What's on the Minds of Banks Regarding EMPLOYMENT-RELATED COMPLIANCE

By Doug Kauffman

It is no secret that banks are subject to numerous regulatory obligations that far exceed those applicable to non-regulated employers. This spring I had an opportunity to spend time with several individuals who have employment compliance responsibilities for banks across Alabama, including HR representatives, in-house attorneys and compliance officers. The event was called "Just for Banks." Many shared the recent employment-related compliance challenges that banks are facing today. From the nuances related to background investigations to new federal contractor obligations, banks are required to stay up to date on emerging regulations and guidance that is unique to the industry. Several of these issues that are currently on the radar for banks are discussed in this article.

Background Investigations

Perhaps one of the biggest areas of concern to banks relates to all of the regulatory requirements associated with obtaining and performing background checks on employees. A review of the various regulations and guidance serves as a reminder that numerous considerations exist when determining whether someone may hold a position in a bank. Finding a way to efficiently and effectively meet all these obligations is a monumental task.

Section 19 of the FDIA

At the centerpiece of background screening is Section 19 of the Federal Deposit Insurance Act,[1] which prohibits a federally insured bank from allowing persons convicted of or agreeing to a pre-trial diversion program for a criminal offense involving dishonesty, breach of trust or money laundering from participating in the conduct of the bank's affairs, becoming affiliated with the bank, or owning or controlling a bank. Thus, Section 19 governs whether a person may be employed by a bank.

If an FDIC-insured institution wants to employ a person who was convicted of or entered a pretrial diversion for a prohibited offense, it generally has to seek a waiver from the FDIC. The FDIC cannot provide such a waiver if an applicant's conviction occurred within the last 10 years and involved an offense falling under a specifically

(Continued on page 22)

1 12 U.S.C. § 1829.

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enumerated section of the criminal code that largely addresses offenses involving dishonest, breach of trust or money laundering[2]. The FDIC states a waiver is not required where certain prohibited offenses are *de minimis*.

On Dec. 11, 2012, the FDIC modified the de minimis exception regarding the potential fine and the numbers of days of imprisonment[3]. To be *de minimis*, an offense has to meet all four of the following criteria:

- There is only one conviction or program entry for a covered offense;
- The offense was punishable by imprisonment for a term of one year or less and/or a fine of $2,500 or less, and the individual served three days or less of actual jail time;
- The conviction or program was entered at least five years prior to the date an application to the FDIC for a waiver would otherwise be required; and
- The offense did not involve an insured depository institution or insured credit union.

Although there is no employment prohibition, a bank must ensure that any person who meets the *de minimis* criteria is covered by a fidelity bond to the same extent as others in similar positions and the person must disclose the presence of the conviction or program entry to all insured institutions in the affairs of which he or she intends to participate.

Section 19 imposes an affirmative duty to screen or perform a "reasonable inquiry" of candidates for employment to determine if a prohibited offense exists. Ultimately, the FDIC did not provide a definition of "reasonable inquiry." Instead, the FDIC "will allow each insured institution to determine what screening methods it will use, and will look to the circumstances of each situation to determine whether an inquiry was reasonable."

However, pursuant to the FDIC's Screening Guidance[4], at a minimum, an employment application should require disclosure of all convictions and program entries[5], and the applicant's identity should be verified. In addition to these minimum requirements, additional measures are suggested including performing a comparison against each federal banking agency's listing of individuals who were assessed civil money penalties or have been permanently removed and/or prohibited from banking, checking cease and desist orders, reviewing the FBI fingerprinting service, and using third-party screening and background checks.

Regulation Z Loan Originator Qualifications

With mortgage originators, background screening is even more complicated. The Dodd-Frank Act amended the Truth in Lending Act to provide that mortgage originators must be "qualified." As part of this qualification process, Regulation Z now requires loan originator organizations to determine whether certain loan originators have (i) been convicted of, or pleaded guilty or nolo contendere to, a felony in a domestic or military court during the preceding seven-year period or, in the case of a felony involving an act of fraud, dishonesty, a breach of trust or money laundering, at any time, and (ii) demonstrated financial responsibility, character, and general fitness such as to warrant a determination that the individual loan originator will operate honestly, fairly, and efficiently[6].

For mortgage originators, banks must obtain (i) a criminal background check through the Nationwide Mortgage Licensing System and Registry ("NMLSR"), and for those not NMLSR registered, a criminal background check from a law enforcement agency or commercial service; (ii) a credit report from a consumer reporting agency; and (iii) information from the NMLSR about any administrative, civil, or criminal findings.

