

NLWJC- Kagan

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THE WHITE HOUSE  
Office of the Press Secretary

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For Immediate Release

October 6, 1992

STATEMENT BY THE PRESIDENT

I have signed into law H.R. 5679, the "Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993."

The Act provides important funding for the space program, environmental protection, and programs for our Nation's veterans.

The Act provides the funds necessary to maintain a balanced civil space program. Space Station Freedom, an essential step in meeting our future space objectives, is funded at a level that will keep the project on schedule during fiscal year 1993.

H.R. 5679 also meets important needs of our Nation's veterans. The Act provides \$14.6 billion for VA Medical Care, an increase of \$1 billion over the FY 1992 enacted level. With this increase, funding for VA Medical Care will have grown by 28 percent since FY 1990.

The Act provides funding for a range of environmental protection programs. I am pleased that the Act funds my request for EPA construction grants targeted to high-priority, coastal secondary treatment facilities, such as Boston Harbor, New York, Los Angeles, and San Diego. Expedited construction of these facilities can help clean the water on America's coasts.

Regrettably, the Act provides significantly less funding than I requested for EPA to carry out environmental commitments in support of the North American Free Trade Agreement. Despite my urging the Congress to fund fully these vital environmental initiatives, the Act cuts \$47 million from the request to control border area sewage flows that pose a public health threat to citizens in San Diego and Calexico, California, and Nogales, Arizona. These cuts will severely constrain the Administration's efforts to clean up the U.S.-Mexico border and to support our proposed program of U.S.-Mexico environmental cooperation.

I also regret that, for the fourth year in a row, the Congress has chosen to reduce my request to clean up hazardous waste sites. This year's \$176 million reduction in EPA's Superfund program brings the total reduction over 4 years to \$643 million. These reductions unnecessarily delay the cleanup of these sites.

I am particularly troubled that the Congress has cut over \$1 billion in civilian research and development programs within NASA, EPA, and NSF. These cuts will have a significant impact on a broad range of important research and education efforts, including my request for crosscutting initiatives in materials science, biotechnology, global change research, high

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performance computing and communications, and math and science education. These investments are important in maintaining our Nation's economic competitiveness, and they are critical in the training of our next generation of scientists and engineers. These investments also contribute to sustaining our commitment to environmental stewardship.

Although the Act provides funds for priority activities requested by the Administration, several housing provisions are flawed. I am greatly concerned over the inadequate funding levels for the Administration's important housing initiatives that emphasize tenant choice and homeownership opportunities. The Congress has provided only \$361 million out of a requested \$1 billion for the HOPE program, a program that would enable low-income people to take control of their lives through homeownership.

I am also disappointed that the Congress has reversed some previously enacted reforms critical to the financial health of the Federal Housing Administration (FHA) mortgage fund. Eliminating the 57-percent limit on the amount of closing costs a borrower can finance with an FHA mortgage will cause an increase in homeowner defaults, weakening the FHA fund and hurting homebuyers. The Congress has also increased the maximum single-family mortgage above \$125 thousand -- an amount that was agreed upon by the Congress and the Administration in the National Affordable Housing Act. This increase moves FHA away from its traditional role as a financial resource for middle- and lower-income buyers.

On the other hand, I am pleased that the Congress agreed to the Administration's request that it remove a prohibition on the issuance by HUD of a rule that would prevent the provision of housing subsidies to vacant public housing units.

The Act directs the Environmental Protection Agency, the National Aeronautics and Space Administration, and the Resolution Trust Corporation each to award 8 percent of funding for Federal contracts to businesses owned or controlled by minorities or women. A congressional grant of Federal money or benefits based solely on the recipient's race or gender is presumptively unconstitutional under the equal protection standards of the Constitution. Accordingly, I will construe these provisions consistently with the demands of the Constitution, and, in particular, monies appropriated by this Act solely on the basis of race or gender.

Although I am disappointed that this bill contains damaging cuts in HOPE tenant ownership, civilian research and development, U.S.-Mexico border cleanup, and Superfund, I recognize that the bill does fund important veterans programs, space initiatives, and environmental programs at acceptable levels. In addition, the total level of spending in the bill maintains progress toward the achievement of my proposal to freeze domestic discretionary spending. For these reasons, I am signing the bill.

GEORGE BUSH

THE WHITE HOUSE,  
October 6, 1992.

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# **FEDERAL REGISTER**

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**Monday  
August 10, 1992**

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## **Part IV**

### **Resolution Trust Corporation**

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**12 CFR Part 1617  
Minority and Women Outreach and  
Contracting Program; Interim Final Rule**

**RESOLUTION TRUST CORPORATION****12 CFR PART 1617**

RIN 3205-AA08

**Minority and Women Outreach and Contracting Program**

AGENCY: Resolution Trust Corporation.

ACTION: Interim final rule.

**SUMMARY:** The Resolution Trust Corporation (RTC) hereby promulgates an interim final rule pursuant to the requirement of section 1216(c) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). The intent of the rule is that RTC identify, promote, and certify eligible firms for inclusion in its contracting activities, at the same time assuring that RTC utilization of the services of the private sector is accomplished in a practicable and efficient manner. In order to accomplish this objective of maximizing the inclusion of minorities and women, and firms owned by minorities and women, RTC has deemed it appropriate to design a program which will aggressively reach out to minorities and women and firms owned by minorities and women to enable them to participate more fully in RTC contracting activities through the use of joint venture agreements and other devices. In addition, pursuant to a recent statute, the RTC will provide incentives (i.e., cost and technical bonuses) in evaluating competitive offers to contract, to firms owned by minorities and women.

As well as covering contracting in general, the rule governs the identification, promotion, and certification of eligible law firms for inclusion in the RTC legal services contracting process.

Comment is solicited on all matters pertaining to this interim final rule.

**DATES:** This interim final rule is effective August 10, 1992. Comments must be received by October 9, 1992.

**ADDRESSES:** Written comments regarding the interim final rule should be addressed to John M. Buckley, Jr., Secretary, Resolution Trust Corporation, 801 17th Street, NW., Washington, DC 20434-0001. Comments may be hand-delivered to Room 314 on business days between 9 a.m. and 5 p.m. Comments may be inspected in the Public Reading Room, 801 17th Street, NW., between 9 a.m. and 5 p.m. on business days. (Phone number: 202-416-6940; FAX 202-416-4753.)

**FOR FURTHER INFORMATION CONTACT:** On issues relating to non-legal contracting, Johnnie B. Booker, Assistant

Vice President, Department of Minority and Women's Programs, Resolution Trust Corporation, 801 17th Street, NW., Washington, DC 20434-0001, 202-416-6925; on issues relating to contracting with law firms, Mary A. Terrell, Legal Division, 202-736-3073. These are not toll-free numbers.

**SUPPLEMENTARY INFORMATION:****A. Background**

FIRREA, enacted on August 9, 1989, amended the Federal Home Loan Bank Act (12 U.S.C. 1421, *et seq.*) by adding section 21A, which established the RTC. Section 21A(b) (11) (A) (ii) provides that, in carrying out the duties of the RTC, the services of independent contractors shall be utilized if deemed practicable and efficient by RTC. FIRREA, at section 1216 (12 U.S.C. 1633e) additionally required RTC to prescribe regulations to establish and oversee a minority and women outreach program to ensure inclusion, to the maximum extent possible, of minorities and women and entities owned by minorities and women in contracting activities of RTC.

On August 15, 1991, (56 FR 40484) the RTC published in the *Federal Register* an interim final rule (12 CFR part 1617) to govern the outreach portion of the program. The Interim Final Rule also provided standards for qualifying as a minority- or women-owned business (MWOB) or minority- or women-owned law firm (MWOLF) for purposes of the program. Public comment was solicited, and 57 comments were received.

In November of 1991, Congress passed the RTC Refinancing, Restructuring, and Improvement Act of 1991 (RRIA). The RRIA required, among other things, that in evaluating contract offers, the RTC provide technical preferences of at least 10 percent and cost preferences of at least 5 percent to MWOBs. The RRIA also gave the RTC authority to adjust the level of those preferences as necessary.

**B. The August 15, 1991 Interim Final Rule (1991 Rule)**

The 1991 Rule set forth the scope of the RTC's Minority and Women Outreach and Contracting Program (MWOC) and set out as its mission the identification, promotion, and certification of appropriate entities for inclusion in RTC contracting activities. In adopting the interim final rule, the RTC observed that the interim final regulation was not intended to govern RTC's procedures regarding preferences in the evaluation of contract proposals by MWOB firms. However, subsequent to the comment period, Congress, through the RRIA, mandated that the

RTC adopt cost and technical bonus provisions, or other measures to increase the number of contracts awarded to MWOB firms. Accordingly, this current interim final rule incorporates such measures.

The RTC's outreach efforts to minorities and women include other matters beyond contracting. They also include outreach to potential purchasers of assets from savings associations under the RTC's control, and to potential acquirors of such savings associations. The regulation, however, addresses only the RTC's contracting program.

**C. Discussion of Comments**

The following discussion summarizes comments and provides the RTC's response to those comments. All comments were considered, even if not specifically addressed.

**1. Methods for Increasing Awards to MWOBs**

Virtually all commenters stated that the regulation must contain cost and technical bonuses in order to be effective. No commenter opposed the use of bonuses. A bank proposed raising the cost bonus to 5 percent. A minority contractor proposed increasing the cost and technical bonus to 10 percent. An accounting firm proposed increasing the cost bonus to 5 percent. The Rainbow Coalition stated that there is an imbalance in awards. To correct this, the Coalition proposes increasing the technical bonus to 15 percent for minorities, while giving a 10 percent bonus to contractors owned and controlled by white women. The Coalition proposes that the cost bonus be increased to 10 percent, the level assertedly granted by other Federal agencies including the Department of Defense. Other commenters generally support the use of bonuses.

Due to the mandate of the RRIA, the RTC is incorporating cost and technical bonuses in the final rule. In addition to being statutorily mandated, the RTC believes that bonuses are a reasonable measure to correct imbalances in the award of contracts to MWOBs vis-a-vis other segments of the contracting community, and can be reasonably tailored to maintain opportunities for other contractors who are capable of performing RTC contracts. Through devices such as awarding bonuses to joint ventures that include MWOBs, and awarding bonuses to prime contractors that subcontract significant portions of contracting work to MWOBs, the bonus system that is incorporated in the final rule is designed to provide incentives for both MWOBs and others to work

together to meet the RTC's statutory obligations.

A law firm proposes expanding the bonus system to majority contractors who have minority and women principals or have their own outreach program for minorities and women. This firm states that its program has progressive goals for increasing the percentage of women as shareholders. Without such a bonus system, the commenter argues, qualified women and minority professionals in majority firms will be effectively penalized. A female contractor argues that RTC should give bonuses to contractors who have significant levels of minorities and women as employees. Management is not the relevant determination as whether a firm is fostering participation of minorities or women.

The RTC agrees with the thrust of this comment. While it is not empowered to award bonus points to such firms, it is setting a goal to foster the use of law firms that use minorities or female lawyers on RTC related legal work.

Several commenters support bonuses for majority firms that use minority subcontractors. The contractor asserts that the 25 percent threshold should include mandatory subcontracts, and that some subcontracts should be non-competitively awarded to MWOBs.

The RTC agrees that one of the more efficient means of fostering MWOB participation is through subcontracting. The interim final rule contains several provisions that provide incentives for contractors to subcontract substantial amounts of work (with commensurate fees) to MWOBs. In addition, contractors are reminded that subcontracting to MWOBs, wherever feasible, is an RTC policy, and the evaluation of each contractor's performance will in part be based upon compliance with this policy.

Several commenters assert that the bonus system needs to be more rational. The commenters argue that the percentage of the bonus should be derived from the effect of bonuses to date, and should correlate with the scores that minority firms have been receiving on their contract offers. A commenter recommends a two tier or a sliding scale bonus system, with larger bonuses for MWOBs that qualify on their own than for joint ventures or subcontracting arrangements.

The RTC agrees with this comment. The interim final rule contains a tiered bonus system that is designed to reflect different levels of MWOB participation. Consistent with its augmented authority under the RRIA, the RTC may periodically adjust the bonus points to correlate to the results of its program.

### 2. Non-Competitive Awards

Several commenters assert that the RTC should place substantial reliance on sole source awards to increase MWOB participation. Another commenter asserts that a certain percentage of contracts (30 percent is suggested) be set aside for MWOB contractors. The Rainbow Coalition recommends that minority vendors be given right of first refusal on any noncompetitive contract below \$25,000. The Coalition recommends that, if such a contract is awarded to a non-minority, there must be a written justification and a record of the attempts that were made to contract with minorities first. Another commenter argues that the RTC should develop portfolios for direct award to minorities.

In the new interim final rule, the RTC reserves the right to award non-competitive contracts in appropriate circumstances, using established RTC contractor selection procedures. However, the RTC intends to rely upon preferences and goals as much as possible to stimulate MWOB participation in a competitive environment.

### 3. Other Proposals to Increase MWOB Participation

Commenters support targeting minority contracting goals to equal the percentage of MWOBs in the database. It is asserted that, if such an approach is followed, contracting goals should be changed periodically to reflect changes in the number of registered firms. One commenter recommends that any contractor awarded a contract worth more than one million dollars should be required to have mandatory MWOB participation, and that the successful bidder should be required to document its effort to employ minorities and report this information at least twice a year.

### 4. RTC Response to Comments Regarding Increasing MWOB Participation

The RTC closely monitors the progress in the percentage of contracts and fees awarded to MWOBs, and is committed to increasing current levels of participation. The RTC expects that implementation of its augmented outreach program and authority to award cost and technical preference points will increase that percentage to 30 percent over the next year. The RTC expects that the percentage of awards will be commensurate with the percentage of fees paid to MWOBs. It is expected that, over the next year, the Division of Legal Services will increase the level of legal fees paid on new

assignments to MWOLFs to at least 20 percent. In addition, it is expected that at least 10 percent of the fees paid over the next year to law firms will be for services performed by minorities or women in non-MWOLF firms. The RTC understands that these projections may represent a substantial increase in the amounts paid to these firms. However, the RTC believes that there is a substantial pool of qualified MWOBs, MWOLFs, or minorities or women in non-MWOLF firms, and that this pool can competently perform the higher levels of work that the RTC would assign to them.

### 5. Joint Ventures

Most commenters suggested improvements to the Joint Venture program. One MWOB suggested that the joint venture definition include two different types of contractors, such as a property manager and a loan underwriter. A minority contractor and a woman-owned contractor suggested that the joint venture concept might actually be detrimental in that non-minority contractors are given a false incentive to deal with MWOBs. An association of minority contractors elaborated on this point by asserting that no contract should be awarded unless 25 percent of the work is to be performed by MWOBs, and that performance of asset managers and other contractors should be evaluated by their use of MWOB firms. They added that outside firms should be used to audit the use of MWOBs. Several commenters suggested that bonuses should be correlated to the percentage of work performed by MWOBs. The MWOB contractor asserted that "stand alone" minority firms should be awarded a bonus twice that awarded to joint ventures. To be eligible for a bonus, a joint venture should have at least 40 percent minority participation. Treating a contractor who gives 25 percent of the contractual duties to minority subcontractors as a joint venture is "repugnant and insulting." This provision will have the unintended effect of preventing participation of minorities as prime contractors. The Rainbow Coalition suggested that the minimum level of MWOB participation in joint ventures be raised from 25 percent to 33 percent. They also recommended that there be a sliding scale for bonuses up to 50 percent participation. A group of three MWOBs and a trade association recommended that joint ventures be at least 51 percent controlled by minorities or women.

In the RRIA, Congress directed the RTC to award bonuses (described in the

statute as "preference points") to joint ventures that include at least 25 percent MWOB participation. However, the RTC agrees with the commenters that MWOB participation should be increased by creating greater incentives for higher levels of MWOB participation in joint ventures and subcontracting arrangements. Accordingly, the interim final rule provides for greater bonuses for MWOBs that qualify on their own, and for contractors who commit to significant levels of subcontracting to MWOBs, than for joint ventures or subcontracting arrangements with lower levels of MWOB participation.

#### 6. RTC Performance

Several MWOBs asserted that the program has been ineffective to date in giving meaningful amounts of work to MWOBs or MWOLFs. The Rainbow Coalition asserts that of the SAMDA contracts awarded to date, a disproportionate number have gone to women, particularly white women, as opposed to minorities. Assertedly, white women received 1/2 of the awards from August 1989 through May 1991; only 1.7 percent of the contracts went to black males, and none to black females. Two MWOBs assert that RTC problems are attributable to a lack of clear policies and the lack of a formal internal structure. A minority trade association asserts that MWOBs that have received contracts are subject to slow payment and that there is insufficient time to respond to contract solicitations. Also they assert that the RTC Consolidated Field Offices are inconsistent in structuring their solicitations, and that this discourages MWOBs from bidding and raises questions of fairness.

Commenters suggested some ways to improve performance. Several commenters advocated using outside contractors to monitor the RTC's compliance. Commenters stated that the regulations must be more clear and consistent. Commenters suggested that the most effective, and possibly the only way for RTC to increase minority participation, is to hire minorities to high level positions within the RTC. Better training of employees was also suggested, as was removal of employees who don't carry out the mandate of the program.

A group of MWOBs assert that the scope of the activities covered by the regulation should be clarified. The contractual services included in the program should specifically include managing agent services, auditing services, the national sales program and other asset disposition activities, and financially-assisted sales of insolvent institutions.

While the RTC's efforts to increase MWOB participation have achieved a level of success, the RTC recognizes the need for continuing improvement in its efforts. The RTC has taken steps, which are reflected in the new interim final rule, to increase the profile of its MWOB Program, to facilitate the roles of the program officials and staff, and to increase the training and accountability of all RTC staff.

#### 7. Certification

Several commenters noted that the certification affidavit should require 51 percent ownership and control. A minority contracting specialist asserts that the program needs clear consistent certification requirements but allows that some flexibility is warranted, such as allowing sole proprietorships to use tax return information.

Three commenters addressed the need for verification of certifications. One commenter suggests onsite inspection during the certification process and a recertification every 2 or 3 years, or anytime the company structure has significantly changed. One contractor argues that the regulation should contain a provision regarding de-certification.

The RTC has corrected apparent discrepancies between the 1991 Rule and the requirements of the certification affidavit. The new interim final rule reflects the RTC's recognition of the need for more effective verification procedures.

#### 8. Subcontracting

A commenter argues that sole source subcontracts to MWOBs would be beneficial if limited to firms not affiliated with the contractor and if the services have a readily determinable market price. The prime contractor would have the option of awarding such sole source subcontracts. The commenter also argues that the regulation should clarify whether the award of the subcontracting preference will be as strictly monitored as the preference for joint ventures. The commenter also requests clarification of whether mandatory subcontracting counts towards the 25 percent subcontracting threshold.

The new interim final rule contains provisions to ensure that the subcontracting preference will not be awarded unless the offeror has firmly committed to utilizing MWOB subcontractors. The RTC believes that, for the present, its use of outreach and preferences will be sufficient to increase MWOB participation. On many contracts where subcontracting is feasible, the prime contractor is not

required to follow RTC's competitive contracting procedures to award subcontracts. However, if qualified MWOB subcontractors are available, the RTC would encourage the contractor to hire such contractors and provide incentives for the prime contractor to do so.

#### 9. Eligibility Criteria and Definitions

A commenter argues that to qualify as a member of one of the minority categories, at least "one-half parentage" must be in the relevant group. Another commenter argues there should be a more objective bench mark for experience in running a business to qualify as a MWOB, such as a minimum of 2 years as President of the firm. Two commenters argue that to receive contracts, majority firms should have significant direct involvement from their minority or women associates or partners. Two Congressmen argue that the ownership requirements are too burdensome. The owner should not have to control the Board of Directors and should be allowed to delegate responsibilities.

