IRS'S SUSPENSION OF ITS AFFIRMATIVE ACTION PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON
GOVERNMENT REFORM
AND OVERSIGHT
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

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IRS'S SUSPENSION OF ITS AFFIRMATIVE ACTION PROGRAM

TUESDAY, OCTOBER 28, 1997

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:40 p.m., in room 2154, Rayburn House Office Building, Hon. John L. Mica (chairman of the subcommittee) presiding.

Present: Representatives Mica, Morella, Cummings, Norton, and Ford, Jr.

Staff present: George Nesterczuk, staff director; Caroline Fiel, clerk; Ned Lynch, senior research director; and Cedric Hendricks, minority counsel.

Mr. MICA. Good afternoon. I'd like to call this meeting of the House Civil Service Subcommittee to order. Today we're conducting a hearing titled IRS' Suspension of Its Affirmative Action Program. I'll start with an opening statement and then yield to other Members and we'll proceed with the hearing.

During the past few weeks, our subcommittee has conducted hearings to examine carefully charges of discrimination in the Federal workplace and to review current policies and practices relating to employment discrimination. This afternoon's hearing will address recent actions by the Internal Revenue Service to suspend parts of its affirmative action program and to replace it with limited corrections. The Internal Revenue Service drew attention during our September hearings, both of those hearings, as a matter of fact, on employment discrimination in the Federal workplace. The Nation's chief tax collector has been accused of tolerating discriminatory practices in our September 10 hearing, and on September 25, we heard from Angelo Troncoso, a Cuban-American IRS agent who had been passed over for promotions three times in favor of people who ranked as low as 13 positions below him who were among the applicants for the position. While we're preparing those particular hearings, the Internal Revenue Service is reevaluating its personnel operations in light of the Supreme Court's decision in *Adarand* v. *Pena* and the Federal District Court for the Western District of Louisiana's decision in *Byrd* v. *Rubin*. In May 1997, a ruling in the *Byrd* case, in that particular case a Federal district judge issued an opinion that IRS' affirmative employment policy as reflected in a document known as ERR–16 could not pass the strict scrutiny test required under the *Adarand* decision.

Rather than proceed to try the *Byrd* case on its merits, the Government moved to settle this case. Like many settlement agreements, this settlement included a non-disclosure agreement so the terms of the settlement have been beyond the reach of the subcommittee until just a few hours ago. We find the timing of this settlement somewhat troubling because it coincides with IRS policy decisions that affect the agency's treatment of its work force. Important issues affecting the management of Federal agencies are matters for congressional oversight, and the members of this subcommittee should be deeply concerned if decisions that shaped agency policy were made in court settlements that are not available to congressional scrutiny.

On August 19, Acting Commissioner Michael Dolan issued a memorandum for all IRS executives in which he stated, ". . . until we thoroughly analyze all of the ramifications of these court cases, it is advisable to temporarily suspend certain aspects of our performance management system which address expectations or measurements in the area of EEO and diversity." As a result of this memo, two of IRS's employee performance elements were suspended and two measures used in its annual business review were suspended.

On September 22, James O'Malley, National Director of the IRS Personnel Division, issued another memorandum announcing the changes in the agency's Executive and Managerial Performance Plans for 1998. This document modifies the performance management factors that were suspended by the August memorandum, but leaves a substantial hole in the public record supporting the policy changes.

Recent press accounts reported these memorandums. The White House has several times reaffirmed that the IRS will continue to adhere to affirmative employment policies, just like other Federal agencies.

We have several questions about the method of establishing this policy. For example, has the IRS consulted the Department of Justice? If so, did they agree that the new guidelines are legally sound? Was the Office of Personnel Management, the government's central personnel management agency, a participant in reaching this decision and how did they participate? Most Federal agencies have similar affirmative action performance requirements. Federal executives and managers can be fired for inadequate performance on these critical job elements. Why is it only the IRS that has seen fit to suspend its performance appraisal criteria in this area? Is IRS the only vulnerable agency?

In a statement submitted to the subcommittee, IRS has reported that its work force is 67 percent female and 35 percent minority. Both of these figures substantially exceed the proportion of women and minorities in the Nation's civilian labor force. If the agency is reinstating performance criteria in this area, it would appear to be pursuing something more than full representation. We would like the agency to clarify the objectives of its affirmative employment program during today's discussion.

There are important lessons to be learned as agencies defend their personnel practices in the U.S. Courts. If one agency's policies are found to be unconstitutional, it is incumbent on the administra-

tion to make certain that all other agencies are not repeating the same errors. With a civil service that extends across the entire government, we have no place for a multitude of individual-agency policies that might result in discriminatory practices.

If the *Byrd* decision has demonstrated a vulnerability of Federal employment policies, Congress should make certain that the remedies that are being proposed by the administration take effective and corrective measures that are consistent with the laws and consistent across the Federal work force.

In this very sensitive area, we must ensure that the Federal Government is not wasting taxpayer dollars defending or settling cases that have already been found to be indefensible. More importantly, every Federal worker should be employed on an equitable basis, promoted on an equitable basis, evaluated and terminated on an equitable basis.

Today we'll hear from the Internal Revenue Service. Our lead witness will be Mr. Charles D. Fowler, the National Director of the IRS' Equal Employment Opportunity and Diversity Program. He'll be accompanied by Mr. Dennis M. Ferrara, the Deputy Assistant Chief Counsel of General Legal Service and Mr. James O'Malley, National Director of IRS' Personnel Division. And we'll be hearing from Mr. Fowler in just a few minutes. We've been joined by other members of the panel. I'd like to recognize the ranking member for an opening statement. Mr. Cummings.

[The prepared statement of Hon. John L. Mica follows:]

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Opening Statement of the Honorable John L. Mica
Chairman, Civil Service Subcommittee
IRS' Suspension of Its Affirmative Action Program
October 28, 1997

During the past few weeks this subcommittee has conducted hearings to examine discrimination in the federal workplace and to review current policies and practices related to employment discrimination. This afternoon's hearing addresses recent actions by the Internal Revenue Service to suspend parts of its affirmative action program and to replace it with limited corrections.

The Internal Revenue Service drew attention during our September hearings on employment discrimination in the federal workplace. The nation's tax collector was accused of tolerating discriminatory practices in our September 10 hearing. On September 25, we heard from Angelo Troncoso, a Cuban-American IRS agent who had been passed over for promotions three times in favor of people who ranked as low as thirteen positions below him among the applicants for the position.

While we were preparing those hearings, the Internal Revenue Service was re-evaluating its personnel operations in light of the Supreme Court's decision in ***Adarand v. Pena*** and the Federal District Court for the Western District of Louisiana's decision in ***Byrd v. Rubin***. In a May, 1997, ruling in the ***Byrd*** case, a federal district judge issued an opinion that the IRS' affirmative employment policy, as reflected in a document known as ERR-16, could not pass the "strict scrutiny" test required after the ***Adarand*** decision.

Rather than proceed to try the ***Byrd*** case on its merits, the government moved to settle this case. Like many settlement agreements, this settlement included a nondisclosure agreement, so the terms of this settlement are currently beyond the reach of this subcommittee. We find the timing of this settlement somewhat troubling because it coincides with IRS policy decisions that affect the agency's treatment of its workforce. Important issues affecting the management of federal agencies are matters for congressional oversight, and the members of this subcommittee should be deeply concerned if decisions that shaped agency policy were made in court settlements that are not available for congressional scrutiny.

On August 19, Acting Commissioner Michael Dolan issued a memorandum for all IRS executives in which he stated, ". . . [U]ntil we thoroughly analyze all of the ramifications of these court cases, it is advisable to temporarily suspend certain aspects of our performance management system which address expectations or measurements in the area of eeo and diversity." As a result of this memo, two of IRS's employee performance elements were suspended, and two measures used in its annual business review were suspended.

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Recent press accounts reported these memoranda, the White House has several times reaffirmed that the IRS will continue to adhere to affirmative employment policies, just like other federal agencies. We have several questions about the method of establishing this policy. For example, has the IRS consulted the Department of Justice? If so, did they agree that the new guidelines are legally sound?

Where was the Office of Personnel Management, the government's central personnel management agency, in reaching this decision? Most federal agencies have similar affirmative action performance requirements. Federal executives and managers can be fired for inadequate performance on these critical job elements. Why is it only the IRS that has seen fit to suspend its performance appraisal criteria in this area? Is IRS the only vulnerable agency?

In a statement submitted to the Subcommittee, IRS reported that its workforce is 67 percent female and 35 percent minority. Both of these figures substantially exceed the portion of women and minorities in the nation's civilian labor force. If the agency is reinstating performance criteria in this area, it would appear to be pursuing something more than full representation. We would like the agency to clarify the objectives of its affirmative employment program during today's discussion.

There are important lessons to be learned as agencies defend their personnel practices in the U.S. Courts. If one agency's policies are found to be unconstitutional, it is incumbent on the Administration to make certain that all other federal agencies are not repeating those errors. With a civil service that extends across the entire government, we have no place for a multitude of individual-agency policies that might result in discriminatory practices.

If the ***Byrd*** decision has demonstrated a vulnerability of federal employment policies, Congress should make certain that the remedies that are being proposed by the Administration take effective corrective measures that are consistent with the laws and consistent across the federal workforce.

In this very sensitive area, we must ensure that the government is not wasting taxpayer dollars defending or settling cases that have already been found to be indefensible. More importantly, every federal worker should be employed on an equitable basis, promoted on an equitable basis, evaluated, and terminated on an equitable basis.

Today we will hear from the Internal Revenue Service. Our lead witness at this hearing will be Mr. Charles D. Fowler, the National Director of the IRS' Equal Employment Opportunity and Diversity Program. He will be accompanied today by Mr. Dennis M. Ferrara, Deputy Assistant Chief Counsel (General Legal Services) and Mr. James O'Malley, National Director of IRS' Personnel Division.

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Mr. CUMMINGS. Thank you very much, Mr. Chairman and members of the committee. Two months ago, this subcommittee initiated a series of hearings on employment discrimination in the Federal workplace. At the first hearing, on September 10, we received shocking reports of widespread discriminatory conduct affecting minorities and women at a number of Federal agencies.

We learned that even though the number of Federal workers has dropped significantly since 1991, the number of discrimination complaints has grown by a third from 9,924 in 1991 to 13,156 in 1996. We also noted the issuance of recent reports by the Office of Personnel Management, Merit Systems Protection Board, and Equal Employment Opportunity Commission which established several disturbing facts. First, while the representation of minorities and women in our work force has significantly increased, they are still concentrated in lower paying jobs and grades. Second, even though there are more Hispanics employed, their numbers still fall below their presence in the labor force. And third, African Americans and Native Americans are fired at disproportionately higher rates than whites. The only conclusion that can be reasonably drawn from this evidence is that discrimination in the Federal workplace remains a major systemic problem.

Now, Mr. Chairman, we turn to today's hearing. I was deeply disturbed when I first saw press reports that the Internal Revenue Service had suspended its affirmative employment program. I felt better when I subsequently learned that their reports were in error and that what had, in fact, occurred was that a far more limited action had been taken. As we will hear from our witnesses today, the IRS merely suspended temporarily certain aspects of its performance management system for executives and managers which address expectations or measurements in the area of EEO and diversity. This action was taken while a review is conducted of a recent court decision. It is important to note, however, that notwithstanding the ongoing review, the IRS reaffirmed its commitment to affirmative action and added a new EEO performance element to this particular appraisal system which it believes is fully consistent with the law.

Let me say to the representatives of the IRS here today that I expect this subcommittee to be kept abreast of the progress of your review and to be immediately informed of any conclusions reached and any further action taken. Mr. Chairman, I want to make it clear for the record that I strongly support affirmative action. I do so because I believe that through properly implemented affirmative action programs, the Federal Government can open the doors of opportunity for the millions of minorities and women that continue to be deprived of a fair chance to enter or advance in the Federal service.

While I recognize that recent court decisions such as *Adarand* v. *Pena* and the California Initiative have led to some retrenchment in this area, I believe that there remains a solid basis for the pursuit of affirmative action. Certainly the testimony that we received at our earlier hearings justified its continued use in the Federal workplace. The policies of equal employment opportunity and affirmative action took root and evolved in the Federal sector over the past 40 years. They are grounded in Executive orders issued

by Republican and Democratic Presidents alike. Today, there is statutory authority for agencies to establish Federal Equal Employment Opportunity recruitment programs through which they may take steps to eliminate the under-representation of minorities and women. If some individuals are disadvantaged as the result of the implementation of these programs, it is important for agencies to determine how and why that happens and, then, to take such corrective action as may be warranted by the situation at hand.

Mr. Chairman, I look forward to the testimony from today's witnesses. I trust that it will greatly assist this subcommittee with our efforts to ensure equal employment opportunity throughout the Federal Government. And thank you very much.

[The prepared statement of Hon. Elijah E. Cummings follows:]

STATEMENT OF THE HONORABLE ELIJAH CUMMINGS
BEFORE THE SUBCOMMITTEE ON CIVIL SERVICE
THIRD HEARING ON
EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE

IRS Suspension of its Affirmative Employment Program

October 28, 1997

Two months ago, this subcommittee initiated a series of hearings on employment discrimination in the Federal workplace. At the first hearing, on September 10th, we received shocking reports of widespread discriminatory conduct affecting minorities and women at a number of agencies.

We learned that even though the number of Federal workers has dropped significantly since 1991, the number of discrimination complaints has grown by a third from 9,924 in 1991 to 13,156 in 1996.

We also noted the issuance of recent reports by the Office of Personnel Management (OPM), Merit Systems Protection Board, and Equal Employment Opportunity Commission (EEOC) which

established several disturbing facts: First, while the representation of minorities and women in our workforce has significantly increased, they are still concentrated in lower paying jobs and grades. Second, even though there are more Hispanics employed, there numbers still fall below their presence in the labor force. And third, African Americans and Native Americans are fired at disproportionately higher rates than whites.

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The policies of equal employment opportunity and affirmative action took root and evolved in the Federal sector over the past 40 years. They are grounded in executive orders issued by Republican and Democratic Presidents alike. Today, there is

statutory authority for agencies to establish Federal Equal Employment Opportunity Recruitment Programs through which they may take steps to eliminate the underrepresentation of minorities and women. If some individuals are disadvantaged as the result of the implementation of these programs, it is important for agencies to determine how and why that happens, and then to take such corrective action as may be warranted by the situation at hand.

Mr. Chairman, I look forward to the testimony from today's witness. I trust that it will greatly assist this subcommittee with our efforts to ensure equal employment opportunity throughout the Federal government.

Thank you.

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Mr. MICA. I thank the gentleman. Mrs. Morella, did you have a statement?

