



Invested in America

December 17, 2013

Via E-Mail to 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 Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to respond to SEC Release No. 34-70731; File No. S7-08-13 (the “Request”). The Request seeks public comment on a set of proposed standards (the “Standards”) for assessing the diversity policies and practices of entities regulated by a group of six federal agencies,² as well as the Agencies’ joint policy statement issued in connection with the Standards.³ The Standards are intended to satisfy the Agencies’ duty under Section 342 of the Dodd-Frank Act (the “Act”) to “develop standards for assessing the diversity policies and practices of entities regulated by the agency.”⁴

SIFMA and its members remain committed to fostering diversity in the financial services industry. SIFMA has a standing diversity and inclusion committee, consisting of approximately thirty member firms, that actively engages on diversity-related issues affecting our industry.

¹ SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

² The agencies include the Securities and Exchange Commission (“SEC”), Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Bureau of Consumer Financial Protection (collectively, the “Agencies”).

³ In accordance with the Request, SIFMA is submitting this comment letter to the SEC only, with the understanding that the SEC will share it with the other Agencies.

⁴ Dodd-Frank Act § 342(b)(2)(c).

SIFMA maintains a space on its website dedicated to diversity resources, including diversity teleconferences, annual diversity awards, and practice guides, among others.⁵ SIFMA has developed and hosted industry-wide diversity conferences in 2013, 2012 and prior years.⁶ Periodically, SIFMA has compiled for the benefit of our members aggregate survey data to assist our members in reviewing the performance of their diversity policies and practices.

Diversity is an inclusive concept that encompasses, without limitation, race, gender, religion, ethnicity, nationality, age, disability, sexual orientation, socioeconomic class, marital and parental status, and military veteran status.⁷ A workforce that is diverse in both demographics and ideas can be more effective and productive by generating more varied perspectives, experiences, backgrounds, and talents for both the financial services industry and its clients.

Diversity is not intended to suggest quotas, racial or other diversity-related preferences, or different standards. Rather, the opportunity to increase diversity is one of a number of important considerations in the decision-making process. Our industry endeavors to hire, retain and promote individuals based on each of our member firms' unique criteria, while at the same time maintaining our commitment to diversity. SIFMA's members undertake to foster diversity through the hiring, retention and promotion policies and practices within their firms.

We recognize that achieving diversity is an evolutionary process that requires a continued renewal of our commitment to our diversity policies and practices, and an ongoing assessment of the effectiveness of those policies and practices. To that end, we welcome the Agencies' joint undertaking to develop best practice Standards to assist our members in self-assessing their diversity policies and practices.

1. Standards for assessing diversity policies and practices. During 2012, SIFMA and its members actively engaged, and met, with the Agencies at their request on several occasions, together with other industry trade groups, to provide constructive input and to help shape the proposed Standards. By and large, the proposed Standards fairly reflect SIFMA's and our members' input and perspectives. We look forward to continuing our collaboration with the Agencies to further develop and improve the Standard over time.

⁵ SIFMA's Diversity Resources website is available at: <http://www.sifma.org/members/hr-and-diversity-resources/diversity-resources/>.

⁶ SIFMA's 2013 Diversity Conference materials are available at: <http://www.sifma.org/diversity2013/program/>.

⁷ We note that neither Section 342 of the Act, nor the Standards, define the term "diversity." Section 342, however, by its title ("*Office of Minority and Women Inclusion*") and by its terms, appears to be squarely focused on only two groups, minorities and women. The diversity policies and practices of SIFMA's members are not so limited, but follow the more inclusive approach described above. To our understanding, the Standards are not intended to suggest that regulated entities should have separate, or different, diversity policies and practices for minorities and women, or that self-assessments of policies and practices should focus only on these two groups. Thus, we would welcome the Agencies' clarification on these points.

The proposed Standard cover four key areas: (i) organizational commitment to diversity and inclusion; (ii) workforce profile and employment practices; (iii) procurement and business practices and supplier diversity; and (iv) practices to promote transparency of organizational diversity and inclusion. We generally agree with and support the four key topical areas covered by the Standards.

With respect to supplier diversity, however, the Standards state:

*The entity has methods to evaluate and assess its supplier diversity, which may include metrics and analytics related to: annual contract spending by entity; percentage spent with minority-owned and women-owned business contractors by race, ethnicity, and gender; percentage of contracts with minority-owned and women-owned business sub-contracts; and demographics of the workforce for contractors and subcontractors.*⁸

Unlike the federal government, however, our members do not have the authority, or as a practical matter, the ability to adequately collect the types of data necessary to meaningfully assess the diversity of their suppliers and service providers. Accordingly, we recommend that this provision be stricken from the Standards.