The new interim final rule contains eligibility criteria that meet the mandates of the RTC's governing legislation and are an attempt to ensure that MWOB participation is indeed increased. They may be modified in the future if they prove, through the RTC's experience, to be unduly restrictive or easily circumvented.

#### 10. RTC Outreach

Several commenters feel there is a need for better communication with minority contractors. Suggestions included using minority trade associations, non-profit organizations, and daily news journals such as The Commerce Business Daily as conduits for information. A commenter complains that it is too difficult to get information about potential contracting opportunities, especially for MWOBs who want mandatory subcontracts. They recommend a posting mechanism for pending solicitations. The information would be posted in RTC Field Offices. A national bank suggests the establishment of a "MWOB Bank" which would maintain a list of eligible MWOBs, with consideration given to the MWOB experience in serving the minority community. Commenters also feel the need for better training by RTC in regard to its contracting.

Four commenters asserted that the program needs goals to be successful. According to these commenters, the Government Accounting Office reported that only 15 percent of RTC's asset

management solicitations went to minority firms. The commenters assert that not enough minority firms are being invited to bid, raising questions whether they are being invited on a proportional basis.

Commenters also recommended that the RTC should use minority contractors with ties to local or regional communities to help identify and foster participation by minority contractors; to monitor compliance with the program; and to prepare quarterly reports regarding the RTC performance. Commenters assert that bidding contracts on a more localized basis will help MWOBs cut their costs and be more competitive.

The RTC is intensifying its efforts to communicate with potential contractors, and to provide effective training. It is compiling a database of qualified MWOBs, and will use a variety of other media resources to increase the level of MWOB participation. The new interim final rule reflects a strengthening of the RTC's outreach efforts, using in-house resources to the extent possible.

#### Special Programs

Special initiatives will be established by the Washington Office to ensure minorities and women are represented not only in contracting, but in other aspects of RTC activities. These efforts will target and promote minorities and women as potential investors, acquirors of thrift institutions, advisors, and joint venture partners. The Washington Office will establish the following programs.

#### Asset Sales—Minority Institutions

In an effort to enhance the viability prospects of minority institutions, and in conformance with § 403 of the RTC RRIA of 1991, the RTC will provide for the segregation of loans or other earning assets to be made available to minority institutions or branches under the interim capital assistance provisions of the Act. Such loans or other earning assets will be priced at market price as determined by the RTC.

In general, the RTC will make available loans or other earning assets, on an option basis, in an amount sufficient to offset the liabilities to be capitalized according to the plan submitted by the minority institution to the appropriate regulators, taking into account requirements for liquidity and other regulatory considerations. In no instance will brokered deposits be considered when calculating the amount of liabilities to be assumed or acquired. In implementing this policy, the RTC will coordinate with the appropriate regulators and, upon request, furnish

written notification to the appropriate regulators of the intent to make earning assets available.

When loans made available under this policy are furnished with standard Representations and Warranties, and if called upon under such Representations and Warranties, the RTC will cure any deficiency or provide for the substitution of assets or payment of cash, as will be provided for in any agreement entered into.

All loans or other earning assets made available under such assistance shall be for the purpose of augmenting the operating earnings of the resultant depository institution and will be assumed and expected to be for the account of the resultant depository institution. It is also assumed that these assets are not being purchased for immediate resale.

#### Minority Investors

The Department of Minority and Women's Programs, in conjunction with the National Sales Center and the Department of Capital Markets, will develop and implement outreach activities to encourage asset purchases by minority and women investors. The RTC is not authorized to offer any price advantages to minority and women investors in the sale of its assets. The outreach activities will focus on explaining the process and available financing options.

#### Investor Database

Joint ventures initiated to provide pools of venture capital for purchase of RTC assets will be encouraged and promoted through development of an investor database.

The database will be designed to provide a directory of interested minority and women investors for joint purchases of assets with institutional investors and to promote transactions with the Department of Capital Markets, the Department of Resolution, and the National Sales Center. Policies and guidelines, as well as promotional events, will be developed in conjunction with the other divisions.

#### 11. Other Comments

Eight banks argue that the RTC has not complied with the requirement of § 1216 of FIRREA that minority financial institutions specifically receive preferences in the award of contracts. Several commenters recommend that the program be separated into two distinct programs, one for ethnic minority contractors, and one for non-ethnic women. Several commenters including the Rainbow Coalition argue that the Small Business Administration's

(SBA) section 8(a) program (which effectuates 15 U.S.C. 637(a)) should only be used to supplement the RTC's program, not to be a substitute for it. The Rainbow Coalition argues that the Pilot Program should use the SBA definition of minority, and not be more restrictive.

One woman-owned firm commented that the program as presently implemented may constitute reverse discrimination. Two commenters suggested methods of financially assisting MWOBs including advancing them their first month's fees to assist in overcoming cash flow problems; developing a special program for prompt payment to MWOBs; and assigning contracts to financial institutions to permit MWOBs to obtain contract financing. A national bank recommends that the RTC consider investing in MWOB firms that offer to purchase non-minority failed institutions, and that in resolving failed thrift institutions, the RTC should target certain failed institutions for non-competitive acquisition by MWOB financial institutions. The eight banks suggested that to increase minority participation, the RTC should expand utilization of minority- and women-owned financial institutions as depositories or financial agents to the RTC, consistent with section 1204 of FIRREA. This could purportedly be accomplished through the RTC's Standard Asset Management and Disposition Agreement. Several commenters recommend that contractors, including outside counsel, should not receive waivers of the ethics regulations, and that outside counsel should not receive waivers of the fee caps, unless they have a "significant MWOB subcontracting plan" in place.

While several of these recommendations have some merit, the RTC has determined that it is not necessary to incorporate them into the new interim final rule. However, the RTC is always receptive to suggestions by which it can help MWOBs overcome hurdles to their participation in the RTC's contracting activities. In response to particular comments, the RTC notes that it has never viewed its utilization of participants in the SBA's programs as a panacea for fulfilling its statutory obligations. While the section 8(a) program is a valuable adjunct to the RTC's own programs, the RTC has relied upon its own efforts, which will be augmented through the final rule. The RTC also notes that FIRREA contains no requirement that minority financial institutions receive preferential treatment in contracting activities beyond that provided to other MWOBs.

These offerors will, however, receive every consideration offered to other eligible participants in the program.

#### 12. Issues Relating to Outreach Program for Minority and Women-Owned Law Firms

The above discussion has focused mainly on the RTC's outreach program for contractors providing services other than legal services. The following discussion applies to the RTC's outreach program for hiring law firms owned by minorities and/or women (MWOLFs), and minorities and women in other law firms.

#### Comments Regarding MWOLFs

Commenters offered extensive suggestions to improve the legal services portion of the program. It is recommended that the organizational commitment be strengthened. For example, it is recommended that there be an entirely new section of the RTC's Division of Legal Services, headed by an Assistant General Counsel, to operate the program, with senior level employees in each RTC Field Office to oversee it, as well as sufficient numbers of staff attorneys and support staff. It is recommended that the MWOLF Director must represent the RTC at conferences and strengthen the RTC's relationship with the bar and other MWOLF organizations; that there be criteria and guidelines for evaluating managers who have contracting authority; and that oversight and evaluation must involve monthly reports and visits to Field Offices.

It is also recommended that outreach efforts be improved in the following ways. Commenters assert that MWOLFs be provided training on new RTC-specific legal issues, and outreach staff must be trained regarding program directives. The MWOLF staff must meet with MWOLF firms to uncover problems. Tracking and reporting of fees to MWOLFs must be improved, and referral patterns must be analyzed. Policies must be improved in correlation to the above analysis. Firm registration must be continued to increase the number of MWOLFs on the RTC List of Counsel. The Washington Pilot Program should be expanded to the RTC Field Offices. New program initiatives should be encouraged, including subcontracting and joint venturing. In addition, commenters recommended that preferences be awarded to non-MWOLF firms that use minority or women lawyers on RTC work, and that have effective programs for promoting minorities and women within the firm.

The RTC believes there is merit in recognizing non-MWOLF firms that

provide opportunities to minorities and women. The RTC's statutory goals can be partly achieved by awarding preferences and setting goals, based upon the performance of RTC legal services by minorities and women within non-MWOLF law firms.

Therefore, the new interim final rule recognizes that, in the legal services context, individual lawyers may hold a large share of responsibility for the RTC as a client. Therefore, the RTC will track, and will make every effort to increase, the percentage of legal fees attributable to work performed by minority and female lawyers in non-MWOLF firms. As an internal matter, the RTC Division of Legal Services has created the Outside Counsel Management and Minority and Women Outreach Section, to oversee matters relating to outside counsel. One of the top priorities of this section is the implementation of the Minority and Women Outreach Program (MWOP) within the Division of Legal Services. This Division, and the RTC in general, are making necessary administrative and organizational adjustments to ensure that the program is carried out effectively.

#### Outreach

The RTC has a wide range of needs for legal services in areas such as litigation, transactions, professional liability, and environmental law, among others. In carrying out its responsibilities, the RTC Division of Legal Services and private sector contractors (in particular asset managers) who perform services for the RTC, will engage MWOLFs to the fullest extent possible. The identification and registration of such firms are nationwide in scope and are primarily dependent upon efforts of the RTC legal staff charged with this special effort. All RTC staff responsible for referring matters to legal services providers will be knowledgeable of and promote this effort.

Generally, the RTC Division of Legal Services will identify MWOLFs by:

(a) Obtaining various lists and directories of MWOLFs maintained by other governmental agencies and bar groups;

(b) Targeting appropriate MWOLFs for participation in the RTC's legal services contracting education effort; and

(c) Participating in conventions, seminars, and professional meetings comprised of or attended by MWOLFs.

A major purpose of the MWOLF outreach effort is to reinforce the RTC's commitment to the program and to increase awareness among potential

contractors for legal services of the ability to participate in this program.

The RTC Division of Legal Services field office staffs will enhance the efforts of the outreach program through regular reporting and ongoing tracking of legal matters referred to outside counsel, identifying areas in which MWOLFs are underrepresented. The outreach program will then target its efforts in areas where the database indicates MWOLFs are underrepresented.

#### Referral

The regulation addresses various methods that will be used by the RTC and its private sector contractors to refer legal work to MWOLFs. The FIRREA requires that the RTC utilize the services of the private sector to the extent that it is practicable and efficient. As the RTC does to a large extent rely upon such private sector contractors, and such contractors have significant responsibility regarding the hiring of outside counsel, it is appropriate that those contractors, as well as RTC employees, adhere to the regulation in this regard.

#### Certification

Law firms claiming status as MWOLFs will be required to provide sworn certification of that status. To preserve the integrity and foster the objectives of the program, the RTC Division of Legal Services must satisfy itself that the ownership requirements of the program are fulfilled.

The RTC will implement a certification policy and procedure for the MWOLF outreach program that is uniform and consistent, and discourages fraudulent representations. Procedures have been established by which the Division of Legal Services will review, evaluate, and approve certification affidavits from MWOLFs prior to their being placed on the RTC List of Counsel.

#### Monitoring Performance

The RTC Division of Legal Services' field office staff will provide complete and current data on a regular basis regarding legal services contracting activity. Minority and Women Outreach Coordinators will review and evaluate the reporting and registration databases for the extent of MWOLF participation and will prepare such reports as are necessary for the Washington legal staff.

In addition, all RTC legal staff dedicated to this endeavor will continuously monitor the implementation of RTC procedures, policies, and guidelines for compliance

with the goals of FIRREA to ensure maximum inclusion of MWOLFs in the provision of legal services to the RTC by outside counsel.

The RTC recognizes that the success of this program requires commitment and leadership from senior management. The RTC pledges the continuing involvement of all levels of its legal staff in making this Outreach Program a success.

#### D. Summary

The RTC is adopting these regulations for the Department of Minority and Women's Programs in order to implement the provisions of section 1216 of FIRREA, which requires the establishment of a minority- and women-owned business outreach program (including the MWOLF provisions) to ensure effective and efficient use of those business entities to support all contracting activities of the Corporation and the requirements of the RRIA, which bolster and supplement the requirements of FIRREA. It is imperative that MWOB enterprises are given fair and equitable opportunities to contract with the RTC. Strict conformance to this regulation shall be enforced.

In light of the passage of the RRIA, which occurred after the issuance of the 1991 Rule, the RTC has decided to issue this rule as an interim final rule. Comment is solicited on all issues pertaining to this interim final rule, as well as to the issues raised in the RRIA.

#### Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, comments were specifically sought on an initial regulatory flexibility analysis. No comments were specifically filed in response. The following analysis is provided.

#### a. Reasons, Objectives, and Legal Bases Underlying the Interim Final Regulations

These elements have been discussed elsewhere in the Supplementary Information. Specifically, it has been noted that the RTC is statutorily mandated to provide an outreach contracting program for a certain segment (minority- and women-owned) of small business firms, including law firms. By publishing this interim final regulation the RTC intends to have aggressive outreach to minorities and women and firms owned by minorities and women to enable them to

participate more fully in RTC contracting activities.

#### b. Small Entities to Which the Interim Final Regulations Would Apply

This element is discussed elsewhere in the Supplementary Information.

#### c. Impact of the Interim Final Regulations on Small Businesses

Participation in the program is purely voluntary, and is beneficial to the participants. Projected reporting, recordkeeping, and other compliance requirements fall upon the RTC, as described above in the preamble. All MWOB firms will need only to certify as to their status prior to contract award. This requirement will entail only the filling out of a certification form and will not require the use of professional skills for the preparation of special reports or records. The RTC seeks comments on alternative methods of compliance, or reporting requirements.

The RTC expects to increase the volume of legal services performed by MWOLFs. Projected reporting, recordkeeping, and other compliance requirements fall upon the RTC, as described above in the preamble. The MWOLFs will need to complete the law firm application materials and the MWOLF certification. The RTC seeks comments on alternative methods of compliance or reporting requirements.

#### d. Overlapping or Conflicting Federal Rules

There are no known Federal rules which overlap, duplicate, or conflict with the interim final regulation.

#### e. Alternatives to the Interim Final Regulation

The RTC has not identified alternatives that would be less burdensome to small businesses and yet effectively accomplish the objectives of the interim final regulation. The RTC has made every attempt to bear the administrative burdens rather than shifting them to prospective contractors.

#### List of Subjects in 12 CFR Part 1617

Government contracts, Government employees, Lawyers, Legal services, Minority businesses, Savings associations, Women.

For the reasons set out in the preamble, the RTC hereby revises part 1617, title 12, chapter XVI, of the Code of Federal Regulations to read as follows:

### PART 1617—MINORITY AND WOMEN OUTREACH AND CONTRACTING PROGRAM

#### Subpart A—General Provisions

Sec.

- 1617.1 Purpose.
- 1617.2 Policy.
- 1617.3 Contracting objectives.
- 1617.4 Definitions.
- 1617.5 Scope.

#### Subpart B—Outreach

- 1617.10 RTC organizational responsibilities and staffing.
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- 1617.13 Certification/verification.

#### Subpart C—Joint Ventures

- 1617.20 General.
- 1617.21 Eligibility.
- 1617.22 Establishing joint ventures.
- 1617.23 Joint venture agreements.

#### Subpart D—Subcontracting

- 1617.30 Policy.

#### Subpart E—Solicitation and Contract Award Guidelines

- 1617.40 Inclusion in solicitations.
- 1617.41 Right to award contracts reserved.
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#### Subpart F—Liaison with Division of Legal Services

- 1617.50 Legal programs unit.

#### Subpart G—Cost and Technical Bonuses

- 1617.60 Policy.
- 1617.61 Application of technical and cost bonus points.
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#### Subpart H—Conservatorship Contracting

- 1617.70 Policy and application.

#### Subpart I—Oversight and Monitoring

- 1617.80 Oversight.
- 1617.81 Monitoring.
- 1617.82 Performance appraisals.
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#### Subpart J—General Provisions Applicable to Law Firms

- 1617.90 Policy and scope.
- 1617.91 Definitions.

#### Subpart K—Law Firm Outreach

- 1617.100 Identification of MWOLFs.
- 1617.101 Promotion of MWOLFs.
- 1617.102 Compliance.
- 1617.103 Certification.

#### Subpart L—Law Firm Direct Referral, Joint Venture, and Other Arrangements

- 1617.110 General.
- 1617.111 Direct referral.
- 1617.112 Joint venture/co-counsel referral.
- 1617.113 Other arrangements.

**Subpart M—Law Firm Oversight and Monitoring**

1617.120 Oversight and monitoring.

Authority: 12 U.S.C. 1441a(f) and 1833e.

**Subpart A—General Provisions****§ 1617.1 Purpose.**

(a) Section 1216 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1833e, requires the Resolution Trust Corporation (RTC or the Corporation) to prescribe regulations to establish and oversee a minority outreach program to ensure inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women, including financial institutions, investment banking firms, underwriters, accountants, and providers of legal services, in all contracts entered into by the agency with such persons or entities, public and private, in order to manage the institutions and their assets for which the agency is responsible or to perform such other functions authorized under any law applicable to such agency.

(b) This part details the procedures that the RTC will follow to ensure the inclusion of firms owned by minorities and firms owned by women in RTC's contracting for goods and services in connection with its management of savings and loan institutions placed under RTC control and disposition of their assets.

(c) This part applies to all contracting activities engaged in by RTC in any of its capacities, including all contracts with private persons and entities for all RTC functions authorized by law.

**§ 1617.2 Policy.**

It is the policy of the RTC that minorities and women, and firms owned and operated by minorities and firms owned and operated by women, have the opportunity to participate, to the maximum extent possible, in all relevant contracting activities of the Corporation. The RTC's objective in contracting will be achieved through the establishment of goals using RTC contracting procedures. This applies to contracting for the procurement of goods and services, and the contracting activities of conservatorships and receiverships.

**§ 1617.3 Contracting objectives.**

The RTC has established standards by which it will evaluate its success in maximizing participation of minority- and women-owned businesses (MWOBs) in its contracting activities. The awards and fees will be tracked separately for minorities and for women.

The RTC's success in meeting its objectives will be evaluated periodically, and modifications to this part will be made as necessary in light of those results.

(a) Each office, including sales centers, must make every effort to raise MWOB participation in accordance with the RTC's objectives.

(b) Contractors are strongly encouraged to utilize joint ventures and subcontracting arrangements with MWOBs to increase MWOB participation. Bonus consideration will be given to contractors that, through joint ventures or subcontracting, achieve specified levels of MWOB participation.

(c) Within 6 months of the date of conservatorship, each conservatorship must bring its contracting activity into compliance with the RTC's Minority and Women Outreach and Contracting (MWOC) Program's policies and procedures.

(d) Evaluation of performance of contractors will include their efforts and success in meeting MWOC Program goals. The RTC will conduct periodic visits or audits of contractors to assess their compliance with RTC MWOC Program policies.

(e) All annual evaluations of performance for senior officials in each RTC office shall include a review of his or her success in meeting the goals and objectives of the MWOC Program.

**§ 1617.4 Definitions.**

The following definitions apply to §§ 1617.1 through 1617.83.

(a) *Joint ventures* means an association of entities and/or individuals, one of which qualifies as an MWOB, formed by written contract to engage in and carry out a specific business venture for which purpose they combine their efforts, resources, and skills for joint profit, but not necessarily on a continuing or permanent basis for conducting business generally.

(b) *Management and daily business operations.* (1) In order for minorities or women to be found to control and manage a business concern, the following must exist:

(i) A minority or woman must hold the position of President or Chief Executive Officer;

(ii) The minority member(s) or woman (women) upon whom eligibility is based shall control the Board of Directors of the firm (if the firm is a corporation);

(iii) The relevant minority member(s) or woman (women) must have directly related managerial or technical experience and competence; and

(iv) Minority group members or women must be directly responsible for

the day-to-day management of the business.

