has its roots in right-wing opponents to Islamic immigration in Europe.¹⁶

It is a sad and cynical day when even words of praise from the President for the LGBT community must be viewed in the context of the first principle he identified throughout his campaign and began to carry out on his first week in office – his Islamophobia that resulted in his executive order banning Muslim immigration to this country.¹⁷ But when viewed in the greater frame of the enormous setbacks to LGBT rights he has set in motion during his Administration, it is not unexpected. Today, after successfully fighting for marriage equality and the repeal of prior discriminatory practices such as “don’t ask, don’t tell,” among other basic freedoms, the LGBT community finds itself once again in a familiar place – being pushed towards the outside looking in, having to summit again the rocky pathway to freedom and equality that was surmounted just scant years ago, all because of a President and an Administration that has chosen intolerance, rather than inclusion, as its first principle.

¹³ Reuters, *Trump Administration Backs Baker Who Refused to Make Cake for Gay Couple*, September 29, 2017, <https://www.reuters.com/article/us-usa-court-lgbt/trump-administration-backs-baker-who-refused-to-make-cake-for-gay-couple-idUSKCN1BI332>.

¹⁴ See U.S. Commission on Civil Rights “Peaceful Coexistence” report, *supra* note 3.

¹⁵ NBC News, *Trump Administration Launches Global Effort to End Criminalization of Homosexuality*, February 19, 2019, <https://www.nbcnews.com/politics/national-security/trump-administration-launches-global-effort-end-criminalization-homosexuality-n973081>.

¹⁶ “[T]he rhetoric Trump is using has some ugly roots: It’s essentially a European right-wing strategy to pit LGBTQ people against Muslims. ... European right-wingers often use Middle Eastern countries’ horrific records on gay rights to try to foster Islamophobic sentiments among LGBTQ communities — a sentiment they can tap into to garner restrictions on immigration from predominantly Muslim countries. It’s effectively pro-gay Islamophobia.” Vox, *Watch Donald Trump Reach Out to “L, G, B, T... Q” Americans*, July 21, 2019, <https://www.vox.com/2016/7/21/12254616/trump-acceptance-speech-lgbtq-rn>. See also Vox, *Donald Trump’s Pro-Gay Islamophobia is Straight Out of The European Right-Wing Playbook*, June 13, 2016, <https://www.vox.com/2016/6/13/11924826/donald-trump-islamophobia-muslim-lgbtq-europe-wilders>

¹⁷ The Guardian, *Is This a Muslim Ban? Trump’s Executive Order Explained*, January 31, 2017, <https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits>.

Dissenting Statement of Commissioner Peter N. Kirsanow

Introduction

Let me save you the trouble of reading this 400+ page report. It can be reduced to two words: Trump Bad.

Whether it is HHS protecting conscience and religious liberty rights, the Department of Education attempting to reduce due process abuses in Title IX cases, or DHS attempting to secure the border - Trump Bad. There is no suggestion that people can have good faith policy disagreements, that economic costs are a valid consideration, or that hotly contested cultural issues are in fact hotly contested. (All the good people agree, you see.) In effect, this report is the progressive civil rights establishment's primal scream about President Trump.

For example, the report states:

The Heritage Foundation has reported that during the first 22 months in office, the Trump Administration initiated approximately half as many significant regulatory actions as were initiated under the George W. Bush Administration, and approximately a third as many as were initiated under the Obama Administration. Some champion these efforts, citing that deregulation can lead to economic growth and "improvements to quality of life from access to innovative products and services." However, many have criticized this deregulatory agenda, arguing that these rollbacks remove standards for protecting the important public needs, such as civil rights.¹

This pattern is followed throughout the report. A Trump Administration policy is described in disapproving terms. A disparaging description of purported benefits of this policy is followed by a "But others say, [insert criticism from progressive advocacy organization]."

The report also engages in attempted guilt-by-association: "According to community leaders and civil rights experts who testified and submitted comments to the Commission, the Trump Administration's restrictive civil rights policy positions are part and parcel of a climate that has fostered increasing discrimination in the form of hate crimes and other civil rights violations."² As an initial matter, the number of reported hate crimes may not even be increasing, or at least is likely not increasing in the dramatic fashion portrayed by the media and the Commission majority. The increase in reported hate crimes may be entirely due to the increase in the number of jurisdictions reporting hate crimes to the FBI.³ Second, I am unsure what other civil rights violations the

¹ Report at n. 310-312.

² Report at n. 318.

³ Robby Soave, *I Testified Before Congress About Hate Crimes and the Alt-Right. Here's What Happened.*, Reason, May 16, 2019, <https://reason.com/2019/05/16/hate-crime-statistics-congress-house-subcommittee/>.

majority is referring to, but it is worth noting that the Administration can't take a breath without being subject to legal challenge, and yet its policies are regularly upheld by the Supreme Court.

Because of the length of this report, I cannot possibly address every issue or agency contained within it. I have endeavored to address issues that I think are of greatest importance.

Chapter 2: U.S. Department of Justice

Here, as elsewhere in the report, the Commission majority adopts wholesale criticisms of CRT leveled by former Obama Administration officials.⁴

The report states:

One way [CRT] can prioritize civil rights is to influence the scope and interpretation of federal civil rights laws through litigation that results in federal courts setting legal precedents. If CRT is active in convincing federal courts to set broad precedents, its work develops broader mandates for compliance and greater efficacy by developing the law and sending a message to potential violators. If CRT's position results in federal courts setting narrow precedents, it would limit the scope of civil rights protections and may result in lesser efficacy, possibly creating a chilling effect.⁵

The report also states, “[T]he major policy considerations in the Obama Administration took expansive views of civil rights protections, and the Trump Administration’s focus has been restrictive and maybe less effective for impacted communities.”⁶ But is it CRT’s job to expand the law? Or is it CRT’s duty to enforce the law as passed by Congress? If CRT is developing “broader mandates,” then at least theoretically it is placing new burdens on regulated entities – burdens that were not approved or contemplated by Congress. The report later cites a case in New York in which CRT initially filed a statement of interest in a case against a housing provider that barred individuals with criminal records, alleging that this violated the Fair Housing Act.⁷ There is simply no way that Congress intended the Fair Housing Act to mean that landlords have to individually assess the criminal records of potential tenants, rather than simply having a “no felons” policy, or even a “no murderers or rapists” policy, and run the risk of having DOJ come down on them if

While it's important to be aware that there is still hate and violence in this country, some policy makers and media figures have seized on the idea that hate crimes are actually rising. The FBI reported 7,175 crimes in 2017 vs. 6,121 crimes in 2016, which represents a 17 percent increase. But it's important to note that nearly a thousand additional municipalities submitted data to the federal government in 2017. This means the perceived increase in hate could partly be explained by the fact that we simply have more data. As the agencies involved in submitting data become more concerned with hate crimes, and more responsible about tallying them, the numbers will appear to be going up.

⁴ Report at n. 642-644.

⁵ Report at n. 481-483.

⁶ Report at n. 816.

⁷ Report at n. 696-699.

HUD disagrees with their assessment.⁸ CRT did not even attempt to claim as much, admitting that the guidance effectively forcing landlords to rent to felons were dreamed up by HUD as part of the Obama Administration's Federal Interagency Reentry Council.⁹

This is what Robert Driscoll meant when he stated:

Federal civil rights enforcement is no different than tax, environmental, or federal contracting as a body of law. There is a set of statutes. There is a constitution. There are specific texts that govern what enforcers do. It's not a blank slate upon which federal civil rights attorneys are free to pursue their own political preferences or particularize a vision of justice.¹⁰

The majority does not consider that the Obama-era Civil Rights Division (and the other Obama-era civil rights agencies and offices) may have exceeded its statutory authority. If that is the case, adopting a narrower interpretation of civil rights is restoring CRT to its proper place. CRT and other administrative agencies are not supposed to make law, merely to interpret and enforce existing law.

Nor is CRT supposed to be the supervisor for every police department in the nation, although for several years it labored under this delusion. The report states, "Former CRT head Vanita Gupta testified at the Commission's briefing that consent decrees are key to civil rights enforcement because they provide for court oversight 'regardless of political winds.'"¹¹ Well, that is the problem. There needs to be political oversight of these decisions and political accountability. Consent decrees are a way of tying the hands of future administrations, which means that there is no way for voters to control the civil rights bureaucracy.

The report also states:

[O]n October 6, 2017, DOJ issued a memorandum to all U.S. Attorneys and DOJ departments ordering them to take into account new guidance on protecting religious liberties. This new guidance permits recipients of federal funding to make exceptions to their services based on "sincerely held religious beliefs." The Commission received testimony that this new guidance prioritizes religious freedom over the rights of others and may be retrogressive to protecting the rights of LGBT persons.¹²

⁸ United States of America's Statement of Interest, *Fortune Society, Inc., v. Sandcastle Towers Housing Development Fund Corp.* (E.D.N.Y.), Oct. 18, 2016, <https://www.justice.gov/crt/case-document/statement-interest-fortune-society-inc-v-sandcastle-towers-housing-development>.

⁹ *Id.* at 1-2; Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, Dep't of Housing and Urban Development, Apr. 4, 2016, https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

¹⁰ Driscoll Testimony, Briefing Transcript, pp. 115-117.

¹¹ Report at n. 642.

¹² Report at n. 831-833.

In this case, the Commission did not even bother presenting the other side. Given the many religious liberty cases that have wound up in the federal courts over the past ten years, it is clear that many Americans do see another side. Additionally, the memorandum at issue states that it is attempting to ensure that federal agencies comply with the provisions of the Religious Freedom Restoration Act (RFRA).¹³ Had the Obama Administration heeded RFRA before issuing Obamacare's contraception mandate, a lot of people and institutions (including the federal government) might have been saved a lot of time and money.¹⁴

The report also trumpets the glory of disparate impact. Disparate impact is a pernicious legal theory when not firmly tethered to smoking out intentional discrimination (or reckless disregard for equal treatment), as was ostensibly the case in *Griggs*.¹⁵ The way disparate impact has been abused to extend the power of the civil rights agencies and to force regulated entities to “get their numbers right” is shameful. And make no mistake, that is exactly what happens. The report may say:

[T]he term ‘disparate impact’ elides the reality that mere statistical disparities are not enough to prove unlawful discrimination; instead, plaintiffs must prove that a policy or practice caused the disparities and that the policy was not necessary to advance a legitimate interest. Courts have long been clear that proving disparate impact discrimination requires more than just providing the existence of a statistical disparity in impact.¹⁶

Hogwash. Sure, the courts may say that – but you have to actually make it in front of a court in order for that requirement to be enforced. In the real world, when a statistical disparity exists, the functionary from Cubicle 17E deep in the bowels of the EEOC, or the Department of Labor, or the Department of Education suddenly perks up and takes an interest in you. And your case may not even make it to the point of attracting the interest of some Washington bureaucrat before the local activists – having been firmly told by activist organizations that the only reason for a disparity is intentional racism – are raising Cain. Much better to simply get your numbers right the first time. Hasn't anyone at the Commission read the facts in *Ricci v. DeStefano*?¹⁷

¹³ U.S. Dept. of Justice, Implementation of Memorandum on Federal Law Protections for Religious Liberty (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001886/download>.

¹⁴ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Zubik v. Burwell*, 136 S.Ct. 1557 (2016).

¹⁵ *Griggs v. Duke Power*, 401 U.S. 424 (1971).

¹⁶ Report at n. 889-890.

¹⁷ *Ricci v. DeStefano*, 557 U.S. 557, 561-575 (2009).

In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain.

...

When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It threw out the examinations.

Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials. Theirs is the suit now before us. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed.

...

When the City of New Haven undertook to fill vacant lieutenant and captain positions in its fire department (department), the promotion and hiring process was governed by the city charter, in addition to federal and state law. The charter establishes a merit system. . . .

The City's contract with the New Haven firefighter's union specifies additional requirements for the promotion process. Under the contract, applicants for lieutenant and captain positions were to be screened using written and oral examination, with the written exam account for 60 percent and the oral exam 40 percent of an applicant's total score. . . .

After reviewing bids from various consultants, the City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations, at a cost to the City of \$100,000. IOS is an Illinois company that specializes in designing entry-level and promotional examinations for fire and police departments. In order to fit the examinations to the New Haven Department, IOS began the test-design process by performing job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions. IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department. At every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results—which IOS would use to develop the examinations—would not unintentionally favor white candidates.

With the job-analysis information in hand, IOS developed the written examinations to measure the candidates' job-related knowledge. For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions. IOS presented the proposed sources to the New Haven fire chief and assistant fire chief for their approval. Then, using the approved sources, IOS drafted a multiple-choice test for each position. Each test had 100 questions, as required by CSB rules, and was written below a 10th-grade reading level. After IOS prepared the tests, the City opened a 3-month study period. It gave candidates a list that identified the source material for the questions, including the specific chapters from which the questions were taken. IOS developed the oral examinations as well. These concentrated on job skills and abilities. Using the job-analysis information, IOS wrote hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. Candidates would be presented with these hypotheticals and asked to respond before a panel of three assessors.

IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. At the City's insistence (because of controversy surrounding previous examinations), all the assessors came from outside Connecticut. IOS submitted the assessors' resumes to City officials for approval. They were battalion chiefs, assistant chiefs, and chiefs from departments of similar sizes to New Haven's throughout the country. Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels contained two minority members. IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria. Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant.

Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.

The report also mischaracterizes the testimony of Joshua Thompson, an attorney at the Pacific Legal Foundation, who cautioned against focusing on disparate impact claims to the detriment of cases of intentional discrimination. The report claims, “Thompson advocated against federal enforcement of this mandatory enforcement tool.”¹⁸ First, although CRT has interpreted the Supreme Court’s decision in *Alexander v. Sandoval* to permit federal enforcement of disparate impact regulations, this is not a *mandatory* enforcement tool. These are mere regulations, and regulations can be changed. Statutes are *mandatory* – for example, enforcement of RFRA is *mandatory*. Second, Thompson did not advocate against all federal use of disparate impact. Rather, he cautioned against “over-enforcement of disparate impact” and suggested that “Title VI disparate impact enforcement should be focused on rooting out covert intentional discrimination.”¹⁹ The report quotes the second statement, but somehow interprets this as “Thompson opposing enforcement of this mandatory enforcement tool.” Nor does the report consider Thompson’s point that seeing a disparate-impact bogeyman behind every disparity can lead to perverse results for minorities – the very people who supposedly benefit from disparate impact.

Chapter 3: Department of Education

This report assumes that the only legitimate interpretations of civil rights statutes are those favored by the Left. As is the case throughout this report, ED OCR’s changes in policy and procedure are considered illegitimate. There is no effort made to grapple with the objections made to Obama-era innovations in the realm of Title VI and Title IX.

The report states: “ED OCR enforces these civil rights laws and regulations through processing and acting upon individual complaints, through its own compliance investigations of schools receiving federal funds, and through issuing policy guidance documents to assist schools in understanding their civil rights obligations.”²⁰ The report also says, “ED OCR has dramatically

The City’s contract with IOS contemplated that, after the examinations, IOS would prepare a technical report that described the examination processes and methodologies and analyzed the results. But in January 2004, rather than requesting the technical report, City officials, including the City’s counsel, Thomas Ude, convened a meeting with IOS Vice President Chad Legel. (Legel was the leader of the IOS team that developed and administered the tests.) Based on the test results, the City officials expressed concern that the tests had discriminated against minority candidates. Legel defended the examinations’ validity, stating that any numerical disparity between white and minority candidates was likely due to various external factors and was in line with results of the Department’s previous promotional examinations.

Several days after the meeting, Ude sent a letter to the CSB purporting to outline its duties with respect to the examination results. Ude stated that under federal law, “a statistical demonstration of disparate impact,” standing alone, “constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntar[y] remedies—even ... race-conscious remedies.”

...

The CSB’s decision not to certify the examination results led to this lawsuit. The plaintiffs—who are the petitioners here—are 17 white firefighters and 1 Hispanic firefighter who passed the examinations but were denied a chance at promotions when the CSB refused to certify the test results. They include the named plaintiff, Frank Ricci, who addressed the CSB at multiple meetings [citations omitted][emphasis added].

¹⁸ Report at n. 901.

¹⁹ Thompson statement at 2-3.

²⁰ Report at n. 1010.

changed its practices in nearly every domain, functionally discontinuing issuance of guidance, reducing the scope and number of investigations conducted, and seeking to curtail its budget capacity significantly.”²¹ The report also approvingly quotes Fatima Goss Graves’s characterization of the regulatory changes made by ED OCR as “OCR has retreated from its proactive commitment to enforce civil rights.”²² Ms. Goss Graves says “proactive commitment,” I (and many others) say “overreach.”²³ The policy changes encouraged by OCR’s overreach had serious negative consequences in a variety of areas, ranging from absurd inquisitions of professors for writing articles²⁴ to students thrown out of college without the benefit of due process²⁵ to increasing disorder in schools.²⁶

The report uncritically parrots a report from the Center for American Progress (CAP) regarding ED OCR’s enforcement of claims of discrimination on the basis of sexual orientation and gender identity. It is risible to treat CAP as an unbiased source. It is even sillier to do so in this instance. CAP claims that it is obvious that the Trump Administration’s OCR is not enforcing Title IX as well as the Obama Administration because ED OCR is issuing *fewer* findings of “no violation” or “insufficient evidence” than it did under the Obama Administration.

Actions taken by the Obama Administration to protect transgender students had been criticized as overreaching and mandating things that schools weren’t ready for. However, the data show that 12 percent of complaints resulted in a finding of no violation or insufficient evidence – twice as much as under the Trump Administration. Recipients were more likely to be found in compliance with Title IX under investigations into SOGI complaints under the previous administration. This finding suggests that schools and colleges were prepared to support their transgender students, and the joint ED-DOJ guidance issued in 2016 was not unduly burdensome on recipients of federal funding.²⁷

I suppose this is one plausible interpretation of the data. However, we all know that if the Obama Administration found “no violation” in 6 percent of cases and the Trump Administration found

²¹ Report at n. 1012-1014.

²² Report at n. 1203.

²³ See, e.g., H. Bader et al., “A Review of Department of Education Programs: Transgender Issues, Racial Quotas in School Discipline, and Campus Sexual Assault Mandates,” released by the Regulatory Transparency Project of the Federalist Society, September 12, 2017, <https://regproject.org/paper/a-review-of-department-of-education-programs/>; Laura Kipnis, *My Title IX Inquisition*, The Chronicle of Higher Education, May 29, 2015, <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>; Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For all Students Under Title IX*, Aug. 21, 2017, <https://dash.harvard.edu/handle/1/33789434>.

²⁴ Laura Kipnis, *My Title IX Inquisition*, The Chronicle of Higher Education, May 29, 2015, <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>

²⁵ *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018).

²⁶ See Dissenting Statement of Commissioner Peter N. Kirsanow in *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, July 2019, U.S. Commission on Civil Rights, at 199-205, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>.

²⁷ Report at n. 1103.

“no violation” in 12 percent of cases, the majority would claim that this proves that the Trump Administration doesn't take the complaints of gay and transgender students seriously.

The CAP report also states:

Author analysis of the data show that the rate of civil rights complaints resolved with a change benefitting the student actually decreased from 13 percent between fiscal years 2009 and 2016 to 11 percent in fiscal years 2017 and 2018.²⁸

Three points: 1) A two percent change tells us very little one way or the other; 2) Looking at percentages does not tell us if the right resolution was reached in individual cases – in some cases, the student's preferred changes will be unreasonable or will not be authorized by statute or regulation; and 3) Comparing an eight-year average to a two-year average could be misleading.

