

Client Update

Financial Regulators Issue Final Standards for Assessing Diversity and Inclusion Policies and Practices of Regulated Entities

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Last week, six financial regulatory agencies published a final interagency policy statement establishing joint standards for assessing the diversity and inclusion policies and practices of regulated entities (the “Policy Statement”), pursuant to a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). The Policy Statement went into effect on June 10, 2015. The issuing agencies are the Office of the Comptroller of the Currency (“OCC”), Board of Governors of the Federal Reserve System (“Board”), Federal Deposit Insurance Corporation (“FDIC”), National Credit Union Administration (“NCUA”), Bureau of Consumer Financial Protection (“CFPB”) and the Securities and Exchange Commission (“SEC”) (collectively, the “Agencies”). The policy is applicable to all entities regulated by these Agencies, including publicly traded companies, banks and investment companies, and registered investment advisors (including private equity and hedge fund advisors).

The Policy Statement is largely consistent with the proposed policy issued for public comment in October 2013, which we reported on in our [Client Update in November 2013](#)), with a few modifications and clarifications addressed below.

BACKGROUND

The Policy Statement was issued pursuant to Section 342 of Dodd-Frank, which created an Office of Minority and Women Inclusion (“OMWI”) within each of the Agencies to monitor and promote diversity and inclusion within the Agencies themselves and the entities they regulate. Section 342(b)(2)(C) required each Agency’s OMWI Director to develop standards for “assessing the diversity policies and practices of entities regulated by the agency.” On October 25, 2013, the Agencies published a proposed policy for public comment. Hundreds of comments were submitted. The final Policy Statement reflects the

Agencies' efforts to address concerns or requests for clarification made by commenters about the proposed policy.

OVERVIEW OF THE FINAL POLICY STATEMENT

As with the proposed policy, the final Policy Statement contemplates a regime under which regulated entities may conduct a "self-assessment" of their diversity policies and practices, may choose voluntarily whether to use the standards set forth in the Policy Statement in conducting such self-assessment and may choose voluntarily what information from such self-assessment, if any, to disclose. The final Policy Statement, like the proposed policy, clearly indicates that the voluntary self-assessment regime contemplated is not a part of the Agencies' examination or supervisory processes and that it is not intended to create new legal obligations.

In response to publication of the proposed policy, many commenters representing regulated entities had applauded the self-assessment and voluntary disclosure approach embodied in the proposed standards, arguing that the Agencies lacked statutory authority to impose more concrete standards, to mandate disclosure or to incorporate assessment of diversity and inclusion policies into the Agencies' examination or other supervisory processes. On the other hand, some commenters representing the civil rights community argued for more specific requirements, use of examination or other supervisory processes, and mandatory disclosure.

Like the proposed policy, the final Policy Statement focuses on voluntary self-assessment of the diversity and inclusion practices of regulated entities in four primary areas: (i) organizational commitment to diversity and inclusion; (ii) workforce profile and employment practices; (iii) procurement and business practices; and (iv) practices to promote transparency of organizational diversity and inclusion.

ADDITIONS TO THE PROPOSED POLICY

While the final Policy Statement largely tracks the proposed policy, it includes additional language clarifying certain provisions, including the following:

- **Definition of Diversity:** The final Policy Statement defines diversity to include minorities, as defined in Section 342(g)(3) of Dodd-Frank (Black Americans, Native Americans, Hispanic Americans and Asian Americans), as well as women. That said, it does not preclude entities from using a broader definition of diversity in effectuating the policy.

- **Applicability to Small Entities:** The final Policy Statement reiterates that it is intended to be tailored to the unique needs of different organizations, and adds that, in creating the Policy Statement, the Agencies were focused on organizations with more than 100 employees.
- **Extraterritorial Application:** Recognizing a concern raised by larger entities, the final Policy Statement limits its intended applicability to an entity's U.S. operations.
- **Metrics:** Many commenters raised concerns about the use of metrics envisioned by the proposed policy. The final Policy Statement retains the reference to metrics and the usefulness of data from EEO-1 Reports and Affirmative Action Plan reporting, but clarifies that other analytical tools may also be useful, emphasizing the importance of both quantitative and qualitative measurements.
- **Frequency and Structure of Assessment and Reporting:** The Agencies added guidance on the frequency of reporting, stating in the final Policy Statement that a self-assessment should be performed annually, with ongoing monitoring. The final Policy Statement also clarifies that an entity may choose to share its self-assessment with the OMWI Director of the entity's primary federal financial regulator, rather than submitting to every relevant Agency.
- **Privacy:** The Agencies recognized that many commenters raised valid concerns about the privacy of diversity and inclusion information voluntarily disclosed. The final Policy Statement states that entities submitting information may designate it as confidential commercial information in accordance with provisions of the Freedom of Information Act.

REQUEST FOR COMMENTS

Along with the final Policy Statement, the Agencies published a notice in the Federal Register concerning the potential burden of the information gathering envisioned by the Policy Statement. The Agencies estimated that the burden on regulated entities would amount to approximately 12 hours annually. The Agencies solicited comments on the collection of information, including: whether it was necessary; the estimated burden; ways to enhance the quality, utility and clarity of information proposed to be collected; and the estimated costs of providing that information. Those wishing to may submit comments to the Agencies by August 10, 2015.

NEXT STEPS

Now that the final Policy Statement has gone into effect, regulated entities should take a close look at their current diversity and inclusion policies and practices and determine what additional steps, if any, may be appropriate in light of the final Policy Statement.

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Please do not hesitate to contact us with any questions.