(2) To establish such day-to-day management responsibility, all of the following functions must be performed by the minority or woman President or Chief Executive Officer (or functional equivalent):

(i) Establishment of company policies;

(ii) Determination and selection of business opportunities;

(iii) Supervision and coordination of projects;

(iv) Control of major expenditures;

(v) Hiring and dismissing of key personnel;

(vi) Marketing and sales decisions; and

(vii) Signature on major business documents.

(c) *Minority* means any Asian American, Black American, Eskimo, Hispanic American, Native American, or Pacific Islander, who is either a citizen or a permanent resident of the United States.

(1) *Asian American*—A person having origins in any of the original peoples of the Far East, Southeast Asia or the Indian Subcontinent.

(2) *Black American (not of Hispanic origin)*—A person having origins in any of the black racial groups of Africa.

(3) *Eskimo*—A person having origin in the Eskimo or Aleutian peoples.

(4) *Hispanic American*—A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

(5) *Native American*—A person having origins in any of the original peoples of North America.

(6) *Pacific Islander*—A person having origin in any of the nations commonly referred to as the "Pacific Rim Countries," including the Hawaiian Islands.

(d) *Minority-owned business* means a business concern that is owned and controlled by one or more members of a minority group.

(e) *MWOB* means minority- and women-owned business.

(f) *Owned* means a business which is more than 50 percent unconditionally owned by one or more members of a minority group or by one or more women or, in the case of a publicly-owned business, more than 50 percent of each class of voting stock of which is unconditionally owned by one or more members of a minority group or by one or more women, or, in the case of a partnership, more than 50 percent of the partnership interest is unconditionally owned by one or more members of a minority group or by one or more women.

(g) *Controlled* means a business whose management and daily business operations are controlled by one or more such individuals.

(h) *Unconditional ownership* means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, shareholder agreements, or other similar arrangements which serve to allow the primary benefits of program participation to accrue to entities or individuals other than those upon whom eligibility for this program is based.

(i) *Women-owned business* means a business concern in which more than 50 percent is owned by, and the business is controlled by, one or more women and a significant percentage of senior management positions are held by women. These senior management positions are enumerated in the definition of "Management and daily business operations" in paragraph (b) of this section.

#### § 1617.5 Scope.

Sections 1617.3 through 1617.83 apply to all contracting activities, with the exception of contracting for legal services, engaged in by RTC, in any of its capacities, for all RTC functions authorized by law. These contracts will typically pertain to services such as asset management, accounting services, appraisals, property management, information systems, property maintenance, surveying, general contracting and subcontracting, architectural/engineering consulting, construction consulting, property tax consulting, title work, financial investigation services, marketing, signage and printing services, and related services. Contracting for legal services is governed by §§ 1617.90 through 1617.120.

#### Subpart B—Outreach

##### § 1617.10 RTC organizational responsibilities and staffing.

(a) *Organization.* The RTC will have staff and resources devoted to this program in each of its offices.

(1) The RTC has established a MWOC Program in Washington with an Assistant Vice President to provide direction, consultation, and training to other RTC offices in order to ensure that this program is being effectively and consistently implemented.

(2) There will be three basic functions in this new office:

(i) *Business Program*—to deal with contracting, minority and women investors, and minority institution deposits and ownership;

(ii) *Legal Program*—to establish a liaison and partnership with the Division of Legal Services to ensure that minority- and women-owned law firms (MWOLFs) and minorities and women in non-MWOLF firms receive an equitable share of legal engagements; and

(iii) *Policy Development and Evaluation*—to include oversight and monitoring activities for the program.

(b) *Role of MWOC Program staff.* In each RTC office, the MWOC Program staff is expected to develop and maintain a direct working relationship with the contract, program and sales offices, oversight managers, and conservatorship staff in order to increase the number of contracts and fees awarded, as well as sales transactions, to minority- and women-owned businesses. The MWOC Program staff will:

(1) Monitor all contracting activities of the RTC and its contractors for compliance with this program;

(2) Implement the MWOC certification process;

(3) Increase the MWOC database, and develop geographically based, potential contractor source lists;

(4) Implement training workshops on contracting to increase access to and award of RTC contracts;

(5) Provide complete and up-to-date information on all contracting activities, investment opportunities, and legal services to appropriate interest groups; and

(6) Develop networking forums among minority and women investor groups to promote sales of RTC assets.

(c) *Reporting Authority.* The MWOC Program staff in the RTC Field Offices will report directly to the Assistant Vice President, Department of Minority and Women's Programs, in Washington. This includes the direct oversight and management of the program's implementation in accordance with RTC policy, directives, and procedures. All MWOC Program personnel decisions which include selections, performance appraisals, promotion, and disciplinary actions shall be made directly by the above mentioned Assistant Vice President of Minority and Women's Programs.

##### § 1617.11 Program components.

(a) *Outreach.* A continuing effort of the RTC involves identifying MWOCs capable of providing contracting services to the RTC. This effort is nationwide in scope and focuses on networking and training.

(1) *Networking.* Field staff and the Washington Office will network with Federal, State and local governments;

nonprofit organizations; professional and trade organizations; and participate in conventions and seminars sponsored and widely attended by minorities and women. Through these activities, the staff will:

(i) Develop directories of minority- and women-owned firms capable of providing services;

(ii) Target appropriate firms for participation in the RTC's contractor training effort;

(iii) Develop promotional campaigns to inform the minority- and women-owned business community of the Corporation's needs and its commitment to involve such firms in its contracting activities;

(iv) Disseminate information on purchasing RTC assets and thrifts;

(v) Assist program participants in understanding and meeting the RTC's contracting needs, especially as they will be represented in various Solicitations of Services (SOS);

(vi) Determine prospective program participants and identify them as MWOCs in the RTC database, as well as assist them in understanding RTC's regulations governing ethical responsibilities, conflicts of interest, confidentiality, and the certification process as an eligible MWOC.

(2) *Database review.* The Field staff will enhance the efforts of the outreach program through their ongoing review of the MWOC database, identifying geographic and service categories in which firms are underrepresented. The outreach program will target its efforts in areas where the MWOC database indicates MWOCs are underrepresented.

(b) *Training.* The Washington Office will coordinate training initiatives, workshops, and seminars for MWOCs and RTC staff. These activities are designed to increase awareness of the RTC contracting process, regulations, and special initiatives, as well as ensure that all RTC staff who interact with the contracting and investment community are knowledgeable of and support the program. These activities include:

(1) The coordination with Field staff on identifying and targeting technical training needs of MWOC contractors;

(2) The development of training materials and modules for MWOC contractors, and where appropriate, other contractors, to increase MWOC subcontracting;

(3) The coordination with the contracting office on increasing awareness of MWOC Program policies, directives, and program goals and objectives in the contractor training modules for RTC staff; and

(4) The development of an internal education program to promote the awareness of all RTC staff about MWOB firms and the RTC's commitment to their full participation in its activities.

(c) *MWOB media program.* The Department of Minority and Women's Programs will establish a MWOB database program of related information for utilization in promoting training workshops and seminars, procurement and subcontracting opportunities, and the sale of assets.

(d) *Special events.* Special events will be developed to meet needs or concerns of MWOBs. These events may include: "subcontracting trade fairs," "open houses" with SAMDA contractors, investor forums, and coordination of events with the Minority Business Development Agency, Small Business Administration, other governmental entities, and private and nonprofit organizations.

#### § 1617.12 Promotion.

(a) The RTC will conduct seminars and workshops within this community. The focus of these encounters will be to provide information regarding the program, its goals and objectives, and companies qualified to participate in the program; facilitate interaction between RTC and this community; and manifest RTC's commitment to doing business with these groups.

(b) Opportunities for MWOBs will be expanded by encouraging both minority- and women-owned firms to form joint venture arrangements and cooperative agreements with majority-owned (i.e. other than MWOB) firms.

#### § 1617.13 Certification/verification.

(a) Each firm claiming status as an MWOB will be required to provide certification and verification of that status. To preserve the integrity and foster the objectives of the program, RTC must satisfy itself that the ownership, control, and day-to-day management requirements of the program are fulfilled. On-site visitations/audits will be coordinated with the Office of Contractor Monitoring.

(b) Accordingly, RTC will implement a certification policy and procedure that is uniform and consistent, and discourage fraudulent representations. Procedures will be established by which the Department of Minority and Women's Programs will review, evaluate, and tentatively approve certification affidavits from MWOBs, subject to the verification process, prior to any contract award. Accomplishment of this segment of the program will involve the

procedures in paragraphs (b)(1) through (7) of this section.

(1) The RTC will send all firms selected as offerors a certification affidavit to be completed and submitted with the proposal.

(2) The Department of Minority and Women's Programs will review returned certification documents to assure that the potential participant has qualifying status.

(3) When an MWOB firm is selected for an award, verification procedures, through the mechanism of site visit/audit, will be initiated for all contracts with estimated fees of over \$50,000. Verification will also be required when an award will result in an accumulation of over \$50,000 in estimated fees to a contractor. This process applies to those firms that have not been previously verified. Further, the Department of Minority and Women's Programs reserves the right to perform an onsite visitation to firms with fees under \$50,000.

(4) The MWOB firms currently doing business with the RTC are required to complete a new certification affidavit.

(5) The certification confirmation granted MWOB firms will be valid for a period not to exceed 12 months from the date certification/verification is approved. The contractor will be required to inform RTC of any action which changes or affects the MWOB status. Failure to notify RTC of a change in MWOB status will result in adverse actions by the Corporation.

(6) Contracts may be terminated should falsification of self-certification be discovered, with appropriate referrals to the Office of the Inspector General.

(7) Adequate notice will be provided of a determination of ineligibility. An opportunity to respond to such determination will be provided.

### Subpart C—Joint Ventures

#### § 1617.20 General.

In an effort to encourage and enhance opportunities for MWOBs to gain access and entry to RTC contracting activities, the Corporation supports and promotes the concept of joint ventures. The intention of this promotion is that through such an effort MWOBs will acquire training through the association with a more established or larger firm and will increase resource development opportunities so that MWOB firms may eventually have the expertise and capacity to compete independently.

#### § 1617.21 Eligibility.

A joint venture will be eligible for this program if:

(a) Each MWOB is responsible for a clearly defined portion of the work to be performed and holds management responsibilities in the joint venture; and

(b) The MWOB performs at least 25 percent of the duties and is contractually entitled to compensation proportionate to its duties.

#### § 1617.22 Establishing joint ventures.

A firm receiving a solicitation from RTC may form a qualifying joint venture with one or more other firms that may or may not have received the solicitation. Each joint venture which is established before receipt of any SOS, and every joint venture engaged by RTC, must have its own Tax Identification Number and must meet RTC's fitness and integrity requirements.

#### § 1617.23 Joint venture agreements.

To qualify for bonus considerations the joint venture must provide a copy of its written joint venture agreement to RTC at the time it submits a proposal. That agreement must clearly identify the extent of participation for each firm in the joint venture and address, among other matters, the following:

(a) The purpose of the joint venture;

(b) The management structure of the joint venture;

(c) The percentage of RTC funds earned by the joint venture to be distributed to the MWOB concern and the allocation of losses, if any;

(d) All major equipment, facilities, and other resources to be furnished by each participant to the joint venture;

(e) That each party to the joint venture is jointly and severally liable for the liabilities of the joint venture;

(f) That the MWOB joint venture partner will have the opportunity to represent itself, or will otherwise be represented at all RTC meetings, such as bidders' conferences, debriefings, contract closings and contract oversight reviews; and

(g) That all parties to the joint venture will fully disclose to one another all SOS, task order bids, notices of best and final offers, SOS amendments, notice of awards, contracts and any and all other documents or meetings necessary or relative to the joint venture. Such disclosures must be made to the minority or women venturers before submission of any proposals, bids or offers for contracts with the RTC.

### Subpart D—Subcontracting

#### § 1617.30 Policy.

(a) The RTC has determined that one of the most effective methods for increasing participation of MWOBs in its contracting activities is the use of

MWOBs as subcontractors. Generally, a suitable level of MWOB subcontracting is 25 percent of the work on a contract. While the ability to subcontract is within the power of the contractor, the RTC will provide incentives, including the award of cost and technical preferences to offerors that commit to subcontracting. Greater incentives will be available to contractors who reach levels of subcontracting greater than 25 percent.

(b) In accordance with RTC's other general requirements for subcontracting activity, the RTC shall satisfy itself that all private sector firms awarded a contract with the RTC will provide the maximum practicable opportunity to minority- and women-owned contractors to participate in subcontracting awards. All RTC contractors must agree to carry out this "maximum inclusion practicable" policy in a manner consistent with RTC's overall contracting policies and procedures.

(c) Bonus considerations are available to any offeror who demonstrates a commitment to subcontract at least 25 percent or more of the work and commensurate fees under a contract to MWOBs. Any offeror that seeks to obtain bonus considerations on a prime contract or task order agreement through subcontracting work to MWOBs must submit with its proposal a subcontracting plan.

(d) The subcontracting plan must include within the proposal:

(1) Specific roles and responsibilities of the MWOB subcontractors;

(2) Separate percentage goals for using minorities and women as subcontractors (how many minorities and how many women);

(3) Previous experience working with MWOB firms;

(4) Estimated dollar amounts of participation of MWOB subcontractors;

(5) The name of an individual employee of the offeror who will be charged with administering the offeror's subcontracting program and a description of the duties of the individual;

(6) A description of the efforts the offeror will make to ensure that minority—and women-owned contractors will have an equitable opportunity to compete for subcontracts; and

(7) Assurances that the offeror will cooperate in any oversight, review, study or surveys as may be required.

(e) Implementation factors:

(1) After contract award, names of contractors firms that will receive work through subcontracting must be

provided, as well as the amount of work and compensation.

(2) The Department of Minority and Women's Programs shall act as liaison to RTC oversight managers for consultation on MWOB issues.

(3) The Department of Minority and Women's Programs shall monitor, oversee, and provide assistance to RTC contractors to carry out the subcontracting policy.

(4) The contractor will be required to submit periodic reports to the contracting office in order to allow RTC to determine the extent of compliance by the contractor with the subcontracting plan. Summary subcontracting reports will be required in accordance with RTC instructions.

(5) The contractor's subcontracting plan shall apply throughout the life of the specific task order.

(6) The RTC will evaluate as part of the contractor's performance the utilization of minority- and women-owned contractors in the contractor's subcontracting program. This evaluation will be used by RTC to recommend the contractor for monetary incentives. When using any contractual incentive provisions based upon rewarding the contractor for exceeding goals, RTC must ensure that the goals are realistic and any rewards for exceeding the goals are commensurate with the efforts the contractor would not have otherwise expended.

#### Subpart E—Solicitation and Contract Award Guidelines

##### § 1617.40 Inclusion in solicitations.

RTC policies and guidelines will ensure to the maximum extent possible that MWOB firms are included in each contract solicitation. This may be achieved by, among other methods, soliciting proposals for asset managers to manage small, homogeneous, geographically concentrated asset pools. For noncompetitive contracts under \$5,000, MWOB firms shall be given first consideration.

##### § 1617.41 Right to award contracts reserved.

The RTC reserves the right to award a contract directly to a MWOB either by technical competition or by non-competitive award.

##### § 1617.42 Participation by the Department of Minority and Women's Programs in solicitation and award process.

(a) The Department of Minority and Women's Programs' staff will have the opportunity to participate in the initial review and Statement of Work meeting with the requesting program office and Legal Division to establish milestones,

specific task descriptions, and contractor responsibilities. The Department of Minority and Women's Programs will have the opportunity to participate in the Source Selection Plan process to assure inclusion of MWOB firms. The Department of Minority and Women's Programs will assure:

(1) Selection criteria for notices or issuance of SOSs;

(2) Advertising language; and

(3) The contract parameters are fair, equitable, and consistent with the contract requirements. This includes reasonable standards for most important, more important, important factors, and scoring criteria.

(b) The contracts office shall receive questions either in written form or by offerors' meetings from offerors and develop answers in consultation with the Program Office, Legal Division, and MWOC Program representatives.

(c) The Department of Minority and Women's Programs staff will have the opportunity to participate or have concurrence in the Technical Evaluation Process. After the technical evaluation, scoring material shall be available for review and concurrence by the Program Office, Legal Division, and the Department of Minority and Women's Programs.

(d) The Department of Minority and Women's Programs shall concur on the assignment of technical and cost bonus points prior to selection to the competitive range.

(e) In the post award phase, the Department of Minority and Women's Programs shall participate in MWOB debriefings and contractor performance evaluations.

(f) The Department of Minority and Women's Programs, in conjunction with the contracting monitoring office, will conduct quarterly and annual site visitations to Standard Asset Management and Disposition Agreement (SAMDA) contractors to review for contractor compliance with MWOC Program policy and procedures.

(g) In order to diversify the contractor base and increase competition among MWOBs, the RTC will implement smaller contract assignments, such as the reduced portfolio size for SAMDAs.

#### Subpart F—Liaison With Division of Legal Services

##### § 1617.50 Legal programs unit.

(a) The Department of Minority and Women's Programs will establish a Legal Programs Unit to provide oversight and monitoring of legal referrals to MWOLF's and minorities and women in non-MWOLF's. This unit will

coordinate activities with the Division of Legal Services' Outside Counsel Management Section to identify MWOLFs and enhance contracting opportunities through direct referrals, joint venture/co-counsel referrals, or other arrangements.

(b) The Department of Minority and Women's Programs will coordinate with the Division of Legal Services the monitoring of RTC SAMDA contractors to ensure that SAMDA contractors are aware of, adopt and adhere to, all RTC policies and procedures to contract with MWOLFs approved by the Division of Legal Services.

(c) The Department of Minority and Women's Programs will have the opportunity to participate on the Legal Services Committee to ensure that the evaluation of MWOLFs for potential outside counsel engagements is fair and follows RTC's policies and procedures. Where applicable to the method of engagement, technical and cost bonuses will be allocated to MWOLFs, and non-MWOLFs that joint venture with other MWOLFs.

**Subpart G—Cost and Technical Bonuses**

**§ 1617.60 Policy.**

In the review and evaluation of proposals submitted by firms eligible as MWOBs, or MWOB joint ventures with an eligible subcontracting plan, the Corporation shall provide additional incentives in the technical and cost relating process.

**§ 1617.61 Application of technical and cost bonus points.**

(a) Technical bonus points will be awarded as a percentage of the total technical points achievable in the rating process in addition to each offeror's technical score.

(b) Cost bonus points will be awarded as a percentage of the total cost points achievable in the rating process in addition to each offeror's cost score.

(c) Beginning May 1, 1992, the technical and cost bonus points shall be allocated as follows:

Firm type	Technical (percent)	Cost (percent)
MWOB	10	5
Joint Venture (JV) with 40% and above MWOB participation	10	5
JV with at least 25% MWOB participation	5	2.5
Non-MWOB firms with subcontracting plan of 40% MWOB participation	10	5

Firm type	Technical (percent)	Cost (percent)
Non-MWOB firms with subcontracting plan of at least 25% MWOB participation	5	2.5

(d) The Department of Minority and Women's Programs will review bonus points assignment upon conclusion of the technical evaluation by the technical evaluation panel and the cost evaluation by the contracts office, prior to determining the competitive range. All MWOB issues will be resolved by the Director, Office of Contracts, and the Assistant Vice President, Department of Minority and Women's Programs.

**§ 1617.62 Authority to adjust technical and cost bonus points.**

(a) The Department of Minority and Women's Programs will evaluate the Corporation's application of bonus points annually. This annual review will determine if the Corporation is meeting the mandate to ensure the maximum participation possible for MWOBs and the need to adjust the bonus points.

