

February 7, 2014

VIA ELECTRONIC MAIL TO: rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Comments of the Equal Employment Advisory Council on the Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies (File Number S7-08-13)

Dear Ms. Murphy:

The Equal Employment Advisory Council (“EEAC”) respectfully submits this comment letter on the *Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies* (the “Proposed Statement”), notice of which was published in the *Federal Register* on October 25, 2013. 78 Fed. Reg. 64052

The Proposed Statement would, if adopted, establish the standards by which six federal agencies will assess the diversity policies and practices of those entities they regulate, as required by Section 342 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“Section 342”). These six federal agencies (and, if applicable, each agency’s respective docket, file, or reference number for the Proposed Statement) are as follows: (1) the Department of the Treasury, Office of the Comptroller of the Currency (Docket ID OCC-2013-0014); (2) the Board of Governors of the Federal Reserve System (Docket No. OP-1465); the Federal Deposit Insurance Corporation; (4) the National Credit Union Administration, (5) the Bureau of Consumer Financial Protection (Docket No. CFPB-2013-0029); and (6) the Securities and Exchange Commission (Release No. 34-70731; File No. S7-08-13).

BACKGROUND

Section 342 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Act”) requires certain federal financial regulatory agencies to create “Offices of Minority and Women Inclusion” (“OMWI”), which the Act in turn directs to establish standards for evaluating the diversity policies and practices of the respective entities those agencies regulate.

On October 25, 2013, the six agencies identified above (the “Agencies”) published in the *Federal Register* the Proposed Statement, a single consolidated notice announcing the joint standards each agency intends to follow for purposes of making these evaluations. The Proposed Statement includes four general evaluation categories and sets forth specific standards within each one. These four categories are: (1) organizational commitment; (2) workforce diversity; (3) supplier diversity; and (4) transparency. The Agencies have requested comments on, among other things, whether the standards set forth in the Proposed Statement are effective and appropriate, whether there are other factors the Agencies should consider when assessing diversity policies and practices, and how the Agencies might better take into account each individual regulated entity’s specific circumstances.

EEAC’S INTEREST IN THE PROPOSED STATEMENT

EEAC is a national nonprofit association of major employers formed in 1976 to promote sound approaches to the elimination of employment discrimination. EEAC’s membership is comprised of nearly 300 of the nation’s largest private-sector companies, collectively providing employment to roughly 19 million people throughout the United States alone. EEAC’s directors and officers include many of the nation’s leading experts in the field of equal employment opportunity, affirmative action, and diversity. Their combined experience gives EEAC a strong base of both knowledge and real-world experience concerning the proper interpretation and implementation of fair employment policies and practices. EEAC’s members are firmly committed to the principle of equal employment opportunity.

Many of EEAC’s members are directly regulated by one or more of the Agencies and therefore would be directly affected by the Proposed Standards. In addition, nearly all of our member companies are federal contractors subject to the additional nondiscrimination and affirmative action compliance requirements administered and enforced by the Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”), many of which overlap significantly with the Agencies’ Proposed Standards. Finally, most if not all EEAC members also have implemented voluntary programs to monitor, analyze, and positively influence the demographic diversity of their applicant pools, workforces, vendors, suppliers, and subcontractors.

SUMMARY OF EEAC’S COMMENTS

EEAC commends the Agencies for the flexibility permitted by the standards contained in the Proposed Statement. As the Agencies well know, diversity and inclusion initiatives are highly specific to each institution’s particular structure, organization, culture, goals, and needs, and allowing regulated entities to demonstrate that they have sufficiently robust diversity programs without prescribing rigid requirements is a sensible and practical approach to addressing the requirements of Section 342. EEAC also supports the Agencies’ position that federal contractor compliance with the OFCCP-enforced nondiscrimination and affirmative

requirements under Executive Order 11246 is a significant indicator that the goals of Section 342 are being met, and indeed urges the Agencies to make this position even clearer in the final standards.