Professor R. Shep Melnick of Boston College testified about the problems created by OCR's refusal during both Republican and Democrat administrations to engage in notice-and-comment rulemaking. Instead, OCR has long preferred to rely on changing enforcement in individual cases and “Dear Colleague Letters” in order to signal changes in policy. The report does not address the substance of Melnick's critique, dismissing it in two sentences:

The Commission received testimony from Shep Melnick criticizing ED OCR's use of guidance as a tool during the Obama Administration, charging that ED OCR lacked authority to issue that guidance, stating that ‘their legal status remains ambiguous.’ But the United States Supreme Court has issued a unanimous and dispositive ruling on the question, which determined that agencies do have authority to issue policy guidance.²⁹

This is not the point Melnick was making. He did not question whether OCR had the *authority* to issue policy guidance. Rather, he questioned whether it would be preferable to make policy through notice-and-comment rulemaking, rather than through guidance.³⁰ Notice-and-comment rulemakings are more transparent than guidances and allow greater participation by regulated entities.

The Supreme Court's decision in *Perez v. Mortgage Bankers Association*³¹, which the report suggests disposes of Melnick's concerns, does not address Melnick's second point – are these

²⁸ Report at n. 1104.

²⁹ Report at n. 1204-1205.

³⁰ Melnick Statement at 2.

Notice-and-comment rulemaking is designed to make room for public participation, to require extensive deliberation and consultation on the part of the agency, and to facilitate “hard look” judicial review. With DCLs [Dear Colleague Letters], regulators' “colleagues” are told they can comment on the new requirements only after they have been announced. The justification for this avoidance of rulemaking procedures is that such “guidance” contains nothing that is new. In many cases this is obviously untrue – and everybody knows it.

³¹ 135 S.Ct. 1199 (2015).

guidances legally binding, or are they not?³² This was not the question at issue in *MBA*, which concerned D.C. Circuit precedent that held “that an agency must use the APA’s notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted.”³³ In dictum that *does* pertain to Melnick’s point, Justice Sotomayor wrote in her majority opinion, “Interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’”³⁴

As Justice Scalia said in his concurring opinion, however, this does not settle the question whether guidances are legally binding. The APA says that interpretive rules are *not* binding. But the Supreme Court, independent of any requirement in the APA, has over the years developed a habit of deferring to an agency’s interpretation of its own regulations. If a court defers to an agency’s interpretive rule, then the interpretive rule *is* binding. Justice Scalia wrote:

Even when an agency’s interpretation gets deference, the Court argues, “it is the court that ultimately decides whether [the text] means what the agency says.” That is not quite so. So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to “decide” that the text means what the agency says. The Court continues that “deference is not an inexorable command in all cases,” because (for example) it does not apply to plainly erroneous interpretations. True, but beside the point. Saying *all* interpretive rules lack force of law because plainly erroneous interpretations do not bind courts is like saying *all* substantive rules lack force of law because arbitrary and capricious rules do not bind courts. Of course an interpretative rule must meet certain conditions before it gets deference – the interpretation must, for instance, be reasonable – but once it does so it is every bit as binding as a substantive rule. So the point stands: By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures.³⁵

The intervening four years have not caused the Court to look more kindly upon judicial deference to agency interpretations of regulations. This last term, all nine justices agreed in *Kisor v. Wilkie* that judicial deference to agency interpretations of regulations (known as *Auer* deference or *Seminole Rock* deference) should be severely curtailed.³⁶ The justices only disputed how far

³² Melnick Statement at 2.

This truncated procedure raises an awkward question: are these various forms of guidance mere suggestions, or are they legally binding? When asked that question by Senator Alexander in 2014, two high ranking officials in the Obama Administration’s Department of Education said they were *not* legally binding. A third – Assistant Secretary for Civil Rights Catherine Lhamon – said they *are* legally binding. So does “enforcing civil rights laws” mean requiring schools to follow each command in these often lengthy guidance documents, or does it mean something less demanding? Given the huge gap between what OCR says in its sparse regulations and what it says in its lengthy guidance documents, this is no minor matter.

³³ *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1204 (2015).

³⁴ *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1204 (2015).

³⁵ *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1212 (2015)(Scalia, J., dissenting).

³⁶ *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).

deference should be pruned back. The majority opinion, written by Justice Kagan, kept *Auer* (and *Seminole Rock*) deference alive, but “reinforce[d] its limits.”³⁷

Justice Kagan’s statements that “*Auer* deference is sometimes appropriate and sometimes not”³⁸ and “this Court has cabined *Auer*’s scope in varied and critical ways – and in exactly that measure, has maintained a strong judicial role in interpreting rules”, encourages judges to apply the requirements of *Auer* deference more energetically than they have been.³⁹ In describing situations in which *Auer* deference would *not* apply, Justice Kagan gives the following examples: a situation in which a court applies the traditional terms of statutory construction to determine that a rule is *not* genuinely ambiguous (in other words, a court can’t just take the agency’s word for it that the regulation is ambiguous)⁴⁰, the agency’s interpretation of a regulation must be reasonable⁴¹, “the agency’s interpretation must in some way implicate its substantive expertise”⁴², a new interpretation must not cause “unfair surprise” to regulated parties, and “[t]hat disruption of expectations may occur when an agency substitutes one view of a rule for another.”⁴³

Justices Gorsuch, Thomas, Kavanaugh, and Alito would have gone farther than Justice Kagan (and the Chief Justice, who provided the crucial vote for her opinion). These four would overrule *Auer*. Justice Gorsuch writes for these four justices:

Still, today’s decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitation on *Auer* that the Chief Justice claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled – in truth, zombified.⁴⁴

All of this suggests that Professor Melnick’s question about the legally binding nature of guidances from ED OCR were not answered decisively by *Mortgage Bankers Association*. And indeed, it would be surprising if they had been. After all, as a political science professor with an interest in administrative law, Professor Melnick is undoubtedly well aware of recent Supreme Court decisions in this area. In the post-*Kisor* world, interpretive rules like the Dear Colleague Letters that emanated from the Obama Office for Civil Rights may be more likely to run afoul of an invigorated judicial role. *Auer* deference, after all, was how the Dear Colleague Letter regarding transgender bathroom access initially managed to survive the Fourth Circuit. Many of Justice Kagan’s *Kisor* guidelines for when *Auer* deference should not apply would seem to apply to that

³⁷ *Kisor v. Wilkie*, 139 S.Ct. 2408 (2019).

³⁸ *Kisor v. Wilkie*, 139 S.Ct. 2408 (2019).

³⁹ *Kisor v. Wilkie*, 139 S.Ct. 2418 (2019).

⁴⁰ *Kisor v. Wilkie*, 139 S.Ct. 2415 (2019).

⁴¹ *Kisor v. Wilkie*, 139 S.Ct. 2415-2416 (2019).

⁴² *Kisor v. Wilkie*, 139 S.Ct. 2417 (2019).

⁴³ *Kisor v. Wilkie*, 139 S.Ct. 2418 (2019).

⁴⁴ *Kisor v. Wilkie*, 139 S.Ct. 2425.

particular guidance when OCR declared that a regulation allowing separate bathroom facilities for the two sexes really means that a biological girl must be allowed access to the boys' bathroom and locker room.⁴⁵ Such an interpretation would at a bare minimum seem to implicate "reasonableness," "unfair surprise," and "disruption of expectations".

Chapter 4: U.S. Department of Health and Human Services, Office for Civil Rights

Policy Priorities

This section of the report casts a jaundiced eye toward HHS OCR's efforts to enforce statutes protecting religious freedom and conscience rights. The report lumps the establishment of the Conscience and Religious Freedom Division with statements from advocacy organizations claiming that LGBT people are routinely discriminated against when seeking medical treatment.⁴⁶ By lumping these two things together, the report implies that religious liberty and freedom of conscience are merely excuses to discriminate against LGBT individuals. This is another installment in the Commission's multi-year campaign advocating for nondiscrimination to supercede religious liberty. The report says:

In a 2018 report, Human Rights Watch found that LGBT people seeking medical care are routinely discriminated against because of their sexual orientation or gender identity, including being denied services and encountering discriminatory language. Discriminatory treatment often results in barriers to healthcare treatment for LGBT people or reluctance to seek care. The result of this policy, says Shabab Mirza, an LGBT research assistant at the Center of American Progress, is that LGBT people frequently report poorer health than their non-LGBT peers. LGBT advocates fear that creation of CRFD along with a rollback of section 1557 of the Affordable Care Act will increase discrimination against the LGBT community. Rea Carey, executive director of the National LGBTQ Task Force says that, "Health professionals have a duty to care for all their patients regardless of one's gender identity, sexual orientation, faith, creed, race, political views, gender or disability, and no one should be denied care for being who they are." In a statement to the Commission, the National LBGTQA Task Force wrote that failure to provide equal access to health care has negative impacts on community members and is not an effective way to enforce civil rights, explaining that 33 percent of transgender patients had at least one negative experience in a healthcare setting within the past year related to their gender identity.⁴⁷

Unsurprisingly, the report tries to steal several bases here. Just as in the Commission's recent school suspension report where "disability" was used to suggest children with physical disabilities

⁴⁵ G.G. *ex rel* Grimm v. Gloucester County Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016).

⁴⁶ Report at n. 1400-1419.

⁴⁷ Report at n. 1414-1419.

rather than emotionally disturbed children⁴⁸, “healthcare” here is undefined, leaving the casual reader to imagine that lesbians seeking treatment for bronchitis are routinely denied antibiotics. The cited Human Rights Watch report is more honest:

The [Obama-era rule interpreting Section 1557 of the Affordable Care Act] ensures that transgender people cannot be denied care – *including transition-related care* – because of their gender identity. It clarifies that transgender people should be treated in accordance with their gender identity, and that insurance providers cannot presumptively deny coverage for transition-related care or refuse treatments to transgender people in a discriminatory manner. [emphasis added]⁴⁹

The Commission majority once again uncritically adopts the party line of the transgender lobby. There is no consideration of the possibility that medical professionals can in good faith disagree with the desires of LGBT individuals, whether on medical, conscience, or religious grounds. A profoundly radical idea – that it is unremarkable and healthy to take hormones to feminize or masculinize one’s appearance, to remove healthy organs because of deep discomfort with one’s body – is presented with no discussion or debate. In fact, the Commission has never considered this, and simply presents the policy positions of transgender organizations as if they are normative.

This is not speculation about what could happen in the future. Earlier this year, a biological woman who now presents as a transgender man sued a Catholic hospital in California because the hospital refused to perform a hysterectomy.⁵⁰ As the ACLU notes in its complaint, Catholic hospitals must abide by Catholic teaching as authoritatively issued by Catholic bishops, and performing a hysterectomy for transition-related purposes violates Catholic teaching for two reasons: 1) Catholic teaching forbids direct sterilization; 2) Catholic teaching forbids assisting in sex reassignment because the Church considers it a rejection of one’s God-given sex.⁵¹

The Commission majority, along with the ACLU⁵², Human Rights Watch, and similar groups, wants to make it illegal for Catholic hospitals to follow Catholic teaching. Even if one grants the debatable premise that it is best for a person suffering from gender dysphoria to remove healthy

⁴⁸ See Dissenting Statement of Commissioner Gail Heriot in *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, July 2019, U.S. Commission on Civil Rights, at 188-189, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>; see also Dissenting Statement of Commissioner Peter N. Kirsanow in *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, July 2019, U.S. Commission on Civil Rights, at 197-198, <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>.

⁴⁹ “You Don’t Want Second Best: Anti-LGBT Discrimination in US Health Care,” Human Rights Watch, July 23, 2018, <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>.

⁵⁰ Nicole Russell, *Why this transgender man sued a Catholic hospital for refusing to do a hysterectomy*, Washington Examiner, March 28, 2019, <https://www.washingtonexaminer.com/opinion/why-this-transgender-man-sued-a-catholic-hospital-for-refusing-to-do-a-hysterectomy>.

⁵¹ *Oliver Knight v. St. Joseph Northern California*, Case No. DR190259, March 21, 2019, 4-6, <https://www.aclunc.org/docs/KnightvStJosephHealth.pdf>.

⁵² *Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threat to Women’s Health and Lives*, ACLU, May 2016, <https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied>.

body parts, there are non-Catholic hospitals at which a person can get this surgery. Our progressive friends want to dragoon hospitals that were established and funded by Catholic religious orders and laypeople, and force them to practice medicine the way they want.

As HHS OCR noted in its response to an earlier draft of this report, it is disingenuous for the Commission to imply that protecting religious freedom and conscience diverts from HHS OCR's core mission. The federal government has long protected rights of religious freedom and conscience. It is not a lesser civil right.⁵³

Furthermore, in the previous administration, HHS discriminated against the U.S. Conference of Catholic Bishops (USCCB) in awarding contracts to help victims of human trafficking. Catholic teaching prohibits the use of some reproductive products and services. Therefore, the USCCB did not refer victims of human trafficking for these products or services. Although the USCCB had received HHS contracts for assisting human trafficking victims since 2006, in 2011 the Obama Administration discontinued the contract. According to the Washington Post, "senior political appointees awarded the new grants to the bishops' competitors despite a recommendation from career staffers that the bishops be funded based on scores by an independent review board".⁵⁴ In short, HHS does not have a history of being overly solicitous of religious liberty.

Additionally, HHS enforces laws that protect the conscience rights of healthcare providers, not just religious rights. This is important because, although the Commission majority does not acknowledge it, there is debate over whether hormone treatments and sex-reassignment surgery are the best treatment for individuals suffering from gender dysphoria. This is particularly true in cases where children and adolescents are suffering from gender dysphoria, because blocking puberty or administering cross-sex hormones may render these children permanently sterile.⁵⁵ It is important that HHS OCR protect the religious and conscience rights of medical professionals in regard to LGBT issues. Much like the Commission majority, there are individuals and institutions who want to force dissenters into acquiescence. For example, the former head of the

⁵³ Correspondence from U.S. Dep't of Health and Human Services to U.S. Commission on Civil Rights, Re: Technical Corrections to USCCR's 2019 Federal Civil Rights Enforcement Report, August 19, 2019, at 2 (on file). For more than 155 years, Congress has offered protections in a variety of contexts, including: exempting religious objectors opposed to bearing arms from military service; exempting conscientious objectors from combat training or military service; exempting law enforcement employees from participating in executions "if such participation is contrary to the moral or religious convictions of the employee"; exempting education institutions from sex discrimination bans under Title IX of the Education Amendments of 1972 where such ban "would not be consistent with the religious tenets" of the institution; prohibiting coercion of persons to undergo ... sterilization procedures by threatening loss of benefits and attaching a criminal punishment of a fine of up to \$1000, imprisonment for up to one year, or both, to violations of that prohibition; and preventing the Federal government from imposing substantial burdens on religious exercise absent a compelling government interest pursued in the manner least restrictive of that exercise.

⁵⁴ Jerry Markon, *Health, abortion issues split Obama administration and Catholic groups*, Wash. Post, October 31, 2011, https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAXV5xZM_story.html.

⁵⁵ *Josephson v. Bendapudi*, Case No. 3:19-mc-99999, March 28, 2019, https://adfllegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4

University of Louisville's Division of Child and Adolescent Psychiatry and Psychology, Dr. Allan Josephson, is suing the university. Despite a stellar career as Division Chief, the university demoted and then fired Dr. Josephson after he served as an expert witness and spoke publicly about his view that children suffering from gender dysphoria should be given psychiatric help to hopefully reconcile them to their biological sex, rather than pursuing hormone and surgical treatments that have irreversible consequences.⁵⁶ There is no indication that Dr. Josephson's beliefs about the proper treatment for children with gender dysphoria is religiously-based, rather than being a scientific and medical judgment. In fact, shortly before he was demoted, "Dr. Josephson outlined a proposed program for treating youth experience gender dysphoria that involved cooperation between identified leaders from child psychiatry and pediatric endocrinology."⁵⁷

It is also worth noting that, unlike the Obama Administration's HHS OCR, the Trump Administration's HHS OCR is not trying to force hospitals and medical personnel to all do things a certain way. The Trump Administration's HHS OCR is not prohibiting hospitals from conducting sex-reassignment surgeries or prohibiting doctors from prescribing hormone therapy.

Section 1557 (Defining the Scope of the Meaning of Sex Discrimination)

The report criticizes HHS's decision to revise Section 1557 of the Patient Protection and Affordable Care Act (Obamacare), stating:

One of the most critical revisions proposed was the redefinition of "sex" to refer only to the biological and anatomical differences between males and females as determined at their birth. Unlike under the Obama Administration, "gender identity" would no longer be a protected class under the scope of Section 1557's civil rights statutes and Title IX's prohibitions of discrimination on the basis of sex.⁵⁸

This is wrong. The proposed revision of 1557 does not redefine sex "to refer only to the biological and anatomical differences between males and females as determined at their birth."⁵⁹ Although proposed Section 1557 does repeal the definition of "on the basis of sex" that included "gender identity" as a protected class, it does not replace it with a statement that "sex" is defined on a biological or anatomical basis. The proposed rule does not define "sex"⁶⁰ because, HHS notes, the Supreme Court is likely to soon issue a decision that helps clarify whether "sex" includes gender identity.⁶¹

⁵⁶ Josephson v. Bendapudi, Case No. 3:19-mc-99999, March 28, 2019, https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/josephson-v.-bendapudi/josephson-v-bendapudi---complaint.pdf?sfvrsn=e8936f02_4.

⁵⁷ Josephson v. Bendapudi at 139.

⁵⁸ Report at n. 1401-1402.

⁵⁹ Report at n. 1401.

⁶⁰ 84 FR 27857.

⁶¹ 84 FR 27857; 84 FR 27855.

Housing of Illegal Immigrant Children

The report states:

“The history of complaints regarding the sexual abuse of migrants, particularly minor migrants, in HHS custody through the shelters that ORR operates, is concerning. . . . During the past four years, the federal government received over 4,500 complaints of sexual abuse of immigrant children in detention facilities. “From October 2014 to July 2018, the HHS’ Office of Refugee Resettlement received 4,556 complaints, and the Department of Justice received 1,303 complaints.” Numbers increased after President Trump’s “zero tolerance policy” was put in place in April 2018 []. The *New York Times* reported that from March to July 2018, ORR recorded 859 complaints of sexual abuse of minors, “the largest number of reports during any five-month span in the previous four years.”⁶²

Obviously everyone opposes sexual abuse of anyone, especially minors. The way this report is written, however, suggests that complaints of sexual abuse of minors are a new development in the Age of Trump. Obviously that is not the case, since the Obama Administration was in power from October 2014 until the end of January 2017.

The report also fails to note that in the vast majority of complaints, the alleged perpetrator is a fellow minor detainee, not an adult staff member. According to the data published by Axios, of the cases reported to DOJ from October 2014 to July 2018, 851 complaints alleged that another minor was the perpetrator, and 178 alleged that an adult staff member was the perpetrator.⁶³ Obviously sexual abuse is terrible regardless of the identity of the perpetrator, but by only discussing a case where an adult staff member at a contract facility was convicted of sexual offenses, the report misleads the reader to believe this is a typical case.⁶⁴

The report also fails to note that the very *New York Times* article on which it relies includes a statement from Commander Jonathan White of the U.S. Public Health Service that the “vast

On April 22, 2019, the U.S. Supreme Court granted three petitions for writs of certiorari, raising the question whether Title VII’s prohibition on discrimination on the basis of sex also bars discrimination on the basis of gender identity or sexual orientation. Because Title IX adopts the substantive and legal standards of Title VII, a holding by the U.S. Supreme Court on the definition of “sex” under Title VII will likely have ramifications for the definition of “sex” under Title IX, and for the cases raising sexual orientation or gender identity claims under Section 1557 and Title IX which are still pending in district courts.

