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Analysis

Employment Law

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Section 342 of Dodd-Frank Intersects With Employment Law

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") celebrated its two-year anniversary this past July. At that time, the Act drew much attention from the media and political pundits because of its stated goal of bringing responsibility and accountability to the financial industry through what some viewed as burdensome and overly broad federal oversight. More recently, the Act has again become the focus of attention as employers and public contractors question the impact of the diversity and inclusion mandates set forth in Title III, Section 342 of the Act ("Section 342"). Somewhat overlooked originally, Section 342's relative obscurity is changing quickly as its potentially broad implications are being debated on Capital Hill by the regulators and impacted industry groups.

Section 342 was proposed by U.S. Representative Maxine Waters (D–Calif.), who argued that diversity regulators in the federal agencies were necessary to help correct racial and gender imbalances at Wall Street firms, as well as imbalances in the subcontracting process. Since the Act's passing, Rep. Walters has vowed to keep Section 342 in the forefront. In general, Section 342 applies to:

- federal financial agencies
- entities that contract with these agencies
- private financial entities that are regulated by these agencies

As discussed below, Section 342 has the potential to impact significantly the diversity practices of the covered entities.

Impacted Agencies and Creation of Offices of Minority and Women Inclusion

Central to Section 342's mission of promoting diversity is its requirement that each of the nine major federal financial agencies create an Office of Minority and Women Inclusion

("OMWI") "to be responsible for all agency matters relating to diversity in management, employment and business activities." Except for the Consumer Financial Protection Bureau ("CFPB"), Section 342 requires that the covered agencies establish their OMWIs by January 21, 2011. The CFPB was given until July 21, 2012 to establish its Office, which it has done recently.

Promoting Diversity and Inclusion in the Financial Industry Acting through an appointed Director, each OMWI develops its own set of standards for: (a) the racial and gender diversity of the agency; (b) increased participation of minority-owned and women-owned businesses in agency contracts and programs; and (c) assessing the diversity policies and practices of entities regulated by the agency. In addition to these three broad duties, Section 342 requires each OMWI to submit an annual report to Congress detailing the agency's efforts to comply with the Section.

The Agencies affected by Section 342 include:

- The Departmental Offices of the Department of Treasury
- The Federal Deposit Corporation
- The Federal Housing Finance Agency
- Each of the Federal Reserve banks
- The Federal Reserve Board
- The National Credit Union Administration
- The Office of the Comptroller of the Currency
- The Securities and Exchange Commission
- The Consumer Financial Protection Bureau

Duties Within the Agency Each agency must take specific, internal steps to promote diversity within its workforce. Such proscribed activities include, but are not limited to, recruiting at colleges or universities that historically serve minorities and women, recruiting at job fairs in urban communities, and placing hiring advertisements in publications that are oriented to minorities and women. In addition to these direct recruiting activities, the Act directs the agencies to partner with industry organizations and high schools in targeted areas to help promote "financial literacy" and create "industry internships, summer employment and full-time positions" for talented minorities and women.

Contracts with the Covered Agencies With respect to agency contracts, the Director of each OMWI must develop standards and procedures to ensure the "fair inclusion and utilization" of minorities, women, and minority-owned and women-owned businesses in the agency's contracts. Furthermore, the procedures by which covered agencies evaluate contract proposals must now include a component that gives consideration to the diversity of the applicant.

The Act also requires the OMWI to develop standards by which the Director can determine whether an agency contractor or subcontractor has made a "good faith effort" to include minorities or women in their workforce. The penalties for failing to make a good faith effort at inclusion can be significant. Upon finding that a contractor failed to make a good faith effort, the Director of the OMWI must recommend to the agency administrator that the contract be terminated. The agency administrator may then terminate the contract, make a referral to the Office of Federal Contract Compliance Programs ("OFCCP"), or take other appropriate action.

Of note, Section 342 significantly expands the definition of "federal contract" to now include almost all financial services entities and law firms that do business with one of the nine affected agencies. This definitional expansion covers "all contracts for all business and activities" and includes:

- contracts for the issuance or guarantee of any debt, equity or security
- the sale of assets
- the management of the assets of the agency
- the making of equity investments by the agency
- the implementation by the agency of programs to address economic recovery

Oversight for Regulated Private Entitles The Act gives the OMWI the ability to assess the diversity policies and practices of regulated entities. This ability has the greatest potential to impact private industry employers because all regulated entities—not just those who have contracts with the affected agencies—will be impacted. Unfortunately, aside from excluding the regulated entity's lending practices from review, Section 342 gives no specific guidance concerning the criteria that the OMWI should use to undertake such assessments.

The OMWI offices have been very slow in promulgating regulations—or even in offering proposed regulation for comment—regarding these standards. In their recent reports to Congress, most OMWIs have blamed this delay on the need for further study and the desire to implement uniform standards across the various agency offices. To this end, the OMWIs have held a number of industry roundtables to garner feedback from their regulated entities and related business organizations. Reed Smith's attorneys are participating in these roundtable discussions and, based on these meetings, expect the OMWIs will issue their proposed regulations within the next few months.

Best Practices for Planning Ahead Without any direction from the OMWIs, private financial industry employers are left, essentially, to speculate about what "standards" they may ultimately be expected to satisfy. Despite the present uncertainty, many employers may likely find that they are already in a strong position to comply with any subsequent standards, regardless of final form.