Turning to specifics, our comments request that the Agencies provide additional detail regarding how they propose approaching the assessment of the diversity and inclusion efforts of regulated entities. To this end, we recommend that the Agencies' final standards:

- state specifically that compliance with already existing federal regulations constitutes compliance with, at a minimum, the organizational commitment to diversity and inclusion standards and the workplace profile and employment practices standards;
- exclude, from the Workforce Profile and Employment Practices standards references to “metrics” and “management accountability”; and
- exclude, from the Transparency of Organizational Diversity and Inclusion standards, requirements regarding the disclosure of workforce demographic and procurement information.

THE IMPORTANCE OF FLEXIBILITY IN ASSESSING REGULATED ENTITIES' PERFORMANCE UNDER SECTION 342

“Diversity” and “inclusion” are broad terms with meanings that often differ depending on context. While these terms are often interchanged with “affirmative action” and “equal opportunity,” they are understood by diversity practitioners to mean very different things. Affirmative action is more selective, often focused on benefitting previously disadvantaged groups, while diversity initiatives strive to embrace a vast array of backgrounds, worldviews and life experiences. Similarly, equal opportunity generally focuses on eliminating policy and procedural impediments, again typically for previously disadvantaged groups, while the goal of inclusion goes beyond policy and procedure to affect an open culture within an organization wherein all groups are accepted, have value, and contribute. Thus, diversity and inclusion are better described as *concepts* that defy any single definition.

The Proposed Statement envisions flexibility in the manner in which regulated entities can publicize their commitment to diversity and inclusion in the workplace. For example, in the discussion of practices to promote transparency, the Proposed Statement notes that entities can publicize information on their diversity and inclusion efforts through several methods such as displaying information on company Web sites, promotional materials, and annual reports to shareholders. The Proposed Statement correctly stops short of prescribing specific methods, allowing regulated entities to decide for themselves how best to convey information to investors, employees, potential employees, suppliers, customers, and the general community.

Along the same lines, whatever means by which a company chooses to broadcast its message of diversity and inclusion, it should have the same flexibility to determine the content of those messages. We are concerned, however, that as currently written, the various standards may be interpreted by many as “checklists” of elements the Agencies intend to require when assessing the sufficiency of a regulated entity’s diversity and inclusion programs. Respectfully, EEAC recommends that the Agencies’ final standards clarify that the various proposed factors are *suggestions* or *recommendations* rather than requirements by which the sufficiency of regulated entities’ diversity programs will be evaluated. This will communicate the expectation that public messages should contain sufficient detail regarding the entity’s *specific* diversity and inclusion efforts—rather than just a broad, generalized statement—while still clearly providing the necessary flexibility when it comes to the actual content of those messages.

THE NEED FOR CLARIFICATION ON HOW AGENCIES WILL ASSESS DIVERSITY AND INCLUSION PERFORMANCE

It is difficult to address the Proposed Statement without further clarification as to how the Agencies actually intend to assess the diversity and inclusion performance of the entities they regulate. The Proposed Statement envisions the display of information regarding company diversity and inclusion programs on public web sites, annual reports, and other materials, a quantitative and qualitative evaluation of company diversity and inclusion efforts, and a voluntary disclosure to the appropriate Agency of each company’s self-assessment results. As members of the *regulated* community, EEAC’s member companies have approached their review of the Proposed Statement with the goal of discerning in real, practical terms what they will be required to do to *comply*. In this regard, the Proposed Statement raises several important questions, including:

- What do the Agencies intend to do with information that regulated entities disclose?
- What information can and/or will be disclosed by the Agencies, and under what circumstances?
- What is meant by “voluntary disclosure?”

The Proposed Statement envisions the disclosure, either to the public or to the Agencies, of detailed information that may raise privacy and confidentiality concerns (discussed in more detail below). Without knowing the answers to some basic questions regarding the assessment process, it is difficult for regulated entities to evaluate the potential impact of the Proposed Statement. Accordingly, EEAC recommends that the Agencies provide further detail regarding the proposed approach to assessment *prior* to the issuance of any final standards. We also urge the agencies to permit an additional period for public comment on the proposed assessment approach.