(b) The Assistant Vice President of the Department of Minority and Women's Programs may grant authority to adjust upward the technical and cost bonus points applicable in evaluating proposals to the extent necessary to ensure the maximum participation for MWOBs.

**Subpart H—Conservatorship Contracting**

**§ 1617.70 Policy and application.**

(a) The RTC recognizes the role of the conservatorships in ensuring inclusion of MWOBs in the RTC contracting and disposition activities to the maximum extent possible. Within 6 months after the institution has been placed into conservatorship, each conservatorship shall comply with RTC MWOC Program policies and procedures.

(b) Accordingly, it is the responsibility of the conservatorship and contracting department to provide the Department of Minority and Women's Programs with an opportunity to review and concur on:

- (1) Requests for contracting services;
- (2) SOS lists;
- (3) SOS, contract, Statement of Work;
- (4) Other contracting documents;
- (5) Application of MWOB bonus points; and
- (6) Certification/verification of contractor's MWOB status.

(c) In addition, the Department of Minority and Women's Programs will have the opportunity to participate in conferences, debriefings, negotiation

meetings, best and final interviews, and any other meetings between RTC and MWOB contractors.

(d) Because of the large number of small awards emanating from conservatorships, the conservatorships are encouraged in all sole source contracts to give preference to local MWOBs. The MWOC Program staff at the RTC Field Office shall be notified if the conservatorship contracting office cannot locate qualified MWOBs for contracting purposes prior to soliciting for services.

**Subpart I—Oversight and Monitoring**

**§ 1617.80 Oversight.**

(a) The RTC recognizes that the success of this program involves commitment and leadership from senior management. The RTC pledges the continuing involvement of all levels of its staff in making this program a success. The Department of Minority and Women's Programs, Office of Policy, Evaluation and Field Management will have responsibility for oversight and monitoring functions.

(b) In order to achieve the objectives in paragraph (a) of this section, all offices will report the extent of their involvement in the program, including the number of contractors participating in the SOS process and the number of contracts awarded. Further, all offices in RTC shall review an RTC contractor's MWOB subcontracting activities on a quarterly basis. The contractor must demonstrate a good faith effort to follow the objectives of the MWOC Program and such effort shall be evaluated as part of the RTC contract performance evaluation conducted by RTC oversight managers. Determination as to conformance shall be the right and sole responsibility of RTC.

(1) Field Office staff will provide complete and current data regarding RTC contracting activity;

(2) The MWOC Program staff in the field will review and evaluate the reporting and MWOB databases for the extent of MWOB participation and will prepare such reports for the Washington staff;

(3) The Washington Department of Minority and Women's Programs will prepare reports for dissemination to management, Congress, and the public.

**§ 1617.81 Monitoring.**

(a) Policy Development and Evaluation staff dedicated to this effort will continuously monitor the usage of RTC policies, procedures, and guidelines for compliance with the goals of FIRREA to ensure maximum inclusion of

MWOBs in the management and disposition of assets of failed thrift institutions. A site visitation program will be established utilizing a uniform assessment process. Each RTC Field Office will be visited periodically by the Policy and Evaluation staff to:

(1) Assess effectiveness of the MWOC Program;

(2) Conduct interviews concerning the program and procedures; and

(3) Make recommendations to facilitate uniform attainment of the MWOC Program goals and objectives.

(b) Adherence to and assistance with MWOC Program policies shall be reflected in RTC Personnel Appraisals to encourage performance and maintain individual accountability.

#### § 1617.82 Performance appraisals.

(a) *Supervisory performance appraisal.* All annual evaluations of performance for Washington and Field Office supervisors shall include a review of his/her level of participation in and enhancement of the Corporation's efforts of including MWOBs in all aspects of the Corporation's business opportunities, to the maximum extent possible.

(b) *Annual performance appraisal.* All annual evaluations of senior officials shall include a review of his/her ability and willingness to work with both internal staff members promulgating the importance of the MWOC Program, as well as with MWOBs, including investors, goods/service contractors, and law firms, capable of assisting in the management and disposition of RTC assets.

#### § 1617.83 Incentive awards.

(a) *Award criteria.* The granting of incentive awards and bonuses to senior staff will take into consideration in significant part the senior manager's ability to show during the calendar year:

(1) A significant percentage increase in the number of contracts awarded to MWOBs;

(2) A significant percentage increase in the number of MWOB subcontractors on SAMDA contracts;

(3) A significant percentage increase in the number of MWOBs on SOS lists; and

(4) A significant percentage increase in the fees paid to MWOBs.

(b) *Special MWOC Program Award.* In conjunction with the RTC's Director of the MWOLF Program, a special MWOC Program award will be created for presentation during the Annual Awards Ceremony in December for any outstanding contribution to the Program during the calendar year.

### Subpart J—General Provisions Applicable to Law Firms

#### § 1617.90 Policy and scope.

(a) It is the policy of the RTC to ensure that MWOLFs and minorities and women in non-MWOLFs, have the opportunity to participate, to the maximum extent possible, in all legal services contracted for by the RTC Division of Legal Services, including legal services contracted for the RTC by private sector contractors. Every employee of the RTC has the affirmative duty to identify and seek to remove any barrier to the maximum possible participation by MWOLFs, and minorities and women in non-MWOLFs, in the RTC's legal services contracting activities.

(b) This policy applies to all contracting for legal services engaged in by the RTC Division of Legal Services (including contracting by private sector contractors for the RTC) including services provided directly to the Corporation, and services provided to conservatorships and receiverships. It applies to legal services including, but not limited to, litigation, transactions, bankruptcy, bond claims, director and officer liability, and other areas of law specific to the RTC Division of Legal Services.

#### § 1617.91 Definitions.

The following definitions apply for the purposes of §§ 1617.91 through 1617.120.

(a) *List of Counsel.* The list of performing law firms that are on the RTC Division of Legal Services, computer database and are eligible to perform legal services for the RTC. Only law firms on this list may have legal matters referred to them.

(b) *Minority.* See the definitions of § 1617.4(c) of subpart A of this part.

(c) *Minority-owned law firm.* A law firm with more than 50 percent of the ownership or control that is held by one or more members of a minority group, all of whom are attorneys in good standing with the bar licensing authority of the pertinent State or other jurisdiction.

(d) *Minority and Women Outreach Coordinator (L-MWOC).* A person in each RTC Division of Legal Services field office designated to serve as liaison with MWOLFs and minorities and women in non-MWOLFs within the pertinent geographical area.

(e) *MWOLF.* A minority- or women-owned law firm.

(f) *Private sector contractor.* Any person or entity that performs services on behalf of the RTC pursuant to contract, including, but not limited to, an asset manager.

(g) *Women-owned law firm.* Any law firm or practice wherein:

(1) More than 50 percent of the ownership or control is held by one or more women;

(2) More than 50 percent of the net profit or loss accrues to one or more women;

(3) A significant percentage of senior management positions are held by women; and

(4) All attorneys within the firm are in good standing with the respective licensing authority of the State or other jurisdiction.

### Subpart K—Law Firm Outreach

#### § 1617.100 Identification of MWOLFs.

(a) *General.* The RTC will design and implement a program, nationwide in scope, to identify MWOLFs capable of meeting the legal services contracting needs of the RTC. Program personnel will network with State and local bar associations, and other entities, and will participate in professional conventions and seminars sponsored and widely attended by MWOLFs.

(b) *Specific elements.* The identification effort will:

(1) Identify MWOLFs nationwide.

(2) Update firm profiles for all MWOLFs on the List of Counsel.

(3) Conduct surveys to determine the distribution of matters referred to MWOLFs.

#### § 1617.101 Promotion of MWOLFs.

(a) *General.* The RTC will conduct and participate in seminars and workshops for MWOLFs with a focus on providing information on the MWOLF outreach program, its goals, and objectives. The RTC will train its employees and private sector contractors regarding the program. Furthermore, RTC employees will participate in seminars and workshops conducted by others regarding relevant topics.

(b) *Specific elements.* The promotional effort will include:

(1) Development of a promotional campaign to inform the legal community, and in particular the women and minority legal community, of the RTC Division of Legal Services' needs and its commitment to the MWOLF outreach program.

(2) Networking with national, State, and local bar organizations to facilitate interaction between the RTC Division of Legal Services and MWOLFs.

(3) Expansion of contracting opportunities by encouraging MWOLFs to form joint ventures/co-counsel or other affiliations with non-MWOLFs or other MWOLFs.

(4) Fostering referral of legal matters to MWOLFs by RTC private sector contractors.

(5) Provision of law firm application materials and guidance regarding their completion to firms that have been identified as MWOLFs.

(6) Ensuring that all RTC staff that interface with the legal services contracting community are knowledgeable of, and adhere to, the principles stated in this part.

#### § 1617.102 Compliance.

Compliance with this part will be achieved by the designation of individuals as L-MWOCs in each Field Office to ensure that the policies and goals of the program are fulfilled. The L-MWOCs in the field will report jointly to their respective field supervisors and to the Senior Counsel for the Minority and Women Outreach Unit in Washington. At the RTC Legal Division Headquarters Office, the Senior Counsel for the Minority and Women Outreach Unit will be directly responsible for the overall implementation of the program. The objectives of the outreach program will be made part of those individual's job description.

#### § 1617.103 Certification.

(a) Firms claiming status as MWOLFs will be required to provide certification of that status.

(b) A certification affidavit will be sent to all MWOLFs on the List of Counsel, to be completed under oath and returned to the RTC Division of Legal Services.

(c) The RTC Division of Legal Services will review the certification affidavit to ensure qualifying status.

#### Subpart L—Law Firm Direct Referral, Joint Venture, and Other Arrangements

##### § 1617.110 General.

(a) The RTC's goal is to increase the use of existing expertise and experience possessed by MWOLFs, and to enable MWOLFs to develop expertise in areas that are new to them. The ultimate goal is that each MWOLF achieve self-sufficiency in all matters. These goals will be achieved through direct referrals, joint venture/co-counsel referrals, and other arrangements.

(b) When work is assigned to law firms based upon competitive solicitations, law firms will be eligible for cost and technical preference points to the same extent as set forth for non-legal contracts in § 1617.51 of this part. The General Counsel (or designee) will determine whether firms are eligible for cost and technical preference points. The General Counsel shall periodically determine whether the level of cost and technical preference points set forth in § 1617.51 of this part are sufficient to maximize MWOLF participation, and if not, shall make a general adjustment to the points to be assigned in competitive solicitations.

##### § 1617.111 Direct referral.

Direct referral of a legal matter to an MWOLF by an RTC attorney or a private sector contractor will be used when the MWOLF has both the capacity and the experience to handle the matter. It is the MWOC's responsibility to identify MWOLFs with the capacity and experience to handle particular matters, or in the case of Headquarters Office matters, it is the responsibility of the General Counsel (or designee).

##### § 1617.112 Joint venture/co-counsel referral.

(a) A joint venture/co-counsel referral will be used to combine the resources of two or more law firms. This arrangement pairs MWOLFs with some experience in the area of referral with other MWOLFs or with non-MWOLFs more experienced in the same area or with greater capability to handle the matter.

(b) The goal with respect to the division of work and the allocation of fees for these matters is that, as a general rule, at least 25 percent of the substantive work be performed by MWOLFs, and at least 25 percent of the projected total fee billings be generated by MWOLFs. The RTC expects that as MWOLFs become more proficient in RTC legal issues, their level of participation in matters referred pursuant to the Joint Referral Program, as well as the fees they generate, shall increase.

(c)(1) The RTC Division of Legal Services will review the joint venture/co-counsel arrangement, which must set

forth the degree of participation of each firm, and provide for liability to be maintained by each firm for its share of the work. These arrangements must be in conformance with Division of Legal Services Policy 92-02 (the Joint Referrals and Representation Program).

(2) Copies of the document referred to in paragraph (c)(1) of this section are available from the RTC Public Reading Room, 801 17th Street, NW., room 100, Washington, DC 20434-0001.

##### § 1617.113 Other arrangements.

(a) Other forms of affiliation between less experienced MWOLFs and more experienced MWOLFs or non-MWOLFs are available and are encouraged to be utilized for work on a particular matter or for a specified period of time.

(b) All arrangements must be approved by the RTC Division of Legal Services' attorney overseeing the matter, in coordination with the L-MWOC, and if necessary, the General Counsel (or designee).

(c) The overriding objective of these arrangements is that for work allocated in such a manner, the less experienced MWOLF receives sound training in the relevant issues while pursuing the matter as cost effectively as possible.

#### Subpart M—Law Firm Oversight and Monitoring

##### § 1617.120 Oversight and monitoring.

Various standardized reports will be prepared by the RTC Division of Legal Services to indicate, among other things, the total number and type of legal matters referred to MWOLFs, the dollar amounts of fees paid to MWOLFs, a breakdown of various affiliations of MWOLFs with non-MWOLFs, and the local outreach efforts made within Field Offices, as well as the Headquarters Office.

By order of the Chief Executive Officer.

Dated at Washington, DC, this 24th day of July, 1992.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Secretary.

[FR Doc. 92-18730 Filed 8-7-92; 8:45 am]

BILLING CODE 6714-01-M

JUN 1

<p>INTEROFFICE MEMORANDUM LEGAL DIVISION</p>	<p>RESOLUTION TRUST CORPORATION 801 17TH STREET, NW WASHINGTON, DC 20434</p>
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**CONFIDENTIAL; ATTORNEY WORK PRODUCT, ATTORNEY-CLIENT PRIVILEGE**

**MEMORANDUM TO:** Johnnie B. Booker  
Director, Office of Minority and Women  
Outreach and Contracting Programs

**FROM:** Carl J. Gold  
Counsel

*CJG by DS*

**CONCUR:** Debra J. Slater  
Assistant General Counsel

*D Slater*

**DATE:** June 19, 1992

**SUBJECT:** Request for Legal Opinion - MWOB Policy

You requested a legal opinion that explains the constitutional issues regarding the RTC's MWOB policy, particularly regarding the April 8, 1992 draft to which we recommended revisions. This memorandum first summarizes the current law on programs that prefer minorities (through goals, set-asides, preferences, etc.). It then compares the April 8th draft with the April 27 draft that the Legal Division endorsed as minimizing legal risk. Finally, it explains why, in light of current law, we recommended the modifications to the April 8th draft.

**LEGAL STANDARDS**

Several leading decisions by the U.S. Supreme Court establish the legal standards that would govern judicial scrutiny of various elements, such as preferences or set-asides, of the MWOB program. For reasons discussed below, however, there is significant doubt as to the continuing viability of the most recent Supreme Court decision in this area, which deals with the constitutionality of certain minority preferences. As a result, the standards by which the RTC MWOB program would be judicially evaluated are not entirely free from doubt. However, an analysis of the key judicial decisions in this area yields a number of basic principles under which the RTC MWOB program could be evaluated.

In Fullilove v. Klutznick (1980), a federal statute required that, absent an administrative waiver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members. Based upon the fact that the program was expressly mandated by Congress, the Court upheld the

program. The Court deferred to Congress's findings of past discrimination, and that the set-aside was a reasonable remedy for that past discrimination.

In Metro Broadcasting (1990), the Federal Communications Commission ("FCC") had adopted a federal regulation permitting certain broadcasting licenses to be sold privately to businesses owned by minorities. These licenses would, absent the sale to the minority firm, otherwise have to be surrendered to the FCC. The Supreme Court upheld the regulation, again deferring to Congress's findings. In upholding the regulations, the Supreme Court accorded "overriding significance" to the fact that the FCC's minority ownership goals had been specifically approved by Congress.

However, in City of Richmond v. Croson (1989), the Supreme Court invalidated the city of Richmond's self-imposed minority contracting set-aside program. The city had adopted an ordinance requiring that at least 30% of the dollar amount of each "prime contract" awarded by the city be subcontracted to a "minority business enterprise". Since the program was not mandated by Congress, the Court applied "strict scrutiny" of the city's findings of a history of discrimination, and the city's argument that the program was related to curing that history.

The Supreme Court's reasoning in these cases can be summarized as follows. Where a governmental entity implements an express mandate of Congress, the court applies "intermediate scrutiny." That is, the Court defers to Congressional findings that there is an important governmental objective, and that the preferential measures are reasonably likely to meet the objective.

Where a governmental entity goes beyond or acts in the absence of an express mandate of Congress, the court applies "strict scrutiny." That is, the Court requires specific findings of a pattern or history of discrimination in specific industries, and determines whether the remedies are narrowly tailored to retain significant opportunities for non-minorities to participate. Unlike the intermediate scrutiny test, the Court has taken nothing at face value, and will rigorously analyze and question the government's evidence and findings. Under this standard, the RTC would have the more difficult burden of trying to establish that its MWOB program was narrowly tailored to achieve a compelling state interest.

#### **DEVELOPMENTS SINCE METRO BROADCASTING DECISION**

Three developments in the law and the courts since the Supreme Court decided Metro Broadcasting in 1990 are worth noting.

First, there have been mixed decisions in the lower federal courts regarding preferential programs. It appears, however, that the lower courts attempt to follow the principles, not the votes,

announced in the three Supreme Court cases. That is, courts do not simply cite a Supreme Court decision as proof that a type of preferential measure is or is not constitutional. Under either level of scrutiny ("strict" or "intermediate") courts look for whether preferential programs are based upon Congressional mandates, whether there have been specific findings of discrimination, and whether the programs are appropriately limited to achieving statutory or regulatory objectives.

Second, since Metro, two decisions of the D.C. Circuit have been hostile to preferential programs. In Lamprecht v. FCC, decided in February 1992, the D.C. Circuit struck down an FCC policy preferring female applicants for broadcasting licenses. Despite professing to follow the Metro Broadcasting standard of "intermediate scrutiny," and despite an express Congressional mandate to award preferences, the court found that the FCC's program did not meet the test of being reasonably related to the professed governmental objective.

In O'Donnell Construction Co. v. District of Columbia (May 5, 1992), the D.C. Circuit Court invalidated the District of Columbia's minority contracting program that "sheltered" (i.e., set aside) contracts for minorities. The court applied the "strict scrutiny" standard. The court found that the program was unduly exclusive of non-minorities, and that the District had failed to make the detailed findings of past discrimination necessary to justify set-asides.

Finally, since the above decisions, Justices Brennan and Marshall have resigned. They were both in favor of the programs in Metro and Fullilove, both of which were narrow (5-4) decisions in favor of preferential programs.

#### **THE RTC'S SITUATION BASED UPON THE ABOVE LEGAL STANDARDS**

The RTC's policy and draft regulation implement **express Congressional mandates**, i.e., outreach and cost and technical preferences. The "goals" are used to measure the RTC's success using these Congressionally-mandated measures. In light of this, under existing Supreme Court precedent, the courts should apply "intermediate scrutiny" and defer to Congress's mandate. The program is reasonably calculated to meet the important governmental objective of increasing MWOB participation. It retains substantial opportunities for non-MWOBs to participate. The potentially burdensome provisions (e.g. mandatory subcontracting that could have been characterized as a set-aside, and was not mandated by Congress) have been removed.

There may still be a challenge to whether the Congressional findings are detailed enough, and whether the RTC has enough of a record to show that its preferential devices are reasonably correlated to the pool of available MWOBs in specific industries.

Given the changes in the courts, and the hostility shown in cases such as Lamprecht and O'Donnell, no program is risk-free. However, the RTC's mandate is to follow the directions of Congress. The program does this in a reasonable manner, including a provision for periodic review to ensure that it is not unduly burdensome to non-MWOBs. As such, it is legally supportable for the RTC to follow this policy and regulation.

