

February 7, 2014

Via E-Mail to
rule-comments@sec.gov
Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549

Re: Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Request for Comment—SEC Release No. 34-70731; File No. S7-08-13

Dear Ms. Murphy:

We appreciate the opportunity to provide our comments regarding the above-referenced Proposed Interagency Policy Statement (PIPS).¹ We believe that the PIPS is an important first effort in developing a coordinated and uniform approach among the related financial services industry regulatory agencies² to implementing parts of Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) (“Section 342”).³ As practitioners in the fields of diversity and securities laws, we are particularly interested in the controlling provision for the PIPS, that is, Section 342 (b)(2)(C), which authorizes the various Offices of Minority and Women Inclusion (OMWI) to carry out the dictates of Section 342. More specifically, we believe that assessing the diversity policies and practices of entities regulated by the Agencies is a primary purpose and core function of the Section. We trust our comments will prove helpful to the decision-makers in crafting the final version of the PIPS.⁴

I. Issue Statement

In our opinion, the most critical issue in the PIPS is the construction of Sections 342(b)(2)(C) and (b)(4) to allow voluntary disclosure by regulated entities about their diversity practices and procedures. We have chosen to focus, primarily, on this decisive issue because allowing voluntary production by regulated entities conflicts with

¹ The authors of this Comment Letter are: Cheryl C. Nichols, Associate Professor, Howard University School of Law and a former Senior Counsel in the SEC’s Division of Enforcement (1992-1996); and Ronald L. Crawford, a former Enforcement Manager in the SEC’s Division of Enforcement and the former

² The six related agencies are: the Consumer Financial Protection Bureau, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency and the Securities and Exchange Commission (the Agencies).

³ Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub.L. No. 111-203, 124 Stat. 1376, 2036 (2010).

⁴ In accordance with the Request, we are submitting this comment letter to the SEC only, with the understanding that the SEC will share it with the other Agencies.

Congressional intent and, therefore misconstrues Sections 342(b)(2)(C) and (b)(4). Moreover, this misconstruction undermines the Agencies' stated goal "to promote transparency and awareness of diversity policies and practices within the entities regulated by the Agencies."⁵

II. Sections 342(b)(2)(C) and (b)(4), by Implication, Prohibit Voluntary Disclosure by Regulated Entities About their Diversity Policies and Procedures

Sections 342(b)(2)(C) and (b)(4) must be construed together by the Agencies to effect the intent of Congress—mandatory disclosure by regulated entities about their diversity policies and practices. The Agencies' role is to interpret Sections 342(b)(2)(C) and (b)(4) in a way that best promotes the Congressional goal (obtaining information about the diversity policies and practices of the Agencies' regulated entities) and must be conducted using the analytical structure enumerated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).⁶ *Chevron* is the seminal case used to determine whether a federal administrative agency's construction of a statute over which it has jurisdiction has been construed in a manner that is contrary to Congressional intent.⁷ Statutory analysis under *Chevron* requires the Agencies to employ a two-step analysis in construing Sections 342(b)(2)(C) and (b)(4). Step one looks to whether Congress has directly spoken to the precise question at issue, and if not, then step two looks to whether the Agencies' construction of the statute is reasonable, in this case, whether allowing voluntary production of information about the diversity policies and practices of their regulated entities is contrary to Congressional intent.

Step one under *Chevron* requires the Agencies to ascertain Congress' intent regarding Sections 342(b)(2)(C) and (b)(4) by employing the traditional tools of statutory construction.⁸ Traditional tools of statutory construction include the statute's text, the statute's structure, canons of statutory construction, and the statute's legislative history. Legislative history does not exist for Sections 342(b)(2)(C) and (b)(4). Accordingly, statutory construction for these sections of Section 342 is confined to their text, structure,

⁵ PIPS, at p. 10.

⁶ See *Cont'l Air Lines, Inc. v. Dep't Transp.*, 843 F.2d 1444, 1450-51 (D.C.Cir. 1998) (recognizing that agency's role is to interpret statute in a way that best promotes the Congressional goal in question and stating that *Chevron* requires that "the agency's interpretation [be] compatible with Congress' purposes informing the measure."); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) and *Chevron*, 467 U.S. 837 (1984) (the judiciary has the final authority over statutory interpretation, the Agencies are required to replicate the judiciary's method of statutory interpretation).

⁷ The executive branch is not permitted to administer a statute in a manner that is inconsistent with the administrative structure that Congress has enacted in law. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988).

