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November 27, 2013

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
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Mail Stop 9W-11
400 7th Street SW
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Mr. Robert deV. Frierson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Ms. Monica Jackson
Office of the Executive Secretary
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Re: Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies
OCC Docket ID OCC-2013-0014
Federal Reserve Docket No. OP-1465
Bureau of Consumer Financial Protection Docket No. CFPB-2013-0029

Ladies and Gentlemen:

The following comments are submitted on behalf of the Independent Bankers Association of Texas ("IBAT"). IBAT is a trade association representing approximately 450 independent, community banks domiciled in Texas. We appreciate the opportunity to comment on this proposal. IBAT's members range from rather small banks with total assets of less than $100 million located in a single market to large institutions with total assets of over $15 billion. Similarly, total employees may range from as few as six to thousands in multiple branches. Many if not most of its members are not subject to the Executive Order requiring affirmative action plans. Others have very sophisticated recruiting and retention programs in place. In short, there is a tremendous diversity among community banks in Texas and in our membership.

On October 23, 2013, the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Consumer Financial Protection Bureau, and the Securities and Exchange Commission ("SEC") (collectively, the "Agencies") proposed joint standards for assessing the diversity policies and practices of each agency's respective regulated entities ("Proposal"). The Proposal implements Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which requires each agency to establish an Office of Minority and Women Inclusion and directs each to develop diversity assessment standards for all of the entities under the Agencies' jurisdiction.

The Agencies' Proposal proposes uniform standards in the following four areas: (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.

Generally, IBAT strongly supports a flexible approach to this area, taking into consideration the significant diversity identified in our opening observations, and strongly opposes adding elements to bank examination for review of bank diversity practices. Our more specific comments follow.

A. *Self-Assessment Plan*

We agree with the Agencies' view that self-assessment, coupled with voluntary disclosure, will be a more effective and appropriate methodology for promoting diversity than would traditional examination or other supervisory assessment. We strongly disagree with any suggestion that the Proposed Standards should have included traditional examination, mandatory disclosure and/or a more rigid, cookie cutter approach. Such a suggested approach would, in our view, not only exceed the Agencies' legal authority, but also would be counter-productive to the goal of promoting diversity.

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. As community based institutions, IBAT members are active and visible in their markets and should be able to devise a diversity strategy that is effective and appropriate for their specific area and needs. In Texas, those markets vary from small rural communities to the largest cities in the United States. There are towns on the Texas/Mexico border with populations of almost 100% Hispanic national origin. There are metropolitan areas with significant Asian communities and everything in-between.

According to the Proposal's release, the Agencies seek comment on how and by what means will the Agencies determine whether an institution has adopted standards and engaged in assessments that meet the requirements of the Proposal. This question appears to pre-suppose that the Agencies should utilize their examination authority in connection with the diversity assessment. However, IBAT believes that such a process would <u>not</u> be an appropriate exercise of the Agencies' authority and would actually exceed their authority granted to them under Section 342(b)(2)(C) of the Dodd-Frank Act. That section merely authorizes the Agencies to develop standards for assessing diversity. It does not authorize the <u>imposition</u> of *any* requirements. To the contrary, as the Proposal correctly notes, 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."

Furthermore, we believe that the self-assessment and voluntary disclosure process suggested by the Proposal is much more likely to be more effective than examination or other supervisory assessment in promoting diversity. As noted above, community banks are far better positioned than financial regulators to assess the entities' own diversity policies and practices. All financial institutions must have policies and procedures in place to assure compliance with federal civil rights laws, including fair lending statutes and an array of employment laws. Financial institutions, thus, have considerable relevant expertise which makes them well-suited to develop, enhance and

assess their own diversity policies and practices. By contrast, the Agencies, though they have expertise in the areas of financial regulation, have no particular experience or expertise with regard to employment law other than as an employer.

Any regulatory process which expressly, impliedly or effectively imposes specific quotas, benchmarks or requirements that benefit certain demographic groups to the possible detriment of others would also be of questionable legality under the civil rights laws. The Proposal's standards are more effective and appropriate than any alternative system that imposed examination or other supervisory assessments, mandatory disclosures, or more rigid benchmarks.

B. *Procurement and Business Practices—Supplier Diversity*

In order to meet the marketplace's expectations with regard to products and services, all community banks rely on third party vendors. In addition, every institution needs the services of an array of servicers and suppliers—whether it is for janitorial service or data processing, the purchase of office supplies or replacement of computers. Third-party vendor due diligence and oversight is already a significant regulatory issue for most community banks as they struggle to compete and thrive and to satisfy the current regulatory expectations in this arena.

Accordingly, we are greatly concerned with the proposed requirement that financial institutions develop methods to assess and evaluate their supplier diversity policy, including the utilization of metrics, and that they implement practices and policies to promote diversity among suppliers, such as outreach to diverse contractors and representative organizations, participation in conferences and other events to attract firms owned by minorities and women and to inform them of contracting opportunities, and ongoing publication of procurement opportunities. Community banks are already stretched to the maximum just to keep up with financial regulatory changes and to attend the necessary conferences to achieve their mandated compliance objectives! Most IBAT members do not have the financial resources and time to develop internal systems to assess and evaluate suppliers and vendors. In fact, access to such programs and diverse personnel is doubtful since many community banks are located in smaller cities or more rural areas.

Furthermore, most IBAT members do *not* have sophisticated information technology systems, comprehensively maintained, to obtain the data required to assess and evaluate suppliers, including the use of metrics. Thus, they may be required to retain outside, third-party service providers to perform the analysis, which will further increase already high compliance costs. Then who evaluates these providers? In short, the Proposal's supplier diversity requirements will impose additional staffing and operational costs on the already over-burdened U.S. banking industry. IBAT members already have strong programs that do their best to promote diversity so that they can attract customers and assure compliance with the spirit as well as the letter of fair lending laws. These banks simply do not have the large scale to spread high compliance costs over a broad base. As a result, these additional compliance costs will fall more disproportionately on community institutions.

