Proskauer

Joint Standards Proposed for Assessing Diversity Policies and Practices of Dodd-Frank Covered Entities

November 5, 2013

Last month the six federal agencies[1] ("Agencies") that are subject to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank" or "the Act") released jointly proposed standards for assessing the diversity policies and practices of the entities they regulate. The standards were published in the Federal Register on October 25, 2013 and there is a 60-day period for public comment, which ends on December 24, 2013. The Agencies request that comments be submitted only once – to one of the Agencies, not duplicate comments to multiple Agencies.

Background

Section 342 of Dodd-Frank requires each agency subject to the Act to establish an Office of Minority and Women Inclusion ("OMWI") to be responsible for, among other things, assessing the diversity policies and practices of entities regulated by the agency. See Dodd-Frank Section 342(b)(2)(C). These entities include financial institutions, investment banking firms, mortgage banking firms, asset management firms, brokers, dealers, financial services entities, underwriters, accountants, investment consultants, and providers of legal services. See Dodd-Frank Section 342(d). For entities that are performing services under a contract or subcontract with a covered agency, OMWI must consider the employment diversity of the entity as well as provide for increased participation of minority- and women-owned businesses in awarding contracts. For more background on Section 342 of Dodd-Frank, see Proskauer's July 27, 2010 client alert - Uncertainty in the Dodd-Frank Act’s "Office of Minority and Women Inclusion" Provision.

Approach to Compliance and Enforcement

In a welcome demonstration of coordination, the Agencies have developed *joint* standards for assessing covered entities' diversity policies and practices. This means that, as proposed, entities regulated by more than one of the Dodd-Frank covered agencies need only comply with one set of uniform standards. The espoused goal of the proposed standards, and Section 342 of Dodd-Frank, is to "promote transparency and awareness of diversity policies and practices within the entities regulated by the Agencies," with the objective of promoting "stronger, more effective, and more innovative businesses, as well as opportunities to serve a wider range of customers."

Other notable aspects of the proposed standards include:

- Recognition that there are a wide variety of regulated entities and that a flexible and entity-specific approach to assessing diversity and inclusion is warranted. This means that the standards do not impose a one-size-fits-all approach to diversity and inclusion, and that regulated entities can adapt programs and practices suitable for them.

- An apparent decision that OMWIs will not conduct examinations or other supervisory assessments of diversity and inclusion programs and practices, but rather expect that regulated entities will conduct self-assessments and voluntarily disclose to appropriate Agencies and the public information about their diversity and inclusion programs and achievements. Thus, it appears that, as proposed, regulated entities will not be subjected to audits or compliance reviews by the OMWIs. This is a happy contrast to the highly burdensome and intrusive audits conducted by the Office of Federal Contract Compliance ("OFCCP") to which some regulated entities already are subjected and which already evaluate such entities' diversity and inclusion practices and programs. However, the proposed standards are vague on how and when the self-reporting should occur. Thus, regulated entities will have some latitude in reporting on compliance.

- A suggestion that entities that already are subject to OFCCP jurisdiction and complying with the various rules and regulations enforced by OFCCP will satisfy their obligations under the proposed standards simply by complying with their obligations as federal contractors and subcontractors.

- A recognition of Section 342(b)(2)(C) of Dodd-Frank, which expressly states that OMWIs may not require any specific action based on findings of diversity and inclusion assessments of covered entities. Here again, rather than the over-

reaching regulations and compliance efforts of other government Agencies with which regulated entities have had to contend, the Dodd-Frank covered Agencies appear to have prepared proposed standards that hew closely to the intent of the law and the contemplated role of the OMWIs.

Summary of Proposed Standards for Regulated Entities

The proposed standards are divided into four assessment areas, which regulated entities should assess (and which the OMWIs will review) to ensure compliance with the goals of Section 342 of Dodd-Frank: (i) organizational commitment to diversity and inclusion; (ii) workforce profile and employment practices; (iii) procurement and business practices (or supplier diversity); and (iv) practices to promote transparency of organizational diversity and inclusion. Highlights from each assessment area are as follows:

Organizational Commitment to Diversity and Inclusion

The proposed standards endorse a top-down commitment and approach to diversity and inclusion within regulated entities. This means that senior management and the board of directors of regulated entities should approve and support their entities' diversity and inclusion policy and include diversity and inclusion as a component of the entities' business strategy with respect to recruitment, retention and promotion of employees and engagement of vendors and suppliers. The proposed standards also suggest that regulated entities can demonstrate commitment to diversity and inclusion by:

- conducting equal opportunity and diversity and inclusion training on a regular and periodic basis;

- taking proactive steps to recruit and secure diverse slates of qualified candidates for open positions and promotional opportunities; and

- Appointing a chief diversity officer or other high-level executive with responsibility for diversity and inclusion efforts who would provide regular progress reports to the entity's senior management and board of directors.

