

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

:

Plaintiff, :

:

-and- :

:

THE VULCAN SOCIETY, INC., *for itself and on* :
behalf of its members, JAMEL NICHOLSON, and :
RUSEBELL WILSON, *individually and on behalf of a* :
subclass of all other victims similarly situated seeking :
classwide injunctive relief, :

ROGER GREGG, MARCUS HAYWOOD, and :
KEVIN WALKER, *individually and on behalf of a* :
subclass of all other non-hire victims similarly :
situated; and :

CANDIDO NUÑEZ and KEVIN SIMPKINS, :
individually and on behalf of a subclass of all other :
delayed-hire victims similarly situated, :

Plaintiff-Intervenors, :

-against- :

THE CITY OF NEW YORK, :

Defendant. :

-----X

07-cv-2067 (NGG) (RLM)

MONITOR’S FIFTH PERIODIC REPORT TO THE COURT

Pursuant to paragraph 55 of this Court’s Modified Remedial Order and Partial Judgment, Permanent Injunction, and Order Appointing Court Monitor dated June 6, 2013 (the “Modified Remedial Order”) (Docket # 1143), Mark S. Cohen, in his capacity as Court Monitor (the “Monitor”) in the above-captioned matter, respectfully submits the Monitor’s fifth 90-day report concerning the status of the parties’ compliance with the Modified Remedial Order.

I. Executive Summary

The period since the Second Circuit lifted its stay on May 14, 2013 and the Court issued the Modified Remedial Order on June 6, 2013 has been an active one. It has included the City’s filing of reports regarding the FDNY’s recruitment and EEO practices; further development of the City’s attrition mitigation plan; background investigations by the Candidate Investigation Division (“CID”) and meetings of the Personnel Review Board (“PRB”) relating to specific firefighter candidates; ongoing communications among the parties and the Monitor regarding the processing of candidates; and the formal appointment in July of a class of probationary firefighters consisting of priority hire claimants, promotional candidates, and “open competitive” candidates who took Exam 2000.

General and Ongoing Activities

Part II of this report sets out relevant procedural background, including a brief discussion of the Modified Remedial Order.

Part III summarizes general activities undertaken by the Monitor in the past 90 days pursuant to the Modified Remedial Order, including the Monitor’s regular communications with the parties on a wide range of issues.

Part IV provides an update on efforts to minimize candidate attrition during the recruitment period and the further development of the City’s Attrition Mitigation Plan.

Part V describes ongoing activities regarding the City's document retention and preservation pursuant to the Modified Remedial Order.

Data Collection and Analysis

A key theme throughout the report is the need for the City to collect and analyze data regarding its recruiting, hiring, and EEO activities in a comprehensive and well executed manner. Part VI of this report sets forth the Monitor's understanding of the City's current data collection and analysis efforts and offers suggestions for improving that process.

Recruitment and EEO Reports

Pursuant to the Modified Remedial Order, the City filed two reports on July 15, 2013. These reports are addressed in Parts VII and VIII, below. The first report, prepared pursuant to Paragraphs 26-28 of the Modified Remedial Order, addresses the FDNY's recruitment activities (the "Recruitment Report"). The second report, prepared pursuant to Paragraphs 43-46 of the Modified Remedial Order, addresses the FDNY's Equal Employment Opportunity ("EEO") practices and procedures (the "EEO Report").

In this 90-Day Report, the Monitor will report on and provide initial feedback on several aspects of the City's final Recruitment Report and EEO Report.¹ *First*, the reports are the result of over one year of research and analysis by the City and its experts, often in consultation with the Monitor and its expert, and are useful steps toward the goals of understanding, assessing, and improving the City's recruitment and EEO practices.

At the Monitor's direction, the City provided the Monitor with initial recruitment and EEO reports in June 2013. The Monitor provided comments to those initial reports, and the City had the opportunity to incorporate those comments in advance of filing the final reports. In the

¹ The Modified Remedial Order requires the Monitor to file a formal response to the Recruitment Report and the EEO Report. The Monitor will file his response to the Recruitment Report and the EEO Report on or before December 16, 2013.

Monitor's view, this exchange of views and information was fruitful. Both final reports are materially more detailed and robust than the initial reports.

Second, the Monitor's initial review of the reports makes it clear that more work remains to be done, including in the following areas:

- **Data**: The Monitor has repeatedly stressed that understanding and reforming the FDNY's recruitment and EEO practices will require thorough and careful collection and analysis of data. The City's reports indicate that it has made advances in this area, but there is a need, recognized by the City, for it to do more to gather and process relevant information and employ it to further the goals of the Modified Remedial Order. This 90-Day Report discusses this issue in Parts VII and VIII, which deal with the Recruitment Report and the EEO Report, respectively, and in Part VI, which deals exclusively with data issues.
- **Tone at the Top**: Research by the Monitor, the City, and their respective consultants makes clear that lasting and effective advances in diversity consistent with the Modified Remedial Order will require unambiguous, sustained and vocal support from FDNY leadership. Significant progress has been made, but the "tone at the top" must be sustained, and it should not be limited to the senior-most ranks of the department. Concrete, positive messages regarding diversity and the remediation process should be clearly and frequently voiced by officers at all levels of the FDNY, from the Commissioner down to the division and firehouse level. The City should update the Monitor on its "tone at the top" messaging on a regular basis.
- **Resources**: The Modified Remedial Order requires the City to include recommended and "ideal" budgets and otherwise specify resources they believe will be needed to carry out their recommendations. The Monitor believes that the City should spell out in more detail the resources that will be required in both the recruitment and EEO settings, and that these efforts are likely to need more funding, staff, and other resources than it appears the City is prepared to commit at this juncture.
- **Execution**: The Recruitment Report and EEO Report include a number of potentially valuable ideas for reforming the FDNY's practices. Some of these ideas have been or are being implemented. In other instances, however, the City has limited itself to laying out concepts, without providing details regarding how, when, and by whom particular ideas will be put into practice. Examples of potentially useful ideas that require more detail are the "hashtag" database maintained by the FDNY's Office of Recruitment and Diversity ("ORD") (as more fully described in Section VI below), the FDNY's use of social media, and the newly instituted EEO training provided within the FDNY. More is obviously required. Indeed, in the EEO context, the Modified Remedial Order directs the

City to “specifically indicate how it plans to carry out the recommendations in the report, providing a specific timetable for those recommendations that cannot be carried out immediately.” (Modified Remedial Order ¶ 46.)

- **Reliance on Historical Benchmarks:** A key question going forward will be how to measure whether the City is making progress toward compliance with the Modified Remedial Order. To date, the City has tended to measure progress solely against historical data regarding, for example, the proportion of the applicant pool that is either black or Hispanic. Such data reflects a status quo that the Court, as affirmed by the Second Circuit, found to be unacceptable, and the City should avoid gauging its progress solely against such metrics.

Additional Issues and Next Steps

Finally, Part IX previews several reports and other filings to be made by the Monitor and the City in the coming months, including:

- A report by the Monitor on the PRB process, based on data regarding the process and on the Monitor’s attendance at several PRB meetings;
- An analysis of demographic and other data regarding the July 2013 Academy class, either separately or in conjunction with the PRB report;
- A report by the City on the results of its comprehensive top-to-bottom assessment of all steps in its process for the selection of entry-level firefighters, a response to that report by the Monitor, and an optional response by the parties; and
- The Monitor’s formal responses, and optional responses by the parties, to the City’s final Recruitment Report and EEO Report.

II. Background

Pursuant to paragraph 55 of the Modified Remedial Order, the Monitor must “provide periodic reports to the court and to the Parties concerning the status of the Parties’ compliance with this Order and other orders of the court or the Court Monitor, including their progress, any barriers to compliance, and potential areas of noncompliance.” Modified Remedial Order ¶ 55. The Modified Remedial Order further provides that “[t]he Court Monitor shall file a report with the court under this provision at least once every 90 days.” *Id.* The Monitor submitted his Fourth Periodic Report to the Court (the “Fourth Report”) on December 5, 2012 (Docket #

1022). The Monitor also submitted his First Interim Report to the Court on December 5, 2012 (Docket # 1023). On February 7, 2013, the United States Court of Appeals for the Second Circuit granted the City's motion for a stay of certain provisions of the Remedial Order dated December 8, 2011 (Docket # 1055). The stay was lifted on May 14, 2013, with instructions as to the revision of the Remedial Order.

Following the Second Circuit's decision on the City's appeal in May 2013, the Court set forth a proposed Modified Remedial Order, upon which the parties provided their comments. The Court entered the final Modified Remedial Order on June 6, 2013. The Modified Remedial Order required the City to submit reports on its recruitment and EEO activities, a top-to-bottom assessment, and an attrition mitigation plan.

This 90-Day Report sets forth an update regarding the parties' compliance with the terms of the Modified Remedial Order, and provides the Monitor's continuing observations on the progress of the parties in fulfilling the goals of the Modified Remedial Order.

III. General Activities

The Monitor has continued to hold conference calls with the parties on a regular basis (typically every week), during which the Monitor has reviewed upcoming deadlines with the parties, discussed ongoing tasks required to be performed by the City pursuant to the Modified Remedial Order, and addressed procedural and substantive issues that are raised by the parties. For example, the issues raised by the parties on the weekly calls include the status of certain applicants who have been seeking guidance and/or more information on the application process, the scheduling of deadlines for next steps in the processing of applications and formation of candidate lists, the language contained in notices for future applicants, and inquiries into pending EEO investigations at the FDNY. As described in the Fourth Periodic Report, the Monitor

continues to believe that these weekly calls continue to be productive in ensuring compliance with specific tasks and deadlines set forth in the Modified Remedial Order. The parties have asked the Monitor to review certain issues connected with alleged instances of retaliation. The Monitor is reviewing these issues.

