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Uncertainty in the Dodd-Frank Act's "Office of Minority and Women Inclusion" Provision

July 27, 2010

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") that President Obama signed into law on July 21, 2010 includes a potentially onerous provision creating an Office of Minority and Women Inclusion at various agencies to monitor the diversity efforts of the agencies, the regulated entities and agency contractors. With approximately 1,600 sections and 2,300 pages, many parts of the Act have not been explored and this one has received barely any scrutiny. Depending on how it is implemented, however, the section could have a large impact on how diversity issues are handled by covered entities and whether there will be a new focus on enforcement of diversity requirements, equal employment obligations and minority business set-aside requirements by the covered governmental agencies.

Section 342 of the Act mandates that each covered governmental agency[1] establish an Office of Minority and Women Inclusion ("OMWI") to be responsible for all agency matters relating to diversity in management, employment and business activities. Section 342 is modeled after a similar provision in the Housing and Economic Recovery Act of 2008 impacting Fannie Mae, Freddie Mac and the Federal Home Loan Banks, which has proposed regulations that impose significant reporting requirements on those entities. (Minority and Women Inclusion, 75 Fed. Reg. 1289 (proposed January 11, 2010) (to be codified at 12 CFR Parts 906 and 1207))

In addition to developing standards for and monitoring the employment diversity of the respective agency, the OMWI will have authority over the entities regulated by the agency and contractors providing services to the agencies. Such contractors include "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." (Section 342(d))

With respect to entities regulated by the agencies, the statute instructs the OMWI to develop standards for "assessing the diversity policies and practices of entities regulated by the agency." (Section 342(b)(2)(C)) Unfortunately, neither the statute nor its legislative history provides any guidance as to the scope of OMWI's authority in assessing an entity's diversity policies or if any remedial steps are available to OMWI.

The OMWI's authority with respect to contractors performing any kind of service under a contract or subcontract with the covered agencyis somewhat more detailed. The Act mandates that the agency consider the employment diversity of a potential contractor, as well as provide for the increased participation of minority-owned and women-owned businesses in awarding contracts. (Section 342(b)(2)(B)) These requirements do not appear to be substantively different from the current affirmative action requirements for government contractors and subcontractors or the minority set-aside programs currently administered by the SBA and procurement agencies, except, of course, it is not clear how the requirements will be administered.

The statute requires each OMWI to establish procedures to ensure the fair inclusion and utilization of minorities and women. These procedures must include a requirement that each contractor provides a written statement that it will ensure the inclusion of women and minorities in its workforce and the workforce of any subcontractors, to the maximum extent possible. (Section 342(c)(1)) The OMWI also must create a procedure for the Director of each OMWI to determine "whether an agency contractor, and, as applicable, a subcontractor has failed to make a good faith effort to include minorities and women in their workforce." (Section 342(c)(3)(A)) If the OMWI determines that there has not been a good faith effort, the Director of the OMWI may recommend that the contractor's contract with the agency be terminated. (Section 342(c)(3)(B)(i)) Upon receipt of such a recommendation, the head of the agency may either terminate the contract, refer the matter to the Office of Federal Contract Compliance Programs ("OFCCP") or take other appropriate action. (Section 342(c)(3)(B)(ii))

Given the statute's vague language and lack of substantive relevant legislative history, Section 342 presents more questions than answers at the current time. It is unclear, for example, how the contractor requirements will be coordinated with the existing requirements for government contractors. Indeed, section 342(a)(3) of the Act states that the OWMIs will not "enforce statutes, regulations or Executive Orders pertaining to civil rights." In addition, while the OWMIs are directed to coordinate their activities with the agency administrators and arguably each other, the potential for overlapping jurisdiction between these entities and with the established federal civil rights enforcement agencies is significant. It is unclear whether OWMIs will become mini-OFCCPs, SBAs and EEOCs, or serve as conduits for the requirements of those agencies. Seemingly, each agency's OMWI may operate somewhat differently depending on the appointed director of the individual OMWI, the views of the respective agency and future acts of Congress.

It also is unclear if individual employees of contractors and/or entities regulated by the respective agency will be permitted to make formal (or informal) complaints directly to the individual OMWI and, if so, how such complaints will be processed. The Act, however, does not establish a private right of action and, absent a regulatory effort to create one, it should be assumed that any OMWI obligations with respect to individual claims will be investigation and report based. Finally, it is unclear if there will be different diversity reporting requirements instituted for each agency's OMWI, if there will be reporting requirements similar to those in the Housing and Economic Recovery Act, or if OFCCP, EEOC or SBA reports will be utilized by the OMWIs.

In sum, the ultimate impact of the OMWIs will not be known until they are operational, but it certainly is one reason to stay abreast of developments under the Dodd-Frank Act and ensure that you are familiar with all of the relevant provisions contained in it.

If you have any questions or concerns regarding this new law or related issues, please contact one of the Proskauer attorneys listed in this alert or your relationship attorney.

[1]The covered agencies are the Department of the Treasury, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, each of the Federal Reserve Banks, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Securities and Exchange Commission and Bureau of Consumer Financial Protection.

Related Professionals

- **Paul Salvatore**
  Partner
- **Anthony J. Oncidi**
  Partner
- **Nigel F. Telman**
  Partner
- **Mark W. Batten**
  Partner