Are Self-Assesments of Diversity Policies and Practices Truly Voluntary?

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In recent guidance, the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency (collectively, the "Agencies") “*strongly encouraged*” certain regulated financial institutions to conduct self-assessments of their diversity policies and practices, to report the results to their primary federal regulators and to post summaries of their efforts on their public websites. Such an assessment could be costly in terms of financial and managerial resources and does not appear to be required. Nonetheless, even a cursory review of the internet suggests that many financial institutions have already begun the process and are posting reports of their efforts. This raises the questions:

1. Are the self-assessments truly voluntary?
2. If so, should a financial institution conduct a self-assessment?

To date, the Agencies have issued two joint releases addressing the self-assessments. The “Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies,” (the “Policy Statement”) was issued on June 10, 2015, and stated that compliance is voluntary, and set forth a series of joint standards for the assessment of policies and practices. The “Frequently Asked Questions (FAQs) Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies,” (the “FAQs”) was released on August 2, 2016, and clarified certain issues addressed in the Policy Statement.

Are the self-assessments truly voluntary?

The Policy Statement indicated “Use of the Standards by a regulated entity is voluntary. The Agencies will not use their examination or supervisory processes in connection with these standards.” While this appears to be clear and unambiguous, the Agencies addressed the issue again in the FAQs with the following:

Q4. Are regulated entities required to conduct a self-assessment and provide the results to their regulators?

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The Policy Statement states that regulated entities' self-assessments of their diversity policies and practices are voluntary, and submissions of information regarding those self-assessments to their primary federal financial regulator are also voluntary.

Thus, it unequivocally appears that the self-assessments truly are voluntary.

Given that the self-assessments truly are voluntary, should a financial institution conduct a self-assessment?

According to the Agencies, the self-assessment process should include, at a minimum,

(i) an annual examination of the "organizational commitment to diversity and inclusion; workforce profile and employment practices; procurement and business practices (supplier diversity); and practices to promote transparency of organizational diversity and inclusion;"

(ii) reporting the results of the self-assessment to the financial institution's primary federal regulator; and

(iii) posting a summary of the financial institution's efforts on its public website.

A thoughtful and thorough application of this process will require more than a modest level of commitment and effort from all levels of a financial institution. It could potentially result in a financial institution incurring expenses in connection with the self-assessment and could identify systemic problems requiring ongoing corrective actions and expenses. Accordingly, financial institutions must consider whether the benefits to be derived from an assessment justify the potential costs. In that regard, we have provided a list of factors that financial institutions may consider in making a determination.

1. As a general matter, it is advisable for a financial institution to do what its primary federal regulator "strongly encourages" it to do.
2. While self-assessments may be beneficial, they may also be detrimental to a financial institution's reputation and potentially result in legal issues if areas of weakness or problems identified in the assessment are ignored and left unaddressed. A strong commitment to follow through is critical to the success of any self-assessment.
3. Consider feedback on diversity and inclusion received from customers, employees, or others interested.
4. While the assessments are voluntary at this time, it is not inconceivable that they will become mandatory or the subject of examinations if ignored by the industry as a whole.
5. Some scholars suggest that a high level of commitment to diversity and inclusion results in:

- increased problem-solving skills and creativity among a company's work-force;
- an increased capacity to serve members of the community with different backgrounds and experiences; and
- an increased likelihood that an employer will meet the expectations of its employees with respect to a nondiscriminatory, harassment free workplace.

6. Improving a financial institution's diversity policies and practices may result in an increased positive reputation in the community.

The foregoing list is by no means exhaustive. The considerations and the answer to the questions will vary from institution to institution, based on each financial institution's unique characteristics and circumstances.