
SOMETHING FOR (ALMOST) EVERYBODY IN DODD-FRANK: RACIAL, GENDER, AND DIVERSITY CONSIDERATIONS IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT¹

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Scattered throughout the 849 pages of the Dodd-Frank Wall Street Reform and Consumer Protection Act² are numerous references to diversity, race, and gender. These considerations may seem out of place in a bill whose stated goal was to “promote the financial stability of the United States by improving accountability and transparency in the financial system.”

These references may seem odder still given the evidence that suggests that racial and ethnic discrimination played an important role in the mortgage and resulting financial crisis.³

Various experts have concluded that government efforts to pressure lenders to disburse more loans to certain racial, ethnic, and income groups helped cause the crisis.⁴

The inclusion of race, gender, and diversity considerations in the Act may not seem odd, however, in light of the breadth of the legislation. Nor should their inclusion seem odd in light of other recent insertions of diversity, race and gender considerations into federal legislation and rulemaking otherwise unrelated to civil rights, such as the health care bill⁵ and the Securities and Exchange Commission’s new regulations regarding corporate boards.⁶

The provisions of the Act that deal with race, gender, and diversity generally fall into two categories: those that ask financial regulators to take these considerations into account in addressing systemic financial risk and those that ask these regulators to take these considerations into account in their workforces, the workforces of their contractors, and the businesses they regulate. All of these provisions raise various legal and policy issues.

I. Race and Gender Considerations in Addressing Systemic Financial Risk

The Act calls for financial regulators to begin considering race in making decisions related to systemic financial risk⁷ in many instances. The sponsor of these particular provisions, Representative Maxine Waters, supported them, in part, with these arguments:

Since minorities were preyed upon by unscrupulous lenders and other financial actors and are at higher risk when the economy takes a down turn, I am pleased that my legislation to ensure access to affordable, safe insurance products and to study the impact of wind down on underserved communities is included in the legislation that passed the House today.⁸

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With these concerns in mind, the Act specifically:

- charges the newly created Financial Stability Oversight Council to consider the impact of a company or financial activity on minority communities when determining whether to place a company or activity under Federal Reserve Board supervision⁹ and whether to recommend that certain financial regulators regulate a financial activity more stringently;¹⁰
- directs various financial regulators (the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission, the Director of the Federal Insurance Office and the Federal Reserve Board) to include written descriptions of how minority communities would be affected by a proposed disposition of certain financial companies in danger of default;¹¹
- directs the FDIC to consider and mitigate potential adverse effects on minority communities in its liquidation plans for failing financial companies placed into government receivership;¹² and
- directs the newly-established Federal Insurance Office to monitor the extent to which “traditionally underserved communities” and minorities have access to affordable insurance products (except health insurance).¹³

These provisions import the disparate impact theory of liability from civil rights law into the world of financial regulation. Under this theory, courts or administrative agencies could find a facially non-discriminatory practice to be discriminatory if the practice had a disproportionate or adverse impact on members of a minority group. The Obama Administration has revived the theory as a basis for civil rights enforcement actions.¹⁴ The current Supreme Court, however, seems generally unwilling to recognize this theory to test for violations of a law unless there is statutory language to support its use.¹⁵

Whatever their statutory basis, agency actions under the disparate impact theory may violate principles of equal protection, since defendants may feel compelled to adopt racial and gender quotas to get their “numbers right.”¹⁶ The agencies affected by these provisions should interpret and enforce these provisions and any implementing regulations with these concerns in mind. Additionally, the agencies should take care to enforce these provisions and any implementing regulations consistently with the Fair Housing Act¹⁷ and the Equal Credit Opportunity Act,¹⁸ which already forbid intentional discrimination in lending.

II. Racial and Gender Diversity Considerations for Their Own Sake?

The above provisions relate to the federal government’s coordinated response to systemic risk in the United States

financial system, but other sections of the Act appear to introduce race, gender, and diversity considerations into employment and contracting.

A. Section 342

Section 342 requires the heads of the departmental offices of various new and old financial regulators¹⁹ to establish an “Office of Minority and Women Inclusion.”²⁰ Each of these Offices would be responsible for “all matters of the agency relating to diversity in management, employment, and business activities.”²¹ So far, these Offices have been established in the Board of Governors Federal Reserve and all twelve Federal Reserve Banks²² and the National Credit Union Administration.²³

Each covered agency’s Office of Minority and Women Inclusion would be responsible for either identifying and in some instances addressing concerns about race and gender in three areas: their own agency’s workforce, the agency’s contracting and other business activities, and the diversity policies and practices of the entities that the agency regulates. The Director of each of these Offices is required to develop standards for “equal employment opportunity and the racial, ethnic, and gender diversity” of the agency’s workforce and management.²⁴ The Director is also required to develop standards to increase the participation of minority-owned and women-owned businesses in the programs and contracts of the agency²⁵ and to assess the diversity policies and practices of entities regulated by the agency.²⁶

The law is also seemingly clear as to what these Directors may not do—their responsibilities do not include “enforcement of statutes, regulations, or executive orders pertaining to civil rights,” except that each Director has to coordinate with the agency administrator (or his or her designee) regarding “the design and implementation of any remedies resulting from violations of such statutes, regulations, or executive orders.”²⁷ This latter exception seems to create the risk of overlapping jurisdiction between covered agencies and the established federal civil rights enforcement apparatus.

