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Hidden in Dodd-Frank: A Look at the Office of Minority and Women  
Inclusion

# HIDDEN IN DODD-FRANK: A LOOK AT THE OFFICE OF MINORITY AND WOMEN INCLUSION

*By James Nelson Lewis<sup>1</sup>*

## I. Introduction

*“An Act [t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”<sup>2</sup>*

The Office of Minority and Women Inclusion, developed in Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 342), is a step in the wrong direction for a country looking to become colorblind. It does not encourage diversity, but rather violates current employment law due to poor draftsmanship. Since the creation of the Dodd-Frank Wall Street Reform and Consumer Protection Act, there has been a great deal of debate regarding the numerous provisions, changes, and increased oversight that live within the hundreds of pages establishing these new laws. The intent of the bill, stated above, lays out a goal that many people agree on. Finding a way to attain this goal is the problem. This bill is wide reaching and discusses everything from methods of preventing corporations from getting “too big to fail” to regulation and disclosure requirements for conflict materials, like blood diamonds.

Section 342 is one portion of the act that is unrelated to the rest and spans roughly three pages of the act. Section 342 does not further any of the goals defined in the intent section at the outset of the act.<sup>3</sup> It requires financial agencies to create the Office of Minority and Women Inclusion for the purpose of ensuring the advancement of diversity in this industry.<sup>4</sup>

Only after understanding the language chosen by legislators to pursue this seemingly positive endeavor does it become clear why this creates a

negative impact on our financial industry. This paper addresses four major issues that arise from Section 342: (1) there will not be uniformity across the relevant agencies and private firms because of the vagueness of important, undefined terms; (2) the act creates a quota system that will develop employment issues for agencies and private businesses alike; (3) it has a number of over inclusive and under inclusive terms that will cause significant confusion when assessing the scope of the act; and (4) the law is redundant because laws defining equal employment opportunity have already been debated and implemented.

## II. Defining Section 342: The Office of Minority and Women Inclusion

*“And nothing embittered me, which is important, because I think ethnic people and women in this society can end up being embittered because of the lack of affirmative action, you know.”<sup>5</sup>*

Before understanding the problems and potential violations, it is important to be aware of what this law says. If we are to fully appreciate the law, the entire section must be carefully considered.

### A. Office of Minority and Women Inclusion

After the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, each federal agency has a six-month window within which it must create an Office of Minority and Women Inclusion.<sup>6</sup> The responsibilities of this office include the furtherance of diversity in the workplace at all levels of the agency.<sup>7</sup> In addition, any agency that already has an office to address these issues must transfer all related duties to the Office of Minority and Women Inclusion.<sup>8</sup> The Office of Minority and Women Inclusion is also

entrusted with the task of implementing remedies for violations of civil rights laws.<sup>9</sup>

### B. Director

Each relevant agency administrator appoints the Director for their Office of Minority and Women Inclusion.<sup>10</sup> This Director reports to the agency administrator.<sup>11</sup>

The Director of each agency's Office of Minority and Women Inclusion must develop three (3) standards by which their office shall be governed. The first of these is "equal employment opportunity *and* the racial, ethnic, and gender diversity of the workforce and senior management of the agency."<sup>12</sup> The second major requirement is to develop greater involvement with minority and women-owned businesses.<sup>13</sup> The final aspect of Director-created standards involves a review of the diversity policies of the various entities that are regulated by that particular agency.<sup>14</sup> This final requirement is not meant to affect the lending policies of any regulated entity.<sup>15</sup>

In addition to these duties, the Director is required to report to the agency administrator, but only with respect to the impact on minority and women-owned businesses.<sup>16</sup>

### C. Inclusion in All Levels of Business Activities

Although the Office of Minority and Women Inclusion was meant to impact the financial sector, it reaches far beyond its intended scope and will influence other unintended businesses. The standards and procedures that the Director creates for his/her Office of Minority and Women Inclusion necessarily involve the "fair inclusion" of minorities, women, and minority-owned and women-owned businesses in all activities and levels of the agency.<sup>17</sup>

When reviewing applications for contracts and hiring employees, the agency must consider the diversity of the applicant.<sup>18</sup> This consideration includes a written statement and requires "to the maximum extent possible, the fair inclusion of women and minorities in the workforce of the contractor and, as applicable, subcontractors."<sup>19</sup>

