WALL STREET REFORM'S HIDDEN EMPLOYMENT LAW AGENDA: WHAT FINANCIAL INDUSTRY EMPLOYERS CAN EXPECT DESPITE ELECTION RESULTS

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Expect Obama Administration to shift focus from legislation to rulemaking

The Republican takeover of the U.S. House of Representatives and the Democrat's loss of their supermajority in the Senate may have the financial industry looking for better times ahead, but don't break out the champagne yet. To be sure, the Administration's legislative agenda has been dealt a serious blow. As the President himself confessed on election day, "My whole agenda is at risk." Based on the outcome, it might be easy to conclude that the President's agenda has been completely derailed; but that would be a mistake.

While the President and his party no longer may have the votes to enact major legislative changes, they still control the Executive branch of government and all of its regulatory agencies. So while the President is expected to tack toward the middle in his dealings with Congress, we also can expect his Administration to shift its focus to achieving as much through regulatory action of what it no longer can achieve legislatively.

What does this mean for business and the financial industry in particular? Among other things, more regulatory oversight, stricter compliance rules, and more

aggressive compliance reviews, especially for federal contractors. If you are a bank that serves as a federal depository or issuer of U.S. Savings Bonds, that means you. And, thanks to one of the Administration's pre-election legislative successes, the Dodd-Frank Wall Street Reform and Consumer and Protection Act (Dodd-Frank), that also means most financial industry employers, whether you are a direct federal contractor or not.

Dodd-Frank's hidden employment law agenda

It's often said that passing legislation is like making sausage. Dodd-Frank is the latest example. During the feeding frenzy that accompanied Dodd-Frank's passage, one of the amendments that snuck it's way into the bill, apparently unnoticed by anyone other than its sponsors, is an ill-conceived and onerous set of new employment law obligations for banks and other financial industry employers. Totally unrelated to the financial crisis that Dodd-Frank was intended to address, section 342 of the "financial reform" bill requires each of more than a dozen federal financial industry regulatory agencies to establish an Office of Minority and Women Inclusion (OMWI) and to publish proposed regulations by no later than January 21, 2011. The covered agencies include the U.S. Treasury, the FDIC, the Federal Housing Finance Agency, each of the Federal Reserve banks and the Board of Governors of the Federal Reserve System, the National Credit Union Administration, the Comptroller of the Currency, the SEC, and the Bureau of Consumer Financial Protection (the new agency established by Dodd-Frank). More significantly, all banks, financial institutions, and other private financial industry service providers, including investment banking firms, mortgage banking firms, asset management firms, brokers, dealers, underwriters, accountants, investment

consultants, and law firms that do business with federal financial industry regulatory agencies or the industries they regulate are subject to the new requirements.

So what are the new requirements? If you already are a federal contractor or subcontractor subject to the affirmative action requirements of Executive Order 11246 for minorities and women, the new rules look like an affirmative action program (AAP) on steroids. In addition to the critical self-analysis of your workforce and employment activity, comparison of labor market data to your incumbent workforce, goal setting, narrative documents, affirmative diversity outreach, and other requirements of your existing AAP, you also will have to take affirmative steps to insure the inclusion of minority- and women-owned subcontractors in your business, take more aggressive action to insure compliance by your subcontractors, and file reports (not required by the current affirmative action regulations) with the affected regulatory agencies certifying and describing your "good faith" (not defined) efforts to include minorities and women in your and your subcontractors' workforces and minority- and women-owned businesses among your subcontractors. In addition, Dodd-Frank's definition of federal contracts is much broader than that provided by the existing affirmative action regulations. So if you are not currently a federal contractor or subcontractor for purposes of Executive Order 11246, you may be for purposes of Dodd-Frank. Indeed, whereas the Executive Order covers only contracts for the provision of goods or services to the federal government, federal contracts under Dodd-Frank include "all contracts for all business and activities of an agency, at all levels." That's broad enough potentially to include any entity doing business with any affected federal financial regulatory agency and, by extension, its subcontractors.

