



February 7, 2014

Via www.regulations.gov

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

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 (File Number S7-08-13).

Dear Ms. Murphy,

The Society for Human Resource Management (“SHRM”) is pleased to submit these comments in response to the proposed interagency policy statement establishing joint standards for assessing diversity policies and practices (hereinafter “joint standards”), 78 Fed. Reg. 64052, *et seq.* (Oct. 25, 2013).

Founded in 1948, SHRM is the world’s largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

SHRM has a dedicated department of Diversity & Inclusion (“D&I”) that creates educational materials for HR professionals including webcasts, training, articles, toolkits, and other information. SHRM’s Diversity & Inclusion Conference and Exposition, held annually in October, provides training to D&I professionals and HR professionals on topics related to diversity including sessions on the business case for D&I, how to develop a D&I strategy that is aligned with an organization’s business objectives and how to create a globally inclusive and culturally competent workplace.

D&I is also a priority within SHRM’s volunteer structure. It is one of seven areas SHRM has determined critical – or core – to the success of achieving its mission to advance the profession and serve the professional. SHRM strongly encourages the

inclusion of volunteer leadership roles on chapter boards and state councils for each of the Core Leadership Areas, including Diversity & Inclusion. SHRM also maintains a D&I Special Expertise Panel made up of volunteer HR professional members who have a special interest and expertise in D&I issues and advise the organization.

SHRM strongly supports efforts to encourage diversity and inclusion in the workplace. Following a thorough review of the joint standards and consultation with HR professionals, we have concluded that the proposed joint standards to implement section 342(b)(2)(C) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, could actually be counterproductive to current diversity and inclusion efforts and, as written, could improperly expose regulated entities to legal liability. Our concerns are set forth in greater detail below.

I. The Final Rule Should Make Clear the Limited Scope and Purpose of the Proposed Joint Standards.

A. Outcomes are specifically excluded by the statute’s rule of construction.

Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 requires the establishment of an Office of Minority and Women Inclusion within 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 the Securities and Exchange Commission (hereinafter “agency” or “agencies”). Section 342 also enumerates the requirements of the Offices of Minority and Women Inclusion and their Directors. Relevant to this rulemaking, the Act requires that:

(2) DUTIES.--Each Director shall develop standards for—

- (A) equal employment opportunity and the racial, ethnic, and gender diversity of the workforce and senior management of the agency;
- (B) increased participation of minority-owned and women-owned businesses in the programs and contracts of the agency, including standards for coordinating technical assistance to such businesses; and
- (C) assessing the diversity policies and practices of entities regulated by the agency.¹

The statute does not mandate how the assessment referenced in (C) above will be done, but it specifically rules out the imposition of any type of sanction related to the contents of what an organization may produce as a part of such assessment. It is clear

¹ Public Law 111-203, 124 Stat. 1376, 1541 (July 11, 2010) codified as 12 U.S.C. 5452.

from the language of the statute that it only contemplates use as an educational and informational tool by the regulated entities, not as an enforcement tool for the agencies. The joint proposed standards must be consistent with this statutory intent.

Further, in its rule of construction, Section 342 makes clear that “nothing in paragraph (2) (C) may be construed...to require any specific action based on the findings of the assessment.”² At the outset, we appreciate the careful balance the agencies attempt to create when proposing non-mandatory joint standards for D&I policies and practices. The proposed joint standards, however, are unclear on this point. While the proposed joint standards state that “the Agencies will not use the examination or supervision process in connection with these proposed standards,”³ the proposal also states that “Voluntary disclosure to the appropriate Agency of the self-assessment and other information the entity deems relevant. The Agencies will monitor the information submitted over time for use as a resource in carrying out their diversity and inclusion responsibilities.”⁴

The joint standards should, therefore, specifically and clearly state that the assessments are voluntary and regulated entities are not required to include specific elements or attain specific numerical outcomes.

B. Diversity and inclusion policies and practices are separate and distinct from an organization’s nondiscrimination and equal employment opportunity compliance.