FINRA's Background Check Rule for Brokers

Background screening for brokers became more onerous due to a new FINRA rule that became effective on July 1. Previously, a Form U4 had to be filed at the time the broker was registered with a FINRA member, and the member's representative must have certified that the broker applicant had taken appropriate steps to verify the accuracy and completeness of the U4. Also, FINRA members were to "ascertain by investigation the good character, business repute, qualifications, and experience" of an applicant[7].

The recently approved FINRA Rule 3110(e) requires FINRA member firms to institute written procedures that are reasonably designed to verify the information in Form U4

(Continued on page 24)

2 12 U.S.C. § 1829.
3 https://www.fdic.gov/news/news/financial/2013/fil13003.html .
4 Pre-Employment Background Screening Guidance on Developing an Effective Pre-Employment Background Screening Process, June 1, 2005.
5 Note that the EEOC's Guidance, as discussed below, states that as a "best practice" employers should NOT ask about criminal convictions on an application.
6 12 U.S.C. § 5104; 12 C.F.R. 34.104(h).
7 15 U.S.C. § 78c(1)(39)(F); 15 U.S.C. § 78o(b)(4)(B).

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within 30 calendar days of the U4 filing. At a minimum, member firms are required to conduct a national search of "reasonably available public records." Foreign jurisdictions do not have to be searched. Examples of "reasonably available public records" include criminal and bankruptcy records, civil litigations and judgments, liens, and available business records. FINRA has commented that the previous obligations to investigate and the new requirements to verify information are "complementary" and may be conducted concurrently. In light of the new requirements, banks should focuson documentation of the verification process, and include any reasons why certain information could not be verified.

EEOC Enforcement Guidance

With the preceding regulatory background screening obligations in the background, banks also cannot forget the issues that face all employers including the Equal Employment Opportunity Commission's ("EEOC's") Enforcement Guidance[8] relating to the consideration of arrest recordsand criminal convictions. The EEOC's guidance in part states that employers should perform an "individualized assessment" in such consideration, which includes informing the applicant that he or she may be excluded because of past criminal conduct, providing an opportunity to the applicant to demonstrate that the exclusion does not properly apply to him, and considering whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity. In determining whether something is job related and consistent with business necessity, some of the factors an employer should consider are the facts and circumstances surrounding the offense or conduct, the number of offenses, how old the offenses are, rehabilitation efforts, and other work history following the offense. Through lawsuits and education, the EEOC has been aggressive in its agenda to curtail an employer's use of past criminal conduct as automatic disqualifiers for positions[9].

The EEOC Guidance, however, recognizes that federal laws and regulations govern the employment of individuals with specific convictions in certain industries or positions, such as banks, and that Title VII does not preempt these federally imposed restrictions, as discussed above. Nevertheless, the EEOC warns that "if an employer decides to impose an exclusion that goes beyond the scope of a federally imposed restriction, the discretionary aspect of the policy would be subject to Title VII analysis." Thus, banks are not free to completely ignore the EEOC's Guidance, and where banks are not able to clearly show that the regulations that govern them do not automatically disqualify a candidate due to past criminal offenses, they find themselves in the same boat with employers at large.

"Ban the Box"

Banks are also paying attention to "Ban the Box" ordinances and proposed legislation that have increased in recent years. The public policy behind Ban the Box is to provide an opportunity for applicants to be evaluated on their qualifications[10]. Most Ban the Box initiatives prohibit employers from asking about criminal history on the application for employment and then require that any background investigation occur only after an initial selection decision has been made. Other, more restrictive, Ban the Box initiatives prohibit employers from making decisions based on certain types of criminal history and require employers to justify that any adverse decisions are based on actual job requirements. Some Ban the Box initiatives are inconsistent with the above-referenced regulatory requirements applicable to banks. At a minimum, banks that become subject to such a Ban the Box law will have to carefully evaluate what parts of such law from which they may be exempted due to federal regulatory requirements and what parts with which they must comply.