Representative Waters’ remarks in the Congressional Record and her subsequent press releases²⁸ offered a diversity rationale for Section 342, tying this diversity to meeting the financial needs of the Nation and minority communities:

These offices would provide for diversity in the employment, management, and business activities of these agencies. The data for the need for these offices speaks for itself. Diversity is lacking in the financial services industry, with the GAO reporting from 1993 to 2004 the level of minority participation in the financial services professions only increased marginally, from 11 percent to 15.5 percent. We took care of that in this bill. And now we have the opportunity to not only give oversight to diversity, but to help these agencies understand how to do outreach, how to appeal to different communities so that we can get the kind of employees that will create the diversity to pay attention to all of the needs of the people of this country.²⁹

1. Diversity in the Workforces of Financial Regulators

Each covered agency must take “affirmative steps to seek diversity” in their own workforce consistent with applicable law.³⁰ These affirmative steps must include recruiting at colleges with high percentages of women or minorities, advertising in print media outlets aimed at minorities and women, partnering with organizations that focus on the placement of minorities and women, and partnering with girls’ high schools and high schools with high percentages of minorities to set up or improve financial literacy programs and provide mentoring.³¹ Title VII of the Civil Rights Act of 1964 generally prohibits employers and employment agencies from discriminating on the basis of race and sex in recruitment and referrals.³² The Equal Employment Opportunity Commission, the agency responsible for enforcing Title VII, has suggested that some forms of targeted recruitment aimed at increasing the number of applicants from underrepresented groups is permissible under the statute.³³ Others have argued that race- and gender-targeted recruitment are not wise policy if the underrepresentation of certain groups in the applicant pool is not due to discrimination and the recruitment itself translates into preferences at the hiring stage.³⁴

The agency’s Office of Minority and Women Inclusion must then report to Congress annually on the “successes achieved and challenges faced . . . in operating minority and women outreach programs,”³⁵ as well as the “challenges the agency may face in hiring qualified minority and women employees.”³⁶ At least one of the covered agencies, the Consumer Financial Protection Bureau, must report to Congress semiannually with an analysis of its efforts to increase workforce and contracting diversity consistent with the procedures established by its Office of Minority and Women Inclusion.³⁷ It is difficult to imagine how these agencies could report on the success achieved in seeking racial and gender diversity in their workforces without reporting on the numerical breakdown of minorities and women employed there. Covered agencies may thus feel forced to adopt racial and gender preferences, including quotas or caps, in order to “get their numbers right.”

These provisions appear to be government racial classifications. When the federal government uses any classifications based on race, these classifications raise constitutional concerns under the equal protection component of the Due Process Clause of the Fifth Amendment.³⁸ Indeed, these kinds of classifications are “presumptively invalid”³⁹ and are reviewed by courts under a standard of strict scrutiny.⁴⁰ Under strict scrutiny, the government must demonstrate that the racial classification is “narrowly tailored” to further a “compelling public interest.”⁴¹

Any racial preferences adopted under these provisions would trigger strict scrutiny review under the Fifth Amendment of the Constitution if challenged in court. Section 342’s author included these provisions to “not only give oversight to diversity, but to help these agencies understand how to do outreach, how to appeal to different communities so that we can get the kind of employees that will create the diversity to pay attention to all of the needs of the people of this country.”⁴² Her

press releases assert that these provisions would “broaden and improve the workforce of these agencies.”⁴³ She also hoped that these provisions would ensure that “competent and qualified minorities and women . . . have a seat at the table.”⁴⁴

The Supreme Court has so far recognized a discrete number of interests sufficiently compelling to justify race-conscious government decisions, but diversity in either the federal or private workforce has not been among them.⁴⁵ As a whole, Rep. Waters’s assertions do not indicate whether the provisions seek diversity for its own sake or diversity with some incidental benefit in mind. Where the Supreme Court has upheld racial diversity as a compelling interest justifying race-conscious measures, the Court deferred to the University of Michigan’s judgment that racial diversity was vital to ensuring intellectual diversity and its resulting educational benefits.⁴⁶ This deference hinged in part on the academic freedoms protected by the First Amendment belonging specially to colleges and universities. Representative Waters’ reference to “all of the needs of the people of this Country” suggests that greater racial diversity in the covered agencies will somehow result in greater attention paid to the impact of their actions on minority communities, but it is not clear how this is so. So far, Section 342’s defenders have not clearly articulated any such incidental benefits to the much sought-after diversity or any countervailing constitutional interests to protect.⁴⁷