Mrs. MORELLA. Thank you, Mr. Chairman, and thanks also for holding today's hearing on the IRS' suspension of its affirmative employment program. I look forward to hearing more details from IRS concerning their actions following the southwestern District of Louisiana's *Byrd* v. *Rubin* decision. This Federal district court ruled that the IRS plan for organizational diversity, known as Enhancing Recruitment and Retention of Employees or ERR–16 which sounds like err 16, violated the Constitution's equal protection clause. This program did not pass the strict scrutiny standard developed in the *Adarand* v. *Pena* decision and the decision led to a review of ERR–16 and the suspension of part of the agency's affirmative employment program for the remainder of the 1997 performance year.

I support affirmative action but I believe that *Adarand's* strict scrutiny standard makes sense and I am concerned about the confusing chain of events by the IRS in the wake of the *Byrd* decision. I look forward to hearing from the IRS' Equal Employment Opportunity and Diversity National Director, Charles D. Fowler, to better understand exactly what did happen and what this means for affirmative action at the IRS and in the Federal Government. Thank you, Mr. Chairman.

[The prepared statement of Hon. Constance A. Morella follows:]

The Honorable Constance A. Morella
Subcommittee on Civil Service
IRS Suspension of Its Affirmative Employment Program
October 28, 1997

Mr. Chairman, I want to thank you for holding today's hearing on the IRS' suspension of its affirmative employment program.

I look forward to hearing more details from IRS concerning their actions following the Southwestern District of Louisiana's ***Byrd v. Rubin*** decision. This federal district court ruled that the IRS plan for organizational diversity known as Enhancing Recruitment and Rentention of Employees, or ERR-16, violated the Constitution's equal protection clause. This program did not pass the strict scrutiny standard developed in the ***Adarand v. Pena*** decision, and the decision led to a review of ERR-16 and the suspension of part of the agency's affirmative employment program for the remainder of the 1997 performance year.

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Mr. MICA. I thank the gentlelady and I'll yield for an opening statement to Ms. Norton.

Ms. NORTON. Thank you, Mr. Chairman. I think you do us all a service by calling this hearing. The area of affirmative action is difficult enough without generating even more confusion. The area is made even more difficult because of the decisions that surround this hearing. First, *Adarand,* of course, *Adarand* v. *Pena,* and then the case that applies directly to the IRS, *Byrd* v. *Rubin.* The fact is that the Supreme Court hasn't settled down where it wants to go in this field. This leaves Federal agencies and other employers between the devil and the deep blue sea. On the one hand, you will find that women and minorities will want to keep the agencies' feet to the fire. On the other hand, others, seeing the Supreme Court's decision, will want to look closely to see if they are victims of discrimination because of affirmative action.

It is very troubling to learn that even as the IRS felt it had to suspend part of its program, complaints were growing. I'm certain those complaints were from all sides. I'm also certain that most of them came from minorities and women. To its credit, the administration is—has proceeded on a very responsible course, to review the entire matter and issue regulations which have now come forward and are receiving complaints for the government as a whole. I would be concerned that agencies in the interim might be—may be left in a kind of self-help position that is inconsistent with what the administration is doing, in the absence of the guidance that is not fully complete or that may be inconsistent with what the courts expect. This area is as subtle as it is technical. I was very concerned with the prior testimony in the hearings, Mr. Chairman, that you called before this one, especially the testimony that came from the Cuban American man who had been passed over. Affirmative action needs to be done. If it's not done well, it can give affirmative action itself a bad name and yet the agency finds itself having to respond in an area that is anything but clear in the law.

When I chaired the EOC, we issued affirmative action guidelines. I want to invite the IRS to look at the affirmative action guidelines. They were an attempt to help agencies engage in affirmative action without trampling on the rights of others and, without guidance like that or the kind of guidance we're getting from the administration, I think that employers, private and public, are put in an impossible position. I do want to say for the record that I am concerned about the way in which we are looking at settlement of cases. My friends on the other side of the aisle would be the first to encourage settlement of cases. Settlement of cases with a resolution that is satisfactory to both parties is mandated under title VII of the 1964 Civil Rights Act as preferential to litigation and is always the best way to handle litigation. The last thing I'm sure that this subcommittee wants to do is to invite people to, in fact, go to trial on every case. Now, people aren't going to settle cases if they have to go through exactly what they would have had to if they had gone to trial. So, therefore, it is common in American law, in fact it is universal in American law, that when you settle a case, you don't then go out to the public and say, I settled this case because I'm a sinner and this is what I settled it for. If you want to increase litigation, what you do is to force settlements completely

into the open. That is not to say that there are not some elements of settlements which should be in the open. And I would certainly agree that elements involving policy should be in the open as between the parties. We, of course, would want the parties to be protected in order to encourage settlement in the ordinary courts. It looks like the IRS was trying to respond to the policy concerns that may be involved in the settlement by reviewing its affirmative action program in its entirety in light of the decision and, beyond that, temporarily suspending at least one part of it. I don't have—I don't get from this case that there was, from the way in which the IRS handled this, that the policy implications would not have come forward. My only concern about the way the IRS handled it is whether or not it was consistent with the overall administration approach to remedying the problems in affirmative action.

My concern would be that we have a uniform policy because agencies are going to be sued left and right and should not be engaging in policy changes on their own at a time when the government has said what it's trying to do is to regularize and systematize affirmative action across all agencies. But the last thing I would like to see emerge from this area of the law is what we do not tolerate in any other area of the law, and that is that you can't settle cases and have an agreement that is not necessarily open to the public. I would, of course, again emphasize that policy matters have to be open to the public. That's the whole point of settling a case, to settle not only for the individual litigant but to settle the case so that the policy does not come up again.

For example, with respect to the Cuban American gentleman, I would not want simply a settlement for him, as primary as that is. I would want included in the settlement agreement safeguards so that the practice of arbitrarily passing over people, assuming that it happened, was no longer going to be the case. If I sue because of discrimination against me because I am pregnant, I don't want to just get my money; I want to make sure that the next pregnant woman is not similarly treated. That can only occur if the settlement agreement says that you will pay her her money and the agency will no longer engage in practices that are the subject of this court suit but will take remedial steps to make sure that pregnant women are, in fact, promoted or, in fact, hired. That's the way the whole thing works. That's the policy notion. And that's going to be made public because it can't become operative unless it is made public.

In other words, Mr. Chairman, I think that this hearing is very important because it'll clarify what, in fact, has been public, what has not been public, whether or not this agreement comports with law, and whether or not it comports with the administration approach, which is to try to fix the entire area of affirmative action. Again, I thank you very much for calling this hearing, Mr. Chairman, and for the deep attention you have given to this area and this agency.

Mr. MICA. I thank the gentlelady. There being no further opening statements, we'll call our first panel. Again, we have Mr. Charles Fowler, Mr. Dennis Ferrara, and Mr. James O'Malley. Gentlemen, Mr. Ferrara and Mr. O'Malley, are you going to testify or provide assistance here?

Mr. FERRARA. Provide assistance.

Mr. O'MALLEY. Assistance.

Mr. MICA. This is an investigations and oversight subcommittee of Congress so I'm going to swear in Mr. Fowler and both of you, then. OK? If you'll stand, please.

[Witnesses sworn.]

Mr. MICA. That is a custom of our investigative and oversight panel and what we also would like to do, since we have just one witness, I guess you're the only one that's going to give an opening statement, is that correct?

Mr. FOWLER. That's correct, Mr. Chairman.

Mr. MICA. Well, we're not going to limit you but if you have other lengthy documents you'd like submitted as part of the record, we will do that by unanimous consent. Mr. Fowler, you're recognized and welcome.

STATEMENT OF CHARLES D. FOWLER, NATIONAL DIRECTOR, EQUAL EMPLOYMENT OPPORTUNITY AND DIVERSITY, INTERNAL REVENUE SERVICE, ACCOMPANIED BY DENNIS FERRARA, DEPUTY ASSISTANT CHIEF COUNSEL, GENERAL LEGAL SERVICES, INTERNAL REVENUE SERVICE, AND JAMES O'MALLEY, NATIONAL DIRECTOR, PERSONNEL DIVISION, INTERNAL REVENUE SERVICE

Mr. FOWLER. Thank you and good afternoon, Mr. Chairman and distinguished members of the subcommittee. I would like to read an abbreviated version of the statement that we've submitted for the record.

I'm pleased to appear before you today to discuss the topic of equal employment opportunity in the Internal Revenue Service. With me are Mr. James O'Malley, the National Director of Personnel, to my right, and Mr. Dennis Ferrara, who is the Deputy Assistant Chief Counsel for General Legal Services in the Internal Revenue.

In listening to your statements, I would like to emphasize that we very much want to comply with the law and we want to offer all of our employees equal opportunity in the workplace and we want to offer the public the benefit of having a diverse work force. Equal employment opportunity issues are often related to work force composition. By the late 1980's, the Internal Revenue Service experienced significant changes, not only in its work force, but also with respect to fulfilling its primary mission—to administer the tax laws—and as an employer. Changes in work force diversity were important in the IRS planning process. Our planning process focused on four strategic areas, one of which was ERR–16. One study reviewed the status of women and minorities in the Internal Revenue and that study, ERR–16, has been provided to this subcommittee and probably is the most relevant study in connection with the subcommittee's recent hearings. ERR–16 addressed a number of equal employment opportunity issues within the Service. It is clear from the study that we were concerned that the concept of equal employment opportunity was clearly reflected in our recruitment efforts, but was reflected far less in advancement.

ERR–16 called for the Internal Revenue Service to look beyond actions that only remedied existing representational imbalances

and to pursue a comprehensive strategy to understand, and be strengthened by, the diversity of its human resources. ERR–16 challenged us to become an institution in which equal employment opportunity was considered a way of doing business. And I would like to add that I just finished talking to the executive cadre at Internal Revenue and one of the things that I stressed is that we must treat all people equally as a way of doing business. It has never been the policy of the Internal Revenue to use quotas to achieve diversity. We wanted to remove barriers to advancement so that any employee who was qualified for a position would be given a fair chance to attain it. This was our objective in the late 1980's and we think that it remains a good objective today.

We acted in good faith to achieve this objective and the concept of equal opportunity and Federal employment has been reaffirmed over the years by the executive and legislative branches of the Federal Government and in Supreme Court decisions. We believe that our programs and policies have served us well. Recent court decisions have caused us to review, as you know, how we strategically approach or evaluate progress toward our objectives in the areas of equal employment opportunity.

In April 1997, a Federal district court found, in the *Byrd* case, that ERR–16 violated the fifth amendment equal protection clause. The plaintiffs contended that ERR–16 encouraged institutional discrimination against white male employees because its objective was to increase representation of women and minorities in managerial and executive positions through employee development and advancement strategies.

In *Byrd,* the court held that ERR–16 encouraged or authorized preferential treatment of minority and female employees. The district court then concluded that diversification of the Service's work force was not a compelling government interest sufficient to justify the agency's use of race and gender criteria in decisionmaking. *Byrd* is one of the first Federal court decisions in which a Federal affirmative action program was found unconstitutional. After *Byrd,* we identified performance standards that were susceptible to misinterpretation and application, possibly in violation of the fifth amendment under *Byrd.* Therefore, the Acting Commissioner, on August 19, 1997, in a memorandum for all executives and managers, temporarily suspended portions of two standards of individual performance plans, and two measures used in the business review. We did not suspend or eliminate our affirmative action program, nor our equal opportunity program. The temporary suspension applies only to these performance end measures, not to the affirmative action program.

In consultation, very recently, with the Justice Department and with the IRS Chief Counsel, we are working to redesign the elements and standards of the performance plans for executives and managers for fiscal year 1998. In a September 22, 1997, memo, Mr. O'Malley, the National Director, Personnel, reiterated the changes to the 1998 performance plans which had been described in the Acting Commissioner's memorandum. The memorandum also described new, Treasury-mandated EEO performance elements and standards for all supervisors and managers to be included in the

executive/managerial performance plan for the fiscal year 1998 performance appraisal period.

The Service has not terminated its affirmative action program and, indeed, remains committed to doing everything permitted under the law to achieve a diverse work force and, I would emphasize again, to also offer equal opportunity for all of our employees. The Service remains committed to providing equal opportunities for all employees and to maximizing the benefits of having a diverse work force. We are aware of the affirmative employment responsibilities under management directives promulgated by the EEOC and we will work with the EEOC in maintaining a lawful affirmative employment program. At this time, my colleagues and I will be happy to answer any questions that you or the subcommittee members might have. Thank you, Mr. Chairman.

[The prepared statement of Mr. Fowler follows:]

STATEMENT OF
CHARLES D. FOWLER III
NATIONAL DIRECTOR EQUAL EMPLOYMENT OPPORTUNITY AND DIVERSITY
INTERNAL REVENUE SERVICE

BEFORE THE
SUBCOMMITTEE ON CIVIL SERVICE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

OCTOBER 28, 1997

Mr. Chairman and Distinguished Members of the Subcommittee:

I am pleased to appear before you today to discuss the topic of equal employment opportunity at the Internal Revenue Service (IRS). With me today are James O'Malley, National Director of Personnel at the IRS and Dennis Ferrara, the IRS' Deputy Assistant Chief Counsel for General Legal Services.

Equal employment opportunity issues often are related to workforce composition. Currently, more than 67% of our workforce is female and more than 35% is from minority groups compared to 61% for females and 30% for minorities just 11 years ago. The percentage of female IRS executives has increased from 9.7% in 1988 to 23.6% in 1997. The percentage of executives from minority groups has risen from 10.4% to 13.1% over the same period. We have had similar changes in the composition of our workforce in the higher pay grades. The percentage of females in the GS/GM 13/14/15 positions was 22.9% in 1988 and 32.9% in 1997. For minorities, the numbers rose from 12.2% to 16.9%.

A number of factors have produced this changing workforce composition. The "baby boomers" who came to the Service in large numbers after 1970 began the change in the ethnic

and gender mix of the IRS. Advances in civil rights and educational opportunities, as well as changing societal mores and economic necessity also provided the IRS labor force with increasing numbers of professionally skilled women and minorities. By the late 1980s, the IRS experienced significant changes, not only in its workforce, but also with respect to fulfilling its primary mission (to administer the tax laws), and as an employer. Changes in workforce diversity were important in the IRS planning process. They also were important as we sought to facilitate changes to our work environment and new business requirements by adopting a strategic approach to planning and management that focused on long- and short-term business objectives.

Our planning process focused on four strategic areas, one of which was "Enhancing Recruitment and Retention of Employees." In this area, the IRS undertook 17 initiatives and studies. One study reviewed the status of women and minorities in the IRS. That study (*A Design for Organizational Diversity: Report of Strategic Initiative ERR-16: Minorities and Women Within IRS* (December 1989)) (ERR-16) has been provided to this Subcommittee and probably is the most relevant study in connection with this Subcommittee's recent hearings. ERR-16 addressed a number of equal employment opportunity issues within the Service. For example, it addressed the underrepresentation of women and minorities in management and leadership positions, as compared to their numbers in the total workforce. It is clear from the study that the IRS was concerned that the concept of equal employment opportunity was clearly reflected in our recruitment efforts, but was reflected far less clearly in advancement. The study also addressed the IRS training and development programs and their adequacy and relevance to the Service's increasingly diverse workforce.

ERR-16 defined the strategic direction the IRS was taking in this area as follows:

> The Internal Revenue Service at all levels will be representative of the public it serves and committed to a leadership role that ensures racial, ethnic, and (sexual) gender equality. The IRS culture will be free of barriers which limit opportunity for minorities and women.

To elaborate on this strategic direction, we articulated strategies in five areas:

- Strengthening Management Accountability;
- Achieving Progress through Education;
- Improving the EEO Functional Support to Management;
- Ensuring Effective Recruitment, Retention, Development, and Advancement; and
- Developing Reliable Workforce Information Systems

ERR-16 called for the IRS to look beyond actions that only remedied existing representational imbalances and to pursue a comprehensive strategy to understand, and be strengthened by, the diversity of its human resources. ERR-16 challenged the IRS to become an organization in which equal employment opportunity was not considered a program for a few designated groups, but a way of doing business that would ensure that all employees were treated equitably and were not advantaged or disadvantaged by their racial or ethnic background or by their gender. It has never been the policy of the IRS to use quotas to achieve diversity. We wanted to remove barriers to advancement so that any IRS employee who was qualified for a position would be given a fair chance to attain it. This was our objective in the late 1980s, and we think it remains a good objective today.

The IRS acted in good faith to achieve this objective, and took many actions to provide opportunities for all employees. We were not alone in our efforts to provide opportunities for all

employees. The concept of equal opportunity in federal employment had been reaffirmed over the years by the executive and legislative branches of the federal government and in Supreme Court decisions. It was against this backdrop that the IRS and other federal departments and agencies developed affirmative employment programs and policies. We believe that our programs and policies have served us well. Recent court decisions in the *Adarand*[1] and *Byrd*[2] cases have caused us to review how we strategically approach or evaluate progress toward our objectives in the areas of equal employment opportunity for all employees.

In April 1997, a federal district court found, in an interlocutory decision, in *Byrd* that ERR-16 violated the Fifth Amendment equal protection clause. The plaintiffs, four white male GS-12 revenue officers, alleged that they had been subjected to age, race, and gender discrimination in connection with specific personnel actions taken by the IRS. The plaintiffs contended that ERR-16 encouraged institutional discrimination against white male employees, because its objective was to increase representation of women and minorities in managerial and executive positions through employee development and advancement strategies.

After *Adarand*, government actions related to race or ethnicity that are challenged under the Equal Protection clause are examined under what is called a "strict scrutiny" standard. Under the strict scrutiny standard, the government prevails if it shows that its program or policy serves a compelling governmental interest and that it is narrowly tailored to serve that interest. In *Byrd*, the Court held that ERR-16 encouraged or authorized preferential treatment of minority and female employees, and that, accordingly, the strict scrutiny standard must be applied to the

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[1] *Adarand Constructors Inc. v. Pena*, 115 S.Ct. 2097 (1995).

[2] *John A. Byrd v. Robert E. Rubin*, Civ. Action No. 95-1280 (W.D. La. April 9, 1997).

Service's initiative. The district court then concluded that diversification of the Service's workforce was not a compelling governmental interest sufficient to justify the agency's use of race and gender criteria in decision making.

Byrd is one of the first federal court decisions in which a federal affirmative action program was found unconstitutional. It was an interlocutory decision on a motion for partial summary judgment which could not be appealed until the trial on the merits had concluded. After that decision and before a final judgment on the merits, the case was settled by the parties under an agreement not to disclose the terms of the settlement.

The Acting Commissioner, in an August 19, 1997, Memorandum For All Executives and Managers, temporarily suspended portions of two standards in individual performance plans and two measures used in the Business Review (copy attached). The temporary suspension applies only to these performance measures -- not the affirmative action program. In consultation with the Justice Department and IRS Chief Counsel, we are working to redesign the elements and standards of the performance plans for executives and managers for FY 1998. The redesigned elements and standards will ensure that all managers and executives are evaluated on their efforts to develop and promote all employees in accordance with affirmative action plans that are consistent with current law and Administration policy.

In a September 22, 1997 memorandum, the National Director, Personnel Division, reiterated the changes to 1998 performance plans which had been described in the Acting Commissioner's memorandum. The memorandum also described new, Treasury-mandated EEO performance elements and standards for all supervisors and managers to be included in the Executive/Managerial Performance Plan for the FY 1998 performance appraisal period (copy

attached.) The IRS has not terminated its affirmative action program and, indeed, remains committed to doing everything permitted under law to achieve a diverse workforce.

In concluding, the IRS remains committed to providing equal opportunities for all employees and to maximizing the benefits of having a diverse workforce. The IRS is aware of its affirmative employment responsibilities under Management Directives promulgated by the Equal Employment Opportunity Commission, and will work with the Commission in maintaining a lawful affirmative employment program. My colleagues and I will be happy to answer any questions you or other subcommittee members may have.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

COMMISSIONER

August 19, 1997

MEMORANDUM FOR ALL EXECUTIVES AND MANAGERS

FROM: Michael P. Dolan
Acting Commissioner of Internal Revenue

SUBJECT: Affirmative Employment Programs and Policies

For many years, the Internal Revenue Service has been in the forefront in developing programs and policies intended to provide opportunities for all employees. The concept of equal opportunity in federal employment has been reaffirmed over the years by the executive and legislative branches and in a number of Supreme Court decisions. From the outset, affirmative action measures permitted the consideration of race, national origin, sex, or disability along with other criteria in government decision making. It was against this backdrop that the Service, as did other federal departments and agencies, developed affirmative employment programs and policies.

I believe that the Service's programs and policies have served us well and that we are a stronger and more effective agency because of our actions in the area of EEO and diversity. However, two court cases are causing us to review how we strategically approach or evaluate progress on our objectives in these areas.

In *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995), the Supreme Court held that federal affirmative action programs that use racial and ethnic criteria as a basis for decision making are subject to strict scrutiny. Under *Adarand*, affirmative action programs and policies must serve a compelling governmental interest, such as the eradication of the present effects of past discrimination against identifiable victims. Affirmative action programs that are based on a showing of underrepresentation alone do not satisfy the *Adarand* standard. Also, a recent district court case called into question the application of the Service's strategic initiative in the area of Enhancing Recruitment and Retention of Employees, ERR-16.

I personally want to reaffirm the Service's commitment to provide equal opportunities for all our employees and our desire to maximize the benefits of having a diverse workforce. However, until we thoroughly analyze all of the ramifications of these court cases, it is advisable to temporarily suspend certain aspects of our performance management system which address expectations or measurements in the

ALL IRS EXECUTIVES AND MANAGERS

area of EEO and diversity. This suspension affects two of the general standards in individual performance plans and two measures used in the Business Review. The following guidance applies to preparation of FY 97 performance appraisals for executives and managers.

Do not prepare any narrative addressing the language shown in the following General Standards.

Critical Element: Achieve Quality-Driven Productivity Through Systems Improvement and Employee Development

General Standard: Coach and develop employees to achieve parity at all grade levels which is reflective of the Civilian Labor Force by eliminating barriers in recruiting, hiring, training, and promoting minorities, women, and persons with disabilities.

Critical Element: Maximize Customer Satisfaction and Reduce Burden

General Standard: Meet the Service's goals in: ..... minority, women, and labor surplus area contacting. [Please note that only a portion of this general standard is affected. Meeting the Service's goals in the areas of cash management, prompt payment and debt collection are still subject to narrative evaluation, as appropriate.]

All other elements and standards in the FY 97 performance plans should be addressed in the evaluations, consistent with the scope of an individual's responsibilities. For purposes of the Business Review this year, in the area of EEO measures, workforce (pool series) representation and targeted disabilities measures will not be addressed. The Business Review will cover complaint resolution rates.

Analysis of the impact of these court cases is ongoing. In the near future you can expect to see modifications to FY 98 performance plan standards and additional guidance on how to approach our critical responsibilities in the areas of EEO and diversity. If you have questions about this memorandum, please contact Paulette Sewell-Gibson, Acting National Director, EEO and Diversity, at (202) 622-5400.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SEP 22 1997

MEMORANDUM FOR REGIONAL COMMISSIONERS, CHIEF OFFICERS, EXECUTIVE OFFICER FOR SERVICE CENTER OPERATIONS, CHIEF INSPECTOR, NATIONAL DIRECTOR OF APPEALS, TAXPAYER ADVOCATE, AND DIRECTORS OF SUPPORT SERVICES

FROM: Eugenio Ochoa Sexton, FOR James O'Malley
National Director, Personnel Division

SUBJECT: Changes to the Executive/Managerial Performance Plan and the New Performance Plan for Management Officials

This memorandum highlights several important changes to the performance management program. These changes will impact executives, managers and management officials Servicewide. Management officials will be on a separate performance plan for FY 1998 (October 1 - September 30) performance appraisal period. Executives and managers will have a new EEO critical element and standards.

Because of these changes we are revising Form 9688, Executive/Managerial Performance Plan, and developing a new form for management officials. These new forms will not be available until mid November. Until these forms become available, the attached interim forms should be locally reproduced in order for employees to receive their performance plans timely. Regulation requires managers to communicate performance expectations with their employees usually within thirty days after the start of the rating period. Discussion and documentation of the attached interim forms would meet that requirement. Completing the formal forms would not be necessary in this case.

Changes to Form 9688, Executive/Managerial Performance Plan. (Attachment 1)

- Suspension of certain aspects of two performance standards in the Executives/Managers Performance Plan addressing expectations/measurements in area of EEO and diversity (Acting Commissioner's memo, Affirmative Employment Programs and Policies dated August 19, 1997).

  The Service is committed to provide equal opportunities for all employees and to maximize the benefits of having a diverse workforce. The Service is currently in the process of assessing its affirmative employment policies and programs in light of the recent court cases. However, until analysis of the impact these court

cases have on our performance management program are completed, we have temporarily suspended portions of EEO and diversity under the following:

Critical Element : Maximize Customer Satisfaction and Reduce Burden

General Standard: Meet the Service's goals in: . . . . minority, women, and labor surplus area contracting. (Only a portion of this general standard is suspended for FY 98 appraisal period.)

Critical Element: Achieve Quality-Driven Productivity through Systems Improvement and Employee Development

General Standard: Coach and develop employees to achieve parity at all grade levels which is reflective of the Civilian Labor Force by eliminating barriers in recruiting, hiring, training, and promoting minorities, women, and persons with disabilities. (Suspended for FY 98 appraisal period.)

- Addition of a separate EEO critical element and performance standards.

  The Secretary of the Treasury is mandating uniform EEO performance element and standards for all supervisors and managers to increase management accountability for EEO activities. As a result of this mandate, the EEO critical element and performance standards have been added to the Executive/Managerial Performance Plan for the FY 1998 appraisal period. The Department's goal is to send a clear message to all supervisors and managers that they will be held accountable for upholding the Department's commitment to the EEO principles.

- Minor changes to the critical elements.

  The wording of the critical elements has been revised to reflect the language in the Strategic Plan and Budget FY 1998. The general standards remain unchanged.

Regional Commissioners, Chief Officers, Executive Officer for Service Center Operations, Chief Inspector, National Director of Appeals, Taxpayer Advocate, and Directors of Support Services

New Performance Plan for Management Officials (Attachment 2)

- In the past, management officials and their supervisors experienced problems linking their work to the three corporate objectives in the Strategic Plan and Budget (SPB) for evaluating performance. Based upon input from all levels of the organization, new performance elements and standards were developed to describe the most common duties to the management official. The new plan is within the scope of the management official and consistent with the overall objectives of the organization.

The revised Executive/Managerial Performance Plan and the new Management Official Performance Plan will be printed for Servicewide distribution. We plan to have Publishing Services print the new forms and send them directly to the CID sites to be available in mid November. If you have questions regarding the recent changes, please call Nora Prokuski at (202) 874-6213, Office of Performance and Position Management.

cc: Personnel Officers
TPC Chiefs

Attachment 1

EXECUTIVE/MANAGERIAL PERFORMANCE PLAN

Name of Employee	Office/Organization	Series and Grade
Title of Position		Period Covered From To
This performance plan has been discussed with me and I have been given a copy. Employee Signature		Date
Supervisor's Name/Signature	Title	Date
Approving Official's Name/Signature	Title	Date

INSTRUCTIONS

Your performance plan should be developed by you and your manager. The plan will contain the established critical elements, related standards, and any amplification/additional standards developed specifically for you. The established critical elements and standards were written at the fully successful level and are designed to reflect basic, on-going responsibilities of executives and managers throughout the Service. While each critical element is a mandatory performance indicator, some general standards may not apply to your specific position. You and your manager should review each general standard and delete any that are not applicable for your plan. Deletions should be noted and initialed on the plan. Additional standards, reflecting only those few high-priority requirements that must be accomplished in the rating period, may be added to your plan. These should be kept to a minimum (usually not more than two per element) and written at the fully successful level with appropriate indicators of quality, quantity, and timeliness.

Your performance will be assessed in accordance with your plan, and will reflect a rating for each critical element and all applicable standards. An overall rating (summary level) will also be determined.

When carrying out your plan responsibilities, it is critical that each element and standard be accomplished in accordance with:

- legal, procedural, administrative, technical, and program requirements
- objectives in the Strategic Plan and Budget
- program directions and manuals
- transition to Leadership Competencies

Progress reviews are an essential part of the performance plan and appraisal system. Although the process of monitoring plan accomplishment is on-going, a minimum of one review must be conducted approximately mid-way through the appraisal period. While a formal written review is not mandated, documentation that the review has been conducted is required in accordance with local procedures.

PRIVACY ACT STATEMENT

The Privacy Act of 1974 and Paperwork Reduction Act of 1980 say that when we ask you for information, we must tell you: our legal right to ask for the information; what major purpose we have in asking for it and how it will be used; what could happen if we do not receive it; and whether your response is voluntary, required to obtain a benefit, or mandatory under the law.

This statement is being provided pursuant to Public Law 93-579 (Privacy Act of 1974) December 31, 1974, for individuals who have been requested to submit a statement of accomplishment/self-assessment.

The authority to solicit this information is derived from 5 USC 4301, et seq., and 5 CFR Part 430.

In order to allow you the opportunity to provide input into the appraisal process, management will request this information from you. The information you furnish will be considered by your supervisory officials in preparing an appraisal of your performance, or conducting mid-year progress reviews. Once prepared, the information contained in your performance appraisal will be used on a "need to know" basis by IRS officials. Disclosures may also be made when appropriate, to routine users as published in the Federal Register, such as the Office of Personnel Management, the Equal Employment Opportunity Commission, the General Accounting Office and others listed in the appropriate system of records. The information contained in your performance appraisal is part of TR/IRS 36.003, General Personnel Records.

Failure to furnish this information may result in your supervisors preparing your appraisal, or conducting a progress review, without considering any information you may feel is relevant or significant.

