



Federal Deposit Insurance Corporation

3501 Fairfax Drive, Arlington, VA 22226-3500

December 3, 2007

TO: The Board of Directors

THROUGH: John F. Bovenzi
Deputy to the Chairman
and Chief Operating Officer

FROM: D. Michael Collins
Director
Office of Diversity and Economic Opportunity

Arleas Upton Kea
Director
Division of Administration

SUBJECT: Proposed Revisions to the FDIC's Minority and
Women Outreach Program Contracting Regulation

PROPOSAL

The Office of Diversity and Economic Opportunity (ODEO) and the Division of Administration (DOA), with the concurrence of the Legal Division (Legal), propose that the FDIC Board of Directors (Board) approve proposed revisions to the FDIC's Minority and Women Outreach Program Contracting regulation to delete obsolete registration, reporting, and coordination provisions.

EXECUTIVE SUMMARY

FDIC staff has reexamined the Corporation's contracting outreach program for minority- and women-owned businesses (MWOBs) prescribed by regulation in 12 C.F.R. Part 361. To remain consistent with existing law and current practice, FDIC staff has prepared revisions to the FDIC's contracting outreach regulation, and these proposed amendments to the FDIC's contracting outreach regulation are submitted for Board approval pursuant to the Federal Deposit Insurance Act (FDI Act).

List of Contacts:

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DOA – Michael Rubino (703-562-2224)
Legal – Debra Decker (202-898-8748)

BACKGROUND

In 1989, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) mandating that financial institution regulators, including the FDIC, prescribe regulations establishing and overseeing a minority outreach program to ensure inclusion, to the maximum extent possible, of minorities and women, and businesses owned by them, in all contracts entered into by the FDIC.¹ Three years later, in compliance with FIRREA, the Board issued the FDIC's "Minority and Women Outreach Program Contracting" regulation providing for various outreach activities that would be undertaken by the FDIC to promote the inclusion of MWOBs as well as establishing price incentives for the selection of MWOBs in the procurement of services for the FDIC.²

In 1995, the Supreme Court concluded in *Adarand* that racial classifications in federal government contracting must serve a compelling governmental interest. Following this case, race-based classifications used in federal contracting would be subject to strict scrutiny and would, therefore, be presumptively unconstitutional. Thus, price incentive policies geared toward MWOBs were called into question. However, it is noteworthy that this decision did not call into question "outreach activities" that are designed to simply extend the awareness of federal or FDIC contracting opportunities to MWOBs. Nonetheless, the *Adarand* decision resulted in major policy revisions to government-wide federal affirmative action contracting programs, which required that contracting incentive programs be race and gender neutral. As a proxy for providing incentives to minority and other traditionally under-represented groups in the selection of contractors, a new government-wide program was instituted in the late 1990s to provide price evaluation adjustments to SDBs.

As an independent federal agency, the FDIC was not required to participate in the government-wide program. However, in 2000, in light of *Adarand* and the new government-wide SDB program, the Board amended the FDIC's own contracting outreach regulation and announced its policy to provide price evaluation adjustments to SDBs similar to the government-wide program. All other outreach activities in the FDIC regulation remained essentially unaffected by the 2000 amendments. Thereafter, in 2004, the government-wide price evaluation adjustment program for SDBs was rescinded for many federal agencies in light of the absence of Congressional re-authorization for this program. DOA then administratively discontinued the program for SDBs within the FDIC.

During its recent review of the contracting outreach regulation, FDIC staff recognized that the (now inoperative) SDB program had not been formally adopted in the FDIC regulation itself (in 2000); it had, however, been announced in the preamble. Also, FDIC staff realized that "outreach activities" mentioned in the regulation contain many procedures and activities that are no longer used by the FDIC. Therefore, FDIC staff proposes a revised regulation to delete obsolete registration, reporting, and coordination provisions. Staff believes there will be no negative impact on SDBs or MWOBs from this revised regulation as these changes have already been implemented by the FDIC.

¹ See 12 U.S.C. § 1833e(c).

² See 12 C.F.R. Part 361 (1992).

Pursuant to Section 9(a) Tenth of the FDI Act (12 U.S.C. § 1819(a) Tenth), the corporation has the power “to prescribe *by its Board of Directors* such rules and regulations as it may deem necessary to carry out the provisions of this Act . . . (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency).” (Emphasis supplied.) Since no other federal agency has been granted exclusive authority to issue rules and regulations governing federal agency contracting outreach programs, the Board retains the power to amend such rules and regulations (in this case, 12 C.F.R. Part 361) as such authority has not been redelegated.

RECOMMENDATIONS

To remain consistent with current law and practice, FDIC staff has prepared a revised the Minority and Women Outreach Program Contracting regulation. ODEO and DOA, with Legal concurrence, therefore recommend that the Board approve proposed revisions to the FDIC’s Minority and Women Outreach Program Contracting regulation to delete obsolete registration, reporting, and coordination provisions.³

CONCUR:

Sara A. Kelsey
General Counsel

Attachments

³ See the proposed amendments to the FDIC’s Minority and Women Outreach Program Contracting regulation, 12 C.F.R. Part 361 (Attachment A), and the proposed Board Resolution amending such regulation (Attachment B).