The same standard applies when the Director makes decisions regarding termination. There must be a procedure in place to evaluate whether "an agency contractor [and/or] . . . a subcontractor has failed to make a good faith effort to include minorities

and women in their workforce."<sup>20</sup> In practice, the Director must first notify the agency administrator of any such violation and recommend the contract be terminated.<sup>21</sup> Next, the agency administrator may act on this recommendation in one of three ways: "(I) terminate the contract; (II) make a referral to the Office of Federal Contract Compliance Programs of the Department of Labor; or (III) *take other appropriate action.*"<sup>22</sup>

### D. Applicability

Section 342 applies to all contracts of an agency for any services it provides.<sup>23</sup> Although the bill names a number of potential firms in the banking industry and the type of business they conduct, the language used in this act suggests that the list is not conclusive.<sup>24</sup>

### E. Reports

Section 342 requires each Office of Minority and Women Inclusion to submit an annual report to Congress, which must include five major elements.<sup>25</sup> First, the Office must indicate the amount the agency paid to its contractors in the last year.<sup>26</sup> Second, it must list a total percentage of the amount paid to contractors that qualified as having a "fair inclusion" of minority, women, minority-owned, and women-owned businesses.<sup>27</sup> Third, the report must provide an explanation of the success and challenges of the programs used to increase women and minority presence.<sup>28</sup> Fourth, the Office must speculate into potential issues that may arise when hiring "qualified minority and women employees and contracting with qualified minority-owned and women-owned businesses."<sup>29</sup> Finally, the Director should include any other information he/she sees fit and necessary.<sup>30</sup>

### F. Diversity in Agency Workforce

In accordance with the decision to implement these criteria, agencies are also required to take action to ensure appropriate diversity in these financial agencies and the companies with which they contract and subcontract.<sup>31</sup> There are six specific ways that the agencies must act when implementing this obligation. First, they must recruit at institutions of higher education with historically significant populations of minorities and women.<sup>32</sup> Second,

they must have a presence in urban community job fairs for sponsoring and recruitment purposes.<sup>33</sup> Third, these agencies and businesses need to advertise in publications with a focus on minorities and women.<sup>34</sup> Fourth, these agencies and businesses must partner with organizations geared towards helping women and minorities find internships or summer employment.<sup>35</sup> The fifth requirement focuses on teaching young minorities and women about finances and mentoring services.<sup>36</sup> This is only necessary where feasible.<sup>37</sup> Finally, the Office of Minority and Women Inclusion has the discretion to implement any other communications it sees fit.<sup>38</sup>

### G. Definitions

The definition portion for this section of the Dodd-Frank Wall Street Reform and Consumer Protection Act is scarce and only explains six words.<sup>39</sup> The dearth of definitions for various key terms creates confusion among the other portions of this act since a number of terms are vague by nature.

### III. Potential Violations and Hardships Created

*"I don't believe in quotas. America was founded on a philosophy of individual rights, not group rights."<sup>40</sup>*

The unintended consequences of Section 342 prevent the Act from effectively creating diversity in agencies, their contractors, and their subcontractors. The Act contains vague terms that eliminate uniformity across the agencies and their contractors, and the language creates a quota system for employers to use when hiring, contracting, and subcontracting. Section 342 does not properly define its scope, making it both over inclusive and under inclusive. It is also redundant because employment law and, where applicable, affirmative action have effectively developed diversity in the workplace. With respect to issues involving race, the Supreme Court has held that racial classifications must be analyzed under strict scrutiny.<sup>41</sup> When a statute classifies individuals on the basis of their gender, the statute must have an "exceedingly persuasive justification" for the classification maintain constitutionality.<sup>42</sup> To satisfy this burden, the government must show that the classification serves "important governmental objectives" and the means employed are "substantially

related to the achievement of those objectives."<sup>43</sup> In fact, "the justification for contracting and employment discrimination has required a showing of entrenched discrimination that cannot otherwise be dislodged."<sup>44</sup>

### A. Vague Terms in § 342 Will Frustrate Uniformity

The term "fair inclusion" is used frequently in Section 342, but it is too vague to serve as an effective benchmark for the various directors that will manage the Offices of Minority and Women Inclusion. The significance on this term stems from its link to the establishment of a quota system. The scope of the term "fair inclusion" could have a variety of possibilities. If the use of "fair inclusion" was meant to apply to current applicants, existing employment law already meets this objective. By using "fair inclusion," Congress most likely meant to encourage hiring staff that are "proportionally across different minority groups in the labor force."<sup>45</sup> Current employment law requires equally qualified candidates of different races to be treated equally when being considered for a job.<sup>46</sup> Through the "fair inclusion" requirement, Section 342 mandates that Directors "consider candidates who never even applied for a job. So if no Pacific Islanders, for example, have applied to at JP Morgan, JP Morgan can still be liable for breaking the law because they're not hiring any."<sup>47</sup> Analyzing the problem for JP Morgan in this example, it would be difficult for the company to adhere to the "fair inclusion" requirements of all regulated industries. For instance, the Securities and Exchange Commission (SEC) could have one requirement for Pacific Islanders and the Federal Deposit Insurance Corporation (FDIC) could have a significantly different requirement. Because JP Morgan cannot hire Pacific Islanders in two distinct proportions to suffice for both SEC and FDIC requirements, it would only be able to do business with one of these two agencies, assuming they meet one of their requirements for hiring Pacific Islanders. Defining the phrase "fair inclusion" would have provided invaluable clarity in the application of this law, but Congress failed to so provide.

The words "fair inclusion" are used multiple times throughout the statute to encourage increased diversity. In fact, this diversity requirement is not simply imposed on the agency in charge of developing

an Office of Minority and Women Inclusion, but must be honored when contracting and subcontracting business. The term is vague and it does not clearly establish what it means to fairly include minorities and women. The law leaves to the discretion of the relevant Director the task of defining what it means to have “fair inclusion.” Each Director may have a different opinion on the scope of this term, which will make it will be nearly impossible for any one business to contract or subcontract with multiple federal agencies. If businesses are forced to have hiring practices consistent with the agency with which they are doing business, then they will be unable to do business with agencies that have differing definitions of “fair inclusion” in their Office of Minority and Women Inclusion.

*B. Section 342 Creates Hiring Quotas in Violation of Established Employment Law*

The most controversial issue regarding the creation and implementation of the Office of Minority and Women Inclusion is the use of quotas for the purposes of employment because quota systems detrimentally effects both individual rights and an employer’s right to assess people on quality rather than race, gender, etc. In employment law, Title VII encourages employers to hire on the basis of job qualifications, rather than because of race or color.<sup>48</sup> In contrast, a quota system encourages employers to rely on statistics and adopt inappropriate measures for assessing job applicants.<sup>49</sup> The Supreme Court found that Title VII does not require an employer favor an applicant based on race if the employer ignores the applicant’s other job qualifications.<sup>50</sup> The Supreme Court also held that past discrimination in a particular industry does not necessarily justify the use of a racial quota.<sup>51</sup>

The creation of quotas is established is in the first duty of the Director for each Office of Minority and Women Inclusion. Directors are required to develop standards for “equal employment opportunity *and* racial, ethnic, and gender diversity of the workforce and senior management of the agency.”<sup>52</sup> The equal employment opportunity has been established through current employment law and has been implemented into modern hiring practices. The second clause initiates the development of the quota system. This clause requires that the director

to develop standards for “racial, ethnic, and gender diversity of the workforce and senior management of the agency.”<sup>53</sup> This requires each Director to develop a quota system for their entire workforce, including senior management. The problem with the vague term “fair inclusion” arises here and further frustrates Congressional intent by permitting a gross disparity among the quota systems established. For these reasons, this type of quota system is impermissible.

Further, this new process is to be implemented in all businesses with which the agency contracts.<sup>54</sup> The Director must ensure racial and gender diversity at all levels of the agency. The quota standards that the Director deems appropriate for his or her agency will then apply to all businesses contracting with their agency. Thus, the quota system is not only applicable to our federal government, but also affects private firms.

There are many differing opinions on this practice and what it will mean for our future. For instance, Michael Yaki, a member of the U.S. Commission on Civil Rights has declared this as “a wake-up call for Wall Street: women, black Americans, Asian Americans, Latino Americans, they all pay for your bailouts . . . [f]irms must take steps to be more reflective of America.”<sup>55</sup> In opposition of this, some people feel that the anti-discrimination laws currently in place are sufficient and developing the quotas will do more harm than good.<sup>56</sup> Some argue that “federal hacks” can now put too much pressure on “private companies to make hiring decisions based on race. It is a backdoor way of instituting a racial quota system.”<sup>57</sup>

*C. The Scope of Section 342 is Unclear Because it is Under inclusive and Over inclusive*

