

David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street NW  
Washington, D.C., 20581

Re: RIN 3038-AD01

Dear Mr. Stawick:

We<sup>1</sup> write to comment on a proposed regulation implementing Section 735(b)(22) of the Dodd-Frank Act. The proposed regulation states in part that each publicly traded designated contract market (DCM) “shall endeavor to recruit individuals to serve on its Board of Directors and its other decision-making bodies (as determined by the Commission) from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of candidates.”<sup>2</sup> We urge that a statement be included in the final rule that striving for a culturally diverse board does not mean giving preferences on the basis of race or ethnicity.

The statute itself does not mention race or ethnicity. The relevant section, which mentions only an obligation to recruit from a “culturally diverse” pool, reads as follows:

DIVERSITY OF BOARD OF DIRECTORS.—The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.<sup>3</sup>

The language in the regulation tracks the language that appears in the statute. Any construction of this statutory language that would encourage racial or ethnic preferences should be disfavored because such uses are presumptively unconstitutional. *See Adarand v. Peña*, 515 U.S. 200, 227 (1995): (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored to achieve a compelling governmental interest.”) Such a presumptively

---

<sup>1</sup> The three of us – Peter Kirsanow, Gail Heriot, and Todd Gaziano – are members of the U.S. Commission on Civil Rights. The U.S. Commission on Civil Rights is an independent, bipartisan agency that makes appraisals of the laws and policies of the Federal Government with respect to discrimination or denials of the equal protection of the laws under 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). We write in our capacities as individual commissioners.

<sup>2</sup> 79 C.F.R. 722, 729.

<sup>3</sup> Section 735(b)(22) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, codified at Pub. L. 111-203.

unconstitutional use of race and ethnicity would likely also violate 42 U.S.C. 1981 and, if directors are considered employees, Title VII of the Civil Rights Act of 1964. When deciding whether the use of racial or ethnic classifications and preferences would actually be unconstitutional, it is significant that the DCM diversity requirement does not appear intended to remedy past discrimination, but rather to ensure that board members bring diverse perspectives to the table.<sup>4</sup> Using race and ethnicity as a proxy for diversity of perspective is inappropriate here because DCMs can screen potential board members directly for diversity of perspective. Because organizations generally give potential board members very close scrutiny and usually choose only a few new members at a time, the use of race and ethnicity as a proxy for perspective seems especially wrongful here. Such a race and ethnic proxy is unconstitutional in any event.<sup>5</sup>

---

<sup>4</sup> Neither the statute nor the proposed regulations state that cultural diversity is intended to remedy past discrimination. A footnote that appears in the Federal Register with the proposed regulations reads:

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 empirical literature on the value of diversity on corporate boards is mixed. For a review of this literature, see John Conley, Lissa L. Broome, and Kimberly Krawiec, *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say About Why Diversity Matters*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1415803](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415803).

<sup>5</sup> See, e.g., *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998):

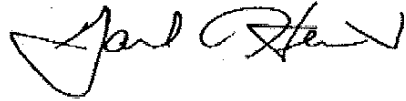
We do not mean to suggest that race has no correlation with a person’s tastes or opinions. We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them. One might well think such an approach antithetical to our democracy... Indeed, 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.

Thank you for your attention to our comments. If you have any questions about this letter, please contact Alison Somin, Special Assistant and Counsel at the Commission, at either [aschmauch@usccr.gov](mailto:aschmauch@usccr.gov) or (202)376-7671.

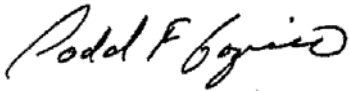
Sincerely,



Peter Kirsanow  
Commissioner



Gail Heriot  
Commissioner



Todd Gaziano  
Commissioner