MBA
MISSOURI BANKERS ASSOCIATION

Missouri Bankers Association

January 22, 2014

To:
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

TRANSMITTED VIA E-MAIL
regs.comments@federal reserve.gov

Subject Line: Docket No OP-1465

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Ladies and Gentlemen:

The Missouri Bankers Association (MBA) appreciates the opportunity to comment regarding the referenced docket for the proposed interagency policy statement presenting joint standards for assessing the diversity policies and practices of the regulated entities. The MBA represents Missouri's community banks. However these comments include observations and remarks that are appropriate to share with all the agencies represented in your joint notice (OCC, FDIC, NCUA, CFPB, and the SEC) and we respectfully request that you share our comment letter with each participating agency.

Section 342 of the Dodd Frank Act expressly rejected any mandate of private sector employer diversity programs. The proposed policy statement is in conflict with Section 342 because it effectively mandates private sector employer diversity programs rather than adhering to the directive that the agencies only perform assessments. The illegal mandate results from including "qualitative" standards in the assessments. The standards are also flawed by requiring performance "metrics" to measure and to promote "inclusiveness" i.e. the establishment of affirmative action quotas.

Many of America's largest corporations (including banking corporations) have adopted diversity policies and implemented practices that promote diverse cultures within their organizations to

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advance their businesses and communities, particularly in regard to reaching desirable markets on a national and global basis and providing relevant products and services.

For most community banks the best diversity program is simply to be an equal opportunity employer. Community banks hire employees and contract services in their local communities. For these banks, their workforce and vendors reflect the composition and culture of the local community which is also their market. In these circumstances, allocating resources to implement and execute a diversity program would provide no return to the employer or the community. The proposal penalizes successful equal opportunity employers if they do not also implement diversity programs that mirror the agencies' assessment standards.

This comment letter develops six points:

- Section 342 of the Dodd-Frank Act *does not authorize* the agencies to mandate diversity programs for private sector employers.
- Section 342 of the Dodd-Frank Act *does not authorize* the agencies to establish "qualitative" assessment standards for diversity programs of private sector employers that effectively mandate the adoption and implementation diversity programs.
- Qualitative standards may only be adopted if supported by record findings that account for diverse and individual characteristics of private sector employers and their communities.
- Assessment standards that implement diversity *metrics* (quotas) without a proper legal basis expose the agencies and private sector employers to discrimination and reverse discrimination claims.
- It is contrary to the objectives of the agencies and the law to direct favorable treatment for organizations and institutions that promote segregated membership, faculty, student body, or citizen populations expressly or through policies that have disparate impact on the opposite sex, other minorities, or non-minorities.
- Assessments must be protected from public disclosure under the standards consistent with federal law and consistent with agency examination practices to protect confidential and commercially sensitive private sector business strategies and practices.

I. <u>The Dodd-Frank Act does not authorize the agencies to mandate diversity programs for private sector employers.</u>

Section 342 of the Dodd-Frank Act requires that each of the regulatory agencies appoint a director for, and establish an Office of Minority and Women Inclusion, within their agencies. Under the law the pu pose of the office is to enhance and improve the civil rights and equal employment opportunity practices of the agencies, to promote the racial, ethnic and gender diversity of the agencies' workforce and the management of each agency, and to increase the participation of minority-owned and women-owned businesses in agency contracting. Essentially the agencies are required to establish internal diversity programs.

In stark contrast Section 342 *does not* require regulated private sector employers to establish diversity programs. Section 342(b)(2)(C) limits the authority of each agency diversity director

only to developing assessment standards for agencies to review the diversity policies and practices of regulated entities (private sector employers). Section 342(b)(4) confirms the limited scope of the section 342(b)(2)(C) by expressly prohibiting the construction of section 342(b)(2)(C) as a mandate for *any* requirement or *any* specific action based upon an assessment.

The first question in every assessment should be whether the regulated entity has adopted express diversity policies and practices. If the answer is no, then assessment is complete and should be concluded. Furthermore, there should be no adverse consequence resulting from the assessment. If the regulated entity has adopted diversity policies and practices – then – those policies and practices can be subjected to further assessment.

The proposed assessment standards violate the express proscription presented in Section 342 by including qualitative standards that effectively mandate diversity practices and programs. This overreach is substantiated in the next section.

II. The Dodd-Frank Act *does not authorize* the agencies to establish "qualitative" assessment standards for diversity programs of private sector employers that effectively mandate the adoption and implementation of private sector employer diversity programs.

The first set of standards is to assess the employer's "*(1) Organizational Commitment to Diversity and Inclusion*" and is premised with this assertion: "The leadership of a *successful* organization demonstrates its commitment to diversity and inclusion." (Emphasis supplied).

By incorporating a "qualitative" assessment standard the proposal acts as an effective mandate that every organization *must* implement a diversity program and biases the diversity assessment itself. Essentially private sector employers that implement diversity programs are assessed as "successful" and those that do not implement diversity programs are assessed as "not successful."

This premise will also taint all other supervisory duties of the agencies.

> *Example* – Banks are examined and rated based on the quality of Capital, Assets, Management, Earnings, Liquidity and Sensitivity. This is commonly referred to as the CAMELS rating system. The quality of management is probably the single most important element in the successful operation of a bank (and for that matter any other business enterprise). Bank examiners will be inappropriately biased from assigning management a top 1 or 2 rating, even for the most successful, safe and sound bank that is fully meeting community needs merely because management does not deem it necessary, cost-effective or beneficial to adopt diversity policies and programs, or, where management has designated such policies and programs a comparatively low priority for the organization.

A ratings downgrade can carry penalties, costs, corrective mandates and sanctions. If qualitative ratings are incorporated in the diversity assessment standards then the standards become illegal mandates.

The second set of standards is to assess the employer's "*(2) Workforce Profile and Employment Practices*" and is premised with this assertion: "Many entities promote the *fair* inclusion of minorities and women in their workforce ..." The adjective "fair" is described by synonyms including "just, equitable, honest, upright, honorable, trustworthy, impartial, unbiased, unprejudiced, nonpartisan, neutral, even-handed, lawful, legal, and legitimate. This premise is carried into the standards making clear that "fair" private sector employers *do* establish diversity programs and *do* focus on the diversity program objectives when evaluating management.

If the objective of the assessment standards is to determine whether a private sector employer is "fair" or "unfair" and a regulated private sector employer is labeled "unfair" as a result of the assessment then the assessment standards effectively mandate the adoption and implementation of private sector employer diversity programs contrary to the express terms of Section 342 of the Dodd Frank Act. No private sector employer could withstand the regulatory, economic and public sanctions associated with being labeled an unfair employer by their primary regulator.

III. Qualitative standards may only be adopted if supported by record findings that account for diverse and individual characteristics of private sector employers and their communities.

The agencies have cited no empirical basis for the assertion that diversity policies and practices contribute to the success of business organizations generally, or, whether particular circumstances might apply where such policies do contribute to the success of some business organizations. Similarly, the agencies have cited no empirical basis that diversity policies and practices promote the "fair" employment outcomes sought by the agencies under the standards.

> *Example* – Community banks typically hire employees and contract services within their local communities. Community banks are equal opportunity employers and most community banks are successful. The workforce and vendors reflect the make-up of the local community. For such institutions it would be a waste of resources and a detrimental to the success of the organization to adopt policies and implement practices that would have no practical or productive affect.

Community banks do an excellent job serving their communities and employing a great work force as equal opportunity employers – and do so without "diversity" programs. The employees and vendors of these community banks reflect their communities.

The OMWI directors claim to have taken into account such factors as asset size, number of employees, governance structures, income, number of members or customers, contract volume, geographic location and community characteristics – but –the proposed standards and the notice do not reflect any of these factors and do not reference the data or body of evidence that the directors relied on and where it may be viewed by those who will be impacted by proposal.

IV. Assessment standards that implement diversity *metrics* (quotas) without a proper legal basis expose the agencies and the private sector employers to discrimination and reverse discrimination claims.

The proposal requires that all regulated private employers establish "metrics" to track, measure and attain "inclusiveness" of their workforce by race, ethnicity, and gender. This applies whether or not there has been any finding or determination of past or present unlawful discrimination by a particular employer. The agencies have made no attempt to narrowly target their proposals' discriminatory race, ethnicity and gender objectives to remedy specific instances of present or past discrimination.

Under federal laws enforced by the United States Equal Employment Opportunity Commission it is illegal for employers to establish a preference for, or to discourage, persons from employment on the basis of race, color, religion, sex, national origin, age (40 and older), disability, or genetic information. The performance metrics proposed by the agencies are in conflict with federal law.

By implementing discriminatory metrics the agencies' proposal becomes a government mandated affirmative action program. When the government undertakes affirmative action it must present a strong evidentiary (compelling) basis for doing so and the consideration of the discriminatory classifications (in his case race, ethnicity, and gender) must be narrowly tailored to serve that compelling state interest. The burden under the Equal Protection Clause is on the agencies and the standard is one of strict scrutiny. The proposal violates the constitutional protection afforded all citizens of the United States to be accorded equal protection of the law.

The joint proposal presented here blankets whole industries with legally suspect employment practices that expose private sector employers to legal peril. The proposal should be withdrawn and re-issued without constitutional, discriminatory and illegal defects.

V. It is contrary to the objectives of the agencies and the law to direct favorable treatment for organizations and institutions that promote segregated membership, faculty, student body, or citizen populations expressly or through policies that have disparate impact on the opposite sex, other minorities, or non-minorities.

The agencies propose that regulated private sector employers engage in "outreach" to minority and women organizations, educational organizations that serve significant minority and women student populations, and to participate in conferences, workshops and other events to attract minorities and women.

It is perverse to direct equal opportunity employers or employers that have adopted and implemented diversity policies and practices to reach out to organizations that may be engaged in deliberately discriminatory conduct or in practices that have a disparate impact upon other minorities, the opposite sex, or non-minorities and to target events that discourage a diverse and inclusive participation.

The agencies should include criteria in their proposal to assure that outreach efforts are not extended to benefit organizations engaged in discrimination or that are non-inclusive. Likewise, the agencies should not promote event organizers that sponsor discriminatory or non-inclusive conferences, workshops and programs.

VI. Assessments must be protected from public disclosure under the standards consistent with federal law and consistent with agency examination practices to protect confidential and commercially sensitive private sector business strategies and practices.

Because the agencies are proposing the assessments to be performed as self-assessments it is not clear that the assessments will be treated as supervisory examinations and accorded confidential treatment. The assessments will include policies and practices that are commercially and competitively sensitive, and if published would alert competitors to recruitment, staff development, staff retention and market strategies. This information is very sensitive and disclosure would be harmful.

Disclosure of this information and the results of the assessments could also expose private sector employers to employment law claims and litigation and would be used by community action organizations to leverage money contributions and business concessions from the regulated employers. This type of risk and conduct can undermine organizational morale and support for diversity programs. Essentially, an employer adopting forthright policies, practices and assessments risks being sued or extorted based on its' own program and assessments. As a result, real progress will be exchanged for "window dressing" and check the box programs.

The proposal cites EEO-1 Reports for large federal contractors for the types of diversity data that an employer may elect to compile and monitor for their internal diversity policies and practices. EEO-1 data is expressly made confidential under Section 709 (e) of Title VII of the Civil Rights Act of 1964, as amended. Federal law prohibits the release of individually identifiable information. Instead, data is made available in aggregated format for major geographic areas and by industry groups.

The agencies should make similar provision for the protection and use of the data reported and for the results of the assessments conducted under the proposal. If there is any uncertainty regarding the protection of this sensitive information the program should not be implemented until this safeguard is assured.

Thank You.
The Missouri Bankers Association appreciates your consideration of our comments.

Sincerely,

Keith Thornburg
General Counsel