Potential conflict with OFCCP

In essence, Dodd-Frank transforms each affected federal financial agency into a federal equal employment opportunity and affirmative action agency. The director of each agency's OMWI will be responsible, among other things, for developing standards and procedures for evaluating the diversity policies and practices of regulated entities. If an OMWI director determines that a regulated entity is not making good faith efforts to include women and minorities in its or its subcontractors' workforces or to do business with women- and minority-owned subcontractors, the director may recommend contract termination to the agency administrator. Upon receipt of such a recommendation, Dodd-Frank authorizes the agency administrator to terminate the contract (which is unconstitutional without a due process hearing), refer the issue to the Office of Federal Contract Compliance Programs (OFCCP) which currently regulates employers covered by Executive Order 11246, or take other appropriate (unspecified) action.

If fully implemented and empowered as required by Dodd-Frank, each OMWI will function much like a mini-OFCCP. Interestingly, the OMWI amendment was not sponsored or supported by either the White House or the OFCCP, but came out of left field as various members of Congress were attaching their earmarks to the bill. In fact, Dodd-Frank's creation of the individual agency OMWIs runs counter to the purposes behind the creation of OFCCP in 1978 when President Carter consolidated nearly a dozen federal agencies with civil rights oversight over federal contractors into a single enforcement agency. Moreover, since each affected agency's OMWI director is empowered to set the agency's standards for determining, and to make determinations, that a contractor or subcontractor is not in compliance, there also is the great potential that individual agency OMWI standards and actions will conflict not only with the

standards and actions of other agency OMWIs, but also with those of OFCCP. Another troubling aspect of Dodd-Frank's OMWI requirements is that the affected federal agencies have no experience enforcing civil rights laws and Dodd-Frank gives no consideration to how each agency is supposed to train financial investigators to become discrimination investigators; nor does it provide any funding or budget for them to do so. The latter issue may be the silver lining for employers as the new Congress may simply refuse to fund Dodd-Frank's OMWI program.

What should financial industry employers be doing now?

No one will know for sure what direction the OMWI program will take until the proposed regulations are published in January. One possibility is that the Administration will not fully implement the OMWI authority, particularly if Congress refuses funding. Another is that, while the affected federal financial agencies will create OMWIs as required by Dodd-Frank, the OMWIs will be assigned only internal functions to compliment each agency's already-existing human resources and EEO offices and leave external oversight of federal contractors to OFCCP. If that happens, still another possibility is that the Administration and OFCCP will seize upon Dodd-Frank's broad definition of federal contracts to expand OFCCP's jurisdiction and unleash an ambitious, far-reaching, and aggressive new OFCCP enforcement initiative, which could happen even in the absence of Congressional funding for the OMWIs.

Without knowing what form the various agency rules will take until the proposed regulations are published in January, it's hard to say what banks and other regulated entities should be doing now to ensure compliance with section 342 of Dodd-Frank. At first blush, Dodd-Frank's diversity requirements do not appear too substantively different from the current affirmative action requirements of Executive Order 11246 apart from

the additional reporting requirements and the requirements that regulated entities make good faith efforts to include minority- and women-owned subcontractors in their businesses and more aggressive efforts to insure compliance by their subcontractors. Therefore, banks and other financial industry employers already subject to Executive Order 11246 should redouble their efforts to comply with the Executive Order. Covered contractors also should make certain their AAP's have been updated and redesigned to withstand scrutiny under OFCCP's current enforcement emphasis on systemic discrimination in hiring and compensation and requiring more proactive efforts to increase the employment opportunities of covered veterans and persons with disabilities. In addition, regulated entities may want to begin giving consideration to expanding their affirmative action efforts to include more proactive outreach to women- and minority-owned subcontractors. We will continue to monitor the development and publication of the proposed OMWI regulations and provide a complete report as soon as the regulations are published.