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## Toward an Intellectual Free Enterprise System as it Relates to the Professional Standards of the Uniform Guidelines on Employee Selection

J. Clay Smith Jr.

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DR. J. CLAY SMITH, JR.  
ACTING CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
BEFORE THE  
NATIONAL URBAN LEAGUE, INC.  
FORUM ON CIVIL RIGHTS IN THE 80'S  
LONGWORTH HOUSE OFFICE BUILDING  
WASHINGTON, D.C.

NOVEMBER 4, 1981

TOWARD AN INTELLECTUAL FREE ENTERPRISE SYSTEM AS IT RELATES  
TO THE PROFESSIONAL STANDARDS OF THE UNIFORM  
GUIDELINES ON EMPLOYEE SELECTION

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TODAY, I WOULD LIKE TO TALK TO YOU ABOUT AN EXTREMELY IMPORTANT SUBJECT OF GROWING CONCERN -- EMPLOYMENT TESTING AND ITS IMPACT UPON EMPLOYMENT DISCRIMINATION. AS YOU KNOW, MANY EMPLOYERS USE TESTS OR OTHER SELECTION PROCEDURES TO HIRE, PROMOTE, OR ASSIGN EMPLOYEES. THE USE OF THESE SELECTION PROCEDURES MAY OPERATE TO DISPROPORTIONATELY EXCLUDE MINORITIES AND WOMEN FROM THE WORKFORCE. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AS THE LEAD AGENCY IN ENFORCING THE FEDERAL LAWS CONCERNING NON-DISCRIMINATION IN EMPLOYMENT HAS BEEN CONCERNED ABOUT THIS PROBLEM FOR MANY YEARS.

TITLE VII DOES NOT FORBID EMPLOYERS TO USE TESTS OR OTHER SELECTION PROCEDURES, EVEN WHEN THEY ADVERSELY AFFECT THE EMPLOYMENT OPPORTUNITIES OF MINORITIES AND WOMEN. WHAT IT DOES DO IS TO PROVIDE THAT, IF THE USE OF THESE TESTS RESULTS IN ADVERSE IMPACT, THE EMPLOYER MUST JUSTIFY THEIR USE BY SHOWING THAT THEY ARE MANIFESTLY RELATED TO JOB PERFORMANCE. IF THE EMPLOYER CANNOT MAKE THIS SHOWING, THEN USE OF THE SELECTION DEVICE IN QUESTION IS PROHIBITED AS DISCRIMINATORY. THE GOVERNMENT HAS ATTEMPTED TO PROVIDE GUIDANCE TO EMPLOYERS AND OTHERS AS TO WHAT CONSTITUTES "ADVERSE IMPACT" AND "JOB RELATEDNESS", OR "VALIDITY." THIS GUIDANCE IS CONTAINED IN A

DOCUMENT CALLED THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES.

THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES WERE ADOPTED ON AUGUST 25, 1978 BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE DEPARTMENTS OF LABOR AND JUSTICE, AND THE OFFICE OF PERSONNEL MANAGEMENT, THEN KNOWN AS THE U.S. CIVIL SERVICE COMMISSION. THEY WERE SUBSEQUENTLY ADOPTED BY THE OFFICE OF REVENUE SHARING IN THE DEPARTMENT OF THE TREASURY. THE UNIFORM GUIDELINES, OF UGESP, THEREFORE REPRESENT A UNIFIED POSITION BY ALL GOVERNMENT AGENCIES WITH EEO ENFORCEMENT RESPONSIBILITIES ON THE PROPER USE OF TESTS AND OTHER SELECTION OR PROMOTION PROCEDURES. THE UGESP WERE LATER AMPLIFIED AND INTERPRETED, BUT NOT MODIFIED, BY THE ISSUANCE OF TWO SETS OF QUESTIONS AND ANSWERS, ONE ON MARCH 2, 1979, AND THE SECOND ON MAY 2, 1980. ALTHOUGH THE GUIDELINES HAVE BEEN THE SUBJECT OF CONSIDERABLE RECENT DISCUSSION AND REVIEW, THEY HAVE NOT BEEN ALTERED, AND REMAIN THE STATED POLICY OF ALL FEDERAL AGENCIES CHARGED WITH CIVIL RIGHTS ENFORCEMENT.