Several federal laws prohibit employment discrimination and HR professionals work within these laws on a daily basis including, but not limited to:

- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin;
- the Equal Pay Act of 1963 (EPA), protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
- the Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older;
- the Americans with Disabilities Act of 1990, as amended (ADA), prohibits employment discrimination against qualified individuals with disabilities;
- the Rehabilitation Act of 1973 requires federal agencies and federal contractors to take affirmative action and prohibits discrimination against qualified individuals with disabilities;

² Ibid. at 12 U.S.C. 5452(b)(4).

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 Federal Register 107 (25 October 2013), pp. 64052.

⁴ Ibid.

- the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employment discrimination based on genetic information about an applicant, employee, or former employee;
- the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) requires federal contractors to take affirmative action and prohibit discrimination against covered veterans; and
- Executive Order 11246 requires federal contractors to take affirmative action and prohibits employment discrimination based on race, color, religion, sex, or national origin.

These laws focus on fairness and nondiscrimination in employment decisions, and most employers have written policies in place that address the organization's commitment to non-discrimination in the areas covered by these statutes. It is important to note that these statutes do not require non-federal contractor employers to have written policies addressing compliance in these EEO areas, nor do they require an organization to have an even-broader D&I policy, which usually address issues and diversity characteristics far beyond those covered by law. Indeed, as current literature reveals, "the diversity discipline has evolved well beyond equal employment opportunity and affirmative action compliance. Diversity and inclusion are aimed at realizing competitive advantage and business opportunity."⁵ No mandate exists under federal or state law requiring an employer to have a D&I policy, nor does Section 342. If that had been Congressional intent, they would have added it to the statutory language of Dodd-Frank. Employers voluntarily establish D&I policies for a variety of reasons, chief among them is the desire to attract the best talent to contribute to the organization and build a globally-competitive workforce. Other benefits cited by employers with a focused diversity effort include enhanced problem-solving efficiency, building synergy in teams, and increased creativity and problem-solving. Whatever the reasons, a well-designed D&I policy will align directly with the organization's key business objectives.

The presumption of the proposed joint standards, as currently drafted, is that an organization is doing something wrong if it does not have a D&I policy. The Agencies' goal, however, should not be to create standards to ensure the "best system," but to create a way for organizations to self-assess and voluntarily put in place systems that will help them increase diversity in a way that makes sense according to their business objectives.

SHRM supports voluntary D&I because organizations get tremendous value from building a diverse, inclusive workplace in several areas, chief among them are those benefits mentioned above. In fact, through relationships with both the American National Standards Institute (ANSI) and the International Organization of Standardization (ISO), HR professionals and SHRM members are involved in the establishment of professional HR standards focused on proposed D&I metrics, D&I programs, and proposed minimum effective skill, knowledge and abilities of an organization's top diversity and/or inclusion professional. SHRM believes these standards should be voluntary and not mandated and

⁵ Peter Bye, "Introduction to the Human Resources Discipline of Diversity," *Society for Human Resource Management*, 27 February 2012, <http://www.shrm.org/diversity> (accessed 7 February 2014).

serve as a guide for organizations to adopt D&I programs. Making initiatives voluntary and less prescriptive will result in the participation of employers of all sizes and in all industries.

SHRM recommends that the Agencies clarify that, in accordance with the statute, the purpose of these regulations are to educate and encourage the regulated entities to adopt D&I programs, and that employers will not be denied contracts, participation in programs or denied any other benefits flowing from the federal Agencies because they do not have a diversity policy or initiative.

II. The Proposed Self-assessment Approach of the Joint Standards is Within Reach Only of Larger Organizations.

The proposed rule lays out The Joint Standards in Section II and a Proposed Approach to Assessment in Section III. The Joint Standards in Section II identify four factors that may be included in an assessment of diversity policies and practices:

- 1) Organizational Commitment to Diversity and Inclusion;
- 2) Workforce Profile and Employment Practices;
- 3) Procurement and Business Practices—Supplier Diversity; and
- 4) Practices to Promote Transparency of Organizational Diversity and Inclusion.

Following each factor, the proposal lists several standards by which an organization will be assessed, as defined by the proposal, in its efforts toward the factors.

