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DE&I Rollbacks: Are Banks in the Crosshairs?

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In January 2025, the new Trump administration issued Executive Order 14173, which ordered all executive departments and agencies to, among other things, end federal "diversity, equity, and inclusion" (DEI) programs and to use federal authority and influence to "enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities." The Trump administration made it clear in the executive order that it considers programs or activities that distinguish and provide benefits to individuals based on classifications such as race, color, religion, sex, and national origin to be violations of civil rights laws. This order was enjoined by a Maryland District Court in February, and its legality is currently being adjudicated in the federal courts.

Should the executive order survive judicial scrutiny, it could create something of a regulatory Catch-22, wherein strict compliance with the executive order would contradict established statutory and administrative mandates regarding access to credit for disadvantaged communities. In the sections that follow, we will explore some of the implications of this order and the ways in which it might create compliance challenges for banks and other regulated financial institutions moving forward.

Could banks be considered federal contractors under executive order 14173?

In pursuit of its stated goal of ending DEI practices in federal agencies and the private sector, including financial institutions, Executive Order 14173 rescinds prior Executive Order 11246 (1965). Prior to its revocation, the latter order had prohibited discrimination in employment by federal contractors and subcontractors alike and mandated that they take affirmative action to ensure

equal opportunity in employment. At the same time, Executive Order 14173 goes further and provides for the identification of private sector entities for potential civil enforcement investigations to ensure compliance with its objectives. Consequently, determining whether banks are properly subject to this order is imperative.

In discerning the impact of Executive Order 14173 on the banking industry, the threshold issue is whether banks may be involuntarily classified as federal contractors and therefore subject to the full thrust of enforcement action under this and related orders merely by engaging in certain activities and fulfilling specified obligations that exist independent of the federal contracting process. This has important implications for banks that maintain community-focused lending programs under the Community Reinvestment Act (12 U.S.C. §§ 2901 *et seq.*), special purpose credit programs authorized under the Equal Credit Opportunity Act (15 U.S.C. §§ 1691 – 1691f), as well as other types of targeted, minority-focused lending initiatives. It also may have consequences for financial institutions that have integrated DEI-style programs into their regular hiring and employee retention processes.

The Office of Federal Contract Compliance Programs (OFCCP), a Department of Labor agency that has been substantially affected by the most recent wave of federal workforce reductions, has historically taken the position that, in the context of prior executive action, a bank may be classified as a federal contractor merely because it obtains federal deposit insurance, acts as an issuing and paying agent for U.S. savings bonds and notes, or is a federal fund depository. However, there is substantial doubt about the validity of this interpretation. The weight of existing authority appears to stand against this proposition, albeit in a landscape has been significantly muddied by recent executive actions.

Traditionally, banks fell under the enforcement authority of the OFCCP and qualified as federal contractors, by, among other things, entering into contracts with the federal government that included specific obligations, such as those outlined in Executive Order 11246. In *First Alabama Bank of Montgomery, N.A. v. Donovan*, 692 F.2d 714 (11th Cir. 1982), the court held that a bank was properly considered to be a federal contractor because it held federal funds on deposit and was an issuer and redeemer of U.S. savings bonds and, as a result, the bank had agreed to be bound by the anti-discrimination provisions of Executive Order 11246 in its contracts with the United States. In *USAA Federal Savings Bank v. McLaughlin*, 849 F.2d 1505 (D.C. Cir. 1988), the court endorsed the OFCCP's reliance on the existence of federal deposit insurance to assert jurisdiction over federally insured financial institutions, considering such insurance as being sufficient to trigger federal contractor status pursuant to Executive Order 11246. Therefore, at least historically, banks could qualify as federal contractors and fall under the OFCCP's enforcement authority when they engaged in contracts with the federal government that required compliance with specific non-discrimination and affirmative action clauses or by holding federal deposit insurance.

When considering cases that do not rely on Executive Order 11246, the landscape becomes significantly more complicated. Importantly, in the absence of Executive Order 11246, courts have held that the previously mentioned roles alone do not convert banks into federal agencies or contractors but rather constitute a delegation of certain limited financial functions. For example, in *State of Texas ex rel. Falkner v. National Bank of Commerce of San Antonio, Texas*, 290 F.2d 229 (5th Cir. 1961), a case occurring before the promulgation of Executive Order 11246 by President Lyndon B. Johnson, the court noted that although banks designated as depositories and financial agents may perform specific functions as required by the Treasury, this nonetheless does not convert them into federal contractors.

