American Bankers Association

ICBA Independent Community Bankers of America®

February 7, 2014

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552
Docket No. CFPB-2013-0029

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Robert deV. Frierson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Docket No. OP-1465

Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
Mail Stop 9W-11
400 7th Street, SW
Washington, DC 20219
Docket ID OCC-2013-0014

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
File Number S7-08-13

Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies

Dear Sir or Madam:

On October 23, the Directors of the Offices of Minority and Women Inclusion of the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau (CFPB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), Office of the Comptroller of the Currency (OCC), and the Securities and Exchange Commission (SEC) (the Agencies) published for comment a proposal under section 342(b)(2)(C) of the Dodd-Frank Act.[1]

The undersigned Associations represent banks of all sizes, charters, and business models, including multi-nationals, public companies, closely-held corporations, minority and women-owned entities, employee-owned companies, and family-owned businesses, among others. Overall, they provide career opportunities for more than 2 million persons of diverse backgrounds who live in diverse communities across the country. The Associations' individual members comply with policies and practices that help them represent the diversity of the communities they serve and develop a workforce that reflects those community attributes.

[1]See, e.g., http://www.fdic.gov/news/news/press/2013/pr13092.html.

Overview

The Associations appreciate the opportunity to comment on the standards proposed by the Agencies to assist them in assessing the diversity policies and practices of the entities they regulate. We have been engaged with the Agencies as they developed the proposal and strongly encouraged them to undertake the outreach sessions which helped inform their work in developing the proposal. Accordingly, we welcome the Agencies' recognition that financial institutions come in many forms and serve communities that are greatly diverse. The Associations believe that it is important to look at each institution within the context of its own unique market area and customer base. This is especially important for community-based financial institutions. With the great breadth and variety of communities across the United States, it would be inappropriate to implement a one-size-fits-all approach. In fact, implementing a rigid one-size-fits-all expectation would do more harm than good. Maintaining flexibility in the proposal is critical to let individual institutions adapt to the unique and often changing nature of their own markets and geographical setting, similar to the performance context used for CRA evaluations.[2]

We also commend the Agencies' recognition that entities should have flexibility in order to tailor their diversity policies and practices to take into account the individual characteristics and circumstances of the institution itself.

Accordingly, 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 review. We also firmly believe that a voluntary self-assessment is better aligned with the limited statutory mandate conferred by Section 342 of the Dodd-Frank Act.

Building on this need to allow individual institutions to reflect the unique characteristics of their communities and organizations, the Associations strongly support the Agencies' proposal that they "will not use the examination or supervision process in connection with these proposed standards" and that, "[l]egal responsibility for insured depository institutions, credit unions, and depository institution holding companies shall be with the primary prudential regulator."

As detailed in the discussion that follows, the Associations recommend changes to improve the proposed standards. In that context, though, we object to proposed expectations for addressing contracting with third-parties and disclosure of assessment work product.

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[2]Performance context is defined by the CRA questions-and-answers as "a broad range of economic, demographic, and institution- and community-specific information that an examiner reviews to understand the context in which an institution's record of performance should be evaluated. See *Federal Register* volume 75, p. 11654, March 11, 2010.

Discussion

Statutory and Policy Support for a Self –Assessment Approach to Diversity

Section 342 of the Dodd-Frank Act requires each agency to establish an Office of Minority and Women Inclusion (OMWI) with a Director appointed to manage the function. The Director's responsibility is expressly limited by section 342(a)(1)(A) to "matters of the agency relating to diversity in management, employment and business activities." Section 342 provides the Director of OMWI with no authority to conduct or direct agency regulatory, supervisory, or enforcement matters. The primary focus of section 342 is to ensure that *the Agencies* incorporate diversity and inclusionary practices into their own staff and administrative practices. However, almost as an after-thought, section 342(b)(2)(C) of the statute assigns the Director an additional duty to develop standards for assessing the diversity policies and practices of entities regulated by the agency. The section makes no assignment of authority or responsibility for the Director or any other agency officer to conduct assessments based on the standards. In fact, this limitation is confirmed by the legislative history of the statute where language in the original House version of the Dodd-Frank Act, H.R. 4173 that would have required each Director to "conduct an assessment, *as part of the examination process*" was specifically deleted from the final version of the law.[3]

Significantly, as the Agencies' explicitly acknowledge, this assignment is further limited by Section 342(b)(4), 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 based on the findings of the assessment." In other words, the statute does not confer any authority to establish requirements, mandates, or specific actions. This language explicitly bars any enforcement or other mechanism that compels any action to be taken with respect to an assessment against the standards in connection with this section.