⁸ *Chevron*, at 843, n. 9.

and canons of statutory construction. The first and foremost tool of statutory construction is the text of the statute, giving it its plain meaning.⁹

In ascertaining the plain meaning of a statute, the Agencies must look to the particular statutory language as well as the language as a whole.¹⁰ The Agencies should not confine themselves to examining a particular statutory provision in isolation, as the meaning of certain words or phrases may only become evident when placed in context.¹¹ They, like the courts, must construe a statute as a whole, consider all sections of the applicable statute together in order to determine legislative intent, and take account of all other matters such as the reasonableness of the proposed interpretation and the policy behind the statute.¹² Moreover, under the canon *noscitur a sociis* (words and people are known by their companions), statutory words are not be construed singly; the connection in which words and phrases are used in statutes affects their meaning.¹³ Accordingly, Sections 342(b)(2)(C) and (b)(4) must be read together to ascertain Congress' intent—mandatory disclosure by regulated entities about their diversity policies and practices.

A. The Plain Meaning of Sections 342(b)(2)(C) and (b)(4), When Read Together, Prohibits Voluntary Disclosure of Information by Regulated Entities

Sections 342(b)(2)(C) and (b)(4) read as follows:

DUTIES. —Each Director shall develop standards for—

(C) assessing the diversity polices and practices of entities regulated by the agency.

RULE OF CONSTRUCTION.—Nothing in paragraph (2)(C) may be construed to mandate any requirement on or otherwise affect the lending policies and practices of any regulated entity, or to require any specific action based on the findings of the assessment.

⁹ *Timex V.I., Inc. v. U.S.*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843, n. 9); *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (1990); and *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296 (1989). See also *Barbour v. Intern. Union*, 640 F.3d 599 (4th Cir. 2011) (when interpreting any statute, federal courts must first and foremost strive to implement congressional intent by examining the plain language of the statute).

¹⁰ *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Bethesda Hosp. Ass'n v. Bowen*, 489 U.S. 399, 402-405 (1988).

¹¹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). See also *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

¹² *State v. Pina*, 233 P.3d 71 (2010).

¹³ See *Maracich v. Spears*, 133 S.Ct. 2191, 2201 (2013) and *State v. Pina*, 233 P.3d 71, 75 (2010).

Statutory construction of Sections 342(b)(2)(C) and (b)(4) should begin with the critical phrase in Section 342(b)(4) “findings of the assessment.” The authors contend that the Agencies have misinterpreted this phrase and consequently misinterpreted Sections 342(b)(2)(C) and (b)(4), when construed together, to allow voluntary disclosure of information about the diversity policies and practices of their regulated entities.

The phrase “findings of the assessment” in Section 342(b)(4), when read together with Section 342(b)(2)(C), prohibits voluntary disclosure by regulated entities about their diversity policies and practices. The terms findings and assessment are not defined in Section 342(b)(4) or elsewhere in Section 342. When a term is not defined in a statute, statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.¹⁴ In defining terms that a statute has not defined, the Agencies, like the courts, may consider dictionary definitions to determine their plain and ordinary meaning. The term findings is used as a noun in Section 342(b)(4). The Merriam-Webster dictionary (“Webster”) definition of findings when used as a noun is “the results of an investigation.”¹⁵ The term investigation is defined as “to try to get information about something.”¹⁶ The term assessment is also used as a noun in Section 342(b)(4) and is defined in Webster as “the act of making judgment about something; an idea or opinion about something.” Accordingly, the phrase “findings of the assessment” implies, a fortiori, that the Agencies will obtain information about the diversity policies and practices of their regulated entities. This implication is critical to effective implementation of Sections 342(b)(2)(C) and (b)(4) because voluntary disclosure by regulated entities provides no assurance of achieving Congress’ intent, i.e., information about the diversity policies and practices of the Agencies’ regulated entities. In essence, it is impossible to have findings and to make an assessment if the Agencies do not obtain both qualitative and quantitative information from their regulated entities.

The plain meaning of Section 342(b)(2)(C) mandates the development of standards for assessing the diversity policies and practices of entities regulated by the Agencies. Section 342(b)(2) states that “each Director shall develop standards...” The word shall is ordinarily considered mandatory¹⁷ and is inconsistent with the idea of discretion.¹⁸ There is no legislative history to indicate that Congress meant otherwise

¹⁴ *Microsoft Corp. v. i4i Ltd. Partnership*, 1313 S.Ct. 2238, 2245 (2011). See also *Milner v. Dep’t. of Navy*, 131 S.Ct. 1259, 1264 (2011).

¹⁵ “findings.” Merriam-Webster Online Dictionary. 2014. <http://www.merriam-webster.com> (6 Feb. 2014).

¹⁶ “investigation.” Merriam-Webster Online Dictionary. 2014. <http://www.merriam-webster.com> (6 Feb. 2014).

¹⁷ *Holly v. Montes*, 231 Ill. 2d 153, 160 (2008), 896 N.E.2d 267 (Ill. 2008), *cert. denied*, 555 U.S. 1191, 129 S.Ct. 1360, (2009).

¹⁸ *U.S. v. Machado*, 306 F.Supp. 995 (N.D. Cal. 1969).

with respect to Section 342(b)(2)(C). This means that the Agencies must give effect to the legislative prescription in Section 342(b)(2)(C) without carving out exceptions.