Executive/Managerial Performance Plan

Critical Elements and Performance Standards

The following critical elements apply to all Executives and Managers. The General Standards appearing with each element describe the requirements for fully successful performance in all organizational components and reflect the importance of successfully managing day-to-day operations and furthering the Service's progress toward meeting the organizational goals of the Strategic Plan and Budget. Additional standards may be prepared for each critical element. These amplification/additional standards should be used for clarification or emphasis of the organization's needs and the needs of the individual.

The EEO element and standards support the Service's commitment in improving and measuring EEO effectiveness.

1. **Increase Compliance.**

Objective: Ensure our products, services, policies, and employees directly or indirectly encourage and assist taxpayers to increase the number who voluntarily file timely, accurate, fully paid returns. When taxpayers do not comply, take appropriate remedial/enforcement actions to correct future behavior.

General Standards: Consistent with the scope of your responsibilities, apply leadership competencies to:

- Plan, implement, monitor, and deliver programs to meet the goals of the Strategic Plan and Budget timely and within budget allocations, including but not limited to effective planning and management of labor costs, space utilization, telecommunication resources, equipment inventories, and accounting controls.
- Identify emerging tax administration issues and develop/implement strategies to address them.
- Provide taxpayers with the ability to interact with employees and systems to meet their diverse needs.
- Maximize resource effectiveness through cross-functional coordination with internal and external stakeholders.
- Foster personal and employee development to better match the skills, abilities, ideas, and experiences of our diverse workforce to appropriate market segments.
- Administer the tax laws with empowered employees who protect taxpayers' rights and treat them ethically with honesty, integrity, fairness, and respect.
- Develop/maintain systems to protect internal and external customer privacy, keep data confidential, and maintain adequate security over tax/personnel data.

Amplification/Additional Standards:

2. **Improve Customer Service.**

Objective: Reduce the time and expense experienced by taxpayers, tax professionals, and others in complying with the tax laws while at the same time increasing their satisfaction with the tax system. Use the skills of a diverse workforce to support front-line initiatives to maximize internal and external customer satisfaction.

General Standards: Consistent with the scope of your responsibilities, apply leadership competencies to:

- Use the skills and abilities of a diverse workforce and technology to redesign/maintain business processes that reduce expenditures of time, money, and resources for taxpayers and internal customers.
- Provide the assistance needed to resolve issues during the initial contact with taxpayers.
- Provide customized education and enhanced outreach efforts.
- Establish and aggressively monitor necessary internal controls (annual assurance process) to deliver a quality product and guard against waste, fraud, and abuse.
- Meet the Service's goals in cash management, prompt payment, and debt collection.

Amplification/Additional Standards:

3. **Increase Productivity.**

Objective: Continually improve the quality of products and services we provide to our internal and external customers through the use of teamwork, systems improvement tools and techniques, and the development of a highly trained, diverse workforce.

General Standards: Consistent with the scope of your responsibilities, apply leadership competencies to:

- Improve processes and products by using systems management techniques and focusing our modernization efforts to meet customer needs.
- Educate the workforce/stakeholders on how organizational goals, strategies, policies, practices, and individual jobs relate to the Strategic Plan and Budget.
- Empower individuals to use independent judgment to solve problems and develop products and services in a timely and effective manner.
- Establish and maintain a constructive working relationship with the National Treasury Employees Union to implement the IRS/NTEU Total Quality Organization partnership.
- Support a healthy, safe work environment, free from harassment and discrimination, in which the privacy of employees is respected.

- Promote a workplace climate where ethical behavior is paramount and everyone is treated with honesty, dignity, and respect.

- Provide a written performance plan within 30 days of the beginning of the rating period and assign an annual performance rating of record within 30 days of the close of the rating period for each employee.

Amplification/Additional Standards:

4. Equal Employment Opportunity

Objective: Application of the Equal Employment Opportunity principles of fairness and equity in the workplace.

General Standards: In consultation with the EEO staff and to the extent authorized and consistent with existing resources:

- Supports staff participation in special emphasis programs.

- Promptly responds to allegations of discrimination and/or harassment, and initiates appropriate action to address the situation.

- Cooperates with EEO counselors, EEO investigators, and other officials who are responsible for conducting inquiries into EEO complaints.

- Assigns work and makes employment decisions in areas such as hiring, promotion, training, and developmental assignments without regard to sex, race, color, national origin, religion, age, disability, sexual orientation, or prior participation in the EEO process.

- Monitors work environment to prevent instances of prohibited discrimination and/or harassment.

Attachment 2

MANAGEMENT OFFICIAL PERFORMANCE PLAN

Name of Employee	Office/Organization	Series and Grade
Title of Position		Period Covered From To

This performance plan has been discussed with me and I have been given a copy.

Employee Signature		Date
Supervisor's Name/Signature	Title	Date
Approving Official's Name/Signature	Title	Date

INSTRUCTIONS

The critical elements are applicable to all management officials. The objective and uniform standards under each critical elements reflect the major day-to-day responsibilities of the position. All standards are written at the fully successful level. While each critical element is a mandatory performance indicator, some general standards may not apply. The supervisor and employee should review the uniform standards and delete any that are not applicable. Deletions should be noted, initialed, and dated by the employee and supervisor. Local, individual, or team standards, as appropriate, may be included to reflect areas of emphasis. These should be kept to a minimum and should be written at the fully successful level with appropriate indicators of quality, quantity, and timeliness.

The employee's performance will be assessed in accordance with the plan, and will reflect a rating for each critical element and applicable uniform standards. An overall rating (summary rating) will also be determined.

Progress reviews are an essential part of the performance plan and appraisal system. Although the process of monitoring plan accomplishment is on-going, a minimum of one review must be conducted approximately mid-way through the appraisal period. While a formal written review is not mandated, documentation that the review has been conducted is required in accordance with local procedures.

PRIVACY ACT STATEMENT

The Privacy Act of 1974 and Paperwork Reduction Act of 1980 say that when we ask you for information, we must tell you: our legal right to ask for the information; what major purpose we have in asking for it and how it will be used; what could happen if we do not receive it; and whether your response is voluntary, required to obtain a benefit, or mandatory under the law.

This statement is being provided pursuant to Public Law 93-579 (Privacy Act of 1974) December 31, 1974, for individuals who have been requested to submit a statement of accomplishment/self-assessment.

The authority to solicit this information is derived from 5 USC 4301, et seq., and 5 CFR Part 430.

In order to allow you the opportunity to provide input into the appraisal process, management will request this information from you. The information you furnish will be considered by your supervisory officials in preparing an appraisal of your performance, or conducting mid-year progress reviews. Once prepared, the information contained in your performance appraisal will be used on a "need to know" basis by IRS officials. Disclosures may also be made when appropriate, to routine users as published in the Federal Register, such as the Office of Personnel Management, the Equal Employment Opportunity Commission, the General Accounting Office and others listed in the appropriate system of records. The information contained in your performance appraisal is part of TR/IRS 36.003, General Personnel Records.

Failure to furnish this information may result in your supervisors preparing your appraisal, or conducting a progress review, without considering any information you may feel is relevant or significant.

PERFORMANCE PLAN FOR MANAGEMENT OFFICIALS

Critical Elements and Performance Standards

Element 1. Program Planning, Management, and Delivery.

Objective: Plans and organizes assigned activities and projects to timely accomplish work objectives according to procedural, administrative, and technical requirements, as well as business goals: Increase Compliance, Improve Customer Service, and Increase Productivity. Quality and customer service are reflected in all products and activities.

Uniform Standards:

- Sets effective short and long-term priorities that are realistic, responsive to accomplishment of the Strategic Plan and Budget, as well as local priorities. Plans, implements, monitors, and delivers assigned programs to meet the local goals of the Annual Performance Plan.
- Effectively implements and monitors assigned programs. Provides necessary oversight to ensure quality results that are responsive to the needs of the Service, as well as internal/external customers.
- Utilizes technology to redesign/maintain business processes that reduce expenditure of time, money, and resources for taxpayers and internal customers. Reviews and/or recommends effective use of resources for functional program areas.
- Utilizes systems management principles. Contributes to continuous quality improvement in day to day work assignments.

Local, individual, or team standards: May be used to define specific outcomes and time frames.

Element 2. Communication, Interpersonal Relationship, Team Work.

Objective: Develops and maintains lines of communication and interaction which ensure work accomplishments and enhances work relationships with peers, external/internal customers, superiors, and others.

Uniform Standards:

- Actively assists in meeting unit/team goals as appropriate.
- Exercises sound judgment in identifying the information needed to be communicated.
- Through timely and effective oral and written communication, disseminates necessary information and program guidance.
- Maintains effective working relationships.

- Keeps management and other appropriate parties timely informed of significant issues.
- Supports a workplace climate where ethical behavior is paramount and everyone is treated with honesty, dignity, and respect free from harassment and discrimination.

Local, individual, or team standards: May be used to identify specific team goals, working relationships to be improved, and feedback systems.

Element 3. Quality of Expertise.

Objective: Effectively demonstrates expertise in assigned program areas.

Uniform Standards:

- Continually develops and maintains technical program expertise.
- Provides accurate, timely guidance and instructions.
- Maintains knowledge of broad organizational goals to assure program direction and guidance advance such goals.
- Effectively researches issues and prepares thorough recommendations and solutions.

Local, individual, or team standards: May be used to cite specific issues, projects, goals, or developmental activities.

Mr. MICA. Thank you, Mr. Fowler. A first question: Did I hear your testimony wrong, it wasn't clear to me regarding the memo of the 22nd. Early on, you suspended policy relating to discrimination and work force standards and things of that sort, as a result of the *Byrd* decision. Now, the memo of the 22nd—I thought that this reinstituted new policy. Did you testify that you still haven't developed a final policy? You're developing——

Mr. FOWLER. We have issued performance standards. The standards include a new element in equal employment opportunity. The original memo that Mr. Dolan issued in August suspended certain portions of our performance standards in order that we might review them.

Mr. MICA. And this——

Mr. FOWLER. And that was to suspend them at the end of the rating period.

Mr. MICA. And this really doesn't reinstitute them in detail. Is that what you're saying?

Mr. FOWLER. It doesn't reinstitute the portions that we had in question.

Mr. MICA. So, what policy do we have in place?

Mr. FOWLER. We now have in place performance standards that we hope will not mislead our managers and executives into doing anything that would appear to be a quota system, which would be in violation of the law.

Mr. MICA. But you haven't replaced that, is that correct? You suspended, then you reinstituted, but you reinstituted with some elements still missing without a full explanation of standards. Is that——

Mr. O'MALLEY. I can answer that question, Mr. Chairman, sure.

Mr. MICA. Mr. O'Malley? Tell me where we are.

Mr. O'MALLEY. What we did was issue new performance plan standards for managers and executives——

Mr. MICA. Right.

Mr. O'MALLEY [continuing]. That contained a new fourth EEO critical element which we worked on with the Department of Treasury that they mandated for all Treasury bureaus. Now, we did make one change to that where we eliminated some language about meeting bureau affirmative employment goals because we weren't sure about that particular language. Now, as indicated in the testimony, we are working with Treasury and the Department of Justice to take a look at that EEO element and see if there is a better way to describe what are appropriate responsibilities for managers and executives——

Mr. MICA. So, what we have in place is temporary.

Mr. O'MALLEY. That's correct.

Mr. MICA. And the specific differences in the revised standard are not there yet. The new standards have not been enumerated, published——

Mr. O'MALLEY. We have published a version of this EEO element as a new fourth critical element but we are working with the Department of Justice to modify that language, to make it more appropriate and clear to our work force.

Mr. MICA. Is this just for IRS or it is going to be for all of Treasury? Is all of Treasury under this edict?

Mr. O'MALLEY. Yes. All of Treasury was mandated to add a fourth, well, an additional, critical element to their performance plans that were developed after August 15 of this year.

Mr. MICA. So, we have a sort of a band-aid mend in place and we're waiting for the specific, is that correct?

Mr. O'MALLEY. That's correct. We——

Mr. MICA. Now, as you formulated these changes, I've heard you talk about Treasury. Where is OPM in this? Is OPM assisting? Are they being involved? Now, this subcommittee doesn't just have a responsibility to IRS. We have a responsibility to the whole Federal work force in making certain, as I said in my opening statement, that every employee is hired on an equitable basis, is disciplined on an equitable basis, is promoted on an equitable basis, is terminated on an equitable basis. My concern is that I have out here the IRS with a partial fix, not really in place, policy, and I'm wondering about OPM, which is responsible for the whole work force and our subcommittee likes to make certain everybody's treated equal in this process, and that we aren't operating under dual systems. Tell me what OPM has been doing with you or you've been doing with OPM to make certain that isn't the case.

Mr. O'MALLEY. I'm not aware of any contacts with OPM, Mr. Chairman.

Mr. MICA. Don't tell me that. Mr. Fowler, come on, now. Mr. Fowler, you——

Mr. FOWLER. Yes. I would——

Mr. MICA. What's the coordination with OPM?

Mr. FOWLER. We've not had coordination, to my knowledge, with OPM, Mr. Chairman. What I can tell you is what we have done in the Internal Revenue Service, pursuant to *Byrd*. *Byrd* specifically focused upon our policies in the Internal Revenue Service. As a result, in looking at our performance standards, we attempted to make sure that we're in compliance with the law.

Mr. MICA. Has OPM contacted you since the *Byrd* decision to coordinate efforts?

Mr. FOWLER. Not to my knowledge.

Mr. MICA. Mr. O'Malley, Mr. Ferrara?

Mr. O'MALLEY. Not to my knowledge.

Mr. FERRARA. Mr. Chairman, it might be helpful to understand that, as we read the *Byrd* decision, it is the implementation of the ERR–16 that was problematic to the court. The implementation was through a performance standard. The performance standards are not uniform throughout the government. The performance standard was a unique IRS performance standard. That link, I think, is what explains why OPM was not consulted because we weren't doing something that was, in our minds, at least, a governmentwide kind of action. We weren't dealing with the overlying policies. We were dealing with the IRS-specific performance management system and particular elements in it, only.

Mr. MICA. Has this ever been a subject of OPM's governmentwide forum, the interagency advisory group?

Mr. O'MALLEY. I don't know, Mr. Chairman.

Mr. MICA. Mr. O'Malley, Mr. Fowler?

Mr. FOWLER. I'm not aware of that, Mr. Chairman.

Mr. MICA. Mr. Ferrara, no?

Mr. FERRARA. No, I'm not aware of that.

Mr. MICA. I'm a little bit concerned that there's not coordination with OPM but you are coordinating all of this activity with Treasury.

Mr. FOWLER. We are coordinating it with Treasury but we are also coordinating it with the Justice Department. We've had meetings just recently at the main Treasury in which we had members of the Treasury Department as well as members of the Justice Department review our activity around our performance standards and our compliance with recent court decisions.

Mr. MICA. The Justice Department is responsible for defending IRS in litigation and has issued legal guidance to agencies to promote compliance, but the *Adarand* guidelines—DOJ issued revised guidelines on Federal agencies' affirmative action programs in response to *Adarand* in February 1996. Did IRS revise its performance management elements to reflect the Department of Justice *Adarand* guidelines between February 1996 and August 19, 1997? Mr. Fowler, do you know?