2. Compliance with antidiscrimination laws. Section 342 explicitly and appropriately recognizes that diversity efforts must be undertaken in a manner “*consistent with applicable law.*”⁹ This means that first and foremost, securities firms must comply with their obligations under federal, state, and local antidiscrimination laws. These laws include Title VII of the Civil Rights Act of 1964 and Section 1981.¹⁰ Together, these statutes prohibit employment discrimination based on race, color, religion, sex, or national origin, and provide for monetary damages in cases of intentional discrimination.

Securities firms – and in fact all employers – must be mindful and vigilant in meeting their legal responsibility to prevent race, gender and other employment discrimination. Firms that use “metrics” or “percentages” to measure progress or set goals under their diversity policies need to be particularly careful to ensure that setting such numerical targets does not in fact encourage or result in discrimination in favor of the groups the diversity policy is intended to benefit. To that end, we recommend that the draft Standard include – as does the Act – an appropriate caution that diversity policies and practices shall be undertaken in a manner consistent with applicable antidiscrimination laws.

3. Limited scope of Section 342(b)(2)(c). Section 342(b)(2)(c) empowers the Agencies to “*develop standards for assessing the diversity policies and practices of entities regulated by the*

⁸ Request at Section II.(3).

⁹ Dodd-Frank Act §§ 342(c)(2) and 342(f).

¹⁰ 42 U.S.C. §§ 2000e and 1981, et seq.

agency.” In interpreting this provision, Section 342(b)(4), entitled “*rule of construction*,” clarifies that “[n]othing in paragraph (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.”

As stated above, we support the development of self-assessment standards. We support uniform, high standards. We agree with the Agencies’ stated purpose of the Standards to the extent it is limited to serving as a guide for regulated entities to self-assess their diversity policies.

The explicit language of the Act strictly limits the Agencies’ mandate to developing assessment Standards. Pursuant to Section 342(b)(4), the Agencies cannot impose diversity-related requirements on a regulated entity, or compel any action based on a diversity assessment.

The Agencies, however, appear to take a much broader view of their mandate under Section 342(b)(2)(c). According to the Agencies, a model assessment would include:

- (i) a self-assessment using the Standards to conduct quantitative and qualitative evaluation of diversity policies and practices;
- (ii) voluntary disclosure to the appropriate agency of the self-assessment and other information that the entity deems relevant;
- (iii) agency monitoring of assessment information submitted over time, and posted on the regulated entity’s website, for use in carrying out their diversity responsibilities; and
- (iv) public communication regarding the entity’s efforts to *comply* with the Standards via website, annual reports and other materials (emphasis added).¹¹

The Act does not empower the Agencies to conduct assessments themselves, or to compel a regulated entity to either conduct, or produce, a self-assessment to the Agencies. The Request helpfully states that the Agencies will not use their supervision or examination processes in connection with the Standards.¹² We strongly agree that the Agencies’ supervision and exam processes should not be so used. The Standards, however, should go further and explicitly state what the Request appears to implicitly acknowledge, namely, that any diversity assessments must be voluntarily made and voluntarily submitted by the regulated entity, and that the Agencies have no power to assess or to compel assessments.

Likewise, the Act does not empower the Agencies to collect and monitor a regulated entity’s self-assessments, or to monitor a regulated entity’s website for diversity and inclusion practices. We believe that these government functions are beyond the scope of the Act’s mandate, and that the Agencies do not otherwise have the legal authority to engage in those functions.

Further, the Act does not empower the Agencies to require a regulated entity to publish on its website, in its annual reports, or elsewhere its efforts to *comply* with the proposed Standards.

¹¹ Request at Section III.

¹² *Id.*

First, the proposed Standards are *assessment* standard for regulated entities to use, or not, as a best practices guide. They are not standards that require, or that should suggest that they require, *compliance* as a regulatory matter. Second, nothing in the Act requires website or other public disclosure of assessments. The Standards should explicitly clarify that they are assessment standards, not compliance standards, and that website or other public disclosure is not required.

Finally, the Standard should explicitly address and explain, pursuant to Section 342(b)(4), that the Agencies cannot compel any action based on a diversity assessment that the Agencies find unsatisfactory or wanting. In order to avoid any potential for government overreach or abuse, we recommend that the Agencies develop policies and procedures to ensure that regulated entities are not subjected to any form of undue or tacit coercion or pressure by the Agencies suggesting that a regulated entity: (i) should or is required to conduct or produce a self-assessment to the Agencies, (ii) should or is required to publish on its website, in its annual reports, or elsewhere its efforts to *comply* with the proposed Standards, or (iii) should or is required to take any specific action based on the findings of a self-assessment.

