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Frances M. Hart
Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
1801 L Street N.W.
Washington, D.C. 20507

Re: Uniform Guidelines - Questions and Answers on "Applicant"
69 *Federal Register* 10152, March 4, 2004

Dear Ms. Hart

The American Bankers Association ("ABA") is responding to the request by the Equal Employment Opportunity Commission, the Department of Labor's Office of Federal Contract Compliance Programs, the Department of Justice, and the Office of Personal Management (collectively, "the Agencies") for comments on their joint proposal adopting additional questions and answers to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines") as they relate to the Internet and related technologies.

The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Our membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—makes ABA the largest banking trade association in the country. Most of these institutions are employers subject to federal and state affirmative action laws and regulations, and thus must be able to clearly understand how to determine who must be considered an applicant for recordkeeping purposes.

Although ABA appreciates the efforts of the Agencies to clarify how to determine who is an "applicant," as discussed more fully below, the proposal falls far short of the guidance needed by Human Resources ("HR") staff. First, because the guidance would apply only to individuals applying electronically, HR departments would have the burden of establishing two parallel systems for paper applications and electronic applications, each using a different definition of "applicant." Second, even the new guidance does not clearly permit employers to use "minimum qualifications" to determine who is an "applicant."

Employers with federal contracts and resulting affirmative action obligations have long been required to monitor their selection processes to prevent discrimination against applicants that are minorities or women. Part of this monitoring process includes determining and recording the race and sex of every applicant. Necessarily, the scope of the term "applicant" has a significant impact on the recordkeeping burden of federal contractors. The current Uniform Guidelines, adopted in 1978, define an applicant as "a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities." The inadequacy of this definition became apparent with the advent of the electronic communications revolution and the creation of electronic resume databases.

In recognition of this electronic revolution, the proposed amendments to the Uniform Guidelines provide that a person becomes an applicant when:

- The employer has acted to fill a *particular* position;
- The individual has followed the employer's standard procedures for submitting applications; and
- The individual has indicated an interest in the *particular* position.

However, because these new criteria would apply only in the case of applications received via the Internet or related electronic data processing technologies, employers will face the enormous burden of creating two parallel tracking systems. The current system would have to be maintained for applications received in paper form using the current definition of applicant in the Uniform Guidelines. An entirely new system would have to be created for applications received via electronic data processing technologies that would be based on the proposed three-pronged set of criteria for determining who is an applicant.

Given the clear and prolonged need for guidance on this definition, ABA sees no reason not to apply the three-pronged test to all applications, no matter what format they are received in. There is simply no justification for requiring employers to create an entirely new and redundant tracking system, when the need for guidance with respect to all forms of applications has become so critical.

Most troubling, though, is the fact that the proposal is silent with respect to the use of minimum qualifications to determine who is an applicant. ABA believes that before a job seeker becomes an "applicant," a fourth criterion should be met, namely, that the individual possesses the advertised, basic qualifications for the position. Thus, employers would not be in the ludicrous position of having to consider as an applicant, an individual that clearly does not satisfy the advertised education and/or skills needed to qualify for the position.

Conclusion

In conclusion, although the Agencies have taken a first step toward providing critical guidance on the definition of "applicant," much more work is needed. As described above, there should be a single definition of the term that applies to all forms of applications. Secondly, employers should not be required to include individuals who are not minimally qualified in their tracking systems.

ABA would be pleased to work with the Agencies on these issues.

Sincerely,

Cristeena G. Naser