



DIVERSITY AND INCLUSION*

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In January 2012, the Consumer Financial Protection Bureau (“Bureau”) launched the Office of Minority and Women Inclusion (“OMWI”).¹ Then, in March 2013, the OMWI published its *Annual Report to Congress* (“Report”) about the Bureau’s due diligence review of diversity and inclusion in certain work environments. The period subject to review was January 1, 2012 to December 31, 2012. The Report produced statistical diversity findings relating to the Bureau and other federal agencies and, importantly, indicated a mission to produce diversity findings for regulated entities.²

The Dodd-Frank Act (“Dodd-Frank”) created not only the Bureau’s OMWI but also similar offices at other federal financial regulatory agencies (collectively, the “Agencies”),³ tasking them with advising on the impact of the policies and regulations regarding minority-owned and women-owned businesses (collectively, the “OWMIs”).

The follow-up to these studies was the goal of developing standards for (1) equal employment opportunity and the racial, ethnic, and gender diversity of the agency workforce and senior management; (2) increased participation of minority-owned and women-owned businesses in the programs and contracts of the agency; and (3) assessing the diversity policies and practices of entities regulated by the agency.⁴

The Report noted that in February 2013 the Bureau entered into a Memorandum of Understanding with the Equal Employment Opportunity Commission to access employment demographic survey data. That data will provide the analytical and statistically derived

* Publication: National Mortgage Professional Magazine – January 2014

composition of regulated entities. The intent on the part of the Bureau and the OWMIs was to develop common standards for assessing the diversity policies and practices of regulated entities and publish a proposal of these standards for public comment sometime in 2013.⁵

On October 23, 2013, the Federal Agencies announced their “common standards” proposal, entitled *Joint Standards for Assessing Diversity Policies and Practices of Regulated Entities* (“Proposal”).⁶ This is an Interagency Proposal that is meant to “promote transparency and awareness of diversity policies and practices within the institutions.”⁷

The Proposal sets forth four areas:

1. Organizational commitment to diversity and inclusion;
2. Workforce profile and employment practices;
3. Procurement and business practices and supplier diversity; and
4. Practices to promote transparency of organizational diversity and inclusion.

In developing these proposed standards, the Agencies have expressed their view that there are operative variables, such as an institution’s asset size, number of employees, governance structure, income, number of members or customers, contract volume, location, and community characteristics.

The Agencies notified the public that their respective OMWI Directors held roundtable discussions with a range of parties, including “representatives from depository institutions, holding companies, credit unions, and industry trade groups to solicit input on assessment standards and to learn about the challenges and successes of current diversity programs and policies.”⁸ Roundtable discussions also were held with financial professionals, consumer advocates, and community representatives to gain a greater understanding of issues facing minorities and women in employment and in business contracting in the financial sector.⁹

The Proposal was published in the Federal Register on October 25, 2013, entitled *Notice of Proposed Interagency Policy Statement with request for Public Comment*.¹⁰ For a period of 60 days from its publication date, this policy statement was available for public comment.¹¹ The comments were due by December 24, 2013. To allow the public more time to consider the proposed standards, the Agencies extended the comment period to February 7, 2014. Thus, comments must be received on or before February 7, 2014.¹²

It is important to institute a policy and procedures for implementing the requirements set forth in the Proposal. In anticipation of the Final Rule, the following provides an outline both of the diversity requirements and the recommended features of a policy statement for diversity and inclusion.

DIVERSITY: POLICIES, PRACTICES, AND STANDARDS

It should be noted that diversity policies, procedures, practices, and standards of the entities regulated by the Agencies would take into consideration an individual entity's size and other characteristics, such as total assets, number of employees, governance structure, revenues, number of members and/or customers, contract volume, geographic location, and community characteristics. These characteristics are to be taken into account when establishing an individual entity's standards.

Organizational Commitment to Diversity and Inclusion

The Agencies provide their philosophical position with respect to organizational commitment on the part of an entity's management. According to the Proposal, "leadership of a successful organization demonstrates its commitment to diversity and inclusion. Leadership comes from the governing body such as a board of directors, senior officials, and those managing the organization on a day-to-day basis."

Standards

The Proposal offers a 'high-level' standard that is meant to promote diversity and inclusion both in employment and contracting. The corporate culture that embraces diversity and inclusion would adopt the following standards:

- The regulated entity includes diversity and inclusion considerations in both employment and contracting as an important part of its strategic plan including hiring, recruiting, retention and promotion.
- The entity has a diversity and inclusion policy that is approved and supported by senior leadership, including senior management and the board of directors.
- The entity provides regular progress reports to the board and/or senior management.
- The entity conducts equal employment opportunity and diversity and inclusion education and training on a regular and periodic basis.
- The entity has a senior level official who oversees and directs the entity's diversity efforts. For some institutions, these responsibilities are assigned to an executive-level Chief Diversity Officer (or equivalent position) with dedicated including women and minorities, in its hiring, recruiting, retention, and promotion, as well as in its selection of board members, senior management, and other senior leadership positions.