Given the bright line that separates the Director's limited duty with respect to regulated entities and the supervisory or enforcement processes, the Agencies have reached the conclusion to propose "standards for …assessing the diversity policies and practices of entities regulated by the agency" within the context of a self-assessment approach. The standards to be developed under 342(b)(2)(C) are fundamentally a resource for regulated entities to evaluate their diversity policies and practices.

The self-assessment approach is further buttressed by the Agencies' recognition of the variation in "the individual entities' circumstances (for example, asset size of the entity, number of employees, governance structure, income, number of members and/or

[3]The language in question was in the Dodd-Frank bill (HR4173RFS) referred to the Senate at section 1801(b)(2)(D), which stated that each OMWI Director shall…"conduct an assessment, as part of the examination process for the entities regulated or monitored by the agency of the diversity and inclusion efforts by such entities." Conference elimination of this language and substitution of the final language as recited in 342(b)(2)(C) is a clear expression of Congressional intent that diversity assessment standards not be part of agency examination processes. Consequently, the Agencies are precluded from adopting such an examination process for diversity.

customers, contract volume, geographic location, and community characteristics.)" Only a flexible set of self-assessment standards can accommodate the broad diversity of both the industry and the communities served. Such an approach is particularly important for addressing the Agencies' expressed concern about how best to take into account the circumstances of small regulated entities. The short answer to the Agencies' request for comment on this point is to maintain the self-assessment approach and standards that support the ability of individual institutions to tailor their diversity policies and practices to the context of their local communities.

For these reasons, the Associations strongly support the self-assessment approach based on standards that allow each institution the latitude necessary to address the challenges of their respective community circumstances.

Specific Comments on the Proposed Joint Standards

As proposed, the assessment standards cover four key areas:

1. Organizational commitment to diversity and inclusion
2. Workforce profile and employment practices
3. Procurement and business practices and supplier diversity
4. Practices to promote transparency of organizational diversity and inclusion

We agree with the preface to the proposed Joint Standards that these standards may be tailored to take into consideration an individual entity's size and other characteristics. Each of the assessment standard categories underscores this flexibility by repeating the instruction to apply a proposed standard, "in a manner reflective of the individual entity's size and other characteristics."

While the Associations support the Agencies' endorsement of this necessary flexibility, we object to the proposal that the standards for individual institutions should address procurement or "supplier diversity" or include performance measures and other specific assessments of work product in transparency of practices.

Organizational Commitment to Diversity and Inclusion

The first step in the proposed standards is intended to assess an entity's commitment to diversity. According to the proposal, leadership demonstrates the organization's commitment. This demonstration comes from the board, senior officials, and those who manage the day-to-day operations of the company. It is proposed that this commitment is evident in the corporate culture which embraces diversity and inclusion.

The Associations believe that having an institutional commitment to diversity is a valid component that can be assessed using the standards proposed. Each entity, though, should be allowed to demonstrate that commitment in its own diverse way. It should not be axiomatic that an institution has extensive and formalized policies and procedures or related structural rigidities. For community banks, that would be counter-productive

since most community institutions are closely tied to the communities and it is better to apply efforts to accomplishing outreach rather than creating a compliance paper trail.

That said, the proposal has outlined certain elements that appropriately may be considered. As long as these standards are applied in a manner reflective of the bank's characteristics, the Associations support their use in this connection, with one exception. As explained in more detail in connection with procurement and "supplier diversity," it is not appropriate to include contracting practices in the commitment or the strategic planning process around that commitment.

However, an important feature that should be encompassed by the standards in this category is support for the concept that it is appropriate for an individual institution to articulate the scope of diversity as it relates to its particular circumstances. We believe this is an integral part of establishing a diversity policy and a keystone to crafting effective practices to achieve the entity's diversity commitment.

Workforce Profile and Employment Practices

This component of the proposed Joint Standards recognizes that there is a wide range of methods for pursuing and measures for evaluating an institution's diversity and inclusion policies.

Included within the standards for entities that already file or prepare them are both annual EEO-1 Reports and Affirmative Action Plans under Executive Order 11246.The Associations support the Agencies' recognition that these established reports are valid components of diversity assessment standards for banks covered by the requirements. The Associations also agree that these existing assessments are tools that can meet the standards without further elaboration, as long as nothing compromises their established confidentiality.