Mr. FOWLER. Mr. Chairman, I'm going to defer to Mr. O'Malley on that.

Mr. MICA. Mr. O'Malley?

Mr. O'MALLEY. No, we didn't make a change.

Mr. MICA. In light of the *Adarand* guidelines and its own loss in the *Byrd* case, did IRS consult with the Department of Justice before issuing the revised guidelines in the September 22 timeframe from August to September?

Mr. O'MALLEY. No.

Mr. MICA. No?

Mr. O'MALLEY. No, we did not.

Mr. MICA. Did not? What makes you confident that the revised guidelines are more legally defensible than the pre-*Byrd* guidelines? Mr. Fowler.

Mr. FOWLER. I think the opinion at this point, in having had conversations with the Justice Department and with Treasury in which we've had counsel from Treasury involved, is that the revised guidelines that we have that deal with the area of equal employment opportunity are certainly in compliance as far as the Justice Department is concerned.

Mr. MICA. Well, let me ask you a question about diversity problems at IRS. How many EEO complaints has IRS received in recent years, Mr. Fowler?

Mr. FOWLER. Mr. Chairman, I didn't come prepared to give those numbers. I can provide them for the record.

Mr. MICA. Are you aware of any statistics, Mr. O'Malley, on this——

Mr. O'MALLEY. No, I'm not, Mr. Chairman.

Mr. MICA. What groups, in your estimation, are under-represented in IRS' recent Federal equal opportunity employment reports? Anyone have that information?

Mr. FOWLER. I didn't bring that with me, Mr. Chairman. I apologize.

Mr. MICA. Well, in addition to the loss of *Byrd* and *Rubin,* has IRS lost any other litigation related to its affirmative employment program? Any other actions lost, Mr. Fowler?

Mr. FOWLER. Not to my knowledge, but I will defer to Mr. Ferrara.

Mr. MICA. Mr. Ferrara.

Mr. FERRARA. There have been no other decisions of the moment of the *Byrd* that deal with the implementation or any of the policies directly. We've had individual cases that we've won and that we've lost but always on individual grounds.

Mr. MICA. Are there any similar cases pending?

Mr. FERRARA. I cannot answer that. I don't know. We are collecting the information but we don't have it yet available.

Mr. MICA. Are there similar cases pending?

Mr. FOWLER. Mr. Chairman, what I would say, in all honesty with you, is that after the *Byrd* decision, obviously, and the controversy that has surrounded the recent activity concerning performance standards and newspaper articles, national publicity on TV, et cetera, there are certainly others who perhaps, feel that they may have a case that centers around the same type of activity as the *Byrd* case. But——

Mr. MICA. But do we have others that you're aware of, Mr. O'Malley?

Mr. O'MALLEY. No. Is the question are any pending?

Mr. MICA. Yes.

Mr. O'MALLEY. No, I'm not aware of any, Mr. Chairman.

Mr. MICA. You're not aware of any. Your statement describes its work force as 67 percent female, 35 percent minorities. When ERR–16 was published in 1989, it reported that the IRS work force was 61.2 percent female and 30.2 percent minorities. Does the agency have any or have they set any numerical objectives about the proper levels of women or minorities in its work force?

Mr. FOWLER. We do not have numerical objectives at this time.

Mr. MICA. Mr. O'Malley, has that been a consideration, setting any kind of corrective measures to create some type of numerical balance?

Mr. O'MALLEY. No, we wouldn't be setting any targets, Mr. Chairman.

Mr. MICA. Mr. Ferrara, no?

Mr. FERRARA. Mr. Chairman, not only are there no goals but the objectives are not on a national level to achieve certain representation in the work force. ERR–16, itself, was not looking at the total work force. It was looking at the higher grade levels and the representation of minorities and women in those grade levels and it was looking at it only as measures at a national level. That doesn't translate to—at individual offices where employment decision are being made, whether there is the same kind of representation in all of those offices equally throughout the country.

Mr. MICA. The final question. We heard the ranking member cite certain statistics about inequity as far as promotion and levels. I believe it was, he cited, statistics of folks having opportunity in the higher positions in IRS. Is there any program that addresses this particular situation within IRS? Mr. Fowler.

Mr. FOWLER. Mr. Chairman, would you repeat that? I'm not sure that I understood all of your question.

Mr. MICA. The ranking member indicated from statistics he had—I didn't have access to them. What were they, Mr.

Cummings? Do you have them? It sounded like people were having a rough time getting to the top in the agency, particularly from a minority standpoint, even though there's significant representation within the agency numerically. Is this something that your policy does address or will address?

Mr. FOWLER. I would say that we have policies that, or strategies, if you will, more than policies, that will address these issues and the strategies are this. Without getting into areas that would subject us to strict scrutiny situations, we've looked at the other ways to address issues and they are to remove barriers, and to have effective outreach and recruitment programs. And we also feel that, in doing so, if we remove those barriers, if we have effective outreach, if we make it known that we support equal opportunity for all employees, we will accomplish many of our objectives. I think that it also must be realized that the court has said to Internal Revenue that it will not say that under no circumstance should we ever set a goal because if we have a compelling government interest, if we feel that we can narrowly tailor it, and if we can make a business case supported by data, then, in fact, we should be able to stand the strict scrutiny test. I think we have to look at all of our employment practices, whether that's hiring, retention, promotion, et cetera. We have to look at what the business case is and how the public will be best served. This is what we're all about here. We must do this in compliance with the law and continue to offer equal opportunity for everyone.

Mr. MICA. Just one final question. We've seen the September 22 memo. Mr. O'Malley, I guess you produced that. When can we expect some final language and some final policy to be developed? Is there a timeframe set for that?

Mr. FERRARA. We are working with the Department of Justice in order to come up with appropriate language for a performance standard and appropriate guidance to put out. I expect it to happen soon but there isn't a timeframe or a target date for that.

Mr. MICA. That suffices as far as you're concerned. Has the agency set a target date, Mr. Fowler?

Mr. FOWLER. We have not set a target date but what I can assure you, Mr. Chairman, is that we are working with all due speed to attempt to try to resolve this issue. As Ms. Norton said, there is a lot of confusion in the work force because of newspaper articles, because of publicity, because of uncertainty with the employees, because of the performance standards being suspended, certain portions of them, and we are anxious to eliminate that confusion so that we can get on with the business of the agency.

Mr. MICA. Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. Tell me, Mr. Fowler, the history of the ERR–16. How did that come about?

Mr. FOWLER. Mr. Cummings, I was not in the Internal Revenue Service at the time but what I can tell you is that the Service recognized that it had under-representation at that time in certain areas and a committee of executives convened and looked over the programs in terms of hiring practices, promotions, retentions, recruitment, et cetera and, as a result of those meetings which occurred, I guess, around 1989 or so, determined that there needed

to be some agency strategies that would deal with removing some of the things that were barriers to promotions for all persons.

Mr. CUMMINGS. Do you know whether—how old is the *Byrd* case, do you know?

Mr. FOWLER. How old?

Mr. CUMMINGS. Do you know when it was filed?

Mr. FOWLER. I don't know when it was filed but I know the ruling was just about 4 months ago.

Mr. CUMMINGS. Yes, I understand that. But I was just—I guess what I'm trying to figure out is was there a court case that caused the agency to begin to look at itself or what happened? Were there complaints? I'm sure it just didn't decide, I mean, just by their goodwill that they just wanted to look into this. This is not the most attractive subject for many agencies and I'm just wondering what may have caused them to begin to even initiate, you know, the—first of all, to recognize the fact that there was a problem and then to try to look into it. I was trying to figure out what may have caused them to even do that.

Mr. FOWLER. To have the genesis of ERR–16?

Mr. CUMMINGS. Yes, yes.

Mr. FOWLER. I'll ask my—either one of my colleagues, since they were here at the time, if they have a better read on it than I do.

Mr. O'MALLEY. Just by way of background, the organization, probably in the mid-1980's, set out to look at what strategic objectives it needed to establish so that it could further its mission and attract and retain the best and brightest for our organization. And so, there was a whole series of initiatives on the subject, the general topic of employee recruitment and retention. And those were promulgated in the mid-1980's and late 1980's and this was one of the later ones in that stream. There was one on ethics, I think it was the No. 17, and so, this was part of an overall assessment the organization went through starting in the mid-1980's to take a look, strategically, at what the organization needed to do to position itself to deliver on its mission. And so, this was one of a series under the topic of employee recruitment and retention.

Mr. CUMMINGS. Now, the—what were the specific actions that the ERR–16 recommended the IRS take? What did it say you needed to do?

Mr. O'MALLEY. Some of those, from my recollection, were to improve management accountability, to improve the support we provided to the EEO community in the agency in terms of people who served as counselors and the like, to improve our ability to gather data on representation of our work force, and to also improve our performance in the area of mid-level grades for women and minorities which was grades 13 through 15.

Mr. FOWLER. I have before me the five strategies if you wish to have them for the record.

Mr. CUMMINGS. Do they pretty much reflect what he just said?

Mr. FOWLER. Pretty much, that they strengthen management accountability, achieve progress through education, improve the EEO functional support to management, ensure the effective recruitment, retention, development, and advancement, and develop reliable work force information systems.

Mr. CUMMINGS. Now, Mr. Fowler, you, a little bit earlier, had mentioned the word outreach and that this was, I take it, one of the strategies to try to reach some of the objectives of getting people at certain levels of management and what have you. Outreach implies to me that, if that is a new strategy, it implies that somebody must not have been doing something before. In other words, that if you're saying that part of the strategy is to outreach, it means, I take it and you can help me with this, that maybe there were not certain efforts to expose certain people to certain opportunities. Is that a pretty fair statement?

Mr. FOWLER. Mr. Cummings, what I would say is, that in my estimation, and again this is part of an ongoing dialog that we have with our regional directors for EEO, that I'm not entirely satisfied that in all arenas we've had sufficient outreach programs to make all persons aware of the opportunities in the IRS. I feel that we could do a better job in terms of our communication strategy, in terms of our relationship with the public, in terms of what's available. And, even internal to the organization, I feel that when we talk about things like acting assignments, promotion potential, and developmental assignments, we need to have a better communication strategy to make sure that all employees are aware of these opportunities. I would say that while we feel that we've had a good faith effort in the past, I would not characterize it as a 100 percent effort. I think that we can certainly find areas in the Service in which we would not be fully satisfied, that there was this push to make sure that all employees were exposed to all opportunities equally across the board. And that's our strategy in the EEO office at this time.

Mr. CUMMINGS. Well, one of the things—that leads me to my next question. I spoke before some IRS employees in Baltimore not very long ago, maybe about 6 or 7 months ago, and I should never forget when I was talking to them about looking to move up, to do those things that are necessary to make themselves better qualified for better positions and talking about the whole idea of applying to move up. They laughed as if to say, that's a joke, we're not going to get the kind of recognition that we ought to get. And so, the question becomes, I guess, and we were talking about outreach, sadly, a lot of people who you're probably aiming at, I assume just from my experience in talking to them afterwards, they already believe that even if you tell them about the jobs, expose them to the jobs and moving up, that there are going to be barriers that are going to block them from getting there. Now, you know, I'm the kind of person who believes that you should do one anyway but I can imagine someone who may have experienced a lot of that in the past saying, you know, well, why bother? So, I guess my question then becomes you also talked about the removal of barriers and the question is, is what barriers are you talking about? You talked about that a little bit earlier.

Mr. FOWLER. Yes, I continue to say the removal of barriers because I feel that there are several things. One, there are psychological barriers. In some cases, the past record of promotion and hiring and retention has not been good and, in that regard, because that has been used as an example, because that is a mindset or because that is the only thing that some employees have been ex-

posed to, then psychologically they can be defeated before they ever step up to the plate. In other cases, we have a corporate mentality that I think we have to deal with and that's a barrier because if we don't have all of our managers on board, that EEO is not just a law but—because a law can be broken. You can have a law to stop at the stoplight but if you want to have a rolling stop and disregard it, then there's a problem there. We are not interesting in hammering over the heads of the employees that this is the law. What we want people to do is to do things in the work force because they are the right things to do, because it makes good business sense and we're going to press that. And what we call for is to make this a leadership issue in the IRS and to say that you must take ownership of this issue and we want you to realize that the tenets of this organization are to provide equal opportunity to everyone and to make them aware that there's equal opportunity out there and that we will do everything that we can to make sure that all of our employees, all over 100,000 of them, feel this way. That's something that we have to work on and, in changing our corporate mentality, it's not something that we can do overnight but we do feel that, with proper communication strategy and leading by example, that we can achieve this over a period of time.

Mr. CUMMINGS. One of the things that I have noticed, which I find very interesting, is that a lot of times people who may be opposed to affirmative action or opposed to diversity, I mean full diversity, a lot of times people use these code words and one of them is quota. And while I understand, you know, what that's all about and why people may have a problem with quota, the question becomes how do you measure your progress? In other words, if you have a situation where you have 1,000 top people, whatever the top grade is, in 1996 and 99.9 percent of them are white, and then in 1997 you want to look after you've done all of these good things to let people know about what's going on and outreach and removing barriers, how do you all measure and we all do it, we measure our progress or I don't see how we can even—I think all of us are trying to get to a certain place, so how did you measure your progress? I mean, do you look at numbers? I mean, do you just say, well, we feel better today because we feel better, or do you say, we now have out of 1,000 employees of top people, we now have 10 minorities and women as opposed to 1? I mean, how do you measure it? You follow what I'm saying?

Mr. FOWLER. I follow.

Mr. CUMMINGS. In some kind of way, it seems to me, that you have to have some kind of way of saying it looks like we made some progress or we're going backward because you all are spending a lot of Federal money trying to do all these ERR–16s and all of this kind of stuff. Then, the question becomes, when you speak to the Congress, how do you tell us, or even tell yourselves, that we made progress after we did all of those wonderful things that you just said you're trying to do?

Mr. FOWLER. You asked me a very difficult question, as you know, Mr. Cummings, but what I can tell you is that the court has said that we can't set quotas and we can't have numbers and, yet, we are called upon to attempt to have a diverse work force. We have to serve a diverse public. We have to administer the tax sys-

tem with the most effectiveness and efficiency that we can and, at the end of the day, we have to look at our work force and ask, have we afforded everyone equal opportunity. And, in some cases, we may very well look at that work force and say that that work force does not mirror society or it doesn't mirror the specific local population. I think what I want to get back to is the court has not left us completely without being able to use numbers. What the court has said is that if, in fact, at the end of the day, we can show that because we are structured the way we are or because we have employees in the numbers that we do, we have a compelling government interest that we need to serve in order to get our job done and we can meet the strict scrutiny of the court, then in those cases we would be able to do it. But I think anything that we do we have to do in accordance with the existing law.

Mr. CUMMINGS. So, the—certainly, you want to consult——

Mr. FOWLER. Excuse me.

Mr. CUMMINGS. Sure, go ahead.

Mr. FOWLER. Thank you, Mr. Cummings.

Mr. CUMMINGS. The—you know, you used two terms a little bit earlier that I just found so interesting. You used the terms acting positions and development assignments. What does that mean?

Mr. FOWLER. Whenever there are vacancies in the Service, and it takes time to certainly fill those positions, normally a person would be placed in an acting position, Acting Director or Acting Service Center Director, Acting Manager or whatever the case may be. There have been accusations, if you will, information given to us that when the choices are made for those persons that would be placed in an acting assignment, which, in fact, can be a developmental assignment, it can expose that person to opportunities to manage where they may not have been a manager before, can expose them to a different group of people in which they may have to interact with those persons and get a different type of exposure, that's what I mean by acting or developmental assignments.

Mr. CUMMINGS. That's very interesting. So, you know, I just read a book by a fellow named Samuel Procter and what Dr. Procter is is a great preacher and, unfortunately, he died about 4 months ago. But one of the things he says in that book is that a lot of times where a person ends up in life is not about race. It's not about age, not about color. It's about opportunity. Opportunity. And opportunity to prove who they are, and opportunity to, what you just said, talking about developmental positions. That they never get into a position to show who they are and what they can do. Then, it's his philosophy that they can go a lifetime and be denied, in some instances, millions of dollars, millions of opportunities for their children, millions of—I mean, thousands of different kinds of opportunities like simple things like violin lessons for kids, private schools, things of that nature. And so, discrimination, for me, is a very serious thing because I realize that it does not only affect the individual, but it affects their children and generations to come and so, you know, I think, as I'm listening to you, I think what you're saying is making a lot of sense to me. And, the reason why it's making sense is because first of all, you're not talking—a lot of people, when they think about affirmative action-type things, they assume that you've got to take away from white people to give to mi-

norities and women, or white men to give to minorities and women. And I think what you're saying, and help me if I'm wrong, is that a lot of times you have to—one of the things you have to do in order to have this level playing field is give people an opportunity to even develop to become whatever it is that they're trying to get to. I mean, am I right?

Mr. FOWLER. Mr. Cummings, I can give you an example that may clarify this completely. I recently had a conversation with one of our Chief Officers in the Internal Revenue and the reason I had that conversation with him is that groups of employees under his purview have said that they did not feel that they've been afforded the opportunity for acting assignments or for developmental assignments, that these assignments were made arbitrarily, that they were made behind closed doors and that those that were in the know had the opportunity, if you will, for acting assignments or developmental assignments but those that weren't in the know or weren't necessarily in the in-crowd or were part of that faceless part of our work force who maybe don't have the charisma or the contacts to always be up front, basically, didn't get these assignments. The question would become to us, how do you do this without setting a quota or a goal or identifying—what you do is we decided that we would make sure that whenever we have an acting assignment in that arena or developmental assignment, that we will make sure that it's published so that everyone is aware that this assignment is coming up and so that everyone has an opportunity to put their hat in the ring and to say that I'm interested and I would like to be considered. The opportunity, then, would present itself at least for consideration. And so, those are the kinds of things that we are trying to do and I'm committed to working personally with everyone in Internal Revenue in terms of attempting to do that.

Mr. CUMMINGS. So, I guess—so what you're saying is you have to get the opportunity and then it's up to you to perform.

Mr. FOWLER. I think absolutely it's up to you to perform but I think you should have the opportunity.

Mr. CUMMINGS. Well, I'll end on this. The reason why I'm so adamant about this is they told me I would never be able to read or write and I'm a Phi Beta Kappa. They told me I'd never be able to read or write. They put me in special education at 5 years old. I was in special education from the 5th—from the 1st through the 6th grade. I'm a lawyer. I'm a Member of Congress. But it was because somebody gave me some opportunities along the way that I sit here today. And so, you know, I know that there are a lot of people, it has nothing to do with, you know, trying to take something away from somebody else, it's just having an opportunity to show what can be done. Their determination cannot be measured by tests so often but it's what's in their heart. And so, you know, I understand what you're trying to do. It makes a lot of sense and it—I mean, we—I've heard a lot of testimony from various people about trying to make sure you stay within the court decisions and a lot of people have this, I don't know, I think it's a—I don't know where they get this concept from that we're still—we're in some color-blind society because that's a lot of stuff. But, be that as it may, the fact is that I think what we're talking about here is not

so much taking away opportunities from others but giving everybody an opportunity to be on the same playing field so that they can show their stuff, so that they can do their things, so to speak, so that they can get to where they've got to go. So, I really appreciate your testimony today.

I think what you're trying to do makes a lot of sense but there's one thing that the chairman said before he chimes in. I know he's probably picked up on this so I need to get to it before he does. He mentioned something about the over-representation. You have a situation where you have a higher number of minority and women than are in the society, say, in the IRS, or whatever, and I'm trying to figure out how—but the problem is not so much the representation in the society, it's where they end up in the system. Is that right?

Mr. FOWLER. Well, certainly, that's only a part of the equation.

Mr. CUMMINGS. Yes, so, in other words, you can have 35 percent African Americans but if they are, like they are in Baltimore's Veterans Hospital—90 percent of them, although they are there, about 60 percent of the total work force, 90 percent of them are in the bottom 3 grades. So, I know it's not that bad at IRS but I'm just—I just wanted to make that point.

Mr. MICA. Don't bet on that. [Laughter.]

Mr. CUMMINGS. Thank you very much.

Mr. FOWLER. Thank you, Mr. Cummings.

Mr. MICA. Don't bet on that, Mr. Cummings. We do need to look at those figures, as a matter of fact. Gentlemen, I've got the *Byrd* decision which we got this morning. The *Byrd* decision regarding these plaintiffs—Mr. Byrd, Weldon and Hansen and McMillan et al—says pretty clearly that as a result of alleged on-the-job discrimination and retaliation while working at the Shreveport post of duty in the Internal Revenue Service, a substantial amount of money—I don't know how much, that's been redacted and I don't care to guesstimate—but this action by the Federal Government has cost the taxpayers a lot of money. And not only has it cost folks money, it has, in fact, discriminated against these folks who work for the Federal Government.

Now, our job as a civil service subcommittee is to try to make certain that we have fairness and equity across the board. I'm a little bit concerned by the lack of coordination with OPM, and I think we should have OPM in this mix in some way. Maybe we can do a letter from Mr. Cummings and myself because every agency is required, as I understand it, to have performance management standards and programs in place. IRS is no different than any other agency. If others have the same violations or standards that violate folks' rights, and there is discrimination, then we could be subject to additional suits, and we shouldn't be exposing ourselves in that fashion.

I'm also concerned that IRS is in the position of setting up its own standard. True, there may be differences in management performance standards, but you are in the process of setting up different elements that would determine whether or not there is discrimination and how you would address discrimination in the workplace. In that regard, I don't see the coordination that we should have across the board.

I'm also concerned about the timeframe. Now, this says some of these standards were suspended for the fiscal year 1998 appraisal period. Is that going to be for the whole fiscal year, Mr. O'Malley, Mr. Fowler, Mr. Ferrara?

Mr. O'MALLEY. Mr. Chairman, as I said earlier——

Mr. MICA. You just put that in for convenience?

Mr. O'MALLEY. Until we come out with a clarification in working with the Department of Justice and the Treasury Department.

Mr. MICA. OK. The other thing is that since September 22, when you issued this memorandum which replaces suspension, most of the public comment on the memo reinstating the performance elements have come from the White House. Did the Office of Policy Development of the Office of Management and Budget or any component of the White House help determine what these decisions have been to date, or are you working with the White House to develop a policy?

Mr. FOWLER. What I can tell you, and Mr. O'Malley can correct me if I am wrong, is that the White House has made its wishes known to the Justice Department and, in our conversations with Justice, we have been very much aware of what the White House position has been. Again, I think that it's important to note that the controversy around all of this was that the newspaper articles were all saying that we had suspended our affirmative action program and we have not suspended our affirmative action program. We suspended certain portions of the performance standards. I have yet to see that as a headline in the newspaper because no one was really interested in that. They were interested in the issue around affirmative action and that we had suspended affirmative action. That just was not true.

Mr. MICA. But, has there been any coordination with efforts to set these new policies or have an interim policy, or are you working with the White House now to develop a policy?

Mr. FOWLER. We—Mr. O'Malley, again, can correct me if I am wrong, but under normal circumstances, and I've served in 5 different government agencies over the last 25 years, normally in setting performance standards for employees and performance criteria, I've never known us to coordinate with the White House on that issue. But I'll let Mr. O'Malley speak to that.

Mr. MICA. Is there coordination with the White House on this?

Mr. O'MALLEY. The—I'm aware of conversations, so I've been told, between the Department and the White House either before or after meetings that we have had with the Department of Justice. And the Department of Justice is working with us and also the Department of Treasury on two issues. One is to revise that EEO element and second, to help us with clarifying guidance that we would issue to our work force around this.

Mr. MICA. Now, you told me that you're working closely with Justice. You weren't coordinating with OPM. What about with the EEOC? Are you coordinating with the Federal EEOC office, Mr. Fowler?

Mr. FOWLER. No, we have not coordinated with the EEOC. Again, this is not what we normally do in terms of setting performance standards. Again, we've looked real carefully at where we are in compliance with court decisions. We've looked at what our exist-

ing practices in the government are in terms of establishing performance standards and, again, I've served at NASA, at the U.S. Secret Service, at the Commerce Department, at main Treasury and at Internal Revenue Service and we've never had that kind of coordination in terms of setting performance standards. We certainly are quite interested and want to make sure that we are in compliance with all procedures and all court decisions but I'm not aware that, you know, we've had that kind of coordination.

Mr. MICA. Given the experience of the *Byrd* decision, don't you think it would be helpful to coordinate with EEOC and to make certain they find acceptable whatever decision you come up with as government-wide policy? We're going to have to make sure that any problems that have been raised as a result of the *Byrd* decision are addressed governmentwide.

Mr. FOWLER. Well, I think, Mr. Chairman, if I understand you correctly, you're concerned that we may possibly be placing ourselves in having to litigate another situation because we've not had proper coordination?

Mr. MICA. You know, we aren't just interested in IRS in this subcommittee. We have governmentwide jurisdiction and we're trying to make certain that everybody's treated equally, fairly, and that we have a consistent policy that we don't discriminate in hiring, performance, giving everybody a fair shot. This is the new approach, but we're also concerned about the taxpayers who are footing the bill. *Byrd* cost a lot of money. You were gone, but I said that it wasn't just the money, but people were discriminated against in the Federal Government. We are their employers and it's our job to see that that doesn't happen again. We want to have it corrected in IRS. We don't want to be running a dual policy so that IRS has its policy and the rest have their own policy. We don't want to operate so that some are suing agencies of government for something they did in IRS and no one else knew about it. So, discrimination continues and we keep paying the tab for this discrimination because we didn't act. That's the reason why you have a committee like this, investigation and oversight, to try to make us all sing from the same page of the hymnal. That's the purpose.

I think it would be good if you coordinated some with OPM. God forbid we should have everybody doing the same thing. It makes sense that the EEOC gets involved in this so we can look people straight in the eye and say we are trying to be consistent, we're trying to be fair, we're trying to avoid the mistakes of the past, the discrimination of the past, and do it right across the board. I didn't start the confusion and we don't want confusion. We want equity, fairness, and consistency in our policy.

Mr. FOWLER. Mr. Chairman.

Mr. MICA. I'll give you a chance to respond.

Mr. FOWLER. Yes, what I'd like to——

Mr. MICA. It's not all your fault.

Mr. FOWLER. Thank you very much.

Mr. MICA. You just happen to be agency du jour that we're picking on so, I encourage this, just go ahead.

Mr. FOWLER. That makes me feel a lot better. I really appreciate that. But let me——

Mr. MICA. We pick on all of the agencies.

Mr. FOWLER. Let me say this. At this point in my career and at this point in my life, there is not anyone that you're going to find that sits before you that has any more interest in saving the taxpayer money than I do or in doing what I think is the right thing to do. Alright, I have no problem in making the contact with OPM, I have no problem in making the contact with EEOC. We don't have a problem in making any contact that would be reasonable and prudent and that would be efficient for the operation of our bureau. What we don't want to do, again, is to do something that would create litigation for us. What we do want to do is to make sure that we continue to offer equal opportunity for all of our employees and this has been very tricky.

If you could have been with me this morning, when I spoke to the executives, one of the things that you would have heard me saying over and over again is that we can ill-afford, as a government entity, to continue to place ourselves in positions where we have to litigate on issues concerning sexual harassment, concerning employment discrimination, concerning employees with disability, you name it, on any of those issues, we don't need to be in the courts attempting to try to find out how we settle these issues. And what we have to do is to take, again, these issues as a leadership issue, serve as examples, step up to the plate and do what we think is right and not do it just because the law requires it but, usually if we do what is right, we will comply with the law. And so, that's my firm belief, that's where we're headed with it. I certainly take your comments seriously and I can assure you that we'll do everything to make sure that we have proper coordination.

Mr. MICA. Mr. Cummings.

Mr. CUMMINGS. First of all, Mr. Fowler, I want to thank both of you gentlemen, all of you, for being here today. Mr. Fowler, as I listen to you, I must tell you that I've been very impressed with what you're trying to do and I'm trying to sit here and be as optimistic as I possibly can be. But I understand that all of your best efforts still there are a whole series of subjective decisions that are made and they are made by individuals. And that's what kind of, you know, that sort of tempers my optimism. But, I just have a suggestion, for whatever it may be worth.

Not very long ago, it's probably been about maybe 9 months ago, the New York Times put out a—had an article about 5 or 6 companies that had effective diversity programs, private companies, and one of the things I found very interesting. They said one of the things that they found consistent with all of these companies, and these are like Fortune 500 companies, one of the things that they found consistent with all of them is that part of the evaluation process of supervisors was that when they were looking to promote supervisors or whatever, pay raises or whatever, is that they looked to see how they addressed the whole question of diversity. Not, like I said, doing any favors for anybody, but just doing the kind of things that you talked about. And you talked a little bit earlier about supervisors and trying to get the word out to them. Sometimes, as much as we want to believe that people would do the right thing, sadly, a lot of times they don't do the right thing and so, sometimes, we have to have methods by which we encourage them to do the right thing. And I think one of the things that

you all might want to—and you probably have already thought about this is that a part of that evaluation process should be one where you say, well, we're looking at you, Mr. Supervisor and Ms. Supervisor. We want to look at how you got the word out. Did you outreach? How, I mean, who did you put this—I mean, how did you bring people in? How widespread were these acting positions and developmental assignments spread out? And we just want to see, you know, how many people have access to opportunity because one of the things you said that shall forever be embedded in the DNA of every cell of my brain was that whole thing that you just—when you just gave that example of the people who never even got to the door to make the application. See, that's two steps before—three steps before you—people talk about diversity. You can't have diversity if there are people who don't—can't even get to the door to make the application, let alone what happens after they get in the door.

