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BANKS, CREDIT UNIONS AND OTHER FINANCIAL INSTITUTIONS NEED TO REVIEW AFFIRMATIVE ACTION PROGRAMS AND ADDRESS OFCCP COMPLIANCE

By Christopher J. Pippett and Kenneth A. Rosenberg

As if the myriad of Consumer Financial Protection Bureau (CFPB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), National Credit Union Administration (NCUA) and other regulations were not enough, there is a new compliance threat that likely impacts financial institutions. Specifically, the U.S. Department of Labor's Office of Federal Contractor Compliance Programs (OFCCP) has been increasing its enforcement activities towards the banking and financial institution industry to ensure it complies with Executive Order 11246, as amended, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, 38 U.S.C. 4212, and Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended. These three programs require federal contractors to provide equal employment opportunities to minorities, women, individuals with disabilities and veterans ("protected categories"), with respect to their personnel decisions, and to prepare affirmative action plans where they have 50 or more employees and a government contract of \$50,000 or more.

The term "government contract" is defined by the OFCCP's regulations as any agreement or agreement modification between any federal contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services and includes, but is not limited to, insurance and fund depository or

issuing/paying on U.S. savings bonds. All banks, credit unions and other financial institutions with federal share and/or deposit insurance and/or that act as issuing and paying agents for savings bonds and notes are considered to be federal contractors under these regulations. They are therefore subject to the EEO and AAP requirements, regardless of the number of employees.

To ensure banks, credit unions and other financial institutions are complying with these regulations, the OFCCP has been aggressively auditing these entities as President Obama has made enforcement of the EEO and AAP laws and regulations a central issue for his second term. When the OFCCP determines an entity is not meeting its affirmative action obligations, it has the authority to demand back pay and interest for any underutilization in the protected categories and to remedy any discriminatory compensation practices that may exist.

All banks, credit unions and other financial institutions should review and address these issues before they are subjected to an audit by the OFCCP in order to avoid these severe monetary penalties as well as yet another unnecessary governmental intrusion. Where a financial institution determines that it is subject to the foregoing EEO and AAP requirements and needs assistance in complying with them, it should retain a

provider: (1) that has substantial experience preparing affirmative action plans and related documentation; (2) that has experience handling OFCCP audits; and (3) whose communications will be protected by the attorney-client privilege. The last of these is extremely important to prevent the OFCCP from using the institution's compliance efforts against it during an audit. Due to the OFCCP's aggressive posture, banks, credit unions and other financial institutions should take steps now to prevent being caught flat-footed, because an ounce of prevention is worth a pound of cure.

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