Workforce Profile and Employment Practices

The proposed standards recommend that regulated entities periodically analyze the demographics of their workforce and vendors/suppliers for purposes of identifying areas of success and areas where increased diversity and inclusion efforts may be warranted. They suggest that regulated entities may do this in a variety of ways including:

- Reviewing year-to-year changes in EEO-1 reports (if filed);
- If subject to OFCCP jurisdiction, complying with their obligations as federal contractors;
- Holding managers accountable for diversity and inclusion efforts;
- Conducting various outreach initiatives to create diverse applicant pools for job and promotion opportunities; and
- Using metrics to evaluate diversity and inclusion programs.

Procurement and Business Practices – Supplier Diversity

The proposed standards also recommend that regulated entities provide opportunities for women- and minority-owned businesses to serve as vendors and suppliers. They endorse the following practices in this area:

- Promulgation of supplier diversity policy;
- Tracking the percent of total spending on services and supplies provided by women- and minority-owned businesses and the percent of total vendors and suppliers that are women- and minority-owned businesses;
- Conducting outreach efforts designed to communicate vendor/supplier opportunities to women- and minority-owned businesses.

Practices To Promote Transparency of Organizational Diversity and Inclusion

Finally, the proposed standards suggest that regulated entities publicize their diversity and inclusion programs and practices by voluntarily submitting reports and information to appropriate Agencies and publishing information about their diversity and inclusion programs on their Web sites, in their annual reports and other means. Among other suggestions is that regulated entities should disclose publicly (on their Web sites or otherwise):

- Their commitment to diversity and inclusion;
- Their diversity and inclusion strategic plans; and
- Their "progress toward achieving diversity and inclusion."

Concerns and Considerations

While many regulated entities already have diversity and inclusion programs that are consistent with the proposed standards, there are several aspects of the proposed standards that are of concern. Specifically, the recommendations in the assessment area of "Practices To Promote Transparency of Organizational Diversity and Inclusion" raise a number of concerns. The proposed standards seem to assume that there is a desired state of "diversity and inclusion", without defining what such a state looks like, and seem to encourage goal-setting and measurements. The manner in which regulated entities may set goals and measure "achievement" or "progress toward goals" is fraught with compliance issues and can give rise to discrimination and "reverse" discrimination claims.

Further, the suggestion that regulated entities publicly reveal strategic plans disregards the sometimes confidential and proprietary nature of such plans.

Finally, the suggestion that regulated entities submit potentially privileged (and certainly confidential) self-assessments to appropriate Agencies and publish data regarding the demographic composition of their workforce and "progress" toward an undefined but OMWI-approved state of "diversity and inclusion" could jeopardize privileged and confidential self-evaluations conducted by regulated entities and subject such regulated entities to government audits or lawsuits by publicly exposing areas where "progress" has not been made or has lagged or, potentially, where diversity and inclusion measures have crossed the line from lawful affirmative action to unlawful discrimination.

If the proposed standards are finalized as is, regulated entities will need to carefully consider how they will comply with the standards, especially in regard to the "promotion of transparency" category, ideally in consultation with their legal and compliance partners.

What Regulated Entities Should Do Now

Regulated entities who wish to file comments to the proposed standards may do so before December 24, 2013. In addition, they can begin to assess their existing diversity and inclusion policies and programs, identify potential changes and additions to them, and determine what and how they may wish to describe them to the pertinent Agency.

Please contact any of the co-chairs of Proskauer's Employment Law Counseling Practice Group or your Proskauer relationship lawyer for more information on the proposed standards and assistance with diversity and inclusion programs and reporting.

[1] These Agencies include the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission.