February 6, 2014

Sheila Clark
OMWI Director
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20219

Joyce Cofield
OMWI Executive Director
Office of the Comptroller of
the Currency
400 7th Street SW
Washington, DC 20219

Melodee Brooks
OMWI Senior Deputy Director
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Tawana James
OMWI Director
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Stuart Ishimaru
OMWI Director
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Pamela Gibbs
OMWI Director
Securities and Exchange Commission
100 F Street NE
Washington, DC 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

Dear OMWI Directors:

The Financial Services Roundtable[1] ("FSR"), the Consumer Bankers Association[2] ("CBA"), the American Bankers Association[3] ("ABA") and the Independent Community Bankers of America[4] ("ICBA") (collectively, the "Associations") are pleased to respond to the proposed joint standards for assessing the diversity policies and practices published in the Federal Register on Friday, October 25, 2013 (the "Proposed Standards") by the Board of Governors of the Federal Reserve System, the Bureau of Consumer Financial Protection, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission (collectively, the "Agencies"). The proposal is intended to implement Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").

Background

Section 342 of Dodd-Frank requires the Agencies each to establish an Office of Minority and Women Inclusion with the primary focus of ensuring that the Agencies themselves have a diverse workforce and take appropriate steps to include minorities and women in their contracting and procurement practices. A less expansive provision requires each Director "to develop standards for . . . assessing the diversity policies and practices of entities regulated by the agency." This mandate is further limited by Section 342(b)(4) of Dodd-Frank, which states that nothing in this requirement to assess diversity practices "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

---

1 As *advocates for a strong financial future*™, FSR represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

2 The CBA is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

3 The ABA represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its two million employees. Learn more at www.aba.com.

4 The ICBA represents the interests of the community banking industry and the communities and customers they serve.

based on the findings of the assessment."

Overview

The Associations and their members are committed to the goal of assessing diversity and inclusion in the financial services industry. We share the Agencies' view that "greater diversity and inclusion promotes stronger, more effective, and more innovative businesses, as well as opportunities to serve a wider range of customers."

As detailed herein, we strongly agree with the Agencies' view that voluntary self-assessment will be a more effective and appropriate methodology for evaluating diversity than would traditional examination or other supervisory assessment. A self-assessment approach is also better aligned with the narrow statutory mandate provided by Congress in Section 342 of Dodd-Frank.

We also commend the Agencies' recognition that entities should have flexibility to tailor their diversity policies and practices to take into account their individual circumstances. The Associations agree with the underlying premise of the Proposed Standards that a rigid, "one-size-fits-all" approach would be counter-productive to the goal of assessing diversity in regulated entities. The Proposed Standards' flexible approach would allow the Associations' members to develop policies and practices that reflect the diversity of the communities they serve.

The Associations strongly disagree with some commentary criticizing the approach taken by the Agencies. We disagree, for example, with the suggestion made by some commentators that the Proposed Standards should have included traditional examination, mandatory disclosure and/or a more rigid, "one-size-fits-all" approach. Such a supervisory model would, in our view, not only exceed the mandate provided by Congress in Section 342 of Dodd-Frank, but also would be counter-productive to the goals of the statute.

Although we applaud the overall approach to assessing diversity articulated by the Proposed Standards, we have also proposed certain ways in which they may be enhanced, as detailed herein.

Flexible Self-Assessment Is The Best Means For Assessing Diversity

The self-assessment approach contemplated by the Proposed Standards is likely to be more effective than examination or other supervisory assessment in assessing diversity. Regulated entities themselves are in the best position to assess their own diversity policies and practices. Many larger regulated entities already have well considered diversity policies and a track record of implementing, applying and developing those policies in the real world. Regulated entities have vast experience addressing the day-to-day challenges of dealing with employee and supplier relations and complying with federal civil rights laws (such as Title VII of the Civil Rights Act of 1964

or Section 1981 of the Civil Rights Act of 1866) and analogous state and municipal laws. Regulated entities, in short, have considerable relevant expertise which makes them well-suited to develop, enhance and assess their own diversity policies and practices. To be effective, external assessment would require considerable expertise and depth of experience in these areas.

The flexibility afforded under the Proposed Standards is also more likely to be effective than a "one-size-fits-all" approach. The Agencies are correct to recognize that the goal of assessing diversity will be better advanced if regulated entities have sufficient autonomy to create diversity and inclusion policies tailored to their unique circumstances. Diversity policies and practices which may be effective in certain circumstances may be ineffective in others. Such flexibility enables banks serving in local communities an opportunity to tailor their policies and practices to fit their specific needs. This is especially important for community banks that operate in small, local or rural areas in which the relevant labor market may be less diverse in certain respects. A "one-size-fits-all" approach involving rigid benchmarks is likely to be counter-productive. The Associations believe that the flexibility afforded under the Proposed Standards will promote natural competition and creativity among the regulated entities as they seek to hire, develop and retain the greatest workforce and supplier pool and attract the broadest customer base. Thus, we firmly believe that the approach contemplated by the Proposed Standards will result in the most robust and meaningful response from the regulated entities possible, without curtailing the regulated entities' commercial freedom.

The Associations are aware that some commentators may suggest that a regime of examination or other supervisory assessment, mandatory disclosure, and/or more rigid benchmarks would be more effective and appropriate than the regime contemplated by the Proposed Standards. We respectfully disagree. For the reasons described above, we do not believe that such a regime would be more effective for achieving the goal of assessing diversity.

Even if such a regime were likely to be more effective (which it would not), we do not believe that such a regime would be an appropriate exercise of the Agencies' authority. We do not believe that the Agencies have statutory authority to impose any specific diversity requirements on regulated entities. The statutory mandate pursuant to which the Proposed Standards were promulgated, Section 342(b)(2)(C) of Dodd-Frank, authorizes the Agencies only to *develop standards* for assessing diversity and does not authorize the imposition of any requirements. To the contrary, as the Proposed Standards correctly note, Section 342(b)(4) states expressly that nothing in Section 342(b)(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*." (Emphasis added.)

Moreover, Sections 342(c)(2) and 342(f) of Dodd-Frank explicitly and appropriately recognize that diversity efforts must be undertaken in a manner "consistent

with applicable law," including federal, state and municipal antidiscrimination laws. Any regulatory regime which expressly, impliedly or effectively imposes specific quotas, benchmarks or requirements that benefit certain demographic groups to the possible detriment of others would be of uncertain legality under antidiscrimination laws.

In addition, given the breadth and diversity of communities and markets across the United States and the extensive effort that would be needed to create examination policies, it is debatable whether a system of examination could survive a cost-benefit analysis.

In sum, the Associations believe that the flexible self-assessment approach contemplated by the Proposed Standards will be effective and appropriate and that any alternative regime including examination or other supervisory assessment, mandatory disclosure, and/or more rigid benchmarks would be ineffective, inappropriate and potentially contrary to law.

Need to Avoid Duplicative Burdens

Many regulated entities are already required, pursuant to Executive Order 11246 and the implementing rules and regulations of the Secretary of Labor, to prepare detailed Affirmative Action Plans ("AAPs"). Such AAPs include extensive qualitative and quantitative assessment. In light of the Agencies' stated intent to avoid undue and duplicative burdens on regulated entities, we propose that where financial institutions are already preparing AAPs or other diversity assessments under Executive Order 11246 or other federal mandates, those Plans should be deemed to satisfy the goal of conducting a self-assessment. In making this proposal, however, we do *not* suggest that AAPs should be disclosed to the Agencies or made available publicly. Given their highly sensitive nature, and the fact that they could be prone to misuse, AAPs are generally kept strictly confidential.

Inappropriateness of Procurement and Business Practices – Supplier Diversity Standard

One element in the proposal is that regulated entities adopt policies for assessing supplier diversity. As proposed, regulated institutions would be required to incorporate a supplier diversity policy and assess its supplier diversity. While many entities already have such policies, we also believe that adopting such policies may be extremely burdensome for many other entities. This provision will be particularly difficult for community banks. Often, community banks operate in small, local, rural areas which lack diversity in certain respects. Frequently, these community banks contract with local service and product suppliers who are faced with the same limitations in the market area. If such community banks are encouraged to seek out businesses based on supplier diversity, they may move their business to regional or national suppliers, thus jeopardizing small local business.

