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Seeking Guidance on Dodd-Frank’s Diversity Clause

By KEVIN ROOSE


Chip Somodevilla/Getty ImagesRepresentative Maxine Waters, who proposed the provision in the Dodd-Frank Act to promote diversity.

As Wall Street scrambles to comply with the regulations of the Dodd-Frank financial overhaul, one little-noticed provision has executives scratching their heads.

The statute, included in Section 342 of the bill, creates 20 Offices of Minority and Women Inclusion at the various regulatory agencies, including the Treasury, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the 12 Federal Reserve banks and the newly created Consumer Financial Protection Bureau.

Once established, the offices are charged with monitoring the diversity at the agencies as well as at any contractors or subcontractors, including law firms, accounting firms and investment banks. These contracts, totaling in the billions a year, are typically awarded to private firms for services like debt issuances and sales of government assets, as well as more general advisory services.

Section 342 was proposed by Representative Maxine Waters, Democrat of California, who argued that putting diversity regulators in the agencies would help to correct racial and gender imbalances at Wall Street firms, as well as in the subcontracting process.

“Qualified minority- and women-owned businesses continue to be excluded from contracting opportunities made available by the government’s historic intervention at banks and other financial institutions,” Ms. Waters said in a floor speech in 2009.

According to the bill’s text, if an agency’s compliance director concludes that a contractor has not made “a good faith effort to include minorities and women in its work force,” the agency head is authorized to cancel the contract, refer the matter to the Office of Federal Contract Compliance Programs or take other unspecified remedial actions.

The clause also requires the agencies to recruit at historically black universities and women’s colleges, sponsor job fairs in urban communities and submit detailed yearly reports summarizing their diversity efforts to Congress.

Republican lawmakers criticized the provision when it was introduced, calling it another example of big-government social engineering.

“The problem with this clause is that it’s largely redundant,” said Lawrence Z. Lorber, an employment law specialist at the law firm Proskauer Rose. “Most of these firms and agencies are already covered by multiple nondiscrimination laws. If you require more extensive disclosure of diversity practices, what you’ll get is a lot of very long reports essentially saying the same thing.”

Mark A. Calabria, director of financial regulation studies at the Cato Institute, called the provision “a wild card.”

“The language of the clause is so vague that it could do nothing at all,” Mr. Calabria said. “But in the hands of a regulator who really wanted to make an issue out of diversity hiring, it could have a substantial impact.”

While Section 342 would require investment banks and other contractors to ensure “fair inclusion and utilization” of minorities and women, it does not define the term, nor does it offer concrete guidelines for firms seeking to comply with the regulations. Also unclear is how the clause’s requirements will differ from existing affirmative action laws, like those enforced by the Equal Employment Opportunity Commission.

The Dodd-Frank bill gives agency administrators until late January to appoint compliance directors who will develop standards for their agencies.

Several large banks declined to comment on their Section 342 compliance plans, and a Fed spokesman said only: “We’re currently working on setting up these offices according to the requirements of the Dodd-Frank bill.”

For guidance, banks and their compliance officers are looking to a similar clause in the Housing and Economic Recovery Act of 2008, which requires Fannie Mae, Freddie Mac and the Federal Home Loan Banks to submit finely detailed reports on the progress of their diversity efforts. Some suspect that Section 342 will impose similar requirements.

Karen L. Corman, a partner at Skadden, Arps who specializes in labor law, said that investment banks, law firms and other affected companies would have to find ways to take “meaningful views” of their work forces in the coming months, but believed it was unlikely that the regulations would result in quotas or other hard-line remedies.

“Until these regulations come out, we don’t know what the standards and remedies are going to look like,” Ms. Corman said. “Firms clearly need to review their diversity profiles and minority outreach programs to make sure everything’s within a range of acceptability. But beyond that, there’s not a lot of guidance.”

