SECURITIES AND EXCHANGE COMMISSION

Release No. 34-74239; File No. S7-02-15

Contract Standard for Contractor Workforce Inclusion and Request for Public Comment

AGENCY: Securities and Exchange Commission.

ACTION: Notice of proposed contract standard; notice of proposed information collection; and request for public comment.

SUMMARY: To implement section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act" or "the Act"), the Securities and Exchange Commission (the "Commission") is proposing to include in its service contracts a standard concerning workforce inclusion of minorities and women.

DATE: Comments should be received on or before: [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File No. S7-02-15 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow instructions for submitting comments.

Paper Comments:

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File No. S7-02-15. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet web site (http://www.sec.gov/rules/other.shtml). Comments will also be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Pamela A. Gibbs, Director, Office of Minority and Women Inclusion, or Audrey B. Little, Senior Counsel, Office of Minority and Women Inclusion at (202) 551-6046, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

Section 342(a)(1)(A) of the Dodd-Frank Act provides for certain agencies, including the Securities and Exchange Commission, to establish an Office of Minority and Women Inclusion ("OMWI").[1] Section 342(c)(1) provides that the OMWI Director shall develop and implement standards and procedures to ensure the fair inclusion and utilization of minorities, women, and minority-owned and women-owned businesses in all business and activities of the agency, including in procurement, insurance, and all types of contracts. Section 342(c)(2) requires that the OMWI Director include in the procedures for evaluating contract proposals and hiring service providers a component that gives consideration to the diversity of an applicant, to the

[1] 12 U.S.C. 5452.

extent consistent with applicable laws. In addition, section 342(c)(2) requires that such procedures include a written statement, in the form and content prescribed by the OMWI Director, 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, section 342(c)(3)(A) requires the OMWI Director to establish standards and procedures for determining whether an agency contractor or subcontractor "has failed to make a good faith effort to include minorities and women" in its workforce. Section 342(c)(3)(B)(i) provides that if the OMWI Director determines that a contractor has failed to make good faith efforts, the Director shall recommend to the agency administrator that the contract be terminated. Upon receipt of such a recommendation, section 342(c)(3)(B)(ii) provides that the agency administrator may terminate the contract, make a referral to the Office of Federal Contract Compliance Programs of the Department of Labor, or take other appropriate action.

Under section 342(c)(3)(A) of the Dodd-Frank Act, the OMWI Director is required to determine whether a contractor or subcontractor has made good faith efforts to include minorities and women in its workforce. The proposed Contract Standard would require that a Commission contractor, upon request from the OMWI Director, provide documentation of the actions undertaken (and as applicable, the actions each covered subcontractor under the contract has undertaken) that demonstrate its good faith efforts to ensure the fair inclusion of minorities and women in its workforce. The documentation requested may include, but is not limited to: 1) the total number of employees in the contractor's workforce, and the number of employees by race, ethnicity, gender, and job title or EEO-1 job category (e.g., EEO-1 Report(s)); 2) a list of covered subcontract awards under the contract that includes the dollar amount of each subcontract, date of award, and the subcontractor's race, ethnicity, and/or gender ownership

status; 3) the contractor's plan to ensure the fair inclusion of minorities and women in its workforce, including outreach efforts; and 4) for each covered subcontractor, the information requested in items 1 and 3 above. The OMWI Director will consider the information submitted in evaluating whether the contractor or subcontractor has complied with its contractual obligation to make good faith efforts to ensure the fair inclusion of minorities and women in its workforce.

The Commission's proposes to satisfy section 342(c)(2) through the inclusion of a contract standard concerning workforce inclusion of minorities and women (the "Contract Standard") in solicitations and resulting contracts for services with a dollar value of $100,000 or more. The proposed Contract Standard is similar to the contract clauses adopted by OMWIs of other federal financial regulatory agencies.[2] The Contract Standard requires the service contractor, upon entering into a contract with the Commission, to confirm that it will ensure, to the maximum extent possible and consistent with applicable law, the fair inclusion of minorities and women in its workforce. In addition, the proposed Contract Standard requires the contractor to include the substance of the Contract Standard in all subcontracts for services awarded under the contract with a dollar value of $100,000 or more. Accordingly, the requirements of the proposed Contract Standard will apply to covered subcontractors, as prescribed in section 342(c)(2) of the Dodd-Frank Act.