Workforce Profile and Employment Practices

In the Proposal, the Agencies state that “many entities promote the fair inclusion of minorities and women in their workforce by publicizing employment opportunities, creating relationships with minority and women professional organizations and educational institutions, creating a culture that values the contribution of all employees, and encouraging focus on these objectives when evaluating performance of managers.” It is expected that entities with diversity and inclusion programs will regularly evaluate their programs and identify areas that can be improved.

The Agencies take the position that entities use various analytical tools to evaluate a wide range of business objectives, including metrics to track and measure the inclusiveness of their workforce (i.e., race, ethnicity, and gender). Regulated entities that are subject to the Equal Employment Opportunity Commission (“EEOC”) and the Office of Federal Contract Compliance Programs (“OFCCP”) reporting requirements currently provide data and supporting documentation that serve as analytical tools to evaluate diversity and inclusion programs.¹³

For entities not subject to the EEOC and OFCCP reporting requirements, the following outline may serve as a model for data analysis in order to evaluate and assess diversity efforts.

Standards

- An entity that files an annual EEO–1 Report as required by Title VII of the Civil Rights Act of 1964, or otherwise tracks their workforce data, uses the data to evaluate and assess workforce diversity and inclusion efforts.
- An entity that prepares annual Affirmative Action Plans as required by Executive Order 11246 under the jurisdiction of the OFCCP uses those plans to evaluate and assess workforce diversity and inclusion efforts.
- The entity utilizes metrics to evaluate and assess workforce diversity and inclusion efforts, such as recruitment, applicant tracking, hiring, promotions, separations (voluntary and involuntary), career development support, coaching, executive seminars and retention across all levels and occupations of the organization including executive and managerial ranks.
- The entity holds management accountable for diversity and inclusion efforts.
- The entity has policies and practices that create diverse applicant pools for both internal and external opportunities that may include:
 - Outreach to minority and women organizations;

- Outreach to educational institutions serving significant minority and women student populations; and
- Participation in conferences, workshops, and other events to attract minorities and women and inform them of employment and promotion opportunities.

Procurement and Business Practices—Supplier Diversity

According to the Proposal, the Agencies assert that they “recognize that there is limited public information available on supplier diversity at regulated entities and it may be more challenging to compare supplier diversity policies and practices among regulated entities. Some smaller institutions may also face greater challenges in gathering such information.” Nevertheless, the Proposal sets forth certain standards that place the responsibility on regulated entities to vet their vendors in light of their vendors’ diversity and inclusion practices.

The Agencies take this view because they consider the challenge to be similar to workforce profile and employment practices. (Supra) Thus, as in the employment context, the Agencies contend that entities often use metrics to know the baseline of how much they spend on procuring goods and services and contracting for other business services, how much they spend with minority-owned and women-owned businesses, the availability of relevant minority-owned and women-owned businesses, and the growth in usage over time. It follows, then, in their view, that “entities can use outreach methods to inform minority-owned and women-owned businesses (and affinity groups representing these constituencies) of the availability of resources to support diversity strategies these opportunities and the mechanism and initiatives.”

Methodologically, the Agencies believe that entities’ “prime contractors” often use subcontractors to fulfill the obligations of various contracts. Therefore, the use of minority-owned and women-owned businesses as subcontractors provides valuable opportunities for both the minority-owned and women-owned businesses as well as for the prime contractor. The view, apparently, is best expressed in the Proposal’s statement that “the prime contractor can use this opportunity to work with minority-owned and women-owned businesses, and can expand the prime contractor’s own capability under the contract.” Furthermore, the Proposal suggest that entities can encourage the use of minority-owned and women-owned subcontractors by incorporating this objective in their business contracts.

Standards

- The entity has a supplier diversity policy that provides for a fair opportunity for minority-owned and women-owned businesses to compete in procurements of business goods and services. This includes contracts of all types, including contracts for the issuance or guarantee of any debt, equity, or security, the sale of assets, the management of assets of the entity,

and the making of equity investments by the entity.

- The entity has methods to evaluate and assess its supplier diversity, which may include metrics and analytics related to:
 - Annual contract spending by the entity;
 - Percentage spent with minority-owned and women-owned business contractors by race, ethnicity, and gender;
 - Percentage of contracts with minority-owned and women-owned business sub-contracts; and
 - Demographics of the workforce for contractors and subcontractors.
- The entity has practices to promote a diverse supplier pool which may include:
 - Outreach to minority-owned and women-owned contractors and representative organizations;
 - Participation in conferences, workshops and other events to attract minority-owned and women-owned firms and inform them of contracting opportunities; and
 - An ongoing process to publicize its procurement opportunities.

Practices to Promote Transparency of Organizational Diversity and Inclusion

How an organization goes about promoting transparency and organizational diversity is a critical component that the Agencies will evaluate. It is their view that diversity policy statements should be evinced by providing public information that allows the public to assess those policies and practices.

