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OPINION

Dodd-Frank provision imposes no hiring quotas

It simply requires federal agencies that regulate the financial markets to promote principles of equal employment in hiring and contracting.

BY PAMELA BETHEL

Some conservative legal thinkers have been denouncing a provision of the new financial services reform bill that they say may impose hiring quotas on Wall Street firms and on anyone who does business with them. For example, Diana Furchtgott-Roth, writing for the Real Clear Markets Web site, has claimed that the provision is "broad and vague," is "certain to increase inefficiency in federal agencies" and represents "a major change in employment law."

None of this is true. The section in question—Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act—will not enforce any quotas, does not change the existing legal standards for minority hiring and contracting and is in fact one of the most positive steps that Congress took when it passed the massive reform legislation earlier this year.

So what does Section 342 actually do? It simply requires the federal agencies that regulate the financial markets—the Treasury Department, the Federal Deposit Insurance Corp., the Federal Reserve regional banks, the U.S. Securities and Exchange Commission and the like—to set up offices of minority and women inclusion that are designed to ensure that the agencies use principles of equal employment in hiring.

In addition, the section provides that, when the agencies enter into contracts with private companies and law firms, which they often do, they must develop and apply policies that are designed to ensure "to the maximum extent possible the fair inclusion" of women and minorities in the contracting process.

This applies to these agencies' contracts with institutions such as investment and mortgage bankers, broker-dealers, underwriters, accounting firms, asset management firms and law firms. If an agency comes to the conclusion that a contractor has not even made a "good faith effort" to include women and minorities in its work force and subcontracts, the agency can, but need not, recommend termination of the contract.

When Congress included this provision in the law, it was concerned that the massive volume of work under the Troubled Assets Relief Program has not flowed to minority- and women-controlled companies and law firms since TARP's inception in 2008. For example, while tens of millions of dollars in legal services contracts have been awarded by the Treasury Department under TARP, minority- and women-owned law firms have not received a significant portion of those contracts.

Congress also knew that Wall Street remains a largely white- and male-dominated place. U.S. Government Accountability Office studies show that women and minorities have made only very minimal gains in the past 15 years in employment in the financial services industry. Women and minorities have figured prominently in the financial crisis, of course—but mostly as victims of improper or even predatory lending practices who lost their homes or their good credit ratings.

We have recently been down this road before. In October 2008, Congress passed the Emergency Economic Stabilization Act, which contains a provision requiring the treasury secretary to develop and implement standards and procedures to ensure, to the maximum extent practicable, the inclusion of women- and minority-owned businesses in TARP. But in practice, this admirable goal was not met. Of 52 contracts awarded by Treasury under TARP, minority-owned firms got only three. That is why Congress passed Section 342.

Another financial crisis of the past shows us a much better precedent for the inclusion of minority- and women-owned firms in a financial bailout. During the savings and loan crisis of the 1980s and 1990s, the Resolution Trust Corp., which was cleaning up the mess, took a major step toward inclusion of minorities. The RTC hired many private law firms to assist the government in its work. Those law firms were not allowed to staff the projects in their normal fashion. They were required, on each assignment, to enter into a joint venture with a minority-owned law firm.

The results were that the work was performed successfully and cost-effectively and that a whole new cadre of minority-owned law firms emerged and gained respect and financial success.

Contrary to the insinuations of its opponents, Section 342 doesn't set any quotas, ratios or goals. The requirement that agencies and contractors ensure to the maximum extent possible the "fair inclusion" of women and minorities is a flexible and common-sense one, and penalties, including the possible termination of a contract, kick in only when a contractor hasn't even acted in "good faith."

Of course, the clear mandate of Section 342 could be misconstrued by some bureaucrat in the future to require gender and racial quotas. But that's why we have reviewing courts that would hear any claim that unconstitutional quotas are being imposed and that would almost surely prevent this from happening. That risk is not worth worrying about. What is worth our concern is ensuring that Wall Street doesn't merely return to business as usual.

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