Maintaining and Implementing Equal Opportunity Work Place Policies For example, many employers have already adopted and promulgated Equal Opportunity Policies affirming their commitment to principles of equal opportunity in employment and the establishment of workplaces free from discrimination, harassment and retaliation.

Additionally, many employers have established internal procedures to receive and attempt to resolve complaints of discrimination, harassment and/or retaliation. Such policies and procedures have become commonplace in light of various federal and state workplace laws. These types of policies and procedures have been cited as examples by the various OMWIs as steps made in their own agencies to promote diversity and inclusion.

Maintaining and Review of Relevant Statistical Information Another step taken by the OMWIs and one already being done by most regulated private employers, is the compilation of statistical information concerning the demographics of its applicant pool and workforce. This may not be a burdensome exercise if it is determined that regulated entities have to provide statistical information concerning the racial and gender composition of an employer's workplace because such information is reflected on an EEO-1 Employer Information Report. Often these entities already take proactive action to seek out qualified candidates from such groups for hiring and promotions.

The EEO-1 Report is already required by the Equal Employment Opportunity Commission for employers with a minimum of 100 employees or entities that contract with the federal government that have a minimum of 50 employees and a contract worth at least $50,000. Such statistical information already allows entities to determine which groups may be under represented in its workforce.

Developing Outreach Programs Third, the OMWIs may push for the development of outreach programs. Similar to the actions taken by the OMWIs with their own agencies, such programs could include partnerships with trade organizations serving minority- and women-owned business or recruiting efforts targeting schools that traditionally serve minorities and women. Such actions also have a business benefits as they ensure that "untapped" applicant pools are represented and the best applicants—regardless of race, sex, religion, etc.—are applying for open positions. Along a similar vein, employers should consider supporting internal practice that develop and promote the careers/advancement of existing minority and women employees for senior management positions.

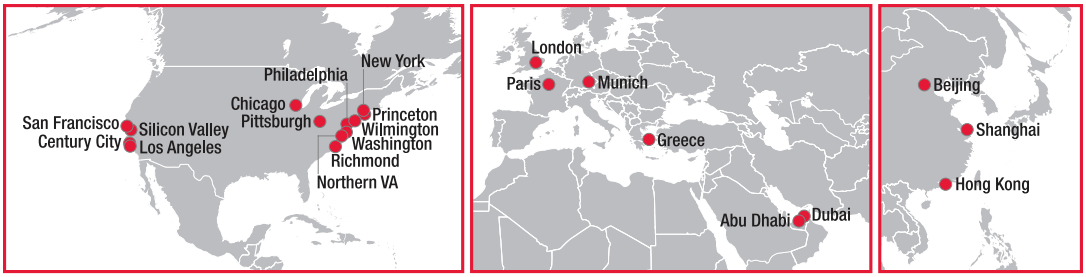
Assessing Diversity Efforts through Mandated Reporting Finally, the OMWIs may require regulated entities to submit annual reports regarding their diversity and inclusion efforts similar to the reports the OMWIs submit to Congress. It has also been noted that a similar reporting obligation was created by the Housing and Economic Recovery Act ("HERA") and that any Section 342 regulations may track HERA. Specifically, pursuant to implementing regulations adopted by the Federal Housing Finance Agency, which is regulated by HERA, entities must submit detailed reports "describing [their] efforts to promote diversity and ensure the inclusion and utilization of minorities, women, individuals with disabilities, and minority- women- and disabled-owned business at all levels, in management and employment, in all business and activities, and in all contracts for services and the results of such efforts." *See* 12 C.F.R. 1207.22(a). More troubling, however, these detailed reports much include the number of equal opportunity complaints that were filed against the entity, the number and result of any claims of discrimination,

and the amount paid by the regulated entity for settlement or judgments on discrimination complaints.

Conclusion Section 342 will likely have a significant impact on the diversity and recruiting practices of the affected agencies, the businesses that contract with these agencies, and the entities that are regulated by these agencies. Despite this likely impact, significant questions about Section 342 remain unanswered. For instance, the Act provides little guidance on the meaning of "fair inclusion and utilization" of minorities and women or how to determine whether an entity has made a "good faith effort" at inclusion.

Questions arise concerning the extent of the Act's enforcement power, specifically as it relates to private entities that are regulated by the federal agencies, but do not otherwise contract with these agencies. These questions are highlighted by the Act's seemingly internally inconsistent provisions. As an example, the Act states that it does not extend to actual enforcement of any civil rights laws, which would include, as an example, Title VII. Moreover, the Act states that it should not be construed "to require any specific action based on the findings of the assessment" of a regulated entity's diversity policies and practices. However, the Act provides that administrative remedies may be designed to address violations of, arguably, civil rights laws. One argument is that the Act's own provisions eliminate any teeth it may have in forcing a regulated entity to change its diversity policies and practices, if there are found to be deficient. However, it would appear that this interpretation would be at odds with the Act's overall objectives and that the Act will likely be construed broadly to allow the OMWIs flexibility in fashioning proper administrative remedies to address such deficiencies. The OMWIs are grappling with these issues and they may not be answered fully until interpretative regulations are finalized.

Reed Smith is monitoring these issues and is able to provide up-to-date information about the Congressional discussions.



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