This view is predicated, philosophically, on the premise that making public an entity's "commitment to diversity and inclusion, its plans for achieving diversity and inclusion, and its metrics used to measure success in both workplace and supplier diversity, informs a broad constituency – its investors, employees, potential employees and suppliers, customers, and the general community."

Entities can publicize information on their diversity and inclusion efforts through normal business methods, which can include, among other things, displaying information on their websites, in their promotional materials, and in their annual reports to shareholders (if applicable). Publication of this information can open new markets to new communities and can illustrate the progress that has been made toward an important business goal.

Standards

- A diversity and inclusion strategic plan;

- Commitment to diversity and inclusion; and
- Progress toward achieving diversity and inclusion in workforce and procurement activities, which may include:
 - Current workforce and supplier demographic profiles;
 - Current employment and procurement opportunities;
 - Forecasts of potential employment and procurement opportunities; and
 - Availability and use of mentorship and developmental programs for employees and contractors.

PROPOSED APPROACH TO ASSESSMENT

An evaluation of an entity’s diversity and inclusion policy is a crucial element in determining compliance with the proposed standards. The term that the Agencies have adopted for this evaluation is “assessment,” because the term “assessment” contemplates both self-assessment and an opportunity for the Agencies and the public to understand the diversity policies and practices of regulated entities.

The assessment envisioned by the Agencies is not one of a traditional examination or other supervisory assessment. Thus, the Agencies do not plan to use the examination or supervision process in connection with the proposed standards.¹⁴

A model assessment would include:

- A self-assessment utilizing the proposed standards to conduct a quantitative and qualitative evaluation of the diversity and inclusion policies and practices.
- Voluntary disclosure to the appropriate Federal Agency of the self-assessment and other information the entity deems relevant. The Agencies will monitor the information submitted over time for use as a resource in carrying out their diversity and inclusion responsibilities.
- The entity displays information on its public website and in its annual reports, and in other materials, regarding its efforts to comply with these proposed standards as an opportunity for more public awareness and understanding of its diversity policies and practices. The Agencies may periodically review information on regulated entities’ public websites to monitor diversity and inclusion practices.

DIVERSITY QUESTIONS

Given the foregoing analysis, there are certain questions that should be considered in the

promulgating of the Proposal. Each of the following six questions are relevant to the discussion, and management of regulated entities ought to give them due consideration.

1. Are the proposed standards effective and appropriate to promote diversity and inclusion? Why or why not? If not, what standards would be appropriate and why? How would such standards support or hinder the objectives of section 342?
2. Are the proposed standards sufficiently flexible but still effective to allow meaningful assessments of entities with a wide range of particular characteristics or circumstances (i.e., asset size; number of employees; contract volume; income stream; and number of members and/or customers)?
3. Are there other ways to approach the standards for smaller entities, such as those with small contracting dollar volumes or those not required to file EEO–1 reports? What other approaches or characteristics would be appropriate for any such alternative, modified or scaled approach? How would such modification or scaling support or hinder the objectives of section 342?
4. What other factors, if any, would be useful in assessing the diversity policies and practices of the regulated entities, and why should such factors be considered? How would such factors support or hinder the objectives of section 342?
5. Is the proposed model approach to assessment effective and appropriate to promote diversity and inclusion? Why or why not? If not, what approach would be appropriate and why? How would such approach support or hinder the objectives of Section 342?
6. Would there be potential advantages or disadvantages of the proposed model approach to assessment? If so, what would they be?

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Information contained herein is not intended to be and is not a source of legal advice.

¹ Consumer Financial Protection Bureau, Office of Minority and Women Inclusion, Annual Report to Congress, Calendar Year 2012

² Ibid. Section 5

³ Board of Governors of the Federal Reserve System, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, Securities and Exchange Commission

⁴ Section 342, *Dodd–Frank Wall Street Reform and Consumer Protection Act* (Public Law 111–203, H.R. 4173)

⁵ Op. Cit. 1, Section 5

⁶ *Federal Financial Regulators Proposing Joint Standards for Assessing Diversity Policies and Practices of Regulated Entities Pursuant to Section 342 of the Dodd- Frank Act*, Press Release

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ *Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Request for Comment*, Federal Register / Vol. 78, No. 207 / Friday, October 25, 2013 / Notices. In my outline, I will draw heavily on the Proposal.

¹¹ Ibid.

¹² Federal Register / Vol. 78, No. 247 / Tuesday, December 24, 2013 / Notices, 77792

¹³ Ibid. Footnote 2. The Employer Information Report EEO–1 (EEO– 1 Report) is required to be filed annually with the EEOC by (a) private employers with 100 or more employees or (b) federal contractors who have 50 or more employees, and are prime contractors or first-tier subcontractors, with contracts of \$50,000 or more.

¹⁴ Entities that are required to file an EEO–1 Report are encouraged to use the proposed standards to develop and monitor diversity policies and practices. Entities that do not file EEO–1 Reports may also consider using the standards in a manner reflective of the individual entity’s size and other characteristics.