

New Federal Initiatives Project

**Race, Sex, and the Dodd-Frank Financial
Regulation Bill**

**By
Roger Clegg***

July 13, 2010



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for Law and Public Policy Studies*

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Race, Sex, and the Dodd-Frank Financial Regulation Bill

EDITOR'S NOTE: *This paper should be read in conjunction with "Financial Reform – The Senate Version," by John Shu, which can be found at: http://www.fed-soc.org/doclib/20100423_NFIPDoddBill.pdf.*

An additional issue raised by the bill is its use of racial, ethnic, and gender classifications and preferences in Section 342, "Office of Minority and Women Inclusion."

Summary of Section 342

Subsection (a) requires "each agency" involved to "establish an Office of Minority and Women Inclusion that shall be responsible for all matters of the agency relating to diversity in management, employment, and business activities."

Subsection (b) requires the director of each such office to "develop standards" for "equal employment opportunity and the racial, ethnic, and gender diversity" of the agency's employees and management, as well as "increased participation of minority-owned and women-owned businesses in the programs and contracts of the agency." The director is also to "assess[] the diversity policies and practices of entities regulated by the agency"; this provision, however, is not to be construed as "mandat[ing] any requirement on or otherwise affect[ing] the lending policies and practices of any regulated entity, or to require any specific action based on the findings of the assessment."

Subsection (c) further provides that each director "develop and implement standards and procedures to ensure, to the maximum extent possible, the fair inclusion and utilization of minorities, women, and minority-owned and women-owned businesses in all business and activities of the agency at all levels." For "contract proposals" and "hiring service providers," this includes "giv[ing] consideration to the diversity of the applicant," and a "written statement" that "a contractor shall ensure, to the maximum extent possible, the fair inclusion of women and minorities in the workforce of the contractor and, as applicable, subcontractors." Further, the director must "make a determination" whether agency contractors and subcontractors have "failed to make a good faith effort to include minorities and women in their workforce"; if they have, the director "shall make a recommendation to the agency administrator that the contract be terminated."

Subsection (d) says that Section 342 applies to "all contracts of an agency for services of any kind" (followed by a list of examples that includes financial institutions, investment and mortgage banking firms, brokers, underwriters, accountants, and "providers of legal services") and that those contracts "include all contracts for all business and activities of an agency, at all levels" (followed by another list that ends with "the implementation by the agency of programs to address economic recovery").

Subsection (e) requires annual reports to Congress by each office, to include inter alia “the successes achieved and challenges faced by the agency in operating minority and women outreach programs.”

Subsection (f) requires each agency to “take affirmative steps to seek diversity in the workforce of the agency at all levels of the agency in a manner consistent with applicable law,” including inter alia: recruiting at colleges with high percentages of women or minorities; advertising “in newspapers and magazines oriented toward minorities and women”; partnering with organizations that focus on the placement of minorities and women; and partnering with girls’ high schools and high schools that have high percentages of minorities “to establish or enhance financial literacy programs and provide mentoring.”

Finally, subsection (g) provides definitions. Among them is “minority,” which references 12 U.S.C. 1811 note, where the definition is “Black American, Native American, Hispanic American, or Asian American”; and “minority-owned business,” which references 12 U.S.C. 1441a(r)(4)(A), where the definition is “a business – (i) more than 50 percent of the ownership or control of which is held by 1 or more minority individuals; and(ii) more than 50 percent of the net profit or loss of which accrues to 1 or more minority individuals”; and “women-owned business,” which references 12 U.S.C. 1441a(r)(4)(B), where the definition is “a business – (i) more than 50 percent of the ownership or control of which is held by 1 or more women;(ii) more than 50 percent of the net profit or loss of which accrues to 1 or more women; and (iii) a significant percentage of senior management positions of which are held by women.”

Analysis of Section 342

Constitutional issues are raised by the various provisions of Section 342 because it is problematic when the government uses classifications or preferences based on race, ethnicity, or sex. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (“all racial classifications ... must be analyzed by a reviewing court under strict scrutiny”); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (gender discrimination requires an “exceedingly persuasive justification”). Indeed, such classifications and preferences are “presumptively invalid” (see *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979)). Typically, the justification for contracting and employment discrimination has required a showing of entrenched discrimination that cannot otherwise be dislodged.

Such “diversity” provisions are frequently found in federal statutes and regulations. In this particular context, some believe that the mortgage crisis was precipitated in part by predatory lending in which minorities were frequently targeted, and so presumably greater diversity among the regulators will lessen the likelihood of such discrimination in the future. Others, however, argue that the mortgage crisis was precipitated by government pressure on lenders to increase “diversity” among homeowners by making loans to those who were really not credit-worthy; to these critics, it is ironic that this “reform” legislation should embody similar discriminatory requirements.

* *Roger Clegg is president and general counsel of the Center for Equal Opportunity.*

Related Links:

Representative Maxine Waters (D-Cal.) has been an important congressional supporter of these provisions. <http://waters.house.gov/News/DocumentSingle.aspx?DocumentID=193428>.

The Wall Street Journal editorialized against these provisions <http://online.wsj.com/article/SB10001424052748704575304575297130299281828.html>; Rep. Waters responded <http://waters.house.gov/News/DocumentSingle.aspx?DocumentID=191382>.

John Rosenberg, on his *Discriminations* blogsite, collects a number of these sources (he is also a critic of Section 342): http://www.discriminations.us/2010/07/the_coming_quota_tsunami.html

"Home Mortgage Affirmative Action" by Carl Horowitz:
http://townhall.com/columnists/carlhorowitz/2010/07/10/home_mortgage_affirmative_action