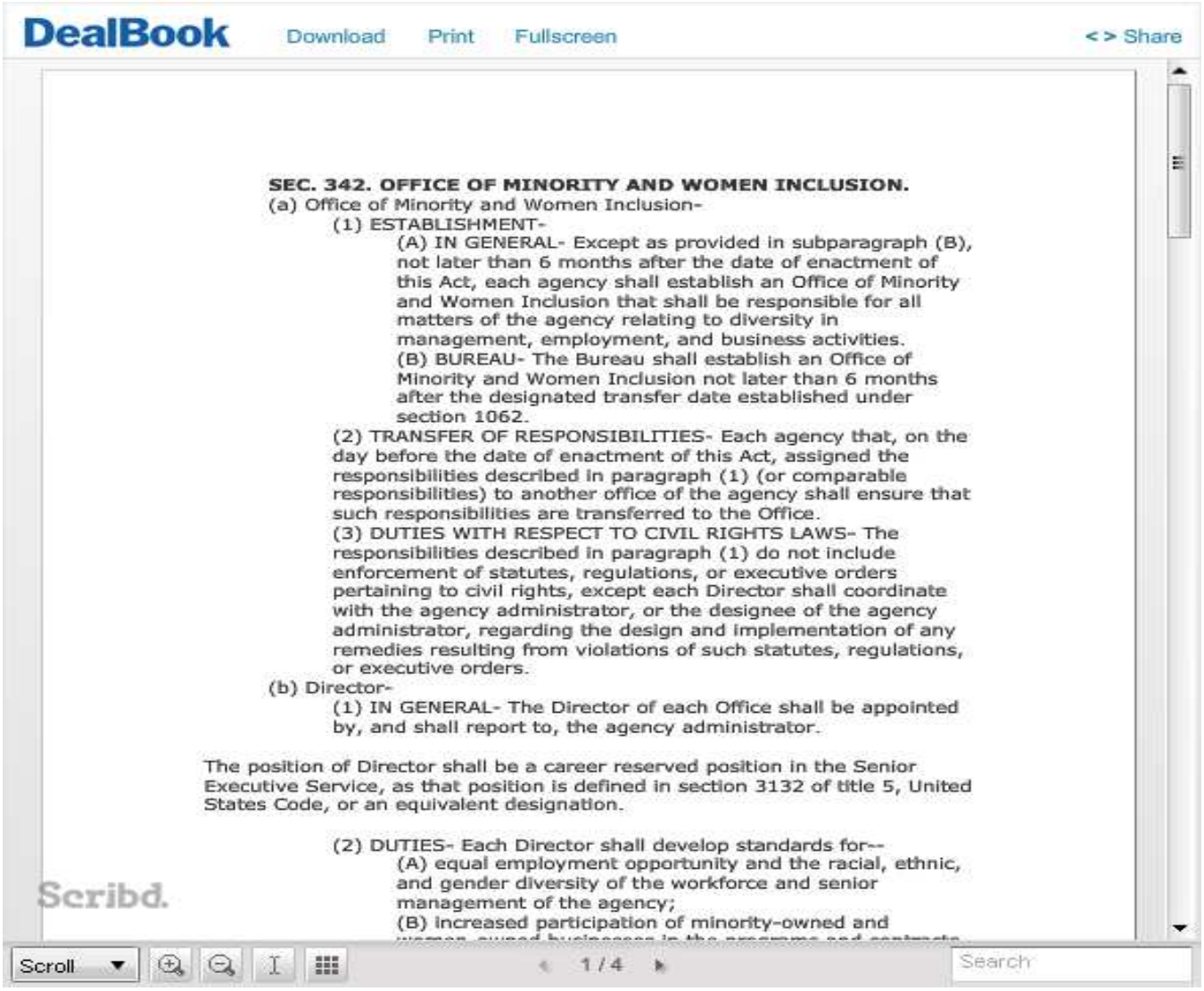
Despite the uncertainty around Section 342, some executives are looking forward to increased scrutiny of Wall Street’s hiring and subcontracting processes.

“No legislation is perfect,” said Jack Foster, managing director at CastleOak Securities, a minority-owned

boutique investment firm. “But this is a good step forward for giving firms like us a chance to compete.”

At the very least, said Susan Ganz, president of the Financial Women’s Association of New York, a professional organization for women in banking and business, “it’s an opportunity to have the conversation about diversity in the financial sector. And maybe it will lead to action.”

Section 342 of the Dodd-Frank Act



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