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December 20, 2013

Via email: rule-comments@sec.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 (SEC Release No. 34-70731; File No. S7-08-13)

Dear Ms. Murphy:

The U.S. Chamber of Commerce (Chamber) is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region. Chamber members include a large number of financial sector companies that will be subject to the regulations implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (hereinafter "the Act," or "the statute").

The Chamber strongly supports a diverse workforce and encourages the use of employer policies and practices which increase opportunities for protected classes and minorities in *all* workplaces, including the financial sector.¹ While section 342 of the statute addresses an important goal, the Chamber has some specific concerns

¹ See, e.g., *Leading Practices on Disability Inclusion* (highlighting strategies for businesses to use to create a more inclusive workplace, marketplace and supply chain with respect to individuals with disabilities; available at: http://www.uschamber.com/sites/default/files/reports/020709_DisabilityInclusion_final.pdf); *Center for Women in Business: Advancing Women to the Top* (examining the best practices of 12 Fortune 1000 companies for promoting and developing women at the board, C-suite, and management levels; available at: <http://cwb.uschamber.com/sites/default/files/cwb-report-awot.pdf>); *2013 Guide to Hiring Veterans* (a collaborative effort of Hiring our Heroes, the U.S. Department of Veteran Affairs and the U.S. Department of Labor designed to provide employers with the resources they need to recruit and retain veterans, transitioning service members, and military spouses; available at: <http://www.uschamber.com/hiringourheroes/guide>).

relating to *how* the section is being implemented through regulations or agency guidance materials.² Most recently, six federal agencies – including the SEC – issued proposed joint standards (“joint standards”) to implement section 342(b)(2)(C) of the Act and “provide guidance to the regulated entities and the public for assessing the diversity policies and practices of regulated entities.” The Chamber’s comments on the proposed joint standards are set forth below.

The Proposed Joint Standards Should Advance a Clearly Defined Goal

Regulations promulgated under Executive Order 11246 already require federal contractors to set goals to remedy “underrepresentation” among minorities and women. *See* 41 C.F.R. §§ 60-2.1-60-2.35 and 60-4.1 to 60-4.9. Recently finalized amendments to regulations which implement Section 503 of the Rehabilitation Act and Section 4212 of the Vietnam Era Veterans Readjustment Assistance Act contain similar requirements for individuals with disabilities and protected veterans, respectively.³ Of course, these regulations are in addition to other federal mandates on employers – such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act and the Age Discrimination in Employment Act – which seek to eliminate workplace discrimination and remove barriers to employment for protected classes.

The compliance burden of these requirements on employers is significant, but their goals of affirmative action and anti-discrimination are clearly discernible. Unfortunately, the “goal” of the joint standards is less clear. The goal does not appear to combat discrimination and, if it were, it would likely be beyond section 342’s statutory authority. Similarly, any affirmative action component to the joint standards would be outside its express statutory authority.

To restate, the word “diversity” – arguably the foundation upon which the joint standards rest – is used 69 times in the 24 pages of the joint standards, but is never defined. For the Chamber and our members, “diversity” is often defined to include a myriad of represented groups,⁴ and is not just limited to “minorities and women” as may be implied by section 342. So while the joint standards implore regulated entities to track and evaluate data to “assess workforce diversity,” they are

² *See* U.S. Chamber comments re: Contract Clause on Minority and Women Inclusion in Contractor Workforce; RIN 1505-AC40, October 22, 2012; available at: <http://www.uschamber.com/sites/default/files/comments/USCC%20comments%20on%20Treasury%20contracting%20language%20for%20Dodd-Frank%20OMWI.pdf>.

³ Available at <https://www.federalregister.gov/articles/2013/09/24/2013-21228/affirmative-action-and-nondiscrimination-obligations-of-contractors-and-subcontractors-regarding>, and <https://www.federalregister.gov/articles/2013/09/24/2013-21227/affirmative-action-and-nondiscrimination-obligations-of-contractors-and-subcontractors-regarding>

⁴ *See* footnote 1, *supra*.

vague as to what, exactly, should be measured given the amorphous nature of what “diversity” means.⁵

Without more specificity, the joint standards are of little utility to regulated entities. Worse, the joint standards are legally hazardous, as they could potentially undermine the fine balance struck by the federal requirements described above. In an otherwise good-faith effort to utilize the joint standards and meet certain standards or metrics relating to “diversity,” regulated entities may inadvertently run afoul of federal workplace requirements by, for example, engaging in “reverse” discrimination. Therefore, because the joint standards are intended to “provide guidance” to regulated entities, the final standards should contain well-defined goals and parameters – consistent with federal law – to assist employers in any voluntary self-assessments they may perform.

The Proposed Joint Standards Should Accurately Reflect the Statutory Prohibition on Mandated “Diversity”

The joint standards and the self-assessments which they contemplate are intended to be entirely voluntary. Section 342(b)(4) of the statute prohibits any such standards from being “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.” Additionally, in remarks accompanying the release of the proposed joint standards, Commissioner Aguilar correctly noted the voluntary nature of the joint standards:

The Proposed Policy Statement provides an approach that relies on *voluntary* self-assessments by regulated entities, *voluntary* disclosure of these self-assessments to the SEC and other regulators, and *voluntary* display of diversity information on public websites. Under this completely volitional approach, companies would not be required to take any specific proactive steps to enhance diversity in their workforce.⁶ (emphasis in original).

The joint standards should be expressly clear that Commissioner Aguilar’s statement is an agreed upon interpretation of the joint standards by the agencies adopting them. However, the proposed factors are drafted prescriptively, rather than as suggestions or recommendations. For instance, a regulated entity could easily misunderstand the following factors, proposed in the joint standards, as being required:

⁵ Similarly, the proposed standards assume an appropriate level of diversity and “inclusion” yet inclusion is also not defined.

