Statement
On behalf of the
National Restaurant Association

ON:  OVERSIGHT OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EXAMINING EEOC’S ENFORCEMENT AND LITIGATION PROGRAMS

TO:  U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS (HELP)

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Chairman Alexander and Ranking Member Murray, thank you for holding this hearing and providing critical oversight on the EEOC’s current questionable and controversial enforcement and litigation practices. My name is Angelo Amador and I am Senior Vice-President and Regulatory Counsel at the National Restaurant Association.

Our Association is the leading business representative for the restaurant and food service industry. The industry is comprised of one million restaurant and foodservice outlets employing 14 million people—about ten percent of the U.S. workforce. Restaurants are job creators and the nation’s second-largest private-sector employer. Despite its size, small businesses dominate the industry; even larger chains are often collections of smaller franchised businesses.

Our Association and its members understand the valuable function the EEOC plays in maintaining a bias-free workplace. However, we have serious concerns about some of the EEOC’s current actions. For example, the lack of transparency by the EEOC creates immeasurable difficulties for companies as they attempt to defend themselves in litigation. In addition, the EEOC is making significant—and sometimes controversial—policy changes by issuing “guidelines” without the publication and comment period that would be required if they followed the formal regulatory process.

Two of the EEOC’s unusual and novel legal theories have proven costly for employers who are increasingly targeted by the EEOC. First, a few years ago, I started hearing
from members about EEOC harassing techniques over the use of background checks, in some cases, as has been pointed out, “the same type of background checks that the EEOC itself uses.” More recently, while the EEOC has tens of thousands of age discrimination complaints that it should address, it has, instead, started investigating some of our member companies that they find suspect—even when no complaint has been filed. In fact, as Chairman Alexander pointed out at the hearing, the EEOC appears to be putting up “Craigslist” ads trying to find complainants, after starting investigations without any individual filing a complaint.

While the EEOC representatives did not seem to know who at the agency may have placed the Craigslist ads, they confirmed that the e-mail addresses used in them belong to the EEOC. We urge you to ask the agency to fully answer the question they were unable to answer at the hearing as to who and why someone has decided that placing these ads on behalf of the EEOC is the proper way to seek complainants when the agency itself is unable to find any through proper channels.

EEOC General Counsel Lopez seemed to have insinuated in his answer that the ads may not have been placed by the agency. If that is the case, why then has the EEOC not tried to find out who and under what authority are these ads being placed on behalf of the agency. As you can see from a copy of the actual Craigslist advertisement below, it appears extremely improbable that anyone else other than agency staff or someone working under its authority, would have placed this advertisement:

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Meanwhile, as the EEOC continues to pursue investigations that do not involve a complainant, the backlog of actual complaints continues to grow and now stands at over 75,000. Our industry is not alone, as the EEOC continues to investigate at least three accounting firms—none of which had a complainant—where partners voluntarily adopted a mandatory retirement age.

One of the most notorious investigations in the restaurant industry involves the Texas Roadhouse restaurant chain—which is also the subject of the Craigslist advertisement copied above. The EEOC began this investigation in 2011 claiming age discrimination—because Texas Roadhouse's hosts, bartenders, and servers seem too young. There was no complaint of such a violation, but the agency's actions forced Texas Roadhouse to fight a lengthy and costly court battle—not to mention the cost to protect its public image against litigation by press release.

As highlighted at the hearing, the EEOC has been losing these lawsuits—which were premised on controversial legal arguments from the start—while receiving strong rebukes from the judges deciding these cases. The EEOC representatives acknowledged that they issue press statements to highlight these cases and
investigations at their outset, but do nothing to clear the names and reputations of employers that are cleared of any wrongdoing by the courts.

Meanwhile, employers are left with the task of cleaning the damage to their reputation from headline grabbing press releases when they have not broken the law as the EEOC alleges under dubious legal arguments.

Another recent example of EEOC’s overreach is apparent in its discrimination claims against employers that offer discounted health insurance to employees who participate in wellness programs. These programs are allowed, and encouraged, under the Affordable Care Act. Regardless, the EEOC has been filing lawsuits against employers under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, claiming that the increased health insurance premiums paid by employees who do not participate are discriminatory.

The National Restaurant Association recently joined other business organizations in asking Congress to pass legislation to increase EEOC transparency and accountability and reaffirm existing law on employee wellness programs. We are encouraged by Chairman Alexander’s own legislation to tackle some of these issues.

Once again, while we support the EEOC’s mission of preventing discrimination in the workplace, we are troubled by its pursuit of frivolous investigations, particularly those that are not driven by employee complaints.

Thank you again for your vital oversight of the EEOC. We look forward to continuing to work with you and your staff to make sure the EEOC properly addresses the concerns outlined above.