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The Basics of Dodd-Frank's Diversity Provision

Law360, New York (October 06, 2010) -- The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act includes new diversity mandates for financial services and related firms. Although this significant provision has not attracted much media attention, it has caused quite a stir across the financial industry.

Dubbed the diversity provision of the Dodd-Frank Act, it gives the executive branch of the federal government new powers to require financial firms with which it contracts to hire, promote and retain more women and minorities, and to use more minority- and women-owned suppliers.

What Is Required?

While government contractors supplying goods and services to the federal government generally are subject to affirmative action regulations enforced by the U.S. Department of Labor Office of Federal Contract Compliance Programs, the new law expands the government's coverage of the financial sector and provides an additional level of oversight and regulation.

The diversity provision will establish new offices of minority and women inclusion for federal financial regulators listed in the law, such as the U.S. Department of the Treasury, U.S. Securities and Exchange Commission, Federal Deposit Insurance Corp. and Federal Reserve.

The provision requires those agencies to develop standards that "ensure, to the maximum extent possible, the fair inclusion and utilization of minorities, women and minority-owned and women-owned businesses and activities of the agency at all levels, including procurement, insurance and all types of contracts."

The new offices must develop standards for:

1) Equal employment opportunity and the racial, ethnic and gender diversity of the work force and senior management of the agency; 2) increased participation of minority-owned and women-owned businesses in the programs and contracts of the agency, including standards for coordinating technical assistance to such businesses; and 3) assessing the diversity policies and practices of entities regulated by the agency.

The diversity provision applies both to companies providing "services of any kind" under contracts with the listed federal agencies, as well as to "financial institutions," including such entities as mortgage banking firms, investment firms, asset management firms, law firms, brokers, dealers and accountants.

Under the law, every contractor and subcontractor of a listed agency must certify that their work forces reflect a "fair inclusion" of women and minorities — and be prepared to demonstrate the truth of their certifications to the satisfaction of the respective agency.

Moreover, the legislation mandates that when procuring service providers, covered agencies must, "to the extent consistent with applicable law," give consideration to the work force diversity of the provider.

What is the Reason for the Legislation?

Proponents of the legislation say that diversity on Wall Street has been seriously deficient and the federal government must hold the industry accountable for increasing the diverse representation of its work force and suppliers.

The latest U.S. Government Accountability Office report concluded that "diversity at the management level in the financial services industry did not change substantially from 1993 through 2008, and diversity in senior positions remains limited."

One member of Congress who serves on the financial services committee noted that, when financial services companies were in financial distress, they utilized federal tax dollars from "all the people" (including diverse taxpayers). In his view, those companies now need to ensure that they are using these funds to benefit "all the people."

The Statute Raises Many Questions

The statute is broadly worded and does not define key terms, such as "fair inclusion." The legislation requires each affected agency to prepare diversity "standards," covering "equal employment opportunity and the racial, ethnic and gender diversity of the work force." The statute appears to be creating "mini-OFCCPs" within each agency.

Conflicting standards or confusion among the various agencies may result, as the law does not require consistent regulation or even coordination among the affected financial regulators. In addition, conflict with existing OFCCP regulations and established law is possible.

Other important questions include:

--Will the definition of "fair inclusion" mean that an employer must only make a "good faith effort" to achieve full utilization of females and minorities in the relevant recruitment area based on U.S. census data, or must an employer, contrary to current OFCCP mandates, achieve actual numerical results?

--What does fair "utilization" mean? Will the agencies seek to regulate promotions, job descriptions and work assignments, or merely base compliance decisions on a stated failure of financial institutions to make measurable progress over time, once the standard is established?

--To what extent will the "standards" specify mandatory recruiting, testing, hiring, advancement, compensation, discipline and other workplace policies, processes and practices?

--Will the standards, pursuant to the "maximum–extent-possible" mandate in the statute, be more stringent than current OFCCP requirements?

--Will the agencies use complex statistical formulas to assess compliance as current OFCCP practice dictates, and to what extent will standards vary from OFCCP practice, and from agency to agency?

--Will the agencies, unlike OFCCP, scrutinize not only "process" in diverse representation, but also insist that over time the process yield specific levels of improvement, in light of congressional criticism over a lack of progress from 1993 to 2008?

Failure to Comply Can Lead to Contract Termination

What is clear is that an agency can terminate a contract, refer the matter to the OFCCP for review and enforcement and "take other appropriate action," where it finds that a company has failed to demonstrate a good faith effort to comply with the diversity provision to the "maximum extent possible."

Contract termination (and potential debarment from federal contracting) is a harsh blow to revenue and the public image of most companies. Even public notice of referral to OFCCP could severely affect a company's reputation and business.

Employers Must Be Proactive

The new legislation highlights the importance of proactively evaluating the diverse representation (or lack thereof) in a company's workforce. The time to take appropriate steps to meet or exceed the anticipated legal requirements is now. The new federal law merely reinforces the fundamental point many companies learned long ago: diversity is a "business imperative."

Compliance with this legislation does not have to be an undue burden. Companies that assess their organizations, develop policies and mechanisms to enhance diversity and a welcoming corporate culture, and eliminate barriers to achievement and other legal vulnerabilities should enjoy a significant competitive advantage.

Although the statute does not provide express requirements for rulemaking, there likely will be an opportunity for the public to comment on proposed standards and regulations. The financial services sector and related industries should weigh in on the anticipated effects of proposed regulations.

Additionally, Congress, hearing the criticisms, may soon amend the statute to define its goals more clearly, coordinate regulations and make clear what one member of Congress stated off the record: "It is high time that Wall Street not only benefit from our diverse society, but also become inclusive of a growing sector of its customer base."

--By Weldon H. Latham, Jackson Lewis LLP

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Mr. Latham has over 20 years of senior partner level direction of major crisis management, civil rights program reviews, and employment discrimination litigation. Mr. Latham has a distinguished record of public service, having served as Assistant General Counsel, White House Office of Management and Budget, during the Ford Administration; General Deputy Assistant Secretary, Department of Housing and Urban Development, during the Carter Administration; member of the Defense Department Advisory Committee on Procurement and Technical Data Rights during the George H. W. Bush Administration; Civilian Aide to the Secretary of the Army during the Clinton Administration; member of the U.S. Small Business Administration National Advisory Council during the Clinton and George W. Bush Administrations; and served on the Board of the Metropolitan Washington Airports Authority, as Chair of the Legal Committee, for more than a decade.

Mr. Latham is a columnist for *DiversityInc* and previously *Minority Business Entrepreneur* magazines, as well as a frequent commentator in *The Washington Post.* In recent years, he has discussed diversity, civil rights and political issues on ABC News "Nightline," CNBC "Power Lunch," Bloomberg Business News and Court TV. He also serves as a keynote speaker to Boards of Directors, CEOs, and executive management teams of major corporations, as well as business and trade associations on the subject of civil rights, diversity and inclusion as a "business imperative," "competitive advantage," "legal vulnerability," and the Washington political scene.

Among his numerous professional and community activities, Mr. Latham serves as Counsel to the PepsiCo Global Diversity and Inclusion Governance Council and the Omnicom Group Diversity Advisory Committee; a member of the American Employment Law Council, and the Economic Club of Washington. He was previously the National Co-Chair, Hillary Clinton Campaign, and Chair, Deloitte External Diversity Advisory Board. He is listed in *Who's Who in American Law*, *Who's Who Among African Americans* and *Who's Who In America*.

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