IV. Attrition Mitigation Plan and Reassessment of Entry-Level Firefighter Selection

Paragraph 31 of the Modified Remedial Order provides that “[t]he City, in consultation with the Court Monitor and the Parties, shall draft and implement a written plan to mitigate and diminish rates of voluntary candidate attrition between different steps of the City’s process for the selection of entry-level firefighters.” Modified Remedial Order ¶ 31. This paragraph is identical to paragraph 31 of the previous Remedial Order. As noted in the Monitor’s previous periodic reports, the parties and the Monitor previously provided their initial comments regarding the City’s draft attrition mitigation plan. *See, e.g.*, Monitor’s Fourth Periodic Report at 9. The Monitor will continue to review the Attrition Mitigation Plan and its implementation with the parties. The Monitor also notes that the Attrition Mitigation Plan may need to be adjusted or revised in the future, as the City’s ability to collect and evaluate data improves.

A. June 12, 2013 Meeting with the Parties

On June 12, 2013, the parties, the Monitor, and the Monitor’s consultants met to review and discuss, among other things, the City’s updated attrition mitigation plan. At this meeting, Assistant Commissioner Michele Maglione of ORD provided a presentation, with accompanying data, of ORD’s efforts at mitigating attrition of minority candidates through the candidate recruitment process. Specifically, Assistant Commissioner Maglione outlined ORD’s CPAT training program and mentorship program, both of which the FDNY has instituted as part of its attrition mitigation efforts for the current class of firefighter candidates. The Monitor views the

City's outreach efforts to applicants to date, including ORD's CPAT training and mentorship programs, as positive steps.² Nevertheless, the Monitor believes the City's efforts remain but one part in the ongoing development of an attrition mitigation plan. The Monitor expects that as the City obtains empirical data regarding the success of outreach initiatives, it will continue to adapt and further revise its programs to improve its attrition mitigation plan.

V. Document Retention and Preservation

A. Document Retention and Preservation Order.

Paragraph 48 of the Modified Remedial Order provides that “[t]he Court Monitor, in consultation with the Parties, shall prepare and file a Document Retention and Preservation Order, for approval by the court, directing the City of New York to retain, preserve, and maintain specified broad categories of documents that are relevant to evaluating the City's compliance with this Order, including documents currently in existence and any documents which will be created in the future.” Modified Remedial Order ¶ 48. The Modified Remedial Order further provides that the Monitor “may amend or supplement the Document Retention and Preservation Order at any time.” *Id.*

As noted in his previous reports, the Monitor submitted his proposed Document Retention and Preservation Order to the Court on August 30, 2012 (Docket # 959). Pursuant to the Court's August 31, 2012 Scheduling Order, the parties were given the opportunity to provide comments on the proposed Document Retention and Preservation Order by September 4, 2012. On September 10, 2012, the Court entered the Document Retention and Preservation Order (Docket # 965).³ The Document Retention and Preservation Order remains in place.

² The Monitor's comments regarding these programs, as well as other recruitment programs instituted by the FDNY, are described in further detail in the assessment of the City's Recruitment Report in Section IV below.

³ As discussed in the Monitor's previous periodic reports, the Monitor received confirmation from the City during

B. Access to Information

The Modified Remedial Order also grants the Monitor with “access, on reasonable notice, to individuals, information, documents, materials, programs, services, facilities and premises under the control of the City of New York that the Monitor requires to perform his or her duties under this Order.” Modified Remedial Order ¶ 62. Since his last report, the Monitor has made several inquiries to the City for data or information concerning various aspects of the FDNY’s process or the July 2013 class of candidates. The City has responded to the Monitor’s requests for information and has provided the Monitor with access to the requested data. The Monitor looks forward to the continued cooperation of the City in the future.

The Modified Remedial Order requires the Monitor to file a written response to the City’s final Recruitment Report and EEO Report. *See* Modified Remedial Order ¶ 30. The initial comments provided in this periodic report are not in lieu of the Monitor’s written response, which will take into account the City’s reaction to comments herein, including any alterations or supplements to the final Recruitment Report and EEO Report and any additional revisions to FDNY policies and procedures, and/or further development in its programs and practices.

VI. Collection and Analysis of Data

The City’s collection, processing, and analysis of data from various stages of the recruitment and hiring process is a key theme throughout this report. In brief, the City collects (or is equipped to collect) a large volume of information that can be used to monitor and improve its recruiting and hiring process. At present, in the Monitor’s view there is inconsistency in the types of data that are collected, how the data is formatted, the processing of the data, and how it is used.

the Monitor’s first conference call with the parties on December 13, 2011, that the litigation hold from the underlying litigation in this matter is still in place.

Through meetings and discussions with various FDNY departments and senior staff, the Monitor has attempted to understand all of the points at which the City gathers information about prospective and actual candidates, where that information is stored, and whether the various resulting databases can interact with one another. The results of this effort are summarized below and in the flowchart in Appendix A. The chart has two pages, one summarizing pre-exam recruiting and attrition mitigation and one summarizing screening and hiring. From a data perspective, the Monitor understands the steps in this chain to be as follows:

- EOI Forms: Recruitment begins with a general campaign that includes events at which ORD collects Expression of Interest (“EOI”) forms. As discussed above, the information on these forms currently has not been, and perhaps cannot be, synched with information in other recruitment databases, and in any event ORD has not yet entered all of the data from the EOI forms.
- Phone banking, direct mail and emails to applicants: ORD retains records of its outreach, by phone and email, to applicants for the exam.
- Exam and Optional Survey: Immediately following the examination, applicants can take an optional survey which gathers data including race and ethnicity, the applicant’s reason for taking the exam, whether the applicant is currently a City employee, whether the applicant has previously taken the FDNY and any other civil service exams, and the extent to which the applicant may have friends or family in the FDNY. This data is collected and analyzed by the City’s test development consultant, PSI, which is currently analyzing the data. (*See Ex. C to the City’s Final Recruitment Report*).
- CPAT Information Session: CPAT Training commences with an information session. Data collection at this stage is limited to the names of the candidates who appear at the session. This data is collected and maintained by ORD and linked with other data maintained by DCAS, which then uses it to coordinate with fraternal firefighter organizations as part of its attrition mitigation plan to keep candidates involved in the post-examination screening and hiring process.
- CID Intake Interviews: CID investigators meet with firefighter candidates, who submit their intake forms and are then interviewed about the information requested in their files, including education, residency, employment history, and any arrest and/or conviction history. This information is maintained by CID as part of the candidate’s file to ultimately determine if the candidate will qualify for appointment as a firefighter.

- CID Investigations: The CID investigators follow up the intake interviews with contacts to educational institutions and former employers to confirm responses provided by the candidates.
- PRB Review: The PRB reviews any candidate files referred to it for character issues noted by the CID investigators such as issues relating to a candidate's employment history, or a record of arrests and/or convictions. The results of the PRB's decisions to disqualify a candidate or allow them to continue through the screening process are maintained by CID.
- Medical and Psychological Exams: These examinations are conducted by the Bureau of Health Services ("BHS"). BHS then informs CID whether the candidate is medically and psychologically qualified for the position.
- CPAT Training: CPAT Training sessions are conducted by the Bureau of Training. Data is collected regarding candidates' performance on each phase of the CPAT, including whether the candidate failed or passed the phase and their reason for failing, for analysis and use in connection with the City's ongoing test development process.
- CPAT Testing: CPAT testing is performed by DCAS personnel, who record whether candidates have passed the CPAT.
- Certified Hiring List: The FDNY informs DCAS of the CPAT results for all of the candidates. The names of those who failed are then removed from the hiring list initially established by DCAS following the scoring of the written firefighter exam.
- Run: As part of the medical exam, Candidates are required to complete a timed mile-and-a-half run in less than 13 minutes. The timed run is conducted by the Bureau of Training. Data collected is limited to the candidates' attendance and whether the candidate successfully completed the run. Candidates who fail the run may still be hired if they pass a stress test.
- Final List: The civil service list is established and maintained by DCAS.
- Academy Participation and Attrition: This data is collected by the Fire Academy, and includes the names of any probationary firefighters who resign from the academy. The resigning firefighters are interviewed regarding their decision and, if they do not change their decision, they are requested to provide written statements explaining, in narrative form, the reasons for their resignation. These responses are then reviewed and categorized by senior staff in the FDNY's Human Resources Department.

Comprehensive collection and analysis of data from these points during the recruitment and hiring process presents significant obstacles. As the Monitor understands the City's current

system, those obstacles are heightened by the use of incompatible database systems by the various divisions within the FDNY responsible for gathering and maintaining data and by the failure to fully process and review all of the data that has been collected.

The City has demonstrated that it is aware of the need to standardize and improve its data processes, and has taken the initiative in some instances. The City should nevertheless take additional steps to make the collection and use of data more thorough and coordinated. For example, creation of a single database able to track prospective applicants from the point of first contact through the hiring process would significantly enhance the City's ability to evaluate its recruitment and hiring procedures. This would enable the City to track whether particular recruiting events ultimately lead to candidates who complete the entire examination and hiring process, and to identify points in the process where candidates might be most likely to drop out. For this purpose, the ability to link the EOI data with the DCAS exam applications and post-examination optional surveys is critical. Further, the City should focus on collecting and publicizing a uniform set of data regarding the various ways in which candidates drop out of the screening process such that the information can be broken out by both race and category (i.e., priority hires, promotional candidates, and open competitive candidates). Without such uniform data, it will be far more difficult to understand candidate attrition and diagnose and resolve the causes of a process the Court found to have a disparate impact on different races.

The City has made progress in this respect. Early in 2013, the FDNY and DCAS coordinated their efforts and created a "hashtag database," which has been used for various purposes in recent months. (Recruitment Report at 31-32.) The Monitor would like to better understand the hashtag database. It is not clear, for example, which of the many sources of data are incorporated in the database, whether it is accessible by and coordinated among ORD, the

CID, the PRB, DCAS, and other relevant departments, and whether it is being used both to track candidates in real time and to improve FDNY recruitment and hiring procedures by enabling FDNY personnel to assess when and why candidates drop out of the hiring process.