THE UGESP DO NOT HAVE THE FORCE OF LAW. THE BASIC LEGAL RIGHTS OF INDIVIDUALS AND GROUPS DISCRIMINATED AGAINST BY THE USE OF TESTS AND OTHER SELECTION PROCEDURES ARE CONTAINED IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED. NEVERTHELESS, THE UGESP HAVE SEVERAL IMPORTANT FUNCTIONS. FIRST, THEY SET FORTH THE STATE OF THE LAW AND INCORPORATE JUDICIAL INTERPRETATIONS OF THE PROCESS BY WHICH TITLE VII RIGHTS ARE ENFORCED. WHILE THE UGESP, AS APPLIED BY EEOC, ARE NOT REGULATIONS AND THEREFORE HAVE NO BINDING EFFECT ON THE COURTS, THEY ARE IMPORTANT INsofar AS THEY ARE CONSISTENT WITH

FAVORING LEGAL OPINION, AND ARE GIVEN DEFERENCE BY THE COURTS. ADDITIONALLY, THE UGESP CONTAIN STATEMENTS OF ADMINISTRATIVE POLICY

WITH REGARD TO THE PROCESSING OF CHARGES AND SYSTEMIC INVESTIGATIONS INVOLVING THE USE OF TESTS AND OTHER SELECTION PROCEDURES BY EEOC, WHILE NOT IMPINGING ON THE FREEDOM OF INDIVIDUALS TO SEEK REMEDIES IN THE COURTS, THE UGESP PLACE LIMITS ON WHAT THE COMMISSION WILL CONSIDER AS EVIDENCE OF VIOLATION OF TITLE VII. FINALLY, THE UGESP INCORPORATE AND RESTSTATE PROFESSIONAL STANDARDS WITH REGARD TO THE SUFFICIENCY OF EVIDENCE SUPPORTING THE VALIDITY OR JOB-RELATEDNESS OF TESTS AND OTHER SELECTION PROCEDURES. THESE THREE FUNCTIONS, WHILE INTERRELATED, DESERVE SEPARATE DISCUSSION.

LEGAL STANDARDS. THE BASIC STATEMENT OF LEGAL RESPONSIBILITIES OF TEST USERS, AS CONTAINED IN SECTION 3A OF THE UGESP, IS THAT: "THE USE OF ANY SELECTION PROCEDURE WHICH HAS AN ADVERSE IMPACT ON THE HIRING, PROMOTION OR OTHER EMPLOYMENT OR MEMBERSHIP OPPORTUNITIES OF MEMBERS OF ANY RACE, SEX, OR ETHNIC GROUP WILL BE CONSIDERED TO BE DISCRIMINATORY AND INCONSISTENT WITH THESE GUIDELINES, UNLESS THE PROCEDURE HAS BEEN VALIDATED IN ACCORDANCE WITH THESE GUIDELINES." THIS STATEMENT STEMS DIRECTLY FROM THE UNITED STATES SUPREME COURT DECISIONS IN GRIGGS V. DUKE POWER Co., 401 U.S. 424 (1971), ALBEMARLE PAPER Co. v. MOODY, 422 U.S. 405 (1975), AND WASHINGTON V. DAVIS, 426 U.S. 229 (1976). IN ALL THREE OF THOSE CASES THE COURT HELD THAT THE EEOC GUIDELINES WERE ENTITLED TO "GREAT DEFERENCE" IN DETERMINING WHETHER SELECTION PROCEDURES COMPLY WITH TITLE VII. ALTHOUGH THESE DECISIONS REFERRED TO EARLIER EEOC GUIDELINES WHICH WERE REPLACED BY THE UGESP, FEDERAL COURTS OF APPEALS HAVE GIVEN THE UGESP THE SAME DEFERENCE, AND, WHEN DISTRICT COURTS HAVE NOT FOLLOWED THE UGESP, HAVE REMANDED CASES WITH SPECIFIC INSTRUCTIONS TO EXAMINE THE EMPLOYER'S SELECTION PROCEDURES IN ACCORDANCE WITH THE