Fair Credit Reporting Act

Due to the various consumer reports, such as credit and criminal background checks that must be obtained to perform all of the screening, verifying, and investigation on various bank employees, it is important for banks to make sure that they are complying with the Fair Credit Report Act ("FCRA")[11]. FCRA requires that prior to obtaining a consumer report for employment purposes an employer must provide a disclosure stating that a consumer report will be requested on the individual and obtain an authorization to have a consumer report pulled. The authorization and

(Continued on page 26)

8 EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, April 25, 2012.
9 http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm
10 http://nelp.org/content/uploads/2015/03/ModelStateHiringInitiatives.pdf
11 15 U.S.C § 1681 et seq.

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disclosure must be stand-alone; they cannot be combined with any other information[12]. Recently, there has been a rash of suits over this issue, as employers have added releases from liability and other information to the authorization and disclosure forms, which arguably violates the FCRA[13]. In the event that employment is being denied in whole or in part due to the consumer report, the employer has certain obligations such as providing a copy of the report, a summary of the individual's rights under FCRA, and certain information about the consumer reporting agency[14]. Further, the employer must provide the individual an opportunity to dispute the information in the consumer report.

New Federal Contractor Obligations

Generally, banks are federal contractors subject to Affirmative Action Programs enforced by the Office of Federal Contract Compliance Programs ("OFCCP") by virtue of federal share and deposit insurance through the Federal Deposit Insurance Corporation or the National Credit Union Association[15]. Thus, banks must comply with numerous recent Executive Orders and updated or proposed OFCCP regulations, such as the following:

Pay Transparency

Executive Order 13665[16] prohibits discrimination against employees and applicants who inquire about, discuss, or disclose compensation information on themselves or others. Compensation is defined broadly to include salary, wages, commissions, vacation pay, and insurance and other benefits. Information that is protected includes any aspect of compensation including any decision, statements, or actions relating to setting or altering compensation. While the National Labor Relations Act already provided protection to non-managerial employees who discuss pay as part of concerted activity, this Executive Order is broader in that it also protects managerial employees and does not require "concerted activity" for a violation to occur. However, employees who have access to compensation information as part of their essential job functions do not have the right to disclose such information under this Executive Order. Proposed regulations were published on Sept. 17, 2014, and the public was allowed to provide comments until December 16, 2014.

Equal Pay Report

On April 8, 2014, Pres. Barack Obama issued a directive for the secretary of labor to develop a rule requiring federal contracts to submit summary compensation data by race and gender[17]. The proposed rule was published on Aug. 8, 2014, and the comment period ended on Nov. 6, 2014. The proposed report requires contractors to disclose the number of workers within specific EEO-1 job categories by race, ethnicity, and gender; W-2 wages in the calendar year for each category by gender; and the total hours worked in the calendar year for each category by gender.

Sexual Orientation and Gender Identity

Executive Order 13672[18] added sexual orientation and gender identity to the list of protected statuses for federal contractors to include in their advertised equal employment policies. Federal contractors are prohibited from discriminating on the basis of sexual orientation and gender identity and to prevent the segregation of facilities on such basis. The secretary of labor issued governing regulations on Dec. 9, 2014. Thus, banks must update their EEO policies to include these two new protected statuses.

"Updates" to Sex Discrimination Guidelines

On Jan. 28, 2015, the OFCCP issued proposed regulations that would "update" the existing sex discrimination guidelines for federal contractors[19]. The public comment period to such proposed regulations ended on April 14. The proposed regulations, in part, do the following:

- clarify that discrimination based on gender identity and transgender is sex discrimination;
- require that transgender employees have access to the bathroom used by the gender with which they identify;
- prohibit discrimination on the basis of a failure of the employee to comply with gender norms and expectations of dress; and

(Continued on page 28)

12 15 U.S.C. § 1681b(b)(2)(A).
13 See e.g., Speer v. Whole Foods Market Group Inc., Case Number 8:14-cv-03035 pending in the U.S. District Court in the Middle District of Florida.
14 15 U.S.C. § 1681b(b)(3)(A).
15 http://www.dol.gov/ofccp/regs/compliance/faqs/emprfaqs.htm#Q. Banks should review each Executive Order and applicable regulation to determine whether it must comply with them, as their applicable depends on factors such as the type of contract at issue, the amount of the contract, and the size of the employer.
16 Fed. Reg. Vol. 79, No. 180, Sept. 17, 2014.
17 Fed. Reg. Vol. 79, No. 153, Aug. 8, 2014.
18 Fed. Reg. Vol. 79, No. 236, Dec. 9, 2014.
19 Fed. Reg. Vol. 80, No. 20, Jan. 30, 2015.