The proposed Contract Standard requires a contractor to provide documentation, upon the request of the OMWI Director, to demonstrate that it has made good faith efforts to ensure the fair inclusion of minorities and women in its workforce and, as applicable, to demonstrate that its covered subcontractors have made such good faith efforts. "Good faith efforts" are interpreted to

[2] See Department of the Treasury Acquisition Regulations; Contract Clause on Minority and Women Inclusion in Contractor Workforce, 79 Fed. Reg. 15551, at http://www.gpo.gov/fdsys/pkg/FR-2014-03-20/pdf/2014-05846.pdf.

include actions by a contractor (and, as applicable, actions by each covered subcontractor) to ensure the fair inclusion of women and minorities in its workforce, while at the same time identifying, and if present, removing barriers to minority and women employment or expansion of employment opportunities for minorities and women within its workforce. Efforts to remove such barriers may include, but are not limited to, recruiting to ensure that applicant pools include minorities and women, providing job-related training, or other activity that could lead to removing such barriers.

Section 342 of the Dodd-Frank Act applies to "all contracts of [the Commission] for services of any kind," but the section does not define the term "contract." FAR 37.101 defines "service contract" as a "contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply." Pursuant to the FAR definition, this proposed Contract Standard will be included in all Commission solicitations and resulting contracts for services with a dollar value of $100,000 or more, and in all subcontracts under the related prime contract for services with a dollar value of $100,000 or more.

Public Comment

The proposed Contract Standard is being published for public comment pursuant to 41 U.S.C. 1707, which applies to the publication of a covered federal procurement policy, regulation, procedure or form. Section 1707 provides that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) is to be published for public comment in the Federal Register if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the

policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors.

Here, the proposed Contract Standard relates to the expenditure of appropriated funds of the Commission, because it will be incorporated in certain Commission service contracts paid for with appropriated funds. The Contract Standard may have a significant effect beyond the internal operating procedures of the agency, as it implements requirements of the Dodd-Frank Act designed to address minority and women inclusion by federal contractors and implements the new contract termination authority contained in section 342(c)(3). The proposed Contract Standard may also have a cost or administrative impact on contractors or offerors, but we believe these effects would be insignificant as a result of the overlap with existing EEO laws. The consequence for non-compliance could have a cost or administrative impact on the covered service contractors, although they again overlap with existing remedies.

PAPERWORK REDUCTION ACT

The proposed Contract Standard contains "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[3] The title for the proposed collection of information is:

- Contract Standard for Contractor Workforce Inclusion

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. We intend to submit these requirements to the Office of Management and Budget ("OMB") for review and approval in accordance with the PRA and its implementing regulations.[4] If approved, the responses to the new collection of information would be mandatory. For collections of

[3] 44 U.S.C. 3501 et seq.
[4] 44 U.S.C. 3507(c); 5 CFR 1320.10.

information not contained in a proposed rule, the PRA requires federal agencies to publish a notice in the Federal Register concerning each proposed collection of information and to allow 60 days for public comment.[5] To comply with this requirement, we are publishing this notice.

A. Overview of Information Collection

1. Description of the Need for the Information and Proposed Use.

Under section 342(c)(3)(A) of the Dodd-Frank Act, the OMWI Director is required to determine whether a contractor or subcontractor has made good faith efforts to include minorities and women in its workforce. The proposed Contract Standard would require that a Commission contractor, upon request from the OMWI Director, provide documentation of the actions undertaken (and as applicable, the actions each covered subcontractor under the contract has undertaken) that demonstrate its good faith efforts to ensure the fair inclusion of minorities and women in its workforce. The documentation requested may include, but is not limited to: 1) the total number of employees in the contractor's workforce, and the number of employees by race, ethnicity, gender, and job title or EEO-1 job category (e.g., EEO-1 Report(s)); 2) a list of covered subcontract awards under the contract that includes the dollar amount of each subcontract, date of award, and the subcontractor's race, ethnicity, and/or gender ownership status; 3) the contractor's plan to ensure the fair inclusion of minorities and women in its workforce, including outreach efforts; and 4) for each covered subcontractor, the information requested in items 1 and 3 above. The OMWI Director will consider the information submitted in evaluating whether the contractor or subcontractor has complied with its contractual obligation to make good faith efforts to ensure the fair inclusion of minorities and women in its workforce.

2. Respondents and Estimate of Recordkeeping and Reporting Burdens.

[5] 44 U.S.C. 3506(c)(2).

The proposed Contract Standard will be included in Commission contracts and subcontracts for services with a dollar value of $100,000 or more. Based on the data showing the dollar value of service contracts and subcontracts awarded in FY 2012 and FY 2013, we estimate that 170 contractors[6] would be subject to the proposed Contract Standard. Approximately 120 of these contractors have 50 or more employees, while about 50 contractors have fewer than 50 employees.

a. Recordkeeping Burden

The information collection under the proposed Contract Standard would impose no new recordkeeping burdens on the estimated 120 contractors that have 50 or more employees. Such contractors are generally subject to recordkeeping and reporting requirements under the regulations implementing Title VII of the Civil Rights Act[7] and Executive Order 11246 ("EO 11246")[8]. Their contracts and subcontracts must include the clause implementing EO 11246 -- FAR 52.222-26, Equal Opportunity. In addition, contractors that have 50 or more employees (and a contract or subcontract of $50,000 or more) are required to maintain records on the race, ethnicity, gender, and EEO-1 job category of each employee under Department of Labor regulations implementing EO 11246.[9] The regulations implementing EO 11246 also require contractors that have 50 or more employees (and a contract or subcontract of $50,000 or more) to demonstrate that they have made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results,[10] and to develop and maintain a written program, which describes the policies, practices, and procedures that the contractor uses

[6] Unless otherwise specified, the term "contractors" refers to contractors and subcontractors.
[7] 42 U.S.C. 2000e, et seq.
[8] Executive Order 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).
[9] See 41 CFR 60-1.7.
[10] See 41 CFR 60-2.17(c).

to ensure that applicants and employees receive equal opportunities for employment and advancement.[11] In lieu of developing a separate workforce inclusion plan, a contractor would be permitted to submit its existing written program prescribed by the EO 11246 regulations as part of the documentation that demonstrates the contractor's good faith efforts to ensure the fair inclusion of minorities and women in its workforce. Thus, approximately 120 contractors are already required to maintain the information that may be requested under the proposed Contract Standard.

The estimated 50 contractors that employ fewer than 50 employees are required under the regulations implementing EO 11246 to maintain records showing the race, ethnicity and gender of each employee. We believe that these contractors also keep job title information during the normal course of business. However, contractors that have fewer than 50 employees may not have the written program prescribed by the EO 11246 regulations or similar plan that could be submitted as part of the documentation to demonstrate their good faith efforts to ensure the fair inclusion of minorities and women in their workforces. Accordingly, contractors with fewer than 50 employees may have to create a plan to ensure workforce inclusion of minorities and women.

In order to estimate the burden on contractors associated with creating a workforce inclusion plan, we considered the burden estimates for developing the written programs required under the regulations implementing EO 11246. [12] As there is no regulatory blueprint for a

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[11] See 41 CFR part 60-2.

[12] According to the Supporting Statement for the OFCCP Recordkeeping and Requirements-Supply Service, OMB Control No. 1250-003 ("Supporting Statement"), it takes approximately 73 burden hours for contractors with 1-100 employees to develop the initial written program required under the regulations implementing EO 11246. We understand the quantitative analyses prescribed by the Executive Order regulations at 41 CFR part 60-2 are a time-consuming aspect of the written program development. As there is no requirement to perform these types of quantitative analyses in connection with a workforce inclusion plan under the proposed Contract Standard, we

workforce inclusion plan, and contractors creating a workforce inclusion plan are not required to perform the same types of analyses required for the written programs prescribed by the EO 11246 regulations, we believe that to develop a workforce inclusion plan contractors with fewer than 50 employees would require approximately a third of the hours that contractors of similar size spend on developing the written programs required under the EO 11246 regulations. Accordingly, we estimate that contractors would spend about 24 hours of employee resources to develop a workforce inclusion plan. This would be a one-time total burden of 1,200 hours. After the initial development, we estimate that each contractor with fewer than 50 employees would spend approximately 10 hours each year updating and maintaining its workforce inclusion plan for a total annual burden of 500 hours. To account for this expected diminishing burden, we use a three-year average of the expected burden during the first year with the expected ongoing burden during the next two years to estimate the annual recordkeeping burden on contractors with fewer than 50 employees. Thus, we estimate that the total annual recordkeeping burden for such contractors to be about 740 hours [(1,200+500+500) / 3 years, rounded up].

The proposed contract standard also would require contractors to maintain information about covered subcontractors' ownership status, workforce demographics, and workforce inclusion plans. Contractors would request this information from their covered subcontractors, who would have an obligation to keep workforce demographic data and maintain workforce inclusion plans because the substance of the proposed Contract Standard would be included in their subcontracts. Based on data describing recent Commission subcontractor activity, we believe that very few subcontractors will have subcontracts under Commission service contracts

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believe the workforce inclusion plan will take substantially fewer hours to develop. The Supporting Statement is available at reginfo.gov.

with a dollar value of $100,000 or more.[13] These subcontractors may already be subject to similar recordkeeping requirements as principal contractors. Consequently, we believe that any additional requirements imposed on subcontractors would not significantly add to the burden estimates discussed above.

b. Reporting Burden

With respect to the reporting burden, we estimate that it would take all contractors on average approximately one hour to retrieve and submit to the OMWI Director the documentation specified in the proposed Contract Standard. We expect to request documentation from up to 100 contractors each year and therefore we estimate the total annual reporting burden to be 100 hours.

