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December 24, 2013

VIA EMAIL (REGS.COMMENTS@FEDERALRESERVE.GOV)

Robert deV. Frierson
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

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
Docket No. OP-1465

Dear Mr. deV. Frierson:

Morgan, Lewis & Bockius LLP (“Morgan Lewis”) appreciates the opportunity to submit comments in response to the Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies (the “Proposed Standards”). The Proposed Standards were issued under Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which directs each agency subject to the statute to assess the “diversity policies and practices” of the entities regulated by the agencies. 12 U.S.C. §5452 (b)(2)(C).

I. Introductory Statement

Morgan Lewis understands and appreciates the goals of the Proposed Standards to improve and promote diversity within the entities regulated (the “Regulated Entities”) by the Federal Reserve Board of Governors, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Bureau of Consumer Protection, and the Securities and Exchange Commission (collectively, the “Agencies”). The Proposed Standards reflect the Agencies’ commitment to fulfilling their responsibilities under the Dodd-Frank Act. Nonetheless, as discussed below, we address two of several issues – the use of EEO-1 data and the disclosure of the Regulated Entities diversity data – that we believe the Agencies

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should clarify regarding their expectations and the Regulated Entities' obligations under the Dodd-Frank Act and the Proposed Standards.¹

II. Comments

A. **EEO-1 Data is Not a Reliable Indicator of an Entity's Diversity Practices and Efforts.**

The Proposed Standards are an important step toward promoting the effort of the Agencies and Regulated Entities to track and measure their individual diversity efforts, and to help them improve overall diversity. To that end, the data relied upon by the Regulated Entities and Agencies in assessing their diversity efforts is of central importance to the Agencies and Regulated Entities. The Proposed Standards encourage Regulated Entities to use the EEO-1 Reports they submit to the Equal Employment Opportunity Commission ("EEOC") to assess their diversity policies and practices. We, however, are concerned with the emphasis and reliance on EEO-1 Reports in assessing the Regulated Entities' diversity efforts and suggest that to the extent EEO-1 Reports are considered, they should form only a small element of a wider, more holistic review of the Regulated Entities' diversity practices.

EEO-1 Reports are based on a general uniform set of standards that are applied to all entities that are required to submit EEO-1 Reports under Title VII. *See* 29 C.F.R. §1602.7 et seq. Among other things, an employer must, regardless of its business or industry, describe its workforce using one of the ten preset job categories created by the EEOC. EEO-1 Instruction Booklet, O.M.B. No. 3046-0007. These categories must be used by all employers submitting EEO-1 Reports in all industries, such as the financial services, retail, manufacturing and other industries, and as a result, the job categories shed little to no light on the actual organization and functioning of an individual workplace. An EEO-1 Report provides a purely numerical view of the diversity of an employer's workforce and little insight into an employer's diversity efforts or how those efforts are impacting the employer's workforce. *See Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 651 (1989) ("Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers – and the long list of other 'skilled' non-cannery positions found to exist by the District Court . . . by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical.").

Another limitation of the purely numerical focus of EEO-1 Reports is that they do not consider the relevant labor market. Viewing diversity as an absolute without considering the market in which the employer operates and hires employees provides a distorted view of the employer's

¹ The comments noted in this letter are intended for the general improvement of the Proposed Standards only.

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diversity efforts because it does not consider the available labor pool.² *Morgan v. UPS*, 380 F.3d 459, 465 (8th Cir. 2004) (relevant inquiry in a disparate impact claim is whether the proffered statistical model takes into account the proper pool of available qualified employees).

While the existence of such data and its availability to managers and recruiters may be circumstantial evidence of a candidate's race or gender playing a role in an employment decision affecting that candidate, the publication of and emphasis on that EEO-1 data in this context may have negative results. EEO-1 data is an artificial number as it relates to diversity efforts. As noted above, it does not provide meaningful insights into an employer's commitment to diversity or its diversity efforts. To the extent that EEO-1 data is made public and shows low "diversity numbers," managers may be inclined to hire diverse candidates (regardless of whether they are qualified) to increase the numbers that will be made public under this proposal and thereby avoid the negative publicity that might be portrayed by the low numbers. That is an outcome to be avoided.

Due to these limitations and concerns, we suggest that the Agencies revise the Proposed Standards to focus less on the use of EEO-1 Reports to assess diversity, and to focus more on the Regulated Entities' diversity efforts by looking at industry-specific considerations, the relevant labor market, and the Regulated Entities' ongoing efforts to facilitate, promote and increase diversity.

B. Disclosure of Regulated Entities' Diversity Data Is Inconsistent with the Treatment of This Data Under Title VII and Could Hamper Regulated Entities' Diversity Efforts.

In passing the Dodd-Frank Act, Congress recognized the importance of promoting diversity in the financial services industry and instructed the Agencies to "assess the diversity policies and practices of regulated entities." 12 U.S.C. §5452 (b)(2)(C). The Proposed Standards suggest that the Agencies are contemplating collecting information on the diversity statistics, policies, and practices of the Regulated Entities as part of this effort. The Proposed Standards also suggest that the Regulated Entities' diversity information, including their plans for achieving diversity and metrics used to measure success, should be made public. The Proposed Standards do not address whether the Agencies, to the extent that the Regulated Entities submit such information to them, intend to publicize that information, or whether the Regulated Entities will be responsible for determining how much and what information they disclose about their diversity programs.

² Indeed, as certain of the Agencies have recognized, identifying and hiring diverse candidates into certain positions in the financial services industry can be challenging. *See* F. Reserve Bd. of Governors 2012 Report to Congress on the Office of Minority and Women Inclusion at 4-5 (recognizing that the Board faces challenges in hiring minorities and women to fill economist positions because there is low availability of minority candidates for those positions).

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Disclosure of the Regulated Entities' diversity information is likely to have an adverse effect on efforts of the Regulated Entities to promote and encourage diversity. Publicizing a Regulated Entity's metrics, and the associated attention from the publicity, may cause the Regulated Entity to focus more on achieving short-term numerical gains rather than sustaining actual diversity; i.e., the Regulated Entity will focus on achieving numerical goals or quotas, which may be used only in very limited situations and promote the use of exclusive measures, rather than implementing inclusive policies that improve employee selection, retention and development and the long-term diversity of their workforces.

Furthermore, publicizing diversity information out of the relevant context may have unintended effects. For example, out of context, such information may be construed as showing that a Regulated Entity has little or no interest in diversity if its numbers are low, when, in fact, the Regulated Entity may have devoted substantial time, resources and effort to diversity and its "resulting numbers" do not meet a preset quota at a given point in time. That failure, which could be the result of factors beyond the Regulated Entity's control, may in turn affect the Regulated Entity's ability to attract the very diversity it seeks and the Proposed Standards are designed to promote.

An attendant risk of the disclosure of the Regulated Entities' diversity information, particularly their numerical data and metrics, is the possibility that this data could be used against them unfairly in a legal action. As previously discussed, data such as EEO-1 Reports provide an imprecise and incomplete view of an employer's workforce and diversity efforts; nevertheless, without restrictions or clarification in the Proposed Standards, a plaintiff may seek to use publicly disclosed data against the Regulated Entities unfairly in a legal action.

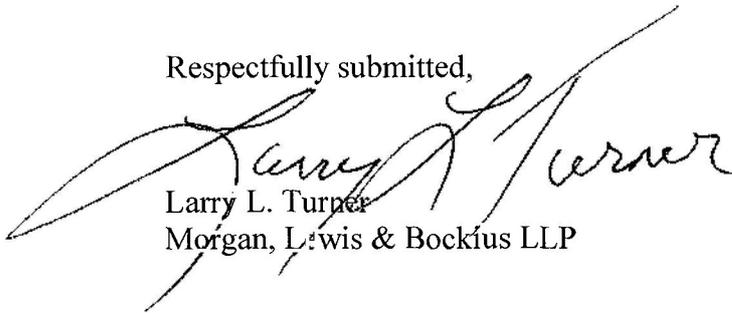
Accordingly, we suggest that the Agencies clarify that the submission of information to them by the Regulated Entities is entirely voluntary and that to the extent such data is submitted to the Agencies, the Agencies will follow the Department of Labor's treatment of such information and treat any diversity data submitted by Regulated Entities as confidential and not subject to an FOIA request. We further suggest that the Agencies clarify that publication of diversity information by Regulated Entities, and what information they choose to share, is also voluntary.

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III. Conclusion

We appreciate the opportunity to submit comments on the Agencies' Proposed Standards, and we thank the Agencies in advance for their time and attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Larry L. Turner". The signature is fluid and cursive, with a large initial "L" and "T".

Larry L. Turner
Morgan, Lewis & Bockius LLP