HARMONIZING THE PROPOSED STATEMENT WITH EXISTING FEDERAL CONTRACTOR
NONDISCRIMINATION AND AFFIRMATIVE ACTION COMPLIANCE REQUIREMENTS

As previously noted, the Proposed Statement includes a number of standards that closely mirror the requirements of other, existing federal regulations. In particular, the regulations enforced by the OFCCP, the agency charged with monitoring and enforcing the nondiscrimination and affirmative action obligations of covered federal contractors,¹ to a large extent parallel several of the specific components of the Proposed Statement. For example, the Proposed Statement's Organizational Commitment to Diversity and Inclusion standards ("Organizational Standards") would require a covered entity to:

- include diversity and inclusion considerations in its strategic plan, including hiring, recruiting, retention and promotion;
- develop a diversity and inclusion policy that is approved and supported by senior leadership;
- provide regular progress reports to the board and/or senior management;
- conduct equal employment opportunity and diversity and inclusion education and training;
- designate a senior level official who oversees and directs diversity efforts; and
- take proactive steps to promote a diverse pool of candidates in its hiring, recruiting, retention, and promotion.

Further, the Proposed Statement's Workforce Profile and Employment Practices standards ("Workforce Standards") would require a covered entity to:

- utilize metrics to evaluate and assess diversity and inclusion efforts;
- hold management accountable for diversity and inclusion efforts; and
- develop policies and practices that create diverse applicant pools for both internal and external opportunities.

By way of comparison, federal supply and services contractors and federally assisted construction contractors generally are subject to the provisions of the equal opportunity clauses

¹ See generally OFCCP's implementing regulations at 41 C.F.R. §§ 60-1 and 60-2.

found in 41 C.F.R. § 60-1.4(a) and (b) respectively.² These clauses prohibit discrimination on the basis of race, color, religion, sex, or national origin, and require contractors to take affirmative action to ensure that applicants and employees are treated without regard to these characteristics. These obligations explicitly extend but are not limited to employment, promotion, demotion, transfer, recruitment, layoff, termination, compensation and training. Moreover, many federal contractors satisfy the provisions of the equal opportunity clause through a combination of many, if not all, of the elements in the Proposed Statement's Organizational Standards.

Further, federal supply and services contractors with 50 or more employees and a contract valued at \$50,000 or more also are subject to OFCCP's Affirmative Action Program ("AAP") requirements outlined in 41 C.F.R. Part 60-2. Under these regulations, contractors are required, among other obligations imposed, to:

- develop and utilize reports on workforce demographics (in more detail than required by the EEO-1 report);
- annually compare the incumbent workforce to demographics in the areas from which the company recruits for open positions and set placement goals for women and/or minorities as necessary;
- perform in-depth analyses of the company's employment processes to determine whether and where impediments to equal opportunity exist;
- develop and execute action-oriented programs designed to correct any problem areas identified;
- monitor records of all personnel activity including referrals, placements, transfers, promotions, terminations, and compensation;
- conduct internal reporting, review reports with all levels of management, and advise top management of program effectiveness; and
- designate responsibility for the program to a top official with sufficient authority, resources and support.

Virtually all of the elements in the Proposed Statement's Organizational Standards and Workforce Standards are already required for entities that are also subject to Executive Order 11246. Accordingly, EEAC recommends that the Agencies' final standards state explicitly that

² Transactions of \$10,000 or less are exempt from these requirements, however, as a practical matter, most entities that are federal contractors, and are regulated by one or more of the Agencies, are likely subject to OFCCP's equal opportunity clause.

compliance with Executive Order 11246 is, at a minimum, adequate to satisfy the Agencies' Organizational Standards and Workforce Standards.

Moreover, the requirements of Executive Order 11246 actually go *beyond* the standards contained in the Proposed Statement in that federal contractors subject to the Executive Order also are required to:

- state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin in all solicitations or advertisements placed by or on behalf of the company;
- send notice of the contractor's nondiscrimination obligations to union representatives with which the contractor has a collective bargaining agreement;
- post the contractor's equal employment policy where it can be seen by all employees and applicants for employment;
- include the equal opportunity clause in all covered subcontracts and purchase orders;

To the extent that the Agencies' Practices to Promote Transparency of Organizational Diversity and Inclusion Standards are designed to ensure that regulated entities make their diversity and inclusion efforts known to the public, EEAC recommends that the Agencies acknowledge that contractors that comply with Executive Order 11246 already meet those standards.