The vast majority of the listed factors are the type adopted by employers with sophisticated, or at least burgeoning, D&I programs. The proposal includes language that attempting to provide some flexibility with the caveat that “An assessment...may include the factors listed below. These standards may be tailored to take into consideration an individual entity’s size and other characteristics (for example, total assets, number of employees, governance structure, revenue, number of members and/or customers, contract volume, geographic location, and community characteristics).”⁶ Even with this caveat, smaller organizations will be at a disadvantage when measuring themselves against these standards.

The Agencies express throughout the proposed joint standards a recognition that smaller entities may struggle to meet the standards as proposed. This concern is well-placed. SHRM has surveyed its membership periodically through the years on whether they have D&I goals and what strategies they use to pursue those goals. In 2010, more than two-thirds, or 68 percent, of organizations reported having practices in place that address workplace diversity, down from 76 percent in 2005. Larger organizations, those

⁶ 78 Federal Register 64055.

with 2,500 or more employees, were more likely to address workplace diversity.⁷ The same is true for specific strategies. For example, larger companies are more likely to have internal groups that focus on diversity, are more likely to have staff dedicated exclusively to diversity, and are more likely to have a method for measuring the impact of diversity practices. Smaller entities have less ability to dedicate staff, time and resources to goal-setting, data collection and reporting.

Some of the proposed standards will be particularly hard for smaller entities to achieve. For example, only 12 percent of entities currently have a Chief Diversity Officer assigned to diversity responsibilities, only 15 percent of all organizations have staff exclusively dedicated to diversity efforts, and only 17 percent of organizations have internal groups that focus on diversity.⁸ In fact, small organizations may not have a board of directors, a website, or other factors listed in the joint standards.

Although the rule, as written, infers flexibility, the fact that specific factors are listed under each of the four prongs of the joint standards makes the rule read as though the listed factors are necessary elements of a successful diversity program. The rule should clearly state that the joint standards are offered as recommendations, not requirements, and that there is no one approach an organization should take to achieve a diverse workforce.

III. The Public Transparency Requirements May Be Counterproductive and Expose Regulated Entities to Possible Legal Liability.

A. The statutory language does not encompass public disclosure.

Dodd-Frank Section 342 (2) (C) requires the development of standards for assessing the diversity policies and practices of entities regulated by the agency. The proposed joint standards make the assertions that “The Agencies believe that the term “assessment” encompasses many different types of assessments including self-assessment and provides an opportunity for the Agencies and the public to understand the diversity policies and practices of regulated entities.”⁹

Nothing in the statutory language supports the Agencies’ conclusion that assessment should include a public assessment component. Congress tasked the Agencies to create standards for assessment. A reasonable interpretation of the language is that the standards should be for the Agencies to assess the policies and practices of the regulated entities. As a matter of logic, the regulated entities themselves will need to engage in a self-assessment as they work through the identified standards. Expanding the interpretation of the language to include an assessment by the public goes too far.

⁷ Society for Human Resource Management, “Workplace Diversity Practices: How Has Diversity and Inclusion Changed Over Time? SHRM Poll,” *SHRM*, 11 October 2010, <http://www.shrm.org/surveys>.

⁸ Society for Human Resource Management, “SHRM 2013 Workplace Diversity Practices Survey,” *SHRM*, 2014 (forthcoming).

⁹ 78 Federal Register 64054.

B. Public transparency as defined by standards and “model assessment” may be counterproductive.

Every D&I and HR professional will tell you that honest self-assessments are critical to progress in the area of diversity and inclusion. The proposed joint standards include, in the section titled “Practices to Promote Transparency of Organizational Diversity and Inclusion,” that “an entity’s diversity and inclusion program should be transparent.” The standards suggest “making the following information available to the public annually through its public Web site or other appropriate communication methods:

- Its diversity and inclusion strategic plan;
- Its commitment to diversity and inclusion; and
- Its progress toward achieving diversity and inclusion in its workforce and procurement activities, which may include its:
 - Current workforce and supplier demographic profiles;
 - Current employment and procurement opportunities;
 - Forecasts of potential employment and procurement opportunities; and
 - The availability and use of mentorship and developmental programs for employees and contractors.”

