



**VIA E-MAIL TRANSMISSION**  
**regcomments@ncua.gov**

February 6, 2014

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

***Re: Comments on Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Regulated Entities***

Dear Mr. Poliquin:

The Illinois Credit Union League ("ICUL") on behalf of its 315 member credit unions, submits this response to the Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies ("Standards"). Each request for information will be addressed in turn.

**Question: Are the proposed joint standards effective and appropriate to promote diversity and inclusion? Why or why not? If not, what standards would be appropriate and why? How would such standards support or hinder the objectives of section 342?**

**Answer:** By statute, the agencies are delegated with the arduous task of establishing an Office of Minority and Women Inclusion ("OMWI") to assess the employment and business diversity policies of the entities they regulate. 12 U.S.C.A §5452(b)(2)(C). Underlying this assumption is that credit unions have diversity policies. Not all credit unions are required to have diversity policies; their obligations vary based upon size.

Historically, the responsibility to adopt diversity or affirmative action plans arose to address statistical workforce imbalances. Executive Order 11246 ("Order") expanded these obligations to federal contractors with 100 or more employees and required them to take affirmative steps to ensure applicants and employees are not discriminated against based upon prohibited categories, such as race, sex, religion and national origin. 41 C.F.R. §60-1.40(a). Affirmative action plans were designed to temporarily increase the employment of qualified individuals in protected categories.

Credit unions with 100 hundred or more employees are required to file EEO-1 reports. The filing of an EEO-1 does not impose affirmative action responsibilities. Credit unions with 15 or more employees are subject to Title VII of the Civil Rights Act ("Title VII"). 42 U.S.C.A. §2000e-2(a)(2). Title VII promotes equal, not preferential treatment. Credit unions subject to Title VII are required to have equal employment opportunity policies, not affirmative hiring policies.

The regulations interpreting Title VII identify limited circumstances when voluntary affirmative action plans may be adopted - to address disparate impact on employment practices, effects of prior discriminatory practices and underrepresented labor pools because of historical restrictions. 29 C.F.R. §1608.3. Employers who voluntarily adopt affirmative action plans must conduct a self-analysis of current employment practices, have a reasonable basis for concluding the action is appropriate and take appropriate action based upon numerical goals and timetables for advancement. 29 C.F.R. §1608.4. Title VII affirmative action plans are designed to address previous wrongs.

Conversely, the Standards are drafted to address to ensure workplace diversity, for the sake of diversity. This policy is known as "Diversity Spotlight Rationale" in which employers voluntarily adopt policies to create a diverse work force to compete in the global economy. Corey A. Ciocchetti, John Holcomb, *The Frontier of Affirmative Action: Employment Preferences & Diversity in the Private Workplace*, 12 Uni.Pa. J. Bus.L. 283 (2010). In 2013, companies such as Verizon Communications, CSX, Bank of America, Horizon Blue Cross Blue Shield, New Jersey, Accenture, Colgate-Palmolive, American Airlines, GE and Kraft Foods voluntarily adopted diversity policies and were rated in the top **50 Out Front Companies for Diverse and Women Managers to Work**. Notably, these companies are large, some Fortune 500 companies in urban areas. They have the resources and employees to voluntarily adopt affirmative action plans.

Most credit unions have equal employment policies. Credit unions support recruiting qualified employees and Board members with diverse backgrounds. In fact, in Illinois, 164 of the 315 member credit unions are managed by women. The Standards suggest credit unions voluntarily adopt "diversity and inclusion policies". Diversity and inclusion are undefined; they are goals but there is no direction on how they should be achieved. The Standards promote a "self-assessment utilizing the proposed standards to conduct a quantitative and qualitative evaluation of the diversity and inclusion policies". 78 Fed.Register No. 207, 64052, 64056 (October 25, 2013). The terms, "quantitative and qualitative" similarly are undefined and are not very instructive.

Without direction, the Standards are ineffective and contrary to the United States Supreme Court holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Grutter*, the Court held minority-based preferences must be narrowly defined, as policies designed to ensure representation of specified ethnic groups are patently unconstitutional. *Grutter*, 539 U.S. at 329-330. As instructed by the Court, diversity policies may be based upon "minority-based plus factors" if all candidates have the same qualification standards and are subject to the following:

a quota system may not be used - a flexible policy must be used to ensure each applicant is evaluated in a way race or ethnicity is not the defining feature. Applicants should be placed on the same footing for consideration although not necessarily according to the same weight;

substantial weight is given to factors other than minority-based considerations;

decisions must not unduly burden others who are not in favored ethnic groups; and

policies must be limited in time.

Similarly, proponents of the Diversity Spotlight Rationale suggest a diversity policy should contain the following components:

a limited timeframe, designed to attain rather than maintain a diverse workforce;

Individualized consideration of applicants and employees; and

race plus factors must not unnecessarily trammel the rights of non-minority employees and applicants.

Drafting a diversity policy is not simple. It must be narrowly defined, limited in duration and not be quota based. At a minimum, the Standards should incorporate these characteristics to provide credit union direction. Like other regulations, the agencies should draft a model diversity and inclusion policy.

If a diversity policy is not appropriately drafted and implemented, it may have a disparate impact on a protected group, establish quotas and subject a credit union to liability. If, for example, 4 out of 15 employees are women, is this an imbalance? What is the correct statistical model for employment of women and individuals in protected categories? What are the quantitative and qualitative requirements? Are women required to represent 50%, 60% or 100% of the workforce? Are women to be hired solely because they are women? What about qualifications? What about other individuals in protected categories? If the imbalance may be attributable to past employment practices- how does the credit union remedy this? If there is a hiring freeze, how does a credit union remedy imbalances? Is a credit union expected to fire existing employees? Diversity should be an employment decision making tool, not an exclusionary tool to favor one protected class over another.

**Question: Are the proposed joint standards sufficiently flexible but still effective to allow meaningful assessments of entities with a wide range of particular characteristics or circumstances (for example, asset size; number of employees; contract volume; income**

**stream; and number of members and/or customers)? Are there other ways to approach the standards for smaller entities, such as those with small contracting dollar volumes or those not required to file EEO-1 reports? What other approaches or characteristics would be appropriate for any such alternative, modified or scaled approach? How would such modification or scaling support or hinder the objectives of section 342?**

*Answer:* We appreciate a flexible, entity specific approach to diversity, rather than a one-size fits all approach. As proposed, the Standards are not sufficiently flexible as there is no permissive language. The Standards articulate what an entity is expected to have, rather what it "may" have based upon its size. Credit unions which file EEO-1 reports have equal employment policies as required by Title VII. These responsibilities should be considered diversity policies and the extra responsibilities set forth in the Standards should not be imposed on smaller credit unions as they have neither the resources nor employees to implement the proposed diversity model.

The Standards identify four factors to be included in a model diversity policy. Our concerns with the factors are as follows:

**Factor 1: Organizational commitment to diversity and inclusion:** The Standards propose a written diversity policy, approved by the Board of Directors and senior management who are regularly updated and trained on diversity efforts. Management is held accountable for diversity efforts. A Chief Diversity Officer or senior officer should be hired, with diversity dedicated resources. Diversity efforts should be made in the community for minority based hiring opportunities as well as attendance at minority-based conferences.

This requirement is cost prohibitive for credit unions with fewer than 100 employees. Based upon credit unions surveyed in Illinois, the costs to implement a diversity policy is the following:

\$5,000 to hire contractor to draft initial diversity policy language;

\$2376 to draft statistical portion of policy;

80 hours of human resource staff to implement the plan;

\$20,000 annual to maintain and update plan;

10 hours per week to track applicant data; and

16 hours annual to prepare mandated reports.

Unless required to implement an affirmative action plan, credit unions should not be required to implement a diversity plan with these elements. It is cost prohibitive and labor intensive. A credit union should not be required to hire a Diversity Officer. A credit union should be permitted to rely on their in-house human resource professionals or contractors. It is

unreasonable to place the burden on the Board of Directors to be responsible for implementing and enforcing diversity policies. Credit union directors are volunteers; credit union managers are delegated with employment responsibilities. To superimpose credit union directors into employment decision-makers is counter-intuitive and subjects them to possible litigation, when no such responsibility should exist. If these standards are imposed, the NCUA should revise its Board of Director responsibilities.

Further, to hold managers accountable for diversity and inclusion efforts is contrary to employment-related liability, which is fault based. Managers may not have control over hiring or recruiting- this typically may be done by Human Resources or senior management. How can managers be held responsible for diversity efforts prior to the Standards are implemented or subsequent to, if they have no hiring responsibilities?

**Factor 2: Workforce Profile and Employment Practices.** This Factor requires regulated entities to periodically analyze workforce demographics and identify areas where increased diversity and inclusion efforts may be warranted. In furtherance of this end, credit unions should review the EEO-1 reports, if applicable, and use “metrics” as an analytical tool.

These tools are not always instructive. If a credit union files an EEO-1, it identifies the number of employees in protected categories. From these numbers, it is unclear how a credit union can identify workforce imbalances and “successes”. It is similarly unclear how a credit union can use “metrics” which are undefined. These responsibilities are labor intensive and ill-suited for credit unions with limited staff and resources.

**Factor 3: Procurement and Business Practices - Supplier Diversity.** This Factor establishes that regulated entities must contract with women and minority-owned businesses, publish a supplier diversity policy; track the percentage and money spent on minority-owned businesses. Like the employment requirements, credit unions will be expected to conduct outreach efforts to ensure minority-owned business are utilized.

