



FLOWCHART FOR DETERMINING COVERAGE UNDER FEDERAL AFFIRMATIVE ACTION LAWS

Companies frequently need to determine whether they are subject to federal affirmative action laws (the “Affirmative Action Laws”) by virtue of their business dealings with the U.S. federal government (the “Government”) or entities that sell to the Government. Federal contractors and their subcontractors (“Contractors”) are generally subject to the following Affirmative Action Laws:

- **Executive Order 11246 (“EO 11246”)**, prohibiting discrimination based on sex, sexual orientation, gender identity, race/ethnicity, national origin, and religion and requiring affirmative action for females and minorities;
- **Section 503 of the Rehabilitation Act (“Section 503”)**, prohibiting discrimination and requiring affirmative action for individuals with disabilities; and
- **Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”)**, prohibiting discrimination and requiring affirmative action for protected veterans.

Because the coverage thresholds for these laws can be easily satisfied, some companies unwittingly enter into contracts or relationships that subject them to coverage. Failing to understand how coverage is triggered can result in unintended and burdensome compliance obligations. The Office of Federal Contract Compliance Programs (“OFCCP”), which enforces the Affirmative Action Laws, randomly audits Contractors for compliance with these laws, including investigating potential systemic discrimination issues. Violations can lead to prolonged and more expensive audits, significant monetary damages, hiring quotas for findings of discrimination, and ongoing monitoring by OFCCP.

The flowchart below is intended to assist companies to determine whether they may be covered by the Affirmative Action Laws.¹ The flowchart is organized into three separate steps.

Step 1 Determining the Source of Coverage: A company must first determine whether it has a contract or relationship with the Government or a Contractor that could potentially subject it to coverage by the Affirmative Action Laws. The primary ways companies are subject to the Affirmative Action Laws are:

- The company has a **direct contract** with the Government;
- The company serves as a **depository of federal funds** (in any amount) or is a financial institution which is an **issuing or paying agent for U.S. savings bonds and saving notes** (in any amount);
- The company has a **subcontract** with: (1) an entity that directly contracts with the government (a “Prime Contractor”); or (2) a company that contracts with a Prime Contractor whose goods or services ultimately serve the Government; or
- The company is considered a **single entity** with a closely related entity (e.g., parent, subsidiary, or affiliate) that is a Contractor subject to the Affirmative Action Laws.

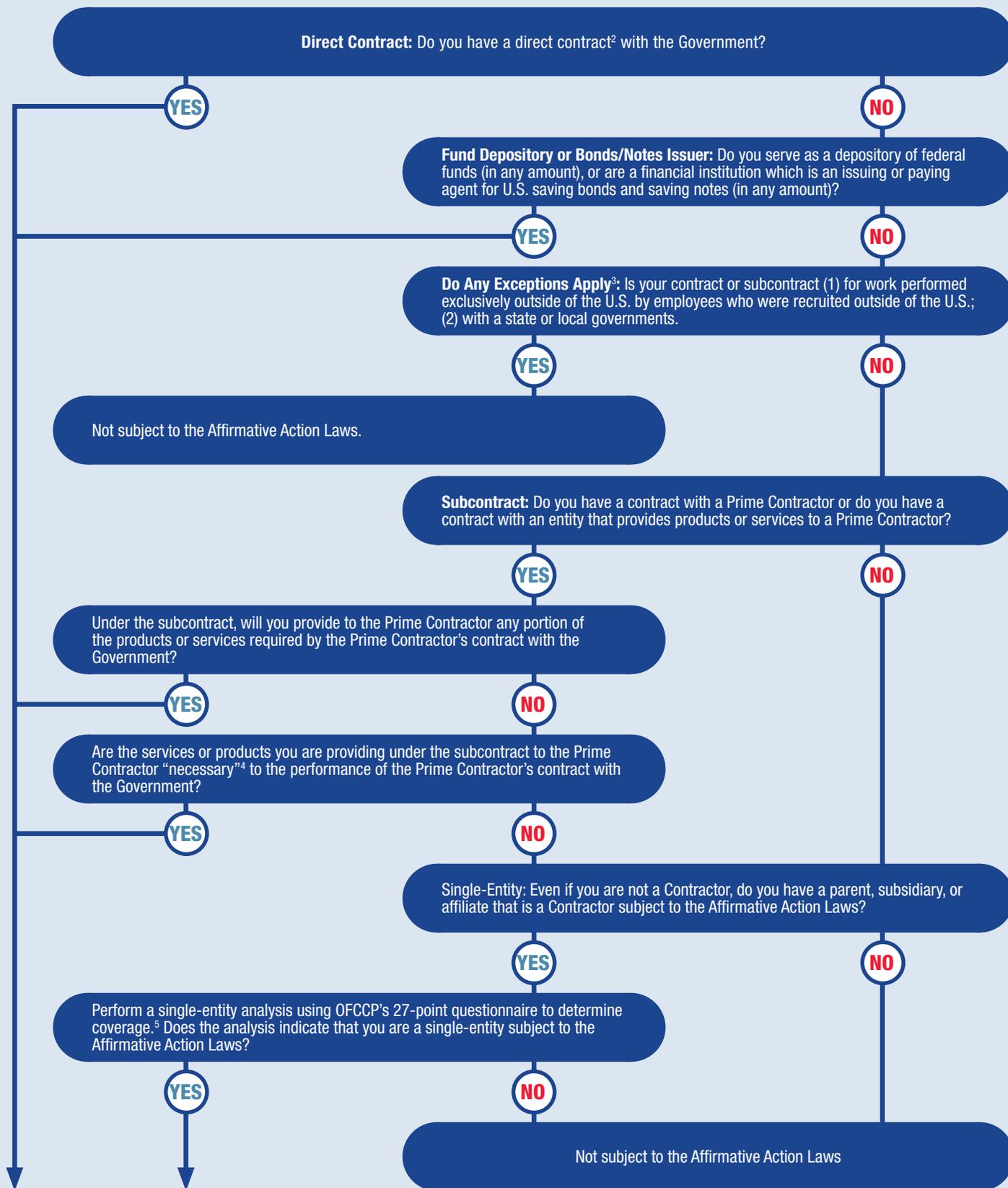
Step 2 Determining the Level of Coverage: A company must then determine which, if any, of the Affirmative Action Laws apply and whether the company has to comply with the minimum requirements under the Affirmative Action Laws (“Basic Coverage”) or, in addition to the Basic Coverage requirements, whether it has to create annual affirmative action plans (“AAPs”) for each of its U.S. establishments with 50 or more employees (“AAP Coverage”).

