

B&B REVIEW

Financial Services and Transactions

Labor and Employment Law

OPPORTUNITIES AND CHALLENGES CREATED IN DODD-FRANK FOR FINANCIAL FIRMS' WORK FORCE DIVERSITY

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INTRODUCTION

The recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act will impose new work force diversity requirements for a wide variety of businesses in the financial industry. The law will create opportunities for organizations, such as colleges and universities, that can assist federal banking agencies in increasing the diversity of their work forces. The law also will impose new compliance challenges for firms that enter into contracts with these agencies.

AGENCIES COVERED BY NEW LAW

The following federal agencies are covered by the new law:

- Department of the Treasury
- Federal Deposit Insurance Corporation
- Federal Housing Finance Agency
- Board of Governors of the Federal Reserve System and each of the Federal Reserve Banks
- National Credit Union Administration
- Office of the Comptroller of the Currency
- Securities and Exchange Commission
- Bureau of Consumer Financial Protection (created under Dodd-Frank)

Any financial industry business that might enter into a contract with one or more of these agencies should familiarize itself with the requirements of the new law.

BUSINESSES THAT MIGHT HAVE CONTRACTS WITH AFFECTED AGENCIES

A wide array of businesses that might enter into contracts with one of the above agencies would be subject to the new law's diversity requirements. Such businesses include:

- Financial institutions
- Investment banking firms
- Mortgage banking firms
- Asset management firms
- Brokers and dealers
- Underwriters
- Accountants
- Investment consultants
- Legal service providers
- Other financial services entities

Contracts with agencies can arise in a number of situations, including in the sale of assets of failed banks, in the issuance or guarantee of securities, and in the "implementation by the agency of programs to address economic recovery" (e.g., future TARP programs). If the agreement between an insured depository and the FDIC is considered a contract for purposes of the new law, then all FDIC-insured banks, and their subcontractors, would be subject to the law.

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NEW OFFICES OF MINORITY AND WOMEN INCLUSION

Each of the federal agencies listed above will be required to establish an "Office of Minority and Women Inclusion" no later than January 2011 (later for the new Bureau of Consumer Financial Protection). To the extent that there are existing offices at these agencies performing comparable functions, they must be transferred to the new offices required by Dodd-Frank. The directors of the new offices must report directly to the respective top-most agency administrators.

Agencies are required to develop standards for the racial, ethnic, and gender diversity of their own agencies, and also for increased participation in the agency's programs and contracts by "minority-owned" and "women-owned" businesses. Procurement and insurance are especially mentioned as programs at the agencies for ensuring fair inclusion of minorities, women, and minority-owned and women-owned businesses.

DEFINITIONS OF "MINORITY-OWNED" AND "WOMEN-OWNED" BUSINESSES

The new law uses the definitions of "minority-owned business" and "women-owned business" found in the Federal Home Loan Bank Act.

"Minority-owned business" is defined as a business more than 50% of which is held by 1 or more minority individuals, and more than 50% of the net profit or loss of which accrues to 1 or more minority individuals.

"Women-owned business" is defined as a business which meets all of the following three criteria: (i) more than 50% of the ownership or control is held by 1 or more women; (ii) more than 50% of the net profit or loss accrues to 1 or more women; and (iii) a significant percentage of senior management positions are held by women.

STANDARDS FOR CONTRACTS

All contractors with one of the federal agencies must ensure, to the maximum extent possible, the "fair inclusion" of women and minorities in the contractors' work forces and, as applicable, in the work forces of their subcontractors. Each agency is required to give consideration to the diversity of

applicants for contracts, "to the extent consistent with applicable law."

The new law does not define what is meant by "fair inclusion."

The new law sets forth a requirement for terminating contracts with an agency contractor that has failed to make a good faith effort to include minorities and women in their work force. The law also contemplates the agency may make a referral to the Federal Contract Compliance Programs of the Department of Labor. That agency separately ensures diversity at all federal contractors.