⁶² Report at n. 1338-1342.

⁶³ Caitlin Owens, Stef W. Kight, and Harry Stevens, Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody, AXIOS, Feb. 26, 2019, <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>.

⁶⁴ Report at n. 1344.

majority of allegations [of sexual abuse] proved to be unfounded.⁶⁵ This may or may not be accurate, but it should at least have been noted. I was unable to find data that evaluates how many of these claims were determined to be unfounded, but in 2013 GAO released a report on allegations of detainee sexual abuse. GAO reported:

Of the 215 investigations of the allegations completed between October 2009 and March 2013, our analysis showed that 55 percent of the allegations were determined to be unsubstantiated (investigators could not determine if abuse had occurred), 38 percent unfounded (investigators determined that abuse had not occurred), and 7 percent – or 15 allegations – substantiated (investigators determined that abuse had occurred). Substantiated allegations included both allegations against staff members and allegations against fellow detainees[.]⁶⁶

Additionally, much of the deplorable increase in complaints of sexual abuse of minors is likely attributed to the increased number of minors arriving at the Southwest border. In FY 2016, the last time comparable numbers of illegal aliens were apprehended at the Southwest border, 408,870 illegal aliens were apprehended at the Southwest border. In FY 2018, 396,579 illegal aliens were apprehended at the Southwest border, following a dip to 303,916 in FY 2017. However, the demographic composition of illegal aliens changed between FY 2016 and FY 2018. In FY 2016, 59,692 unaccompanied children, 77,674 family unit members, and 271,504 single adults were apprehended at the Southwest border.⁶⁷ In FY 2018, 50,036 unaccompanied children, 107,212 members of family units, and 239,331 single adults were apprehended at the Southwest border.⁶⁸ If we assume that 40% of the individuals who showed up as part of family units were adults, that means that the number of minors arriving at the Southwestern border increased from 106,296 in FY 2016 to 114,363 in FY 2018. This does not fully account for the increase in complaints from approximately 275 in the second quarter of FY 16 to 514 in the second quarter of FY 18, but it is likely a contributing factor.⁶⁹

Chapter 5: U.S. Department of Housing and Urban Development

In keeping with the theme of this report, HUD's 2015 Affirmatively Furthering Fair Housing (AFFH)⁷⁰ rule is treated as an uncontroversial clarification of what the Fair Housing Act had meant

⁶⁵ Matthew Haag, Thousands of Immigrant Children Said They were Sexually Abused in U.S. Detention Centers, Report Says, *N.Y. Times*, Feb. 27, 2019, <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>.

⁶⁶ *Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse*, GAO, November 2013, at 16, <https://www.gao.gov/assets/660/659145.pdf>.

⁶⁷ United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, Statement by Secretary Johnson on Southwest Border Security, Customs and Border Patrol, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

⁶⁸ Southwest Border Migration FY 2018, Customs and Border Patrol, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018#>.

⁶⁹ <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>

⁷⁰ 80 FR 42271.

for fifty years.⁷¹ In reality, AFFH is a sweeping governmental power grab that masks its radicalism in layers of bureaucrat-speak. Given the overwhelming number of topics covered in this report, the Commission staff may not have realized this is the case.

Nevertheless, it is important to be clear on what AFFH is. No one, to my knowledge, alleges that there are still racial covenants in the U.S. or that landlords specify the preferred race of would-be tenants. Disparate treatment discrimination in housing is more subtle these days. However, people still tend to live in neighborhoods populated primarily by people who share their income level. Many people also prefer to live in neighborhoods zoned for single-family homes, or that have a certain lot size. And many people live in neighborhoods populated primarily by people of their own race. As long as no one is being barred from buying or renting a home because of his race or religion, this should not be problematic. As Stanley Kurtz, a critic of AFFH, explained:

Ultimately, [AFFH] amounts to back-door annexation, a way of turning America's suburbs into tributaries of nearby cities. . . .

If you press suburbanites into cities, transfer urbanites to the suburbs, and redistribute suburban tax money to cities, you have effectively abolished the suburbs. For all practical purposes, the suburbs would then be co-opted into a single metropolitan region. Advocates of these policy prescriptions call themselves "regionalists." . . .

AFFH obligates grantees to conduct all of these analyses [of race, ethnicity, poverty, etc.] at both the local and regional levels. In other words, it's not enough for, say, Philadelphia's "Mainline" Montgomery County suburbs to analyze their own populations by race, ethnicity, and class to determine whether there are any imbalances in where groups live or in access to schools, parks, transportation and jobs. Those suburbs are also obligated to compare their own housing situations to the Greater Philadelphia region as a whole.

So if some Montgomery County's suburbs are predominantly upper-middle-class, white, and zoned for single-family housing, while the Philadelphia region as a whole is dotted with concentrations of less-well-off African Americans, Hispanics, or Asians, those suburbs could be obligated to nullify their zoning ordinances and build high-density, low-income housing at their own expense. At that point, those suburbs would have to direct advertising to potential minority occupants in the Greater Philadelphia region. Essentially, this is what HUD has imposed on Westchester County, New York, the most famous dry run for AFFH.

In other words, by obligating all localities receiving HUD funding to compare their demographics to the region as a whole, AFFH effectively nullifies municipal boundaries. Even with no allegation or evidence of intentional discrimination, the

⁷¹ Report at n. 1681-1693.

mere existence of a demographic imbalance in the region as a whole must be remedied by a given suburb. Suburbs will literally be forced to import population from elsewhere, at their own expense and in violation of their own laws. In effect, suburbs will have been annexed by a city-dominated region, their laws suspended and their tax money transferred to erstwhile non-residents. And to make sure the new high-density housing developments are close to “community assets” such as schools, transportation, parks, and jobs, bedroom suburbs will be forced to develop mini-downtowns. In effect, they will become more like the cities their residents chose to leave in the first place.⁷²

The report also does not even try to claim that “segregation” is the result of refusals to sell or rent housing on the basis of race. Instead, the report says, “Supporters of AFFH and AFH say that the AFH process forces municipalities to evaluate how housing remains segregated in the community, and that the delay of the rule will effectively halt progress towards desegregation. NFHA [National Fair Housing Alliance] states that minority neighborhoods often experience resource disparities when compared to more affluent or white neighborhoods.”⁷³ Well, of course. The key word here is “affluent”. Of course affluent neighborhoods have more resources than poorer ones. The principal benefit of affluence is having more resources! Poverty is not a protected class. And as I have noted in the past, it is unclear why a “geographic area with significant concentrations of poverty and minority populations” (the definition of “racially or ethnically concentrated area of poverty”) is a more pressing concern than a racially mixed area of concentrated poverty or a predominantly white area of concentrated poverty.⁷⁴

Racial imbalances that are the result of freely made choices are not problematic. But clearly, for the social engineers in the Obama Administration, they were.

The Obama Administration’s enthusiasm for racial bean-counting in the housing context manifested in bizarre ways. For instance, Dubuque, Iowa was not allowed to prefer its own residents over non-residents when providing housing assistance.⁷⁵ The people of Dubuque are too white, you see. Instead, HUD classified Dubuque as being part of the same “region” as Chicago, which is 200 miles away. HUD’s racial alchemists then forced Dubuque to advertise the availability of public housing assistance in Chicago, where people in need of assistance were more likely to be African-American.⁷⁶ Never mind that Dubuque had plenty of its own residents languishing on the waiting list. Somehow this is going to usher in utopia.

⁷² Stanley Kurtz, *Attention America’s Suburbs: You Have Just Been Annexed*, National Review, July 20, 2015, <https://www.nationalreview.com/corner/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz/>.

⁷³ Report at n. 1701-1702.

⁷⁴ 80 FR 42355.

⁷⁵ Letter of Findings of Noncompliance, Civil Rights Compliance Review of the City of Dubuque’s CDBG and Section 8 Programs, June 17, 2013, <https://nlihc.org/sites/default/files/Dubuque-LOF.pdf>; see also *Our opinion: National Review right about HUD*, Telegraph Herald, Jan. 17, 2016, http://www.telegraphherald.com/opinion/article_43c9faf1-c767-525f-ac0e-2f1a6042620f.html.

⁷⁶ Voluntary Compliance Agreement Between the U.S. Dep’t of Housing and Urban Development and Dubuque, Iowa, HUD Compliance Case Review Number 07-11-R001-6, Mar. 31, 2014, at 18, <http://cityofdubuque.org/DocumentCenter/View/22707>.

Similarly, Westchester County in New York ran afoul of HUD because the county was reluctant to strong-arm towns into changing their zoning requirements in order to build low-income housing.⁷⁷ HUD argued that local zoning practices excluded blacks and Hispanics. In HUD's view, the County also was insufficiently obsessed with ensuring the exact same racial balance in all the towns within its borders. The National Low-Income Housing Coalition, which is supportive of AFFH, described the dispute between HUD and Westchester County this way:

[Assistant U.S. Attorney] Mr. Kennedy also noted that the AIs [Analysis of Impediments] failed to address why minority populations were so low in many of the towns compared to the minority population as a whole. For example, several towns have a minority population of 1.5% or less, while Westchester County's African-American population alone is 14.6% of the total. The federal attorney pointed out that there is a connection between the likelihood that minority families would need and use multifamily housing, while there is an absence of multifamily housing in many towns. Even when the County's "cherry-picked" data are considered, minority populations declined as lot sizes grew larger.⁷⁸

In other words, HUD and the low income housing lobby want to use AFFH to force towns to build multifamily housing, even when the towns don't want to. There are pros and cons to building multifamily housing in areas previously zoned only for single-family housing, but without evidence that the refusal to change the zoning is motivated by racism, this should not be considered a violation of the FHA. Nor should it be any of the federal government's business. Zoning is as local an issue as it comes. If the residents of a town want to only have single-family housing because they want a less crowded, traditionally suburban way of life, that is their prerogative.

As is so often the case, the report repeatedly refers to "patterns of segregation", as did HUD when promulgating AFFH.⁷⁹ This is galactically dishonest. First, legal segregation is dead and gone, but using the term automatically conjures up thoughts of the Jim Crows era. As used by AFFH and this report "segregation" doesn't even mean areas that were predominantly populated by African-Americans before passage of the Fair Housing Act and that continue to be predominantly populated by African-Americans today. Instead, it essentially means any person who is not a white, able-bodied male. The final rule defines "segregation" thus:

The Affordable Housing section shall also include specific one year goals to Affirmatively Further Fair Housing, by including a plan to increase the number of minorities, specifically African American households, to be provided affordable housing through activities that provide rental assistance, family self-sufficiency programs, or homeownership assistance. This may include marketing and information sharing of the programs availability and participation benefits.

⁷⁷ It took Westchester County 11 attempts over 8 years to receive approval for its fair housing plans. See Joseph De Avila, *Westchester County Wins HUD OK in Housing Dispute*, Wall St. J., July 18, 2017, <https://www.wsj.com/articles/westchester-county-wins-hud-ok-in-housing-dispute-1500407638>.

⁷⁸ New Developments in Westchester County AFFH Court Settlement, National Low Income Housing Coalition, Apr. 30, 2019, <https://nlihc.org/resource/new-developments-westchester-county-affh-court-settlement>.

⁷⁹ Report at n. 1683, 1691.

Segregation means a condition, within the program participant's geographic area of analysis, as guided by the Assessment Tool, in which there is a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area. For persons with disabilities, segregation includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual's needs in accordance with the requirements of the Americans with Disabilities Act, and section 504 of the Rehabilitation Act.⁸⁰

This is clear in the Analysis of Impediments submitted by Westchester County, which painstakingly details the percentage of black and Hispanic residents in different parts of the county.⁸¹ Given the massive demographic changes in the United States following immigration changes in the 1960s, the vast majority of non-whites who are not African-American never experienced racial covenants or legal segregation. Nor did their parents or grandparents, at least in this country. People live where they can afford to live. It is HUD, not these municipalities, that has a fixation on race.

Fortunately, HUD has announced its intention to revise AFFH. When HUD asked for comments on how to reduce the regulatory burden, "136 (45% of the total) discussed the AFFH rule."⁸² Contrary to what the Commission majority might think, opposition to AFFH was not expressed only by coldhearted Dickensian landlords. A number of individuals who work for housing authorities wrote to express frustration with AFFH. The Director of Compliance and Training at the Dallas, Texas Housing Authority wrote, "[T]here is a mismatch between the depth of data and research required, and the expertise and funding with which housing agencies are equipped to pursue this analysis. . . . [T]he takeaway is that as it currently stands, this rule is impossible to satisfy for the majority of housing agencies without additional resources or funding."⁸³ The National Association for County Community and Economic Development wrote, "While we fully support AFFH as well as supported approaches to satisfying AFFH, the rule in its current state is overly burdensome and impracticable for many communities to implement."⁸⁴ The General Counsel from the Vermont Department of Housing and Community Development (Vermont, of

⁸⁰ 80 FR 42355.

⁸¹ Westchester County Analysis of Impediments, Supplement to Chapter 12 – Zoning Analysis, July 13, 2017, <https://homes.westchestergov.com/images/stories/AReport/ZACHap1220170713.pdf>.

⁸² 83 FR 40714.

⁸³ Jeni Webb, Director of Compliance and Training, Dallas Housing Authority, Comment to FR-6030-N-01, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 8, 2017, <https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>.

⁸⁴ Laura DeMaria, Executive Director, National Association for County Community and Economic Development, Comment to FR-6030-N-01, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 14, 2017, <https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>.

all states!) recommended that AFFH be amended to “eliminate the requirement that States prepare an Assessment of Fair Housing”:

The Assessment of Fair Housing Tool developed by HUD for use by entitlement jurisdictions does not translate well to states. The local data that forms the basis of the Tool cannot be interpreted on the state level in the same way that it can within the densely populated environs of a city. We are concerned that the effort required to comply with this regulatory requirement will detract from our ability to perform our most important functions.

In our view, the resources that would be needed to complete the Assessment of Fair Housing should be devoted to addressing the severe lack of affordable housing and funding other economic and community development projects. HUD estimates that the assessment will take 1500 hours, or 37 weeks of work for a full-time employee. That time and money could be better spent. . . .

We are strongly committed to affirmatively furthering fair housing, but we do not see how this Tool will help us with those efforts. Additionally, in a state with a relatively low growth rate, the facts on the ground do not change rapidly enough to justify anew[sic] assessment once every five years, especially not where that assessment will divert the full-time attention of one of our very small staff for most of a year.⁸⁵

Chapter 6: Department of Labor

The report notes that OFCCP has taken steps to protect the religious liberty of federal contractors. The report, of course, regards such actions with a jaundiced eye. The report notes that OFCCP recently issued a proposed rule to clarify the scope of the religious exemption available to federal contractors, which the report claims “would allow federal contractors to cite religious objections as a valid reason to discriminate against employees on the basis of LGBT status, sex, race, ethnicity, national origin, and other characteristics.”⁸⁶

This is spectacularly wrong, but perhaps it is understandable that the Commission got it wrong, since it relied on that well-known legal journal, *Buzzfeed*, for an explanation of the proposed rule. The introduction to the proposed rule states, “religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate on other protected bases.”⁸⁷ This is discrimination on the

⁸⁵ Dale Azaria, General Counsel, Vermont Department of Housing and Community Development, Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, June 14, 2017, <https://www.federalregister.gov/documents/2017/05/15/2017-09730/reducing-regulatory-burden-enforcing-the-regulatory-reform-agenda-under-executive-order-13777>.

⁸⁶ Report at n. 2032.

⁸⁷ 84 FR 41679.

basis of conduct and belief, not status. If an employee of a Baptist-run homeless shelter is proselytizing for the Seventh-Day Adventists while working with clients of the homeless shelter, the shelter is well within its rights to fire the person. Similarly, if the USCCB is running a program for unaccompanied alien children, and the “getting your life back on track” program includes “abstain from sexual activity until marriage, and *especially* while you are a minor,” and the unmarried program director shows up pregnant – well, that is going to undermine the program’s message.

This is why the proposed rule “proposes defining Religion to provide that the term is not limited to religious belief but also includes all aspects of religious observance and practice.”⁸⁸ Otherwise, someone whose lifestyle choices violate their religion’s moral teachings will claim that they are entitled to continue to be employed by the religious organization because they self-identify as a member of the religion. And on the other hand, someone whose religious beliefs are at odds with the organization’s religious beliefs will claim that they are entitled to continued employment because they agree with the secular aspects of the organization’s mission (this is what happened in *Spencer v. World Vision*).⁸⁹

It is also important to note that OFCCP did not make up this exemption out of whole cloth. Rather, the proposed rule is based on a Ninth Circuit case, *Spencer v. World Vision*⁹⁰, that set out a test for establishing whether an entity qualifies for Title VII’s religious exemption.⁹¹ The fact that the proposed exemption is available to for-profit corporations as well as non-profit corporations is not nefarious. All entities that want to receive the religious exemption must meet a three-part test to qualify:

- 1) “[T]he contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor’s only purpose.”
- 2) “[T]he contractor must hold itself out to the public as carrying out a religious purpose.”
- 3) “[T]he contractor must exercise religion consistent with, and in furtherance of, a religious purpose.”

In short, my colleagues need not fear that Lockheed or Booz Allen Hamilton are suddenly going to seek and receive religious exemptions.

The report also says ominously that, “The proposed rule conflicts with a 2014 Executive Order that prohibited discrimination based on sexual orientation and gender identity by federal contractors.”⁹² Well, that’s the thing about Executive Orders – they aren’t laws. They only last as long as the executive branch cares to enforce them. In this instance, the executive branch has decided to add a regulation explaining how it will evaluate religious exemption claims. Religious

⁸⁸ 84 FR 41679.

⁸⁹ *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011).

⁹⁰ *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011).

⁹¹ 84 FR 41682.

⁹² Report at n. 2034.

exemptions are required by Title VII, which is an actual statute, rather than an executive order. This proposed regulation will not affect the 2014 Executive Order as applied to contractors that do not seek a religious exemption.

Chapter 7: U.S. Equal Employment Opportunity Commission

Sometimes I wonder if the memory of anyone at the Commission extends more than a year into the past. Three pages into the section on the EEOC, the Commission states:

These laws [Title VII, etc.] protect individuals from discrimination in employment based on race, color, religion, sex (including **gender identity, sexual orientation,** and pregnancy), national origin, age, disability, and genetic information. [emphasis added]⁹³

The problem is that a mere two years ago, the Commission issued a report entitled “Working for Inclusion” in which the Commission majority found that there are *no* federal statutes explicitly prohibiting discrimination on the basis of sexual orientation and gender identity, and stated that some federal courts have said that Title VII covers sexual orientation and gender identity while other federal courts disagree, and that DOJ now takes the position that Title VII does not encompass sexual orientation.⁹⁴ The entire point of the report was to urge Congress to pass legislation prohibiting discrimination on the basis of sexual orientation and gender identity.⁹⁵ The issue remains sufficiently unsettled that the Supreme Court is hearing a case this fall regarding whether Title VII covers discrimination on the basis of gender identity. Yet for some reason the Commission now blithely asserts that federal anti-discrimination laws cover sexual orientation and gender identity. I am aware that EEOC takes this position, but it is not based in the actual text – nor did the Commission think it was based in the text two years ago.