However, the suggestion by the Agencies that entities not already subject to such reporting requirements should model their evaluations against such forms is not well-founded. It expands a legal requirement to entities that have been exempted from the requirements for sound public policy reasons and suggests a creep of regulatory standards to entities for which the forms are not intended nor developed.

Standards on management accountability and diverse applicant pools for internal and external opportunities can be appropriate. As with the other standards, though, suggestions about what diverse applicant pools should include must be tailored to the concept of diversity articulated in the overall policy for the unique attributes of an institution and its community. However, when measuring diversity accomplishments, we believe that the standard should be that an institution uses appropriate "means" for evaluating diversity instead of recommending "metrics" since "metrics" suggests a level of analytical rigor that does not match the circumstances of most community banks and implies a mandate outside the authority conferred by the statute.

Procurement and Business Practices – Supplier Diversity

The Associations firmly believe that this component that attempts to address procurement and supplier diversity is outside the parameters of the statutory authority. First, there is a fundamental difference between compelling *government agencies* to use public funds to promote diversity through procurement as a legislative imperative and compelling private entities to spend their own funds for a public purpose, especially when private entities are expected to be color-blind in their business dealings. There is no indication in Section 342(b)(2)(C) that Congress meant to override this distinction between the expenditures of public and private funds. While the Agencies may be compelled to take such steps as public entities, the statute does not apply the same expectations to the private sector.

Second, at a time when the Agencies are stressing responsible third-party risk management and have issued detailed supervisory guidance on the subject, it is revealing that not one supervisory statement identifies business contractor diversity as a valid component for conducting third party risk management or due diligence. For the OMWI Directors to do otherwise is to contravene the prohibition in 342(b)(4) not "to mandate any requirement on or otherwise affect the lending policies and practices of any regulated entity." This statutory admonition is designed, among other purposes, to preserve the separation between institutional safety and soundness and the diversity assessment standards. Procurement requirements have proven to be problematic to administer, and it would be unwise to introduce similar risks of fraud and abuse[4] into the banking regulatory environment.

Third, in many communities, the ability of an institution to identify a supplier or vendor that meets these standards is non-existent, and the ability of smaller institutions even to begin to make this assessment is both costly and unproductive. For many banks in many communities, outreach to predominantly minority or women-owned businesses means reaching outside the community they serve and denying business opportunities to capable local employers. This in turn effectively undermines the economic base of their local communities. In other instances, such as retaining core processors, community banks are limited to a handful of national providers over whom they have no leverage.

Fourth, as the Agencies recognize, but too readily discount, there is limited information available to evaluate a contractor diversity standard. Contractors do not have badges that display their diversity status. Indeed a contractor that promotes diversity can be a contractor that has no one minority or gender based-identity.

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[4] For example, earlier this year, the City of Chicago Inspector General found the process rife with fraud: http://chicagoinspectorgeneral.org/major-initiatives/mwbe-oversight/. Similar problems have been found in Seattle (http://www.king5.com/news/investigators/Official-steps-down-after-fraud-exposed-in-WAs-minority-contracting-program-150853055.html), Philadelphia (http://www.newsworks.org/index.php/local/off-mic/54473-cracking-a-minority-contracting-scam-corbett-still-in-trouble), New York (http://www.ac-lawyers.com/news/2010/12/06/new-york-contractor-fined-20-million-for-violation-of-minority-and-women-business-enterprise-practices) and other cities.

For the above reasons, the suggestion that this component of the Joint Standards should also evaluate the regulated entity's efforts to reach a contractor's subcontractor is beyond the proper implementation of 342(b)(2)(C) and the policy of flexible assessment standards. Accordingly, we strongly recommend that the standards on procurement and supplier diversity be deleted from the final Joint Standards.

Practices to Promote Transparency of Organizational Diversity and Inclusion

Finally, the Joint Standards propose that the objectives of a company's diversity and inclusion program should be transparent, asserting that transparency and publicity can be an important aspect of assessing diversity policies and practices. The Associations, though, see a limited role for transparency. To be properly effective, transparency must clearly distinguish between naturally public actions undertaken in conducting outreach to the local community and the internal evaluation and assessment work product that is a naturally confidential component of performance measurement and accountability to the entities' governance structure. For many years, government authorities have clearly recognized the need to encourage frank and thorough evaluation of internal operations and therefore protect that analysis from complete transparency. The sound public policy is that, without this protection of confidentiality, institutions would be ill-advised to conduct the necessary analysis.

