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July 1, 2016

Kimberly A. Holden

Deputy Associate Director for Recruitment and Hiring

U.S. Office of Personnel Management

1900 E Street NW

Room 6351D

Washington, DC 20415

**Re: Proposed Rule Regarding Recruitment, Selection, and Placement (General)
and Suitability, 81 Fed. Reg. 26173 (May 2, 2016), RIN: 3206-AN25**

Dear Ms. Holden:

On behalf of The Leadership Conference on Civil and Human Rights, the NAACP Legal Defense and Education Fund, the National Employment Law Project, All of Us or None, JustLeadershipUSA, Southern Coalition for Social Justice, PolicyLink, the PICO National Network, the American Civil Liberties Union, the AFL-CIO, and the 63 undersigned organizations, representing faith leaders, criminal justice reform groups, and civil and human rights advocates, we write to offer our strong support for the Office of Personnel Management's (OPM) proposed rules on *Recruitment, Selection, and Placement (General) and Suitability*.

We applaud the rule's requirement that federal agencies "ban the box" in the hiring process and postpone a request for conviction information from job applicants until the individual has received a conditional offer of employment. Indeed, the rules will take the federal government one step closer to becoming a "model employer" of people with records, which the Federal Interagency Reentry Council identified as a top priority.¹ As described below, we also join The Leadership Conference on Civil and Human Rights, the National Employment Law Project, the NAACP Legal Defense and Education Fund, the American Civil Liberties Union and Legal Services for Prisoners with Children in urging OPM to strengthen the proposed regulations in several key areas.²

¹ FEDERAL INTERAGENCY REENTRY COUNCIL, EMPLOYMENT SNAPSHOT (Aug. 2015), available at <https://csgjusticecenter.org/wp-content/uploads/2014/06/Employment.pdf>.

² COMMENTS FROM THE LEADERSHIP CONFERENCE ET.AL., TO THE OFFICE OF PERSONNEL MANAGEMENT REGARDING PROPOSED RULE REGARDING RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL) AND SUITABILITY, 81 FED. REG. 26173 (MAY 2, 2016), RIN: 3206-AN25, available at, <http://civilrightsdocs.info/pdf/criminal-justice/OPM-BanTheBox-Comments.pdf>



An estimated 70 million adults have arrests or convictions that will show up on routine background checks.³ Studies demonstrate that the disclosure of a criminal record by an otherwise qualified applicant can reduce the likelihood of a callback or job offer by nearly 50 percent.⁴ As the U.S. Equal Employment Opportunity Commission (EEOC) has recognized, requiring a background check can have an even more acute impact on individuals from communities of color due to the racial profiling and discriminatory practices that persist at each stage of the justice system.⁵

The “ban the box” movement, which has been embraced by 24 states and over 100 cities and counties around the nation, was launched over a decade ago by All of Us or None, an organization founded and led by formerly incarcerated individuals and their families. In those communities that have adopted ban the box, the laws have significantly improved the hiring rates of people with records.⁶ We value OPM’s leadership in building on the movement’s success, and we endorse OPM’s compelling justification for the new rules, which seek to “encourage applicants from all segments of society to seek Federal employment, and to ensure that for most Federal jobs, individuals with prior criminal or other adverse history are given the opportunity to demonstrate their knowledge, skills and ability in a fair and open competition.”⁷

Additionally, when inquiries into conviction histories are posed earlier in the hiring process, it leads to less clarity for the agency and the job applicant regarding the rationale for the agency’s background check determination and more opportunity for bias to enter the hiring process. Therefore, OPM’s regulations will ensure that use of background checks by federal employers are more efficiently, effectively, and fairly enforced. As OPM recognized as well, early inquiries into an applicant’s record “could have the effect of discouraging motivated, well-qualified individuals from applying for a Federal job[.]”⁸ thus undermining a core goal of the federal government to recruit a strong pool of qualified candidates.

³ MAURICE Emsellem & Michelle Natividad Rodriguez, NATIONAL EMPLOYMENT LAW PROJECT, ADVANCING A FEDERAL FAIR CHANCE HIRING AGENDA (Jan. 2015), available at <http://www.nelp.org/content/uploads/2015/01/Report-Federal-Fair-Chance-Hiring-Agenda.pdf>.

⁴ Devah Pager, Bruce Western & Naomi Sugie, SEQUENCING DISADVANTAGE: BARRIERS TO EMPLOYMENT FACING YOUNG BLACK AND WHITE MEN WITH CRIMINAL RECORDS, 623(1) Ann Am Acad Pol Soc Sci. 195, 198 (2013) (Author Manuscript), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3583356/pdf/nihms-439026.pdf>.

⁵ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), available at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

⁶ THE OFFICE OF THE DISTRICT OF COLUMBIA AUDITOR, THE IMPACT OF “BAN THE BOX” IN THE DISTRICT OF COLUMBIA (June 10, 2016), available at http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report_0.pdf; SOUTHERN COALITION FOR SOCIAL JUSTICE, THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC (2014), available at http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf.

⁷ 81 Fed.Reg. 26173, 26174 (May 2, 2016) (to be codified at 5. C.F.R. pts. 330 & 731).

FEDERAL INTERAGENCY RESOURCE COUNCIL, OVERVIEW (Aug. 2015), available at https://csgjusticecenter.org/wp-content/uploads/2014/05/FIRC_Overview.pdf.