B. Solicitation of Public Comment

We request comments on the proposed collection of information in order to: (a) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) evaluate the accuracy of the Commission's estimate of the burden (including hours and cost) of the proposed collection of information; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Persons who desire to submit comments on the collection of information may use any of the methods shown in the ADDRESSES section of this notice. Comments should be received on or before: [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL

[13] A search of subcontract awards on the usaspending.gov website showed that four subcontractors in FY 2012 and three subcontractors in FY 2013 had subcontracts of $100K or more. See data on subcontract awards available at http://usaspending.gov.

REGISTER]. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Text of Proposed Contract Standard for Contractor Workforce Inclusion

NOTE: The Text of this Proposed Contract Standard will not appear in the Code of Federal Regulations.

CONTRACTOR WORKFORCE INCLUSION

Authority: 12 U.S.C. 5452; Sec. 342, Pub. L. 111-203.

Scope.

The agency will include the Contractor Workforce Inclusion contract standard in all Commission solicitations and resulting contracts for services with a dollar value of $100,000 or more.

Contract Standard.

The following contract standard shall be included in all Commission solicitations and resulting contracts for services with a dollar value of $100,000 or more.

CONTRACTOR WORKFORCE INCLUSION

The Contractor confirms its commitment to equal opportunity in employment and contracting, and that it shall ensure, to the maximum extent possible and consistent with applicable law, the fair inclusion of minorities and women in its workforce.

The Contractor shall insert the substance of this contract standard in each subcontract for services awarded for performance of this contract with a dollar value of $100,000 or more.

Within ten (10) business days of a written request from the Director of the Commission's Office of Minority and Women Inclusion (OMWI Director) or designee, or such longer time as the OMWI Director or designee determines, and without any additional consideration, action or authorization required from the OMWI Director, the Contractor shall provide documentation, satisfactory to the OMWI Director, of the actions it has undertaken (and as applicable, the actions each covered subcontractor under the contract has undertaken) to demonstrate its good faith efforts to comply with the aforementioned provisions.

For purposes of this contract, "good faith efforts" shall include actions by the Contractor (and as applicable, actions by each covered subcontractor under the Service Contract) to identify and, if present, remove barriers to minority and women employment or expansion of employment opportunities for minorities and women within its workforce. Efforts to remove such barriers may include, but are not limited to, recruiting to ensure that applicant pools include minorities and women, providing job-related training, or other activity that could lead to removing such barriers.

The documentation requested by the OMWI Director or designee to demonstrate good faith efforts may include, but is not limited to, one or more of the following:

a. The total number of Contractor's employees, and the number of employees by race, ethnicity, gender, and job title or EEO-1 Report job category (e.g., EEO-1 Report(s));
b. A list of covered subcontract awards for services under the contract, and for each covered subcontract award, the dollar amount, date of

award, and the subcontractor's race, ethnicity, and/or gender ownership status;

c. The contractor's plan for ensuring the fair inclusion of minorities and women in its workforce, including outreach efforts; and

d. For each covered subcontractor, the documentation specified in paragraphs a. and c. above.

Consistent with Section 342(c)(3) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), 12 U.S.C. § 5452(c)(3), a Contractor's failure to demonstrate to the OMWI Director that it has made good faith efforts to include minorities and women in its workforce (and as applicable, failure to demonstrate that its subcontractor(s) has made such good faith efforts) may result in termination of the contract for default after the contractor is provided written notice and an opportunity to cure the failure in accordance with the procedures set forth in FAR 49.402-3(d), other contractual remedies, referral to the Office of Federal Contract Compliance Programs (OFCCP), or other appropriate action.

Compliance with this standard does not necessarily satisfy the requirements of EO 11246, as amended, nor does it preclude OFCCP compliance evaluations and/or enforcement actions undertaken pursuant to that Executive Order, or demonstrate

compliance with other FAR clauses that may be included in this contract.

For purposes of this contract standard, the term “minority” shall have the meaning set forth in section 342(g) of the Dodd-Frank Act.

By the Commission.

Brent J. Fields,
Secretary.

Dated: February 10, 2015.

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