⁶ See Commissioner Luis A. Aguilar, “Statement on the Proposed Interagency Policy Statement to Establish Standards to Assess the Diversity Policies and Practices of Regulated Entities,” U.S. Securities and Exchange Commission, Washington, D.C., October 23, 2013 (available at: http://www.sec.gov/News/Speech/Detail/Speech/1370540026835#_edn12).

- The entity conducts equal employment opportunity and diversity and inclusion education and training on a regular and periodic basis.
- The entity utilizes metrics to evaluate and assess workforce diversity and inclusion efforts, such as recruitment, applicant tracking, hiring, promotions, separations (voluntary and involuntary), career development support, coaching, executive seminars and retention across all levels and occupations of the organization including executive and managerial ranks.
- The entity holds management accountable for diversity and inclusion efforts.

Furthermore, the joint standards encourage regulated entities to include information on their websites and in other public materials concerning their “efforts to comply with these standards” (emphasis added). Given the prescriptive nature of the language described above, as well as this instruction that indicates that some level of compliance is expected, the substantive text of the joint standards seems to incorrectly contemplate at least some obligation on the part of regulated entities.⁷ This is in direct conflict with both the statutory language of section 342(b)(4) and Chairman Aguilar’s comments. Therefore, these provisions should be amended.

Instead, the final joint standards should: (1) contain a clear statement that assessments are strictly voluntary, pursuant to the statutory mandate; and (2) be drafted in a manner consistent with such a statement (i.e., as recommendations rather than requirements).

The Proposed Assessment Process Subjects Regulated Entities to Potential Legal Liability

Confusion as to the voluntary nature of the standards is surely compounded by the terms used to describe the “Proposed Approach to the Assessment.” This section appears to explain the manner in which Office of Minority and Women Inclusion (OMWI) Directors will assess and evaluate “the diversity policies and practices of entities regulated by the agency.” *See* § 342(b)(2)(C). The joint standards state that such an assessment will not be “one of a traditional examination” but instead rely on employers to conduct self-assessments.

The Chamber has noted certain specific concerns with the self-assessments as described in the joint standards below. First, the standards encourage regulated entities to voluntarily disclose their self-assessments to the SEC. As such assessments are presumably intended to measure hiring/retention data and other sensitive information, it is likely that they may contain proprietary, privileged or confidential

⁷ Moreover, though these standards are voluntary, companies will make efforts to follow them, so their substance must be carefully considered.

information. Making this type of material available to the public could expose employers to potential legal liability and expose trade secrets to competing entities.

Second, what will agencies do with the information provided by the companies who self-disclose? The joint standards state that that “[t]he Agencies will monitor the information submitted over time for use as a resource in carrying out their diversity and inclusion responsibilities.” The notion that the SEC will “monitor” this information goes beyond the statutory mandate. This is particularly worrisome given other subsections of section 342, which include procedures for terminating a contract where a contracting entity fails “to make good faith effort[s] to include minorities and women in [its] workforce.” *See* § 342(C)(3)(a).

Section 342 also permits an OMWI Director to take action that may lead to a referral to the Office of Federal Contract Compliance Programs (OFCCP), which has the ability to debar federal contractors. *See* § 342(C)(3)(a)(ii). What steps will the SEC take to ensure that any information gleaned from “monitoring” voluntary diversity assessments will not be used in any enforcement proceedings or the contract reward process? The proposed joint standards should make clear any “voluntarily” disclosed information will not be utilized in any enforcement action by any agency of the government.

The Proposed Standards Should Consider Modern Supply Chain Realities

The third assessment factor of the joint standards is entitled, “Procurement and Business Practices – Supplier Diversity.” At the outset, we must question whether section 342 even provides the statutory authority to suggest that a company “evaluate and assess its supplier diversity.” By including this assessment factor, the joint standards attempt to reach down the supply chain to companies who may not even be regulated entities. Therefore, this assessment factor should be eliminated.

Alternatively, even if section 342 permits such supply chain “evaluation,” the joint standards woefully mischaracterize how supply chains work. According to the standards, a regulated entity is expected to undertake the following evaluations:

The entity has methods to evaluate and assess its supplier diversity, which may include metrics and analytics related to: [a]nnual contract spending by the entity; [p]ercentage spent with minority-owned and women-owned business contractors by race, ethnicity, and gender; [p]ercentage of contracts with minority-owned and women-owned business sub-contracts; and [d]emographics of the workforce for contractors and subcontractors.

This is a completely unrealistic and outdated view of how companies operate within supply chains. Supply chains are not linear or static, but are perhaps more accurately described as “webs” which are constantly evolving and impossible to map. So while most regulated entities have diversity policies with regard to their suppliers,

many are unlikely to have the ability to analyze, for example, the workforce demographics of a subcontractor further down the supply chain. To be sure, many contractors will not even be able to *identify* such subcontractors. Therefore, in providing guidance to employers regarding their procurement practices, the final joint standards should take into account the practical realities of how modern companies obtain goods and services in a global economy. Additional, unrealistic burdens on covered entities need to be avoided.

Conclusion

While the Chamber applauds efforts to promote workplace diversity for all employees, such policies need to be thoughtfully evaluated within a complex web of federal statutes, regulations, and court holdings. Practical consideration in assembling, evaluating, and revealing information need to be taken into account. Furthermore, the voluntary nature of the joint standards needs to be made clear to avoid confusion.

We welcome the opportunity to provide feedback and look forward to continued discussion of practical and legal issues implicated by the proposed joint standards.

Sincerely,



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Amanda Eversole
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cc: Robert deV. Frierson
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Robert E. Feldman
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