Accordingly, failure to develop standards for assessing the diversity policies and practices of the Agencies' regulated entities is a violation of the statute.

1. The Agencies' Construction of Sections 342(b)(2)(C) and (b)(4) to Allow Voluntary Disclosure from Regulated Entities does not Effect the Intent of Congress

Step two of the *Chevron* analysis looks to whether the Agencies' construction of Sections 342(b)(2)(C) and (b)(4), when read together, gives effect to the intent of Congress. Although deference is given to an agency's construction of statutory provisions it is charged with administering, such constructions must be rejected if they are contrary to clear Congressional intent or frustrate policy Congress sought to implement.¹⁹

When construed together, Sections 342(b)(2)(C) and (b)(4) require, by implication, non-voluntary disclosure of information about the diversity policies and practices of the Agencies' regulated entities. When interpreting a statute, the Agencies, like the Supreme Court, must presume that the legislature intended each word or provision of a statute to express a significant meaning and should give effect to every word, clause, or sentence whenever possible.²⁰ That which is implied in a statute is as much a part of the statute as that which is expressed.²¹ Moreover, a statutory grant of power carries with it, by implication, everything necessary to carry out the power and to make it effectual and complete.²² Accordingly, the implied power to require non-voluntary disclosure of information about the diversity policies and practices of the Agencies' regulated entities is essential to effecting Congressional intent. Specifically, permitting the Agencies' regulated entities to voluntarily disclose information required by the Agencies to comply with a statutory mandate makes Section 342(b)(2)(C) ineffective, i.e. it frustrates Congressional intent under Sections 342(b)(2)(C) and (b)(4). When interpreting a statute, it must be assumed that Congress intended to enact effective laws.²³

¹⁹ *Renee v. Duncan*, 686 F.3d 1002 (9th Cir. 2012).

²⁰ *In re Estate of Manchester*, 66 A.3d 426 (R.I. 2013). See also *Samantar v. Yousuf*, 560 U.S. 305 (2010) and *Richmond v. New Hampshire Court Committee on Professional Conduct*, 542 F.3d 913 (2008).

²¹ *Laughlin v. Riddle Aviation Co.*, 205 F.2d 948 (5th Cir. 1953).

²² *Rural Water Dist. No. 4, Douglas County, Dansas v. City of Eudora, Kan.*, 604 F. Supp. 2d 1298 (D. Kan. 2009), order clarified on reconsideration, 2009 WL 1360182 (D. Kan. 2009) and *Stettner v. International Printing Pressmen and Assistants' Union of North America*, 278 F. Supp. 675 (E.D. Tenn. 1967).

²³ *Garcia-Villeda v. Mukasey*, 531 F.3d 141 (2d Cir. 2008); *In re White*, 266 F. Supp. 863 (N.D.N.Y. 1967); *U.S. v. Milk Distributors Ass'n, Inc.*, 200 F. Supp. 792 (D. Md. 1961).

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i.e. it frustrates Congressional intent under Sections 342(b)(2)(C) and (b)(4). When interpreting a statute, it must be assumed that Congress intended to enact effective laws.²³

The Agencies' failure to construe Sections 342(b)(2)(C) and (b)(4) to require non-voluntary disclosure of information about the diversity policies and practices of their regulated entities would seem to render these sections ineffective.

III. The Importance of Mandatory Disclosure of Information by Regulated Entities

Mandatory disclosure will provide data to ascertain whether minorities and women are fairly included in the workforce (including senior management) and all business activities of the financial services industry.²⁴ This data is essential to both Congress and the industry because it will allow Congress to determine whether more legislation is needed to ensure the fair inclusion of minorities and women in the workforce (including senior management) and all business activities of the financial services industry. Also, as noted by SEC Commissioner Luis A. Aguilar, mandatory disclosure will provide a needed baseline to allow the financial services industry "as a whole to chart improvement as intended by [Section 342]."²⁵ Finally, a standardized template should be used by regulated entities when disclosing information about their diversity policies and practices to the Agencies to ensure maximum usefulness of the data.

Thank you for taking this comment into consideration. Please contact the undersigned if you would like to further discuss the issues raised in our comment letter.

Sincerely,



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²³ *Garcia-Villeda v. Mukasey*, 531 F.3d 141 (2d Cir. 2008); *In re White*, 266 F. Supp. 863 (N.D.N.Y. 1967); *U.S. v. Milk Distributors Ass'n, Inc.*, 200 F. Supp. 792 (D. Md. 1961).

²⁴ Section 342 (b)(2)(A).

²⁵ Commissioner Luis A. Aguilar, Statement on the Proposed Interagency Policy Statement to Establish Standards to Assess the Diversity Policies and Practices of Regulated Entities (October 23, 2013), available at http://www.sec.gov/News/Speech/Detail/Speech/1370540026835#_edn2.