It is possible that the government interest here is remedying past discrimination by the covered agencies, which has fared better in surviving strict scrutiny. But it would be hard to show past discrimination in the covered agencies newly established by the Act and also hard to show it in the older covered agencies, since they have been bound by Title VII of the Civil Rights Act of 1964, which categorically prohibits the federal government from discriminating on the basis of either race or sex in hiring.⁴⁸

Assuming there is a compelling interest, any racial hiring preferences adopted under Section 342 would also have to be narrowly tailored. For example, the covered agency would have to demonstrate that it gave serious good-faith consideration to race-neutral approaches to meeting its racial diversity goals.⁴⁹

Any hiring preferences based on gender would also be presumptively invalid under an equal protection analysis, requiring an “exceedingly persuasive justification.”⁵⁰ The government would have to show that the challenged action furthers an important government interest by means that are substantially related to that interest.⁵¹ Generally, the Supreme Court has recognized that remedial purposes can justify gender-based classifications in the equal protection context, but not diversity purposes.⁵²

These provisions of Section 342 also raise concerns under the antidiscrimination provisions set forth in Title VII of the Civil Rights Act of 1964,⁵³ which prohibits the federal government from discriminating on the basis of either race or sex in hiring. The Supreme Court has allowed the limited use of racial and sexual preferences in hiring under Title VII, but only to redress past employment practices that resulted in “manifest imbalances” of the groups being discriminated against in “traditionally segregated job categories.”⁵⁴ Since many of these covered agencies are newly created, it would be difficult

to demonstrate historical entrenched discrimination. It would likewise be difficult to show such discrimination in the older agencies, since they have been subject to the amended scope of Executive Order 11,246 since 1967.⁵⁵ Federal appeals courts have so far rejected preferences based on the diversity rationale in the Title VII context.⁵⁶ Diversity in an agency’s workforce would seem to require ongoing maintenance by the employer, and the Supreme Court has noted that preferences can only be used to attain, not maintain, racial balance.⁵⁷

2. Diversity and Inclusion in Contractors and Their Workforces

Covered agencies must now come up with and follow procedures to ensure the fair inclusion and utilization of women and minorities (and business owned by either group) in all their businesses and activities.⁵⁸ They must also now consider the diversity of an applicant when weighing contract proposals.⁵⁹ They must require a written assurance from contractors that they will ensure fair inclusion of women and minorities in their workforces and those of any subcontractors.⁶⁰ Finally, covered agencies will hold the contractors to these assurances and may penalize them by terminating the contract.⁶¹ The Act does not create a private right of action for aggrieved contractors, nor does it create a procedure by which an aggrieved contractor can lodge a complaint with the agency.

The Act does not define the term “fair inclusion.” Critics of the Act point out that defining “fair” in the antidiscrimination context has long eluded bureaucrats, university admissions officials, and employers. Worse, according to these critics, federal agencies like the Department of Education have defined “fair” as “proportional” in areas like intercollegiate athletics, which could likewise lead to the adoption of racial and gender quotas by the agencies, contractors, and subcontractors.⁶² Several members of the United States Commission on Civil Rights have warned that these firms will do just that to ward off regulatory trouble.⁶³

Federal contractors’ obligations under the Act and elsewhere tend to substantiate this fear. Regulations promulgated under Executive Order 11,246 already require federal contractors to set goals and timetables to remedy “underrepresentation” among minorities and women.⁶⁴ Section 342 requires each covered agency’s Office of Minority and Women Inclusion report to Congress annually on the total amounts paid to minority-owned and women-owned business with which the agency contracts and the challenges the agency faces in contracting with qualified minority-owned and women-owned businesses.⁶⁵

Any government preference for a minority-owned or women-owned business raises the same concerns under the equal protection component of the Fifth Amendment’s Due Process Clause as those cited above. It is not clear what interest, either compelling or important, can be found to justify these fair inclusion provisions and whether fair inclusion is coextensive in any way with diversity or remedying specific past discrimination. Representative Waters believed that these provisions would expand opportunities for minority-owned and women-owned small businesses to participate in government contracting programs rather than “continuing to rely on the same ‘old boy’ network and handful of Wall Street firms responsible for the

crisis in the financial markets.”⁶⁶ She may have meant to suggest that greater participation by minority- (and women-) owned businesses in contracts with covered agencies would somehow avoid another financial meltdown, but it is not clear that this is true or how these goals are consistent with other compelling or important government interests.

More problematic is that this provision calls for the covered agencies to impose new obligations on contractors and subcontractors. Contractors must now provide written statements that they will ensure “fair inclusion” of women and minorities in their workforces and those of any subcontractors. Businesses eager to obtain lucrative contracts with the covered agencies may feel pressure to adopt race and gender preferences in hiring to live up to these assurances. As discussed, these preferences will likely only survive a court challenge under Title VII if they were adopted to redress past employment practices that resulted in manifest imbalances of the groups being discriminated against in traditionally segregated job categories.

It would be difficult to assert a remedial basis for these fair inclusion guarantees and any attendant racial and gender preferences, goals, or timetables set by the contractor. It does not seem plausible that federal contractors have a history of recent and entrenched discrimination, since they have been bound by Title VII and Executive Order 11,246 as amended since 1967, both of which prohibit federal contractors from discriminating in employment on the basis of race, color, religion, sex, or national origin. Executive Order 11,246 also requires federal contractors to take “affirmative action” to ensure that they consider applicants and treat employees without regard to their race, color, religion, sex or national origin.

Any racial hiring preferences adopted by a contractor may also violate Section 1981, which was originally enacted as part of the Civil Rights of 1866 but later amended by the Civil Rights Act of 1991. Section 1981 prohibits racial discrimination in the making, enforcing, modification, and termination of employment contracts.⁶⁷ Thus, covered agencies would have to interpret any obligations they seek to impose under Section 342 in a manner consistent with Title VII, Section 1981, and Executive Order 11,246.

3. Diversity in the Regulated Entities

As enacted, the Act does not place any obligations on regulated businesses regarding the racial and gender makeup of their workforce. The Director of each covered agency’s Office of Minority and Women Inclusion is required to develop standards for assessing the diversity policies and practices of these entities, but the Act adds that nothing in that requirement “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.”⁶⁸ Each Office must report to Congress annually “any other information, findings, conclusions, and recommendations for legislative or agency action, as the Director determines appropriate,”⁶⁹ which could presumably contain the Director’s assessment of the diversity policies and practices of the regulated entities.

It is possible that the purpose of the covered agencies’

assessment of these entities’ diversity policies and practices is to build a factual predicate for further federal intervention into the hiring practices of financial services companies. Any further regulation should be consistent with the Act, Title VII of the Civil Rights Act of 1964, and Section 1981, which already govern the hiring practices of these companies.

B. Section 735

Section 735 requires that a board of trade, if a publicly traded company, “endeavor to recruit individuals to serve on [its] board of directors and its other decision-making bodies . . . of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of candidates.”⁷⁰ The Act does not specify whether cultural diversity in this instance includes race.

It is possible that the regulators in this case, the Securities and Exchange Commission and the Commodity Futures Trading Commission, may construe a racial diversity requirement here and require the boards of trade to use racial preferences in appointments to their boards of directors. A government racial classification like that would raise the equal protection concerns cited above. If the board of trade were to adopt them on their own to appease their regulators, then this may raise the same concerns under Title VII and Section 1981 as those cited above.

The Commodity Futures Trading Commission has proposed two rules to implement this statutory requirement, neither of which indicates that this requirement seeks to remedy past discrimination.⁷¹ Rather, these regulations seek to ensure that a diversity of perspectives is brought on to the board of directors of these contract markets. For example, a footnote in a rule proposed earlier this year states that:

Section 735(b) of the Dodd-Frank Act retains the existing DCM core principle on conflicts of interest and governance fitness standards, but (i) amends the existing DCM core principle on composition of governing boards of contract markets to state: “[t]he governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants,” and (ii) adds a new DCM core principle on diversity of the Board of Directors. Together, such core principles empower the Commission to develop performance standards for determining whether a DCM has: (i) Appropriate fitness standards for directors, members, and others; (ii) rules to minimize conflicts of interest in DCM decision-making; (iii) appropriate governance arrangements to permit the Board of Directors to consider the views of market participants; and (iv) rules, if the DCM is a publicly-traded company, regarding the cultural diversity of the Board of Directors.

The constitutional and legal viability of this provision would rest on shaky ground if any implementing regulations required that race be used as a proxy for a diversity of views.⁷² With these concerns in mind, some have asked the CFTC to not extend the meaning of “diversity” beyond that in the statute. These critics have also pointed out that the careful scrutiny that companies give in vetting the few board members

they do hire may sufficiently uncover the diversity of viewpoint sought. Thus, it would be harder for these companies to justify using race as a proxy in this effort.⁷³

III. Conclusion

The race, gender, and diversity provisions of Dodd-Frank are illustrative of similar provisions Congress has inserted into a large number of recent statutes. Because their existence may be overshadowed by the primary effect of the legislation, and because they may bring to life problematic implementing regulations, the public should be aware of these provisions. Race and gender considerations in the sections of the Act addressing the financial system could risk distracting financial regulators and their regulated entities from concerns such as the financial stability of an institution or the creditworthiness of a loan applicant.

It is possible that federal financial regulators may undertake recruitment strategies ranging from targeted to inclusive to attract higher numbers of qualified applicants from all groups to meet their diversity goals. These regulators may undertake targeted recruitment, and only targeted recruitment, for the same end. They may also turn to goals, timetables, and hiring preferences based on race and gender. How much discrimination takes place within these agencies will depend on which of these roads they choose.

It remains to be seen how much discrimination will take place outside of the federal government. Companies eager to maintain profitable contracting relationships with the financial regulators will be under pressure to live up to their required guarantee of fair inclusion of women and minorities in their workforce. As such, they may turn to racial and gender quotas, goals, and timetables. Likewise, companies regulated by these agencies may feel pressure to fend off an unfavorable diversity assessment from their regulator and any future intrusive legislation and regulation which may result. They should remain always vigilant that they do not violate any law, regulation, or executive order which forbids discrimination.

Endnotes

1 The reader may wish to also consult ROGER CLEGG, RACE, SEX, AND THE DODD FRANK FINANCIAL REGULATION BILL (FEDERALIST SOCIETY NEW FEDERAL INITIATIVES PROJECT 2010), available at http://www.fed-soc.org/doclib/20100712_DoddFrankBill.pdf, for a summary of some of the provisions cited here and the constitutional and legal problems they present.

2 Pub. L. No. 111-203 (2010) (hereinafter “The Act”). President Obama signed the Act into law on July 21, 2010. A copy of the Act may be found at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf> (last visited Mar. 24, 2011). Although the version made available above by the Government Printing Office comes in at 849 pages single-spaced, various sources have reported that the Act was over 2300 pages in length. See, e.g., Ben Protess, *Unearthing Exotic Provisions Buried in Dodd-Frank*, DEALBOOK/N.Y. TIMES (July 13, 2011), available at <http://dealbook.nytimes.com/2011/07/13/unearthing-exotic-provisions-buried-in-dodd-frank> (last visited Aug. 22, 2011); *The Uncertainty Principle*, WALL ST. J. (July 14, 2010), available at <http://online.wsj.com/article/SB10001424052748704288204575363162664835780.html> (last visited Aug. 22, 2011).

3 See, e.g., FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT (2010) (dissent of Commissioner Peter Wallison), available at http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic_final_report_

wallison_dissent.pdf (last visited Mar. 24, 2011); PETER J. WALLISON, AM. ENTERPRISE INST., CAUSE AND EFFECT: GOVERNMENT POLICIES AND THE FINANCIAL CRISIS 1 (Nov. 25, 2008), available at http://www.aei.org/docLib/20081203_1123724NovFSOg.pdf (last visited Mar. 24, 2011); Stan J. Liebowitz, *Anatomy of a Train Wreck; Causes of the Mortgage Meltdown*, NAT’L REV., Oct. 3, 2008, at 34-42 (“The government had been attempting to increase homeownership in the U.S., which had been stagnant for several decades. In particular, the government has tried to increase homeownership among poor and minority Americans. Although a seemingly noble goal, the tool chosen to achieve this goal was one that endangered the entire mortgage enterprise: intentional weakening of the traditional mortgage-lending standards.”). See generally UNITED STATES COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS AND THE MORTGAGE CRISIS 25-29 (Sept. 2009) (summary of research).

4 See, e.g., THOMAS SOWELL, THE HOUSING BOOM AND BUST (2010); Howard Husock, *Housing Goals We Can’t Afford*, N.Y. TIMES, Dec. 11, 2008, available at <http://www.nytimes.com/2008/12/11/opinion/11husock.html> (last visited Apr. 7, 2011); Editorial, *Covering Their Fannie*, INVESTOR’S BUS. DAILY, Apr. 3, 2010, available at <http://www.investors.com/NewsAndAnalysis/Article.aspx?id=529897> (last visited Apr. 7, 2011); Editorial, *The Subprime Lending Bias*, INVESTOR’S BUS. DAILY, Dec. 22, 2008; Liebowitz, *supra* note 3; Paul Taylor, *The Risks Posed to National Security and Other Programs by Proposals to Authorize Private Disparate Impact Claims Under Title VI*, 46 HARV. J. LEGIS. 57, 105-06 (2009); Hans von Spakovsky, *It’s Time to Uproot the Real Cause of the Mortgage Crisis*, PAJAMAS MEDIA, Dec. 20, 2008, available at <http://pajamasmedia.com/blog/its-time-to-uproot-the-real-cause-of-the-mortgage-bailout> (last visited Apr. 7, 2011).

5 Pub. L. No. 111-148, §§ 5301 and 5303 (2010) (authorizes the Secretary of Health and Human Services to give priority consideration in awarding contracts or grants to medical and dental schools that have a record of training individuals from underrepresented minority groups).

6 74 Fed. Reg. 68334 (Dec. 23, 2009), codified at 17 C.F.R. § 229.407 (c)(2)(vi).

7 The Act also includes race or minority status in imposing several record-keeping requirements and in calling for outreach to minority communities. For example, Section 1443 requires the Director of Housing Counseling to develop and conduct national public service multimedia campaigns promoting housing counseling to “elderly persons, persons who face language barriers, low-income persons, minorities, and other potentially vulnerable consumers” and other seeking or maintaining a residential mortgage loan. Section 1450 requires the Director of the Consumer Financial Protection Bureau to prepare a booklet to help consumers applying for federally related mortgage loans to understand the nature and costs of real estate settlement services. The Director must prepare the booklet in “various languages and cultural styles” (as he or she determines to be appropriate), so that the booklet is “understandable and accessible to homebuyers of different ethnic and cultural backgrounds.”

See also The Act, *supra* note 2, at §§ 1071 (requiring each financial institution, in the case of an application for credit for either a small business or a women-owned or minority-owned business, to both inquire whether the business is a women- or minority-owned business or a small business and maintain a record of the response), 1077 (requiring the Bureau of Consumer Financial Protection and the Department of Education to submit to Congress a report on private education loans that contains “socioeconomic characteristics (including income and education levels, racial characteristics, geographical background, age, and gender)”), and 1109 (mandating that the Comptroller General’s audit of the Federal Reserve System include an examination of the “extent to which the current system of appointing Federal reserve bank directors effectively represents ‘the public, without discrimination on the basis of race, creed, color, sex or national origin . . . in the selection of bank directors, as such requirement is set forth under section 4 of the Federal Reserve Act’”).

8 See Press Release, Waters Wins Big for Minorities, Women in Wall St. Reform and Consumer Protection Bill (July 1, 2010), available at <http://waters.house.gov/News/DocumentSingle.aspx?DocumentID=193428> (last visited Mar. 31, 2011); see also 156 CONG. REC. H5242 (2010) (statement of Maxine Waters).

9 See The Act, *supra* note 2, at § 113.

10 See *id.* at § 120. These other financial regulatory agencies are required to impose the standards recommended by the Council. See *id.* at § 120 (c)(2).

11 See *id.* at 203 (a)(2). Written recommendations by various financial regulators (the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission, the Director of the Federal Insurance Office and the Federal Reserve Board) to the Secretary of the Treasury concerning the disposition of certain financial companies in danger of default must include a “description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities.”

12 See *id.* at § 210 (n)(9)(A).

13 See *id.* at § 502 (a)(3).

14 See, e.g., Press Release, Department of Justice, Justice Department Settles Lawsuit Against the City of Portsmouth, Virginia, Alleging Discrimination Against African Americans in the Hiring of Firefighters (Mar. 25, 2009), available at <http://www.justice.gov/opa/pr/2009/March/09-ag-272.html> (last visited Apr. 11, 2011); Press Release, Department of Justice, Justice Department Settles Lawsuit Against the City of Dayton, Ohio, Alleging Discrimination Against African Americans in the Hiring of Police Officers and Firefighters (Feb. 26, 2009), available at <http://www.justice.gov/opa/pr/2009/February/09-crt-172.html> (last visited Apr. 11, 2011); see also Paul Baskin, *Education Department Promises Push in Civil Rights Enforcement*, CHRON. OF HIGHER EDUC., Mar. 8, 2010, available at <http://chronicle.com/article/Education-Department-Promises/64567/> (last visited Apr. 11, 2011); Neil King, Jr., *Students’ Civil Rights to Get Scrutiny*, WALL ST. J., Mar. 8, 2010; Transcript of U.S. Secretary of Education Arne Duncan Press Conference Call on Civil Rights Enforcement, Mar. 8, 2010, at 10.

15 See, e.g., *Smith v. City of Jackson*, 544 U.S. 228 (2005). Only three statutes—the 1991 amendments to Title VII of the Civil Rights Act of 1964, the 1982 amendments to the Voting Rights Act of 1965, and the Americans with Disabilities Act—set forth a disparate impact cause of action. The Court has not recognized the validity of the disparate impact theory outside of employment and voting.

16 See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681-2682 (2009) (Scalia, J., concurring) (“Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.”).

17 42 U.S.C. § 3605 (b)(1) (2006).

18 15 U.S.C. §§1691-1691f (2006).

19 The Department of the Treasury, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, each of the Federal Reserve Banks, the Board of Governors of the Federal Reserve, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Securities and Exchange Commission, and the Bureau of Consumer Financial Protection.

20 See The Act, *supra* note 2, at § 342 (a)(1).

21 See *id.* at § 342 (a)(1)(A).

22 See Press Release, Board of Governors of the Federal Reserve System (Jan. 18, 2011), available at <http://www.federalreserve.gov/newsevents/press/other/20110118a.htm> (last visited Apr. 1, 2011).

23 See Media Advisory, NCUA Opens New Office of Minority and Women Inclusion (Jan. 21, 2011), available at http://www.ncua.gov/news/press_releases/2011/MA11-0121MatzCutsRibbonFINAL.pdf (last visited Apr. 1, 2011).

24 See The Act, *supra* note 2, at § 342 (b)(2)(A).

25 See *id.* at § 342 (b)(2)(B). Section 342 also applies to “all contracts of an agency for services of any kind, including the services of 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.” The contracts include “all contracts for all business and activities of an agency, at all levels, including contracts for the issuance or guarantee of any debt, equity, or security, the sale of assets, the management of the assets of the agency, the making of equity investments by the agency, and the implementation by the agency of programs to address economic recovery.”

26 See *id.* at § 342 (b)(2)(C).

27 See *id.* at § 342 (a)(3).

28 Press Release, U.S. Congresswoman Maxine Waters, Congresswoman Waters Celebrates Approval of Provision to Promote Inclusion of Minorities & Women; Blasts WSJ for Distortions in Editorial (June 18, 2010), available at <http://waters.house.gov/News/DocumentSingle.aspx?DocumentID=191382> (last visited Mar. 23, 2011). This press release states:

What this legislation will do is help address an indisputable problem, the lack of diversity in financial services. Rigorous analysis documents the discrimination that women and minorities face compared to white men of similar educational background and age. Data from the Office of Personnel Management shows the lack of African-American and Hispanic senior managers at the federal financial services agencies.

At the Treasury Department, for example, minorities only make up 17.2 percent of employees at senior pay levels. A recent report from the Government Accountability Office points to the lack of diversity within the financial services industry, with virtually no improvement at the management level from 1993 to 2008. The lack of contracting opportunities for minority- and women-owned businesses through programs like TARP has also been documented.

The provision is designed to broaden and improve the workforce of these agencies and expand opportunities for our nation’s small businesses—including minority- and women-owned businesses—to participate in programs and contracts instead of continuing to rely on the same “old boy” network and handful of Wall Street firms responsible for the crisis in the financial markets.

29 156 CONG. REC. H5242 (2010) (statement of Maxine Waters).

30 See The Act, *supra* note 2, at § 342 (f); see also §§ 156 (b)(2)(C)(i) and 1067 (b)(2)(C)(i). Under these provisions, the Office for Financial Research and the Consumer Financial Protection Bureau must each submit annual reports to Congress that include a recruitment and retention plan that includes the steps needed to target “highly qualified applicant pools with diverse backgrounds.” While these provisions do not explicitly call for these agencies to consider race and gender diversity in these recruitment and retention plans, it is possible that the agencies will construe “diversity” to include these considerations.

31 See *id.*

32 See 42 U.S.C. § 2000e-2 (2011).

33 See, e.g., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL at §§ 15-VI (A) and (C)(2006), available at <http://www.eeoc.gov/policy/docs/race-color.html> (last visited Apr. 7, 2011).

34 See, e.g., Equal Employment Opportunity Commission, Meeting on the E-Race Initiative, Feb. 28, 2007 (testimony of Roger Clegg), available at <http://www.eeoc.gov/eeoc/meetings/archive/2-28-07/clegg2.html> and http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=147&Itemid=54.

35 See The Act, *supra* note 2, at § 342 (e)(3).

36 See *id.* at § 342 (e)(4).

37 See *id.* at § 1016 (c)(9).

38 The Fifth Amendment to the Constitution of the United States does not provide a guarantee of equal protection of the laws as does the Fourteenth Amendment. However, the Supreme Court has held that such a guarantee inheres in the Fifth Amendment’s guarantee that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212-217 (1995).

39 See *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

40 See *Adarand*, 515 U.S. at 224.

41 See *id.* at 227.

42 See 156 CONG. REC. H5242 (2010) (statement of Maxine Waters).

43 See Press Release, *supra* note 28.

44 See *id.*

45 The Supreme Court has so far recognized only a discrete number of these compelling interests: national security (see *Korematsu v. United States*, 323 U.S.

214, 217-20 (1944)), the educational benefits that flow from a diverse student body in higher education (*see* Grutter v. Bollinger, 539 U.S. 306, 328-330 (2003)), and remedying specific past discrimination (*see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490-92 (1989)).

46 539 U.S. 306 at 328-330.

47 *See* Press Release, *supra* note 8. Perhaps Ms. Waters hopes that racial diversity at a federal financial regulatory agency would allow the agency to better understand the impact of its actions (and presumably the actions of the businesses it regulates) on minority communities and prevent irresponsible lending and any possible future financial failure.

48 *See* 42 U.S.C. § 2000e-16 (a) (2011) (“All personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.”).

49 *See, e.g.,* Grutter, 539 U.S. 306 at 339-340; *Adarand*, 515 U.S. 200 at 237-38.

50 *See* United States v. Virginia, 518 U.S. 515, 533-534 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

51 *See Hogan*, 458 U.S. at 724-725; *Craig v. Boren*, 429 U.S. 190 at 197 (1976).

52 *See, e.g.,* Califano v. Webster, 430 U.S. 313, 317 (1977) (per curiam) (“Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective.”).

53 *See* 42 U.S.C. § 2000e-16 (a).

54 *See, e.g.,* Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616-639 (1987) (gender preferences); *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208-209 (1979) (racial preferences).

55 *See* Exec. Order No. 11,246, 30 Fed. Reg. 12, 319 (Sept. 24, 1965) (“It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin.”). President Johnson issued Executive Order 11,375 in 1967 to amend Executive Order 11,246 to include sex as a protected category. *See* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967); *see also* 41 C.F.R. §§ 60-2.1-60-2.35 and 60-4.1 to 60-4.9 (2008).

56 *See, e.g.,* Messer v. Meno, 130 F.3d 130, 135-137 (5th Cir. 1997); *Taxman v. Bd. of Educ. of the Twp. of Piscataway*, 91 F.3d 1547, 1557-1563 (3d Cir. 1996) (en banc).

57 *See Johnson*, 480 U.S. at 639.

58 *See* The Act, *supra* note 2, at § 342 (c)(1).

59 *See id.* at § 342 (c)(2).

60 *See id.*

61 *See id.* at § 342(c)(3). The Director of Minority and Women Inclusion is required to make a determination as to whether an agency contractor or subcontractor has failed to make a good-faith effort to include minorities and women in their workforce. If the Director determines that the contractor or subcontractor failed to make this good-faith effort, he or she must recommend to the agency administrator to terminate the contract. The agency administrator may then terminate the contract, make a referral to the Department of Labor’s Office of Federal Contract Compliance Programs, or take other appropriate action.

62 *See* Diana Furchtgott-Roth, *Racial, Gender Quotas in the Financial Bill*, REAL CLEAR MARKETS, July 8, 2010, available at http://www.realclearmarkets.com/articles/2010/07/08/diversity_in_the_financial_sector_98562.html (last visited Mar. 29, 2011).

63 *See* Letter from Commissioners Todd Gaziano, Gail Heriot, Peter Kirsanow, and Ashley Taylor to Joseph Biden, President of the Senate, and Senators Harry Reid, Mitch McConnell, Richard Durbin, John Kyl, Christopher J. Dodd, and Richard G. Shelby, available at <http://blog.heritage.org/wp-content/uploads/DoddFrankLetterFINAL.pdf> (last visited Mar. 31, 2011) (“All too often, when bureaucrats are charged with the worthy task of preventing race or gender discrimination, they do in fact precisely the opposite: Consciously or unconsciously, they *require* discrimination by setting overly optimistic goals that can only be fulfilled by discriminating in favor of

the groups the goals are supposed to benefit.”) (emphasis in the original).

64 *See* 41 C.F.R. §§ 60-2.1-60-2.35 and 60-4.1 to 60-4.9 (2008).

65 *See* The Act, *supra* note 2, at § 342 (e).

66 *See* Press Release, *supra* note 28.

67 *See* 42 U.S.C. §§ 1981 (a) and (b) (2011).

68 *See* The Act, *supra* note 2, at § 342 (b)(4).

69 *See id.* at § 342 (e)(5).

70 *See id.* at § 735 (b)(22).

71 *See, e.g.,* Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest, 76 Fed. Reg. 722, 729 (proposed Jan. 6, 2011); Core Principles and Other Requirements for Designated Contract Markets, 75 Fed. Reg. 80572, 80574 (proposed Dec. 22, 2010).

72 *See, e.g.,* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 355, 355 (D.C. Cir. 1998):

We do not mean to suggest that race has no correlation with a person’s tastes or opinions. We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them. One might well think such an approach antithetical to our democracy... Indeed, its danger is poignantly illustrated by this case. It will be recalled that one of the NAACP’s primary concerns was its belief that the Church had stereotyped blacks as uninterested in classical music.

73 *See, e.g.,* Comments of Commissioners Gaziano, Heriot, and Kirsanow of the United States Commission on Civil Rights on 76 Fed. Reg. 722 (Mar. 7, 2011); Comment of Center for Equal Opportunity on 76 Fed. Reg. 722 (Mar. 7, 2011). Both comments are available on the CFTC’s website.