Interoperable databases are also essential in studying the impact of the FDNY Recruitment campaigns on test registrations, including the ability to compare applicants who apply for the examination as a result of campaign initiatives with those who enter the DCAS database directly without encountering the FDNY Recruitment process.

The Monitor also recommends that the City designate a single individual or office within the FDNY with responsibility for coordinating the collection and analysis of data from all of the steps in the recruitment and hiring process, regardless of whether the information was collected by ORD, CID, DCAS, or some other department or agency.

The Monitor anticipates ongoing dialogue with the City and the parties on this issue.

VII. The City's Recruitment Report

A. Background

Paragraph 26 of the Modified Remedial Order requires the City to submit a report on its recruitment efforts covering specifically delineated areas. *See* Modified Remedial Order ¶ 26. On May 31, 2013, the Monitor recommended that, in addition to the proposed revised deadlines offered by the parties, the City provide a report on recruitment activities upon which the Monitor could offer comments. (Docket # 1131.) The City objected to this recommendation. (Docket # 1132.) On June 3, 2013, the Court issued an order establishing revised deadlines for the parties' submissions and requiring that the City provide an interim report to the Monitor (Docket # 1136.) The City timely provided its interim report to the Monitor on June 15, 2013.

On July 1, 2013, the Monitor provided his comments to the City on its interim

Recruitment Report, noting the City's progress but also raising a number of concerns. On July 15, 2013, the City timely filed its Recruitment Report Pursuant to Modified Remedial Order Paragraph 26 (the "Recruitment Report") (Docket # 1166). The final report reflects the work performed by the City on recruitment issues and also addresses certain issues raised by the Monitor. Some of the issues raised earlier by the Monitor remain unresolved and new concerns have arisen. These are detailed below.

B. Identification and Analysis of Recruitment Activities (§ 26(a))

Paragraph 26 of the Court's Modified Remedial Order sets forth minimum requirements for the City's Recruitment Report. Paragraph 26(a) specifically requires that the City's report "identif[y] and evaluate[] the effectiveness of ORD's various recruitment activities at recruiting black and Hispanic firefighter candidates against the cost of those activities." As such, the City must both (i) identify and describe ORD's recruitment activities and (ii) evaluate the effectiveness of those activities against their respective cost.

In comments to the City's interim recruitment report, the Monitor noted that the City had provided useful descriptions of its recruiting effort, but urged the City to go further in evaluating, rather than merely identifying its practices. The Monitor noted that such an assessment would require more thorough collection and analysis of data regarding recruitment efforts to help determine which practices were most effective and why.

The City's final Recruitment Report expands upon the earlier description of past recruiting campaigns. It provides additional information on ORD's efforts to attract a proportionally higher number of black and Hispanic recruits for Exams 6019 and 2000. *See* Recruitment Report at 10-15. The City also makes some effort to evaluate its recruitment practices, as required by Paragraph 26(a) of the Modified Remedial Order. However, in the

Monitor's view, the final report still does not include a sufficiently developed analysis of the effectiveness of ORD's activities. This is in part because, at this stage, the City lacks adequate data by which the effectiveness of various recruitment methods can be evaluated, and in part because the report includes very little self-criticism, whether based on statistical analysis or otherwise.

This report expands on these observations below in discussing the five phases of recruitment the City identified in its Recruitment Report.

1. "Phase 1 – Awareness"

Events: The Recruitment Report describes ORD's efforts to raise awareness about Exams 6019 and 2000 throughout the City. The primary means used by ORD was in-person recruiting events. ORD conducted more than 2,600 such events for Exam 6019, and more than 6,700 for Exam 2000. *See* Recruitment Report at 10. The Recruitment Report gives several examples of such events and describes some of the materials displayed and/or distributed at the events. *Id.* at 10-11. The City also provides (as Exhibit B to the report) a table with information on each event, including the name, date, type, location, and recruiters who attended. *Id.* at Ex. B.

A primary goal of Phase 1 was the collection at recruiting events of EOI forms, which contained information about prospective applicants to be used to contact and recruit them going forward. *Id.* at 10-11. ORD collected hundreds of EOI forms during the Exam 2000 recruitment campaign. The ultimate usefulness of the EOI forms is discussed below.

Marketing and Advertising: Although the Exam 6019 and Exam 2000 campaigns were dominated by in-person recruiting events, the City also engaged in some online and traditional advertising and marketing efforts, according to the Recruitment Report. *See* Recruitment Report at 13-14. Among other things, the FDNY advertised on radio stations, in community

newspapers, in YouTube videos, and on the FDNY website. *Id.*

With respect to City's interim recruitment report, the Monitor noted that the City had provided little information regarding, among other things, which particular media outlets were chosen and why. The final Recruitment Report also lacks such information regarding the marketing and advertising efforts for the Exam 2000 recruitment campaign. Further, the final report provides little analysis about how that campaign was designed and implemented.

Further, ORD apparently has not taken full advantage of focus groups, outside studies, consultants, and other contemporary means of identifying target audiences and shaping their messages to maximize impact. The Recruitment Report offers only one such instance, and the results there appear to have been favorable. Specifically, the report notes that recent advertising campaigns were based in part on the results of an academic study regarding recruitment and diversity in the FDNY. *See* Recruitment Report at 19. The City credits the resulting campaign for at least part of the increase in diversity of the applicant pool for Exam 2000. *Id.* The City states that it plans to take similar steps in the future. Specifically, the Recruitment Report states that FDNY "intends to undertake significant research in conjunction with a City-based graduate school or consulting firm that will help develop the most effective messaging possible for recruiting young men and women of color." Recruitment Report at 60. This appears to be a useful and important approach. Yet, at this time, the City's proposed budget for the next recruitment campaign, which is discussed in more detail below, includes no allotment for such a study. The City should also consider the use of outside consultants to conduct focus groups and create more targeted messaging, but has not specified any plans, or any budget, to do so.

Collection and Analysis of Data: An important issue in the City's Recruitment Report stems from the failure to adequately collect, coordinate, and analyze comprehensive data

regarding its recruitment efforts. The Monitor has stressed the importance of such efforts throughout this process, and did so again in comments to the City's interim recruitment report. *See, e.g.*, Monitor's First Periodic Report (Docket # 823) at 20; Monitor's Second Periodic Report (Docket # 892) at 16; Monitor's Third Periodic Report (Docket # 960) at 16; Monitor's Fourth Periodic Report (Docket # 1022) at 17. The broad collection and proper use of statistical information on each phase of the recruitment process is necessary for the City to fulfill its responsibility under the Modified Remedial Order to "evaluate[] the effectiveness of ORD's various recruitment activities at recruiting black and Hispanic firefighter candidates against the cost of those activities." Modified Remedial Order ¶ 26(a). (ORD's collection and analysis of data is also discussed in Part VI, above.)

Ideally, the City would track each prospective candidate from first contact through hiring and attempt to determine the reason for attrition at each step. Toward that end, the City at one point contemplated a "hashtag" database in which each prospective applicant would be assigned a unique number or "hashtag" that would be used to track him or her throughout the various stages of the recruitment and hiring process. As the Monitor understands it, only portions of that database have been created. In his comments on the City's interim recruitment report, the Monitor recommended that the City provide more information regarding the status of its hashtag database. In its final report, the City states that it has not developed the ability to track an applicant's progress from the point of first contact because the EOI form does not ask for social security numbers, which are utilized to generate each applicant's unique hashtag identifier. *See* Recruitment Report at 13. The City should consider whether it is practical to request social security numbers in the EOI forms or whether there are alternative ways to generate hashtags at the EOI stage so that applicants can be properly tracked.

Other barriers to more robust collection and use of statistical and other information should be easy to overcome, even if the result is not a single end-to-end database. The City did collect large numbers of EOI and similar forms during the recruiting campaigns, but this data has not been fully entered into a database because the “volume of data exceeded the data entry and analysis capability available.” *Id.* Further, although the City tracks recruitment events hosted by ORD by date and location of event, it does not track the number of EOI forms obtained at each event or the number of exam applications completed at each event. This issue appears in large part to be one of resources. In other words, resources need to be deployed to collect such data. Although the City’s “ideal” budget for the next full recruiting campaign, discussed below, includes an allotment for additional data entry temps, it is not clear whether or when those personnel will be assigned data from the EOI forms. The City’s Recruitment Report also notes that ORD is considering “automating data collection through the use of tablets at events” to eliminate the data entry issues in future campaigns, but the proposed budget appears to include no funding for such an initiative. Recruitment Report at 13.

As another example, the City’s Recruitment Report fails to provide cost data for recruitment events, activities, marketing and advertising at all phases of recruitment. As a result, there is no empirical basis on which to assess which efforts were most cost effective and calibrate future campaigns accordingly.

The City acknowledges the need to improve its collection and use of data going forward. In a closing section on “Strategies for Increasing Diversity,” the Recruitment Report lists “Maximize Use of Data” as one of several priorities. *Id.* at 59-60. This section includes some potentially helpful proposals. Among other things, the section cites the potential advantages of an end-to-end hashtag database. *See id.* But the report offers no solutions to the problems that

have thwarted creation of a database to date. The City also offers “examples of additional useful data collection,” but in most instances no indication that any particular idea will be pursued. *Id.* at 59.

It is important that the City move to execution of these suggestions, in the form of concrete programs. The City should commit to creating the end-to-end hashtag database and to entering and analyzing the existing data. The City should also commit to administering surveys to candidates in the top tier of the current list and to applicants that applied but did not show up for the exam.