The Commission notes that EEOC issued proposed guidance in January 2017 defining sex-based harassment as encompassing gender identity, which it stated “includes using a name or pronoun inconsistent with the individual’s gender identity in a persistent or offensive manner.”⁹⁶

Perhaps the anti-discrimination laws should cover sexual orientation and gender identity. But that is a decision for Congress, not agencies. Agencies can only enforce statutes passed by Congress, and they should only enforce the statutes *as written*, not as unelected bureaucrats within agencies wish to amend them. The Commission majority should not give agencies cover for abusing their authority.

⁹³ Report at n. 2090.

⁹⁴ Working for Inclusion at 71-72.

⁹⁵ Working for Inclusion at 73.

⁹⁶ Report at n. 2257.

Chapter 8: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties

No one should be surprised that the chapter of this report concerning DHS CRCL is primarily concerned with the illegal immigration crisis at the border. If you approach this section with the assumption that the majority of the Commission prefers to eviscerate the immigration laws, everything will make sense. As far as the Commission is concerned, family separation at the border is entirely the fault of the Trump administration. The individuals who choose to cross the border illegally have no agency whatsoever. The report states:

This [zero-tolerance policy] impacted thousands of families who had fled dangerous conditions in Central America and wanted to apply for asylum, which is a right under U.S. law no matter where a person enters. The Administration's new policy of "metering," or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings.⁹⁷

This is misleading for at least two reasons. First, having "fled dangerous conditions" is not grounds for asylum. As it turns out, we have this somewhat radical thing called a "law" that spells out the circumstances in which individuals are eligible for asylum:

The term "refugee" means (A) any such person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution *on account of race, religion, nationality, membership in a particular social group, or opinion*, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing and who is persecuted or has a well-founded fear of persecution *on account of race, religion, nationality, membership in a particular social group, or political opinion*.⁹⁸

"My country is violent" is not grounds for seeking asylum, but that is the strongest reason the would-be asylum seekers (and their coaches in the open borders crowd here in the U.S.) can come up with. Individuals are only eligible for asylum if they are being persecuted *on account of* race, religion, nationality, membership in a particular social group, or opinion. There is no indication that the individuals flocking to our southern border differ, as a group, in race, religion, nationality, membership in a particular social group, or opinion from much of the rest of the population in Central American countries. Maybe they could claim "we have membership in a particular social group because we don't belong to gangs," but it isn't as if the entire population of Guatemala or

⁹⁷ Report at n. 2376-2377.

⁹⁸ Pub. L. 96-212.

El Salvador belong to gangs. We all know that what is really happening is that Central American countries are poor and they would rather live in the United States. As I have had occasion to remark elsewhere in this dissent, “Poverty is not a protected class.” Nor is it grounds for asylum. If living in a country poorer than the United States was grounds for asylum, Germans would be eligible for asylum. Indeed, almost every human being on earth would be eligible for asylum.

Second, not only are the vast majority of these people not eligible for asylum no matter when or where they enter the U.S., but “metering” is not prohibiting them from *ever* entering the U.S. and making their asylum case.⁹⁹ It is only a way to control the flow of people into the United States. Additionally, the report claims that “The Administration’s new policy of ‘metering,’ or not allowing asylum-seeking families to legally enter, reportedly led to increased unauthorized crossings.”¹⁰⁰ This is flatly dishonest. The very government document cited for the proposition that metering may have increased the number of unauthorized crossings states that CBP has utilized metering at least since 2016. In other words, not only is metering not a new practice, but it started during the Obama Administration, not the Trump Administration.¹⁰¹ And it is hardly an excuse to say that metering has caused people to cross illegally. The vast majority of the people arriving at the southern border do not have legitimate asylum claims, and they know it. Not only are they unwilling to wait in line to immigrate legally, but many of them are not even willing to wait in the much shorter line at the southern border to be processed in an orderly fashion. No one is forcing them to cross the border illegally. They choose to break the law.

The Commission majority would likely dispute my assertion that many of those claiming asylum at the southern border do not have a valid claim. Only 44.5 percent of asylum applicants who pass a credible fear interview show up in court to apply for asylum.¹⁰² If you are truly worried that you will be subjected to physical persecution if you are returned to a country, you would be a little more on top of ensuring that you *actually applied* for asylum. After all, as we are told many times, these people undertake a treacherous journey from Central America to arrive at our southern border. If you can make it from Honduras to the United States, you can definitely show up in court to make your asylum claim – *if* you believe your claim is likely to be granted. If you know it is unlikely to be granted, you will probably vanish into the interior of the United States and hope to avoid removal. And this is exactly what the majority of those who have passed a credible fear interview do.

⁹⁹ Anna Giaritelli, *DHS secretary defends metering asylum seekers at border: ‘We’re not turning anybody around,’* Wash. Examiner, March 6, 2019 (“All asylum seekers have the opportunity to present their case. We’re not turning anybody around,” Nielsen said. “What we are doing is exercising the statutory authority that enables us to, in conjunction with Mexico, to return to Mexico migrants who have arrived from that country, to await processing.”), <https://www.washingtonexaminer.com/news/dhs-secretary-defends-metering-asylum-seekers-at-border-were-not-turning-anybody-around>.

¹⁰⁰ Report at n. 2377.

¹⁰¹ DHS OIG, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, 5-6, OIG-18-84 (Sept. 2018) (“CBP was regulating the flow of asylum-seekers at ports of entry through ‘metering,’ a practice CBP has utilized at least as far back as 2016 to regulate the flow of individuals at ports of entry.”), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

¹⁰² Andrew R. Arthur, *Trump Bait the Press on Asylum No-Shows*, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>.

Of those who do show up for their hearing after passing a credible fear interview, DHS notes that “many more fail to comply with the lawfully issued removal orders from the immigration courts and some families engage in dilatory legal tactics when ICE works to enforce those orders.”¹⁰³ Furthermore, the number of those who do not show up for hearings or removal has ballooned. According to EOIR (Executive Office for Immigration Review), in 2006 there were 573 final orders issued in absentia for cases originating as credible fear claims. In FY 2017, this had exploded to 4,038 – which actually was a marked decline from FY 2016, in which 8,999 such orders were issued.¹⁰⁴ Only 16 percent of adults who initially receive credible fear determinations are ultimately granted asylum.¹⁰⁵

Other parts of this section of the report are so dumb that anyone with an ounce of common sense can spot the problem.

The overwhelming majority of persons crossing that [southern] border are persons of color, primarily from Latin America. For example, CBP data about Border Patrol arrests along both the southern (with Mexico) and northern border (with Canada) from FY 2015-2018 show that of a total 837,518 arrests, the great majority were made along the southern border. Data from the top five countries of origin shows that of those people arrested by the Border Patrol, 537,650 (64.2%) people were from Mexico, 110,802 (13.2%) were from Guatemala, 72,402 (8.6%) were from El Salvador, 68,088 (8.1%) were from Honduras, and 11,600 (0.01%) were from India. Those detained have been disparaged by the President’s xenophobic comments, exacerbating a long-standing and recent history of discrimination against Latino immigrants, and implicating equal protection based on national origin. Their rights to family integrity are also at stake.¹⁰⁶

Let me take a wild stab at this: the vast majority of arrests are made at the southern border because hundreds of thousands of Canadians are not rushing our northern border and vanishing into the interior of the United States, never to return. I’m not sure how the national origin of those crossing

¹⁰³ 83 FR 45520.

¹⁰⁴ Credible Fear in the U.S. Immigration System, U.S. Dep’t of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 5, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; see also Andrew R. Arthur, *Trump Bait the Press on Asylum No-Shows*, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, *A One-Sided Study on Detention of Illegal-Immigrant Families*, Center for Immigration Studies, Sept. 14, 2018, <https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families>.

¹⁰⁵ Credible Fear in the U.S. Immigration System, U.S. Dep’t of Justice, Executive Office for Immigration Review (EOIR), May 24, 2018, at 9, https://cis.org/sites/default/files/2018-09/EOIR_Credible%20Fear_USCIS%20Proceedings%20Table.pdf; see also Andrew R. Arthur, *Trump Bait the Press on Asylum No-Shows*, Center for Immigration Studies, Nov. 2, 2016, <https://cis.org/Arthur/Trump-Baits-Press-Asylum-NoShows>; Jessica M. Vaughan, Andrew R. Arthur, and Dan Cadman, *A One-Sided Study on Detention of Illegal-Immigrant Families*, Center for Immigration Studies, Sept. 14, 2018, <https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families>.

¹⁰⁶ Report at n. 2386-2391.

the border illegally is supposed to affect our immigration enforcement decisions. “Oops, let that guy go, he’s from El Salvador. We have to arrest a thousand more white Canadians today before we arrest anyone else from Mexico or Central America.” (I will also note that the fact that almost 12,000 people arrested by the Border Patrol were from India, which is literally an ocean and a continent away, is evidence that those worried that our lax border security attracts lawbreakers from around the world have a point.) If people from Mexico and Central America are disproportionately inclined to break our immigration laws, how is the fault of the United States, Border Patrol, or President Trump?

The report also says, “Their rights to family integrity are also at stake.”¹⁰⁷ Sorry, no they are not. People go to jail and prison all the time, and that means they are separated from their children. Their right to family integrity isn’t at stake *because they broke the law*. When Willie Sutton goes to prison for ten years for bank robbery, no one claims his right to family integrity is being violated. A decision from the Southern District of California, cited in this report, claims that the right to family integrity is being violated because the parents are separated from their children while awaiting adjudication of their asylum claims.¹⁰⁸ But that is simply because the government does not have sufficient family detention facilities, and we all have a strong interest in detaining these individuals, given the large percentage that abscond when released. The Commission majority, of course, would almost certainly not be satisfied by expanded family detention facilities so that families can be held together. Our 2015 report on detention facilities concerned (in part) family detention facilities, and the majority was unhappy about that too.¹⁰⁹

Furthermore, many people who arrive at the border claiming to be families are not actually related. ICE instituted a pilot program earlier this year in which they did rapid DNA tests of adults and children whom they suspected might not be related. Thirty percent of those tested were not in fact related.¹¹⁰ During one week in July, 102 tests were administered, and 17 of the tests showed no familial relationship.¹¹¹

The rest of this section can be boiled down to, “No one should ever be deported, ever” – an approach that the majority believes applies to DACA recipients and TPS (Temporary Protected Status) recipients. The report states that “Federal courts are also hearing a series of allegations regarding retraction of Temporary Protective Status (“TPS”) from African, Haitian and Central American immigrants, which also implicate substantive due process and equal protection concerns,

¹⁰⁷ Report at n. 2391.

¹⁰⁸ *Ms. L. v. U.S. Immigration and Customs Enforcement*, 302 F.Supp.3d 1149 (S.D. Cal. 2018).

¹⁰⁹ *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*, U.S. Comm’n on Civil Rights, Sept. 2015, at 127 (“DHS should look at alternative to detaining families, such as releasing the families to custodial agents in the United States.”),

https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf

¹¹⁰ Anna Giaritelli, *DNA tests reveal 30% of suspected fraudulent migrant families were unrelated*, Washington Examiner, May 18, 2019, <https://www.washingtonexaminer.com/policy/defense-national-security/dna-tests-reveal-30-of-suspected-fraudulent-migrant-families-were-unrelated>

¹¹¹ Priscilla Alvarez, *ICE ramps up DNA testing for migrant families along the southern border*, CNN, July 22, 2019, <https://www.cnn.com/2019/07/22/politics/ice-deploys-dna-testing-at-border/index.html>.

including allegations that the retraction of TPS being motivated by racial animus.”¹¹² Clearly the reader *must* believe these allegations, because oh my goodness, those countries are populated by People of Color!

If the termination of Temporary Protected Status is due to racism, DHS is doing a pretty poor job of it. On August 1, 2019, Acting DHS Secretary Kevin McAleenan extended TPS for Syrian nationals for 18 months.¹¹³ On March 18, 2019, then-DHS Secretary Kirstjen Nielsen extended TPS for South Sudan for 18 months.¹¹⁴ On July 19, 2018, then-Secretary Nielsen extended TPS for Somalia for 18 months¹¹⁵, and on July 5, 2018, she extended TPS for Yemen for 18 months.¹¹⁶ The only countries that are currently designated for TPS (some of which are currently mired in litigation due to the Secretary's efforts to terminate TPS) are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. Notice that there is not a single European or majority-white country on that list, and only one Asian country. DHS isn't treating people who are colloquially considered “white” with TPS status better than people of color with TPS status *because there aren't any people in the former category*. Furthermore, the countries for which DHS has extended Temporary Protected Status are all countries populated by “people of color.” DHS must have the most incompetent racists ever.

Furthermore, Temporary Protected Status is meant to be just that – temporary. The underlying statute repeatedly makes this clear: “the Attorney General . . . may grant the alien *temporary* protected status,”¹¹⁷ “the Attorney General finds that there has been an earth, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but *temporary*, disruption of living conditions in the area affected,”¹¹⁸ “the foreign state is unable, *temporarily*, to handle adequately the return to the state of aliens who are nationals of the state,”¹¹⁹ “the Attorney General finds that there exist extraordinary and *temporary* conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety”.[emphasis added]¹²⁰

¹¹² Report at n. 2437.

¹¹³ *Acting DHS Secretary McAleenan Announces Extension of Temporary Protected Status for Syria*, Department of Homeland Security, August 1, 2019, <https://www.dhs.gov/news/2019/08/01/acting-dhs-secretary-mcaleenan-announces-extension-temporary-protected-status-syria>.

¹¹⁴ *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for South Sudan*, Department of Homeland Security, March 8, 2019, <https://www.dhs.gov/news/2019/03/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>.

¹¹⁵ *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Somalia*, Department of Homeland Security, July 19, 2018, <https://www.dhs.gov/news/2018/07/19/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>.

¹¹⁶ *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Yemen*, July 5, 2018, <https://www.dhs.gov/news/2018/07/05/secretary-nielsen-announcement-temporary-protected-status-yemen>.

¹¹⁷ 8 U.S.C. § 1254a(a)(1).

¹¹⁸ 8 U.S.C. § 1254a(b)(1)(B)(i).

¹¹⁹ 8 U.S.C. § 1254a(b)(1)(B)(ii).

¹²⁰ 8 U.S.C. § 1254a(b)(1)(C).

The underlying statute also provides for the termination of Temporary Protected Status.¹²¹ The statute also specifies that TPS is a nonimmigrant status, stating, “the alien shall not be considered to be permanently residing in the United States under color of law;”¹²² and “for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.”¹²³

Temporary Protected Status for Nicaragua and Honduras was first issued on January 5, 1999 because of damage caused by Hurricane Mitch.¹²⁴ When the Secretary issued the termination of TPS status for Nicaragua, it had been *almost 19 years* since the designation was issued. Whatever condition Nicaragua is in now, this is as good as it is going to get as far as Hurricane Mitch goes. According to the notice provided by the Secretary, conditions have markedly improved over the past decade – for instance, “Electrification of the country has increased from 50% of the country in 2007 to 90% today. . . . Internet access is also now widely available.”¹²⁵ Likewise, although Honduras faces challenges, those challenges are unrelated to Hurricane Mitch and overall conditions have improved in recent years.¹²⁶ If Temporary Protected Status can’t be terminated now, it can never be terminated.¹²⁷

Much as in other aspects of immigration, the argument against terminating TPS benefits depends heavily on emotional appeals to the difficulties such a termination would cause U.S. citizen children of TPS beneficiaries.¹²⁸ The majority’s default position seems to be that the immigration laws cannot be enforced if doing so might affect U.S. citizen children. This is the problem with not enforcing the immigration laws. If TPS for these countries had not been extended for decades beyond any reasonable “temporary” time frame, it would not be so disruptive for people to return to their countries. This makes it even more imperative to end more recent grants of TPS (like Nepal) in a timely manner. There should not be an assumption that TPS status will be extended indefinitely, which seems to be the desire of the Commission majority.¹²⁹

There is nothing wrong with a U.S. citizen child returning to live with their parents in their parent’s country of origin. No one is permanently barring them from the U.S. U.S. citizen children live in

¹²¹ 8 U.S.C. § 1254a(b)(3)(B).

¹²² 8 U.S.C. § 1254a(f)(1).

¹²³ 8 U.S.C. § 1254a(f)(4).

¹²⁴ 64 FR 526; 82 FR 59637; 83 FR 26074.

¹²⁵ 82 FR 59637.

¹²⁶ 83 FR 26076 (stating that Honduras is currently the third largest producer of Arabica coffee beans in the world and that drought conditions have improved in recent years).

¹²⁷ Similarly, Nepal was first granted TPS following an earthquake in 2015, but, as DHS notes, recovery efforts have succeeded to such an extent that more tourists visit Nepal now than prior to the earthquake. 83 FR 23706. Sudan may be a more arguable case for extending TPS benefits, as the termination of TPS status for Sudan admits that there is still fighting in two areas of Sudan, though not in the entire country. On the other hand, Sudan was first granted TPS in 1997, so again, after 22 years, this may be as good as it is going to get. 82 FR 47229.

¹²⁸ *Ramos v. Nielsen*, 336 F.Supp.3d 1075 (N.D. Cal. 2018).

¹²⁹ This is also why it is imperative to return the “asylum seekers” at the southern border to their countries of origin forthwith. The longer they remain here, the more pleading there will be that it is simply too disruptive to return them to their countries of origin.

their parents' (non-U.S.) countries of origin all the time, and children who are citizens of other countries (legally) live in the U.S. with their parents all the time.

In closing, I note that I do not blame the beneficiaries of TPS from trying to remain in the country, even though I don't think they have a leg to stand on. I wouldn't want to live in Nicaragua, Haiti, El Salvador, Nepal, etc. Yet it is ironic that the same people who are in high dudgeon over President Trump referring to "s***hole countries" simultaneously insist that we must never, ever, under any circumstances, return people to these wonderful countries in which everyone is clamoring to live.

Chapter 11: U.S. Department of Agriculture

The report mentions lawsuits brought on behalf of black, Hispanic, Native American, and female farmers that were settled during the Obama Administration. These settlements are commonly referred to as "*Pigford*."¹³⁰ The report does not mention that these programs were riddled with fraudulent claims and abuses. No less a progressive institution than the *New York Times* investigated the settlement and reported:

In 16 ZIP codes in Alabama, Arkansas, Mississippi and North Carolina, the number of successful claimants *exceeded the total number of farms operated by people of any race in 1997*, the year the lawsuit was filed. Those applicants received nearly \$100 million.

In Maple Hill, a struggling town in southeastern North Carolina, *the number of people paid was nearly four times the total number of farms*. More than one in nine African-American received checks. In Little Rock, Ark., a confidential list of payments shows, 10 members of one extended family collected a total of \$500,000, and dozens of other successful claimants shared addresses, phone numbers or close family connections. [emphasis added]¹³¹

Pigford I was rife with fraud – as journalist Jim Bovard wrote, USDA “expected only a few thousand legitimate claims” from the *Pigford I* settlement.¹³² USDA was in for a surprise:

[M]ore than 90,000 blacks asserted that they were wrongly denied farm loans or other USDA benefits in the 1980s and 1990s. This was surprising because there were at most 33,000 black-operated farms nationwide in that period. But that number itself was wildly inflated by USDA methodology. Anyone who sells more

¹³⁰ Report at n. 3183-3195.

¹³¹ Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, *N.Y. Times*, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.