The residential mortgage lending rules required by the Dodd-Frank Act have already required the banking industry to either invest significant resources into compliance with an increasingly complex regulatory scheme or to exit this product. For example, the Loan Originator rules (layered on top of the SAFE Mortgage Act requirements) are forcing banks to restructure their compensation program and to require new training and qualification regimes. There is significant competition for experienced mortgage lenders. One solution to this regulatory dilemma is a shift to outside vendors. The vendor diversity rules would simply add one more layer to an overwhelming burden.

Currently, banks already face stringent expectations with regard to their vendor due diligence programs to assure that critical safety and soundness issues are addressed—including safeguarding of customer records and regular oversight of core service providers. Adding reviews of a vendor's employment policies, along with analysis of the

vendor's "metrics," would significantly add to the cost of vendor management programs at the very time that IBAT members are increasingly dependent on such vendors for core activities.

At most, we recommend that the Agencies simply require that a financial institution have a supplier diversity policy that provides minority-owned and women-owned businesses with a fair opportunity to compete in the procurement of business and services. Requiring a community bank to develop methods to assess and evaluate its supplier diversity policy, including the utilization of metrics, is truly not practical. As noted above, suppliers include major data processors and online banking support services, computer vendors (such as Dell), forms companies such as LaserPro and Wolters Kluwer, as well as the local office supply store. It is simply not rational to expect the local bank to demand data from the behemoths that provide services to it and then to analyze such metrics.

In addition, we do not believe that the Agencies have statutory authority to require more than essentially requiring each bank to have a policy as described above. Section 342(b)(2)(C) of the Dodd-Frank Act merely requires each Agency to develop standards for "assessing policies and practices of entities regulated by the agency." It does *not* grant the Agencies statutory authority to require a financial institution to develop methods to assess and evaluate its supplier diversity policy, including the utilization of metrics, nor mandate outreach activities to contractors.

Requiring banks to utilize contractors that are minority-owned and women-owned businesses exceeds the authority granted the Agencies under the Dodd-Frank Act. While such a requirement is often used in government contracting, the imposition of this proposal on community banks engaged in providing financial products and services to private individuals and businesses is completely outside the bounds of the underlying law.

C. *Need for Greater Protection for Disclosed Information*

Confidentiality is the keystone of banking, and confidentiality for the information to be gathered under this proposal is absolutely critical. The Agencies' goal "to promote transparency and awareness of diversity policies and practices" should be balanced with the banks' competing need to protect sensitive information disclosed to the Agencies. The best way to achieve this balance is to provide adequate protection for this data from broader disclosure. Without such protection, many financial institutions may be reluctant to conduct a truly rigorous self-assessment and/or to voluntarily disclose the self-assessment. Thus, the final standards promulgated by the Agencies should explicitly provide a safe-harbor protecting self-assessments and data voluntarily submitted to the 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").

The need to incorporate explicit privacy protections into the final standards is particularly critical because the Agencies are not invoking their supervisory or examination powers. Thus, the voluntarily disclosed self-assessments arguably would not be protected from disclosure to the public pursuant to FOIA exemption 8.[1] 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").[2] However, this should be made very clear so that FOIA requests can be appropriately answered.

We would suggest that a possible paradigm is the treatment of EEO-1 reports, which the Proposal's standards view as a "valuable model" for analysis and assessments of diversity efforts. These are protected from public disclosure. 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

[1] 5 U.S.C. § 552(b)(8) (involving bank examinations).
[2] 5 U.S.C. §§ 552(b)(4), (6).

the identity of an individual entity.[3] 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.

To further protect the materials voluntarily submitted to the Agencies, there should be an anti-waiver provision in 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 further the goal of transparency by providing regulated entities the freedom to incorporate privileged materials in their submissions without risk of waiver.

D. *Submission of Self-Assessments to One Federal Prudential Regulator*

The Proposal states 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 Proposal does not specify whether self-assessments and other data are to be submitted voluntarily to multiple Agencies.

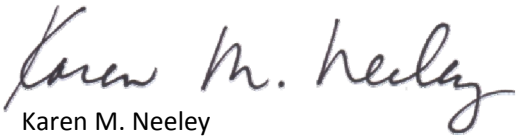
We believe the final standards should clarify that each financial institution will have one "lead Agency" to which the entity may submit diversity and inclusion data. Establishing a "lead Agency" will enable a regulated entity to make a single submission of its diversity and inclusion data, thus alleviating the need for duplicative, unnecessary or overly taxing 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.

E. *Timing of Self-Assessments*

The Proposal does 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 final standards should encourage entities to aim to conduct self-assessments every two years. A two-year assessment period would allow regulated entities to conduct meaningful data gathering and analysis, and develop and implement improved diversity and inclusion policies and practices. A shorter time period likely would be insufficient to enable entities to evaluate meaningfully the state of their diversity policies or to make responsible, thoughtful plans for improvement. A shorter time period would also impose a greater regulatory burden on community banks, which are already staggering under the burden of complying with ever-increasing regulations implementing the Dodd-Frank Act. Finally, we believe the assessment schedule should begin in the first calendar year following promulgation of the final standards, and not be retroactive, to ensure that it is fairly based on the guidance in the final standards.

Thank you for your consideration.

Respectfully,



Karen M. Neeley
General Counsel

[3] 29 C.F.R. § 1610.18.