2. “Phase 2 – Filing”

Direct Contact: The City’s Recruitment Report describes in detail ORD’s attempts to encourage prospective applicants to file applications by making direct contact – via phone calls (phone bank or robo-calls), direct mailings, and e-mails – using information from the EOI forms collected during Phase 1. *See* Recruitment Report at 15-16. The City states that ORD tried to contact each prospective applicant eleven times. During the Exam 2000 campaign, ORD was also able to send a link to the DCAS application and encourage applicants to apply online. *Id.* at 16. The Monitor remains encouraged by the City’s efforts to contact prospective applicants in the hiring process. At the same time, the Monitor believes some additional data on these efforts would be helpful. In particular, the City should specify how many prospective applicants were reached through phone banks.

Marketing and Advertising: The City’s Recruitment Report states that ORD continued some marketing and advertising efforts during Phase 2. *See* Recruitment Report at 16. Advertisements were reportedly placed in “publications serving communities of color,” and radio ads in English and Spanish were run on various stations. *Id.* The City states generally that ORD

made use of “electronic media such as Facebook, YouTube videos and Twitter, as well as distribution of e-alerts and e-news.” *Id.* The Recruitment Report does not provide detail on these efforts.

Filing Day Events: The Recruitment Report describes 342 Filing Day events held throughout the city to assist prospective candidates in filing online applications for the exam. *See* Recruitment Report at 16. According to the report, of the approximately 6,600 applicants that filed applications at the events, 62% were black, 26% were Hispanic, and 21% were women. *Id.* In other words, black and Hispanic applicants took advantage of the Filing Day events in far higher proportions than in the current ranks of the FDNY and in the applicant pool as a whole. Further, the Filing Day events produced 32.3% of the black candidates who applied for Exam 2000, 12.8% of Hispanic candidates who applied for Exam 2000, and 11.2% of all candidates who applied for the exam. Accordingly, while it remains unclear how the Filing Day candidates fared in the exam or in the hiring process, it appears that the Filing Day activities likely increased the number of minority applicants to the FDNY for Exam 2000. Here again, an end-to-end database would be useful because it would make it possible to be more definitive about the ultimate effectiveness of the Filing Day activities. For example, the City should ideally be able to track, by race, which individuals who filled out EOI cards actually took the exam.

Outreach Programs: The Recruitment Report also discusses two outreach programs aimed at fostering interest in the FDNY among young people: the FDNY High School for Fire and Life Safety, and the FDNY Fire and Emergency Medical Services Exploring Program. *See* Recruitment Report at 27-30. According to the Recruitment Report, both programs, particularly the FDNY High School, appear to have had some success at recruiting prospective applicants who eventually enter the Academy.

The Monitor believes that more detailed, data-driven analysis of the outreach programs would be useful. For example, the Recruitment Report does not specify the ultimate rate of success of minority participants in these programs in joining the FDNY. If, for instance, these outreach programs have a high rate of success at not only encouraging minority students to apply to the FDNY, but also in maintaining the interest of such applicants through the hiring and appointment process, such information would be important for the FDNY's outreach efforts and allocation of resources going forward. Accordingly, the Monitor recommends that the City commit to improving its collection and analysis of data regarding participants in minority outreach programs.

Additional Outreach Efforts: One of the City's efforts to weigh the costs and benefits of specific recruitment or outreach activities concerns a 10-day effort by the City and the Vulcan Society in December 2011 to contact individuals with incomplete applications to encourage them to complete their applications. *See* Recruitment Report at 17-18. A total of 221 applicants finalized their paperwork as a result of this process, including 103 black and 53 more Hispanic applicants. *See id.* at 18. Only 54 of these new applicants, however, actually took the exam and attained scores likely to be within the range of applicants actually hired. *Id.* From this data, the City concludes that "[t]he resources and costs expended on this outreach effort appear to outweigh the benefits." *Id.*

Although the Modified Remedial Order requires the City to make cost/benefit determinations, the information included in the Recruitment Report is insufficient to support this conclusion. The City offers no cost data at all on this effort (or on other competing recruitment efforts) and thus provides no basis for comparing the cost-effectiveness of this particular outreach program to any other effort undertaken by ORD. As further discussed below, the

Monitor believes that the Modified Remedial Order calls for a more rigorous and systematic evaluation of the costs and benefits of various programs.

3. “Phase 3 – Preparing for the Exam”

Tutorial Program: The Recruitment Report provides a thorough description of the ORD’s tutorial program instituted during Phase 3 recruitment for Exam 2000. *See* Recruitment Report at 21-23. The City notes that ORD held tutoring sessions in multiple locations in each borough and also made training materials available online in an effort to improve performance on the exam. *See id.* at 21. According to the Recruitment Report, approximately 21.5 percent of the tutorial session attendees reportedly were black while 29.7 percent were Hispanic. *Id.* at 22.

The Recruitment Report does not, however, provide any statistical or cost information or analysis as to the effectiveness of the tutorial program. It is unclear, for example, if prospective candidates who participated in the Tutorial Program were more successful on the test than candidates who did not, or whether the Tutorial Program was cost-effective in increasing participant performance. To the extent data that would answer such questions is available, the City should provide and analyze it, and should incorporate the results in planning for the tutorials used in upcoming exams.

4. “Phase 4 – Taking the Exam”

The City’s Recruitment Report provides a snapshot of the demographics of test-takers for Exams 6019 and 2000. *See* Recruitment Report at 23. Of the candidates that passed Exam 6019 with high enough scores to be considered for appointment, 31.5% self-identified as either black or Hispanic. *Id.* For Exam 2000, that figure increased to 42%. *Id.* at 12. By point of reference, even though more than 50% of New York City’s population is black or Hispanic, as noted during the litigation, approximately 90% of FDNY firefighters are white. The Monitor notes the

relative increased diversity in candidates to be considered for appointment that the City has achieved in the recent Exam 2000.

The Recruitment Report notes that between Exam 6019 and Exam 2000, ORD broadly increased its efforts to convince applicants to take the test through phone and e-mail reminders to prospective test-takers. *Id.* at 22-23. The report does not attribute the increase in diverse applicants from one exam to the next to particular recruitment or outreach activities and offers no data that would support such a specific link.

Exam 2000 Optional Survey: Pursuant to Paragraph 25 of the Modified Remedial Order, the City was required to design an optional survey for individuals taking Exam 2000, the purposes of which “shall be to determine the effectiveness of ORD’s various recruitment activities and strategies, to determine the reasons why firefighter candidates chose to apply to become entry-level firefighters, to determine how many firefighter candidates have friends or family members in the FDNY, and to obtain any other such useful information.” Modified Remedial Order ¶ 25. The City carried out the optional survey in connection with the administration of Exam 2000, with more than 99% of the test-takers completing some portion of the survey. *See* Recruitment Report at 18. The Optional Survey represents an important data collection point, and the City has provided the analysis it has conducted to date, which includes useful information. (Recruitment Report Ex. C.)

The City’s Recruitment Report briefly describes some of the knowledge it gained from the Exam 2000 Optional Survey results and includes, as an attachment, some of the raw results data. (*Id.* at 18-21; Exhibit C.) For example, the Exam 2000 Optional Survey data suggests that recruiting at City College and Queens College, as well as at community events such as parades and street fairs, was probably effective. *Id.* at 19. Similarly, subway stations appear to have

been effective locations for recruitment based upon the Optional Survey data. *Id.*

In comments to the City's interim recruitment report, the Monitor noted that the Optional Survey data did not permit a thorough analysis of which recruiting efforts were most effective and/or cost-effective, and why. The final Recruitment Report also acknowledges this issue, stating that "the data does not identify any individual event or method of advertising as more or less effective than any other." (Recruitment Report at 19.) For example, the City's Recruitment Report provides the total number of Survey takers who heard about the Exam 2000 recruitment campaign on a given radio station and, of the total who heard about the campaign on that station, what percentage were black or Hispanic. (*Id.*) While useful, this information alone is insufficient to inform whether or not advertising on that radio station is effective. For that, the Recruitment Report would also need to show, for example, the percentage of black or Hispanic Survey takers who *passed* the test, whether black or Hispanic Survey takers found the advertisement was a factor in their awareness of or encouragement to take the test, and how much money ORD spent on advertisements on that particular radio station.

Given the acknowledged shortcomings of the survey data, the City appears to be overly ambitious in extrapolating the results. The City states that "[t]he Survey data ... supports both the underlying rationale of ORD's recruitment strategies and the effectiveness of its methods." (*Id.* at 19.) A thorough review of this assertion is beyond the scope of this Periodic Report, but the Monitor urges the City to revisit its conclusions on the basis of a more thorough analysis of existing data and of data from future surveys that may resolve some of the flaws in the Exam 2000 survey.

In connection with the interim recruitment report, the Monitor encouraged the City to consider ways to improve the survey going forward to enable better data collection. The City's

final Recruitment Report notes that it is pursuing improvements to the survey as well as deeper analysis of the results. (Recruitment Report at 59.) The Monitor looks forward to seeing more concrete plans in this regard and to dialog with the City as these plans evolve. The Monitor also encourages the City to consider enlisting outside professionals in redesigning the survey and guiding the analysis of survey results. Further, the Monitor and its consultants are also in the process of analyzing the data and will provide a more thorough analysis in a separate report in the coming months.

5. “Phase 5 – Post-Exam Attrition Mitigation”

As discussed in Part IV, above, the Modified Remedial Order requires the City to document its attrition mitigation efforts in a separate Attrition Mitigation Plan. *See* Modified Remedial Order ¶ 31. The City’s Recruitment Report also describes several efforts to minimize attrition of candidates following the administration of recent exams, namely, CPAT Training, Mentorship, and Academy Preparation. *See* Recruitment Report at 24-25. The final Recruitment Report includes important information regarding attrition mitigation programs that was absent from the interim recruitment report.