¹³² James Bovard, The great farm robbery, *Wash. Times*, Apr. 3, 2013, <https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>.

than \$1,000 in agricultural commodities – the equivalent of 150 bushels of wheat or one horse – is categorized by USDA [as] as bona fide farmer.¹³³

The appropriate response to being fleeced was apparently, “Thank you sir, may I have another?” The government spent \$1.25 billion in the *Pigford II* settlement, ostensibly to compensate still more black farmers who had not been compensated in *Pigford I*. \$195 million was paid out to Hispanic and female farmers, and \$680 million was paid out to Native American farmers.¹³⁴ To make it even worse, not enough Native American farmers could even be found to distribute all the money. The remaining \$400 million was left “in the control of plaintiffs’ lawyers to be distributed among a handful of nonprofit organizations serving Native American farmers.”¹³⁵ Just because an organization is a non-profit doesn’t mean someone isn’t profiting. This is also an example of why former Attorney General Sessions was wise to end the practice of including payments to non-governmental third parties in settlement agreements.¹³⁶

It might seem difficult for this story to smell worse, but it does. The settlement with Hispanic and female farmers was unnecessary. The Department of Agriculture had defended itself for ten years, and the plaintiffs had lost at every stage of litigation, including the Supreme Court. But the Obama Administration couldn’t allow this to happen. Racial spoils for one non-white group must be available to all non-white groups. “New settlements would provide ‘a way to neutralize the argument that the government favors black farmers over Hispanic, Native American or women farmers,’ an internal department memorandum stated in March 2010.”¹³⁷ As the Times reported:

On the heels of the Supreme Court’s ruling, interviews and records show, the Obama administration’s political appointees at the Justice and Agriculture Departments engineered a stunning turnabout: they committed \$1.33 billion to compensate not just the 91 plaintiffs but thousands of Hispanic and female farmers who had never claimed bias in court.

The deal, several current and former government officials said, was fashioned in White House meetings despite the vehement objections – until now undisclosed – of career lawyers and agency officials who had argued that there was no credible evidence of widespread discrimination. What is more, some protested, the template for the deal – the \$50,000 payouts to black farmers – had proved a magnet for fraud.¹³⁸

¹³³ James Bovard, The great farm robbery, Wash. Times, Apr. 3, 2013, <https://www.washingtontimes.com/news/2013/apr/3/the-great-farm-robbery/>.

¹³⁴ Report at 3186-3192.

¹³⁵ Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.

¹³⁶ Memorandum, Prohibition on Settlement Payments to Third Parties, Office of the Attorney General, June 5, 2017, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice>.

¹³⁷ Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.

¹³⁸ Sharon LaFraniere, U.S. Opens Spigot After Farmers Claim Discrimination, N.Y. Times, Apr. 25, 2013, https://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html?_r=0.

A report cited by the Commission claims that “systemic racism at USDA has denied black farmers equal access to credit and crop insurance”.¹³⁹ The report – again from the Center for American Progress – does not provide any evidence of continuing systemic discrimination against black farmers. The report only cites one recent case of alleged discrimination, in which a family of cane farmers claim that a bank and USDA denied them crop loans.¹⁴⁰ Legislation sponsored by Sen. Tim Scott allows “heirs’ property,” which is landed inherited by family members without a formal will, to receive assistance from USDA.¹⁴¹ The CAP report also notes that black farmers have increased as a percentage of farmers, and they own more land.¹⁴²

¹³⁹ Report at n. 3200.

¹⁴⁰ Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>.

¹⁴¹ Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>.

¹⁴² Abril Castro and Zoe Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/>.

Rebuttal of Commissioner Peter N. Kirsanow

Commissioner Narasaki writes that the Declaration of Independence was followed by, “a Constitution that condoned the ownership, sale, and enslavement of Black men, women, and children for over 200 years.” N.b. The Constitution was ratified on June 21, 1788.¹ Slavery was formally abolished throughout the United States by the 13th Amendment, which was ratified on December 6, 1865.²

¹ The day the Constitution was ratified, National Constitution Center, June 21, 2019, <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>.

² 13th Amendment to the U.S. Constitution: Abolition of Slavery (1865), Our Documents Initiative, <https://www.ourdocuments.gov/doc.php?flash=false&doc=40>.

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APPENDIX A

Department of Justice Civil Rights Division Cases – Total Cases Resolved FY 2016-2018³⁷⁵⁷

CRT SEC	DRS	EOS	ELS	IER	HCE	SPL	VOT	TOTAL/FY
2016	16	8	6	61	41	8	3	143
2017	8	14	3	57	46	4.5	4	136.5
2018	14	5	5	49	28	3	5	109
TOTAL	38	27	14	167	115	15.5	12	388.5

CRT SEC	VOT	SPL	IER	HCE	ELS	EOS	DRS	TOTAL
Settlements	6	8.5	166	44	3	14	25	266.5
Consent Decrees	4	5		64	9	10	12	104
Judicial Decisions	2	2	1	7	2	3	1	18
TOTAL								388.5

³⁷⁵⁷Methodology and definitions are described in Chapter 2.

Appellate Section Cases (FY 2016-2018)

Case	Issue	Brief Date	Doc	Decision Date or other subsequent action	Doc
FY 2016 (33 cases)					
Flores v. U.S. Department of Education (4th Cir.) – Respondent	Education	10/8/2015	Motion to Dismiss	10/19/2015	Court of Appeals Order
Green v. Brennan (S. Ct.) - Respondent	Employment Discrimination (Race, National Origin, Sex, and Religion)	10/25/2015	Reply Brief as Respondent	5/23/2016	Supreme Court Decision
Midwest Fence Corporation v. U.S. Department of Transportation (7th Cir.) - Appellee	Affirmative Action	10/26/2015	Brief as Appellee	11/4/2016	Court of Appeals Decision, reported at 840 F.3d 932
G.G. v. Gloucester County School Board (4th Cir.) – Amicus	Education	10/28/2015	Brief as Amicus	4/19/2016	Court of Appeals Decision, reported at 822 F.3d 709
Fisher v. University of Texas (S. Ct.) - Amicus	Affirmative Action, Education	11/2/2015	Brief as Amicus	6/23/2016	Supreme Court Decision, reported at 136 S. Ct. 2198
Harris v. Arizona Independent Redistricting Commission (S. Ct.) - Amicus	Voting	11/2/2015	Brief as Amicus	4/20/2016	Supreme Court Decision, reported at 136 S. Ct. 1301
Heffernan v. City of Paterson (S. Ct.) - Amicus	Employment (Race, National Origin, Sex, and Religion)	11/23/2015	Brief as Amicus	4/26/2016	Supreme Court Decision, reported at 136 S.Ct. 1412

Revock v. Cowpet Bay West Condominium Association (3d Cir.)	American With Disabilities Act (ADA) and § 504 of the Rehabilitation Act (§ 504); Housing	11/23/2015	Brief as Amicus	3/31/2017	Court of Appeals Decision, reported at 853 F.3d 96
United States v. Rushin, et al. (11th Cir.) - Appellee	Criminal	12/10/2015	Brief as Appellee	12/21/2016	Court of Appeals Decision, reported at 844 F.3d 933
Shelby County v. Lynch (S.Ct.) - Respondent	Voting	1/6/2016	Brief in Opposition	1/25/2016	Certiorari Denied, reported at 136 S.Ct. 981
Chadam v. Palo Alto Unified School District (9th Cir.) – Amicus	ADA and § 504	1/21/2016	Brief as Amicus	11/15/2016	Court of Appeals Decision, available at 666 F. App'x 615
Rothe Development Corp. v. United States Department of Defense (5th Cir., Fed. Cir., D.C. Cir.) – Appellee	Affirmative Action	1/28/2016	Brief as Appellee	1/13/2017	Court of Appeals Order
Wittman v. Personhuballah (S.Ct.) - Amicus	Voting	2/3/2016	Brief as Amicus	5/23/2016	Supreme Court Decision, reported at 136 S.Ct. 1732
United States v. Secretary, Florida Department of Corrections (11th Cir.) - Appellee	Institutionalized Persons, Religion	2/24/2016	Brief as Appellee	7/14/2016	Court of Appeals Decision, reported at 828 F.3d 1341
Michigan Protection and Advocacy Service, Inc. v. Flint Community Schools (6th Cir.) – Amicus	ADA, § 504 and Individuals with Disabilities Education Act	4/14/2016	Brief as Amicus	2/3/2017	Dismissed
Drayton v. McIntosh County (S.D. Ga.) - Intervenor	ADA and § 504	4/21/2016	Intervenor's Response in Opposition to Motion to Dismiss	6/17/2016	District Court Order

Watkins v. Secretary, Florida Department of Corrections (11th Cir.) – Amicus	Institutionalized Persons, Religion	4/22/2016	Brief as Amicus	10/28/2016	Court of Appeals Decision, available at 669 F. App'x 982
Tucker v. Idaho (Idaho) – Amicus	Access to Justice	5/11/2016	Brief as Amicus	4/28/2017	State Court Decision, reported at 394 P.3d 54
Exodus Refugee Immigration, Inc. v. Pence (7th Cir.) - Amicus	Immigration	5/16/2016	Brief as Amicus	10/3/2016	Court of Appeals Decision, reported at 838 F.3d 902
Clark v. Virginia Department of State Police (Va.) - Amicus	Servicemember	5/17/2016	Brief as Amicus	12/1/2016	State Court Decision, reported at 793 S.E.2d 1
Cazares v. United States (S.Ct.) - Respondent	Criminal	5/18/2016	Brief in Opposition	6/20/2016	Certiorari denied, reported at 136 S. Ct. 2484
United States v. North Carolina (4th Cir.) - Appellant	Voting	5/19/2016	Brief as Appellant	7/29/2016	Court of Appeals Decision, reported at 831 F.3d 204
Doe v. Mercy Catholic Medical Center (3d Cir.) – Amicus	Education	6/9/2016	Brief as Amicus	3/7/2017	Court of Appeals Decision, reported at 850 F.3d 545
Silva v. Baptist Health South Florida, Inc. (11th Cir.) – Amicus	ADA and § 504	6/23/2016	Brief as Amicus	5/8/2017	Court of Appeals Decision, reported at 856 F.3d 824
United States v. Cortes-Meza (11th Cir.) - Appellee	Criminal	6/24/2016	Brief as Appellee	4/13/2017	Court of Appeals Decision, available at 685 F. App'x 731
Rodella v. United States (S. Ct.) - Respondent	Criminal	7/15/2016	Brief in Opposition	10/3/2016	Certiorari Denied, reported at 137 S. Ct. 37

McGann v. Cinemark USA (3d Cir.) – Amicus	ADA and § 504	7/18/2016	Brief as Amicus	10/6/2017	Court of Appeals Decision, reported at 873 F.3d 218
Ohio A. Philip Randolph Institute v. Husted (6th Cir.) - Amicus	Voting	7/18/2016	Brief as Amicus	9/23/2016	Court of Appeals Decision, reported at 838 F.3d 699
United States v. Hill (4th Cir.) - Appellant	Criminal	7/28/2016		8/18/2017	Court of Appeals Decision, available at 700 F. App'x 235
Fry v. Napoleon Community Schools (S. Ct.) – Amicus	Individuals with Disabilities Education Act	8/29/2016	Brief as Amicus	2/22/2017	Supreme Court Decision, reported at 137 S. Ct. 743
Ivy v. Morath (S. Ct.) – Amicus	ADA and § 504	8/30/2016	Brief as Amicus (merits)	10/31/2016	Vacated & Remanded with instructions to Dismiss as Moot, reported 137 S.Ct. 414
Paulk v. Georgia Department of Transportation (11th Cir.) – Amicus	Housing	9/6/2016	Brief as Amicus	3/14/2017	Dismissed
Bethune-Hill v. Virginia State Board of Elections (S. Ct.) - Amicus	Voting	9/14/2016	Brief as Amicus	3/1/2017	Supreme Court Decision, reported at 137 S. Ct. 788
United States v. County of Maricopa (9th Cir.) - Appellee	Police Misconduct (Civil Cases), Title VI	9/16/2016	Brief as Appellee	5/7/2018	Court of Appeals Decision, reported at 889 F.3d 648
FY 2017 (39 cases)					
Bank of America v. Miami; Wells Fargo v. Miami (S. Ct.) – Amicus	Housing	10/7/2016	Brief as Amicus	5/1/2017	Supreme Court Decision, reported at 137 S. Ct. 1296
Cooper (McCrory) v. Harris (S. Ct.) - Amicus	Voting	10/19/2016	Brief as Amicus	5/22/2017	Supreme Court Decision, reported at 137 S. Ct. 1455

United States v. Louisiana (5th Cir.) - Appellee	Voting	10/21/2016	Motion to Dismiss	12/21/2016	Dismissed
Issa v. The School District of Lancaster (3d Cir.) – Amicus	Education	10/24/2016	Brief as Amicus	1/30/2017	Court of Appeals Decision, reported at 847 F.3d 121
Francis v. Kings Park Manor (2d Cir.) – Amicus	Housing	10/31/2016	Brief as Amicus in Response to Court's Invitation		
Geraci and Fields v. Philadelphia (3d Cir.) - Amicus	Other	10/31/2016	Brief as Amicus	7/13/2017	Order Amending Court of Appeals Decision
Baston v. United States (S. Ct.) - Respondent	Criminal	11/16/2016	Brief in Opposition	3/6/2017	Certiorari Denied, reported at 137 S. Ct. 850
Andrew F. v. Douglas County School District RE-1 (S. Ct.) – Amicus	Individuals with Disabilities Education Act	11/21/2016	Brief as Amicus	3/22/2017	Supreme Court Decision, reported at 137 S. Ct. 988
Abbott v. Veasey (S. Ct.) - Respondent	Voting	11/28/2016	Brief in Opposition	1/23/2017	Certiorari Denied, reported at 137 S.Ct. 612
United States v. Wilson (8th Cir. and S. Ct.) - Appellee/Respondent	Criminal	12/9/2016	Court of Appeals Judgment		
Andrews v. City of Hartford (11th Cir.) – Amicus	ADA and § 504	12/12/2016	Brief as Amicus	6/30/2017	Court of Appeals Decision
Cowan v. Cleveland School District (5th Cir.) – Appellee	Education	12/16/2016	Brief as Appellee	3/9/2017	Dismissed
Mullet, et al. v. United States (S. Ct.) - Respondent	Criminal	12/22/2016	Brief in Opposition	2/21/2017	Certiorari Denied, reported at 137 S. Ct. 1065

United States v. Colin Boone (8th Cir.) - Appellee	Criminal	1/9/2017	United States Waived Response to the Petition for a Writ of Certiorari	1/9/2017	Certiorari Denied, reported at 137 S. Ct. 676 (S. Ct.)
United States v. Michael Smith (11th Cir.) - Appellee	Criminal	1/9/2017	United States Waived Response to the Petition for a Writ of Certiorari	1/9/2017	Certiorari Denied, reported at 137 S. Ct. 690
United States v. Metcalf (8th Cir.) - Appellee	Criminal	1/18/2017	Brief as Appellee	2/2/2018	Court of Appeals Decision, reported at 881 F.3d 641
North Carolina v. North Carolina State Conference of the NAACP (S. Ct.) - Respondent	Voting	1/19/2017	Brief in Opposition	5/15/2017	Certiorari Denied, reported at 137 S. Ct. 1399
United States v. Greer (6th Cir.) - Appellee	Criminal	2/2/2017	Brief as Appellee	10/3/2017	Court of Appeals Decision, reported at 872 F.3d 790
OCA-Greater Houston v. Texas (5th Cir.) - Amicus	Voting	2/6/2017	Brief as Amicus	8/16/2017	Court of Appeals Decision, reported at 867 F.3d 604
King v. Marion County Circuit Court (S. Ct., 7th Cir.) – Intervenor and Amicus	ADA and § 504, Constitutionality of Federal Statutes	2/17/2017	Brief as Intervenor and Amicus	8/18/2017	Court of Appeals Decision, reported at 868 F.3d 589
United States v. Umbach and Kines (11th Cir.) - Appellee	Criminal	2/27/2017	Brief as Appellee	8/30/2017	Court of Appeals Decision, available at 708 F. App'x 533

Youhoing-Nanan v. United States Department of Justice (D.C. Cir.) - Respondent	Other	3/22/2017	Motion to Dismiss and Response to Motion to Proceed In Forma Pauperis	9/8/2017	Dismissed
McGreevey v. PHH Mortgage Corp., et al. (9th Cir.) - Amicus	Servicemember	3/29/2017	Brief as Amicus	7/26/2018	Court of Appeals Decision, reported at 897 F.3d 1037
United States v. Nebraska Beef, Ltd. (8th Cir.) - Appellee	Immigration	4/25/2017	Brief as Appellee	8/27/2018	Court of Appeals Decision, available at 2018 WL 4061521
United States v. Barnes and Brown (10th Cir.) - Appellee/Cross-Appellant	Criminal	5/10/2017	Brief as Appellant, https://www.justice.gov/crt/case-document/united-states-v-barnes-and-brown-brief-appellee; DOJ filed Reply Brief on 8/18/2017, https://www.justice.gov/crt/case-document/united-states-v-barnes-and-brown-reply-brief-0	5/16/2018	Court of Appeals Decision, reported at 890 F.3d 910
Melendres v. Sands (9th Cir.) - Appellee	Police Misconduct (Civil Cases)	5/25/2017	Motion to Dismiss	7/27/2017	Court of Appeals Order

Smith v. United States (S. Ct.) - Respondent	Criminal	5/30/2017	United States Waived Response to the Petition for a Writ of Certiorari	5/30/2017	Certiorari Denied, reported at 137 S. Ct. 2193 (United States Waived Response to the Petition for a Writ of Certiorari)
United States v. Cowden (4th Cir.) - Appellee	Criminal	6/5/2017	Brief as Appellee	2/16/2018	Court of Appeals Decision, reported at 882 F.3d 464
Midwest Fence Corporation v. U.S. Department of Transportation (S. Ct.) - Respondent	Affirmative Action	6/26/2017	Certiorari Denied, reported at 137 S.Ct. 2292	Brief in Opposition - 5/23/17	
United States v. Hatley (5th Cir.) - Appellee	Criminal	7/3/2017	Brief as Appellee	1/26/2018	Court of Appeals Decision, available at 717 F. App'x 457
Rothe Development Corp. v. United States Department of Defense and the Air Force	Affirmative Action	7/7/2017	Brief in Opposition	10/16/2017	Cert. denied, reported at 138 S. Ct. 354
Magee v. Coca Cola Refreshments (S. Ct.) – Amicus	American With Disabilities Act and Section 504 of the Rehabilitation Act	7/19/2017	Brief as Amicus	10/2/2017	Certiorari Denied, reported at 138 S. Ct. 55
In re: Asociación de Titulares de Condominio Castillo (1st-BAP Cir.) – Appellee	Housing	7/31/2017	Brief as Appellee	2/8/2018	Court of Appeals Decision, reported at 581 B.R. 346
United States v. Hines (5th Cir.) - Appellee	Criminal	8/21/2017	Brief as Appellee	12/28/2017	Court of Appeals Decision, available at 707 F. App'x 803
United States v. Bergeron (5th Cir.) - Appellee	Criminal	8/25/2017	Brief as Appellee	12/21/2017	Court of Appeals Decision, available at 707 F. App'x 288