Section 342 is over inclusive because it applies to an unlimited scope of agency contractors and subcontractors, and under inclusive because the only industry that will feel its impact is the financial sector. Section 342 is under inclusive because “harmful conduct falls outside the statute’s scope belies a governmental assertion that it has genuinely pursued an interest ‘of the highest order,’”<sup>58</sup> The statute is over inclusive because “the broad scope of the statute is unnecessary to serve the interest.”<sup>59</sup>

The text of the statute supports the argument that the Act is both under inclusive and over inclusive. Requiring agencies, the companies they contract with, and the companies they subcontract with to

become more reflective of racially and gender diverse citizens is a drastic expansion of employment law. The law is also under inclusive because it only applies to the *financial* industry. Limiting this type of law to the financial industry is analogous to “past[ing a band-aid] on top [of current employment law].”<sup>60</sup> If Congress truly wanted to change employment law, then the requirement “should apply to all industries, it should be carefully debated, it should work out which parts of the law supersede existing law, and it hasn’t done it.”<sup>61</sup>

This law is over inclusive because it reaches all companies that either contract or subcontract with any agency or business. Its effects will reach beyond the financial industry and impact other firms, such as the businesses that clean the offices or businesses that cater office parties in the financial industry.<sup>62</sup> Congress probably did not intend to make this law expand as far as it does, but the language they chose cannot be refuted. Congress employed key statutory terms that serve to expand this law far beyond financial industries.

Finally, numerous “catchalls” throughout the Act give employers no guidance or boundaries. This is concerning because the Office Director and Agency Administrator have the potential to implement rules beyond a scope that is even imaginable.

*D. Section 342 Is Redundant Because Efforts to Ensure Diversity Have Already Been Incorporated into Current Employment Law and Affirmative Action*

Section 342 will create confusion when litigation arises pertaining to the controlling, applicable law because fair employment laws are already in place. The purported goal of Section 342 (attaining diversity) is redundant and will only cause confusion because employment discrimination is already prohibited under Title VII of the Civil Rights Act on the basis of race, sex, etc.<sup>63</sup> “Title VII prohibits both intentional discrimination (known as ‘disparate treatment’) as well as, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as ‘disparate impact’).”<sup>64</sup> More specifically, Congress has enforced civil liability upon employers that unintentionally discriminate in the workplace.<sup>65</sup>

As mentioned previously, this law does not affect all modern employment law; it has merely altered and expanded the rules for one single industry. In so doing, Congress is generating confusion and a platform for controversy.<sup>66</sup> Careful consideration is due when the first violation of Section 342 eventually comes into play. Not knowing which law to apply may be the factor that exposes this section of the act to the light it deserved long before this point in time. This provision is at best redundant. At worst, it could harm the financial industry with unrealistic requirements.<sup>67</sup>

**IV. Section 342 Will Have a Harmful Impact on the Financial Industry**

*“With my academic achievement in high school, I was accepted rather readily at Princeton and equally as fast at Yale, but my test scores were not comparable to that of my classmates... [a]nd that’s been shown by statistics, there are reasons for that. There are cultural biases built into testing, and that was one of the motivations for the concept of affirmative action to try to balance out those effects.”<sup>68</sup>*

The biggest concern of this section of the Dodd-Frank Wall Street Reform and Consumer Protection Act is the detrimental impact it will have on the ability of American firms to compete internationally. It mandates an additional requirement for American businesses that our international counterparts will not have to address.

In fact, the impact could be greater than simply making business more difficult to conduct in the United States. For some companies it may make less economic sense to conduct business in the United States. Many of these companies are already multinational or international with strong roots in other countries. If this is the last straw for a struggling branch in the United States, it could make sense for such business to close its doors.

With unemployment standing as a constant concern in the United States, this law may in fact be counterproductive to this goal by making it more difficult for employers to hire employees and more difficult for firms to conduct business in this country. On the other end of the spectrum, this could encourage government agencies and their contractors to hire less qualified candidates in order to fulfill a racial quota.<sup>69</sup>