**Use of These Standards in Analyzing the RTC's Policy as Proposed in the April 8th Draft**

As you will recall, there were several provisions of the April 8th draft that we believed significantly raised the legal risks associated with the policy. We recommended deleting these to minimize legal risk. In brief, these provisions were as follows:

- (1) The policy proposed to establish firm annual goals for the total number of contract awards and the total dollar amount of fees to MWOBs.
- (2) All contractors receiving fees of \$200,000 or more, would have been required to allocate, through subcontracts, at least 25% of their substantive work and commensurate fees to MWOBs.
- (3) In several places the policy made clear that non-compliance with these goals for subcontracting could result in contract termination and debarment.
- (4) A detailed subcontracting plan would have been required for all contractors with over \$200,000 in fees.
- (5) A more important factor in evaluating the offeror's technical capacity would have been the use of MWOB firms as subcontractors. The draft policy stated that if the offeror submitted a subcontracting plan without goals and insurance, or if the plan were vague or incomplete or evidenced an intention not to comply, the offeror's proposal would be considered non-responsive.
- (6) An evaluation of the performance in utilizing MWOBs as subcontractors could have been used to determine whether to award other contracts or additional assets for management and disposition.

In comparison, in the April 27th draft we attempted to change the focus from goals to more general objectives. We attempted to make clear that RTC's MWOB participation level was already close to the 30% standard, and the announced standards such as 30% were intended to reflect the success of our outreach efforts and the statutory authorized preferences, rather than be mandatory requirements. The subcontracting requirement was removed except insofar as

contractors voluntarily agree to subcontract in order to receive cost and technical preference points. We recommended removing the use of MWOB subcontracting as a factor in whether to award additional contracts or additional assets, or to terminate contracts.

The reasons for these recommended changes were as follows. As we explained above, to the extent that a program is not expressly mandated by Congress, courts review it extremely rigorously. Any measures that the RTC might adopt that are not mandated by the RTC's statutes (i.e., measures stronger than outreach or bonus points) would fall within this category.

The main concerns we had with the April 8th draft were based upon the goals and the means for implementing them. The courts have looked at whether agency goals and standards were reasonably attainable, or whether they were set so high as to infer favoritism to a particular group, whether or not that group was willing or able to perform the work. This is why we recommended altering the focus of the Policy from an absolute goal to the use of best efforts through processes statutorily mandated by Congress, i.e., outreach, cost and technical preference points. As noted above, the courts have applied a much less rigorous review to programs expressly mandated by Congress. In addition, as is noted above, courts look at the means actually used to increase participation and not at the terms used. That is, whether or not an agency labels a program as having set-asides or "sheltered" contracts, the court will look at whether the contractor is encouraged to voluntarily increase MWOB participation, rather than being coerced. If there is coercion, the program can easily run afoul of the legal test, which is that non-minority contractors not be unduly burdened.

As such, we recommended that all provisions which could be seen as coercive, be removed. Accordingly, each instance where a contractor was threatened with some form of punishment for not meeting a goal was deleted. In addition, we recommended deleting provisions that would have held offerors' proposals to be nonresponsive. There is no more coercive measure than the promise of rejecting an offer for failure to meet a single criterion. This has the effect of being a sheltered contract or set-aside, regardless of terminology.

We trust that this information satisfactorily explains our recommendations and the issues we see involved in this policy. In addition, you asked whether there were additional changes that could be made to the policy to further reduce legal risk. While we believe the policy as approved by the Executive Committee and the Chief Executive Officer is legally supportable, we note that the application of the policy and the ensuing regulations will determine whether the policy and regulations are challenged, and if challenged, whether they will survive judicial review. The

O'Donnell decision referred to above is a good indication that the mere statement of a policy or program on paper does not necessarily determine the outcome of judicial review; the means of implementation can obviously influence the court's decision.

Please contact us if you have further questions.

cc: David Cooke  
Dennis Geer  
Gerald Jacobs  
Daniel Lonergan  
Gladys Gallagher



RESOLUTION/CONTROL NO.

92-128

**CHIEF EXECUTIVE OFFICER  
DECISIONAL MEMORANDUM**

DATE SUBMITTED

5/20/92

**ACTION REQUEST DATE**

5/20/92

*(If less than one week briefly explain reason)*

NEED TO ADVISE PUBLIC OF RTC COMPLIANCE WITH  
RESTRUCTURING ACT.

**SUBJECT**

MINORITY AND WOMEN OUTREACH AND CONTRACTING PROGRAMS POLICY

**ACTION REQUESTED**

The Executive Committee, in its meeting of May 19, 1992, and by notational vote on May 20, 1992, has recommended that you approve this policy which implements the above-captioned programs. The policy includes the cost and technical preferences for contract offerors as authorized by the RTC Restructuring Act. The Committee recommended that the policy form the basis for the RTC's regulation governing the contracting portion of the program, and delegated to the General Counsel the authority to submit the regulation to you for your approval.

**RECOMMENDING OFFICIAL**

**CONCURRING OFFICIAL**

**AUTHORIZATION**

APPROVED

DISAPPROVED

OTHER

**REMARKS/QUALIFICATIONS**

**SIGNATURE OF CHIEF EXECUTIVE OFFICER**

**DATE**

May 20, 1992



RESOLUTION/CONTROL NO.

92-128

EXECUTIVE COMMITTEE  
DECISIONAL MEMORANDUM

DATE SUBMITTED

MAY 18, 1992

ACTION REQUEST DATE

MAY 19, 1992

(If less than one week briefly explain reason)

SUBJECT

MINORITY AND WOMEN OUTREACH AND CONTRACTING PROGRAMS POLICY

ACTION REQUESTED

(1) Concur in staff's recommendation that the RTC adopt this policy which implements the mandates of FIRREA and RTCRRIA regarding participation of women and minorities in RTC activities; (2) concur in staff's recommendation that the policy form the basis for the RTC's regulation on MWOB contracting; (3) delegate to the General Counsel the authority to recommend a regulation to the Chief Executive Officer.

RECOMMENDING OFFICIAL

*Phonice B. Booker*

CONCURRING OFFICIAL

*Robert Clark*

AUTHORIZATION

APPROVED

DISAPPROVED

OTHER

REMARKS/QUALIFICATIONS

The Committee amended the MWOB reporting authority policy, and incorporated the revised language into the statement at Section V. Organizational Responsibilities and Staffing, Part B. Reporting Authority. The revised part was approved on May 20 by notational vote and is attached to this memorandum.

SIGNATURE OF CHAIRPERSON

*Robert Clark*

DATE

May 20, 1992



**Resolution Trust Corporation**

May 20, 1992

**MEMORANDUM TO:** Executive Committee

**FROM:** Johnnie B. Booker, Director  
Office of Minority and Women  
Outreach and Contracting Programs

A handwritten signature in cursive script, appearing to read 'J. Booker'.

**SUBJECT:** MWOB Reporting Authority

I have attached the amended MWOB reporting authority policy for your review and approval. Once this amendment has been approved, it will be incorporated into the final policy document.

Attachment

**APPROVED BY:**

A handwritten signature in cursive script, appearing to read 'Gerald Jacobs'.  
\_\_\_\_\_  
Signature

May 20, 1992  
\_\_\_\_\_  
Date

**cc:** Gerald Jacobs  
Lamar Kelly  
David Cooke  
William Roelle



Resolution Trust Corporation

May 20, 1992

MEMORANDUM TO: Executive Committee

FROM: Johnnie B. Booker, Director  
Office of Minority and Women  
Outreach and Contracting Programs

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SUBJECT: MWOB Reporting Authority

I have attached the amended MWOB reporting authority policy for your review and approval. Once this amendment has been approved, it will be incorporated into the final policy document.

Attachment

APPROVED BY:

A handwritten signature in cursive script, appearing to read 'W. Jacobs'.

Signature

A handwritten date in cursive script, appearing to read '5/20/92'.

Date

cc: Gerald Jacobs  
Lamar Kelly  
David Cooke  
William Roelle



Resolution Trust Corporation

May 20, 1992

MEMORANDUM TO: Executive Committee

FROM: Johnnie B. Booker, Director  
Office of Minority and Women  
Outreach and Contracting Programs

SUBJECT: MWOB Reporting Authority

I have attached the amended MWOB reporting authority policy for your review and approval. Once this amendment has been approved, it will be incorporated into the final policy document.

Attachment

APPROVED BY:

Signature

5/20/92

Date

cc: Gerald Jacobs  
Lamar Kelly  
David Cooke  
William Roelle

POLICY  
MINORITY AND WOMEN OUTREACH AND CONTRACTING PROGRAMS

**I. BACKGROUND**

Section 1216(c) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") requires the Resolution Trust Corporation ("RTC" or the "Corporation") to "prescribe regulations to establish and oversee a minority outreach program . . . to ensure inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women, including financial institutions, investment banking firms, underwriters, accountants, and providers of legal services, in all contracts entered into by the agency with such persons or entities, public and private, in order to manage the institutions and their assets for which the agency is responsible or to perform such other functions authorized under any law applicable to such agency."

The Resolution Trust Corporation Refinancing, Restructuring and Improvement Act (RRIA) of 1991 augmented the requirement of FIRREA that the RTC foster the participation in its activities of minorities, women, and businesses owned by minorities and women. As to contracting, the RRIA mandates that the RTC award preferences in evaluating offers made by MWOBs, and gives the RTC authority to adjust the level of those preferences to the extent necessary to ensure the maximum possible level of participation. In addition, the RRIA provides authority for the RTC to provide various forms of assistance to minorities and women that seek to acquire savings associations from the RTC.

In regard to contracting, the Interim Final rule for the Minority- and Women-Owned Business Contracting Program published in the Federal Register on August 15, 1991, generated 57 comments by members of the U.S. Congress, professional associations, corporate entities, and individual business owners. The RTC has reviewed and catalogued these commentaries, as well as the provisions in the RTC Refinancing, Restructuring and Improvement Act (RRIA) of 1991 which affect this program. The substance of the comments have been evaluated for incorporation into a final regulation.

The policy contains the essential elements of the original program and the expanded areas of responsibility mandated by the provisions of the Funding Act of 1991. Among the elements and areas included are: outreach and training activities, certification, joint ventures, subcontracting, conservatorship contracting, solicitation, contract award and monitoring, minority and women investors, minority depository institutions and ownership, and legal process initiatives.

## II. PURPOSE AND SCOPE

### A. **Purpose**

This policy details the procedures that the RTC will follow to ensure the inclusion of firms owned by minorities and firms owned by women in RTC's contracting for goods and services and disposition of their assets in connection with its management of savings and loan institutions placed under RTC control.

### B. **Scope**

The program applies to all contracting and sales activities engaged in by RTC after the effective date of this policy, May 1, 1992, in any of its capacities, including all contracts and investment opportunities with private persons and entities for all RTC functions authorized by law.

## III. STATEMENT OF POLICY

It is the policy of the RTC that firms owned and operated by minorities, firms owned and operated by women, and minority and women investors, have the opportunity to participate, to the maximum extent possible, in all relevant contracting activities of the Corporation. Our objectives in contracting will be achieved through the establishment of goals using RTC contracting procedures. This applies to contracting for the procurement of goods and services, and the contracting activities of conservatorships and receiverships. In addition, the RTC will seek to provide investment opportunities in thrift institutions and other assets.

This document embodies the general policy of the RTC. Consistent with the Administrative Procedure Act and other applicable statutes, the RTC will implement the policy through, as necessary, regulations, directives, contractual provisions, and other contract-related documents. To the extent that there is a conflict between this policy and such other implementing document, the implementing document controls.

## IV. CONTRACTING OBJECTIVES

As of March 1, 1992, reports generated by the Contracting Activity Reporting System show that approximately twenty-six percent (26%) of the fees awarded to all contractors were being awarded to MWOB firms. The RTC expects that implementation of its augmented outreach program and authority to award cost and technical preferences will increase that percentage to thirty

percent (30%) over the next year. The RTC expects that the percentage of awards will be commensurate with the percentage of fees paid to such firms. It is expected that, over the next year, the Division of Legal Services will increase the level of legal fees paid on new assignments to MWOLFs to at least twenty percent (20%). In addition, at least ten percent (10%) of the total legal fees paid by the RTC will be for services performed by minorities or women in non-MWOLF firms. The RTC understands that these projections may represent a substantial increase in the amounts assigned to these firms. However, the RTC believes that there is a sufficient pool of qualified MWOBs, MWOLFs, or minorities or women in non-MWOLF firms, to competently perform the amount of work the RTC expects can be assigned to them.

Awards and fees will be tracked separately for minorities and for women. These objectives apply to all contracts issued by the RTC in its corporate, conservatorship, and receivership capacities, including those for goods and services.

- Each office, including sales centers, must make every effort to raise MWOB participation to the levels set forth above.
- Contractors are strongly encouraged to utilize joint venture and subcontracting arrangements with MWOBs to increase MWOB participation. Bonus considerations will be given to contractors that, through joint ventures or subcontracting, achieve specified levels of MWOB participation.
- Within six months of the date of conservatorship, each conservatorship must bring its contracting activity into compliance with the RTC's Minority and Women Outreach and Contracting Programs' policies and procedures.
- Evaluation of performance of contractors will include their efforts and success in meeting MWOB goals. RTC will conduct periodic visits or audits of contractors to assess their compliance with RTC MWOB policies.
- All annual evaluations of performance for senior officials in each RTC office shall include a review of his or her success in meeting the goals and objectives of the Minority and Women Outreach and Contracting Programs.

#### **V. ORGANIZATIONAL RESPONSIBILITIES AND STAFFING**

RTC will have staff and resources devoted to this program in each of its offices.

**A. Organization**

The RTC has established a Minority- and Women-Owned Business Outreach and Contracting Program in Washington with a Director to provide direction, consultation, and training to other RTC offices in order to ensure that this program is being effectively and consistently implemented.

There will be three basic functions in this new office:

1. **Business Program -**  
to promote contracting, minority and women investors, and minority institution deposits and ownership;
2. **Legal Program -**  
to establish a liaison and partnership with the Office of General Counsel to assure that minority- and women-owned law firms receive an equitable share of legal engagements; and
3. **Policy Development and Evaluation -**  
to include oversight and monitoring activities for the program.

In each RTC office, the Minority- and Women-Owned Business Department staff is expected to develop and maintain a direct working relationship with all programs including contracts, sales offices, legal division, oversight managers and conservatorship staff in order to increase the number of contracts and fees awarded, as well as sales transactions, to minority- and women-owned businesses. MWOB Department staff will:

1. monitor all contracting activities of the RTC and its contractors for compliance with this program;
2. implement the MWOB certification process;
3. increase the MWOB registration database, and provide oversight and review of the registration process;
4. implement training workshops on contracting to increase access to and award of RTC contracts; and
5. provide complete and up-to-date information on all contracting activities, investment opportunities, and legal services to appropriate interest groups; and

6. develop networking forums among minority and women investor groups to promote sales of RTC assets.

**B. Reporting Authority**

MWOB Department staff in the RTC field offices will report directly to the Director, Office of Minority and Women Outreach and Contracting Programs in Washington. This includes the direct oversight and management of the program's implementation in accordance with RTC policy, directives, and procedures.

All MWOB personnel decisions which include selections, performance appraisals, promotion, and disciplinary actions shall be made directly by the above mentioned MWOC Director.

**VI. PROGRAM COMPONENTS**

**A. Outreach**

A continuing effort of the program involves identifying minority- and women-owned businesses (MWOB) and investors capable of providing contracting services to the RTC. This effort is nationwide in scope and focuses on networking and training.

**1. Networking**

Field staff and the Washington Office will network with federal, state and local governments; non-profit organizations; professional and trade organizations; and participate in conventions and seminars sponsored and widely attended by minorities and women. Through these activities, the staff will:

- a. develop directories of minority- and women-owned firms capable of providing services;
- b. target appropriate firms for participation in the RTC's contractor training effort;
- c. develop promotional campaigns to inform the minority- and women-owned business community of the Corporation's needs and its commitment to involve such firms in its contracting and disposition activities; and
- d. disseminate information on purchasing RTC assets and thrifts.

Once prospective program participants have been determined, they will be identified as MWOBs in the RTC database and assisted in understanding RTC's regulations governing ethical responsibilities, conflicts of interest, confidentiality, and the certification process as an eligible MWOB.

The field staff will enhance the efforts of the outreach program through their ongoing review of the MWOB database, identifying geographic and service categories in which firms are under-represented. The outreach program will target its efforts in areas where the MWOB database indicates MWOBs are underrepresented.

## **2. Training**

The Washington office will coordinate training initiatives, workshops, and seminars for MWOBs and RTC staff. These activities are designed to increase awareness of the RTC contracting process, regulations, and special initiatives, as well as ensure that all RTC staff who interact with the contracting and investment community are knowledgeable of and support the program. These activities include:

- a. the coordination with field staff on identifying and targeting technical training needs of MWOB contractors;
- b. the development of training materials and modules for MWOB contractors, and where appropriate, other contractors, to increase MWOB subcontracting;
- c. the coordination with the contracting office on increasing awareness of MWOC policies, directives, and program goals and objectives in the contractor training modules for RTC staff; and
- d. the development of an internal education program to promote the awareness of all RTC staff about MWOB firms and the RTC's commitment to their full participation in its activities.

## **B. Special Programs**

Special initiatives will be established by the Washington Office to ensure minorities and women are represented not only in contracting, but in other

aspects of RTC activities. These efforts will target and promote minorities and women as potential investors, acquirers of thrift institutions, advisors, and joint venture partners. The Washington Office will establish the following programs.

1. **Asset Sales**

a. **Minority Institutions**

In an effort to enhance the viability prospects of minority institutions, and in conformance with §403 of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, the RTC will provide for the segregation of loans or other earning assets to be made available to minority institutions which acquire non-minority institutions or branches under the interim capital assistance provisions of the Act. Such loans or other earning assets will be priced at market price as determined by the RTC.

In general, the RTC will make available loans or other earning assets, on an option basis, in an amount sufficient to offset the liabilities to be capitalized according to the plan submitted by the minority institution to the appropriate regulators, taking into account requirements for liquidity and other regulatory considerations. In no instance will brokered deposits be considered when calculating the amount of liabilities to be assumed or acquired. In implementing this policy, the RTC will coordinate with the appropriate regulators and, upon request, furnish written notification to the appropriate regulators of the intent to make earning assets available.

When loans made available under this policy are furnished with standard Representations and Warranties, and if called upon under such Representations and Warranties, the RTC will cure any deficiency or provide for the substitution of assets or payment of cash, as will be provided for in any agreement entered into.

All loans or other earning assets made available under such assistance shall be for the purpose of augmenting the operating earnings of the resultant depository institution and will be assumed and expected to be for the account of the resultant depository institution. It is also assumed that

these assets are not being purchased for immediate resale.

**b. Minority Investors**

The Office of Minority and Women Outreach and Contracting Programs, in conjunction with the National Sales Center and the Capital Markets Department, will develop and implement outreach activities to encourage asset purchases by minority and women investors. The RTC is not authorized to offer any price advantages to minority and women investors in the sale of its assets. The outreach activities will focus on explaining the process and available financing options.

**c. Investor Database**

Joint ventures initiated to provide pools of venture capital for purchase of RTC assets will be encouraged and promoted through development of an investor database.

The database will be designed to provide a directory of interested minority and women investors for joint purchases of assets with institutional investors and to promote transactions with the Capital Markets Department, the Resolutions Department, and the sales centers. Policies and guidelines, as well as promotional events, will be developed in conjunction with the other divisions.

**2. MWOB Media Program**

The Office of Minority and Women Outreach and Contracting will establish a MWOB database program of related information for utilization in promoting training workshops and seminars, procurement and subcontracting opportunities, and the sale of assets.

