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The Financial Reform Act's Little-known Diversity Provision and What It May Mean to You

By Matthew J. Feery, Esq.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Act") signed into law last month establishes a new regulatory structure over the country's financial industry. As many commentators have correctly pointed out, the Act may not only overhaul the way Wall Street works, but also the way it looks.

The Act contains a provision that, while vague, may be far-reaching. Entitled simply "Office of Minority and Women Inclusion," Section 342 of the Act requires each of the 30 federal financial agencies and departments, which includes all federal reserves as well as the Securities and Exchange Commission, to establish an Office of Minority and Women Inclusion ("Office"). Each Office is to be headed by a Director, who will be tasked with "develop[ing] and implement[ing] standards and procedures to ensure, to the maximum extent possible, the fair inclusion and utilization of minorities, women, and minority-owned and women-owned businesses in all business and activities of the agency at all levels, including in procurement, insurance, and all types of contracts." This applies to "all contracts . . . for services of any kind," including, among others, the services of financial institutions, investment banking firms, law firms, and accountants.

The diversity provisions also require Directors of agencies to obtain from contractors bidding on federal service contracts a written statement, "in a form and with such content as the Director shall prescribe," that the contractor will undertake efforts, "to the

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maximum extent possible," to ensure the fair inclusion of women and minorities in its workforce and, as applicable, in the workforce of its subcontractors. Should a Director determine that an agency contractor has failed to make a "good faith effort to include women and minorities" in the contractor's workforce, the Director "shall" make a recommendation to the agency administrator that the contractor's contract be terminated. At that point, the agency Director can terminate the contract, refer the matter to the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), or take "other appropriate action."

What does all this mean? The potential ramifications of the language are staggering. Given its broadest interpretation, the Act requires all service industry contractors - which include everyone from accounting firms to janitorial service providers - to have a diverse workforce. With the intertwined nature of the private sector with federal financial agencies, these diversity requirements could reach a large portion of the private sector. Failure to have a diverse workforce could cost many companies not only the federal contracts they have, but any chance at federal contracts in the future.

The first provision to go into effect - the establishment of an Office in each agency - is slated to occur in January 2011. Currently, there is no timeframe by which Directors have to establish the criterion to be used by their respective agencies. It may take time for the Directors to develop coherent rules and guidelines for employers. Further, midterm elections later this year may change the political will of agencies to make any major policy changes applicable to federal contracts. In the meantime, employers, especially those with federal service contracts or looking to seek federal service contracts in the future, should be mindful of these diversity requirements, so that they are well-positioned when bidding opportunities arise.

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