The Supreme Court has not heard many cases involving the issue of affirmative action in the workplace over the past twenty years and, as a result, they have left many questions regarding the scope and legality of affirmative action efforts in the workplace.<sup>70</sup> Nevertheless, affirmative action exists in workplace hiring processes.<sup>71</sup> It has been suggested that, “[s]omeone must sacrifice to achieve a level playing field for Blacks and Whites. . . . [T]he question remains: Who should be expected to sacrifice to remedy the racial disparity and injustice that still exists in American institutions and in the greater American community?”<sup>72</sup> This argument for affirmative action indicates that opportunities will become real in the minds of the oppressed when changes occur as a sacrifice to right a wrong.<sup>73</sup> While affirmative action is already a controversial issue, this change in the law does not fit within the realm of affirmative action. It is more properly qualified as “affirmative action plus.” Forcing employers to hire in a way that is consistent with society’s level of diversity takes affirmative action one step past productivity. Legislators failed to provide justification for this law. One might say that Congress is sacrificing the financial industry to create equality in this country, but our legislators, in their haste, enacted a counter-progressive law.

Two additional provisions will create complications in the financial industry. First, the Act requires Agencies report only successes to Congress, not failures. Congress will be left in the dark without a requirement for Agencies to detail failures as well as successes, and there will be no way for Congress to know the struggles of the Act’s implementation. Second, the Act requires an Agency take “affirmative steps.” Agencies and businesses cannot take these new diversity requirements lightly with such a mandate in place.

## V. Conclusion

*“Affirmative action works but we’re going to need to muster all our political resources if we are to keep it in place.”<sup>74</sup>*

While the new law aims to develop an improved society by creating a diverse banking and financial sector, there are major concerns regarding the impact of this portion of the Dodd-Frank Wall Street Reform and Consumer Protection Act since it was passed without much debate and hidden within

the pages of the massive act. Basic legislative issues are in place that may cause employment concerns that could go on for years without a resolution due to the inherently slow process of our judicial system. Whether this will come to the attention of the courts is unknown. If it does, it could have been avoided with proper legislation. This law introduces uncertainty about the future due to the issues raised herein. Firms and government agencies will need to keep up to date with employment laws.<sup>75</sup>

In recent years, many have complained about our financial industry. Most agree that something needs to be done, but the method of accomplishing this is crucial. Our elected officials volunteer to accomplish these tasks and should be held to a higher standard. Whether one considers the vague terms scattered throughout, the implementation of quota system, the blurry scope of the act due to the over inclusive and under inclusive nature of it, or the inherent redundancy of an act with the intent of previously established federal law, Congress enacted the Office of Minority and Women Inclusion at the wrong time and in the wrong way. If change is made with haste and without debate, we can expect results reflective of that effort. If change is carefully considered and implemented with language of the act is both lawful and construed reasonably there will be a greater chance for success.

Dr. Martin Luther King, Jr. wanted the United States to be a country in which people are judged by their character, not their race. Unfortunately, the federal government has forcibly contravened Dr. King’s lofty aspiration, and now imposes race as a factor of federal employment decision-making.

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## (Endnotes)

<sup>1</sup> Widener University School of Law, J.D., 2012; University of Delaware, B.S. Finance, B.S. Business Management, 2009.

<sup>2</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 342, 124 Stat. 1376, 1376 (2010) (defining the intent of the entire act).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1541.



<sup>5</sup> ACADEMY OF ACHIEVEMENT, <http://www.achievement.org/autodoc/steps/per?target=jon2-016> (last visited Nov. 10, 2011) (quoting James Earl Jones).

<sup>6</sup> § 342, 124 Stat. at 1541; see Cynthia L. Hackerott, *Dodd-Frank Act Requires Office of Minority and Women Inclusion for Covered Agencies*, WOLTER KLUWER LAW & BUSINESS (Aug. 24, 2010), <http://www.employmentlawdaily.com/index.php/2010/08/24/dodd-frank-act-requires-office-of-minority-and-women-inclusion-for-covered-agencies/> (stating the required agencies as, (1) the Departmental Offices of the Department of the Treasury; (2) the Federal Deposit Insurance Corporation; (3) the Federal Housing Finance Agency; (4) each of the Federal Reserve banks; (5) the Federal Reserve Board; (6) the National Credit Union Administration; (7) the Office of the Comptroller of the Currency; (8) the Securities and Exchange Commission; and (9) the Bureau of Consumer Financial Protection (Section 342(g))).

<sup>7</sup> § 342, 124 Stat. at 1541.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1542.

<sup>16</sup> *Id.* at 1541.

<sup>17</sup> *Id.* at 1542 (emphasis added).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> *Id.* (explicitly citing “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” and 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”).

<sup>25</sup> *Id.* at 1543.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1543-44.