THERE ARE SIGNIFICANT PROBLEMS WITH REQUIRING "METRICS" TO EVALUATE AND ASSESS WORKFORCE DIVERSITY AND INCLUSION EFFORTS

As noted above, "diversity" and "inclusion" are not widely considered to be synonymous with "affirmative action" and "equal employment opportunity." Affirmative action and equal employment opportunity can be measured more easily using relatively reliable statistics gathered from multiple, well-established sources, such as the United States Census Bureau, the Department of Labor, and educational institutions, that track demographic information such as race/ethnicity, gender, age, and other factors. In contrast, the degree to which an organization embraces a vast array of backgrounds, worldviews, and life experiences, and positively fosters an open culture wherein all groups are accepted, have value, and contribute, is not conducive to quantifiable measurement. Most "mature" diversity initiatives, therefore, generally are not driven by quantitative, goal-oriented programs.

Efforts by companies to gauge the effectiveness of their diversity efforts and identify areas of focus or improvement often will *begin* with an overall view of workforce demographics, but they certainly do not end there. The specific elements of any robust diversity program will necessarily be particular to each organization based on much more than the size of the company

and the extent of its resources. The specific industry, geographic location, workplace culture, workforce education levels, employee recruiting methods and sources, training, policies and practices are just some of the factors that may be considered in a diversity and inclusion program. Moreover, diversity may be viewed enterprise-wide, or by establishment, division, department, line of business, shift, or other subdivision or combination of subdivisions. Finally, companies may have multiple diversity and inclusion initiatives with different objectives throughout the organization. All of these characteristics contribute to making qualitative measurements of “diversity” elusive and complex, and quantitative measurements of “diversity” potentially impossible.

To the extent that diversity and inclusion efforts *are* subject to some kind of quantitative measurement, especially in the context of broad standards administered by federal regulators and applicable to a wide array of organizations, the Agencies are prudent to rely on the overlap that does exist between diversity and affirmative action. As noted above, workforce demographics are almost always an element in the development and evaluation of an organization’s diversity programs, and the use of workforce demographics is likely to be common among many types of diversity and inclusion initiatives.

However, the use of “metrics” beyond the starting point for evaluating diversity and inclusion efforts is potentially problematic for at least two reasons. First, a true diversity and inclusion program will not neatly lend itself to quantifiable measurement. Second, reliance on “numbers” as the indicator for whether or to what extent diversity and inclusion objectives are being met runs the risk of reducing, oversimplifying, or misdirecting the intended scope of an organization’s otherwise effective diversity and inclusion program.

Accordingly, EEAC respectfully recommends that the Agencies’ final standards avoid encouraging entities to rely on “metrics” in their evaluations of diversity and inclusion programs in such a way as to detract from the continuing and successful characteristics of the very diversity and inclusion programs the Agencies are trying to encourage.

THE PRACTICAL AND LEGAL CHALLENGES OF HOLDING MANAGEMENT “ACCOUNTABLE” FOR DIVERSITY AND INCLUSION EFFORTS

The Proposed Statement’s Workforce Standards contain the requirement that covered entities “hold *management* accountable for diversity and inclusion efforts” (emphasis added). We respectfully submit that this language is overbroad and implies that covered entities are required to incorporate diversity and inclusion measurements into their performance evaluation process for all management personnel. This type of “accountability” can easily become a slippery slope, however, leading to employment decisions based on protected characteristics in violation of Title VII of the Civil Rights Act of 1964. For example, a manager faced with a “goal” or “metric” of hiring more minorities could easily but improperly be motivated to hire individuals *because* of their race or ethnicity in violation of the law, and in doing so expose the employer to potentially significant liability.