Similarly, in *U.S. v. Citizens & Southern National Bank*, 889 F.2d 1067 (Fed. Cir. 1989), the court clarified not only that the designation of banks as depositaries and financial agents of the U.S. government does not, in and of itself, constitute a procurement of property and services under the Federal Property and Administrative Services Act (41 U.S.C. §§ 251 *et seq*.), but also that it does not transform banks into federal contractors pursuant to their activities conducted under the National Bank Act (12 U.S.C. § 38). In other words, this designation merely allows banks to perform specific financial functions for the government without transforming the relationship into one of procurement on behalf of the federal government.

After the recission of Executive Order 11246, the status of banks as federal contractors remains unsettled. However, it would appear that, as in the *Falkner* ruling cited above, the mere existence of federal deposit insurance, the fact of acting as an issuing and paying agent for U.S. savings bonds and notes, or the maintenance of a role as a federal fund depository should not, by themselves, be sufficient to transform a bank into a federal contactor. However, in light of the *USAA* ruling, also cited above, there exists a risk that, even in the absence of Executive Order 11246, courts may hold that the fulfillment of these roles or participation in such programs, particularly the maintenance of federal deposit insurance, are in and of themselves sufficient to subject banks to treatment as federal contractors and together therewith to the full impact of recent executive action as well.

How would Executive Order 14173 apply to the Community Reinvestment Act?

The Community Reinvestment Act (CRA) was enacted in the 1970s to combat the pernicious practice of redlining—that is, the discriminatory practice of denying financial services to residents of certain neighborhoods based on their race, ethnicity or other prohibited reason—and thus expand community access to credit and other banking services. Though historically rooted in addressing race-based discrimination, the CRA does not mention race, sex, or other traditional civil rights classifications, and it does not require banks to offer credit or other financing to "diverse" individuals. Instead, the CRA requires banks to meet the financing needs of the local communities in which they are chartered by requiring banks to meet the credit needs of the local "low- and moderate-income neighborhoods."

12 U.S.C. §§ 2901(b), 2903(a). In other words, the CRA's mandate to banks is to foster equitable lending practices by ensuring that community members of all income levels have reasonable access to credit.

The Federal Reserve, Office of the Comptroller of the Currency, and Federal Deposit Insurance Corporation are the three federal regulators charged with developing and enforcing rules that implement the CRA. Banks must also comply with the robust regulatory and supervisory regime established by these regulators to comply with the CRA. *See id*. § 2905. Further, banks are held accountable for such compliance during their safety and soundness examinations. *See id*. § 2906. During these examinations, banks are specifically rated by their primary federal regulator with respect to their compliance with the CRA and whether the bank is sufficiently meeting the credit needs of their communities, including low- and moderate-income neighborhoods. Such findings are publicly disclosed after they are finalized by the bank's regulator and can impact a bank's ability to expand or merge with other institutions. *Id*. However, even the revised CRA regulations finalized under the Biden administration in 2023 do not require banks to address race or ethnicity in any direct manner beyond ensuring a bank is not engaging in illegal discrimination. *See* 89 Fed. Reg. 6,574 (Apr. 1, 2024). Thus, compliance with the text of the CRA itself is likely not in contradiction with Executive Order 14173, though Executive Order 14173 could certainly influence how regulators interpret and implement the statute going forward.

How would Executive Order 14173 apply to minority lending programs?

Beyond the CRA, some banks have developed credit programs that are specifically available to minority-owned businesses. Such programs are enabled by the Equal Credit Opportunity Act (ECOA), outside of CRA requirements, and are aimed strengthening underserved and minority communities. These programs vary widely across banks but often involve financial and credit options available specifically to minority-, veteran- and woman-owned businesses.