4. Flexibility is key to applying the Standards and conducting self-assessments. As discussed above, the very narrow statutory mandate of the Act limits application of the proposed Standards to voluntary self-assessments and voluntary submissions to the Agencies. Encouragingly, the Agencies recognize that the “[S]tandards may be tailored to take into consideration an individual entity’s size and other characteristics.” We strongly support this flexible approach towards applying the Standards.

a. Consolidated group assessments. The same approach should apply when a firm elects to perform a self-assessment. For example, a number of SIFMA’s members are large, full-service firms that provide broker-dealer, investment adviser, and banking services, among others, under a corporate structure that includes numerous subsidiaries, affiliates and/or business units. These firms generally implement and track diversity policies and initiatives at the corporate level, and not separately by regulated entity. It would be extremely costly, inefficient and burdensome for these firms to prepare separate self-assessments for each regulated entity. These firms should retain the flexibility to prepare self-assessments at the “consolidated group” level. We recommend that the Standards address and confirm this point.

b. International assessments. Similarly, a number of SIFMA’s members operate internationally, with numerous foreign workplaces and foreign employees. Outside of the U.S., the meaning and understanding of the term “diversity”, as well as the pool of qualified applicants, can vary widely from country to country. Moreover, to our understanding, the intent of the Act is directed towards regulated entities’ domestic operations. Accordingly, international firms should retain the flexibility to prepare self-assessments that are limited to domestic operations and employees or, where excluding international operations and employees would be, in the firm’s discretion, unduly burdensome or expensive, to prepare self-assessments that include both domestic and international operations and employees. The Standards should also address and confirm this point.

c. Existing assessment obligations. A number of SIFMA’s members that do business with the federal government are currently required to comply with various federal affirmative action program obligations that include the development of written plans and assessments.¹³ To avoid regulatory duplication or overlap, these firms should retain the flexibility to repurpose such assessments to satisfy, in whole or in part, in the firm’s discretion, the self-assessment contemplated by the Standards.

d. Single point of submission. Implicit in the description of our members above is the fact that many if not most are regulated by numerous Agencies. When a firm elects to submit a consolidated group level self-assessment, we do not believe it is reasonable to expect that the firm should make a separate submission to up to six different Agencies. A submission to one of the Agencies should be deemed sufficient for all. Thus, we recommend that the Agencies designate a single lead agency to receive submissions from each regulated entity that elects to self-assess and report at the consolidated group level.

e. Timing. Finally, the timing for preparing self-assessments, like the Standards themselves, should be appropriately tailored to each firm’s individual circumstances. Different firms operate on different timetables and time horizons for running their businesses, as well as for managing and assessing their diversity policies. Firms will inevitably differ in the time reasonably required to gather data, conduct analysis, measure progress, identify areas for improvement, and synthesize findings and recommendations, as part of the self-assessment process. Accordingly, firms should retain the general flexibility to determine the timing of when to perform an initial self-assessment, how frequently to perform subsequent self-assessments, and what period of time should be covered by a self-assessment.

5. Privacy of information voluntarily disclosed. As things now stand, any self-assessment information submitted to the Agencies would be readily publicly accessible via Freedom of Information Act (“FOIA”) requests.

Separately, certain regulated entities are required to periodically file with the Equal Employment Opportunity Commission an Employer Information Report EEO-1 (“**EEO-1 Report**”), which contains data on the employment diversity at the regulated entity. EEO-1 Reports are entitled to confidential treatment. Only data aggregating information by industry or area without revealing the identity of a particular regulated entity may be made public. In addition, EEO-1 Reports and data for a particular regulated entity are not subject to FOIA requests unless accompanied by a copy of a court complaint stamped “filed” in a case under Title VII and/or the Americans with Disabilities Act against the regulated entity.

We recommend that the Agencies should treat diversity self-assessment information voluntarily submitted by regulated entities with at least the same level of confidentiality and protection from FOIA requests as EEO-1 Reports. To the extent the Agencies are unwilling to extend such protection, the Agencies should amend the Standards to conspicuously disclose that any

¹³ *E.g.*, Executive Order 11246, as amended; The Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, 38 U.S. C. 4212; and Section 503 of the Rehabilitation Act of 1973, as amended.

information voluntarily submitted by regulated entities in connection with a diversity assessment will be readily discoverable and publicly available through a FOIA request.

Finally, based on oral suggestions made by various Agencies' staff, we are concerned that the Agencies may attempt to obtain access to regulated entities' EEO-1 Reports to help assess their diversity practices. Again, the Act does not empower the Agencies to access EEO-1 reports, or to collect and monitor regulated entities' diversity data and information. Thus, we would object to and oppose any efforts by the Agencies to access, collect and review EEO-1 reports. In the event the Agencies do access EEO-1 reports, then these reports should remain subject to the same confidential treatment and existing protections from FOIA requests that exist today.

* * *

Please contact the undersigned if you would like to further discuss these issues or if we can provide further assistance to the Agencies on this important topic.

Sincerely yours,



Kevin M. Carroll
Managing Director and
Associate General Counsel

cc: Mary Jo White, Chair
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