Melendres v. Maricopa County (9th Cir.) - Intervenor/Appellee	Police Misconduct (Civil Cases)	8/29/2017	Brief as Intervenor/Appellee	7/31/2018	Court of Appeals Decision, reported at 897 F.3d 1217
Walker v. City of Calhoun (11th Cir.) – Amicus	Access to Justice	9/13/2017	Brief as Amicus	8/22/2018	Court of Appeals Decision, reported at 901 F.3d 1245
Uzuegbunam v. Preczewski (N.D. Ga.) - Amicus	Other	9/26/2017	Statement of Interest	5/25/2018	District Court Order
Houston v. City of Atlanta (11th Cir.) - Amicus	Employment Discrimination (Race, National Origin, Sex, and Religion)	9/27/2017	Brief as Amicus	8/24/2018	Court of Appeals Decision, available at 735 F. App'x 701
FY 2018 (38 cases)					
Clark v. Virginia Department of State Police (S. Ct.) - Amicus	Servicemember	10/12/2017	Brief as Amicus in Response to the Court's Invitation	12/4/2017	Certiorari Denied, reported at 138 S. Ct. 500
United States v. Groce (7th Cir.) - Appellee	Criminal	10/12/2017	Brief as Appellee	5/23/2018	Court of Appeals Decision, reported at 891 F.3d 260
Freyre v. Chronister (fna Gee) (11th Cir.) – Intervenor	American With Disabilities Act and Section 504 of the Rehabilitation Act	10/13/2017	Brief as Intervenor		
Melendres v. Penzone (9th Cir.) - Appellee	Police Misconduct (Civil Cases)	10/13/2017	Response to Petition for Panel Rehearing	10/24/2017	Court of Appeals Order

United States v. Whittington (9th Cir.) - Appellee	Criminal	10/16/2017	Brief as Appellee	5/1/2018	Court of Appeals Decision, available at 721 F. App'x 713
A.R. v. Secretary, Florida Agency for Health Care Administration (11th Cir.) – Appellant	American With Disabilities Act and Section 504 of the Rehabilitation Act	10/18/2017	Brief as Appellant	3/1/2018	Reply Brief
Shaw v. Burke (C.D. Cal.) - Amicus	Other	10/24/2017	Statement of Interest	1/17/2018	District Court Order, available at 2018 WL 459661
Veasey v. Abbott (5th Cir.) - Appellee	Voting	10/27/2017	Brief as Appellee - response in motion to lift stay		Court of Appeals Decision, 888 F.3d 792 (5th Cir. 2018)
Fryberger v. University of Arkansas (8th Cir.) – Intervenor	Education	11/22/2017	Brief as Intervenor	5/2/2018	Court of Appeals Decision, reported at 889 F.3d 471
Davis v. Guam (9th Cir.) - Amicus	Voting	11/28/2017	Brief as Amicus		
Bratwaite v. Broward County School Board (11th Cir.) - Amicus	Employment Discrimination (Race, National Origin, Sex, and Religion)	12/7/2017	Brief as Amicus		
Valencia v. City of Springfield (7th Cir.) – Amicus	Housing	12/18/2017	Brief as Amicus	3/1/2018	Court of Appeals Decision, reported at 883 F.3d 959
United States v. Givhan (6th Cir.) - Appellee	Criminal	12/20/2017	Brief as Appellee	6/29/2018	Court of Appeals Decision, available at 2018 WL 3202773
Smith v. School Board of Concordia Parish (5th Cir.) – Appellee	Education	12/21/2017	Brief as Appellee	10/12/2018	Court of Appeals Decision, available at 2018 WL 4939471
Espinoza v. Montana Department of Revenue (Mont. Sup. Ct.) – Amicus	Religion	1/18/2018	Brief as Amicus		

Young America's Foundation v. Napolitano (N.D. Cal.) - Amicus	Other	1/25/2018	Statement of Interest	4/25/2018	District Court Order
Silguero v. CSL Plasma, Inc. (5th Cir.) – Amicus	American With Disabilities Act and Section 504 of the Rehabilitation Act	2/6/2018	Brief as Amicus	10/23/2018	Court of Appeals Decision, available at 2018 WL 5262734
Dagher v. Washington Metropolitan Area Transit Authority (4th Cir.) – Amicus	American With Disabilities Act and Section 504 of the Rehabilitation Act	2/8/2018	Brief as Amicus	4/25/2018	Dismissed
United States v. County of Lauderdale, et al. (5th Cir.) – Appellant	Access to Justice	2/20/2018	Brief as Appellant	5/17/2018	Reply Brief
Abbott v. Perez (S. Ct.) - Appellee	Voting	2/26/2018	Brief as Appellee Supporting Appellants	4/17/2018	Reply Brief
Edwards v. Gene Salter Properties (8th Cir.) – Amicus	Housing	3/8/2018	Brief as Amicus	10/9/2018	Court of Appeals Decision, available at 2018 WL 4896179
United States v. Broussard (5th Cir.) - Appellee	Criminal	3/19/2018	Supplemental Letter Brief	3/29/2018	Court of Appeals Order, Petition for Rehearing DENIED
Silberman v. Miami Dade Transit (11th Cir.) – Amicus	American With Disabilities Act and Section 504 of the Rehabilitation Act	4/4/2018	Brief as Amicus		
United States v. Town of Colorado City, Arizona, et al. (9th Cir.) – Appellee	Housing	4/19/2018	Brief as Appellee		
United States v. Asher (6th Cir.) - Appellee	Criminal	5/14/2018	Brief as Appellee		

Sheridan v. Melendres (S. Ct.) - Respondent	Police Misconduct (Civil Cases)	5/22/2018	Brief in Opposition	6/25/2018	Certiorari Denied, available at 2018 WL 574922
United States v. Doggart (6th Cir.) - Appellee	Criminal	5/24/2018	Brief as Appellee	10/18/2018	Court of Appeals Decision, available at 2018 WL 5075044
United States v. Corder (6th Cir.) - Appellee	Criminal	6/11/2018	United States Waived Response to the Petition for a Writ of Certiorari	6/11/2018	Certiorari Denied, available at 2018 WL 1952577
Jesus Christ is the Answer Ministries v. Baltimore County, Maryland (4th Cir.) – Amicus	Religion	7/2/2018	Brief as Amicus		
United States v. Badillo (1st Cir.) - Appellee	Employment Discrimination (Race, National Origin, Sex, and Religion)	7/3/2018	Motion to Dismiss	11/7/2018	Court of Appeals Judgment
United States v. Slager (4th Cir.) - Appellee	Criminal	7/5/2018	Brief as Appellee		
United States v. Royal (4th Cir.) - Appellee	Criminal	7/31/2018	Brief as Appellee	11/6/2018	Court of Appeals Decision, available at 2018 WL 5809731
Ashby v. Warrick County School Corp. (7th Cir.) – Amicus	ADA and § 504	8/20/2018	Brief as Amicus	11/5/2018	Court of Appeals Decision, available at 2018 WL 5784478
Furgess v. Pennsylvania Department of Corrections (3d Cir.) – Amicus	ADA and § 504	8/27/2018	Brief as Amicus		

Metcalf v. United States (S. Ct.) - Respondent	Criminal	9/14/2018	Brief in Opposition	10/29/2018	Certiorari Denied, available at 2018 WL 3008926
United States v. Brown (11th Cir.) - Appellee/Cross-Appellant	Criminal	9/20/2018	Brief as Appellee/Cross-Appellant		
United States v. Antico (11th Cir.) - Appellee/Cross-Appellant	Criminal	9/24/2018	Brief as Appellee/Cross-Appellant		
United States v. Puerto Rico (1st Cir.) - Appellee	Police Misconduct (Civil Cases), Third Party Intervention in Civil Rights Cases	10/9/2018	Response to Court Order to Show Cause		

Disability Rights Section Cases (FY 2016-2018)

Cases	Date	Document
FY 2016 (16 cases)		
County of Riverside (CA)	10/8/2015	Consent Decree
Pikes Peak Wrestling League (CO)	10/29/2015	Consent Decree

Augusta County (VA)	11/4/2015	Consent Decree
Bolivar County (MS)	11/17/2015	Consent Decree
North Florida OB/GYN Associates (FL)	1/7/2016	Settlement Agreement
Two Men and a Truck	1/28/2016	Settlement Agreement
Greyhound Lines, Inc.	2/10/2016	Consent Decree
Arlington-Mansfield Area YMCA (TX)	2/24/2016	Settlement Agreement
Pain Management Care, P.C.	4/7/2016	Consent Decree
Columbia, South Carolina Police Department (SC)	5/3/2016	Settlement Agreement
Mid-America Center	5/5/2016	Settlement Agreement
Philadelphia Freedom Valley YMCA – Rocky Run Branch	5/19/2016	Settlement Agreement
Omaha Performing Arts Society	7/14/2016	Settlement Agreement
YMCA of the Triangle	7/27/2016	Settlement Agreement
Humboldt County (CA)	9/13/2016	Consent Decree
30 Hop Restaurant	9/19/2016	Consent Decree
FY 2017 (8 cases)		
Miami University, et al.	10/17/2016	Consent Decree
City of Florence (KY)	10/26/2016	Consent Decree
		Judicial Decision, new Administration agreed to stipulated motion to dismiss (EDVA decided in favor of Defendant 11/22/16; notice of appeal filed 1/18/17)
Sheriff Woody & City of Richmond (VA)	11/12/2016	
Gualtieri	11/16/2016	Settlement Agreement
Ohio Department of Rehabilitation & Correction	1/3/2017	Settlement Agreement
Palm Beach County Supervisor of Elections	1/19/2017	Settlement Agreement
City of Philadelphia (PA)	2/17/2017	Consent Decree
Washington Metropolitan Area Transit Authority	3/1/2017	Consent Decree
FY 2018 (14 cases)		
City of New Albany (IN)	10/4/2017	Settlement Agreement
Bar-T Year Round Programs for Kids	10/10/2017	Settlement Agreement
Louisiana State Penitentiary (LA)	11/14/2017	Settlement Agreement
When Pigs Fly BBQ Pit	1/18/2018	Settlement Agreement
Claremore VFW & Auxiliary 2976	2/6/2018	Settlement Agreement

Atlantis Events, LLC	2/20/2018	Settlement Agreement
Learning Care Group, Inc.	3/20/2018	Settlement Agreement
Union Parish Detention Center	3/22/2018	Settlement Agreement
South Carolina Department of Corrections (SC)	3/29/2018	Settlement Agreement
Teachers Test Prep, Inc.	6/27/2018	Settlement Agreement
The Pawn Shop	7/24/2018	Settlement Agreement
Saint Joseph Hospital and SCL Health	7/31/2018	Settlement
Philadelphia Police Department (PA)	8/2/2018	Settlement Agreement
City of Minneapolis (MN)	8/14/2018	Settlement Agreement

Educational Opportunity Section Cases (FY 2016-2018)

Cases	Basis	Type of Resolution	Date of Resolution
FY 2016	FY 2016 (8 cases)		
Monroe City SB (LA)	Race (deseg)	Consent Order	4/14/2016
Arizona DEO (AZ)	National Origin (ELL & FLEP)	Settlement (amended 6/30/16 in 1 aspect)	4/22/2016
Univ. Tennessee Health Science Center (TN)	Disability	Settlement	7/25/2016
Wheaton College (MA)	Sex (sexual harassment; Title IX)	Settlement	9/21/2016
Worcester P.S. (MA)	National Origin (ELL & FLEP)	Settlement	10/7/2016
Palm Beach County (S.D. Fla.)	National Origin (ELL & FLEP)	Settlement	10/11/2016
Univ. of New Mexico (NM)	Sex (sexual assault/discrimination; Titles IV & IX)	Settlement	10/17/2016
California DOE (CA)	National Origin (ELL)	Settlement	9/8/2016
FY 2017	FY 2017 (12 cases)		
St. Johns County SD (M.D. Fla)	Race (deseg)	Judicial Order	19/26/16
St. Martin Parish SD (LA)	Race (deseg)	Consent Order	11/16/2016
SD of Philadelphia (PA)	National Origin (ELL)/Disability (IDEA)	Judicial Opinion	11/30/2016
Cotton Plant SD #1 (AR)	Race (deseg)	Consent Order	1/18/2017
BEO of Hendry County (FL)	Race (deseg)	Consent Order - of stipulated facts & ongoing monitoring needs	1/23/2017
St. James Parish SB (LA)	Race (deseg)	Consent Order	1/30/2017
Covington IPS (KY)	Disability	Settlement	3/13/2017
Kansas State Univ. (KS)	Sex (sexual assault/harrasment, Title IX)	Judicial Opinion	3/14/2017
Wicomico County SD (MD)	Race (Black & Latino)/Disability	Settlement	3/20/2017
SB of the City of Suffolk (VA)	Race (deseg)	Consent Order	3/20/2017

Bolivar County BOE #4 (MS)	Race (deseg)	Consent Order (fy 2016 Judicial Opinion)	5/25/2017
State of Georgia (McDuffie SD)(GA)	Race (deseg)	Consent Order	5/25/2017
Gallup-McKinley County Schools (NM)	Race (Native American, Title VI disparate impact regs)	Settlement	6/16/2017
Horry County Schools (SC)	National Origin (ELL)	Settlement	8/24/2017
FY 2018	FY 2018 (6 cases)		
Westminster Public Schools (CO)	National Origin (ELL)	Settlement	3/1/2018
Union County P.S. (OK)	National Origin (ELL)	Settlement	7/5/2018
Jackson County SB (FL)	Race (deseg)	Consent Order	2/23/2018
Providence Schools (RI)	National Origin (ELL)	Settlement	8/9/2018
South Bend Community School Corp. (IN)	Race (deseg)	Consent Order - updated by stipulation	9/4/2018

Employment Litigation Section Cases (FY 2016-2018)

Defendant Name	Type of Resolution	Date of Resolution	Basis	Issue
FY 2016 (6 cases)				
City of Chicago Board of Education (IL)	Consent Decree	12/17/2015	Title VII (sex)	Title VII: §706 (Sex - gender & pregnancy) (settlement based on consent entered by court as court order)
Niagara County (NY)	Consent Decree	1/7/2016	Title VII (sex)	Title VII: §706 (Sex & pregnancy)(CD signed in Dec. 2015, entered into court Jan. 2016)
City of Somerville & Commonwealth of Massachusetts (MA)	Settlement	2/4/2016	USERRA	USERRA (stipulated settlement with dismissal)
State of Hawaii (HI)	Judicial Findings	4/14/2016	Title VII (sex)	Title VII § (jury found State of Hawaii discriminated against individual on basis of sexual harassment)
Laborers' Local #1149 (IL)	Consent Decree	4/20/2016	USERRA	USERRA
City of Chicago (IL)	Consent Decree - stipulated consent judgement	6/8/2016	Title VII (N.O.)	Title VII: §§706/707 (National origin discrimination based on 10-year continuous residence requirement for probation officer positions)
FY 2017 (3 cases)				
City of Lubbock (TX)	Consent Decree	14-Nov-16	Title VII (sex & ethnicity/race)	Title VII: pattern or practice of discrimination against Hispanic and female applicants on the basis of national origin and sex in selection process for position of probationary police officer under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII").

City of Florence (KY)	Consent Decree	19-Dec-16	Title VII (sex) & ADA	Title VII & ADA Section I - Discrimination based upon sex (pregnancy) - Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000 & disability
School Board of Palm Beach County (FL)	Consent Decree	17-Jan-17	Title VII (sex)	Discrimination based upon sex - Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000
FY 2018 (5 cases)				
Rhode Island (RI)	Consent Decree	20-Oct-17	Title VII (race/N.O)	Titel VII: §707(defendant engaged in pattern or practice of employment discrimination against African American and Hispanic applicants for entry-level positions)
University of Baltimore (MD)	Settlement	22-Feb-18	Title VII (sex & pregnancy)	EEOC charge - violation of Title VII b/c refusing to hire a pregnant woman
Wyoming Military Department (WY)	Judicial Findings	21-Mar-18	Title VII (sex/harassment)	Sexual harassment under Title VII
Commonwealth of Puerto Rico (PR)	Settlement	21-May-18	USERRA	USERRA (case dismissed wo/prejudice, attaching settlement)
Jacksonville & Jacksonville Ass'n of Firefighters (FL)	Consent Decree	7/26/2018	Title VII (race)	Title VII (disparate impact regs) (race)

Federal Coordination and Compliance Section Cases (FY 2016-2018)

Party	Type of Resolution	Date of Resolution	Basis
FY 2016 (3 cases)			
Washington State DOL (by DOJ & DOL)	Settlement	10/1/2015	LEP (workers)
Kentucky Courts	Settlement	6/22/2016	LEP (public users)
Los Angeles Superior Court	Settlement	9/20/2016	LEP (public users)
FY 2017 (1 cases)			
Washington State Courts	Partnership	7/18/2017	LEP (public users)
Pennsylvania State Courts	Settlement	4/20/2017	LEP (public users)
FY 2018 (1 cases)			
Eau Claire County, WI, Circuit Court	Settlement	6/13/2018	LEP (public users)

Housing and Civil Enforcement Section Cases (FY 2016-2018)

Defendant	Type of Resolution	Date of Resolution	Basis
FY 2016 (41 cases)	41 cases in FY 16		
Fifth Third Bank (S.D. Ohio)	Consent Order	10/1/2015	Race
Eagle Bank and Trust Co (E.D. Mo.)	Consent Order	10/1/201	Race
Sayville Development LLC (E.D.N.Y.)	Consent Order	10/2/2015	Disability
Collier (W.D. La.)	Consent Order	10/7/2015	Race
Lincolnshire (N.D. Ill.)	Consent Order	10/19/2015	Disability
Housing Authority of Baltimore City (D. Md.)	Consent Decree (Supplemental)	10/29/2015	Disability
Dawn Properties, Inc. (S.D. Miss.)	Consent Order	11/3/2015	Disability
Hudson City Savings Bank, F.S.B. (D.N.J.) (DOJ with CFPB)	Consent Order	11/4/2015	National Origin
The Durst Organization (S.D.N.Y.)	Consent Decree (Partial)	11/13/2015	Disability
Sage Bank (D. Mass.)	Consent Order	12/1/2015	Race
Southwind Village, LLC (M.D. Fla.)	Consent Decree (Partial)	12/15/2015	Familial Status
Twin Oaks Mobile Home Park, Inc. (W.D. Wis.)	Consent Decree	12/17/2015	Familial Status
United States v. Christensen (D. S.D.)	Consent Order	1/7/2016	Disability
United States v. Applewood of Cross Plains (W.D. Wis.)	Consent Decree	1/20/2016	Disability
United States v. Evolve Bank & Trust (W.D. Tenn.)	Consent Order	1/21/2016	Disability
Brooklyn Park 73rd Leased Housing Assoc., LLC (D. Minn.)	Consent Decree	1/22/2016	Disability
United States v. Countrywide Financial Corp. (C.D. Cal.)	Consent Order (Amended)	1/25/2016	National Origin/Fair Lending
United States v. Schimnich (D. Minn.)	Consent Decree	2/8/2016	Disability
United States v. Toyota Motor Credit Corp. (C.D. Cal.)	Consent Order	2/11/2016	Race
Pendygraft (E.D. Ky.)	Consent Decree	2/26/2016	Sex
Fort Worth, Texas (N.D. Tex)	Consent Decree	3/7/2016	Disability

Rappuhn (N.D. Ala.)	Consent Order	3/8/2016	Disability
United States v. Mere	Consent Order	3/15/2016	Race
United States v. Bryan Company (Byran II) (S.D. Miss.)	Consent Order (Supplement)	4/19/2016	Disability
United States v. Avatar Properties, Inc. (D. N.H.)	Consent Decree	5/3/2016	Disability
United States v. Glenwood Management Corporation (S.D.N.Y.)	Consent Order	5/18/2016	Disability
United States v. Gentle Manor Estates, LLC (N.D. Ind.)	Consent Decree	5/18/2016	Familial Status
United States v. Brinson (D. Nev.)	Consent Order	6/14/2016	Familial Status
City of Beaumont, Texas (E.D. Tex.)	Consent Decree	6/16/2016	Disability
United States v. Noble Homes (N.D. Ohio)	Consent Decree	6/23/2016	Disability
BancorpSouth Bank (N.D. Miss.)(DOJ with CFPB)	Consent Order	7/25/2016	Race
United States v. Blass (D. Kan.)	Consent Order	8/2/2016	Disability
United States v. Loecher	Consent Order	8/8/2016	Familial Status
United States v. Encore Management Company, Inc. (S.D. W. Va.)	Consent Order	8/12/2016	Sex
HSBC Auto Finance (N.D. Ill.)	Consent Order	8/18/2016	Servicemembership
Parkside East, Inc. (E.D. Mich.)	Consent Decree	9/1/2016	Familial Status
Hillside Park Real Estate, LLC (N.D.N.Y.)	Consent Decree	9/12/2016	Disability
Kent State University (N.D. Ohio)	Consent Decree	9/20/2016	Disability
Ginsburg Development, LLC (S.D.N.Y.)	Judicial Decision (Preliminary Injunction)	9/28/2016	Disability
NALS Apartment Homes (D. Utah)	Consent Order	9/28/2016	Disability
Plaza Home Mortgage (S.D. Cal.)	Consent Order (Granting Extension of)	9/29/2016	National Origin
FY 2017 (46 cases)	46 cases in FY 17		
Kormanik (W.D. Pa.)	Consent Order	10/3/2016	Familial Status
Wells Fargo Bank, N.A., d/b/a Wells Fargo Dealer Services, Inc. (C.D. Cal.)	Consent Order	10/4/2016	Servicemembership
Housing Authority of Bossier City (W.D. La.)	Consent Decree	10/6/2016	Disability & Race

Charter Bank (S.D. Tex.)	Consent Order	10/12/2016	National Origin
First Federal Bank of Florida (M.D. Fla.)	Consent Decree	10/12/2016	Sex
Pittsfield Charter Township (E.D. Mich.)	Consent Order	10/14/2016	Religion
Nistler (Nistler II) (D. Mont.)	Consent Order	10/28/2016	Disability
San Diego Family Housing, LLC (S.D. Cal.)	Consent Order	11/1/2016	Servicemembership
Southwind Village, LLC (M.D. Fla.) (Carl Bruckler)	Judicial Decision (Default Judgement)	11/18/2016	Familial Status
City of Port Jervis (S.D.N.Y.)	Consent Decree	11/23/2016	Religion
Dawn Properties, Inc. (S.D. Miss.)	Consent Order	12/2/2016	Disability
Goss (M.D. Fla.)	Consent Order	12/12/2016	Race/testing program
Wygul (W.D. Tenn.)	Consent Order	12/15/2016	Sex
Charter Bank (S.D. Tex.)	Consent Order	1/3/2017	National Origin
Guardian Savings Bank & Union Savings Bank (S.D. Ohio)	Consent Order	1/3/2017	Race
United States v. Silverstein Properties, Inc. (S.D.N.Y.)	Consent Decree	1/12/2017	Disability
JPMorgan Chase Bank, N.A. (S.D.N.Y.)	Consent Order	1/20/2017	Race
United States v. Webster AV Management, LLC (S.D.N.Y.) (formally United States v. Strulovitch (S.D.N.Y.))	Judicial Decision (Preliminary Injunction)	1/26/2017	Disability
Albanese Organization, Inc. (S.D.N.Y.)	Consent Decree (Partial)	2/13/2017	Disability
Edmunds (D. Minn.)	Consent Order	2/23/2017	Race
United States v. Friedman Residence, LLC (S.D.N.Y.)	Consent Decree	2/24/2017	Disability
City of Sterling Heights (E.D. Mich.)	Consent Order	3/1/2017	Religion
Trumbull Housing Authority (N.D. Ohio)	Consent Order	3/2/2017	Disability
Encore Management (S.D. W.Va.) (James)	Judicial Decision (Default Judgement)	3/20/2017	Sex
Town of Colorado (D. Ariz)	Judicial Decision (Order Granting Injunctive Relief)	4/18/2017	Religion
United States v. Katz (D. Mont.)	Judicial Decision (Verdict)	5/17/2017	Disability

Bernards Township (D. N.J.)	Settlement Agreement	5/30/2017	Religion
Pritchard (D. Kan.)	Settlement Agreement	6/2/2017	Familial Status
City of Des Plaines, Illinois (N.D. Ill.)	Settlement Agreement	6/6/2017	Religion
Dominic Properties (D. Minn.)	Settlement Agreement	6/7/2017	Familial Status
Crowe (M.D. Ala.)	Settlement Agreement	6/16/2017	Servicemembership
City of Jackson (S.D. Miss.)	Consent Decree	6/26/2017	Disability
City of Jacksonville (M.D. Fla.)	Consent Decree	6/29/2017	Disability
J & R Associates (D. Mass.)	Settlement Agreement	7/6/2017	Race
COPOCO Community Credit Union (E.D. Mich.)	Settlement Agreement	7/6/2017	Servicemembership
Walden (N.D. W. Va.)	Consent Decree (last one during FY 16-18)	7/10/2017	Sex
Trump Village Section IV Inc. (E.D.N.Y.)	Settlement Agreement	7/18/2017	Disability
505 Central Avenue Corp. (S.D.N.Y.)	Settlement Agreement	7/20/2017	Disability
Bensalem Township (E.D. Pa.)	Settlement Agreement	9/1/2017	Religion
Appleby (W.D. Wash.)	Settlement Agreement	9/6/2017	Familial Status
Garden Grove, LLC (D. Minn.)	Settlement Agreement	9/12/2017	Disability
Housing Authority of the City of Anderson, Indiana (S.D. Ind.)	Settlement Agreement	9/14/2017	Sex & Disability
CitiFinancial Credit Co. (N.D. Tex.)	Settlement Agreement	9/18/2017	Servicemembership
Westlake Services, LLC (C.D. Cal.)	Settlement Agreement	9/27/2017	Servicemembership
VP2, LLC (D. Minn.)	Settlement Agreement	9/28/2017	Disability
Kansas City, Kansas Housing Authority (D. Kan.)	Settlement Agreement	9/29/2017	Sex
FY 2018 (28 cases)	28 cases in FY 18		
Tjoelker	Settlement Agreement	10/3/2017	Sex
Euramex Management Group, LLC (Wesley Apartment Homes, LLC)	Settlement Agreement	10/20/2017	Race
United States v. DeRaffele (D. Mass.)	Judicial Decision	10/30/2017	Familial Status
United States v. Salem (D. S.D.)	Settlement Agreement	11/23/2017	Disability
Park City Communities, (fka Bridgeport H.A. (D. Conn.)	Settlement Agreement	11/28/2017	Disability

MSM Brothers, Inc. d/b/a White Cliffs at Dover (D. N.H.)	Settlement Agreement	12/12/2017	Familial Status
Jarrah; aka Yurman, Land Guardian, Inc., f/d/b/a Gaslamp, d/b/a 360 Midtown (S.D. Tex.)	Settlement Agreement	2/1/2018	Race
PHH Mortgage Corp. (D. N.J.)	Settlement Agreement	2/6/2018	Servicemembership
City and County of Honolulu, PM Autoworks Inc, d/b/a All Island Towing (D. Haw.)	Settlement Agreement	2/15/2018	Servicemembership
BMW Financial Services (D. N.J.)	Settlement Agreement	2/22/2018	Servicemembership
Kips Bay Towers Condominium, Inc. (S.D.N.Y.)	Settlement (Stipulated)	2/28/2018	Disability
Fairfax Manor Group, LLC (W.D. Tenn.)	Settlement Agreement	3/19/2018	Disability
Webb (E.D. Mo.)	Settlement Agreement	3/19/2018	Sex
Lawrence Downtown Holdings LLC (formerly United States v. Equity Residential) (S.D.N.Y.)	Settlement (Stipulated w/Dismissal)	3/23/2018	Disability
Westview Park Apartments, L.P. (D. Minn.)	Settlement Agreement	4/11/2018	Disability
Belshaw (C.D. Cal.)	Settlement Agreement	4/11/2018	Servicemembership
Gingsburg Development, LLC (S.D.N.Y)	Settlement Agreement	4/12/2018	Disability
Riexinger (E.D. Wash.)	Settlement Agreement	4/12/2018	Disability
Notre Dame de Namur University (N.D. Cal.)	Settlement Agreement	4/19/2018	Disability
KleinBank (D. Minn.)	Settlement Agreement	5/8/2018	Race
Kelly (D. S.D.)	Settlement Agreement	6/29/2018	Sex
Pacific Mercantile Bank	Settlement Agreement	7/18/2018	Race & National Origin
The Home Loan Auditors (N.D. Cal.)	Settlement Agreement (Partials on 8/2 and 8/21)	8/2/2018	National Origin
Irvin (W.D. Okla.)	Settlement Agreement	8/10/2018	Disability
Village of Tinley Park, Illinois (N.D. Ill.)	Settlement Agreement	8/24/2018	Race
Twin Creek Apartments, LLC d/b/a/ Pavilion at Twin Creek (D. Neb.)	Settlement Agreement	9/11/2018	Servicemembership
Northwest Trustee Services, Inc. (W.D. Wash)	Settlement Agreement	9/26/2018	Servicemembership
United Communities LLC (D. N.J.)	Settlement Agreement	9/27/2018	Servicemembership

Criminal Section: Hate Crimes Cases (FY 2016-2018)

Case	Date	Charge or Conviction
FY 2016 (20 cases)		
United States v. Garza, et al.	2/17/2016	Settlement Agreement (Plea)
US v. James Hill	1/19/2016	Charge (Indictment)
	1/23/2018	Conviction
US v. Ted Hakey	2/11/2016	Conviction
US v. Martin Schnitzler	2/12/2016	Conviction
US v. Randy Metcalf	3/30/2016	Conviction
US v. Jedediah Stout	4/18/2016	Conviction
US v. Omar Martinez, et al.	4/27/2016	Charge
US v. Gil Payne	5/13/2016	Conviction
US v. John Vangastal	5/19/2016	Conviction
US v. Matthew Gust	5/19/2016	Conviction
US v. Jose Saucedo, et al.	7/7/2016	Charge
	4/5/2018	Conviction
US v. Charles Butler, et al.	7/29/2016	Charge
United States v. Butler	11/9/2016	Settlement Agreement (Plea)
	11/9/2016	Conviction
US v. Curtis Allen, et al.	10/14/2016	Charge
US v. Robert Paschalis	11/22/2016	Conviction
US v. Ryan Kyle	11/28/2016	Charge
United States v. Kyle	2/23/2017	Settlement Agreement (Plea) Conviction
US v Armando Sotelo	11/29/2016	Conviction
US v. Daniel Fisher	11/30/2016	Conviction
US v. Justin Whittington	12/5/2016	Conviction
United States v. Vallum	11/2/2016	Settlement Agreement (Plea)
US v. Joshua Vallum	12/21/2016	Conviction

FY 2017 (16 cases)		
United States v. Martinez	11/26/2016	Settlement Agreement (Plea)
	3/17/2017	Conviction
United States v. Schneider	1/4/2017	Settlement Agreement (Plea)
	2/7/2017	Conviction
US v. Dylann Roof	12/15/2016	Conviction
	1/10/2017	Court Order
US v. James Jones	1/23/2017	Charge
	2/8/2017	Conviction
US v. Robert Doggart	2/16/2017	Conviction
US v. Shane Rucker	2/16/2017	Charge
US v. William Dennis, et al.	3/10/2017	Conviction
	4/4/2017	Conviction
US v. Michael Kadar	4/21/2017	Charge
US v. Samuel Whitt	5/24/2017	Charge
US v. Gerald Wallace	6/15/2017	Charge
	10/18/2017	Conviction
US v. Marq Perez	6/22/2017	Charge
	7/16/2018	Conviction
US v. James Medina	8/16/2017	Conviction
US v. Mark Porter	9/15/2017	Charge
	3/22/2018	Conviction
United States v. Burgess	3/16/2017	Charge
	11/28/2017	Conviction
US v. Ray Llegend	12/1/2017	Conviction
US v. Preston Howard	12/13/2017	Charge
	5/9/2018	Conviction
	3/28/2018	Conviction

FY 2018 (21 cases)		
US v. David Howard	2/6/2018	Charge
	2/27/2018	Conviction
US v. Merced Cambero	2/16/2018	Conviction
US v. William Syring	2/21/2018	Charge
US v. Michael Kadar	2/28/2018	Charge
US v. Izmir Koch	3/21/2018	Charge
	12/17/2018	Conviction
US v. Christopher Beckham	4/4/2018 6/4/2018	Charge Court Order (Residential Treatment Program)
US v. Patrick Stein et al.	4/18/2018	Conviction
US v. John Taylor	6/21/2018	Charge
	8/30/2018	Court Order (Not Guilty)
US v. Michael Hari, et al.	6/21/2018	Charge
US v. Glenn Halfin	6/22/2018	Charge
US v. James Fields, Jr.	6/27/2018	Charge
US v. Dustin Hughes	6/29/2018	Conviction
US v. Terry Knope, et al.	7/26/2018	Charge
US v. Nolan Brewer	8/16/2018	Charge
US v. Maurice Diggins, et al.	8/27/2018	Charge
US v. Chadwick Grubbs	9/13/2018	Charge
United States v. Nucera	11/1/2017 10/31/2017	Charge
United States v. Shelton	1/4/2018	Settlement Agreement (Plea)
US v. Chancler Encalade	9/18/2017	Conviction
US v. Adam Purinton	6/9/2017	Charge
United States v. Purinton	5/21/2018	Conviction Settlement Agreement (Plea)

Criminal Section: Color of Law Cases (per Press Releases) (FY 2016-2018)

Name of Case	Resolution Date	FY	Type of Resolution	Link to DOJ Press Release
U.S. v. Robert McGee	10/13/2015	FY16	guilty plea	https://www.justice.gov/opa/pr/former-mamou-louisiana-police-chief-sentenced-second-former-police-chief-pleads-guilty-firing
U.S. v. Bliss Barber Worrell	10/26/2015	FY16	guilty plea	https://www.justice.gov/opa/pr/former-st-louis-assistant-prosecutor-pleads-guilty-concealing-police-officers-assault
U.S. v. Randy T. Doss	10/29/2015	FY16	guilty plea	https://www.justice.gov/opa/pr/former-tate-county-mississippi-sheriff-s-deputy-pleads-guilty-unlawful-tasing
Investigation into death of Anastasio Hernandez Rojas	11/6/2015	FY16	closed investigation with no charges	https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas
Investigation into death of Dontre Hamilton	11/10/2015	FY16	closed investigation with no charges	https://www.justice.gov/opa/pr/federal-officials-close-review-death-dontre-hamilton
U.S. v. Chris Miles	11/17/2015	FY16	guilty plea	https://www.justice.gov/opa/pr/former-tal-lassee-alabama-assistant-police-chief-pleads-guilty-beating-suspect-during
U.S. v. Jeanette Sue Barnes	11/18/2015	FY16	guilty plea	https://www.justice.gov/opa/pr/former-carroll-county-tennessee-sheriff-s-office-lieutenant-pleads-guilty-using-taser
U.S. v. Eddie Rodas-Castro	1/13/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and
U.S. v. William Houghton	1/13/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/two-us-bureau-prisons-corrections-officers-plead-guilty-assaulting-prison-inmate-and
U.S. v. Justin Watson	1/20/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/former-madison-county-alabama-deputy-pleads-guilty-lying-under-oath-obstruct-investigation

U.S. v. Robert C. Nalley	2/1/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/former-maryland-circuit-court-judge-pleads-guilty-civil-rights-violation
U.S. v. Shawn D. Shaw	2/5/2016	FY16	bench conviction	https://www.justice.gov/opa/pr/new-jersey-correctional-officer-sentenced-25-years-prison-sexual-abuse-detainee
U.S. v. Theodore Robert	2/8/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/former-south-bend-indiana-police-officer-pleads-guilty-violating-civil-rights-arrestee
U.S. v. James Beckham	2/26/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault
U.S. v. Robert E. Burns	2/29/2016	FY16	guilty plea	https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html
U.S. v. Byron Benjamin Lassalle	2/29/2016	FY16	guilty plea	https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html
U.S. v. Wade Bergeron	2/29/2016	FY16	guilty plea	https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html
U.S. v. Bret Klein Broussard	2/29/2016	FY16	guilty plea	https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html
U.S. v. Wesley Hayes	2/29/2016	FY16	guilty plea	https://www.theadvocate.com/acadiana/news/crime_police/article_ae11c254-d234-5625-89e6-16a0df33cc25.html
U.S. v. Matthew McConniel	3/2/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault
U.S. v. Berthurm Allen	3/3/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/former-alcorn-state-university-police-officer-pleads-guilty-assaulting-former-student

U.S. v. Randel Branscum	3/3/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/former-jail-administrator-stone-county-arkansas-pleads-guilty-instructing-inmates-assault
U.S. v. Thomas Carroll	4/6/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/former-st-louis-police-officer-pleads-guilty-violating-civil-rights-assaulting-arrestee
Investigation into death of Jamal Clark	6/1/2016	FY16	closed investigation with no charges	https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-jamar-clark
U.S. v. Anthony Heath	6/29/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/berrien-county-georgia-sheriff-pleads-guilty-using-excessive-force-against-arrestees
U.S. v. Daniel Winters	7/14/2016	FY16	jury conviction	https://www.justice.gov/opa/pr/stevenson-alabama-police-chief-sentenced-assaulting-and-failing-protect-arrestee
U.S. v. Matthew Corder	7/22/2016	FY16	jury conviction	https://www.justice.gov/opa/pr/former-deputy-bullitt-county-kentucky-sheriff-s-office-convicted-civil-rights-violations
U.S. v. Willie Fred Knowles	8/5/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/former-homer-louisiana-police-officer-pleads-guilty-civil-rights-violation
U.S. v. Mark A. Cowden	10/17/2016	FY17	jury conviction	https://www.justice.gov/opa/pr/former-hancock-county-west-virginia-sheriff-s-deputy-convicted-using-excessive-force
U.S. v. Gerald Savoy	10/27/2016	FY17	guilty plea	https://www.justice.gov/opa/pr/judge-sentences-three-law-enforcement-officer-defendants-iberia-parish-louisiana-civil-rights
U.S. v. Deonte Pate	11/17/2016	FY17	guilty plea	https://www.justice.gov/opa/pr/former-mississippi-corrections-officer-pleads-guilty-cover-inmate-assault
U.S. v. Romander Nelson	11/17/2016	FY17	guilty plea	https://www.justice.gov/opa/pr/mississippi-corrections-officers-sentenced-inmate-assault-and-cover

Investigation into SRO Benjamin Fields	1/13/2017	FY17	closed investigation with no charges	https://www.justice.gov/opa/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley-south
U.S. v. Lawardrick Marsher	2/2/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover
U.S. v. Robert Sturdivant	2/2/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/mississippi-corrections-officers-plead-guilty-inmate-assault-and-cover
U.S. v. William Kostopoulos	2/3/2017	FY17	jury conviction	https://www.justice.gov/opa/pr/miami-dade-police-detective-convicted-civil-rights-offenses-stealing-property-motorists-and
U.S. v. Wayne Barnes	2/9/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/former-jail-administrator-pleads-guilty-civil-rights-violation-depriving-inmate-medical-care
U.S. v. Kevin Asher	4/12/2017	FY17	jury conviction	https://www.justice.gov/opa/pr/kentucky-deputy-jailer-convicted-jury-assault-inmate-and-obstruction-justice
U.S. v. Peggy Kendrick	4/26/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile
U.S. v. Dennis Fuller	4/26/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/two-former-arkansas-juvenile-detention-officers-plead-guilty-conspiracy-assaulting-juvenile
U.S. v. Michael Slager	5/2/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal
Investigation into death of Alton Sterling	5/3/2017	FY17	closed investigation with no charges	https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling
U.S. v. Shylene Lopez	5/8/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/former-puerto-rico-police-officer-pleads-guilty-civil-rights-violation-assaulting-juvenile

U.S. v. Jeremy Walker	5/9/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/former-corrections-officer-cadet-alabama-pleads-guilty-assaulting-handcuffed-man
U.S. v. William Curtis Howell	5/12/2017	FY17	jury conviction	https://www.justice.gov/opa/pr/former-deputy-jailer-kentucky-river-regional-jail-convicted-federal-charges-related-death
U.S. v. Adam Joseph Neal Graham	5/19/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/former-correctional-officer-west-virginia-pleads-guilty-using-force-punish-detainee
U.S. v. John Sanders	9/6/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/another-former-correctional-officer-pleads-guilty-beating-handcuffed-and-shackled-inmate
Investigation into death of Freddie Gray	9/12/2017	FY17	closed investigation with no charges	https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray
U.S. v. Richard Scavone	9/29/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/former-las-vegas-metropolitan-police-department-officer-pleads-guilty-excessive-use-force
U.S. v. Edgar Daniel Johnson	10/4/2017	FY18	guilty plea	https://www.justice.gov/opa/pr/former-georgia-prison-guard-pleads-guilty-sexual-assault-female-inmates-obstruction-and
U.S. v. Philip Antico	11/21/2017	FY18	jury conviction	https://www.justice.gov/opa/pr/boynton-beach-officers-convicted-using-excessive-force-against-arrestee-and-obstruction
U.S. v. Michael Brown	11/21/2017	FY18	jury conviction	https://www.justice.gov/opa/pr/boynton-beach-officers-convicted-using-excessive-force-against-arrestee-and-obstruction
U.S. v. Gregory McLeod	11/22/2017	FY18	guilty plea	https://www.justice.gov/opa/pr/former-federal-penitentiary-lieutenant-pleads-guilty-abusing-inmate-and-attempting-cover-it
U.S. v. Dwight Hamilton	11/22/2017	FY18	guilty plea	https://www.justice.gov/opa/pr/jailer-pleads-guilty-abusing-inmate-dekalb-county-jail

U.S. v. Jerry Lynn Gragg	11/30/2017	FY18	guilty plea	https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-exploiting-his-authority-sexually-assaulting-individual
U.S. v. Steve C. Jones	12/8/2017	FY18	jury conviction	https://www.justice.gov/opa/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing
U.S. v. Daniel Davis	1/27/2018	FY18	jury conviction	https://www.justice.gov/opa/pr/former-major-angola-prison-convicted-federal-obstruction-offenses-connection-beating
U.S. v. David Prejean	2/21/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-sergeant-pleads-guilty-assault-detainee-0
U.S. v. Mark Frederick	3/2/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-captain-pleads-guilty-aiding-and-abetting-assault-detainee
U.S. v. Jason Benton	4/4/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-arkansas-juvenile-detention-officer-pleads-guilty-assaulting-juvenile-detainee
U.S. v. Anthony Maldonado	4/19/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-maui-police-officer-pleads-guilty-theft-under-color-law-and-witness-tampering
U.S. v. Christopher M. Holbrook	4/19/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-las-cruces-us-customs-and-border-protection-officer-pleads-guilty-obstruction-justice
U.S. v. Edward Gibson	5/8/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-mississippi-detention-officers-plead-guilty-juvenile-assault-and-cover
U.S. v. Alex Huntley	6/12/2018	FY18	jury conviction	https://www.justice.gov/opa/pr/former-tuskegee-police-lieutenant-convicted-civil-rights-offense-assaulting-arrestee
U.S. v. William Dukes Jr.	6/18/2018	FY18	jury conviction	https://www.justice.gov/opa/pr/police-officer-convicted-wrongful-arrest
U.S. v. Michael Kaim	7/2/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-indianapolis-police-officer-sentenced-prison-excessive-force-against-arrestee-veterans

U.S. v. Guillermo Ravelo	7/26/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-police-officer-pleads-guilty-federal-court-conspiracy-deprive-civil-rights-and
U.S. v. Charlie Dayoub	8/3/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights
U.S. v. Raul Fernandez	8/3/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/two-former-biscayne-park-patrol-officers-plead-guilty-deprivation-juvenile-s-civil-rights
U.S. v. Gary Ola	9/12/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/tennessee-jail-supervisor-pleads-guilty-making-false-statements-fbi
U.S. v. Raimundo Atesiano	9/14/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-biscayne-park-chief-police-pleads-guilty-conspiring-other-officers-violate-victims
U.S. v. Timothy Williams	9/18/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/former-st-bernard-parish-correctional-officer-pleads-guilty-violating-civil-rights-inmate
U.S. v. Corderro Cody	10/30/2015	FY16	guilty plea	https://www.justice.gov/opa/pr/pennsylvania-man-pleads-guilty-running-sex-trafficking-operation-compel-multiple-women-and
U.S. v. Ana Angelica Pedro-Juan	12/14/2015	FY16	guilty plea	https://www.justice.gov/opa/pr/leader-human-trafficking-organization-sentenced-over-15-years-exploiting-guatemalan-migrants
U.S. v. Granville Robinson	2/3/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/tennessee-man-pleads-guilty-role-new-orleans-based-sex-trafficking-scheme
U.S. v. Ana Angelica Pedro Juan	2/29/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/remaining-defendant-pleads-guilty-forced-labor-scheme-exploited-guatemalan-minors-ohio-egg
U.S. v. Miguel A. Hernandez	5/11/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/spanish-fugitive-pleads-guilty-connection-prostitution-enterprise-operated-out-florida-hotel

U.S. v. Abdullah Hamidullah	6/17/2016	FY16	guilty plea	https://www.justice.gov/opa/pr/florida-man-pleads-guilty-sex-trafficking-and-interstate-prostitution
U.S. v. Monta Groce	7/15/2016	FY16	jury conviction	https://www.justice.gov/opa/pr/heroin-dealer-convicted-jury-sex-trafficking-and-drug-related-offenses ³⁷⁵⁸
U.S. v. Paul Carter	11/22/2016	FY17	guilty plea	https://www.justice.gov/opa/pr/milwaukee-man-pleads-guilty-sex-trafficking-and-related-crimes
U.S. v. Marcus D. Washington	12/7/2016	FY17	guilty plea	https://www.justice.gov/opa/pr/knoxville-man-pleads-guilty-sex-trafficking-conspiracy-and-drug-offenses
U.S. v. David Q. Givhan	12/13/2016	FY17	jury conviction	https://www.justice.gov/opa/pr/michigan-man-sentenced-235-months-prison-sex-trafficking-and-interstate-transportation
U.S. v. Julio Perez-Torres	1/13/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/master-s-degree-student-pleads-guilty-attempting-entice-minor
U.S. v. Severiano Martinez-Rojas	4/19/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/fourth-defendant-convicted-role-georgia-based-mexican-sex-trafficking-ring
U.S. v. Jovan Rendon-Reyes	4/21/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex-trafficking
U.S. v. Saul Rendon-Reyes	4/21/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex-trafficking
U.S. v. Felix Rojas	4/21/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex-trafficking
U.S. v. Odilon Martinez-Rojas	4/21/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex-trafficking
U.S. v. Guillermina Rendon-Reyes	4/21/2017	FY17	guilty plea	

³⁷⁵⁸ Link has become inactive (accessed Nov. 4, 2019).

U.S. v. Jose Rendon-Garcia	4/21/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex-trafficking
U.S. v. Steven Tucker	9/28/2017	FY17	guilty plea	https://www.justice.gov/opa/pr/new-hampshire-man-pleads-guilty-sex-trafficking-minor
U.S. v. David D. Delay	11/6/2017	FY18	jury conviction	https://www.justice.gov/opa/pr/seattle-area-man-sentenced-33-years-prison-sex-trafficking-teens-and-young-women
U.S. v. Vishnubhai Chaudhari	12/18/2017	FY18	guilty plea	https://www.justice.gov/opa/pr/indian-nationals-sentenced-roles-alien-harboring-scheme-involving-labor-exploitation-nebraska
U.S. v. Leelabahen Chaudhari	12/18/2017	FY18	guilty plea	https://www.justice.gov/opa/pr/indian-nationals-sentenced-roles-alien-harboring-scheme-involving-labor-exploitation-nebraska
U.S. v. Antonio Francisco-Pablo	12/18/2017	FY18	guilty plea	https://www.justice.gov/opa/pr/two-aliens-plead-guilty-connection-labor-trafficking-scheme-targeted-guatemalan-national
U.S. v. Antonia Marcos Diego	12/22/2017	FY18	guilty plea	https://www.justice.gov/opa/pr/two-aliens-plead-guilty-connection-labor-trafficking-scheme-targeted-guatemalan-national
U.S. v. Paul Jumroon	2/15/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/oregon-man-pleads-guilty-forced-labor-and-related-crimes-connection-scheme-coerce-thai
U.S. v. Tyno Keo	3/8/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/texas-couple-sentenced-alien-harboring-scheme-involving-labor-exploitation
U.S. v. Phearom Lay	3/8/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/texas-couple-sentenced-alien-harboring-scheme-involving-labor-exploitation
U.S. v. Bobby Paul Edwards	6/5/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/south-carolina-man-pleads-guilty-forced-labor-compelling-man-intellectual-disability-work

U.S. v. Tanya Jumroon	6/14/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/oregon-woman-pleads-guilty-role-forced-labor-and-visa-fraud-scheme-involving-thai-restaurant
U.S. v. Rashad Sabree	7/25/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/massachusetts-man-pleads-guilty-sex-trafficking-women-exploiting-their-opioid-addiction
U.S. v. Pablo Duran Ramirez	9/17/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/defendant-pleads-guilty-connection-ohio-labor-trafficking-scheme-involving-immigrant-minors
U.S. v. Bridget Lambert	9/18/2018	FY18	guilty plea	https://www.justice.gov/opa/pr/amite-woman-pleads-guilty-conspiring-obtain-forced-labor-woman-disabilities

Immigration and Employee Rights Section Cases (FY 2016-2018)

Defendant or Case	Date of Resolution	Type of Case	Civil Penalty to US	Back Pay (or fund for) & related claims to Charging Party
FY 2016 (20 total)(all settlements)				
North American Shipbuilding, LLC	1/15/15	Retaliation	\$1,750.00	\$15,000.00
Yellow-Checker-Star Transportation	10/1/15	Unfair Documentary Practices	445,000	
The School Board of Miami-Dade County, Florida	10/1/15	Unfair Documentary Practices	90,000	125,000
Postal Express, Inc.	10/14/15	Unfair Documentary Practices		
School Board of Miami	10/22/15	Unfair Documentary Practices	\$90,000	\$30,000
McDonald's USA, LLC	11/1/15	Unfair Documentary Practices	335,000	
Sunny Grove Landscaping & Nursery, Inc.	11/1/15	Unfair Documentary Practices	7,500	
Rio Grande Pak Foods, Ltd.	1/1/16	Unfair Documentary Practices	\$1,800.00	7,200
Freedom Home Care, Inc.	1/19/16	Unfair Documentary Practices	\$400	\$832.00
Barrios Street Realty LLC	3/21/16	Citizenship Status (H-2B abuses/discrimination v. qualified US workers)	\$30,000.00	\$15,000.00
NetJets Services, Inc.	5/13/16	Unfair Documentnary Practices	\$41,480	
Villa Rancho Bernardo Care Center	5/31/16	Unfair Documentary Practices	\$24,000	
Podiatry Residency Programs	6/1/16	Citizenship Status (LPRs & other work-authorized immigrants)	\$65,000	\$141,500
Macy's West Stores, Inc.	6/1/16	Unfair Documentary Practices	\$8,700	\$523.90
Montgomery County Public Schools	6/15/16	Unfair Documentary Practices	0	\$4,450
Powerstaffing, Inc.	6/23/16	Unfair Documentary Practices	\$153,000	
Crookham Company	6/27/16	Unfair Documentary Practices	\$200,000	
Hartz Mountain Industries	8/9/16	Citizenship Status	\$1,400	
Eastridge Workforce Solutions	8/15/16	Unfair Documentary Practices	\$175,000	

Atwork Cumberland Staffing	9/1/16	Unfair Documentary Practices (requiring US birth certificate)	\$1,200	
FY 2017 (13 total)(all settlements)				
American Cleaning Company	10/17/16	Unfair Documentary Practices (requiring US birth certificate)	\$195,000	
Denver Sheriff's Department	11/1/16	Citizenship Status	\$10,000	
Aldine Independent School District	11/22/16	Citizenship Status	\$14,000	
1st Class Staffing, LLC	12/13/16	Unfair Documentary Practices	\$17,600	
J.E.T. Holding Co., Inc.	1/17/17	Citizenship Status	\$12,000	\$40000 back pay fund
Levy Restaurants	2/2/17	Unfair Documentary Practices	\$2,500	
Paragon Building Maintenance, Inc. and Pegasus Building Services Company, Inc.	3/13/17	Unfair Documentary Practices	\$115,000	
Pizzerias, LLC	3/20/17	Unfair Documentary Practices	\$140,000	
Brickell Financial Services Motor Club, Inc. d/b/a Road America Motor Club, Inc. (Unfair Documentary Practices)	4/6/17	Unfair Documentary Practices	34200	
Provisional Staffing Solutions	5/9/17	Unfair Documentary Practices	16290	
Carrillo Farm Labor, LLC	5/23/17	Citizenship Status (H2-B/US workers)	5000	44000
Panda Restaurant Group, Inc.	6/28/17	Unfair Documentary Practices	400000	200000
Sellari's Enterprises, Inc.	6/30/17	Unfair Documentary Practices	12000	
FY 2018 (18 total)(17 settlements & 1 judicial order)				
CitiStaff Solutions, Inc. and CitiStaff Management Group, Inc.	10/6/17	Unfair Documentary Practices	200,000	
InMotion Software, LLC	10/11/17	Retaliation	3621	
Ark Rustic Inn LLC d/b/a Rustic Inn Crabhouse	10/13/17	Unfair Documentary Practices	4000	
Washington Potato Company and Pasco Processing, LLC	11/14/17	Unfair Documentary Practices	100000	

Freeze Pack	11/16/17	Unfair Documentary Practices200000	100000	
Crop Production Services, Inc.	12/18/17	Unfair Documentary Practices	10500	
Omnicare Health	1/23/18	Citizenship Status	3621	
Ichiba Ramen	2/20/18	National Origin	2000	1760
West Liberty Foods, LLC	3/10/18	Unfair Documentary Practices200000	52100	
Themesoft, Inc.	4/20/18	Citizenship Status (asylee)	4543.25	12000
University of California, San Diego	5/10/18	Unfair Documentary Practices200000	4712.4	
Setpoint Systems, Inc.	6/19/18	Unfair Documentary Practices200000	17475	
J.C. Penney	6/25/18	Unfair Documentary Practices200000	14430	11177.6
Triple H Services, Inc.	6/26/18	Citizenship Status (US workers)	15600	85000
Technical Marine Maintenance Texas	6/28/18	Unfair Documentary Practices	757,868	
Clifford Chance US LLP	8/1/18	Citizenship Status (dual citizen)	13200	
Rose Acre Farms, Inc.	8/1/18	Unfair Documentary Practices200000	70000	
Palmetto Beach Hospitality, LLC	9/1/18	Citizenship Status (US citizens)	42000	
		TOTAL	3,302,622.65	

Immigrant and Employee Rights Cases (FY 2016-2018), Including Letters of Resolution

Fiscal Year	Letters of Resolution	Other IEC Cases	Total Cases
FY 2016	41	20	61
FY 2017	44	13	57
FY 2018	31	18	49
	116	51	167

Special Litigation Section Cases (FY 2016-2018)

Defendant	Type of Case	Type of Resolution	Date of Resolution
FY 2016 (8 total)			
Westchester County Jail (NY)	Corrections	Settlement Agreement	11/24/2015
Disability Rights Idaho v. Sonnenberg	Disability	Judicial Memorandum Decision and Order	3/7/2016
City of Miami Police Department (FL)	Law Enforcement	Settlement Agreement	3/10/2016
City of Ferguson	Law Enforcement	Consent Decree	4/19/2016
City of Newark	Law Enforcement	Consent Decree	5/5/2016
Georgia State Hospitals and Georgia Mental Health and Developmental Disabilities Systems (GA)	Disability	Consent Order entering extension of Settlement Agreement	5/27/2016
Alamance County Sheriff's Office	Law Enforcement	Settlement Agreement	8/17/2016
Hinds County Adult Detention Center (MS)	Corrections	Consent Decree	7/19/2016
FY 2017 (4.5 total)			
Yonkers (NY)	Law Enforcement	Settlement Agreement	11/14/2016
St. Louis County Family Court (MO)	Juvenile Justice	Settlement Agreement	12/14/2016

Chicago Police Department (IL)	Law Enforcement	Agreement in principle for CD- later opposed in 10/12/18 Statement of Interest Opposing Proposed Consent Decree (counted as 0.5 Settlements)	1/13/2017
Baltimore Police Department (MD)	Law Enforcement	Consent Decree (and related Judicial Memo/Order)(case counted as CD)	4/7/2017
United States v. Town of Colorado City (AZ)	Law Enforcement	Judicial Decision	4/18/2017
FY 2018 (3 total)			
City of Ville Platte (LA)	Law Enforcement	Settlement Agreement	5/31/2018
Evangeline Parish Sheriff's Office (LA)	Law Enforcement	Settlement Agreement	6/4/2018
Louisiana Use of Nursing Facilities for People with Mental Health Disabilities (LA)	Disability	Settlement Agreement	6/6/2018

Voting Section Cases (FY 2016-2018)

Cases	Date	Basis	Type
FY 2016 (3 enforcement matters resolved)			
United States and the State of Alabama	11/12/2015	NVRA	Settlement
United States and Napa County, California	5/31/2016	VRA sec 203	Settlement
United States and the State of Connecticut	8/5/2016	NVRA	Settlement
FY 2017 (4 enforcement matters resolved)			
NC State NAACP v. North Carolina State Board of Elections	5/15/2017	VRA sec 2	Judicial Resolution (denial of certiorari)
The United States and the Palm Beach County Supervisor of Elections	1/19/2017 1/10/2017	HAVA	Settlement
United States and the State of New York	6/20/2017	NVRA	Settlement
United States v. State of Louisiana	8/21/2017	NVRA	Settlement
FY 2018 (5 enforcement matters resolved)			
Common Cause New York and United States v. Board of Elections in the City of New York	12/14/2017	NVRA	Consent Decree
U.S. v. State of Arizona	2/15/2018	UOCAVA	Consent Decree
U.S. v. State of Wisconsin	6/20/2018	UOCAVA	Consent Decree
United States v. Commonwealth of Kentucky (Judicial Watch v. Grimes)	7/3/2018	NVRA	Consent Decree
United States v. Texas (Veasey v. Abbott)	9/17/2018	VRA sec 2	Judicial Resolution (Unappealed final judgment)

Source: CRT Website; Commission Staff Research