UNIFORM GUIDELINES TO DETERMINE WHETHER THE PROCEDURES HAVE BEEN PROPERLY VALIDATED. U.S. v. CITY OF BUFFALO, 633 F.2D 643 (2ND CIR. 1980), JOHNSON v. UNCLE BEN'S, INC., 628 F.2D 419 (5TH CIR. 1980), VACATED ON OTHER GROUNDS, \_\_\_ U.S. \_\_\_. 25 FEP CASES 737 (1981). DECISIONS APPLYING THE UGESP TO SPECIFIC SELECTION PROCEDURES HAVE BEEN HANDED DOWN BY DISTRICT COURTS IN ALL BUT THE FIRST CIRCUIT, AND HAVE BEEN UPHELD ON APPEAL IN SEVEN CIRCUITS. TO DATE, ONLY ONE APPELLATE DECISION HAS GIVEN LESS THAN FULL ENDORSEMENT TO THE USE OF UGESP AS A STANDARD FOR DETERMINING VIOLATION. IN GUARDIANS ASS'N v. CIVIL SERVICE COMM'N, 633 F.2D 232 (2ND CIR. 1980) (GUARDIANS IV), THE SECOND CIRCUIT CAUTIONED AGAINST OVERLY RIGID APPLICATION OF THE GUIDELINES. THE COURT OF APPEALS NOTED THAT THE GUIDELINES COMBINED THE WEIGHT OF EXPERT PSYCHOLOGICAL OPINION WITH THE LEGAL FORCE DERIVED FROM AGENCY ADMINISTRATIVE INTERPRETATION, BUT ADMONISHED THAT THIS WEIGHT WAS LESS THAN THE FULL FORCE OF LAW AND THAT FAILURE TO COMPLY WITH THE GUIDELINES DID NOT ESTABLISH A PER SE VIOLATION OF TITLE VII. WHILE THE COURT PROCEEDED TO CRITICIZE SEVERAL ASPECTS OF THE GUIDELINES, IT ALSO AFFIRMED THE DISTRICT COURT'S FINDING THAT THE TEST PLACED BEFORE IT WAS INVALID. AND, THREE MONTHS AFTER THE GUARDIANS DECISION, ANOTHER PANEL OF THE SAME COURT EXPRESSLY ADOPTED THE UGESP AS THE STANDARD FOR DETERMINING VALIDITY IN THE CITY OF BUFFALO CASE CITED ABOVE.

THUSFAR, ONLY ONE DISTRICT COURT CASE HAS REJECTED THE GUIDELINES OUTRIGHT AS A STANDARD FOR FIXING LIABILITY. IN A RECENT DECISION, CORMIER v. PPG INDUSTRIES, 26 FEP CASES 652 (W.D.LA. 1981), THE DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA REJECTED THE % RULE ARTICULATED BY THE GUIDELINES AS BEING AN INAPPROPRIATE

REFLECTION OF CURRENT PROFESSIONAL STANDARDS. THE CASE IS PENDING ON APPEAL. IT STANDS IN SHARP CONTRAST TO A NUMBER OF RECENT DECISIONS, NOTABLY THE RULING IN U.S. v. COUNTY OF FAIRFAX, 25 FEP CASES 662 (E.D.VA. 1981), WHICH STRICTLY APPLIED THE GUIDELINES IN DETERMINING WHETHER DEFENDANT'S VALIDITY STUDIES WERE SUFFICIENT TO SATISFY TITLE VII.

WHEN THE USE OF SELECTION OR PROMOTION PROCEDURES HAS BEEN FOUND TO VIOLATE TITLE VII, COURTS HAVE GENERALLY ORDERED AS A REMEDY THE DEVELOPMENT OF NEW PROCEDURES AND THEIR VALIDATION IN ACCORDANCE WITH THE UGESP. FIREFIGHTERS INSTITUTE v. CITY OF ST. LOUIS, 616 F.2D 350 (8TH CIR. 1980); U.S. v. COUNTY OF FAIRFAX, SUPRA. THE VALIDITY ON THE NEW SELECTION PROCEDURES IS THEN SUBJECT TO COURT SCRUTINY AND EVALUATION. U.S. v. STATE OF NEW YORK, 474 SUPP. 1103 (N.D.N.Y. 1979). IN ONE CASE, KIRKLAND v. NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, 628 F. 2D 792 (2ND CIR. 1980), THE COURT HELD THAT THE NEW TEST DESIGNED UNDER COURT ORDER WAS PROPERLY VALIDATED UNDER THE GUIDELINES ONLY WHEN TEST SCORES OF BLACK APPLICANTS WERE ADJUSTED TO TAKE INTO ACCOUNT DISPARITIES IN TEST PERFORMANCE WHICH WERE NOT ASSOCIATED WITH SIMILAR DISPARITIES JOB PERFORMANCE. THUS, THE SUPPORT GIVEN TO THE UGESP BY THE COURTS OFTEN GOES BEYOND THE SPECIFIC DETERMINATION OF DISCRIMINATION INTO THE REMEDY PHASE.

ADMINISTRATIVE POLICY. MANY OF THE PROVISIONS OF THE UGESP ARE NOT BASED ON LAW, BUT ARE MATTERS OF ADMINISTRATIVE DISCRETION. THESE PROVISIONS INCLUDE THE BOTTOM LINE, THE 80% RULE, AND THE SCOPE OF THE SEARCH FOR ALTERNATIVE SELECTION PROCEDURES REQUIRED TO JUSTIFY THE USE OF A GIVEN TEST. THE BOTTOM LINE PRINCIPLE, WHICH

HOLDS THAT, IN MOST INSTANCES, FEDERAL ENFORCEMENT AGENCIES WILL NOT TAKE ACTION AGAINST A SPECIFIC SELECTION PROCEDURE IF THE TOTAL SELECTION PROCESS DOES NOT HAVE AN ADVERSE IMPACT, WAS ADOPTED AT THE REQUEST OF THE BUSINESS COMMUNITY AND IN CONSIDERATION OF OUR LIMITED RESOURCES.