**3. Special Events**

Special events will be developed to meet needs or concerns of minority- and women-owned businesses. These events may include: "subcontracting trade fairs", "open houses" with SAMDA contractors, investor forums, and coordination of events with the Minority Business Development Agency, Small

Business Administration, private, non-profit, and other governmental organizations.

The MWOB Department will monitor and provide oversight on all disposition activities in conservatorships where minority- and women-owned firms are potential purchasers.

**C. Certification/Verification**

Firms claiming status as a minority- or women-owned business will be required to provide certification/verification of that status. To preserve the integrity and foster the objectives of the program, RTC must satisfy itself that the ownership, control and day-to-day management requirements of the program are fulfilled. On-site visitations/audits will be coordinated with the Office of Contractor Monitoring. This will permit efficient use of limited staff.

Accordingly, RTC will implement a certification policy and procedure that is uniform and consistent, and discourages fraudulent representations. Procedures will be established by which the MWOB Department will review, evaluate, and tentatively approve certification affidavits from minority- and women-owned businesses, subject to the verification process, prior to any contract award.

Accomplishment of this segment of the program will involve the following procedures.

1. RTC will send all firms selected as offerors a certification affidavit to be completed and submitted with the proposal.
2. The MWOB Department will review returned certification documents to assure that the potential participant has qualifying status.
3. When an MWOB firm is selected for an award, verification procedures, through the mechanism of site visit/audit, will be initiated for all contracts with estimated fees of over \$50,000. Verification will also be required when an award will result in an accumulation of over \$50,000 in estimated fees to a contractor. This process applies to those firms that have not been previously verified.

Further, the MWOB Department reserves the right to perform an on-site visitation to firms with fees under \$50,000.

4. MWOB firms currently doing business with the RTC are required to complete a new certification affidavit.
5. The certification confirmation granted MWOB firms will be valid for a period not to exceed twelve (12) months from the date certification/verification is approved. The contractor will be required to inform RTC of any action which changes or affects the MWOB status. Failure to notify RTC of a change in MWOB status will result in adverse actions by the Corporation.
6. Contracts may be terminated should falsification of self-certification be discovered, with appropriate referrals to the Office of the Inspector General.
7. Adequate notice will be provided of a determination of ineligibility. An opportunity to respond to such determination will be provided.

## **VII. JOINT VENTURES**

In an effort to encourage and enhance opportunities for minority- and women-owned businesses to gain access and entry to RTC contracting activities, the Corporation supports the concept of joint ventures. Through this use of joint ventures, MWOBs working with larger firms will increase their resource development opportunities and capacity to compete independently. A joint venture will be eligible for this program if:

1. the minority- or women-owned business is responsible for a clearly defined portion of the work to be performed and holds management responsibilities in the joint venture; and
2. the minority- or women-owned business must perform more than twenty-five percent (25%) of the duties and be contractually entitled to compensation proportionate to its duties.

Performance of less than twenty-five percent (25%) of the work by the MWOB firm, or an inequitable distribution of compensation in a joint venture does not qualify the joint venture for bonus consideration.

A firm receiving a solicitation from RTC may form a qualifying joint venture with one or more other RTC registered firms that may or may not have received the solicitation. Each joint venture which is established before receipt of any SOS, and every

joint venture engaged by RTC, must have its own Tax Identification Number, and must meet RTC's standards of fitness and integrity.

To qualify for the bonus consideration described below, the joint venture must provide a copy of its written joint venture agreement to RTC at the time it submits a proposal. That agreement must clearly identify the extent of participation for each firm in the joint venture and address, among other matters, the following matters:

1. the purpose of the joint venture;
2. the management structure of the joint venture;
3. the percentage of RTC funds earned by the joint venture to be distributed to the MWOB concern and the allocation of losses, if any;
4. all major equipment, facilities, and other resources to be furnished by each participant to the joint venture;
5. that each party to the joint venture is jointly and severally liable for the liabilities of the joint venture;
6. that the MWOB joint venturer will have the opportunity to represent its interests, or will otherwise be represented at RTC meetings, such as bidders conferences, debriefings, contract closings and contract oversight reviews; and
7. that all parties to the joint venture will fully disclose to one another all Solicitations of Service (SOS), Task Order Bids, Notices of Best and Final offers, SOS Amendments, Notice of Awards, Contracts and any and all other documents or meetings necessary or relative to the joint venture. Such disclosures must be made to the minority or women venturers before submission of any proposals, bids or offers for contracts with the RTC.

#### VIII. SUBCONTRACTING

The RTC has determined that one of the most effective methods for increasing participation of MWOBs in its contracting activities is the use of MWOBs as subcontractors. Generally, a suitable level of MWOB subcontracting is twenty-five percent (25%) of the work on a contract. While the ability to subcontract is within the power of the contractor, the RTC will provide incentives, including the award of cost and technical preferences to offerors

that commit to subcontracting. Greater incentives will be available to contractors who reach higher levels of subcontracting than twenty-five percent (25%).

In accordance with RTC's other general requirements for subcontracting activity, the RTC shall satisfy itself that all private sector firms awarded a contract with the RTC will provide the maximum practicable opportunity to minority- and women-owned firms to participate in subcontracting awards. RTC contractors must agree to carry out this "maximum inclusion practicable" policy in a manner consistent with RTC's overall contracting policies and procedures.

Bonus considerations are available to any offeror who demonstrates a commitment to subcontract twenty-five percent (25%) or more of the work and commensurate fees under a contract to MWOBs. Any offeror that seeks to obtain bonus considerations through subcontracting work to MWOBs must submit with its proposal a subcontracting plan.

The subcontracting plan must include within the proposal:

1. specific roles and responsibilities of the MWOB subcontractors;
2. separate percentages for using minorities and women as subcontractors (how many minorities and how many women);
3. previous experience working with MWOB firms;
4. estimated dollar amounts of participation of MWOB subcontractors;
5. the name of an individual employee of the offeror who will be charged with administering the offeror's subcontracting program and a description of the duties of the individual;
6. a description of the efforts the offeror will make to ensure that minority- and women-owned firms will have an equitable opportunity to compete for subcontracts; and
7. assurances that the offeror will cooperate in any oversight, review, study or surveys as may be required.

Implementation factors:

1. After contract award, contractor must provide the name of the MWOB firm that will receive subcontracting work under the contractor's subcontracting plan, along with

the amount (percentage) of work the MWOB firm will receive and the amount of proportionate compensation to the MWOB firm.

2. The MWOB Department shall act as liaison to the Contracts Department and the oversight managers for consultation on MWOB issues.
3. The MWOB Department shall monitor, oversee and provide assistance to RTC contractors to carry out the subcontracting policy.

The contractor will be required to submit periodic reports to the contracting office in order to allow RTC to determine the extent of compliance by the contractor with the subcontracting plan. Summary subcontracting reports will be required in accordance with RTC instructions.

RTC will evaluate as part of the contractor's performance the utilization of minority- and women-owned firms in the contractor's subcontracting program. This evaluation will be used by RTC to recommend the contractor for monetary incentives. When using any contractual incentive provisions based upon rewarding the contractor for exceeding goals, RTC must ensure that (a) the goals are realistic and (b) any rewards for exceeding the goals are commensurate with the efforts the contractor would not have otherwise expended.

#### **IX. CONSERVATORSHIP CONTRACTING AND INVESTMENT OPPORTUNITIES**

The RTC recognizes the role of the conservatorships in ensuring inclusion of minority- and women-owned firms in the RTC contracting and disposition activities to the maximum extent possible. Within six months after the institution has been placed into conservatorship, each conservatorship shall comply with RTC MWOB contracting policies and procedures.

Accordingly, it is the responsibility of the conservatorship and contracting department to provide the MWOB Department with an opportunity to review and concur on:

1. requests for contracting services;
2. SOS lists;
3. SOS contract, SOW;
4. other contracting documents;
5. application of MWOB bonus points; and

6. certification/verification of contractor's MWOB status

In addition the MWOB Department will have the opportunity to participate in conferences, debriefings, negotiation meetings, best and final interviews and any other meetings between RTC and MWOB contractors.

Because of the large number of small awards emanating from conservatorships, the conservatorships are encouraged in all sole source contracts to give preference to local minority- or women-owned businesses. The MWOB Department at the CFO or Regional Office shall be notified if the conservatorship contracting office cannot locate qualified minority- or women-owned businesses for contracting purposes prior to soliciting for services.

**X. SOLICITATION AND CONTRACT AWARD GUIDELINES**

RTC policies and guidelines will ensure to the maximum extent possible that MWOB firms are included in each contract solicitation. RTC reserves the right to award a contract directly to a minority- or women-owned business by non-competitive award. For noncompetitive contracts under \$5,000, MWOB firms shall be given first consideration. Staff time and resources will be devoted to an internal education program to promote the awareness of all RTC staff about MWOB firms and RTC's commitment to their full participation in its activities.

- A. The MWOB Department staff will have the opportunity to participate in the initial review and Statement of Work (SOW) meeting with the requesting program office and legal division to establish milestones, specific task descriptions, and contractor responsibilities. The MWOB Department will have the opportunity to participate in the Source Selection Plan process to assure inclusion of MWOB firms. The MWOB Department will assure (1) selection criteria for notices or issuance of SOSs, (2) advertising language, and (3) the contract parameters are fair, equitable, and consistent with the contract requirements. This includes reasonable standards for most important, more important, important factors and scoring criteria.

The contracts office shall receive questions either in written form or by offerers' meetings from offerers and develop answers in consultation with the program office, legal division, and MWOB Department representatives.

MWOB Department staff will have the opportunity to participate or have concurrence in the Technical

Evaluation Process. After the technical evaluation, scoring material shall be available for review and concurrence by the program office, legal division, and MWOB Department.

The MWOB Department shall concur on the assignment of technical and cost bonus points prior to selection to the competitive range.

In the post award phase, the MWOB Department will have the opportunity to participate in MWOB debriefings and contractor performance evaluations.

- B. The MWOB Department, in conjunction with the contracting monitoring office, will conduct quarterly and annual site visitations to SAMDA contractors to review for contract and compliance of MWOB policy and procedures.

In order to diversify the contractor base and increase competition among minority- and women-owned businesses, the RTC will implement smaller contract assignments, such as the reduced portfolio size for SAMDAs.

## **XI. BONUS CONSIDERATION**

In the review and evaluation of proposals submitted by firms eligible as minority- or women-owned businesses, MWOB joint ventures, or firms with an eligible subcontracting plan, the Corporation shall provide additional incentives in the technical and cost rating process.

### **A. Application of Technical and Cost Bonus Points**

Technical bonus points will be awarded as a percentage of the total technical points achievable in the rating process in addition to each firm's technical score.

Cost bonus points will be awarded as a percentage of the total cost points achievable in the rating process in addition to each firm's cost score.

The technical and cost bonus points shall be allocated as follows:

<u>Firm Type</u>	<u>Percent Technical</u>	<u>Percent Cost</u>
MWOB	10%	5%
JV with 40% and above MWOB participation	10%	5%
JV with at least 25% MWOB participation	5%	2.5%
Non-MWOB firms with sub-contracting plan of 40% MWOB participation	10%	5%
Non-MWOB firms with sub-contracting plan of at least 25% MWOB participation	5%	2.5%

The MWOB Department will review bonus points assignment upon conclusion of the technical evaluation by the technical evaluation panel and the cost evaluation by the contracts office, prior to determining the competitive range. MWOB issues will be resolved by the Director, Office of Contracts, and the Director, Office of Minority and Women Outreach and Contracting Programs.

**B. Authority to Adjust Technical and Cost Bonus Points**

The Office of Minority and Women Outreach and Contracting Programs will evaluate the Corporation's application of bonus points annually. This annual review will determine if the Corporation is meeting the mandate to ensure the maximum participation possible for minority- and women-owned businesses and the need to adjust the bonus points.

In accordance with the results of this review, the RTC (through the Office of MWOC), after a finding that it is necessary to achieve its statutory objectives, may make a general adjustment to the levels of bonus points as needed to increase MWOB participation to the maximum possible levels.

**XII. LEGAL SERVICES**

The Washington Office will establish a Legal Programs Unit to provide oversight and monitoring of legal referrals to minority- and women-owned law firms ("MWOLFs") and minority and women partners in majority law firms. This unit will coordinate

activities with the Legal Division's Outside Counsel Management Section to identify MWOLFs and enhance contracting opportunities through direct referrals, joint venture/co-counsel referrals, or other arrangements.

The MWOB Department will coordinate with the Legal Department the monitoring of RTC SAMDA contractors to ensure that SAMDA contractors are aware, adopt and adhere to all RTC policies and procedures to contract with minority- and women-owned law firms approved by the Legal Department.

The MWOB Department will have the opportunity to participate on the Legal Services Committee to ensure that the evaluation of minority and women legal firms for potential outside legal engagements is fair and follows RTC's policies and procedures. Technical and cost bonuses will be allocated to all MWOLF firms.

### **XIII. OVERSIGHT AND MONITORING**

The RTC recognizes that the success of this program involves commitment and leadership from senior management. RTC pledges the continuing involvement of all levels of its staff in making this program a success. The Policy Development and Evaluation Division of MWOC will have responsibility for oversight and monitoring functions.

#### **A. Oversight**

In order to achieve these objectives, all offices will report the extent of their involvement in the program, including the number of firms participating in the SOS process and the number of contracts awarded. Further, all offices in RTC shall review a RTC contractor's MWOB subcontracting activities on a quarterly basis. The firm must demonstrate a good faith effort to follow the objectives of the MWOB program and such effort shall be evaluated as part of the the RTC contract performance evaluation conducted by RTC oversight managers. Determination as to conformance shall be the right and sole responsibility of RTC.

1. Field office staff will provide complete and current data regarding RTC contracting activity;
2. The MWOB Department in the field will review and evaluate the reporting and MWOB databases for the extent of minority- and women-owned business participation and will prepare such reports for the Washington staff.

3. The Washington MWOC office will prepare reports for dissemination to management, Congress and the public.

#### **B. Monitoring**

Policy Development and Evaluation staff dedicated to this effort will continuously monitor the usage of RTC policies, procedures and guidelines for compliance with the goals of FIRREA to ensure maximum inclusion of minorities and women-owned firms in the management and disposition of assets of failed thrift institutions. A site visitation program will be established utilizing a uniform assessment process. Each regional and consolidated field office will be visited periodically by the Policy and Evaluation staff to:

1. assess effectiveness of the MWOB program;
2. conduct interviews concerning the program and procedures, and
3. make recommendation to facilitate uniform attainment of the MWOB goals and objectives.

Adherence to and assistance with MWOC policies shall be reflected in RTC Personnel Appraisals to encourage performance and maintain individual accountability.

#### **1. Performance Appraisals**

##### **a. Supervisory Performance Appraisal**

All annual evaluations of performance for Washington, Regional and Consolidated Field Office Directors, Assistant Directors, Department Heads, Section Chiefs and Managing Agents, shall include a review of his/her level of participation in and enhancement of the Corporation's efforts of including minority- and women-owned businesses in all aspects of the Corporation's business opportunities, to the maximum extent possible.

##### **b. Annual Performance Appraisal**

All annual evaluations of senior officials shall include a review of his/her ability and willingness to work with both internal staff members promulgating the importance of the Minority- and Women-Owned Business Programs, as well as with minority- and women-owned

businesses, including investors, goods/service contractors, and law firms, capable of assisting in the management and disposition of RTC assets.

## 2. Incentive Awards

- a. The granting of incentive awards and bonuses to senior staff will take into consideration in significant part the senior manager's ability to show during the calendar year:
- a significant percentage increase in the number of contracts awarded to MWOBs.
  - a significant percentage increase in the number of MWOB subcontractors on SAMDA contracts.
  - a significant percentage increase in the number of MWOBs on SOS lists.
  - a significant percentage increase in the fees paid to MWOBs.

### ~~b.~~ Special MWOB Award Appraisal

In conjunction with the RTC's Director of the MWOLF Program, a special MWOB award will be created for presentation during the Annual Awards Ceremony in December for any outstanding contribution to the MWOB Program during the calendar year.

## XIV. DEFINITIONS

As used in this policy statement, the following terms and phrases shall have the meanings set forth below:

1. **Joint Venture** - An association of entities and/or individuals, one or more of which qualifies as an MWOB, formed by written contract to engage in and carry out a specific business venture for which purpose they combine their efforts, resources and skills for joint profit, but not necessarily on a continuing or permanent basis for conducting business generally.
2. **Management and Daily Business Operations** - In order for minorities or women to be found to control and manage a business concern, the following must exist:

- a. A minority or woman upon whom eligibility is based must:
    - (1) hold the position of President or Chief Executive Officer;
    - (2) control the board of directors of the firm; and
    - (3) have directly related managerial or technical experience and competency.
  - b. That person must be directly responsible for the day-to-day management of the business. To establish such day-to-day management responsibility, the following functions must be performed by the minority or woman president or chief executive officer:
    - (1) establishment of company policies;
    - (2) determination and selection of business opportunities;
    - (3) supervision and coordination of projects;
    - (4) control of major expenditures;
    - (5) hiring and dismissing of key personnel;
    - (6) marketing and sales decisions; and
    - (7) signature on major business documents.
3. **Minority** - Any Asian American, Black American, Eskimo, Hispanic American, Native American, or Pacific Islander, who is either a citizen or a permanent resident of the United States.
- a. **Asian American** - A person having origins in any of the original peoples of the Far East, Southeast Asia or the Indian Subcontinent.
  - b. **Black American (not of Hispanic origin)** - A person having origins in any of the black racial groups of Africa.
  - c. **Eskimo** - A person having origin in the Eskimo or Aleutian peoples.
  - d. **Hispanic American** - A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.
  - e. **Native American** - A person having origins in any of the original peoples of North America.
  - f. **Pacific Islander** - A person having origin in any

of the nations commonly referred to as the "Pacific Rim Countries", including the Hawaiian Islands.

4. **Minority-Owned Business** - A business concern that is owned and controlled by one or more members of a minority group.
5. **Owned and Controlled** - A business:
  - a. which is at least fifty-one percent (51%) unconditionally owned by one or more members of a minority group or by one or more women or, in the case of a publicly-owned business at least 51% of each class of voting stock is unconditionally owned by one or more members of a minority group or by one or more women, or, in the case of a partnership, at least 51% of the partnership interest is unconditionally owned by one or more members of a minority group or by one or more women; and
  - b. whose management and daily business operations are controlled by one or more such individuals.
6. **Unconditional Ownership** - Ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, shareholder agreements, or other similar arrangements which serve to allow the primary benefits of program participation to accrue to entities or individuals other than those upon whom eligibility for this program is based.
7. **Women-Owned Business** - A business concern in which at least fifty-one (51) percent is owned and controlled by one or more women and a significant percentage of senior management positions are held by women. These senior management positions are enumerated in the definition of "Management and Daily Business Operations" above.

#### **XV. SUMMARY**

The RTC is adopting this policy for the Minority- and Women-Owned Outreach and Business Contracting Programs in order to implement the provisions of Section 1216(c) of FIRREA which requires the establishment of a Minority- and Women-owned Business Outreach Program to assure effective and efficient use of those business entities to support all contracting and investment activities of the Corporation. It is imperative that MWOB enterprises are given fair and equitable opportunities to contract with, and

acquire assets from, the Resolution Trust Corporation. Strict conformance to this policy shall be enforced.

XVI. EFFECTIVE DATE

This policy is effective immediately.



**Resolution Trust Corporation**

March 11, 1992

Honorable Donald W. Riegle, Jr.  
Chairman  
Committee on Banking, Housing,  
and Urban Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

As you requested, I am pleased to enclose a copy of the Resolution Trust Corporation's policy for its Minority and Women Outreach and Contracting Program. This policy sets goals for minority- and women-owned businesses (MWOB) in all RTC program areas.