CPAT Training Program: The Recruitment Report provides a brief description of a new program to train candidates for the CPAT. *Id.* at 24. The CPAT training program was launched for candidates who passed Exam 2500 and again for those who passed Exam 2000. *Id.* The Recruitment Report stresses that new measures such as electronic sign-in and phone banks for contacting registrants “greatly improved the nature of ORD’s data collection and follow-up.” *Id.*

With respect to data collection, the Recruitment Report indicates that the information collected was sent to the Program coordinator and ORD’s “Director of Data” for further analysis. Recruitment Report at 25. The analysis is apparently ongoing. The Recruitment Report notes

that there were 708 CPAT participants, 621 of whom passed the CPAT, and that of these, 32.85% were black and 33.66% were Hispanic. *Id.* The report also states that the data regarding test takers, as well as phone banks and other initiatives, were used to follow up with candidates who missed scheduled CPAT training classes. *Id.* The subject of candidates who missed scheduled CPAT training classes and/or needed additional information was discussed on several of the weekly calls held by the parties and the Monitor. Data regarding applicants, their participation in the CPAT training programs, and the ability of the City to track applicants throughout the CPAT process, remains a significant issue in analyzing the City's recruitment efforts with the current class of candidates. The City should establish concrete plans to collect, analyze, and maintain that data, and should specify the budget it would need to do so.

Mentoring Program: The City's Recruitment Report describes the institution of the new Mentoring Program to assist candidates who passed the exam. *See* Recruitment Report at 25-26. The Recruitment Report mentions the demographics of mentors selected. *Id.* The Monitor believes that the Mentoring Program will benefit candidates as they progress through the FDNY hiring process. The City's Recruitment Report, however, does not list the demographics of candidates who participated in the program. It also provides no data by which to evaluate the impact of the mentorship program on prospective candidates. The Monitor recommends that the City provide a more comprehensive examination of the program, including the data cited above, in its final report on Attrition Mitigation as well as its top-to-bottom assessment.

Academy Preparation and Social Media: The City's Recruitment Report notes that ORD has begun to use social media to remain in contact with candidates during the processing period. *See* Recruitment Report at 26-27. Among other things, candidates may post questions on Facebook and Twitter to be answered by ORD, and ORD distributes a newsletter. *Id.* at 27. In

addition, the Recruitment Report states that ORD is seeking to encourage candidates who passed the CPAT to begin preparing for the physical demands of the training academy through the use of a survey about candidates' current exercise regimen and other informational initiatives. *Id.* The City should continue to broaden its use of social media in all of its recruitment activities (as well as its attrition mitigation and hiring processes).

C. The City's Identification of Best Diversity Recruitment Practices (¶ 26(b))

Paragraph 26(b) of the Modified Remedial Order provides that the City's Recruitment Report must "identif[y] best practices for the recruitment of black and Hispanic employees generally and firefighter candidates in particular, both nationally and in New York City in particular." Modified Remedial Order ¶ 26(b). The Recruitment Report explores the definition of the term "best practices," and summarizes the City's findings on the practices employed by the federal government, the military, and other fire departments. *See* Recruitment Report at 34.

1. Definition of "Best Practices"

As to the concept of "best practices," the City's Recruitment Report states that in certain academic disciplines "a practice cannot be categorized as 'best' until it has been proven effective by objective and comprehensive research and evaluation." Recruitment Report at 34. The City notes that its recruitment consultant, Vernā Meyers Consulting Group ("VMCG"), found no objective research that definitively identified specific recruiting practices as "best," and that as used in the field of diversity recruiting, the term includes a wide range of practices and methods. *Id.*

The Recruitment Report "describes methods and strategies that are self-defined by those using them as 'best.'" *Id.* at 34-35.⁴ As the City notes, and as Monitor pointed out in his

⁴ To the extent the City takes the position that the concept of "best practice" is too restrictive to permit it to identify any possible approaches to improving current FDNY practices, the Monitor notes that the City could have

comments to the City's interim recruitment report, this approach is consistent with that of a Task Force appointed by the Equal Employment Opportunity Commission to study private sector practices. *See id.* at 35.

2. Practices from the Federal Government and Military

The City's Recruitment Report generally describes some of the practices currently employed by federal agencies and the military to promote diversity in the federal workforce. *See* Recruitment Report at 35-37. The Monitor noted that the interim recruitment report lacked details regarding which agencies and which programs and initiatives were studied, and the final report, although it includes some additional information, is still overly vague in this respect. The Monitor also noted in connection with the interim report that "the final report should identify which of the various recruitment approaches it studied can be considered [a] 'best practice' ... and why." The Recruitment Report states only that the City's recruitment consultant "conducted research on best practices, both generally and for firefighters in particular, including information gathering from other urban fire departments, the military, and others." *Id.* at 5. Consequently, the Recruitment Report offers only the broad conclusion that "[t]argeted advertising, attendance at job fairs, presentations to faculty and community, hosting field trips and sponsoring volunteer activities are all recruitment strategies employed by the government in its effort to recruit an interested, talented and diverse staff." *Id.* at 36. It remains unclear what specific research was performed by the City regarding the recruitment practices of the federal government, what the success rates of such practices have been in other settings, or what conclusions the City drew based on this research.

The United States military has a long history of integrating diversity into its organization

approached the Court to clarify the Court's intent as to Paragraph 26(b), and indeed should do so if there remains any doubt on this issue.

and thus can be an important resource for the sort of comparative “best practices” analysis required by the Modified Remedial Order. Indeed, the FDNY chose a dean of the United States Military Academy to address participants at the Leadership Conference in October 2012, an event at which the FDNY sought to “mak[e] clear the goal of making the FDNY a national leader in diversity, inclusiveness, and EEO practices.” (EEO Report at 6.) The Monitor believes that a deeper and more thorough analysis of the military’s recruitment processes is warranted and recommends that the City further analyze the issue of whether the FDNY can and should adopt some of the US military’s successful diversity strategies going forward.

3. Practices from Other Fire Departments

Background: The City looked at two principal sources of information on how other fire departments are seeking to maximize diversity among firefighters: a study conducted by the International Association of Firefighters (“IAFF”), and visits by the City’s consultants to fire departments in other large urban areas. The Monitor has reviewed the IAFF study and, together with its own consultant, visited many of the same fire departments as the City’s consultants. The Monitor has also conducted additional research into best practices used by other fire departments and has drawn on the expertise of its consultants in this regard.

IAFF Study: The IAFF is an organization consisting of more than 300,000 full-time professional firefighters and paramedics. In 2006, the IAFF undertook extensive research into tools for increasing diversity within fire departments in the United States and Canada, the result of which was a study that is widely considered an important benchmark in recruitment among fire departments nationwide. The City’s Recruitment Report identifies the key findings from this study and compares its findings to the City’s recruitment efforts and initiatives. *See* Recruitment Report at 38-50. In brief, the City concludes that most of the tools recommended by the IAFF

are being used or will be used by the FDNY.

The Monitor believes, however, that a closer analysis may be warranted in comparing the City's own initiatives with those in the IAFF study. For example, after listing several key findings from the IAFF study, the City states that it fulfills the recommendations because it has adopted most or all of the recommended programs. *See, e.g.*, Recruitment Report at 41. For example, the City states that it used some "formal" means of advertising by "including advertising in in community based newspapers targeted to communities of color, the LGBT community and the women's [sic] community, and radio advertisements on urban radio stations." *Id.* at 40.

Beyond noting that these programs are in place or are planned, the report does not always explore in detail how extensively such programs have been used or whether they have been given appropriate resources. The Monitor raised the same concern in connection with the City's interim recruitment report. Although the final Recruitment Report is significantly more detailed, further information is needed on when the recommended programs were adopted, how effective they have been, and what their budget has been and should be.

Other Fire Departments: The Monitor commented that the portion of the City's interim recruitment report devoted to other fire departments lacked sufficient detail. The final Recruitment Report includes a nearly identical, very brief description of the review by the City's consultant of recruitment practices at other fire departments. (*See* Recruitment Report at 51-52.) This narrative and analysis has only a fraction of the detail devoted to the IAFF study. Although the Recruitment Report does provide a table with certain recruitment information from other fire departments (*id.*, Ex. D), that information is principally limited to staff and budgetary information. The Monitor's staff and consultant accompanied the City's consultants on certain

site visits, and in the Monitor's view there is significantly more to be learned from these other examples. The Monitor will further develop this topic in his formal responses to the City's Recruitment Report and in meetings with the City and the parties.

The underlying theme in the City's comparative analysis is that the FDNY, by virtue of its size and complexity, is unlike any other fire department in the nation and therefore diversity initiatives employed by other fire departments are of limited relevance in planning what may work here. (*See, e.g.*, Recruitment Report at 54.) ("Even in other fire departments, where the basic structure of recruiting and hiring is substantially similar to New York, the impact of the differential in size must be considered in determining whether any particular method can be adapted for use in New York."). It is true that the FDNY is the largest fire department in the country and that the diversity challenges it faces are unique in scale if not type. Yet it is difficult to understand why the size of the FDNY means that practices from other fire departments cannot be adapted to New York (with appropriate modifications to account for the differences in size) or should be ignored. Further, the City appears to give credence to the IAFF study, which itself focused on other jurisdictions. It makes little sense to accept those findings but reject the lessons learned by individual fire departments in other large and complex urban areas. The Monitor intends to further develop this topic in its response to the City's Recruitment Report, as well as in meetings with the City and the parties.

D. The City's Strategies for Increasing Diversity (¶¶ 26(c)-(e)).

Paragraphs 26(c)-(e) of the Modified Remedial Order require the City's Recruitment Report to make a variety of recommendations for enhancing ORD's diversity-oriented recruitment programs. Specifically, those paragraphs state that the City must submit a report that:

(c) recommends tactics ORD can use to improve the effectiveness and efficiency with which it recruits black and Hispanic firefighter candidates;

(d) recommends changes to ORD's long-term black and Hispanic firefighter candidate recruitment strategy and intensive pre-exam recruitment strategy;

(e) recommends measurable short-term and long-term goals for the recruitment of black and Hispanic entry-level firefighter candidates;

Modified Remedial Order ¶ 26 (c)-(e).