THE "80% RULE" FOR DETERMINING ADVERSE IMPACT IS ANOTHER MATTER OF ADMINISTRATIVE DISCRETION. THE RULE WAS ORIGINALLY ADOPTED WITHIN THE FEDERAL GOVERNMENT BY OFCCP AS A RULE OF THUMB TO INDICATE WHETHER FURTHER INQUIRY INTO AN EMPLOYER'S HIRING AND PROMOTION PRACTICES WOULD BE JUSTIFIED. IT PROVIDES THAT, WHERE AN EMPLOYER'S RATE OF SELECTION FOR A GIVEN PROTECTED GROUP IS 80% OF THAT WHICH WOULD BE EXPECTED AS A MATTER OF RANDOM SELECTION, NO FURTHER INQUIRY WILL BE MADE. THE RULE WAS NOT INTENDED TO BE A LEGAL DEFINITION OF DISCRIMINATION, AND, IN MOST COURT CASES, EVIDENCE OF STATISTICAL SIGNIFICANCE IS CONSIDERED ALONG WITH DETERMINATIONS OF WHETHER THE 80% RULE WAS VIOLATED. NEVERTHELESS, COURTS HAVE FOUND ADVERSE IMPACT AND, WITH THE ABSENCE OF ADEQUATE VALIDITY EVIDENCE, DISCRIMINATION, WHEN THE 80% RULE HAS BEEN VIOLATED, REGARDLESS OF THE EVIDENCE OF STATISTICAL SIGNIFICANCE. U.S. v. CITY OF MONTGOMERY, 19 EPD PAR. 9239 (N.D.ALA 1979); U.S. v. SAN DIEGO COUNTY, 20 FEP CASES 1425 (S.D.CAL. 1979); FIREFIGHTERS v. CITY OF ST. LOUIS, SUPRA. WHILE THIS VIEW HAS NOT BEEN UNIFORM, SEE, E.G., RICH v. MARTIN MARIETTA, 467 F.SUPP. 587 (D.COL. 1979), THOSE COURTS WHICH HAVE FAILED TO FOLLOW AT LEAST AS STRINGENT A STANDARD AS THE 80% RULE ARE IN THE DISTINCT MINORITY. THE RULE APPEARS TO COINCIDE WITH THE SUPREME COURT'S INTERPRETATION OF STATISTICAL SIGNIFICANCE IN ASTENEDA v. PARTIDA, 434 U.S. 482 (1977), AND HAS BEEN ACCEPTED GENERALLY.

THE SCOPE OF AN APPROPRIATE SEARCH FOR ALTERNATIVE SELECTION DEVICES HAS BEEN A MATTER OF CONSIDERABLE DEBATE. THE 1970 EEOC GUIDELINES REQUIRED THAT EMPLOYERS USING SELECTION PROCEDURES WITH ADVERSE IMPACT SHOW, IN ADDITION TO THE VALIDITY OF THE SELECTION PROCEDURES, THAT ALTERNATIVE PROCEDURES WITH A LESSER ADVERSE IMPACT ARE NOT AVAILABLE FOR USE. THIS WAS INTERPRETED BY SOME AS A REQUIREMENT FOR A "COSMIC" SEARCH RESULTING IN A POSITIVE CONCLUSION THAT NOTHING ELSE EXISTS ANYWHERE IN THE UNIVERSE. THE UNIFORM GUIDELINES ATTEMPTED TO ELIMINATE THIS MISPERCEPTION BY CLEARLY STATING THAT: (1) THE SEARCH FOR ALTERNATIVES IS REQUIRED ONLY DURING THE COURSE OF A VALIDITY STUDY; AND (2) THE SEARCH NEED ONLY INVOLVE A REASONABLE INVESTIGATION. FURTHER CONCERNS ABOUT THE DEFINITION OF "REASONABLE" WERE DEALT WITH IN THE SECOND SET OF QUESTIONS AND ANSWERS, PUBLISHED ON MAY 2, 1980. THESE Q'S AND A'S DEFINED "REASONABLE", IN MOST CIRCUMSTANCES, AS A SEARCH OF THE PUBLISHED LITERATURE. INVESTIGATION OF THE UNPUBLISHED LITERATURE IS REQUIRED ONLY WHEN VALIDITY IS LOW AND ADVERSE IMPACT IS HIGH.