Step 3 Develop and Implement Plan for Compliance with the Affirmative Action Laws: If a company is subject to one or more of the Affirmative Action Laws, it will need to develop and implement a plan for complying with the applicable requirements. Please contact Andrew Turnbull at aturnbull@mofo.com or (703) 760-7717 to obtain a checklist of the requirements under the Affirmative Action Laws.

¹ This flowchart is intended only for determining coverage for supply and service Contractors. Companies providing construction services to the Government have different thresholds for coverage and obligations under the Affirmative Action Laws.



STEP 1 DETERMINING THE SOURCE OF COVERAGE



2 Contracts are generally subject to the Affirmative Action Laws if they are for the purchase, sell, or use of goods or services with a federal government entity (e.g., any executive agency, non-appropriated funds instrumentalities, such as Army AirForce Exchange, lease of land from the government). Loans, grants, and federal financial assistance, such as Medicaid, are not covered contracts.

3 Other exemptions may apply depending on the Affirmative Action Law at issue (e.g., EO 11246 exempts contracts with certain religious organizations).

4 Whether a company's products or services are "necessary" to the performance of a Prime Contractor's obligations to the Government has been broadly interpreted. See *OFCCP v. Monongahela Railroad Co.*, 85-OF-2 (Apr. 2, 1986) (finding railroad that transported coal from coal mine to power plant that supplied power to government offices was a covered subcontractor because its transportation of coal was "necessary" to the power plant to perform its federal contract of supplying power to the government offices).

5 OFCCP's 27-point questionnaire can be found at: <https://webapps.dol.gov/elaws/ofccp/fcca/assessment.asp>



STEP 2 DETERMINING THE LEVEL OF COVERAGE

EO 11246 AND SECTION 503 BASIC COVERAGE

Do your Government contracts or subcontracts in the aggregate exceed \$10,000 in a 12 month period?

YES

Must comply with the of Basic Coverage requirements under EO 11246

NO

Not subject to EO 11246

Do you have a single contract or subcontract that exceeds \$15,000 in a 12 month period?

YES

Must comply with the Basic Coverage requirements under Section 503 and EO 11246

NO

Not subject to Section 503

EO 11246 AND SECTION 503 AAP COVERAGE

Do you have 50 or more employees located in the U.S. and either: (1) a single Government contract or subcontract of \$50,000 or more; or (2) a single Government contract or subcontract that could reasonably be expected to total \$50,000 or more in any 12 month period?⁶

YES

Must comply with the Basic and AAP Coverage requirements under EO 11246 and Section 503

NO

Not subject to EO 11246 or Section 503 AAP Coverage requirements

VEVRAA BASIC COVERAGE

Do you have a single Government contract or subcontract that exceeds \$150,000 in a 12 month period?

YES

Must comply with the Basic Coverage requirements under VEVRAA

NO

Not subject to VEVRAA

VEVRAA AAP COVERAGE

Do you have 50 or more employees located in the U.S. and either: (1) a single government contract or subcontract of \$150,000⁷ or more; or (2) a single government contract or subcontract that could reasonably be expected to total \$150,000 or more in any 12 month period?

YES

You must comply with the Basic and AAP Coverage requirements

NO

Not subject to VEVRAA AAP Coverage requirements



STEP 3 DEVELOP AND IMPLEMENT PLAN FOR COMPLIANCE WITH THE AFFIRMATIVE ACTION LAWS

⁶ Blanket purchase agreements or indefinite quantity, delivery contracts are used for determining coverage if the expected value of those contracts over a twelve-month period is \$50,000 or more (even if no orders have been placed).
⁷ The coverage threshold for VEVRAA is based on the simplified acquisition threshold, which is periodically revised.