The section of the Recruitment Report devoted to “strategies for increasing diversity” consists largely of broad-level descriptions of strategies used on the Exam 6019 and Exam 2000 campaigns. These include eight specific goals, such as “Create a Strategic Diversity and Inclusion Plan” and “Improve Internal Communications and Inter-Agency Coordination.” Most of these goals represent expansions on the same tactics already being used. As discussed, however, the Recruitment Report offers little information upon which to determine whether or why any particular strategies were effective. For example, the City presently offers no way to determine whether there were enough recruiting events in the most fruitful venues, whether social media have been used effectively, or whether print and television advertisements were appropriately crafted and targeted.

The City acknowledges the importance of “[d]ata-driven decision making” and sets as one of its goals to “Maximize [the] Use of Data.” *Id.* at 59. For example, the City states that more comprehensive use of hashtags to track applicants throughout the recruitment process and improvements on the design of the post-exam optional survey would yield information on which to target resources more efficiently in the future. The Monitor urges the City to ensure that this goal is appropriately budgeted and carried out.

Paragraph 26(e) goes beyond requiring recommendations on new tactics and strategies; it also requires the City to set “measurable short-term and long-term goals” for the recruitment of diverse candidates. The City’s Recruitment Report does set forth several ambitions, including “establish goals” and “create a strategic diversity and inclusion plan.” Recruitment Report at 56-57. Several are not “measurable” in any precise sense, but could nevertheless benefit from additional detail. For example, the City states that it will develop and expand its Diversity Training program, but offers no specifics as to timing, budget, curriculum, or other aspects of the potentially expanded training program.

The most concrete goal set forth in the report is to recruit an applicant pool for the next exam that is 23.5% black and 24.8% Hispanic. Recruitment Report at 57. This would represent a 2% improvement over the results for Exam 2000, roughly equal to the improvement of Exam 2000 over Exam 6019. As noted throughout this report, the City should carefully assess which of its past tactics are likely to yield these returns – or higher returns – in the future, and whether new tactics might offer additional gains, including those used by other fire departments. Additionally, the Monitor notes that the FDNY’s historical figures for diversity (with the FDNY currently consisting of approximately 5% black and 9% Hispanic firefighters) should not be the principal benchmark by which success in increasing diversity is measured. After all, the Court concluded (as affirmed by the Second Circuit) that the historical figures reflect the unacceptably disparate impact of existing policies on blacks and Hispanics. An increase against an inadequate baseline is not the best measure of progress.

E. The City’s Analysis of its Recruitment Budget and Costs (¶ 26(f))

Paragraph 26(f) of the Modified Remedial Order provides that the City’s final report must “identif[y] the resources needed by ORD to meet its goals, and recommend[] minimum and

ideal budgets for ORD for those fiscal years in which no firefighter examination will be administered and separate minimum and ideal budgets for ORD for fiscal years in which the City of New York will administer a firefighter examination.” Modified Remedial Order ¶ 26(f).

As an initial matter, the City states that “City and Department budgets are not developed or tracked in a manner that allows for a cost/benefit analysis of individual activities and programs.” Recruitment Report at 31. The City does not state that its budgets *cannot* be analyzed at this level or why it has not done so here. In any event, the City’s Recruitment Report omits any information about the costs of any particular recruitment programs and initiatives. Instead, the City provides only ORD’s aggregate budgets in recent years. The City has noted that, with the addition of its new ORD staff members and the new mentoring program and Candidate Physical Ability Test (“CPAT”) training program, the ORD non-exam year budget increased to \$5,013,000. *See id.* at 32-33. In the Monitor’s view, the mandate of Paragraph 26(f) – *i.e.*, to “identify[] the resources needed by ORD to meet its goals” – requires more specific information.

The City does offer a slightly more detailed breakdown of its proposed budget for an “intensive” recruiting campaign to take place in the year preceding the next administered exam. *See* Recruitment Report at 32-33. The budget includes “Recruitment Events,” “Exam Tutorials,” miscellaneous clerical support, and “Phone Bank,” and provides aggregate amounts for each. In total, the City projects the additional cost items to reach approximately \$3,750,825 during an exam year, on top of ORD’s base budget. *Id.* at 33.

That proposed budget raises as many questions as it answers, however. To begin with, it covers “campaign years” only, that is, the full-scale recruitment campaign prior to the next exam. No allowance is made for off-year increases in budget. Further, the budget appears to account

only for personnel expenses; there is no apparent room for the use of outside professional services, improvements in technology, or other items that should play an integral part in any future campaign. On its face, the budget does not even cover all of the efforts that the City credits for what it views as the success of recent campaigns or the key activities recommended by the IAFF. There appears to be no advertising budget, for example, and no allowance for training staff, for the mentoring program, or for conducting the next optional survey.

As noted, Paragraph 26(f) requires the City to identify both minimum and ideal budgets. The City characterizes its proposed budget as “ideal,” but provides no basis on which to conclude that the figures it proposes are, in fact, ideal. The Recruitment Report states that “[t]he ideal budget for ORD is finding for the recruitment activities that research shows or that Assistant Commissioner Maglione demonstrates are effective methods and the flexibility to obtain additional funding to initiate activities to address unexpected opportunities.” *Id.* at 33-34. The City has offered no “research” to support the budgetary figures it proposes (and has not included in its budget any funding designed to improve its data collection and analysis, which would lay the groundwork for more targeted budgets in future). The Monitor believes Paragraph 26(f) requires more specificity, and that the proposed budget may be inadequate. The Monitor recommends that the City provide additional information with regard to its categories of expenditures for recruitment, and relatedly, its proposed and ideal budgets based upon these detailed budgetary figures.

VIII. The City’s EEO Report

Paragraph 43 of the Modified Remedial Order requires the City to submit a report on its EEO compliance reform activities, delineating specific areas for analysis. *See* Modified Remedial Order ¶ 43. As noted in Section II, the Monitor recommended that the City provide

interim reports on recruitment and EEO activities (Docket # 1131). Pursuant to the Court's June 3, 2013 order, the City timely provided its interim reports to the Monitor on June 15, 2013. On July 1, 2013, the Monitor provided his comments to the City on its interim EEO Report. In turn, the City timely filed its EEO Report on July 15, 2013, pursuant to paragraph 43 of the Modified Remedial Order.

The City's interim EEO Report reserved, for the final version, its discussion of recommendations for specific goals and procedures for improving the efficacy of the EEO Office. The City's final EEO Report provides these recommendations, and also takes into consideration and incorporates a number of the Monitor's comments to the interim EEO Report. The following comments include prior comments by the Monitor that were not addressed in the final EEO Report, along with new comments that are based on additional information provided by the City in the final EEO Report.

The City's EEO Report incorporates research and analysis provided by its EEO consultant, Prof. Rick Rossein, who was initially appointed as an independent EEO Consultant pursuant to the Court's original Remedial Order. (Docket # 765) Prof. Rossein, independently and in conjunction with the parties and the Monitor, conducted research on the City's EEO compliance activities and the EEO programs of municipal and other public entities in New York City and other jurisdictions.

A. Identification of Ongoing Compliance Activities (§ 43(a))

Paragraph 43(a) of the Modified Remedial Order requires that the City's EEO Report identify "all equal employment opportunity law compliance activities currently performed by all FDNY offices, bureaus, divisions, board, or other subdivisions, including without limitation the EEO Office, ORD, BITS, CID, and the PRB." Modified Remedial Order § 43(a). The City's

EEO Report includes extensive descriptions of the principal tasks of the EEO Office, the office's staff, the EEO complaint process, and how the EEO Office allocate its time between complaint investigation and resolution, reasonable accommodation, compliance inspections, and training. (EEO Report at 11-35; Ex. C.) In doing so, it incorporates comments offered by the Monitor on the interim report.

The final EEO Report did not address all of the Monitor's comments to the interim report, however. For example, although the EEO Report includes a chart depicting the percentage of time spent by staff members on various activities (*id.* Ex. C), neither the chart nor the report describe the processes by which EEO Office decides how to allocate its resources among its responsibilities or what steps are taken, if any, to evaluate the appropriateness and efficiency of such allocations. Such information is particularly important in light of the Court's finding that "the FDNY EEO Office remains chronically under-resourced and over-burdened." (Docket # 741 at 10, quoting Memorandum Findings of Fact at 78.) The need for a clear understanding of how resources are allocated was demonstrated by the testimony at the bench trial of former Assistant Commissioner for EEO Lyndelle Phillips. Phillips testified generally that the EEO Office's lack of staff and resources compelled her to reduce compliance inspections (*id.* at 79), and that to reduce its case backlog the EEO Office had to reallocate resources from other tasks such as compliance inspections. (*Id.* at 71-72.)

B. Evaluating the Effectiveness of EEO Compliance Activities (§ 43(b))

Paragraph 43(b) of the Modified Remedial Order provides that the City's EEO Report must "evaluat[e] the effectiveness of the equal employment opportunity law compliance activities currently performed by each FDNY office, bureau, division, or other subdivisions."

Modified Remedial Order ¶ 43(b). The interim report did not include a detailed evaluation, in part because the City advised that it was still gathering and processing relevant information.

The final EEO Report goes further than the interim report in evaluating the effectiveness of the FDNY's EEO activities and incorporates much of the Monitor's input. For example, the report provides data regarding active and closed EEO disciplinary cases from 2010 to 2013, allowing some degree of historical comparison. (EEO Report, Ex. D.) Data from earlier years would enhance this analysis, if it is available. The final report also describes the record-keeping procedures related to EEO complaint processing, evaluates their effectiveness, and suggests potential improvements. (*Id.* at 23-24, 56.)

In some respects, however, the City should go further in evaluating the FDNY's existing EEO activities. As was true of the interim report, for example, the final report notes that "delays in conducting investigations are often due to the difficulty in scheduling interviews when the firefighter wanted both a union representative and a union lawyer to be present." (*Id.* at 25.) The Monitor stated that the interim report "does not identify how frequently delays occur overall on a relative basis to on-time completion, provide any data about other causes of delay, or permit comparison of the various causes of delay to one another within the total pool." The same is true of the final EEO Report.