The model assessment language goes further suggesting that “the entity display information on its public web site and in its annual reports, and in other materials, regarding its efforts to comply with these proposed standards as an opportunity for more public awareness and understanding of its diversity policies and practices.”¹⁰

Currently, many organizations proudly display their voluntary achievements in D&I. According to SHRM’s diversity survey, the most important diversity practice outcome was improved public image of the organization.¹¹ However, organizations need time to work through their plans to develop success before they determine whether and when to make their progress public. D&I experts recognize that adoption of diversity policies requires change management and that “each organization has a maximum rate at which it can process cultural change. This depends in part on the organization’s cultural competence and the magnitude of the gap between current situation and the diversity initiative’s objectives.”¹²

Under current law, organizations are not required to make their EEO-1 reports or Affirmative Action plans public. In fact, the Equal Employment Opportunity Commission (EEOC) is prohibited by federal statute from making public the employment data derived from any of its compliance surveys. In the context of these reports, the federal government has recognized that publicizing the information does not benefit the

¹⁰ Ibid. at 64056.

¹¹ Society for Human Resource Management, “Workplace Diversity Practices: How Has Diversity and Inclusion Changed Over Time? SHRM Poll,” *SHRM*, 11 October 2010, <http://www.shrm.org/surveys>.

¹² Ibid.

regulators or the regulated community. An organization may do everything they can but still experience challenges in achieving the numerical goals. This can be difficult to explain to the public.

In addition, most organizations would view many of the above-bulleted items as confidential, proprietary business information, akin to a marketing strategic plan or data regarding customer demographic profiles. Many organizations have policies in place which prohibit the disclosure of such proprietary and trade secret information, as doing so could seriously compromise their competitive strength. If organizations would be required to publicly disclose its strategic plans or self-analyses of its progress in this area, many employers may well opt not to engage in these activities at all.

The requirements of transparency and making an organization's progress toward its goals public are not supported by statute and are, in fact, counter-productive to an honest self-assessment. As a result, SHRM recommends eliminating public disclosure in the final rule.

C. Disclosure of metrics is not appropriate in the context of D&I and may improperly expose regulated entities to legal liability.

The proposed rule discusses metrics in the joint standards and points to both the EEO-1 and Affirmative Action plan requirements of the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) as “valuable models for data analysis to evaluate and assess diversity efforts.”¹³ Encouraging entities not subject to the EEOC and OFCCP reporting requirements to use them as models for data analysis is problematic.

First, as mentioned above, the proposed rule does not define “diversity” but suggests that it can be measured using EEO-1 reports. Modern concepts of diversity, however, have evolved beyond nondiscrimination and a focus on protected classes. Nearly all modern definitions of diversity include, at a minimum and in addition to race, ethnicity and gender, members of the Lesbian, Bisexual, Gay and Transgender (LBGT) community and individuals with disabilities. Some organizations employ a broader definition depending on their business model—mix of generations, learning styles, etc. This broader diversity is not reflected in the EEOC or OFCCP reporting requirements because those reporting tools are not designed to measure diversity and inclusion.

The existing reporting tools are designed to measure numerical thresholds which are based on historic underrepresentation of protected classes in a particular geographic area or industry. Yet there is no standardized measure for when an employer has reached a “diverse workforce.” For purposes of Section 342, a better means to foster D&I programs is the adoption of policies and programs that foster inclusion throughout the organization such as training, linkage agreements and outreach.

Second, it is not clear what the Agencies will do with the information disclosed by the regulated organizations. The joint standards state that the “Agencies will monitor

¹³ 78 Federal Register 64055.

the information submitted over time for use as a resource in carrying out their diversity and inclusion responsibilities.” Agency monitoring implies ongoing oversight. The data disclosed would not only be available to the Agencies that are part of this rulemaking, but also to private plaintiffs’ attorneys and to other agencies with oversight responsibility for various nondiscrimination statutes such as the EEOC and OFCCP.

For these reasons, the joint standards should make clear that any voluntary disclosure to an Agency will not be utilized in any enforcement action by *any* agency.

CONCLUSION

SHRM appreciates the opportunity to submit these comments and would be pleased to provide the Agencies with additional information or clarification. We look forward to continuing to partner with the Agencies to effectuate the promulgation of regulations that will be reasonable, enforceable and effective regulations that will aid in the encouragement of voluntary diversity and inclusion programs in all organizations.

Respectfully Submitted,



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