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Reporting Labor Violations

Executive Order 13673[20] will require certain federal contractors to disclose adverse administrative merit determinations, such as "cause" findings by the EEOC and citations by OSHA, arbitral awards and civil judgments relating to a long list of federal employment laws and regulations, including but not limited to the Fair Labor Standards Act, the National Labor Relations Act, the Family Medical Leave Act, Title VII, and the Americans with Disabilities Act. Although the reporting requirements are not expected to be implemented until 2016, banks are paying attention to this now, because the initial report will cover adverse determination for the last three years. Thus, any adverse rulings or determinations now may have to be reported in 2016. There are consequences for federal contractors in the event of "serious, repeated, willful, or pervasive violations" such as having to agree with the government to take remedial action or accept compliance assistance and non-renewal or disbarment from federal contracting. Recently, the Department of Labor issued proposed guidance relating to the reporting requirements[21] and several government agencies published a proposed rule amending the Federal Acquisition Regulation to implement the Executive Order.[22]

New Protected Veteran and Section 503 Regulations

Most banks currently are working on their compliance efforts with the new regulations governing protected veterans and individuals with disabilities[23]. The most onerous obligations, which are contained in Subpart C of the regulations, must be implemented in the next affirmative action plan year following the March 24, 2014 implementation date. Thus, banks are actively working on, among other things, their voluntary invitations to self-identify for protected veterans and individuals with disabilities, the mandatory training, the implementation and analysis that must be performed in light of the new hiring benchmark for protected veterans and the new utilization goal for individuals with disabilities.

Further, on Oct. 1, 2014, the OFCCP issued a new scheduling letter and itemized listing of information and documentation that will be requested in audits after Oct. 1, 2014[24]. Some of the additional information that will be requested includes compliance with the new protected veterans and disability regulations, such as the results of a review of the effectiveness of the required outreach programs, documentation of the audit of the employer's compliance with the regulations, accommodation policies, requests and resolutions, the assessment of personnel processes, and the assessment of physical and mental qualifications. Thus, the OFCCP will be checking on compliance with the new regulations.

