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GUIDELINES FOR DETERMINING PARENT, SUBSIDIARY, AFFILIATE COVERAGE/SAMPLE MEMORANDUM

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THE SITUATIONS

1. Is a non-federally involved subsidiary corporation obligated to comply with OFCCP's three regulatory programs if the acquiring parent corporation is a covered federal contractor or subcontractor?
2. Is a non-federally involved parent corporation obligated to comply with OFCCP's three regulatory programs if it acquires a subsidiary, which is a covered federal contractor or subcontractor?
3. Is a non-federally involved subsidiary obligated to comply with OFCCP's three regulatory programs if it is owned by a non-federally involved parent corporation which, in turn, owns a second subsidiary, which is a covered federal contractor or subcontractor?
4. Must a covered federal contractor establish a written affirmative action plan at all locations regardless of the number of persons employed there even if that location is not otherwise a covered federal contractor or subcontractor?

THE ANSWER

To determine whether non-contractor/subcontractor parents, subsidiaries or affiliates must comply with Executive Order 11246, Rehab Act and VEVRAA, OFCCP uses the same "single entity" test applied by the National Labor Relations Board under the National Labor Relations Act and the Department of Labor Wage and Hour Division under the Fair Labor Standards Act. The single entity test requires the consideration of five factors:

1. Common ownership;
2. Common directors and/or officers;

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3. Defacto exercise of control;
4. Unity of personnel policies emanating from a common source; and
5. Dependency of operations.

Additionally, OFCCP has developed a 27 point questionnaire to assist companies in determining whether the single entity test is met. See 27 point questionnaire (attached).

With regard to the issue of whether all locations of a covered contractor/subcontractor must develop an affirmative action plan, OFCCP takes the position that all locations of a covered contractor/subcontractor must include all of its employees in a written affirmative action plan regardless of how many persons are employed at that location even if that location performs no federal contract/ subcontract work. This requirement can be satisfied by developing a separate affirmative action plan for each of these locations or, in some cases, multiple facilities may be considered a single establishment thereby allowing an affirmative action plan that covers multiple locations provided that the locations are in the same labor/recruiting market.

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THE 27 POINT QUESTIONNAIRE

The following 27 questions were taken from an unofficial OFCCP document. Answers to the 27 questions are useful to help contractors determine whether the relationship of two corporate entities (e.g., parent, subsidiary, affiliate) are sufficiently closely related that it is fair to say that they operate as a “single-entity,” each sharing the responsibilities and rights of the other.

1. What percentage of the stock of the subsidiary or affiliate is owned by the parent corporation?
2. How many directors are on the Board of parent corporation?
3. How many directors are on the Board of both the parent and the subsidiary corporations?
4. How many individuals are officers of both the parent and the subsidiary corporations?
5. How many individuals are employees of both the parent and the subsidiary corporations?
6. What positions do the individuals in No. 5 hold in each corporation?
7. Does the parent corporation pay the wages of any of the subsidiary's employees?
8. Does the parent corporation pay any other expenses of the subsidiary?

If yes, please list which expenses are paid.

9. In advertisements, is the subsidiary referred to as a part of the parent corporation?
10. In financial statements of either corporation, is the subsidiary described as a department or division of the parent corporation?
11. Does the same in-house legal staff serve both the parent and subsidiary corporation?
12. Are any services provided by the parent corporation for the subsidiary corporation or vice versa?

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If yes, what service?

13. Are the books and/or financial records of the parent and subsidiary kept separately?
14. Does the parent corporation control the hiring practices and procedures of the subsidiary? For example:
 - (a) Does the parent corporation set hiring standards for the subsidiary?
 - (b) Does the parent corporation set any hiring rules for the subsidiary?
 - (c) Does the parent corporation set equal employment opportunity policy for the subsidiary?
15. Does the parent review and/or control the labor practices of the subsidiary? For example:
 - (a) Does the parent negotiate and/or take part in the negotiation of collective bargaining agreements of the subsidiary?
 - (b) Does the parent sign the collective bargaining agreements of the subsidiary?
16. Is there ever an exchange of personnel between parent and subsidiary?

If yes, does the individual who transfers retain the same seniority date used at the transferor corporation for purposes of benefits, promotions, layoffs and/or recall?
17. Does the parent recruit personnel for the subsidiary or vice versa?
18. Does the parent hire the subsidiary's top management officials or vice versa?
19. Are minority employees of the subsidiary listed on the EEO-1 reports of the parent?
20. Has there ever been an infusion of capital from the parent to the subsidiary or vice versa?

If yes, list dates and amounts.

21. What percentage of the subsidiary's business is with the parent?

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22. What percentage of the parent's business is with the subsidiary?
23. Does either the parent or the subsidiary use any of the property of the other?
24. Is the product or service of either the parent or the subsidiary essential to the conduct or operation of the other's business?

If yes, list the product(s) or service(s).
25. Does either the parent or the subsidiary provide any marketing service for the other?
26. Would either the parent or the subsidiary be unable to function if the other ceased to exist?
27. IF THE ANSWER TO QUESTIONS 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 23, 24, 25 OR 26 WAS NEGATIVE, STATE SEPARATELY FOR EACH SUCH NEGATIVE ANSWER WHETHER THE ANSWER WOULD HAVE BEEN AFFIRMATIVE IF THE QUESTION WAS ASKED FOR THE LAST FIVE (5) YEAR PERIOD.

CONFIDENTIAL DRAFT:

**ATTORNEY-CLIENT COMMUNICATION
WORK PRODUCT PRIVILEGED**

MEMORANDUM

TO:

FROM:

DATE:

RE: Affirmative Action Programs

As you know, federal law requires that certain federal contractors and subcontractors have affirmative action programs for minorities, women, individuals with disabilities, and veterans. The regulatory provisions that govern whether or not a particular company facility is subject to these laws are complex and involve a number of factors, many of which we have little or no control over (*e.g.*, contracts entered into by companies to whom we sell our products), that easily can change from year to year. Therefore, there will be circumstances when the adoption of an affirmative action plan by one of our company facilities is undertaken voluntarily, notwithstanding references in the program documents to these laws, and not because it is required by law. Accordingly, it is important that all personnel remember that the mere adoption of an affirmative action program referencing these laws does not mean that a determination has been made that the facility in question, in fact, is subject to these laws.

In all cases, personnel receiving any inquiry from a government agency concerning a particular facility's compliance with these laws (*e.g.*, notice of compliance evaluation/audit, complaint, reporting requirements) need to contact [insert appropriate office] to determine whether, in fact, the facility is subject to the law(s) in question before undertaking to respond to the inquiry.

If you have any questions about this issue, please contact [insert appropriate person].