So, all I'm saying to you is that, one of the things that I like about Mr. Mica is that we both have agreed that we want to be effective. We don't want to just go through a series of sitting here, wasting taxpayers money, and not be effective. But be effective and be fair at the same time. And so, that's why I make that suggestion. I don't know, you may want to comment on that but I think that, I know, and I understand what you're saying at this point in your career that this is where you have arrived but we also want it so that when you leave this position and maybe move onto another position or whatever that you have left some things in place that, hopefully, will be there for a long time and where you don't have to be there checking to see if it's going alright. Because one of the things that I've learned about the Federal Government, you have an in-and-out situation. People are constantly in-and-out. The question is, in your time and in your space can you do something that has a lasting effect consistent with the goals that you're trying to accomplish? And so, you know, just a little commentary there.

Mr. FOWLER. Mr. Cummings, and Mr. Chairman, first of all let me thank you for what I consider to be a fair hearing and certainly I am very interested in hearing your positions and your questions on both sides of the aisle. I think they all are pertinent.

I have looked at the operational procedures of companies like Allstate, Xerox, Johnson and Johnson, Nations, Harley-Davidson Corp., in terms of what they have done concerning diversity, concerning equal opportunity, concerning some of the work force issues that you speak of. Some of them have had even more severe problems than we feel that we have in Internal Revenue. Again, I don't think anyone has a magic bullet but what I think you have to have in this line of work is you have to have commitment. I have commitment. I am not interested in doing what I can do for a short period of time and then leaving the job and having it to fall through the floor. In that regard, I've just brought onboard Ms. Marsha Coates who was the Director of Equal Opportunity Programs for Civilian and Military Programs at the Coast Guard and we intend to continue to pursue this. I'm getting competent staff onboard. We have a commitment from the Commissioner's office. We report directly to the Commissioner of Internal Revenue and we are determined that we will push to have equal opportunity for

all of our employees, that we will do what is right, that we will not do it on the backs of other employees who feel that, OK, now you have a program and now I'm disadvantaged. Again, some of this is a mindset, some of this has to do with policy and procedure. I have no reason to sit before you and attempt to give you a lot of stuff because it doesn't benefit me any. I'm interested when I leave the Internal Revenue Service in seeing that the problems that we have today are not the problems of tomorrow. And so, we're going to work on these and, hopefully, we'll be able to come before you in a future hearing and have both you and Mr. Mica feel that we have given this a fair shot, that we've had the proper coordination between the Federal agencies, that we all are working together to make sure that we don't have litigation and any other agency as well as the Internal Revenue and that we're doing what's right by the general public.

Mr. CUMMINGS. Thank you.

Mr. MICA. Well, I thank Mr. Ferrara, Mr. O'Malley and Mr. Fowler for joining us today. Again, we are an investigations and oversight subcommittee of Congress. We're trying to deal with the problem of discrimination in the Federal workplace in a fair manner and come up with some good solutions, workable solutions, in compliance with accord edicts and all the other constraints that we have.

In that regard, I would like you to keep us advised, Mr. O'Malley and Mr. Fowler, of your actions in this regard so we can follow what your agency is doing. Mr. Cummings, I think it would be helpful if we wrote OPM, the EEOC office, and asked them to also counsel with these folks so that we can, hopefully, avoid the same kinds of mistakes and discrimination, and also to find a mechanism to institute governmentwide action. I think as an action item we can initiate that, so, again, we're all singing off the same sheet of music.

I want to thank you for participating. We look forward to your future response to the subcommittee.

There being no further business before the Civil Service Subcommittee, this meeting is adjourned.

[Whereupon, at 4:10 p.m., the subcommittee adjourned subject to the call of the Chair.]

[Additional information submitted for the hearing record follows:]

STATEMENT OF
INTERNAL REVENUE SERVICE
SUBMITTED FOR THE RECORD

for the

Subcommittee on Civil Service
Committee on Government Reform and Oversight

Employment Discrimination in the Federal Workplace
September 25, 1997

The Internal Revenue Service (IRS) appreciates the opportunity to submit this statement for the record of the hearing on the topic of employment discrimination in the Federal workplace. Our statement discusses equal employment opportunity at the IRS.

Equal employment opportunity issues often are related to workforce composition. Currently, more than 67% of our workforce is female and more than 35% is from minority groups compared to 61% for females and 30% for minorities just 11 years ago. The percentage of female IRS executives has increased from 9.7% in 1988 to 23.6% in 1997. The percentage of executives from minority groups has risen from 10.4% to 13.1% over the same period. We have had similar changes in the composition of our workforce in the higher pay grades. The percentage of females in the GS/GM 13/14/15 positions was 22.9% in 1988 and 32.9% in 1997. For minorities, the numbers rose from 12.2% to 16.9%.

A number of factors have produced this changing workforce composition. The "baby boomers" who came to the Service in large numbers after 1970 began the change in the ethnic and gender mix of the IRS. Advances in civil rights and educational opportunities, as well as

changing societal mores and economic necessity also provided the IRS labor force with increasing numbers of professionally skilled women and minorities. By the late 1980s, the IRS experienced significant changes, not only in its workforce, but also with respect to fulfilling its primary mission (to administer the tax laws), and as an employer. Changes in workforce diversity were important in the IRS planning process. They also were important as we sought to facilitate changes to our work environment and new business requirements by adopting a strategic approach to planning and management that focused on long- and short-term business objectives.

Our planning process focused on four strategic areas, one of which was "Enhancing Recruitment and Retention of Employees." In this area, the IRS undertook 17 initiatives and studies. One study reviewed the status of women and minorities in the IRS. That study (*A Design for Organizational Diversity: Report of Strategic Initiative ERR-16: Minorities and Women Within IRS* (December 1989)) (ERR-16) has been provided to this Subcommittee and probably is the most relevant study in connection with this Subcommittee's recent hearings. ERR-16 addressed a number of equal employment opportunity issues within the Service. For example, it addressed the underrepresentation of women and minorities in management and leadership positions, as compared to their numbers in the total workforce. It is clear from the study that the IRS was concerned that the concept of equal employment opportunity was clearly reflected in our recruitment efforts, but was reflected far less clearly in advancement. The study also addressed the IRS training and development programs and their adequacy and relevance to the Service's increasingly diverse workforce.

ERR-16 defined the strategic direction the IRS was taking in this area as follows:

> The Internal Revenue Service at all levels will be representative of the public it serves and committed to a leadership role that ensures racial, ethnic, and (sexual) gender equality. The IRS culture will be free of barriers which limit opportunity for minorities and women.

To elaborate on this strategic direction, we articulated strategies in five areas:

- Strengthening Management Accountability;
- Achieving Progress through Education;
- Improving the EEO Functional Support to Management;
- Ensuring Effective Recruitment, Retention, Development, and Advancement; and
- Developing Reliable Workforce Information Systems

ERR-16 called for the IRS to look beyond actions that only remedied existing representational imbalances and to pursue a comprehensive strategy to understand, and be strengthened by, the diversity of its human resources. ERR-16 challenged the IRS to become an organization in which equal employment opportunity was not considered a program for a few designated groups, but a way of doing business that would ensure that all employees were treated equitably and were not advantaged or disadvantaged by their racial or ethnic background or by their gender. It has never been the policy of the IRS to use quotas to achieve diversity. We wanted to remove barriers to advancement so that any IRS employee who was qualified for a position would be given a fair chance to attain it. This was our objective in the late 1980s, and we think it remains a good objective today.

The IRS acted in good faith to achieve this objective, and took many actions to provide opportunities for all employees. We were not alone in our efforts to provide opportunities for all employees. The concept of equal opportunity in federal employment had been reaffirmed over the years by the executive and legislative branches of the federal government and in Supreme Court decisions. It was against this backdrop that the IRS and other federal departments and agencies developed affirmative employment programs and policies. We believe that our programs and policies have served us well. Recent court decisions in the *Adarand*[1] and *Byrd*[2] cases have caused us to review how we strategically approach or evaluate progress toward our objectives in the areas of equal employment opportunity for all employees.

In April 1997, a federal district court found, in an interlocutory decision, in *Byrd* that ERR-16 violated the Fifth Amendment equal protection clause. The plaintiffs, four white male GS-12 revenue officers, alleged that they had been subjected to age, race, and gender discrimination in connection with specific personnel actions taken by the IRS. The plaintiffs contended that ERR-16 encouraged institutional discrimination against white male employees, because its objective was to increase representation of women and minorities in managerial and executive positions through employee development and advancement strategies.

After *Adarand*, government actions related to race or ethnicity that are challenged under the Equal Protection clause are examined under what is called a "strict scrutiny" standard. Under the strict scrutiny standard, the government prevails if it shows that its program or policy serves a

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[1] *Adarand Constructors Inc. v. Pena*, 115 S.Ct. 2097 (1995).

[2] *John A. Byrd v. Robert E. Rubin*, Civ. Action No. 95-1280 (W.D. La. April 9, 1997).

compelling governmental interest and that it is narrowly tailored to serve that interest. In *Byrd*, the Court held that ERR-16 encouraged or authorized preferential treatment of minority and female employees, and that, accordingly, the strict scrutiny standard must be applied to the Service's initiative. The district court then concluded that diversification of the Service's workforce was not a compelling governmental interest sufficient to justify the agency's use of race and gender criteria in decision making.

Byrd is one of the first federal court decisions in which a federal affirmative action program was found unconstitutional. It was an interlocutory decision on a motion for partial summary judgment which could not be appealed until the trial on the merits had concluded. After that decision and before a final judgment on the merits, the case was settled by the parties under an agreement not to disclose the terms of the settlement.

The Acting Commissioner, in an August 19, 1997, Memorandum For All Executives and Managers, temporarily suspended portions of two standards in individual performance plans and two measures used in the Business Review (copy attached). The temporary suspension applies only to these performance measures -- not the affirmative action program. In consultation with the Justice Department and IRS Chief Counsel, we are working to redesign the elements and standards of the performance plans for executives and managers for FY 1998. The redesigned elements and standards will ensure that all managers and executives are evaluated on their efforts to develop and promote all employees in accordance with affirmative action plans that are consistent with current law and Administration policy.

In a September 22, 1997 memorandum, the National Director, Personnel Division, reiterated the changes to 1998 performance plans which had been described in the Acting Commissioner's memorandum. The memorandum also described new, Treasury-mandated EEO performance elements and standards for all supervisors and managers to be included in the Executive/Managerial Performance Plan for the FY 1998 performance appraisal period (copy attached.) The IRS has not terminated its affirmative action program and, indeed, remains committed to doing everything permitted under law to achieve a diverse workforce.

In concluding, the IRS remains committed to providing equal opportunities for all employees and to maximizing the benefits of having a diverse workforce. The IRS is aware of its affirmative employment responsibilities under Management Directives promulgated by the Equal Employment Opportunity Commission, and will work with the Commission in maintaining a lawful affirmative employment program.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

COMMISSIONER

August 19, 1997

MEMORANDUM FOR ALL EXECUTIVES AND MANAGERS

FROM: Michael P. Dolan
Acting Commissioner of Internal Revenue

SUBJECT: Affirmative Employment Programs and Policies

For many years, the Internal Revenue Service has been in the forefront in developing programs and policies intended to provide opportunities for all employees. The concept of equal opportunity in federal employment has been reaffirmed over the years by the executive and legislative branches and in a number of Supreme Court decisions. From the outset, affirmative action measures permitted the consideration of race, national origin, sex, or disability along with other criteria in government decision making. It was against this backdrop that the Service, as did other federal departments and agencies, developed affirmative employment programs and policies.

I believe that the Service's programs and policies have served us well and that we are a stronger and more effective agency because of our actions in the area of EEO and diversity. However, two court cases are causing us to review how we strategically approach or evaluate progress on our objectives in these areas.

In *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995), the Supreme Court held that federal affirmative action programs that use racial and ethnic criteria as a basis for decision making are subject to strict scrutiny. Under *Adarand*, affirmative action programs and policies must serve a compelling governmental interest, such as the eradication of the present effects of past discrimination against identifiable victims. Affirmative action programs that are based on a showing of underrepresentation alone do not satisfy the *Adarand* standard. Also, a recent district court case called into question the application of the Service's strategic initiative in the area of Enhancing Recruitment and Retention of Employees, ERR-16.

I personally want to reaffirm the Service's commitment to provide equal opportunities for all our employees and our desire to maximize the benefits of having a diverse workforce. However, until we thoroughly analyze all of the ramifications of these court cases, it is advisable to temporarily suspend certain aspects of our performance management system which address expectations or measurements in the

area of EEO and diversity. This suspension affects two of the general standards in individual performance plans and two measures used in the Business Review. The following guidance applies to preparation of FY 97 performance appraisals for executives and managers.

Do not prepare any narrative addressing the language shown in the following General Standards.

Critical Element: Achieve Quality-Driven Productivity Through Systems Improvement and Employee Development

General Standard: Coach and develop employees to achieve parity at all grade levels which is reflective of the Civilian Labor Force by eliminating barriers in recruiting, hiring, training, and promoting minorities, women, and persons with disabilities.

Critical Element: Maximize Customer Satisfaction and Reduce Burden

General Standard: Meet the Service's goals in: ..... minority, women, and labor surplus area contacting. [Please note that only a portion of this general standard is affected. Meeting the Service's goals in the areas of cash management, prompt payment and debt collection are still subject to narrative evaluation, as appropriate.]

All other elements and standards in the FY 97 performance plans should be addressed in the evaluations, consistent with the scope of an individual's responsibilities. For purposes of the Business Review this year, in the area of EEO measures, workforce (pool series) representation and targeted disabilities measures will not be addressed. The Business Review will cover complaint resolution rates.

Analysis of the impact of these court cases is ongoing. In the near future you can expect to see modifications to FY 98 performance plan standards and additional guidance on how to approach our critical responsibilities in the areas of EEO and diversity. If you have questions about this memorandum, please contact Paulette Sewell-Gibson, Acting National Director, EEO and Diversity, at (202) 622-5400.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SEP 22 1997

MEMORANDUM FOR REGIONAL COMMISSIONERS, CHIEF OFFICERS, EXECUTIVE OFFICER FOR SERVICE CENTER OPERATIONS, CHIEF INSPECTOR, NATIONAL DIRECTOR OF APPEALS, TAXPAYER ADVOCATE, AND DIRECTORS OF SUPPORT SERVICES

FROM: Eugenio Ochoa Sexton, FOR
James O'Malley
National Director, Personnel Division

SUBJECT: Changes to the Executive/Managerial Performance Plan and the New Performance Plan for Management Officials

This memorandum highlights several important changes to the performance management program. These changes will impact executives, managers, and management officials Servicewide. Management officials will be on a separate performance plan for FY 1998 (October 1 - September 30) performance appraisal period. Executives and managers will have a new EEO critical element and standards.

Because of these changes we are revising Form 9688, Executive/Managerial Performance Plan, and developing a new form for management officials. These new forms will not be available until mid November. Until these forms become available, the attached interim forms should be locally reproduced in order for employees to receive their performance plans timely. Regulation requires managers to communicate performance expectations with their employees usually within thirty days after the start of the rating period. Discussion and documentation of the attached interim forms would meet that requirement. Completing the formal forms would not be necessary in this case.

Changes to Form 9688, Executive/Managerial Performance Plan, (Attachment 1)

- Suspension of certain aspects of two performance standards in the Executives/Managers Performance Plan addressing expectations/measurements in area of EEO and diversity (Acting Commissioner's memo, Affirmative Employment Programs and Policies dated August 19, 1997).

  The Service is committed to provide equal opportunities for all employees and to maximize the benefits of having a diverse workforce. The Service is currently in the process of assessing its affirmative employment policies and programs in light of the recent court cases. However, until analysis of the impact these court

cases have on our performance management program are completed, we have temporarily suspended portions of EEO and diversity under the following:

Critical Element : Maximize Customer Satisfaction and Reduce Burden

General Standard: Meet the Service's goals in: . . . . *minority*, women, and labor surplus area contracting. (Only a portion of this general standard is suspended for FY 98 appraisal period.)

Critical Element: Achieve Quality-Driven Productivity through Systems Improvement and Employee Development

General Standard: Coach and develop employees to achieve parity at all grade levels which is reflective of the Civilian Labor Force by eliminating barriers in recruiting, hiring, training, and promoting minorities, women, and persons with disabilities. (Suspended for FY 98 appraisal period.)

- Addition of a separate EEO critical element and performance standards.

  The Secretary of the Treasury is mandating uniform EEO performance element and standards for all supervisors and managers to increase management accountability for EEO activities. As a result of this mandate, the EEO critical element and performance standards have been added to the Executive/Managerial Performance Plan for the FY 1998 appraisal period. The Department's goal is to send a clear message to all supervisors and managers that they will be held accountable for upholding the Department's commitment to the EEO principles.

- Minor changes to the critical elements.

  The wording of the critical elements has been revised to reflect the language in the Strategic Plan and Budget FY 1998. The general standards remain unchanged.

Regional Commissioners, Chief Officers, Executive Officer for Service Center Operations, Chief Inspector, National Director of Appeals, Taxpayer Advocate, and Directors of Support Services

New Performance Plan for Management Officials (Attachment 2)

- In the past, management officials and their supervisors experienced problems linking their work to the three corporate objectives in the Strategic Plan and Budget (SPB) for evaluating performance. Based upon input from all levels of the organization, new performance elements and standards were developed to describe the most common duties to the management official. The new plan is within the scope of the management official and consistent with the overall objectives of the organization.

The revised Executive/Managerial Performance Plan and the new Management Official Performance Plan will be printed for Servicewide distribution. We plan to have Publishing Services print the new forms and send them directly to the CID sites to be available in mid November. If you have questions regarding the recent changes, please call Nora Prokuski at (202) 874-6213, Office of Performance and Position Management.

cc: Personnel Officers
TPC Chiefs

Attachment 1

EXECUTIVE/MANAGERIAL PERFORMANCE PLAN

Name of Employee	Office/Organization	Series and Grade
Title of Position		Period Covered From To

This performance plan has been discussed with me and I have been given a copy.

Employee Signature		Date
Supervisor's Name/Signature	Title	Date
Approving Official's Name/Signature	Title	Date

INSTRUCTIONS

Your performance plan should be developed by you and your manager. The plan will contain the established critical elements, related standards, and any amplification/additional standards developed specifically for you. The established critical elements and standards were written at the fully successful level and are designed to reflect basic, on-going responsibilities of executives and managers throughout the Service. While each critical element is a mandatory performance indicator, some general standards may not apply to your specific position. You and your manager should review each general standard and delete any that are not applicable for your plan. Deletions should be noted and initialed on the plan. Additional standards, reflecting only those few high-priority requirements that must be accomplished in the rating period, may be added to your plan. These should be kept to a minimum (usually not more than two per element) and written at the fully successful level with appropriate indicators of quality, quantity, and timeliness.

Your performance will be assessed in accordance with your plan, and will reflect a rating for each critical element and all applicable standards. An overall rating (summary level) will also be determined.
When carrying out your plan responsibilities, it is critical that each element and standard be accomplished in accordance with:

- legal, procedural, administrative, technical, and program requirements
- objectives in the Strategic Plan and Budget
- program directions and manuals
- transition to Leadership Competencies

Progress reviews are an essential part of the performance plan and appraisal system. Although the process of monitoring plan accomplishment is on-going, a minimum of one review must be conducted approximately mid-way through the appraisal period. While a formal written review is not mandated, documentation that the review has been conducted is required in accordance with local procedures.

PRIVACY ACT STATEMENT

The Privacy Act of 1974 and Paperwork Reduction Act of 1980 say that when we ask you for information, we must tell you: our legal right to ask for the information; what major purpose we have in asking for it and how it will be used; what could happen if we do not receive it; and whether your response is voluntary, required to obtain a benefit, or mandatory under the law.

This statement is being provided pursuant to Public Law 93-579 (Privacy Act of 1974) December 31, 1974, for individuals who have been requested to submit a statement of accomplishment/self-assessment.

The authority to solicit this information is derived from 5 USC 4301, et seq., and 5 CFR Part 430.

In order to allow you the opportunity to provide input into the appraisal process, management will request this information from you. The information you furnish will be considered by your supervisory officials in preparing an appraisal of your performance, or conducting mid-year progress reviews. Once prepared, the information contained in your performance appraisal will be used on a "need to know" basis by IRS officials. Disclosures may also be made when appropriate, to routine users as published in the Federal Register, such as the Office of Personnel Management, the Equal Employment Opportunity Commission, the General Accounting Office and others listed in the appropriate system of records. The information contained in your performance appraisal is part of TR/IRS 36.003, General Personnel Records.

Failure to furnish this information may result in your supervisors preparing your appraisal, or conducting a progress review, without considering any information you may feel is relevant or significant.

Executive/Managerial Performance Plan

Critical Elements and Performance Standards

The following critical elements apply to all Executives and Managers. The General Standards appearing with each element describe the requirements for fully successful performance in organizational components and reflect the importance of successfully managing day-to-day operations and furthering the Service's progress toward meeting the organizational Strategic Plan and Budget. Additional standards may be prepared for each critical amplification/additional standards should be used for clarification or emphasis of needs and the needs of the individual.

The EEO element and standards support the Service's commitment in improving a EEO effectiveness.

1. Increase Compliance.

Objective: Ensure our products, services, policies, and employees directly or indirectly encourage and assist taxpayers to increase the number who voluntarily file timely, accurate, fully paid returns. When taxpayers do not comply, take appropriate remedial/enforcement actions to correct future behavior.

General Standards: Consistent with the scope of your responsibilities, apply leadership competencies to:

- Plan, implement, monitor, and deliver programs to meet the goals of the Strategic Plan and Budget timely and within budget allocations, including but not limited to effective planning and management of labor costs, space utilization, telecommunication resources, equipment inventories, and accounting controls.
- Identify emerging tax administration issues and develop/implement strategie them.
- Provide taxpayers with the ability to interact with employees and systems to me diverse needs.
- Maximize resource effectiveness through cross-functional coordination with internal and external stakeholders.
- Foster personal and employee development to better match the skills, abilities, ideas, and experiences of our diverse workforce to appropriate market segments.
- Administer the tax laws with empowered employees who protect taxpayers' rights and treat them ethically with honesty, integrity, fairness, and respect.
- Develop/maintain systems to protect internal and external customer privacy, keep data confidential, and maintain adequate security over tax/personnel data.

Amplification/Additional Standards:

2. Improve Customer Service.

Objective: Reduce the time and expense experienced by taxpayers, tax professionals, and others in complying with the tax laws while at the same time increasing their satisfaction with the tax system. Use the skills of a diverse workforce to support front-line initiatives to maximize internal and external customer satisfaction.

General Standards: Consistent with the scope of your responsibilities, apply leadership competencies to:

- Use the skills and abilities of a diverse workforce and technology to redesign/maintain business processes that reduce expenditures of time, money, and resources for taxpayers and internal customers.
- Provide the assistance needed to resolve issues during the initial contact with taxpayers.
- Provide customized education and enhanced outreach efforts.
- Establish and aggressively monitor necessary internal controls (annual assurance process) to deliver a quality product and guard against waste, fraud, and abuse.
- Meet the Service's goals in cash management, prompt payment, and debt collection.

Amplification/Additional Standards:

3. Increase Productivity.

Objective: Continually improve the quality of products and services we provide to our internal and external customers through the use of teamwork, systems improvement tools and techniques, and the development of a highly trained, diverse workforce.

General Standards: Consistent with the scope of your responsibilities, apply leadership competencies to:

- Improve processes and products by using systems management techniques and focusing our modernization efforts to meet customer needs.
- Educate the workforce/stakeholders on how organizational goals, strategies, policies, practices, and individual jobs relate to the Strategic Plan and Budget.
- Empower individuals to use independent judgment to solve problems and develop products and services in a timely and effective manner.
- Establish and maintain a constructive working relationship with the National Treasury Employees Union to implement the IRS/NTEU Total Quality Organization partnership.
- Support a healthy, safe work environment, free from harassment and discrimination, in which the privacy of employees is respected.

- Promote a workplace climate where ethical behavior is paramount and everyone is treated with honesty, dignity, and respect.

- Provide a written performance plan within 30 days of the beginning of the rating period and assign an annual performance rating of record within 30 days of the close of the rating period for each employee.

Amplification/Additional Standards:

4. Equal Employment Opportunity

Objective: Application of the Equal Employment Opportunity principles of fairness and equity in the workplace.

General Standards: In consultation with the EEO staff and to the extent authorized and consistent with existing resources:

- Supports staff participation in special emphasis programs.

- Promptly responds to allegations of discrimination and/or harassment, and initiates appropriate action to address the situation.

- Cooperates with EEO counselors, EEO investigators, and other officials who are responsible for conducting inquiries into EEO complaints.

- Assigns work and makes employment decisions in areas such as hiring, promotion, training, and developmental assignments without regard to sex, race, color, national origin, religion, age, disability, sexual orientation, or prior participation in the EEO process.

- Monitors work environment to prevent instances of prohibited discrimination and/or harassment.

Attachment 2

MANAGEMENT OFFICIAL PERFORMANCE PLAN

Name of Employee | Office/Organization | Series and Grade

Title of Position | Period Covered From To

This performance plan has been discussed with me and I have been given a copy.
Employee Signature | Date

Supervisor's Name/Signature | Title | Date

Approving Official's Name/Signature | Title | Date

INSTRUCTIONS

The critical elements are applicable to all management officials. The objective and uniform st under each critical elements reflect the major day-to-day responsibilities of the position. All stan written at the fully successful level. While each critical element is a mandatory performance indicat some general standards may not apply. The supervisor and employee should review the uniform standards and delete any that are not applicable. Deletions should be noted, initialed, and dated by the employee and supervisor. Local, individual, or team standards, as appropriate, may be included to reflect areas of emphasis. These should be kept to a minimum and should be written at the fully successful level with appropriate indicators of quality, quantity, and timeliness.

The employee's performance will be assessed in accordance with the plan, and will reflect a rating for each critical element and applicable uniform standards. An overall rating (summary rating) will also be determined.

Progress reviews are an essential part of the performance plan and appraisal system. Although the process of monitoring plan accomplishment is on-going, a minimum of one review must be conducted approximately mid-way through the appraisal period. While a formal written review is not mandated, documentation that the review has been conducted is required in accordance with local procedures.

PRIVACY ACT STATEMENT

The Privacy Act of 1974 and Paperwork Reduction Act of 1980 say that when we ask you for informa tell you: our legal right to ask for the information; what major purpose we have in asking for it and h what could happen if we do not receive it; and whether your response is voluntary, required to ob mandatory under the law.

This statement is being provided pursuant to Public Law 93-579 (Privacy Act of 1974) Decemb individuals who have been requested to submit a statement of accomplishment/self-assessment.

The authority to solicit this information is derived from 5 USC 4301, et seq., and 5 CFR Part 43

In order to allow you the opportunity to provide input into the appraisal process, management w information from you. The information you furnish will be considered by your supervisory officials in appraisal of your performance, or conducting mid-year progress reviews. Once prepared, the informa in your performance appraisal will be used on a "need to know" basis by IRS officials. Disclosures may a made when appropriate, to routine users as published in the Federal Register, such as the Office of Personn Management, the Equal Employment Opportunity Commission, the General Accounting Office and others listed in the appropriate system of records. The information contained in your performance appraisal is part of TR/IRS 36.003, General Personnel Records.

Failure to furnish this information may result in your supervisors preparing your appraisal, or conducting a progress review, without considering any information you may feel is relevant or significant.

PERFORMANCE PLAN FOR MANAGEMENT OFFICIALS

Critical Elements and Performance Standards

Element 1. Program Planning, Management, and Delivery.

Objective: Plans and organizes assigned activities and projects to timely accomplish work objectives according to procedural, administrative, and technical requirements, as well as business goals: Increase Compliance, Improve Customer Service, and Increase Productivity. Quality and customer service are reflected in all products and activities.

Uniform Standards:

- Sets effective short and long-term priorities that are realistic, responsive to accomplishment of the Strategic Plan and Budget, as well as local priorities. Plans, implements, monitors, and delivers assigned programs to meet the local goals of the Annual Performance Plan.
- Effectively implements and monitors assigned programs. Provides necessary oversight to ensure quality results that are responsive to the needs of the Service, as well as internal/external customers.
- Utilizes technology to redesign/maintain business processes that reduce expenditure of time, money, and resources for taxpayers and internal customers. Reviews and/or recommends effective use of resources for functional program areas.
- Utilizes systems management principles. Contributes to continuous quality improvement in day to day work assignments.

Local, individual, or team standards: May be used to define specific outcomes and time frames.

Element 2. Communication, Interpersonal Relationship, Team Work.

Objective: Develops and maintains lines of communication and interaction which ensure work accomplishments and enhances work relationships with peers, external/internal customers, superiors, and others.

Uniform Standards:

- Actively assists in meeting unit/team goals as appropriate.
- Exercises sound judgment in identifying the information needed to be communicated.
- Through timely and effective oral and written communication, disseminates necessary information and program guidance.
- Maintains effective working relationships.

- Keeps management and other appropriate parties timely informed of significant issues.
- Supports a workplace climate where ethical behavior is paramount and everyone is treated with honesty, dignity, and respect free from harassment and discrimination.

Local, individual, or team standards: May be used to identify specific team goals, working relationships to be improved, and feedback systems.

Element 3. Quality of Expertise.

Objective: Effectively demonstrates expertise in assigned program areas.

Uniform Standards:

- Continually develops and maintains technical program expertise.
- Provides accurate, timely guidance and instructions.
- Maintains knowledge of broad organizational goals to assure program direction and guidance advance such goals.
- Effectively researches issues and prepares thorough recommendations and solutions.

Local, individual, or team standards: May be used to cite specific issues, projects, goals, or developmental activities.