This factor similarly is labor intensive. Many of the businesses with which credit unions contract are unwilling to share their statistical work force composition. It is considered proprietary. Businesses fear litigation. Many will not have diversity obligations and are not subject to the Standards. It may be difficult to determine which businesses are minority-owned. If this becomes a component, credit unions will be forced to work only with larger businesses, like those identified as the *Out Front Companies for Diverse and Women Managers* - to the detriment of smaller businesses which are not required nor can afford to participate in diversity policies as proposed in the Standards.

Credit unions have existing due diligence vendor requirements, *see* NCUA Supervisory Letter 07-01 (October 2007). This Letter directs credit unions to conduct risk assessment, due diligence and risk measurement, monitoring and controls for third party vendor relationships. The Standards now impose additional responsibilities. It is becoming increasingly difficult to conduct business without a compliance taskforce. Nevertheless, if these requirements are adopted, the NCUA should issue a revised supervisory letter incorporating these responsibilities.

**Factor 4: Practices To Promote Transparency of Organizational Diversity and Inclusion.** Finally, the Standards suggest that regulated entities voluntarily disclose their diversity policies and strategic plans on their website and to the NCUA. The suggested information includes annually publishing the diversity and inclusion strategic plan and progress towards achieving diversity and inclusion in its employment and business practices. The latter includes employee and business demographics, forecasts and mentoring opportunities.

Collecting data and making forecasts involve financial resources and labor. The NCUA will monitor the diversity and inclusion responsibilities. The publication and reporting responsibilities are not even imposed on credit unions with affirmative action responsibilities. This requirement jeopardizes privileged and confidential self-evaluations; strategic plans contain confidential business information. At most, credit unions could be asked to publish its diversity statement. They should not be required to post demographical data and strategic plans. Credit unions should be allowed to elect whether to publish its diversity policies and strategic plans on its website. The information and data constitute confidential business information. What is labelled "voluntary" is quite to the contrary.

**Question: What other factors, if any, would be useful in assessing the diversity policies and practices of the regulated entities, and why should such factors be considered? How would such factors support or hinder the objectives of section 342?**

*Answer:* Perhaps the most useful factor in assessing diversity policies is for the NCUA to identify which credit unions should implement a diversity policy. Those who have affirmative action responsibilities should so comply. Credit unions which file EEO-1 should have equal employment opportunity policies. They should not have to adopt voluntary policies, which essentially are involuntary and are affirmative action responsibilities.

**Question: Is the proposed model approach to assessment effective and appropriate to promote diversity and inclusion? Why or why not? If not, what approach would be appropriate and why? How would such approach support or hinder the objectives of Section 342?**

*Answer:* As stated above, the model approach does not define diversity and has the potential to protect one group over another, if not implemented appropriately. Without limits or definition, the Standards promote quotas, where there has been no legal finding of an imbalance and contrary to *Grutter*.

If the model approach is adopted, the NCUA should consider incorporating the following in the Final Rule:

a safe harbor for credit unions which voluntarily comply with the Standards as the policy may have a disparate impact on one protected group over another or cause reverse discrimination;

a statement that a credit union may elect to adopt a diversity policy;

a statement that Compliance with the affirmative action responsibilities under 41 C.F.R. §60-1.40(a) is deemed compliant with the Standards; and

a statement that the purpose of the Standards is to promote individualized consideration of vendors, applicants, employees and Board members. There should be no quotas or set asides. Diversity of employees should be one of many factors involved in employment-related decision making; and.

a statement that the NCUA may not require any specific action based on findings made about a credit union's diversity and inclusion policies.

**Question: Would there be potential advantages or disadvantages of the proposed model approach to assessment? If so, what would they be?**

**Answer:** See response to Questions above. The disadvantage to the proposed model is that there is no way for credit unions to elect which elements of the model it may choose, if at all. The Standards as drafted contain an "all or nothing" proposition. They have the potential to promote quotas and do not provide direction on how "diversity or inclusion" can be achieved. The diversity efforts may have a disparate impact on other protected categories, exposing the credit union to liability under Title VII or the ADA. These Standards should not be used a tool to impose affirmative action responsibilities on credit unions, if they are not required to do so under 41 C.F.R. §60-1.40(a). Diversity obligations are not synonymous with affirmative action responsibilities. By requiring diversity policies, the agencies metamorphose voluntary diversity polices into statutorily mandated preference based affirmative action plans which no longer are voluntary, are cost prohibitive and provide no structure or basis for minority- based hiring.

We appreciate the opportunity to respond to the proposed rule.

Very truly yours,

ILLINOIS CREDIT UNION LEAGUE

By: Lynn W. Esp  
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