EEAC member companies that employ some form of evaluation of managers' and supervisors' performance regarding diversity, equal employment opportunity, and affirmative action initiatives do so cautiously, and make deliberate efforts to ensure that their organizations are not inducing managers to make decisions that run afoul of applicable federal, state, or local employment laws. Unfortunately, our members have informed us that the Agencies' proposed Workforce Standards, as written, likely will lead some organizations to hastily develop employee evaluation practices that do more harm than good.

While the notion of "accountability" can, and perhaps should, be encouraged, EEAC believes the responsibility should lie with whichever senior-level official(s) a regulated entity has designated to oversee and direct its diversity efforts. Indeed, covered entities that hold federal contracts subject to Executive Order 11246 are already subject to a similar requirement enforced by OFCCP that requires them to assign "responsibility and accountability" for the company's equal employment and affirmative action efforts to an official with sufficient authority, resources, support of and access to top management.³

As noted previously, the Proposed Statement's Organizational Standards already include a provision that covered entities designate a senior-level official to oversee and direct the company's diversity efforts. EEAC respectfully recommends that the Agencies' final standards make clear that it is this senior-level official who is ultimately responsible and accountable for the company's diversity efforts, not all "management personnel."

PROMOTING TRANSPARENCY SHOULD MEAN NO MORE THAN PUBLICIZING REGULATED ENTITIES' DIVERSITY AND INCLUSION POLICIES AND PROGRAMS

The Proposed Statement's Transparency of Organizational Diversity and Inclusion standards ("Transparency Standards") would potentially require regulated entities to reveal proprietary and confidential information in a public forum, which raises a number of significant concerns.

First, the Transparency Standard requirement that entities publish progress toward achieving diversity and inclusion initiatives by revealing current workforce demographics could conflict with local, state, and federal privacy laws. For example, the Equal Employment Opportunity Commission ("EEOC") is precluded by statute from disclosing a company's individual EEO-1 Reports and is authorized by law to release EEO-1 data only in the aggregate. In fact, any EEOC officer or employee who discloses a company's EEO-1 Report can face a fine of up to \$1,000 or up to one year in prison. 42 U.S.C. § 2000-e(8)(e).⁴

³ See 41 C.F.R. § 60-2.17(a).

⁴ Privacy of information submitted through the EEOC reporting process is protected by a number of statutes, public laws and regulations such as the Privacy Act of 1974. See <http://www.eeoc.gov/employers/eeo1survey/privacyimpact.cfm>.

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Second, current workforce demographics are not necessarily reflective of a company's diversity and inclusion programs and efforts. Requiring the publication of demographic information could unfairly punish companies with robust diversity and inclusion programs not evidenced by workforce representation statistics.

Third, current procurement opportunities and forecasts of potential employment and procurement opportunities may constitute confidential commercial or financial information and trade secrets. Companies have a right to choose not to share proprietary information that could, for instance, reveal insight into the company's financial health or business plans. Were such information required to be submitted to a regulating agency, much of the information would likely be protected from disclosure under the Freedom of Information Act.⁵ Standards that require the *public disclosure* of such information also could conflict with state and federal trade secret protections.⁶

Finally, the Transparency Standards also envision disclosure of a regulated entity's current *supplier and subcontractor* demographics. Given the sensitivity of workforce demographic information, it is unlikely that many suppliers or subcontractors will willingly provide this information for public disclosure by a third party. Rather, it is likely that requests for such information will damage business relationships and put regulated entities at a competitive disadvantage.

For these reasons, EEAC recommends that the Transparency Standards focus on the publication of the regulated entities' diversity and inclusion policies and programs, without specific reference to disclosure of demographic information or procurement opportunities.

CONCLUSION

EEAC appreciates the opportunity to submit these comments as the Agencies develop their final standards under Section 342. Please feel free to contact me if you have any questions, or if our staff can provide you with any additional information.

Sincerely,



Joseph S. Lakis, Jr.
President

⁵ See generally 5 U.S.C. § 552(b).

⁶ See generally the Uniform Trade Secrets Act, currently enacted in 47 states and the District of Columbia, at http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf.