

The Honorable Joseph Biden, President, United States Senate  
The Honorable Harry Reid, Majority Leader, United States Senate  
The Honorable Mitch McConnell, Minority Leader, United States Senate  
The Honorable Richard Durbin, Majority Whip, United States Senate  
The Honorable Jon Kyl, Minority Whip, United States Senate  
The Honorable Christopher J. Dodd, Chairman  
The Honorable Richard G. Shelby, Ranking Member

Dear President Biden and Distinguished Senators:

We write today to express our concerns about Sec. 342 of the proposed Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>1</sup>

Taken as a whole, the Dodd-Frank bill is not about civil rights law—the area that we, as members of the Commission, are charged with studying and reporting on to members of Congress and the President.<sup>2</sup> But like several major bills that have passed or may pass the 111<sup>th</sup> Congress, the Dodd-Frank bill includes a section on race and gender that even those who pride themselves on keeping up with national affairs may have failed to notice.<sup>3</sup> It's not hidden, but in a document that is almost two thousand pages long, nothing can ever be as accessible as we would like it to be.<sup>4</sup>

Section 342 requires that each covered agency establish an “Office of Minority and Women Inclusion” responsible for “all matters of the agency relating to diversity in management, employment, and business activities.”<sup>5</sup> The director of each such office must, among other things, “develop standards” for

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<sup>1</sup> The U.S. Commission on Civil Rights was established to, among other things, “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). Due to the shortness of time, this letter is being sent in our individual capacities as commissioners and not as an official Commission letter. The next regularly scheduled meeting of the Commission will take place on July 16, 2010.

<sup>2</sup> See Conference Report to Accompany H.R. 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act, 111<sup>th</sup> Cong. (2010).

<sup>3</sup> See Letter of October 9, 2009, from the U.S. Commission on Civil Rights to President Barack Obama and Distinguished Members of Congress on the Health Care Bill's provisions on race, <http://www.usccr.gov/correspd/CommissionHealthCareBill100909.pdf>. See also America COMPETES Reauthorization Act (H.R. 5116) (passed in House, pending in Senate). Other bills that directly concern issues of race and/or gender addressed by the 111<sup>th</sup> Congress include the Matthew Shepard and James Byrd Hate Crimes Prevention Act (passed and signed into law) and the Native Hawaiian Government Reorganization Act (passed by the House of Representatives and pending in the Senate).

<sup>4</sup> Some commentators nevertheless have noticed it. 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](http://www.realclearmarkets.com/articles/2010/07/08/diversity_in_the_financial_sector_98562.html); Caroline May, Racial Quotas in Dodd-Frank Financial Regulatory Bill, Daily Caller (July 11, 2010), available at <http://dailycaller.com/2010/07/11/racial-quotas-in-dodd-frank-financial-regulatory-bill/>; Politicizing the Fed: Congress Seeks More Control Over 12 Regional Banks, Wall Street Journal (June 14, 2010) (calling the racial and gender provisions of the Dodd-Frank bill “the biggest underreported threat” coming from this legislation”), available at <http://online.wsj.com/article/SB10001424052748704575304575297130299281828.html?KEYWORDS=maxine+waters>.

<sup>5</sup> § 342(a)(1)(A).

“assessing the diversity policies and practices of entities regulated by the agency” and “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 businesses and activities of the agency.”<sup>6</sup> This “fair inclusion” will apply to “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.”<sup>7</sup> Unsurprisingly, the bill does not define terms like “fair inclusion and utilization.”

Each covered agency must also develop a standard or procedure under which the director can make a determination that a contractor or subcontractor has “failed to make a good faith effort to include minorities and women in their workforce.”<sup>8</sup> Upon determining that a contractor or subcontractor has not made such good faith effort, the Director “shall make a recommendation to the agency administrator that the contract be terminated.”<sup>9</sup> The agency administrator may then terminate the contract; make a referral to the Office of Federal Contract Compliance Programs of the Department of Labor; or take other appropriate action.<sup>10</sup>

The potential for abuse should be obvious, but sadly sometimes it is not to those who are unfamiliar with the workings of governmental and corporate bureaucracies. All too often, when bureaucrats are charged with the worthy task of preventing race or gender discrimination, they in fact do 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. Those who are regulated by, or do business with, a federal agency are understandably eager to please that agency. When the agency says, “Jump!,” they know the financially smart response is, “How high?,” not “We’re concerned that your diversity goals cannot be achieved without tilting the playing field in favor of one group or another—something we believe the law and the Constitution forbid.”

In this case, the bureaucrats are not even being asked to prevent discrimination, but to ensure “fair inclusion.” The likelihood that it will in fact promote discrimination is overwhelming.

For these reasons alone, we would oppose Section 342 and recommend its deletion from the Dodd-Frank bill. But there is another, equally important aspect of Section 342 that concerns us. Some legislators have evidently come to think of women and minorities as just another constituency whose leaders must be brought on board with incentives when major legislation is being considered. The notion that legislation should include “a little something” for everyone is troubling in any context, but it is especially troubling in the context of race and gender, given the requirements of the Fifth and Fourteenth Amendments to the Constitution.

We thank you for your attention and hope that you delete or significantly change Section 342. If you should have any questions or comments, you should feel free to direct them to any of us or to Alison Schmauch, special assistant and counsel, at (202) 376-7671 or at [aschmauch@usccr.gov](mailto:aschmauch@usccr.gov).

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<sup>6</sup> § 342(c)(1).

<sup>7</sup> § 342(d).

<sup>8</sup> § 342(c)(3).

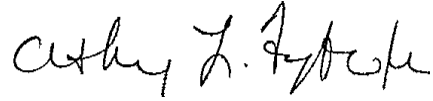
<sup>9</sup> §342(c)(3)(B)(i).

<sup>10</sup> §342(c)(3)(B)(ii).

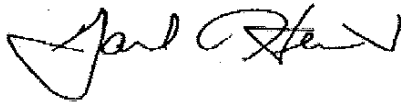
Sincerely,



Peter Kirsanow  
Commissioner



Ashley Taylor  
Commissioner



Gail Heriot  
Commissioner



Todd Gaziano  
Commissioner