THE LIMITATIONS OF THE SEARCH FOR ALTERNATIVES RESULT FROM ADMINISTRATIVE DECISIONS BASED ON OUR PERCEPTIONS OF WHAT PROFESSIONAL STANDARDS REQUIRE WHEN CONDUCTING A VALIDITY STUDY. THE LEGAL STANDARD OF MOODY V. ALBERMARLE, BY WHICH A PLAINTIFF CAN PROVE DISCRIMINATION BY SHOWING THAT AN ALTERNATIVE WHICH SERVES THE EMPLOYER'S LEGITIMATE BUSINESS NEEDS BUT HAS LESSER ADVERSE IMPACT EXISTS, IS NOT CHANGED BY THE GUIDELINES OR THE QUESTIONS AND ANSWERS.



PROFESSIONAL STANDARDS. THE THIRD FUNCTION OF THE UGESP IS TO PUT FORTH OUR VIEW OF MINIMUM PROFESSIONAL REQUIREMENTS THAT A VALIDITY STUDY MUST MEET IN ORDER TO PROVIDE ADEQUATE JUSTIFICATION FOR THE USE OF A SELECTION PROCEDURE IN LIGHT OF ITS ADVERSE IMPACT. SOME HISTORY ON THIS POINT WOULD BE IN ORDER.

THE FIRST SET OF EEOC GUIDELINES, ISSUED IN 1966, DID NOT CONTAIN PROFESSIONAL STANDARDS BUT REFERENCED INSTEAD THE TECHNICAL STANDARDS PUBLISHED BY THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN 1954. THE BELIEF WAS THAT IF A VALIDITY STUDY MET THESE GENERALLY ACCEPTED PROFESSIONAL STANDARDS, ITS USE WOULD BE JUSTIFIED UNDER TITLE VII. VALIDITY WAS DEFINED IN MANY WAYS IN THE PROFESSIONAL STANDARDS, HOWEVER, AND IT BECAME CLEAR THAT SOME LIMITATIONS WOULD BE NECESSARY TO ENSURE THAT TESTS WERE NOT USED TO DISCRIMINATE ON THE BASIS OF RACE, SEX, OR ETHNIC GROUP MEMBERSHIP. IN GRIGGS V. DUKE POWER, GENERAL ABILITY TESTS USED TO SCREEN APPLICANTS FOR EMPLOYMENT HAD BEEN FOUND TO BE LEGAL BY THE DISTRICT COURT AND THE APPELLATE COURT BECAUSE, ACCORDING TO EXPERT TESTIMONY, THEY VALIDLY MEASURED GENERAL INTELLIGENCE AND MECHANICAL UNDERSTANDING, QUALITIES WHICH EMPLOYERS WOULD LOGICALLY WANT TO FIND IN THEIR EMPLOYEES. THE SUPREME COURT REVERSED, IN PART BECAUSE THE TESTS IN QUESTION HAD NOT BEEN SHOWN TO HAVE A DEMONSTRABLE RELATIONSHIP TO SUCCESSFUL PERFORMANCE OF THE PARTICULAR JOB IN QUESTION. "WHAT CONGRESS HAS COMMANDED," THE COURT STATED, "IS THAT ANY TEST USED MUST MEASURE THE PERSON FOR THE JOB AND NOT THE PERSON IN THE ABSTRACT."

THE 1970 EEOC GUIDELINES INCORPORATED THE REQUIREMENT FOR VALIDATION AGAINST SPECIFIC JOB PERFORMANCE MANDATED BY THE SUPREME COURT. IN ADDITION, CERTAIN MINIMUM STANDARDS WITH RESPECT TO REPRESENTATIVENESS OF THE SAMPLES, ADEQUACY OF THE JOB PERFORMANCE MEASURES, AND DIFFERENTIAL VALIDITY WERE INCLUDED IN THE GUIDELINES. OTHER THAN THESE MINIMUM STANDARDS, HOWEVER, THE TECHNICAL REQUIREMENTS WERE THOSE OF THE APA STANDARDS, WHICH AGAIN WERE INCORPORATED BY REFERENCE INTO THE GUIDELINES.

THE TECHNICAL STANDARDS OF THE EEOC GUIDELINES HAVE BEEN GIVEN GREAT DEFERENCE BY COURTS AT ALL LEVELS. IN MOODY V. ALBERMARLE, A VALIDITY STUDY WAS FOUND BY THE SUPREME COURT TO BE DEFICIENT WHEN MEASURED AGAINST THE EEOC GUIDELINES, REVERSING A LOWER COURT JUDGMENT FOR THE DEFENDANT. THE APPLICATION BY THE COURTS OF PROFESSIONAL STANDARDS OTHER THAN THOSE EXPLICITLY SET FORTH IN THE EEOC GUIDELINES, HOWEVER, CAUSED PROBLEMS. THE APA'S PUBLISHED STANDARDS WERE SOMEWHAT VAGUE, AND SUBJECT TO DIFFERING INTERPRETATIONS, AND COURTS WERE OFTEN FACED WITH THE NECESSITY OF RECONCILING CONFLICTING TESTIMONY OF TWO EXPERTS, EACH PURPORTING TO REPRESENT GENERALLY ACCEPTED PROFESSIONAL CONSENSUS. OPINION SUCH AS THOSE IN U.S. V. CHICAGO, 411 F. SUPP. 218 (N.D. 1976), AND U.S. V. STATE OF NEW YORK, SUPRA, REFLECTED THE NEED FOR A MORE CLEARLY STATED SET OF MINIMUM TECHNICAL STANDARDS WHICH THE ENFORCEMENT AGENCIES WOULD USE TO EVALUATE VALIDITY STUDIES, AND WHICH