The FDNY EEO office also conducts compliance inspections of firehouses, and the final EEO Report describes recent enhancements to this process. The report also notes that the results of the compliance inspections have improved: of the firehouse inspections conducted as of the date of the report, 97% resulted in no violation, as compared with an 87% compliance rate in 2012. (*Id.* at 30.) The City attributes this change in part to enhanced inspection procedures and remedial and disciplinary action taken for violations. (*Id.*) A more careful analysis may be

needed, however. The comparison of 2012, when there were 208 inspections and 38 violations, with 2013, when there have been only 99 inspections and 3 violations, is not yet conclusive. The City should conduct a similar comparison at the end of 2013, and should also review historical data from earlier years.

C. Additional Activities to be Performed by the EEO Office (¶¶ 43(c)-(d))

Paragraphs 43 (c) and (d) of the Modified Remedial Order require the City to identify tasks the EEO should be performing to enhance its effectiveness. Specifically, those provisions state that the City's EEO Report must:

(c) identif[y] all tasks the FDNY's EEO Office ought to be performing under the City's EEO Policy; [and]

(d) identif[y] all tasks the EEO Office should be performing to ensure the FDNY's compliance with applicable equal employment opportunity laws and policies in light of the violations of the equal employment opportunity laws identified by the court in its Disparate Impact Opinion (Docket Entry # 294), Disparate Treatment Opinion (Docket Entry # 385), and Exam 6019 Validity Opinion (Docket Entry # 505), and in light of the deficiencies in the FDNY's EEO compliance program identified in the court's Findings of Fact as to the Need for and Scope of Injunctive Relief (Docket Entry # 740).

Modified Remedial Order ¶¶ 43(c), (d).

The City's final EEO Report goes further than the interim report in describing what tasks it believes the EEO Office should be performing. These tasks include additional training to improve the skills and capabilities of the EEO staff, improved standardization of its case files and investigative procedures, and augmenting its staffing resources. (EEO Report at 54-56.) These measures will be positive steps in addressing concerns raised by the Court and noted by Prof. Rossein, particularly with respect to implementing standardized procedures for, and records of, EEO investigations.

Paragraphs 43(l)-(n) similarly require the City to recommend steps to improve its EEO procedures, and Paragraph 46 requires the City to specify how its recommendations will be carried out. The City's compliance with those provisions is discussed on pages 48-50, below.

D. Identifying Best EEO Practices (§ 43(e))

Paragraph 43(e) of the Modified Remedial Order requires that the City's EEO Report identify "best practices used by other offices responsible for ensuring a comparable municipal department's compliance with applicable equal employment opportunity laws and policies, and particularly, best practices used by EEO offices in other fire department nationally." Modified Remedial Order § 43(e). The City's EEO Report, citing to a definition provided by www.businessdictionary.com, defines "best practices" as "[a] method or technique that has consistently shown results superior to those achieved with other means, and that is used as a benchmark." EEO Report at 40. Relying on research conducted by Prof. Rossein, the City's EEO Report further states:

Professor Rossein concluded that because the practices utilized by the public employers and others he met were too new to have been evaluated or replicated they did not meet the rigorous definition of "best practice." However, his research revealed practices that he describes as "noteworthy," "good ideas," "innovative" and "smart", which satisfy the concept of "best practice" utilized by the EEOC in its report.

Id. at 41. As suggested by the Monitor in comments to the interim EEO report, the City also takes note of the EEOC definition of "best practice" in the context of EEO activities. (*Id.* at 40-41.)⁵

The final EEO Report details the research by Prof. Rossein into EEO practices in other jurisdictions and institutional settings, including fire departments, the U.S. military, the New

⁵ The discussion of the meaning of "best practices" and whether any practices identified by the City and Prof. Rossein can properly be characterized as "best" should not distract the City from the basic goal of drawing ideas from other settings that can potentially be of use to the FDNY.

York City Police Department, and other City agencies. (EEO Report at 39-51.) The report also makes clear that the City drew on this research in at least some instances by adapting “noteworthy” practices from other settings to the FDNY. For example, the City notes that several departments have taken steps to eliminate hazing within their training academies and firehouses, and that the FDNY has drafted its own anti-hazing order based on policies from other jurisdictions. (EEO Report at 43-44.) That order was issued on August 13, 2013. The FDNY has also taken steps to make officers more accountable for EEO practices under their command and to enhance EEO training at the firehouse level. (*Id.* at 45-46.) The report is somewhat vague as to the details of these measures, and the Monitor recommends that the City provide more specific details on these programs as the programs are developed and implemented.

Amid the competing definitions of “best practices,” however, it remains unclear what other lessons the City has drawn from EEO practices in other jurisdictions and institutional settings. In comments to the interim report, the Monitor suggested several particular measures undertaken by other fire departments that could prove effective in the FDNY. These include strengthening “Tone at the Top” efforts through the issuance of “Chief’s Orders,” a practice currently used by the Houston Fire Department to emphasize directives of special importance being issued directly by the Chief of the Department. The final EEO Report does not mention this proposal. (It should be noted, however, that the City has taken a number of recent steps to address tone at the top. (*Id.* at 47-48.)) The Monitor also suggested that the City consider periodic reviews of EEO procedures by consultants, as occurs in the Baltimore Fire Department. The Monitor repeats his recommendation from his prior comments on the interim EEO Report that the City consider these and other initiatives from other fire departments, and will discuss this further with the City and the parties.

E. Detecting, Deterring and Preventing Acts of Discrimination and Retaliation
(¶¶ 43 (g) – (i))

Paragraphs 43(g) through (i) of the Modified Remedial Order require the City's EEO Report to identify and recommend methods and programs for detecting, deterring and preventing acts of discrimination and retaliation against any current or future employees of the City involved in this litigation.

The Monitor's comments to the interim EEO report noted that the City had identified several barriers to the detection and deterrence of retaliation but did not offer any solutions. The City's EEO final EEO Report identifies some measures recently implemented by the FDNY, and recommends additional steps to be taken in the near future, to deter, detect and deal with acts of discrimination and retaliation. These include the FDNY's recently issued anti-hazing policy (EEO Report at 44); additional training and EEO compliance responsibility for FDNY officers, including captains and lieutenants in particular, in order to enhance officer accountability for maintaining an EEO compliant working environment at the firehouse level (*id.* at 44-46, 58); regular diversity training for the FDNY's senior leadership (*id.* at 60); EEO training for firefighters beginning in the Fire Academy firehouses (*id.* at 44, 57); and "Command Climate Surveys" to be implemented at each firehouse to "identify whether there are EEO, diversity and inclusiveness issues or concerns that should be addressed." (*Id.* at 61.)

These measures, if fully executed, could be important steps toward overcoming entrenched barriers to EEO compliance within the FDNY. As described in the report, however, several of these measures, including officer accountability, appear to be at the conceptual stage. No specific proposals are set forth and no timetable is set for turning these ideas into concrete action. The Monitor recommends that the City further define these measures by setting clear goals and timetables, and explicitly assign responsibility for implementation of the measures to

designated senior FDNY officers and managers. Indeed, as further discussed below, the City is required by Paragraph 46 of the Modified Remedial Order to provide a detailed plan and timetable for implementing recommendations made in the report.

In particular, the Monitor and his consultants agree with the City that the administration of “command climate surveys” can be a very constructive step, particularly if the survey is properly designed and administered. The Monitor will request that the City share the survey and the plan for its administration and consider input from the Monitor and his consultant.

The City’s compliance with Paragraphs 43(g)-(i) would also be improved if the City expanded its analysis of the FDNY’s process for allowing FDNY employees to report specific incidents of discrimination, harassment, intimidation, or retaliation by considering a wider range of reporting options, including options that have been successful in other jurisdictions. The EEO Report deals with this topic only by describing the currently available options for FDNY employees to report such incidents, noting that one option previously available to employees for reporting instances of discrimination, harassment, and retaliation – the ability to report a complaint with the assistance of a trained EEO Liaison – is “essentially defunct.” *Id.* at fn. 20. The City provides no further information regarding this program, including the reasons for its discontinuance, and offers no recommendation for replacing the liaison program or otherwise enabling employees to report problems.⁶

Importantly, the probationary firefighter class appointed on July 29, 2013, and the class to be appointed in January of 2014, arrive at the FDNY following a lengthy litigation and publicized controversy over EEO and diversity issues. The City should consider whether specific measures should be taken to detect and deter discrimination and harassment of members

⁶ Along these lines, the City should consider establishing a dedicated hotline for EEO complaints to be operated by the EEO Office. The phone number currently provided to FDNY employees for reporting complaints directs calls to the Fire Operations Center, which in turn relays the complaint to an EEO staff attorney.

of these classes. Among the steps to consider could be additional EEO training for firehouses into which members of these classes are placed and additional messaging from the Commissioner and senior department leadership regarding the process that led to the appointment of these classes.

F. Disciplinary Processes (¶ 43(j))

In its Findings of Fact, the Court noted its concern with the ability of the FDNY to “investigate, and thereby deter, acts of discrimination or retaliation against the black and Hispanic firefighters who will join the ranks of the FDNY in the coming months and years.” Memorandum and Findings of Fact at 81. Against that backdrop, Paragraph 43(j) of the Modified Remedial Order requires that the City’s EEO Report evaluate “the FDNY’s policies, procedures, and actual practices for disciplining employees found to be responsible for substantiated equal employment opportunity law and policy violations.” Modified Remedial Order ¶ 43(j).

The FDNY’s EEO office is responsible for investigating EEO complaints and, where complaints are substantiated, referring them to the department’s Bureau of Investigations and Trials (“BITs”). BITs is responsible for imposing particular disciplinary measures. The EEO Report includes a useful discussion of the EEO process, but could provide additional clarity regarding the process by which BITs decides to collaborate and/or share information with the EEO when BITs receives charges of discrimination and retaliation.