By banning the box in the hiring process, the federal government is also helping to improve public safety and boost the economy.⁹ Because employment is the most important influence in decreasing recidivism,¹⁰ the ban the box regulations will reduce federal barriers to successful reentry by ensuring that qualified job applicants can support themselves and their families. Thus, it will help to reverse the effects that exclusion of individuals with criminal histories has had on the economy. In 2014 alone, poor job prospects for formerly incarcerated individuals reduced U.S. GDP by as much as \$87 billion.¹¹

While we strongly support OPM's proposed regulations extending the arrest and conviction history inquiry until the conditional offer stage of the hiring process, we share several of the concerns expressed in the detailed comments submitted by The Leadership Conference on Civil and Human Rights, the National Employment Law Project, the NAACP Legal Defense and Education Fund, the American Civil Liberties Union, and Legal Services for Prisoners with Children.

First, we strongly urge OPM to prohibit any exceptions to banning the box in the hiring process. However, to the extent that OPM adopts case-by-case exceptions, the regulations should prevent further discrimination against qualified applicants by ensuring that all agencies are complying with Title VII of the Civil Rights Act of 1964 and by expressly incorporating the key features of the guidelines adopted by the EEOC in 2012 regulating the consideration of arrest and conviction records in hiring decisions.¹² By incorporating the EEOC guidelines, OPM will also be addressing prior concerns expressed by the EEOC with OPM's "suitability" regulations.¹³ Second, we urge OPM to expand the reach of the new policy beyond "competitive service" workers to include the large numbers of federal workers employed in "excepted service" positions. Finally, in the event that OPM does not have the independent authority to extend the new regulation to all federal contractors across the federal government, we urge OPM to adopt the policy as applied to its contractors and to recommend that other federal agencies similarly do so.

⁹ MICHAEL WALDMAN & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, 15 EXECUTIVE ACTIONS 20 (2014), available at http://www.brennancenter.org/sites/default/files/publications/15_Executive_Actions.pdf.

¹⁰ MARK T. BERG & BETH M. HUEBNER, REENTRY AND THE TIES THAT BIND: AN EXAMINATION OF SOCIAL TIES, EMPLOYMENT, AND RECIDIVISM (2011), available at <http://www.tandfonline.com/doi/full/10.1080/07418825.2010.498383>.

¹¹ CHERRIE BUCKNOR & ALAN BARBER, CENTER FOR ECONOMIC POLICY RESEARCH, THE PRICE WE PAY: ECONOMIC COSTS OF BARRIERS TO EMPLOYMENT FOR FORMER PRISONERS AND PEOPLE CONVICTED OF FELONIES (June 2016), available at

<http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf?v=5>.

¹² U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012) (The EEOC guidelines, which implement Title VII of the Civil Rights Act of 1964, state that federal agency officials should be directed to take into account the age of the offense, the nature of the offense, and whether the offense is directly related to the job; and to conduct an "individualized assessment" providing the candidate an opportunity to present evidence of rehabilitation and verify the accuracy of the record.), available at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

¹³ 5 C.F.R. § 731.202 (2016); LETTER TO ANNA MAZZI, OPM DEPUTY ASSOCIATE DIRECTOR, FROM PEGGY MASTROIANNI, EEOC ASSOCIATE LEGAL COUNSEL (Mar. 19, 2007), available at https://www.eeoc.gov/eeoc/foia/letters/2007/arrest_and_conviction_records.html. https://www.eeoc.gov/eeoc/foia/letters/2007/arrest_and_conviction_records.html.



Thank you for the opportunity to comment on this proposed rule. We applaud your leadership in ensuring that all segments of society, including the vast segment of people with arrest or conviction histories, receive equal opportunity in federal employment. We offer our strong support for the proposed rules and urge its swift implementation to prevent any more qualified applicants from being unfairly locked out of the federal job market. If you have any questions, please contact Sakira Cook, Counsel, at cook@civilrights.org or (202) 263-2894.

Sincerely,

9to5 California
9to5 Colorado
9to5 Georgia
9to5, National Association of Working Women
9to5 Wisconsin
AFL-CIO
All Eyes On Africa Communications
All of Us or None
American Civil Liberties Union
American Federation of Teachers (AFT)
Amnesty International USA
Anti-Defamation League
Asian Pacific American Labor Alliance, AFL-CIO (APALA)
Black Alliance for Just Immigration
Black Women's Roundtable
Black Youth Vote!, NCBCP
Brennan Center for Justice at NYU School of Law
The Center for Church and Community
Center for Community Change Action
Center for Employment Opportunities (CEO)
The Center for HIV Law and Policy
Church of Scientology National Affairs Office
Coalition on Human Needs
CURE (Citizens United for Rehabilitation of Errants)
Disciples Center for Public Witness
Drug Policy Alliance
Ella Baker Center for Human Rights
Heartland Alliance
House of Dreams Outreach
Interfaith Action for Human Rights
Jewish Council for Public Affairs
JustLeadershipUSA
Kentucky Council of Churches

LatinoJustice PRLDEF
Lawyers' Committee for Civil Rights Under Law
The Leadership Conference on Civil and Human Rights
Legal Services for Prisoners with Children
Mommieactivist and sons
MomsRising.org
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National African American Drug Policy Coalition, Inc.
National Association of Criminal Defense Lawyers
National Association of Social Workers
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition on Black Civic Participation
National Council of Asian Pacific Americans (NCAPA)
National Council of Churches, USA
National Council of Jewish Women
National Council of La Raza (NCLR)
National Employment Law Project
National Employment Lawyers Association
National Immigration Law Center
National LGBTQ Task Force
National Low Income Housing Coalition
National Urban League
OneAmerica
PICO National Network
PICO Network LIVE FREE Campaign
PolicyLink
The Sentencing Project
Service Employees International Union (SEIU)
Sex Workers Project at the Urban Justice Center
Southern Coalition for Social Justice
Southern Poverty Law Center
StoptheDrugWar.org
Transformative Justice Coalition
T'ruah: The Rabbinic Call for Human Rights
United States Student Association
Voice of the Experienced
Voices for a Second Chance
Women Who Never Give Up, Inc.