

December 24, 2013

Via Electronic Submission

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
Mail Stop 9W-11
400 7th Street SW
Washington, DC 20219
regs.comment@occ.treas.gov

OCC
Docket ID OCC-2013-0014

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

Dear Sirs and Madams:

The National LGBT Bar Association respectfully submits these comments supporting the Office of the Comptroller of the Currency; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; National Credit Union Administration; Bureau of Consumer Financial Protection; and Securities and Exchange Commission (collectively the “Agencies”) Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies (“Proposed Policy Statement”).¹ On October 25, 2013, the Agencies published the Proposed Policy Statement in the Federal Register. The Proposed Policy Statement establishes joint standards for assessing the diversity policies and practice of the entities regulated by the Agencies.

The National LGBT Bar Association is a national association of lawyers, judges and other legal professionals, law students, activists and affiliated lesbian, gay, bisexual and transgender (“LGBT”) legal organizations. The LGBT Bar promotes justice in and through the legal profession for the LGBT community in all its diversity.

The National LGBT Bar Association generally supports the Agencies’ Proposed Policy Statement. **However, we urge that the Proposed Policy Statement be changed so that it expressly includes the terms *sexual orientation* and *gender identity* where *race*, *ethnicity*, and *gender* is used.**

¹ 78 Fed. Reg. 64052 (proposed Oct. 25, 2013).

Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) establishes the Office of Minority and Women Inclusion (“OMWI”) within the Agencies and requires the Directors of the OMWI to develop standard by which the policies and practices of the entities regulated by the Agencies may be assessed.² OMWI Directors worked together on the Proposed Policy Statement to promote consistency in this area.

The Proposed Policy Statement does not definitively state which groups are to be considered when assessing the diversity policies and practices of regulated entities, but does specifically mention race, ethnicity, and gender. For example, the Proposed Policy Statement encourages entities to “track and measure the inclusiveness of their workforce (e.g., race, ethnicity, and gender)” and to “evaluate and assess its supplier diversity . . . [according to the] [p]ercentage spent with minority-owned and women-owned business contractors by race, ethnicity, and gender”³ Section 342 of the Dodd-Frank Act authorizes OMWI Directors to include sexual orientation and gender identity in assessing diversity and inclusion, and we urge them to do so.

Section 342 mandates minimum standards that the OMWI Directors are required to apply, but it authorizes the Directors to look beyond those standards. For example, the Office “shall be responsible for *all matters of the agency relating to diversity* in management, employment, and business activities,” and “shall take affirmative steps *to seek diversity* in the workforce of the agency *at all levels of the agency*.”⁴ This expansive language suggests that Congress did not intend section 342 to limit OMWI Directors’ authority or that the application of section 342 be limited to race, ethnicity, or gender.

The Congressional conference report discussing the Dodd-Frank Act contains similarly expansive language. House Report 517 (“the Report”) indicates that section 342 was aimed at assisting “minority-owned and women-owned businesses *and to promote diversity* in the workforce of the regulators.”⁵ The use of the phrase “to promote diversity” suggests that Congress was concerned generally about socially and economically disadvantaged groups.

One agency has already extended the reach of a similar provision in another statute beyond the statute’s enumerated groups. Section 1116 of the Housing and Economic Recovery Act of 2008 (“HERA”) requires the Federal Housing Finance Agency (“FHFA”) to create an Office of Minority and Women Inclusion with similar duties to that of the OMWI required by section 342 of the Dodd-Frank Act. Just like section 342, section 1116 explicitly included only certain identified minorities and women. FHFA published a final rule on December 28, 2010 and included “individuals with disabilities” within the groups covered by section 1116.⁶ FHFA’s final rule specifically addressed whether FHFA had the authority to expand the

² §342, 12 U.S.C. § 5452 (2012).

³ Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Request for Comment, 78 Fed. Reg. at 64055 col. 2; *Id.* at 64056 col. 1.

⁴ Dodd-Frank Act § 342(a) & (f) (emphasis added).

⁵ H.R. REP. NO. 111-517, at 870 (Conf. Rep.) (emphasis added).

⁶ Minority and Women Inclusion, 75 F.R. 81,395, 81,396 (Dec. 28, 2010) (codified at 12 C.F.R. pt



coverage of section 1116. In concluding that it did have such authority, FHFA pointed to language in section 1116, language—identical to the language in section 342 of the Dodd-Frank Act—to support the inclusion of individuals with disabilities. FHFA also noted that Congress previously recognized that individuals with disabilities face discrimination and barriers to economic participation, and therefore considered it appropriate to include the group within the diversity aims of section 1116. FHFA concluded that section 1116 sets minimum standards, and that the agency was free to define the coverage of section 1116 consistent with its mandate to individuals with disabilities.

This rationale applies equally to sexual orientation and gender identity. Both section 342 of the Dodd-Frank Act and section 1116 of HERA contain statutory language making clear that Congress did not intend to limit the authority of OMWI Directors in defining diversity. Congress has recognized discrimination and barriers to economic participation relating to sexual orientation or gender identity.⁷

The Federal Reserve Bank of Atlanta (“FRB Atlanta”) noted in its March 2013 report to Congress that it has included individuals with disabilities, veterans, and *LGBT organizations* in its definition of minority inclusion.⁸ It is also worth noting that a significant number of entities regulated by the Agencies include sexual orientation and gender identity in their policies relating to nondiscrimination and equal access to opportunity, and it could undermine the credibility of the Agencies if their standards for assessing diversity policies were to be under inclusive as applied. Hence, *sexual orientation* and *gender identity* should be included in the Proposed Policy Statement just as *individuals with disabilities* is included in FHFA final rule implementing section 1116 of HERA.

. 1207).

⁷ In 2009, Congress passed the *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act* finding that “[t]he incidence of violence motivated by the actual or perceived . . . sexual orientation[or] gender identity . . . of the victim poses a serious national problem” and that “[m]embers of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.” §4702, 18 U.S.C. § 249 note (2012). Additionally, in 2013, the Supreme Court decided in *Windsor v. United States* that same-sex marriages should be treated no differently than heterosexual marriages, stating that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.” 570 U.S. _____ (2013).

⁸ See Joan Buchanan, REPORT TO CONGRESS: OFFICE OF MINORITY AND WOMEN INCLUSION 18 (2013), available at http://www.frbatlanta.org/documents/about/atlantafed/omwi/130329_AnnualReportToCongress.pdf.



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For the reasons stated above, the Proposed Policy Statement should expressly include *sexual orientation* and *gender identity* where *race*, *gender*, and *ethnicity* are used. Thank you for considering this comment on the Proposed Policy Statement. Please feel free to contact me at darcy@LGBTBar.org or (202) 607-0732, if you have any questions.

Respectfully submitted,

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Executive Director