Even though the Agencies themselves will be required to conduct such assessments, this expectation is based on the premise that the Agencies are expending public funds and policy precedents built around the apportionment of public funding expenditures; there is no similar foundation to compel private funds to be so allocated, and no such authority is supplied by Section 342(c) of Dodd-Frank. The Associations strongly recommend that this provision be eliminated in the final standards.

Need for Greater Protection for Disclosed Information

The Associations understand the Agencies' desire to encourage self-assessment by the regulated entities. However, for the reasons that follow, the Associations believe that such a goal is best achieved by respecting process confidentiality.

First, it is important for the Agencies to acknowledge that information can be taken out of context all too easily and misused. For example, each year when the Federal Financial Institutions Examination Council publishes data collected by lenders on race, gender and other factors to assess diversity lending practices, it must always issue a caveat that, "[t]he HMDA data alone cannot be used to determine whether a lender is complying with fair lending laws"[5] for this very reason.

Second, lack of adequate protections for confidentiality is a demonstrated disincentive for conducting self-assessments. In March 2003, the Board of Governors of the Federal Reserve, which then had authority for the rules under the Equal Credit Opportunity Act, added section 12 CFR 202.15, providing incentives for financial institutions to conduct voluntary self-testing to assess compliance programs with equal access to credit and to ensure there was no prohibited discrimination taking place. While the statutory amendment was intended to encourage self-testing, insufficient privilege protections for the data collected discouraged institutions from under-taking self-tests, leading to what is generally conceded to be an overall failure of intended policy. The absence of adequate protection for sensitive information in the current proposal has the serious potential for replicating the same unintended consequence, which would undermine the Agencies' goal.

Accordingly, a "model" assessment should not be conditioned on whether voluntary disclosure to the Agencies or the public occurs.

Independent of being considered a "model" assessment, to the extent that the Associations' members choose to voluntarily share assessment information, such disclosure must have adequate protection from broader disclosure. The Associations therefore propose that the final standards promulgated by the Agencies should explicitly provide a safe-harbor protecting self-assessments and data voluntarily submitted to the

[5] http://www.ffiec.gov/press/pr091813.htm

Agencies from disclosure to the public or other federal or state government entities, including as a result of requests made under the Freedom of Information Act ("FOIA").

While we agree with the Agencies that a self-assessment approach is more likely to obtain the Proposal's intended results, the need to incorporate explicit privacy protections into the final standards is even more critical here because the Agencies are not invoking their supervisory or examination powers. Voluntarily disclosed self-assessments arguably would not be protected from disclosure to the public pursuant to FOIA exemption 8. 5 U.S.C. § 552(b)(8) (involving bank examinations). Some of the data and information included in entities' self-assessments may fall within FOIA exemptions 4 ("trade secrets and commercial or financial information obtained from a person and privileged or confidential") and 6 ("personnel....files the disclosure of which would constitute a clearly unwarranted invasion of privacy"). 5 U.S.C. §§ 552(b)(4), (6).

The courts and Congress have historically recognized the need for privacy with respect to diversity and inclusion data submitted to regulatory agencies. For example, Employer Information Reports (EEO-1), which the Proposed Standards view as a "valuable model" for analysis and assessments of diversity efforts, generally are protected from public disclosure under the Freedom of Information Act. The Equal Employment Opportunity Commission ("EEOC") is prohibited by federal statute from making public the employment data included in EEO-1 reports and the EEOC FOIA Regulations limit the diversity and inclusion data that the EEOC can make public to aggregate compilations, prohibiting the disclosure of any data that could reveal the identity of an individual entity. 29 C.F.R. § 1610.18. Any self-assessment and/or supplemental diversity and inclusion data submitted by the regulated entities should be entitled to at least as much protection as EEO-1 reports.

The Associations urge the Agencies to further protect the materials voluntarily submitted by incorporating an anti-waiver provision into the final standards to ensure that privileged materials generated during an entity's self-assessment remain privileged and will not be shared beyond the Agency receiving the submission. Incorporating an anti-waiver provision similar to that found in 12 U.S.C. § 1828(x) will enhance the impact of the Proposed Standards by providing regulated entities the freedom to incorporate privileged materials in their submissions without risk of waiver.