The City’s EEO Report reviews the disciplinary actions imposed by BITs as a result of EEO investigations since the beginning of fiscal year 2012, with details regarding the range of disciplinary actions taken. (EEO Report at 27.) The report notes that the EEO office referred 9 EEO complaints to BITs. The City’s EEO Report also provides general information regarding

BITs investigations and disciplinary measures imposed on firefighters in the period from 2010 to 2013, with limited data specifically concerning EEO complaints. (*Id.* at 27-28.) This information is useful and has been added since the interim EEO report.

The Monitor believes the City's assessment of its disciplinary procedures should be more probing. For the most part, the report's treatment of this issue is purely descriptive; there is little effort to evaluate the strengths and weaknesses of the disciplinary process. The statistics on EEO complaints are useful, but there is no historical data against which to judge the current figures. There also is no effort to determine whether the results reached in the 9 EEO complaints referred to BITs in 2013 will act as a sufficient deterrent to future discrimination and retaliation.

Further, the Monitor noted that the interim EEO report did not describe existing disciplinary procedures with sufficient detail, and the same is true of the final report. For example, there is no indication of what parameters, if any, govern the determination of appropriate disciplinary measures. If such parameters exist, they should be evaluated pursuant to Paragraph 43(j).

The City notes that the FDNY's audit unit will conduct quarterly reviews of EEO investigations and evaluate the results. (*Id.* at 63.) Those audits should include an assessment of the process and results of BITs disciplinary proceedings, and the results of the audits should be made available to the Court, the Monitor, and the parties.

G. Recommendations (¶¶ 43 (l)-(n))

Paragraphs 43(l) through (n) of the Modified Remedial Order require the City to make recommendations for procedural, organizational, and policy changes within the EEO Office, the FDNY, and the City as a whole that will help eliminate barriers to the EEO Office's ability to ensure the FDNY's compliance with applicable EEO laws and policies. The interim EEO report

expressly reserved these recommendations pending completion of the City's research evaluation process.

The City's final EEO Report makes several recommendations, including (i) additional EEO training for firefighters and senior FDNY Officers, (ii) additional EEO staff and additional staff training, standardization of procedures, and (iii) periodic internal and external reviews of data regarding EEO compliance. The City's recommendations do not include any suggested changes to existing EEO policies, and it is unclear whether the City has conducted an adequate self-evaluation of the policies themselves, as distinct from compliance with those policies.

EEO training will be critical to reforming the department's culture. In its discussion of diversity and EEO issues raised by participants in a Leadership Conference conducted by the City's independent consultants, the City notes that participants in the conference characterized the FDNY's culture as "hardened." (*Id.* at 6.) The EEO Report includes broad recommendations for training, from probationary firefighters to senior department leadership. (*Id.* at 57-60.) As depicted in the report, however, many of these recommendations lack details on, for example, who will design and administer the training, what the curriculum will be, and when the new training programs will be rolled out. The Monitor recommends that the City provide more detail regarding the execution of the new training program.⁷

Among the measures contemplated in the EEO Report is enhanced reporting on EEO complaints and their resolution. (EEO Report at 56-57.) Among other things, the EEO Report states that the EEO Office will review "key metrics" regarding discrimination investigations and firehouse inspections. (*Id.*) Those reports will be created on a quarterly basis, as required by

⁷ The Monitor is considering whether to require the City to provide a detailed report on its training programs pursuant to Paragraph 56 of the Remedial Order.

City EEO policies. In addition to quarterly reporting, the City might also consider more frequent tracking of the progress of investigations and inspections against target schedules.

Paragraph 46 of the Modified Remedial Order states:

The City's final report shall specifically indicate how it plans to carry out the recommendations in the report, providing a specific timetable for those recommendations that cannot be carried out immediately.

Modified Remedial Order ¶ 46. Although the final EEO report includes a range of very promising recommendations and ideas, it does not specify how, when, or by whom those recommendations will be executed. The City should consider supplementing or revising the report so that it fully satisfies the requirements of Paragraph 46. In any event, the Monitor would like to see more detail regarding the execution of the City's recommendations, and plans to discuss this issue with the City and parties in the coming weeks.

IX. Additional Issues and Next Steps

A. Composition of the New Class of Probationary Firefighters

At the Monitor's request, the City recently provided data regarding the composition of the new class of probationary firefighters. The Monitor will analyze the data and provide its findings in a forthcoming interim report.

B. Attrition at the FDNY Academy

The City has provided the parties and the Monitor with updates during the weekly conference calls regarding the current class of candidates at the FDNY Academy. Relatedly, the City has advised the Monitor and the parties on a weekly basis of the resignations of candidates from the FDNY Academy. The Monitor is reviewing this data on an ongoing basis, will continue discussing these matters with the parties, and will report on any issues that require attention in future reports.

C. Personnel Review Board Processes

Pursuant to Paragraph 39 of the Modified Remedial Order, the Monitor attended a number of PRB sessions at which candidates for the July 2013 class were considered. As directed by Paragraph 40 of Modified Remedial, the Monitor will submit a separate report assessing the CID and PRB process in detail.

D. Near-Term Schedule

Pursuant to the Modified Remedial Order, the Monitor and the parties will file several additional reports and responses in the coming months. In addition to those described immediately above, these will include:

- A report by the City on the results of its comprehensive top-to-bottom assessment of all steps in its process for the selection of entry-level firefighters pursuant to paragraph 32 of the Modified Remedial Order, and a response to that report by the Monitor (and by the parties, if they so choose) pursuant to Paragraph 36.
- The Monitor's formal responses (and responses by the parties, if they so choose) to the City's final Recruitment Report and EEO Report pursuant to paragraphs 30 and 47 of the Modified Remedial Order

Additionally, the Monitor will continue to hold weekly conference calls with the parties to discuss the status of the July 2013 class, the parties' compliance with the requirements of the Modified Remedial Order, and other issues that may arise in this case and/or between the parties.

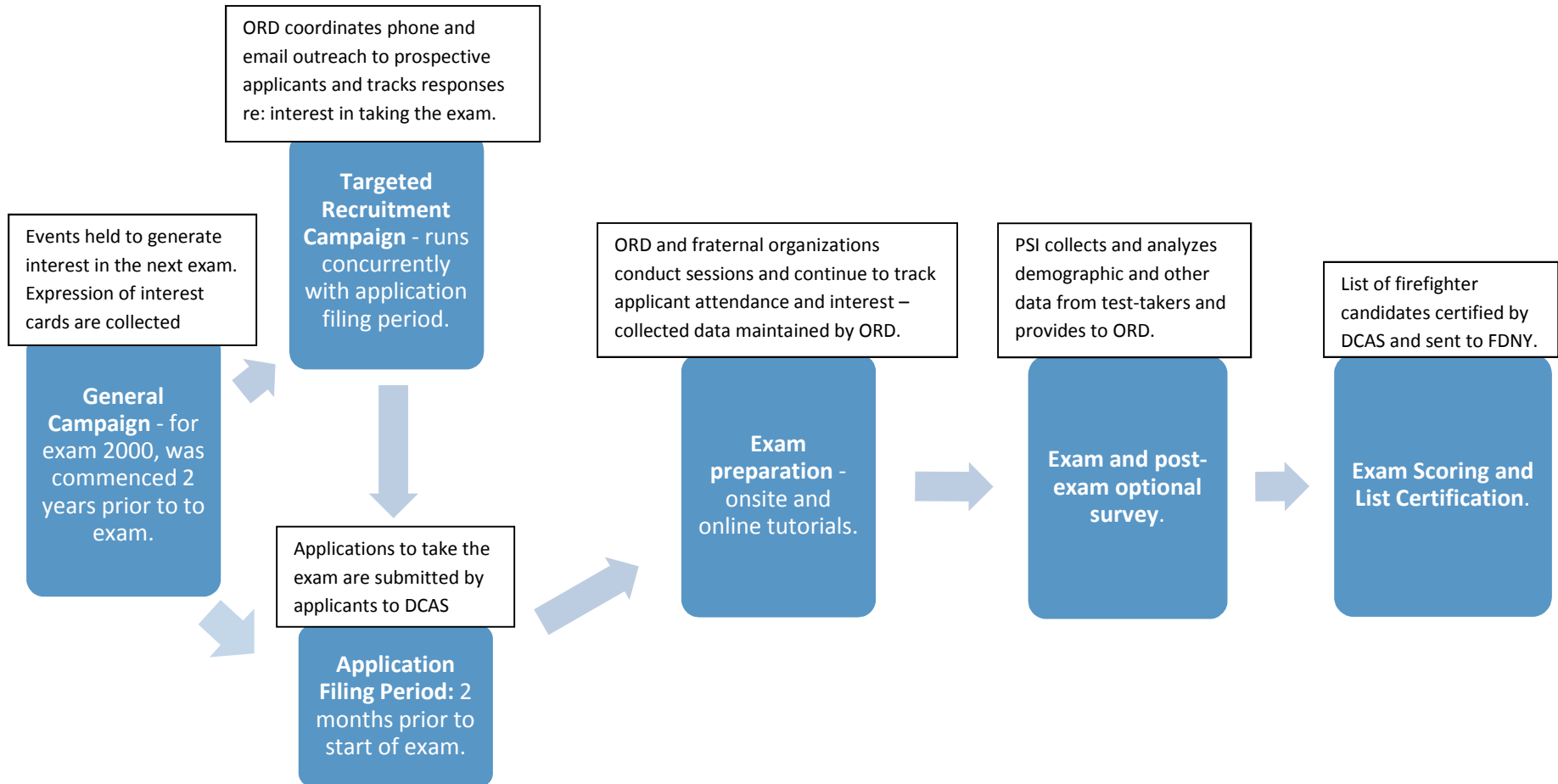
Dated: September 9, 2013
New York, New York

/s/

Mark S. Cohen

APPENDIX A

Recruitment, Application and Testing



Post-Examination Screening and Hiring