Institutions that pursue diversity and inclusion are engaged with their communities in ways that communicate by words and actions their openness to the full range of diverse backgrounds that their communities provide and from which they seek to recruit and develop their workforce and to whom they market their products and services. Factors that capture the institution's activity of this type are appropriate for inclusion in the Joint Standards. These, for example, may include but not compel items such as presenting general information about its diversity efforts through its website and other annual communications about its diversity and inclusion strategic plan, evaluating the visibility of its community recruitment efforts, gauging the degree of its participation in endeavors sponsored with or by cultural representatives in the community that build its reputation as an attractive employer and engaged member of the community, and the availability of mentoring and developmental programs for employees as well as the community at large or different population segments as a resource to improve employment skills.

For many community banks, the success of their diversity efforts derives from a long-term investment in and involvement with their local communities. These community banks want to be identified as a place where the aspiring youth of the community who wore the bank-sponsored Little League uniform, took financial skills courses taught by bank employees, or received a bank-funded college scholarship return to begin a management trainee position at the bank. For larger banks the story is not much different—it just has more pages.

However, as elaborated more in the next section of this comment letter, transparency about the institution's self-assessment process, its results or performance data is not an appropriate part of the Joint Standards.

Comments on the Proposed Approach to Assessment

The fundamental nature of self-assessments is their frankness which can only succeed if they are protected and reinforced by confidentiality. Whether they are done as part of a fair lending risk assessment or other type of risk assessment, they are not generated to be public documents. Instead they are intended to be evaluations for the internal deliberations of management and the board of directors in gauging the performance of responsible staff and the bank overall. The goal is to encourage candid evaluations; for example, to encourage such assessments under the Equal Credit Opportunity Act as implemented by Regulation B, the rules protect the confidentiality of the evaluation.[5] To fulfill this governmental purpose, these self-assessments deserve and receive confidential treatment. The diversity self-assessments these proposed standards hope to encourage deserve no less, and the same treatment should be accorded to diversity self-assessments. This confidentiality is particularly critical for diversity assessments that reflect on sensitive human resources activity. This public policy need is explicitly recognized in connection with EEO-1 reports and similar documentation. There is no demonstrated rationale to depart from these long-standing public policy standards.

At the same time, there is no authority—express or implied—conferred by section 342 which the Directors can use to compel an institution's public disclosure of its assessment results. Unlike the public evaluation expressly required by the Community Reinvestment Act, Congress authorized no similar requirement in connection with workforce diversity under section 342(b)(2)(C). Furthermore section 342(b)(4) leaves no doubt that the assessment standards contemplated are not to be used to compel any specific action. This prohibition is stated in a passive voice that encompasses not only direct agency enforcement action, but also any mechanism—such as mobilization of public criticism—that disclosure of a self-assessment might invite. Similarly, the proposal's suggestion that "model" assessments should include voluntary disclosure to the Agencies of an institution's self-assessment or any other related performance information steps beyond the authority afforded in the law will erode incentives for conducting such self-assessments.

In summary, the policy trade-offs represented by the legislative language contained in section 342 rely on a process of having non-supervisory agency Directors develop standards for assessing diversity policies and practices, that regulated entities can voluntarily use as a common resource to self-evaluate diversity performance within the confidential governance process of their institutions. The Associations believe such standards will be a useful reference to our members whose boards and senior management can apply them to their own circumstances, as appropriate. However, a "model assessment" based on such standards should not entail either voluntary disclosure to an agency or public posting of the assessment efforts.

[5] 12 CFR 1002.15

Conclusion

The Associations commend the Agencies for their efforts to tackle this challenging assignment. We look forward to continuing to work with the Agencies in the evolutionary process that supports diversity efforts. At the same time, we believe it is critically important to recognize the great diversity of communities and financial institutions across the United States where trying to establish any kind of uniform approach clearly would be counter-productive.

To succeed, we believe it is important to recognize that any one-size-fits-all model would be extremely burdensome to many community financial institutions and would be another burden that serves to the detriment of community banks and, in turn, the communities they serve. We encourage the Agencies to be mindful that all banks are integral parts of their local communities and, as such, reflect the make-up of their communities appropriately whether their retail footprints are national, regional, state-wide, or simply a part of a political subdivision, whether they are urban, suburban, or rural.

Sincerely,

American Bankers Association
Independent Community Bankers of America

Alabama Bankers Association
Arkansas Community Bankers Association
Alaska Bankers Association
Arizona Bankers Association
Arkansas Bankers Association
Asociacion de Bancos de Puerto Rico
Bluegrass Bankers Association
California Bankers Association
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Colorado Bankers Association
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