As you will note in the policy, the twenty-five percent goal required of all contractors and the twenty-five percent used in the distribution of bonus points to joint ventures and non-MWOB firms are subject to review in the context of finalizing the "interim final rule" (see footnotes 1 and 2). We recognize, however, that requiring contractors who receive fees of \$200,000 or more to have twenty-five percent subcontracting plans may negate the bonus they would have received under the interim rule. It is our judgment that mandating a subcontracting plan for these large contractors will maximize MWOB participation even if the bonus is negated. The rule essentially requires that the RTC treat subcontracting plans the same as joint ventures. In this regard, our policy is consistent with the rule.

On or before March 31, 1992 you will receive the final rule for the Minority and Women Outreach and Contracting Program. This final rule will include comments received from the public and will incorporate the experiences the RTC has encountered.

I want to assure you that the RTC is committed to this Program, and we shall make every effort to adhere to our mandate. I look forward to working with you and your Committee and welcome your comments and suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Albert V. Casey'.

Albert V. Casey  
President and CEO

Enclosure

# RESOLUTION TRUST CORPORATION

## MINORITY AND WOMEN OUTREACH AND CONTRACTING PROGRAM POLICY

### Goals and Objectives

- All RTC offices, including sales centers, are required to set a goal to allocate, at a minimum, thirty percent (30%) of all contracts and fees to minority- and women-owned businesses (MWOBs).
- The Division of Legal Services is required to set a goal to allocate twenty percent (20%) of the budgeted fees in new assignments to minority- and women-owned law firms (MWOLFs), and ten percent (10%) of the budgeted fees in new assignments to minorities and women in non-MWOLFs.
- All contractors with estimated or actual fees of \$200,000 or more, including those utilizing legal services, are required to set a goal to subcontract at least twenty-five percent (25%) of substantive work and commensurate fees to MWOBs and twenty percent (20%) to MWOLFs. This also includes subcontracting under the Basic Ordering Agreements.<sup>1</sup>
- Within six months of the date of conservatorship, each conservatorship must bring its existing contracts into compliance with the RTC's Minority and Women Outreach and Contracting policies and requirements.
- Evaluation of performance of contractors will include their success in meeting MWOB goals. RTC will conduct periodic visits or audits of contractors to assess their compliance with RTC MWOB policies. Instances of non-compliance may result in contract termination and debarment.
- All annual evaluations of performance for senior officials in each RTC office shall include a review of his or her success in meeting the goals and objectives of the Minority and Women Outreach and Contracting Program.

### Certification of MWOB Status

- All MWOBs who submit proposals are required to complete a self-certification affidavit. MWOB firms currently doing business with the RTC are required to complete a new certification affidavit.
- Certifications will be reviewed and approved by the MWOB office.

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<sup>1</sup> These levels are subject to review in the context of finalizing the Interim Final Rule.

- On-site visitations or audits will be conducted to verify certifications.
- Contracts will be terminated should falsification of self-certification be discovered with appropriate referrals to the Office of the Inspector General.

Solicitation and Award

- MWOB staff will intensify outreach and evaluation efforts in areas of MWOB underrepresentation in contract awards.
- MWOB staff in Washington, regional and field offices will review solicitation and technical evaluation recommendations prior to all contract awards.
- Unresolved MWOB issues in the evaluation and award process will be resolved by the MWOB Department Head and the Director of Contracts.

Technical and Cost Bonus Points<sup>2</sup>

- The technical and cost bonus points shall be allocated as follows:

<u>Firm Type</u>	<u>Percent Technical</u>	<u>Percent Cost</u>
MWOB (at least 51% owned and controlled)	10%	5%
JV with 40% and above MWOB participation	10%	5%
JV with more than 25% MWOB participation	5%	2.5%
Non-MWOB firms with subcontracting plan of 40% MWOB participation	10%	5%
Non-MWOB firms with subcontracting plan of more than 25% MWOB participation	5%	2.5%

- The MWOB office will approve the assignment of bonus points after consultation with the Contracts, Legal and Program offices, prior to all awards. MWOB issues will be resolved by the Director, Office of Contracts and the Director, Office of Minority and Women Outreach and Contracting Programs.

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<sup>2</sup> These levels are subject to review in the context of finalizing the Interim Final Rule.

### Reporting Authority

- MWOB staff in the regional and consolidated field offices will report jointly to the Regional Vice Presidents or Consolidated Office General Managers and the Washington Director of Minority and Women Outreach and Contracting Programs.
- All MWOB personnel decisions which includes selections, performance appraisals, and disciplinary actions, shall be made jointly by the above mentioned RTC officials.
- Unresolved MWOB issues between the Regional Vice Presidents, Consolidated Office General Managers and the Washington Minority and Women Outreach and Contracting Program Director will be resolved by the Executive Committee.

### Asset Sales

- In an effort to enhance the viability prospects of minority institutions, and in conformance with §403 of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, the RTC will provide for the segregation of loans or other earning assets to be made available to minority acquirors of institutions. Such loans or other earning assets will be priced at a market price as determined by the RTC. In general, the RTC will make available loans or other earning assets in an amount sufficient to offset the difference between core deposits, as defined by the RTC, and assets being acquired from the resolved thrift. All loans made available under such assistance shall be for the purpose of augmenting the operating earnings of the resultant depository institution and not intended for resale. In addition, the RTC provides interim capital assistance to minority acquirors of financial institutions.
- The Office of Minority and Women Outreach and Contracting Programs, in conjunction with the National Sales Center and the Capital Markets Department, will develop and implement outreach activities to encourage asset purchases by minority and women investors. The RTC is not authorized to offer any price advantages to minority and women investors in the sale of its assets. The outreach activities will focus on explaining the process and available financing options.



**Resolution Trust Corporation**

JUN 19 1991

June 19, 1991

Mr. Peter H. Monroe  
President  
Oversight Board -- Resolution Trust Corporation  
Washington, D.C. 20232

Dear Peter:

Thank you for your letter dated June 3, 1991, regarding the RTC's most recent proposal for a final Minority- and Women-Owned Business Contracting Program ("MWOB Program"). The Oversight Board's comments on the proposal will be helpful in adopting final regulations that will implement the Program.

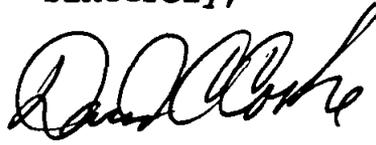
At this juncture, I want to emphasize that the RTC is complying with the requirement of FIRREA that it promulgate regulations governing the MWOB Program. The memorandum, dated April 8, 1991, that transmitted the proposal for your Board's review expressed the RTC's clear recognition that regulations are required to implement the Program. I thought this was understood as indicated in our comments included in your May 9 report, "RTC Management Initiatives: Current Status."

The RTC will, of course, follow all the steps set out in your letter in implementing our program and the regulations. We will, as soon as possible, revise the proposed regulation, taking the Oversight Board's comments into account.

The RTC will promptly bring the proposed final regulation to our Board for adoption as an interim final regulation. As instructed by the Oversight Board, we will delete from the interim final regulation any provision for preferences. Additionally, once we receive the required opinion from the Department of Justice, we will provide the proposed regulation for preferences along with the data you requested. However, we will leave in place the preferences allowed in the current interim policy pending the review by the Department of Justice.

Please let me know if this approach does not comport with your understanding or that of the members of the Oversight Board.

Sincerely,

A handwritten signature in black ink, appearing to read "David C. Cooke". The signature is written in a cursive style with a large, prominent initial "D".

David C. Cooke  
Executive Director

INTEROFFICE MEMORANDUM  
LEGAL DIVISION

RESOLUTION TRUST CORPORATION  
801 17TH STREET, NW  
WASHINGTON, DC 20434

MEMORANDUM TO: Deputies to Directors of the Corporation

FROM: Carl J. Gold *CJG*  
Counsel

DATE: September 25, 1991

SUBJECT: Summary of Case Law on Preferential Treatment of  
Businesses Owned or Controlled by Minorities

Three United States Supreme Court decisions have been issued since 1980 that set the legal parameters for these issues.

The only decision that actually struck down preferential treatment of minority businesses was City of Richmond v. Croson, 109 S. Ct. 706 (1989). In that case, the Court invalidated the city of Richmond's self-imposed minority contracting set-aside program (i.e., at least 30% of the dollar amount of each "prime contract" awarded by the city must be subcontracted to a "minority business enterprise".) The program was found unconstitutional because there was no record of a pattern of discrimination by the city that needed to be corrected. The Court held that a program not mandated by Congress would be constitutional only if it remedied such a recorded pattern of discrimination.

Two other Supreme Court decisions have affirmed preferential treatment of minorities. These cases are Fullilove v. Klutznick, 100 S. Ct. 2758 (1980); and Metro Broadcasting v. FCC, 110 S. Ct. 2497 (1990).

In Fullilove, the Court upheld the Public Works Employment Act of 1977, which set aside federal funds for minority-owned businesses (i.e., funds would be granted to states or localities only if a certain percentage would be used to procure services or supplies from minority-owned businesses). The Act was based on findings of past inequities in awarding federal contracts, and was a reasonable measure designed to remedy such inequities.

In Metro Broadcasting, the Federal Communications Commission ("FCC") adopted a regulation favoring the sale of broadcasting licenses to minority-owned businesses. While the FCC rather than Congress initiated this program, the Court's favorable decision was based on a specific Congressional mandate to continue the program based upon findings of inadequate services to the markets served by minority broadcasters.

It should be noted, however, that Metro was only a 5-4 decision in favor of the preferences. Both Justices Brennan and Marshall, who

avored the preferences, were on the Court for Metro and for Fullilove.

POLITICS & POLICY

# Some Agencies Stage Affirmative-Action Retreat While White House Still Debates Its Battle Plan

By MICHAEL K. FRISBY  
Staff Reporter of THE WALL STREET JOURNAL  
WASHINGTON — As President Clinton considers changes to affirmative-action policies, his administration already is retreating.

Without clear guidance from the top—it's still not known if Mr. Clinton will abandon some established practices — agencies have begun some backtracking on their own. In the Justice Department, for instance, a conservative and cautious standard is now being used for establishing race-based remedies within other government agencies, even before the president makes his decision.

The Commerce Department learned this recently, when it sought approval for a new fellowship program aimed at minority business students. But it got a surprise answer: Don't create a race-based program, because there isn't convincing evidence of past discrimination.

The Commerce Department wanted to model a program for its U.S. and Foreign Commercial Service after one in the State Department: five minority student-interns were to gain experience, which could lead to jobs as foreign commercial service officers, just as the State Department's program has trained students for diplomatic duty. Currently, only 23 of the service's 217 commercial officers are minorities.

The Justice Department said no. In a March 6 memo, Commerce Assistant Counsel Barbara S. Fredericks recommended that "race-neutral criteria", such as economic disadvantages, be used to determine eligibility. "This office has discussed the proposed fellowship program with the Office of Legal Counsel, Department of Justice, and it is their opinion that there is insufficient legal basis for US&FCS to base eligibility for a fellowship program on minority status," Ms. Fredericks wrote.

### Foundation Program

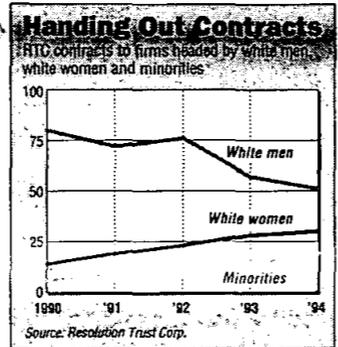
Moreover, she said the Justice Department believes a state program at the Woodrow Wilson National Fellowship Foundation, in place since 1992, "may not withstand judicial scrutiny."

This interpretation has both angered and puzzled civil-rights lawyers. Barbara Arnwine, head of the Lawyers Committee For Civil Rights Under Law, said their view is that the 1989 Richmond vs. Croson Supreme Court decision, plus other cases, does not require the federal government to show a pattern of past discrimination before adopting race-based remedies (though state governments may have to). She voiced "surprise" at the Justice Department's view, saying it recently argued in a pending Supreme Court case that the

federal government has "much broader powers" than the states.

The Commerce Department, meanwhile, isn't sure what to do next. "We are in the process of reassessing the best way to proceed, because it is a very solid program," says Carol Hamilton, the press secretary. She says the department wants more minority commercial officers, the people who work overseas to promote trade, because much U.S. export growth will be in Third World countries.

At other agencies, programs fashioned to help minorities and women also are



under attack. For example, a technicality has been used at the Agriculture Department to question the legality of a task force designed to help African-American land grant colleges. The Federal Deposit Insurance Corp. may not absorb a Resolution Trust Corp. program that helps generate contracts for female and minority headed-firms when the two agencies merge. And the Office of Management and Budget suggests a procurement change that would make it more difficult to know if large government contractors meet federal goals for awarding subcontracts to minority companies.

"Of course this is backtracking," says Frank Watkins of the Rainbow Coalition, an activist group. "If you are not seen as moving forward aggressively on enforcing racial justice and gender-equality remedies, then your government will move backwards."

### Planned Speech

In fact, a presidential review of preference programs, prompted by GOP attacks, has caused exactly what the administration doesn't want: Minorities are irritated by perceived attempts to take away hard-earned victories, yet blue-collar whites aren't impressed. When Mr. Clinton makes a planned speech on affirmative action, originally scheduled for this week but put off until next month, he doesn't want to

upset either constituency.

This issue, however, appears to be uniting two of his potential opponents, Jesse Jackson and Texas billionaire Ross Perot. Mr. Jackson has invited Mr. Perot to join him at a news conference in support of affirmative action.

Meanwhile, the administration sends mixed signals. At a recent meeting, Chief of Staff Leon Panetta vowed to Mr. Jackson and other civil-rights leaders that "we will not go backwards" on affirmative action. Deval Patrick, the head of the Justice Department's Civil Rights Division, will be grilled today at a House hearing on affirmative action. But in the agencies, bureaucrats move in different ways.

Minority-college presidents are upset because the Agriculture Department's general counsel recently ruled the USDA/1890 Task Force, intended to improve its relations with 17 predominately black agriculture schools, is operating illegally. They say the task force, which has both department officials and college presidents, violates the Federal Advisory Committee Act, which limits what officials and citizens can do together in closed meetings.

"They expected us to cease and desist," complains James Tatum, special assistant to the task force. Although there is concern in the civil-rights community that the move is linked to the review of affirmative-action programs, it may reflect unrelated legal requirements. Mr. Tatum says he doesn't question the department's commitment to the task force.

### 'Purely Technical' Concerns

In fact, Tom Amontree, the department's press secretary, says the depart-

ment "fully supports" the task force and has the "purely technical" concerns under review. The task force dates from the Reagan administration and is supposed to help black colleges gain a larger share of federal resources. For example, they received \$69.2 million of USDA funds in 1991, while white schools got \$267.8 million.

To get this done, the task force recommended stationing a bureaucrat at each of the 17 college campuses as a liaison officer, and helped start a program that awards scholarships and, eventually, jobs at the Agriculture Department to 34 minority students each year. It also helps the colleges acquire surplus government property to upgrade their facilities.

"To dismantle this based on some technicality would be unfortunate," says William DeLaurer, president of Delaware State College and a co-chairman of the task force.

Minority businesses are concerned about a proposed regulation change at the Office of Federal Procurement Policy. It would let major government contractors report whether they're meeting small and disadvantaged business subcontracting goals on a company-wide basis, rather than on each contract over \$500,000.

Such a change, says Belinda Guadarrama, president of a minority computer-software company in California, would make it difficult to know if contractors give disadvantaged companies at least 5% of their subcontracting work, the government goal. She says the move comes after she won a court ruling which forces the Pentagon to release twice-yearly reports from contractors about meeting these goals.

### Easing Paperwork Burden

But William Coleman, the OFPP deputy administrator, says the administration wants to ease the paperwork burden on companies by making this change, and has asked Congress to eliminate the need for subcontracting goals on commercial pur-

chases.

At the FDIC, Chairman Ricki Tigert Helder is postponing a decision about how much of an RTC minority and women's program to include when the two agencies

merge at year end. Alan Whitney, the press spokesman, says the FDIC has hired an outside consultant to study the program and Ms. Helder "is awaiting the results of this review."

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SOLUTION  
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## FEDERAL REPORT

# Executive orders, regulations backbone of affirmative action

## Lack of legal mandates makes practice easy to overturn

By Ruth Larson  
THE WASHINGTON TIMES

Affirmative action, fast becoming the pivotal issue of the day, has largely been carried out by executive orders and federal regulations, enforced by federal agencies with little congressional — or public — scrutiny.

But critics say the current system of minority preferences is far different from the one intended by the authors of the Civil Rights Act of 1964, which guaranteed women and minorities equal access to education, federal contracts, housing and employment.

"Agencies may think they're implementing the law," said Michael Rossman, associate general counsel at the Center for Individual Rights. "But judges and courts have taken a law that says 'don't discriminate' and interpreted it as 'do discriminate.'"

Clint Bolick, legislative director at the Institute for Justice, agrees.

"I can say categorically that there is not a single civil rights law that requires the government to engage in preferences."

Nevertheless, since passage of the civil rights law, judges and federal bureaucrats have created a system that mandates preferences for minorities and women.

For example, agencies are officially "encouraged" to use minority-owned firms and banks for federal contracts and federally backed loans. They also are required to set annual goals for the use of such minority firms.

Minorities and women are given preference in several federal grant programs, including housing and education. Federal agencies also must periodically develop affirmative-action plans for their employees, along with a "minority recruitment program" to eliminate "underrepresentation" in specific federal job categories.

Proponents of affirmative action, such as Civil Rights Commissioner Arthur A. Fletcher, say preferences and goals — not quotas — are necessary to address the effects of past discrimination.

"The country has only now arrived at the most difficult area of the struggle for full equality, which is economic equity," Mr. Fletcher told a recent gathering of the group Blacks in Government. "We must concede that the present effect of past discrimination against women and minorities is alive and well and as debilitating as ever."

Mr. Fletcher, who was President Nixon's assistant secretary of labor for employment standards, was instrumental in crafting the influential Philadelphia Plan, which established mandatory minority hiring goals for construction unions working on federally

### AFFIRMATIVE ACTIONS

At least 159 federal regulations require that preference or consideration be given to "race, gender or ethnicity as factors in federal employment or the allocation of federal contracts or grants to individuals or institutions."

**Federal hiring:** Agencies must prepare affirmative-action plans and submit them to the Equal Employment Opportunity Commission for approval.

- Agencies must implement "minority recruitment" programs to eliminate minority "underrepresentation" in specific federal job categories, and must document measurable progress toward that goal.
- Members of the Senior Executive Service are graded on their support of affirmative-action goals.

**Federal contracts:** All employers who receive federal contracts worth more than \$50,000 must file written affirmative-action plans.

- Contractors are given incentives for meeting or exceeding goals set for hiring minorities or using minority- or female-owned businesses as subcontractors.
- Since 1987, the Department of Defense has had a goal of awarding minorities 5 percent of all contracts for procurement, research and development, military construction, and operations and maintenance. Last year, the 5 percent goal was extended to NASA and Coast Guard contracts.
- The Energy Department has a goal of awarding minorities 5 percent of all contracts in its national security program, along with at least 10 percent of its subcontracts.

**Banking:** A variety of loan programs "encourage" agencies to use minority- or female-owned businesses.

- Agriculture: Eligibility for technical assistance grants considers the number of low-income minority families the applicant will assist in obtaining affordable housing.
- Resolution Trust Corp.: Provides "incentives" and "bonus considerations" to RTC prime contractors who agree to give at least 25 percent of the work to minority- or female-owned subcontractors.
- Local Public Works Capital Development and Investment Program: At least 10 percent of every project grant must go for contracts with minority business enterprises.
- Housing and Urban Development: For direct loans to housing projects, "more favorable consideration will be given to projects with the higher percentage of minority or women representation in the ownership of the project."