WOULD BE SUGGESTED TO THE COURTS AS A GUIDE FOR THEIR EVALUATION IN CASE OF LITIGATION. THESE MINIMUM TECHNICAL STANDARDS WERE INCLUDED IN THE UNIFORM GUIDELINES.

IT SHOULD BE EMPHASIZED THAT THE INCLUSION OF THESE TECHNICAL STANDARDS IN THE UGESP WAS NOT INTENDED TO DICTATE PROFESSIONAL STANDARDS. THE TECHNICAL STANDARDS ARE INTENDED TO BE CONSISTENT WITH PROFESSIONAL STANDARDS, AND WE HAVE TURNED TO THE PSYCHOLOGICAL PROFESSION ITSELF FOR GUIDANCE. AFTER REVIEWING THE UGESP AND THE PUBLISHED Q'S AND A'S, THE APA COMMITTEE ON PSYCHOLOGICAL TESTS AND ASSESSMENT STATED ON FEBRUARY 11, 1980, THAT THE "GUIDELINES HAVE ATTAINED CONSISTENCY WITH THE STANDARDS [I.E. THE 1974 REVISION OF APA'S PUBLISHED STANDARDS] IN THOSE AREAS IN WHICH COMPARISONS CAN BE MEANINGFULLY MADE."

AS SOME OF YOU MAY KNOW, THE PSYCHOLOGICAL PROFESSION IS IN THE PROCESS OF REVIEWING ITS PUBLISHED STANDARDS TO DETERMINE WHETHER DEVELOPMENTS IN RESEARCH AND IN PRACTICAL EXPERIENCE MANDATE CHANGES IN THOSE STANDARDS. A JOINT COMMITTEE, CONSISTING OF REPRESENTATIVES OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, AND THE NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, HAS BEEN FORMED TO CONSIDER THESE DEVELOPMENTS, PREPARE A DRAFT OF NEW JOINT TECHNICAL STANDARDS, HOLD OPEN HEARINGS ON THIS DRAFT AND ADOPT NEW STANDARDS BY THE END OF NEXT YEAR. THE U.S. OFFICE OF PERSONNEL MANAGEMENT HAS WRITTEN THIS COMMITTEE SUGGESTING SPECIFIC CHANGES IN THE STANDARDS, BASED UPON THEIR RESEARCH WHICH PURPORTEDLY SHOWS, AMONG OTHER THINGS, THAT ALL MENTAL ABILITY TESTS ARE VALID FOR ALL JOBS AND THAT DIFFERENCES IN TEST SCORES BETWEEN RACE, SEX AND ETHNIC

GROUPS ALWAYS REFLECT DIFFERENCES IN JOB PERFORMANCE BETWEEN THOSE GROUPS RATHER THAN, IN SOME CASES, TO BIAS IN THE TEST THEMSELVES. THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION HAS JUST PUBLISHED A REPORT BY A GROUP OF LAWYERS AND PSYCHOLOGISTS WORKING FOR MAJOR CORPORATIONS AND TEST PUBLISHERS AND DISTRIBUTORS, CALLED "PROFESSIONAL AND LEGAL ANALYSIS OF THE UNIFORM GUIDELINES IN EMPLOYEE SELECTION PROCEDURES." THIS REPORT ADVOCATES "PROFESSIONAL STANDARDS" WHICH ARE MUCH WEAKER THAN THOSE CONTAINED IN APA'S CURRENTLY PUBLISHED AND EFFECTIVE STANDARDS.

THERE HAS BEEN SOME SUGGESTION THAT, BECAUSE PROFESSIONAL STANDARDS ARE CHANGING, THE GUIDELINES SHOULD BE REVISED TO REFLECT THESE CHANGES, AND THAT SUCH REVISIONS SHOULD BE UNDERTAKEN RIGHT NOW. THE COMMISSION REJECTS THE NOTION THAT THE TECHNICAL STANDARDS OF THE GUIDELINES SHOULD BE REVISED PRIOR TO FINAL ISSUANCE OF THE NEW JOINT TECHNICAL STANDARDS. SUCH AN ACTION WOULD BE CONTRARY TO THE HISTORY OF COOPERATION WITH THE PROFESSIONAL COMMUNITY WHICH HAS EXISTED UNTIL NOW, AND IT WOULD SUBSTANTIALLY ALTER THE ROLE OF THE GUIDELINES AS REFLECTING, RATHER THAN DICTATING, PROFESSIONAL STANDARDS.

WE DO NOT INTEND TO INFLUENCE THE OPEN PROCESS BY WHICH THE PROFESSION DETERMINES ITS STANDARDS BY PREMATURELY AND UNILATERALLY ADOPTING CHANGES IN THE UGESP BASED ON WHAT SOME INDIVIDUALS PERCEIVE AS "NEW DEVELOPMENTS" IN THE FIELD OF PSYCHOLOGICAL TESTING. WE NOTE, FOR EXAMPLE, THAT THERE IS ALREADY CONCERN EXPRESSED IN SUCH PRESTIGIOUS PUBLICATIONS AS THE ANNUAL REVIEW OF PSYCHOLOGY OVER THE WAY IN WHICH OPM CONDUCTED ITS RESEARCH. I SUBMIT THAT THE SIGNI-

SIGNIFICANCE OF THESE DEVELOPMENTS TO THE PROFESSIONAL STANDARDS SHOULD  
BE DETERMINED BY THE INTELLECTUAL FREE ENTERPRISE SYSTEM OF THE  
PROFESSION, THROUGH ITS ESTABLISHED PROCESSES OF OPEN HEARINGS AND  
REPRESENTATIVE PARTICIPATION BY ALL SEGMENTS OF THE COMMUNITY, AND  
NOT BY THE DICTATES OF GOVERNMENT AGENCIES. WE MUST NOTE, HOWEVER,  
THAT THE DEFERENCE TO PROFESSIONAL STANDARDS IS FINITE, HAVING TO DO  
ONLY WITH PSYCHOMETRIC ISSUES AND NOT WITH LEGAL OR POLICY ISSUES.  
IT REMAINS THE OBLIGATION OF EEOC AND THE COURTS TO DECIDE HOW  
PROFESSIONAL STANDARDS RELATE TO TITLE VII.

ANOTHER AREA IN WHICH THERE HAS BEEN A CALL FOR REVISION OF  
THE UGESP INVOLVES THE REQUIREMENT THAT EMPLOYERS KEEP CERTAIN  
SPECIFIC RECORDS CONCERNING THEIR USE OF PARTICULAR SELECTION  
DEVICES. EEOC IS PRESENTLY CONDUCTING A REVIEW OF THESE DOCUMENTATION  
REQUIREMENTS IN CONJUNCTION WITH THE OFFICE OF MANAGEMENT AND BUDGET.  
THIS REVIEW IS INTENDED TO DETERMINE THE EXTENT TO WHICH THE UGESP  
MAY HAVE CREATED ADDITIONAL RECORDKEEPING REQUIREMENTS FOR TEST  
USERS, AND WHETHER ANY SUCH REQUIREMENTS CAN BE ELIMINATED. THE  
FOCUS OF THE REVIEW WILL BE TO REDUCE THE BURDEN ON EMPLOYERS  
WITHOUT UNDERCUTTING THE PRACTICAL SIGNIFICANCE OF THE GUIDELINES.  
THE REVIEW PROCESS INCLUDES A SURVEY OF EMPLOYERS, LAWYERS AND  
PSYCHOLOGISTS. EEOC DESIGNED SURVEY QUESTIONNAIRES FOR THIS  
PURPOSE, AND OBTAINED OMB APPROVAL FOR THOSE FORMS IN JULY, 1981.  
DISTRIBUTION OF THE FORMS HAS BEEN DELAYED, HOWEVER, BECAUSE THE  
GENERAL ACCOUNTING OFFICE (GAO) SUBSEQUENTLY EXPRESSED CONCERN  
OVER THE SURVEY DESIGN.

IN AN EFFORT TO ACCOMMODATE THESE CONCERNS, THE COMMISSION HAS  
HELD NUMEROUS MEETINGS WITH THE STAFFS AT OMB, GAO AND THE BUREAU

OF THE CENSUS. ADDITIONALLY, THE SURVEY DESIGN HAS BEEN COORDINATED WITH THE OTHER AGENCIES WHICH ARE SIGNATORY TO THE GUIDELINES, INCLUDING OPM AND THE DEPARTMENT OF JUSTICE. THE PROCESS HAS BEEN A DIFFICULT ONE AS IT INVOLVES RECONCILIATION OF THE ADVICE AND POSITIONS OF VARIOUS GOVERNMENTAL AGENCIES WITH COMPETING CONCERNS. IT IS PARTICULARLY COMPLICATED BY THE FACT THAT SEVERAL OF THESE AGENCIES APPARENTLY VIEW THE UGESP REVIEW AS A VEHICLE FOR CHALLENGING EEOC'S ASSIGNED ROLE AS THE LEAD AGENCY IN ENFORCING THE LAWS GOVERNING EMPLOYMENT DISCRIMINATION.

IN ITS RECENT TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL SERVICE, GAO EXPRESSED THE VIEW THAT EEOC'S ROLE IN CONDUCTING THE RECORDKEEPING SURVEY RAISED CONCERNS ABOUT THE "APPEARANCE OF CONFLICT OF INTEREST" IN THAT "THE AGENCY MOST STRONGLY COMMITTED TO THE CONTINUANCE OF THE GUIDELINES IS CHARGED WITH CONDUCTING A REVIEW OF ITS ADMINISTRATION AND REGULATORY BURDEN." THIS COMMENT FOLLOWED AN EARLIER LETTER FROM OPM TO OMB ASSERTING THAT "EEOC LEADERSHIP HAS A STRONG VESTED INTEREST IN PRESERVING THE GUIDELINES IN THEIR PRESENT FORM" AND THAT "ONLY OPM HAS THE PROFESSIONALLY COMPETENT STAFF TO REVIEW THE TECHNICAL ISSUES IN THE GUIDELINES."

THE COMMISSION BELIEVES THESE CHARGES TO BE WHOLLY UNFOUNDED. THE COMMISSION WAS GIVEN THE RESPONSIBILITY TO FUNCTION AS THE LEAD AGENCY IN EQUAL EMPLOYMENT OPPORTUNITY BY THE CIVIL RIGHTS REORGANIZATION ACT OF 1978 AND EXECUTIVE ORDER 12067 BECAUSE WE ARE THE PRIMARY ENFORCER IN THE FIELD. INDEED, OPM IS SIGNATORY TO THE UGESP ONLY BECAUSE ITS PREDECESSOR, THE CIVIL SERVICE COMMISSION

FORMERLY HAD AUTHORITY TO ENFORCE TITLE VII IN THE FEDERAL SECTOR. THAT AUTHORITY WAS TRANSFERRED TO EEOC IN 1979. THUS, OPM'S PRESENT STATUS IS MERELY THAT OF AN EMPLOYER COVERED BY TITLE VII -- AN EMPLOYER WHO DEVELOPED TESTS WHICH WERE JUDICIALLY DETERMINED TO BE DISCRIMINATORY IN U.S. v. STATE OF NEW YORK, SUPRA, AND DOUGLAS v. HAMPTON, 512 F.2D 976 (D.C. CIR. 1975).

IN CONCLUSION, EEOC HAS BEEN CHARGED BY OMB WITH RESPONSIBILITY FOR THE RECORDKEEPING REVIEW. WE HAVE THE WILLINGNESS, THE RESOURCES AND THE PROFESSIONALLY COMPETENT STAFF NEEDED TO FULFILL THAT RESPONSIBILITY. OUR ONLY VESTED INTEREST IS IN PROTECTING THE LEGAL RIGHTS OF ALL PERSONS WHO SEEK EQUAL EMPLOYMENT OPPORTUNITY; THAT IS TO SAY, WE ARE DETERMINED TO CARRY OUT THE CONGRESSIONALLY MANDATED MISSION OF THE AGENCY. WE INTEND, OF COURSE, TO MINIMIZE THE BURDEN OF OUR GUIDELINES ON EMPLOYERS CONSISTENT WITH OUR OBLIGATIONS TO ENFORCE THE LAW. AN WE INTEND, OF COURSE, TO REVIEW AND MONITOR GENUINE CHANGES IN PROFESSIONAL CONSENSUS AND TO INCORPORATE THESE CHANGES IN OUR GUIDELINES TO THE FULLEST EXTENT POSSIBLE CONSISTENT WITH LAW. WE WILL NOT, HOWEVER, TAKE ANY ACTION WHICH UNDERCUTS THE RIGHTS OF INDIVIDUALS NOT TO BE DISCRIMINATED AGAINST ON THE BASIS OF THEIR RACE, SEX OR ETHNIC GROUP MEMBERSHIP BY THE USE OF TESTS OR OTHER SELECTION PROCEDURES WHICH OPERATE TO EXCLUDE THESE GROUPS, AND WHICH HAVE NOT BEEN SHOWN TO BE MANIFESTLY JOB RELATED BY GENERALLY ACCEPTED PROFESSIONAL STANDARDS AS FREELY DETERMINED BY A CONSENSUS OF THE PROFESSIONAL COMMUNITY.