UNITED STATES COMMISSION ON CIVIL RIGHTS

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November 4, 2013

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
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Washington, DC 20219
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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 and Request for Comment (78 Fed. Reg. 64,052, 64,057)

Legislative and Regulatory Activities Division:

This comment is submitted by four members of the eight-member U.S. Commission on Civil Rights,[1] and not on behalf of the Commission as a whole. We urge that the Proposed Interagency Policy Statement ("Proposed Statement") be changed so that it does not require or encourage the use of classifications and preferences based on race, ethnicity, and sex by financial institutions or any other regulated entities. Further, the Proposed Statement should affirmatively state that the Department of the Treasury, the Federal Reserve, the FDIC, the National Credit Union Administration, the Bureau of Consumer Financial Protection, and the SEC (the "Agencies") should *not* assess the diversity policies and practice of regulated entities based on the entities' use of numerical goals, metrics, or percentages with regard to diversity in hiring or contracting, because using such goals and metrics may lead to unlawful discrimination by the regulated entities.

The Proposed Statement requires, or at least strongly encourages, financial institutions to use numerical quotas based on race, ethnicity, and sex to ensure compliance. For example, the Proposed Statement endorses using "metrics to track and measure the inclusiveness of the[] workforce (e.g., race, ethnicity, and gender)"; "metrics to evaluate and assess workforce diversity"; "metrics and analytics related to . . . [p]ercentage spent with minority-owned and women-owned business contractors by race, ethnicity, and gender; [and] [p]ercentage of contracts with minority-owned and women-owned business sub-contracts"; and "metrics used to measure success in both workplace and supplier diversity."

Such use of classifications and preferences by the government based on race, ethnicity, or sex raises serious constitutional concerns. *See, e.g.*, *Fisher v. Univ. of Texas*, 133 S.Ct. 2411, 2418 (2013) ("Distinctions between citizens solely because of their ancestry are by their very

[1] The U.S. Commission on Civil Rights was established, among other things, to "make appraisals of the laws and policies of the Federal Government with respect to . . . discrimination or denials of equal protection under the laws of the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice." 42 U.S.C. § 1975(a).

nature odious to a free people . . . and therefore are contrary to our traditions and hence constitutionally suspect.") (quotation marks omitted); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. . . . [R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.") (quotation marks omitted); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (discriminating on the basis of sex requires an "exceedingly persuasive justification") (quotation marks omitted). Racial classifications and preferences by the government are "presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979). They must be "subjected to the most rigid scrutiny" because they "so seldom provide a relevant basis for disparate treatment." *Fisher*, 133 S.Ct. at 2418-19 (quotation marks omitted).Thus, racial classifications can only be used as a last resort, if very narrowly tailored, to fix a compelling problem. As Chief Justice Roberts wrote, "It is a sordid business, this divvying us up by race." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

The Supreme Court has recognized only a few limited exceptions to the general principle that classifications based on race are impermissible, only one of which—remedying past specific and particular discrimination—is applicable in the context of employment and contracting. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989). The Proposed Statement makes no attempt to explain how its use of classifications and preferences fits within this exception.

In the employment and contracting context, the only possible justification for using race, ethnicity, and sex is to prevent or stop discrimination. And yet there is no mention in the Proposed Statement of preventing or stopping discrimination.

One of the other exceptions the Supreme Court has recognized as a compelling interest that may justify racial classifications is the educational benefits that allegedly flow from attaining a diverse student body in higher education. *See Fisher*, 133 S.Ct. at 2419. This exception of course does not apply to the Agencies or entities covered by Section 342. Even with regard to higher education, the Supreme Court has made clear that the courts must aggressively monitor universities' admissions processes "to ensure that '[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" *Fisher*, 133 S.Ct. at 2420 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)). The burden is on the "University [to] prove that the means chosen by the University to attain diversity are narrowly tailored to that goal." *Fisher*, 133 S.Ct. at 2420.

Neither Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") nor the Proposed Statement even try to explain what the government's compelling interest is in requiring or encouraging financial institutions to use diversity quotas in hiring and contracting. Racial balancing for its own sake cannot be a compelling interest. *See Parents Involved*, 551 U.S. at 732 ("Racial balancing is not transformed

from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"); *Grutter*, 539 U.S. at 330 ("[O]utright racial balancing . . . is patently unconstitutional.").

While the statute says that diversity efforts are to be taken in a manner "consistent with applicable law," 12 U.S.C. § 5452(c)(2) and (f), the Proposed Statement fails to mention this cautionary language. Instead, the Proposed Statement's blatant use of classifications and preferences based on race, ethnicity, and sex violates the Constitution's equality protections and is at odds with federal civil rights statutes such as Title VII of the 1964 Civil Rights Act, which makes it unlawful for employers to "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

Banks and the other regulated entities will be caught in a double bind. On the one hand, their regulators in the Agencies will monitor their diversity efforts in hiring and contracting based on "metrics" and "percentages," i.e., based on numerical quotas. On the other hand, federal civil rights law prevents these financial institutions from making hiring or contracting decisions based on race, ethnicity, or sex.

An example of the double bind is seen in *Ricci v. DeStefano*, 557 U.S. 557 (2009). In *Ricci*, the City of New Haven, Connecticut, believed that the results of its firefighter exam would not produce enough promotions for minority candidates, so the city threw out the test results. White and Hispanic firefighters who believed they would have been promoted if the test results had been certified sued the city for intentionally discriminating against them on the basis of their race under Title VII. The Supreme Court held that the city's race-based action violated the white and Hispanic firefighters' rights under Title VII, even though the city took the action to increase the number of minority officers. As *Ricci* shows, intentionally increasing one group's numbers to increase diversity can result in intentional discrimination against members of another group.

Another example of the double bind comes from *Police Association of New Orleans v. City of New Orleans*, 100 F.3d 1159 (5th Cir. 1996). In that case, the city was promoting African-American police officers over white officers "to give a better reflection of the racial composition of the city." *Id.* at 1168. The city "was attempting to remedy racial imbalances in the police department" but did not present to the court "any specific evidence of past discrimination." *Id.* The white officers sued the city under the Equal Protection Clause of the Fourteenth Amendment. The court concluded that "although the promotions based on race were made with a laudable goal in mind, we cannot hold that they were in furtherance of a compelling state purpose under *Croson* [488 U.S. 469]," and they were therefore in violation of the Fourteenth Amendment. *Police Ass'n*, 100 F.3d at 1169. Increasing a group's numbers in order to increase diversity is not a compelling interest sufficient to justify racial discrimination against members of another group, which the Proposed Statement seems to require.

For the reasons stated above, the Proposed Statement should remove all language that requires or encourages financial institutions to use goals, metrics, or percentages regarding diversity in hiring or contracting. In addition, the Proposed Statement should affirmatively state that the Agencies should *not* assess the diversity policies and practices of financial institutions on

the basis of whether the institutions use goals, metrics, or percentages with regard to diversity in hiring or contracting.

Thank you for taking this comment into consideration, and please contact John Martin, Commissioner Todd Gaziano's special assistant, at jmartin@usccr.gov or 202-376-7570, should you have any questions.

Sincerely,

Abigail Thernstrom
Vice Chair

Todd Gaziano
Commissioner

Gail Heriot
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