Value of a Lead Agency

The Associations agree with the position taken by the Agencies in the Proposed Standards, where they state that "[l]egal responsibility [with respect to the standards] for insured depository institutions, credit unions, and depository institution holding companies shall be with the primary prudential regulator." However, the Proposed Standards do not specify whether self-assessments and other data are to be submitted voluntarily to multiple Agencies.

The Associations understand from roundtable discussions with the Agencies that their intent was to draft standards that would not create duplicative, unnecessary or overly taxing burdens on the regulated entities. To further this intent, we propose that each regulated entity should have the opportunity to designate a "lead Agency" or primary regulator to which the entity may submit diversity and inclusion data and which will be responsible for providing all guidance and answering all questions. Establishing a "lead Agency" will enable a regulated entity to make a single submission of its diversity and inclusion data, thus alleviating the need for duplicative filings. Establishing a "lead Agency" will also ensure that each individual entity understands what is expected of it in terms of conformance with the standards, and that such expectations are based on the consistent guidance of a single Agency.

Option for Consolidated Assessment

Many regulated entities are large, complex enterprises encompassing several different subsidiaries, affiliates or business units. Conducting self-assessments for each individual unit would, in many cases, be unnecessarily burdensome. We assume that any self-assessment may, at a regulated entity's discretion, be conducted at the consolidated group level. We propose that the final standards confirm this assumption.

Flexibility with Respect to Timing

The Proposed Standards do not specify a date by which self-assessments are to be completed or the frequency with which self-assessments should be conducted. We believe the absence of such specifics is appropriate in light of the Agencies' recognition that the goal of promoting diversity will be best served if regulated entities have flexibility to tailor the standards to their individual circumstances. A timetable which may be meaningful and useful for one regulated entity may be less so for other regulated entities.

If the Agencies are inclined to adopt more specific timetables in the final standards (which the Associations believe would be ill-advised), the Associations propose that it would be unrealistic to encourage entities to aim to conduct self-assessments any more frequently than once every two years. A shorter time period likely would be insufficient to enable entities to conduct meaningful data gathering and analysis, develop and implement improved diversity and inclusion policies and practices, or to make responsible, thoughtful plans for improvement.

In any event, any proposed assessment schedule should not begin until the first calendar year following promulgation of the final standards. This would give the regulated entities adequate time within which to plan for and allocate resources to conduct a self-assessment in conformance with the final standards. The assessment should, of course, be forward looking, not retroactive, to ensure that it is fairly based on the guidance in the final standards.

Need for Greater Clarity On International Issues

The Associations assume that the Proposed Standards are concerned with domestic workplaces and not offices or other facilities that regulated entities may maintain overseas. In our view, application to overseas workplaces would be unfeasible and beyond the mandate and intent of Section 342 of Dodd-Frank. We propose, therefore, that the final standards confirm that regulated entities may, at their discretion, exclude any assessment of overseas workplaces (though regulated entities may also, at their discretion, include overseas workplaces, for example, where excluding them would be administratively burdensome).

Conclusion

The Associations know that the Agencies conducted extensive due diligence prior to drafting the Proposed Standards. During this process, we appreciated the opportunity provided to the Associations and the many other industry groups, communities and consumer advocates to meet with the Agencies and discuss the challenges and opportunities created by Section 342 of Dodd-Frank. We believe that the Proposed Standards reflect this due diligence by incorporating an approach that will efficiently assess diversity and inclusion within the regulated entities, without creating an overly rigid, burdensome, and ultimately counter-productive regulatory scheme. In particular, we appreciate that the approach embodied in the Proposed Standards recognizes that the regulated entities must themselves have ownership of the goal of promoting diversity. We are confident that the entities will rise to this challenge.

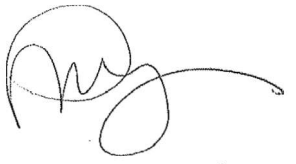
Thank you for the opportunity to comment on the Proposed Standards. If you have any questions, please feel free to contact Richard Foster at (202) 589-2424.

Respectfully submitted,

Richard Foster
Vice President & Senior Counsel for
Regulatory and Legal Affairs
Financial Services Roundtable

Steven I. Zeisel
Executive Vice President and
General Counsel
Consumer Bankers Association

Robert Rowe
Vice President & Senior Counsel
American Bankers Association



Lilly Thomas
Vice President & Regulatory Counsel
Independent Community Bankers of America