Such programs are expressly authorized under the ECOA, but they are likely to receive less encouragement and may even be closely scrutinized by regulators under the Trump administration based on Executive Orders 14173 and 14281. The ECOA and its implementing regulation, Regulation B, permit lenders to extend credit under special purpose credit programs (SPCPs) to meet special social needs. *See* 15 U.S.C. §1691(c), 12 C.F.R. § 1002.8. Banks cite a wide variety of community-oriented reasons for implementing such programs. Additionally, lenders have used SPCPs to satisfy their CRA obligations and improve their CRA ratings, and such programs were even strongly encouraged under the Biden administration's guidance. However, the programs themselves are not required of lenders and do expressly permit targeting services to specific minority communities. Thus, these programs are a potential target of change in interpretation and implementation for regulators under the guidance of the Trump administration than implementation of the CRA itself. Already,

government-sponsored enterprises Fannie Mae and Freddie Mac have been directed by their regulator (the Federal Housing Finance Agency) to terminate all SPCPs that they support.

An executive order cannot override a federal statute (such as the ECOA), but it can and likely will influence how regulators interpret and enforce the law. It seems possible that federal banking regulators under the guidance of the Trump administration could use safety and soundness examinations to issue findings to banks who have implemented such SPCPs as going beyond the CRA requirements and potentially even alleging the way a bank has implemented such a program constitutes a civil rights violation. However, such use of safety and soundness examinations is speculative at this point.

More likely, federal regulators will announce or make clear any changes in expectations and guidance with respect to SPCPs, if any, and while certain announcements and actions will likely be challenged in the courts, lenders will be expected comply in the near term. However, over the coming weeks and months, this issue will be important to monitor as banks' safety and soundness CRA compliance results are published by federal regulators in order to see how this new administration will shift the manner in which the financial sector approaches how banks should ensure they are serving entire communities.

How has Executive Order 14173 affected enforcement actions?

The most significant impact of Executive Order 14173 is a signal to regulators on how to interpret existing statutes and regulations. In one recent example, the Consumer Financial Protection Bureau (CFPB) is demonstrating a shift in how it will approach certain racial discrimination cases. The CFPB is not charged with enforcing the CRA, which is the responsibility of other federal regulators, but it does implement and enforce various consumer finance laws and regulations that overlap in some respects with the goals and rules of the CRA. In particular, in the past the CFPB has brought lawsuits against lenders under the ECOA, alleging illegal racial discrimination in the form of redlining (the same pernicious practice the CRA was enacted to combat).

Even though Executive Order 14173 is suspended pending judicial review, CFPB Acting Director Russ Vought is making changes at the agency that seem to align with similar values of the order. Notably, the CFPB is currently attempting to vacate a settlement to a redlining case and return the penalty fee that the lender paid to the CFPB because, after review, the CFPB under Vought's leadership found that the evidence against the lender was "not based on any act of discriminatory conduct, but solely on perceived racial disparities." According to Acting Director Vought, the "CFPB abused its power, used radical 'equity' arguments to tag [the lender] as racist with zero evidence, and spent years persecuting and extorting them—all to further the goal of mandating DEI in lending via their regulation by enforcement tactics." *Id*. This example is an indicator that, regardless of whether Executive Order 14173 survives its legal challenges, regulators under the Trump administration's

guidance may change the way they interpret or implement a wide variety of statutes to adopt a similar "anti-DEI" approach to governance.

About a month after the CFPB filed to vacate the *Townstone* settlement, the White House issued Executive Order 14281, titled "Restoring Equality of Opportunity and Meritocracy" (Apr. 23, 2025), mandating that federal agencies "eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, federal civil rights laws, and basic American ideals." The executive order further directs all agencies to deprioritize enforcement of statutes and regulations that include disparate-impact liability, which includes the ECOA and Regulation B, and within 45 days, the CFPB director, who is responsible for enforcement of the ECOA, and other agency leaders "shall evaluate all pending proceedings that rely on theories of disparate-impact liability and take appropriate action with respect to such matters consistent with the policy of this order." While the CRA is not specifically mentioned in the executive order, this is yet another signal by the Trump administration of its intent to change how companies, including banks and others in the financial sector, serve traditionally underserved communities by changing how statutes and regulations are enforced. How federal financial regulators will respond to Executive Order 14281 specifically has yet to be seen but will be another important issue to watch in the coming weeks and months.