<sup>40</sup> See SEARCH QUOTES, <http://www.searchquotes.com> (last visited Nov. 28, 2011) (search Clarence Thomas in the search box, then go to page two) (quoting Clarence Thomas).

<sup>41</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

<sup>42</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1982).

<sup>43</sup> *Id.*

<sup>44</sup> ROGER CLEGG, RACE, SEX, AND THE DODD-FRANK FINANCIAL REGULATION BILL, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES 3 (2010), [http://www.fed-soc.org/doclib/20100712\\_DoddFrankBill.pdf](http://www.fed-soc.org/doclib/20100712_DoddFrankBill.pdf).

<sup>45</sup> Telephone Interview with Diana Furchtgott-Roth, Director, Ctr. for Employment Policy; Senior Fellow, Hudson Inst. (Feb. 8, 2011).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 499 (1989).

<sup>52</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, § 342, 124 Stat. at 1376, 1541 (2010) (emphasis added).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1542.

<sup>55</sup> Julia Love & Jim Puzzanghera, *Financial Reform Bill Calls for Diversity*, L.A. TIMES, Aug. 25, 2010, <http://articles.latimes.com/2010/aug/25/business/la-fi-reform-diversity-20100825-18>.

<sup>56</sup> See Telephone Interview with Diana Furchtgott-Roth, Director, Ctr. for Employment Policy; Senior Fellow, Hudson Inst. (Feb. 8, 2011) (indicating

“many women who have children prefer jobs with flexible schedules and that doesn’t lend itself to Wall Street . . . it doesn’t make sense to say that there has to be the same male/female or minority/majority quota of workers in every single workplace. You don’t find that women want to go work on oil rigs or mining or drilling or construction sites even though . . . the Labor Department has an affirmative action rule . . . for women . . . in on-site construction sites”).

<sup>57</sup> *Editorial: Quotas by Proxy in Dodd-Frank Bill*, WASH. TIMES, July 14, 2010, [www.washingtontimes.com/news/2010/jul/14/quotas-by-proxy-in-dodd-frank-bill/print/](http://www.washingtontimes.com/news/2010/jul/14/quotas-by-proxy-in-dodd-frank-bill/print/).

<sup>58</sup> *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) (joined by Justice O’Connor).

<sup>59</sup> *Id.*

<sup>60</sup> Telephone Interview with Diana Furchtgott-Roth, Director, Ctr. for Employment Policy; Senior Fellow, Hudson Institute (Feb. 8, 2011).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2676.

<sup>66</sup> See Kevin Roose, *Seeking Guidance on Dodd-Frank’s Diversity Clause*, N.Y. TIMES, Nov. 11, 2010, <http://dealbook.nytimes.com/2010/11/11/seeking-guidance-on-dodd-franks-diversity-clause/> (employment law specialist Lawrence Z. Lorber calling the clause “largely redundant”).

<sup>67</sup> *Politicizing the Fed: Congress Seeks More Control Over the 12 Regional bBanks*, WALL STREET J., June 14, 2010, <http://online.wsj.com/article/SB10001424052748704575304575297130299281828.html>.

<sup>68</sup> Charlie Savage, *Videos Shed New Light on Sotomayor’s Positions*, N.Y. TIMES, June 10, 2009, <http://www.nytimes.com/2009/06/11/us/politics/11judge.html> (quoting Supreme Court Justice Sonia Sotomayor).

<sup>69</sup> Diana Furchtgott-Roth, *Racial, Gender Quotas in the Financial Bill?*, REAL CLEAR MARKETS, July 8, 2010, [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).

<sup>70</sup> Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005).

<sup>71</sup> *Id.*

<sup>72</sup> Robert J. Lipkin, *Affirmative Action & the Obligations of American Citizenship*, 1 WIDENER J.L., ECON. & RACE 1, 2 (2010).

<sup>73</sup> *Id.* at 4, 8, 12.

<sup>74</sup> Evelina Alarcon, *Harold Washington: Champion of Diversity*, PEOPLE’S WORLD, Feb. 7, 2003, <http://www.peoplesworld.org/harold-washington-champion-of-equality/> (quoting Harold Washington).

<sup>75</sup> John P. Furfaro & Risa M. Salins, *Dodd-Frank’s Diversity Clause*, N.Y. L.J., Dec. 3, 2010, [http://www.skadden.com/content/Publications/Publications2302\\_0.pdf](http://www.skadden.com/content/Publications/Publications2302_0.pdf).