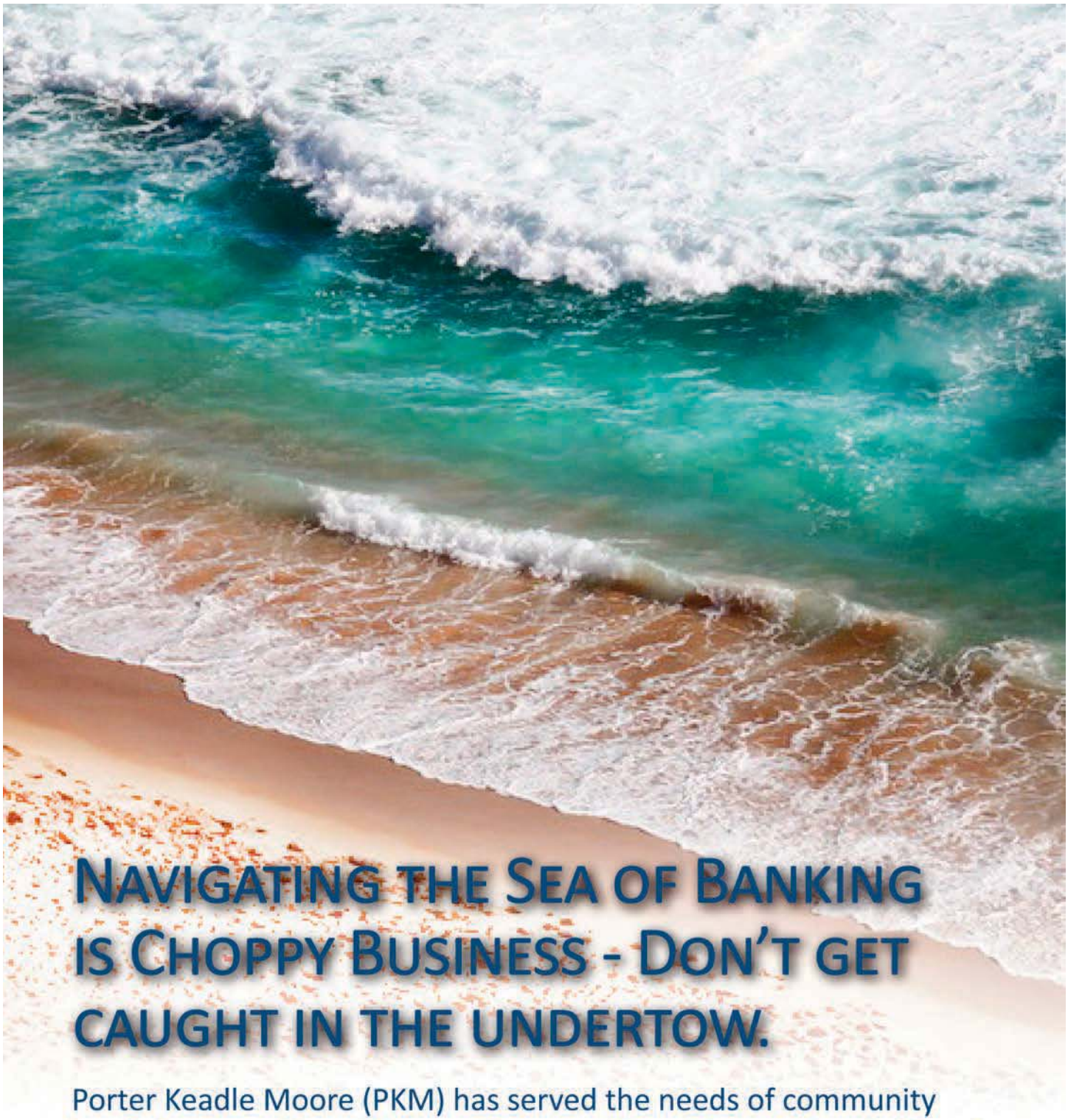
Dodd-Frank Diversity Standards

In addition to having federal contractor obligations relating to equal employment and affirmative action, sometimes banks face additional equal employment standards that are issued by the regulators. The Dodd-Frank Act requires numerous financial regulatory agencies to establish Offices of Minority and Women Inclusion, and requires these offices to develop standards for assessing the diversity policies and practices of the entities they regulate, such as banks. On Oct. 23, 2013, several agencies jointly issued proposed standards designed to implement these assessment requirements[25]. Comments on the proposed standards were received until Feb. 7, 2014. The proposed standards would assess financial institutions in four broad areas:

- Organizational commitment to diversity, which includes having diversity and inclusion as part of a strategic plan, senior leadership support, and a senior official to oversee the efforts.
- Workforce profile and employment practices, which includes using metrics to evaluate and assess workforce diversity, holding management accountable for diversity efforts, and developing policies and practices that create diverse applicant pools.
- Procurement and business practices, which includes having a supplier diversity policy that promotes opportunities for minority-owned and women-owned businesses to compete, outreach efforts to promote supplier diversity, and an evaluation of supplier diversity efforts.
- Practices that promote transparency, which involves making diversity efforts available to the public through various communication methods.

(Continued on page 30)

20 Fed. Reg. Vol. 79, No. 150, Aug. 5, 2015.
21 http://federalregister.gov/a/2015-12562.
22 http://federalregister.gov/a/2015-12560.
23 41 C.F.R. Part 60-300; 41 C.F.R. Part 60-741.
24 http://www.affirmativeactionlawadvisor.com/files/2014/10/Scheduling-Letter-final-09-12-2014.pdf
25 Fed. Reg. Vol.78, No. 207, Oct. 25, 2013.



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Social Media Guidance

Due to privacy and consumer protection laws applicable to banks' primary services, in the world of social media, banks have more to deal with than the challenges that other employers face, including certain protections recognized by the National Labor Relations Board when social media is viewed as protected activity. For example, the Federal Financial Institution Examination Council published its "Social Media: Consumer Compliance Risk Management Guidance" on Dec. 10, 2013 to address the applicability of federal consumer protection and compliance laws, regulations and policies to activities conducted via social media[26]. Although it did not impose new requirements or dictate terms of employee's personal use of social media, the guidance states that a financial institution's risk management program associated with social media should be designed with participation from human resources. Policies and procedures regarding the use and monitoring of social media to ensure the protection with all applicable consumer protection laws and regulations should be included as part of a risk management program. Further, the guidance states that banks should take steps to address reputational risks such as establishing policies and training methods to address employee participation in social media on behalf of the bank.

26 https://www.fdic.gov/news/news/financial/2013/fil13056.html

Conclusion

Those who have responsibility for employment compliance in banks must continue to keep abreast of the various new regulations, standards, and guidance that govern the respective workforces. Continuing to review and discuss the various requirements and obligations is an important step in that process.

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