**Education:** The secretary of Education is required to give priority to awarding grants for postgraduate study to "individuals from minority groups and women."

- In awarding facility improvement grants, the education secretary "shall give priority to institutions of higher education that serve large numbers or percentages of minority or disadvantaged students."
- When a particular minority group is over- or underrepresented on the staff of a vocational education program, the department's Office of Civil Rights "will presume that the disproportion results from unlawful discrimination."

Source: Congressional Research Service report

The Washington Times

funded projects.

Mr. Fletcher says mandatory goals are sometimes necessary when voluntary goals fail. In the case of the Philadelphia Plan, for example, four years of voluntary minority hiring goals had yielded no increases in minority hires at construction sites.

Federal courts upheld the legality of the mandatory hiring goals.

The plan has since been duplicated in every federal department and agency.

"That's what you do when you're not out on the street with a sign that says, 'We shall overcome.' You're inside, overcoming," Mr. Fletcher said.

Mr. Bolick noted that many preferences are cloaked in language designed to help "socially and economically disadvantaged businesses." In practice, however, they equate to race or sex preferences, he said.

"There has never been a straight up-or-down vote on preferences, because proponents of affirmative action are well aware that they couldn't win," Mr. Bolick said. Instead, they have implemented their policies through executive orders and regulations — what he calls "very surreptitious" tactics.

But that approach now makes it easier to roll back the system of federal preferences. "It wouldn't require civil rights laws to be modified. A single comprehensive statute would override all the preferences," Mr. Bolick said.

Mr. Rossman agrees that the system needs to be modified. "We've gone from what was probably a good idea, designed to help out socially and economically disadvantaged, to a system of quotas that look solely at a person's race or ethnic background."

# Career

## The Diversity Drive

When the message comes from the top that all agencies under the Clinton Administration, including the White House, are to reflect this country's diverse makeup, change becomes apparent. From the president down, the commitment to diversifying the federal government is flowing like a river through the offices of those who hope to set an example for the rest of the country.

Secretary of Commerce Ronald H. Brown has been a key force in the growing number of African Americans hired at the U.S. Department of Commerce and other agencies, but diversity is not just a black-and-white issue. Last October, Secretary Brown announced a new initiative to diversify the Department of Commerce, whereby the agency will join with members of the Hispanic Association of Colleges and Universities (HACU) and the National Hispanic University (NHU) to develop and promote employment opportunities for Hispanic youth.

"These memorandums of understanding between the Department and these institutions will strengthen our cooperation as we seek to support the critical mission of the Department and increase employment and other opportunities for Hispanics," said Brown. "I seek to have this

partnership program underscore this administration's commitment to diversity and my own interest in identifying and promoting the best and most talented Hispanics to leadership positions in the Department and become a model for

other federal government agencies."

The coordination of the partnership taskforce is led by Deputy Assistant Secretary for Administration Gloria Gutiérrez. Gutiérrez is former executive vice president and chief operating officer of A.M. Herman & Associates, Inc., a minority-owned corporation specializing in organizational effectiveness and developing corporate strategies for diversity, multiculturalism, career management, minority/disadvantaged business enterprise, community and public relations, and image enhancement.

As part of the program, at least 100



Ronald H. Brown, Secretary of Commerce, and Gloria Gutiérrez, Deputy Assistant Secretary for Administration at the U.S. Department of Commerce.

Hispanic college interns will fly to Washington, D.C. this month to spend ten weeks working in the various bureaus at Commerce including the National Oceanic and Atmospheric Administration, the Patent and Trademark Office, and

the Bureau of the Census. Besides obtaining valuable work experience, Gutiérrez says, interns will be involved in other activities and will tour the Nation's Capital as part of their learning experience. Gutiérrez says that initiatives such as the partnership program are just a small part of the overall systemic changes at the Commerce department. Long-range initiatives for outreach and recruitment in the Hispanic community will enhance systemic institutionalized change within the Department. This is important, according to Gutiérrez, because an institutional change is much more effective than a short term bandaid approach.

Another systemic change for the agency is diversity training, where outside specialists hold two-day interactive seminars for management-level employees. So far, nearly 500 people have gone through the training process.

"We can't change anyone's attitude; they have to want to change. But we can change the working environment which influences attitude change," explains Gutiérrez. She will model the type of behaviors which will support these types of initiatives while contributing to the overall administration's goals and national effort to build and strengthen diversity and a multicultural workforce. By taking part in this initiative and

others, "We are building Commerce face to show that the Department of Commerce is a good place to work," says Gutiérrez.

Another exciting and increasingly diverse workplace is the U.S. Secret Service. The agency employs a focused

recruitment effort that reaches out to the national Hispanic community, and each year more and more Hispanics are sworn in as Secret Service agents. The job is very exciting, says Special Agent Victor Erevia. "It gives you opportunities that no other law enforcement [career] could give." Although he admits that his job is demanding, Erevia looks at it as a welcomed challenge, and highly recommends a Secret Service career.

Erevia was raised by his grandparents in Wharton, Texas, and was motivated by his grandfather to go into law enforcement. "[He] was a big fan of the FBI," remembers Erevia, who is currently assigned to Presidential Protective service at the White House. "This is a premier assignment. I consider it a privilege and an honor," says Erevia who just like in the movies, wears an earphone and scopes the crowd before, during, and after the president's public appearance. Erevia jokes that he actually listens to "99.1 FM, a progressive rock station." In truth, he says, agents, "listen to each other. We have a common post and a shift leader who stands back and gives us instructions." As a Special Agent assigned to protecting the president, Erevia spends a lot of time with the president. Although they don't have many conversations, Erevia says he recently President Clinton chatted with him and other agents while jogging ear in the morning.

Erevia says he loves many aspects of his job such as the traveling, the constant education, and the personal challenges. But you can't disregard the long hours and danger factors, he says. Married with two young children, Erevia says his wife has learned not to dwell on the risks. For Erevia, the benefits of his job



Johnnie B. Booker, VP, Division of Minority and Women's Programs, RTC

far outweigh the negatives.

Diversity in the area of federal contracts has long been a concern of Hispanic vendors who bid for contract after contract with no success. Many experts believe that Hispanic entrepreneurs have not received a fair share of Uncle Sam's pie, but Johnnie B. Booker, Vice President, Division of Minority and Women's Programs at the Resolution Trust Corporation (RTC) is trying to change this. Since Booker joined the RTC in 1991 she has advocated that minority and women business owners should have a fair and equitable chance to compete and participate in the RTC's contracting and investment opportunities. "Booker's mandate is to increase opportunities for minorities and women throughout the RTC's programs," said Roger C. Altman, RTC's Interim Chief Executive Officer. "She will execute outreach programs and new initiatives in asset sales, legal services, and contracting." Recently, President Clinton signed the RTC Completion ACT, which provides the remaining funds for the government to fulfill its obligation to savings and loan depositories. The act also prohibits the RTC from "...entering into any contract involving \$500,000 or more, unless the



Victor Erevia, Special Agent, U.S. Secret Service

contractor subcontracts with Minority and Women Owned Businesses," said Booker. This mandatory subcontracting provision is expected to expand opportunities for minorities and women. This is the key to diversity not only within the federal government, but other establishments as well. It's all about expanding opportunities and with this philosophy everyone wins.

Maggie Contreras

# Lawmakers Seek More RTC Business for Minorities

## Strict Provision on Distribution of Contracts Is Inserted in House Funding Bill

By ALBERT R. KARR

Staff Reporter of THE WALL STREET JOURNAL  
WASHINGTON — Are minority-owned businesses getting a fair shake in the continuing cleanup of the savings-and-loan industry?

That may be the trickiest issue when the House takes up final funding for the Resolution Trust Corp., the government's S&L graveyard. A vote is expected within a few weeks.

Pressured by the Clinton administration, the RTC has recently become more vigorous about extending contracts to minority and women-owned companies. But critics in Congress contend that companies owned by white women receive an inordinate share of the agency's contracts aimed at minorities and women.

Companies owned by white women received 27% of the RTC's contracts during the first five months of 1993, even though only slightly more companies owned by white women than minority concerns have registered as potential contract seekers. Minority-owned companies got 13% of those contracts. Black and Hispanic-owned businesses did garner a slightly higher proportion of the fees, however. The contracts primarily cover financial and asset analysis and management of failed thrifts.

### Added Language

Black and Hispanic House members have successfully pushed for additional language in the RTC funding bill that would require women and minority contracts to be spread more evenly between those groups. "The RTC has proven itself unable to keep up with what they tell Congress they will do" about giving contracts to minority-owned businesses, says

Rep. Maxine Waters, a black Democratic lawmaker from California. "It has been very tough to rely on them simply to do the right thing," she adds.

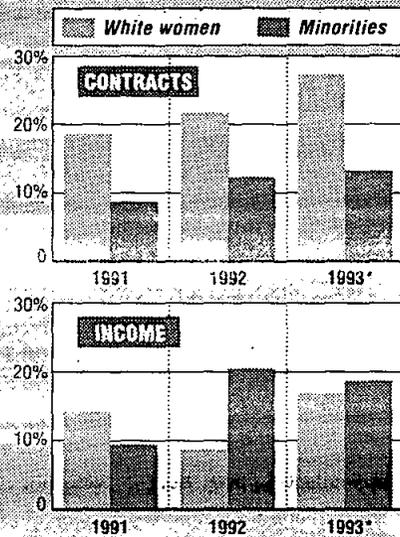
The House measure would force the RTC to write guidelines for achieving "reasonably even distribution of contracts" between various subgroups, such as women, blacks and Hispanics. A roughly equal allotment of contracts would have to be made to any subgroup that accounts for at least 5% of all companies registered with the agency. The bill also would impose sanctions on prime contractors that violate joint-venture and subcontracting requirements involving the use of minority companies. The Senate version of the RTC funding bill doesn't carry such language.

Lucille Dobbins, chief executive of Resolution Resources, a black-owned, financial management and consulting firm formed to do business with the RTC, says the agency isn't doing all it might be for minority-owned businesses. The Chicago company has gotten some work helping to manage the agency's failed S&Ls, but not as much as she would like. She declines to specify the amount of her RTC work. While seeing some improvement recently, Ms. Dobbins says that RTC officials "have not put out the amount of effort to involve the minority community that they should have."

Some RTC officials also appear to favor giving more contracts to minority-owned businesses. Last year, the agency set a goal of awarding 30% of its contracts to businesses owned by women or minorities. The RTC reports that goal has been exceeded lately. But Johnnie Booker, a black woman recently promoted to RTC

### Contested Shares

Percentage of total contract awards issued under the Resolution Trust Corp.'s minority and women-owned business program



Source: Resolution Trust Corp. January-May

vice president for minority women's programs, has said that she may recommend a goal of 20% for minorities alone.

The Clinton administration and the Democratic House leadership need black and Hispanic votes to pass the RTC measure. They worry that the minority-contracting provisions could help to defeat the legislation on the House floor, however.

### 'Quotas Within Quotas'

Opponents argue that this approach would snarl the RTC in de facto "quotas within quotas." Rep. Stephen Neal (D.,

N.C.), chairman of the House Banking Committee's financial institutions subcommittee, recently said he favored the goals of the provisions, but didn't want to "inspire opposition from a number of people who would be automatically opposed to anything that had quotas."

Overall, the RTC is giving a rising share of contracts to minority and women-owned companies. In the first five months of this year, 41% of its awards and 36% of its fees went to such companies, up from 34% and 29%, respectively, in all of 1992. A recent report from the congressional General Accounting Office noted "significant" gains in RTC efforts to award contracts to companies owned by minorities and women. The report praised the agency for creating a specific office to push this program and for setting specific goals. But "key areas [still] need improvement," the GAO said.

Minority-owned concerns cite other reasons they have trouble dealing with the RTC besides its purported unfair allotment of contracts to white women. "It's hard to tell when something would work with the RTC and when it wouldn't work," says Daniel LeMaute, principal owner of LeMaute Financial Group, an asset-management company in Los Angeles. Mr. LeMaute, who is black, worked for the RTC when it was formed in 1989, but says his company has been able to get RTC business only sporadically.

Another problem is that the RTC has been pooling assets and selling them off in huge packages, often limiting the players to larger financial houses, which aren't owned by minorities or women.

# Needed: Minority Lawyers for Big Job

By JOHN H. CUSHMAN Jr.  
Special to The New York Times

ATLANTA, April 5 — Susan Davis, who has a new law practice in Columbia, S.C., had never thought of the Resolution Trust Corporation as a potential client. But that changed after the agency pulled her name from a state bar association list and invited her to a conference this week on opportunities for minority and female lawyers.

"I had no idea there was any work to do for them," said Ms. Davis, who was among more than a hundred lawyers who attended the workshop. The corporation, which seizes bankrupt savings and loan associations and sells their assets, spends about \$1 million a day for legal fees. It expects to pay outside counsel more than \$800 million on the work already assigned, making it the largest consumer of private legal services in the Federal Government.

With years of work ahead, the corporation is in the midst of an aggressive campaign to steer as many legal contracts as possible to minority and female lawyers, as mandated by the law that established the agency. The lawyers are handling everything from routine title searches and foreclosure proceedings to complex lawsuits involving responsibility for a failed savings and loans.

## Facing 76,000 Legal Cases

Many government agencies have similar programs to favor small businesses or those owned by women and racial minorities. But none of them have pinpointed lawyers for so much business. With a caseload of 76,000 legal matters at the start of the year, including 32,000 cases in litigation, the corporation is in an especially good position to motivate lawyers to apply for inclusion on the list of outside counsel approved by the agency.

That is even truer when it comes to women, blacks, Asians, American Indians and Hispanic lawyers, who get preferred treatment when they bid for the corporation's work.

"Consider this your pre-Easter egg hunt," Mary Terrell, the agency's Washington director of legal programs, told the Atlanta audience. After a slow start, the campaign to recruit female and minority lawyers has picked up momentum in the past year. And the Clinton Administration's top finance officials have pledged to expand the effort even further, in part to win support for the savings and loan cleanup among newly influential women and minority members of Congressional banking committees.

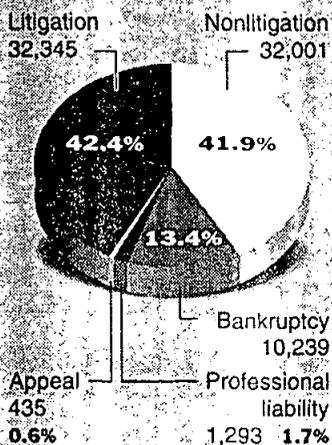
## 20 Percent Work Goal

Last May the agency affirmed the new goal of sending 20 percent of its legal business to minority and women-owned law firms. For 1992 as a whole, just 10 percent of all legal fees went to firms owned by minorities and women. But of the fees paid for new referrals from the time the goal was established until the end of the year, more than \$7 million out of \$28 million, or 26 percent, went to minority or women-owned firms.

During 1992, the corporation referred 17,441 legal matters, or 43 percent of the total, to such firms. In 1991, they received 7,629 referrals, or

## A Bonanza For Lawyers

Resolution Trust Corporation legal matters, by type, as of Dec. 31, 1992.



Source: Resolution Trust Corporation

26 percent.

So far, white women have been sought out by the corporation, along with ethnic and racial minority

groups. But Johnnie B. Booker, the assistant vice president of the corporation in charge of minority and women's programs, said she is considering whether to analyze the agency's data more closely and, if appropriate, to insure that more business goes to racial minorities rather than female lawyers.

The agency was strongly criticized by blacks two years ago for sending little business their way despite the affirmative-action provisions in the statute that established the corporation. It reacted with a stronger program, including a technique that scores bids on the basis of technical factors and cost, then allows minority or women-owned firms to win competitions even when they are not the highest scorers.

Charles B. Patterson, a black lawyer in Greenville, S.C., said that he might do 10 percent of his work for the corporation. He applied to be included on the list of qualified lawyers about a year ago and was approved a few months later. A few months after that he received his first referral.

In the past, it has sometimes taken more than a year for the agency to pass on a referral. The agency says it also pays legal bills more promptly now, since long delays in payment had discouraged some small firms from working for the agency earlier.

## RTC Lags Behind in Effort to Give Out Legal Work to Minorities and Women

By RICHARD B. SCHMITT,

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON — The Resolution Trust Corp. is lagging behind in its efforts to distribute more of its legal work to minorities and women, creating a political problem for the agency just as it seeks billions more in added funding from Congress.

The RTC is required by the August 1989 thrift-bailout statute to make a special effort to seek out minority and women contractors. But, especially in the legal area, recruitment efforts were virtually nonexistent or caught up in bureaucratic snags until last year, and as a result, law firms that would have qualified have lost millions of dollars in potential revenue.

"The numbers are abysmal, and clearly indicate that in the past, the RTC has not taken seriously any commitment for diversity," said New York Rep. Floyd H. Flake, chairman of a House banking subcommittee scheduled to hold hearings on RTC contracting procedures today.

Last year, minority-controlled or women-controlled firms accounted for 9.7%, or \$28.7 million, of the agency's outside legal budget for cases that involve disposing of the assets of failed thrifts, according to RTC testimony scheduled for presentation at today's hearing. The amount compares with a rate of less than 3% in 1991 but falls short of the 20% goal that the agency itself set last year.

RTC officials acknowledge some problems and say they are taking steps to do better. In one show of concern, Treasury Secretary Lloyd Bentsen just last week said the RTC official in charge of minority and women programs would start reporting directly to the agency's chief executive officer.

"We simply have a lot of work to do," said Rick Aboussie, acting RTC general counsel.

The RTC and the Federal Deposit Insurance Corp., which also has been making special efforts to increase diversity among contractors, have been a focus of attention, because in recent years the amount they have spent on private law firms and lawyers has mushroomed. The agencies' combined outside legal spending peaked at almost \$1 billion in 1991, and spending is expected to continue to run several hundred million dollars a year for some time.

The FDIC also gave about 9% of its outside legal work last year to firms controlled by minorities or women, although it hasn't set numerical goals. Jose Ceppi, assistant general counsel, said the FDIC is "looking for continued substantial progress" this year, and he acknowledged pressure from minority bar groups to step up the FDIC's programs.

Both agencies are also encouraging law firms whose partners are mostly white men to hire minorities and women, and are doling out work accordingly. Michael Flowers, a partner at the Columbus, Ohio, law firm of Porter, Wright, Morris & Arthur, says the firm got additional FDIC work, for example, after demonstrating that minority lawyers would have a significant role in investigating a big Texas bank failure for the agency.

But the RTC has suffered because of a feeling among some top officials that minority law firms lacked the expertise or manpower to handle major commercial cases, agency officials said. The program was also bogged down by the agency's own oversight board, which in 1991 sought a legal opinion from the Justice Department on whether giving preferences based on

race, ethnic identity or gender was discriminatory. No opinion was ever received, and the request slowed the program's momentum, officials said.

But such groups as the National Bar Association, the nation's largest group of black attorneys, which has been lobbying both the RTC and FDIC on legal fees, take great exception to the view that there's an insufficient number of skilled minority lawyers. Moreover, they argue that smaller firms — some of them minority-run — tend to be less expensive than some larger ones that the RTC has been using.

A major problem for the RTC has been that "our field staff continues to provide the work to people they know, as opposed to spreading the wealth among minorities and women," said Johnnie B. Booker, assistant vice president in the department of minority and women's programs at the RTC. Ms. Booker, a former deputy assistant secretary of the Department of Housing and Urban Development, joined the RTC in December 1991.

"We are going to have to have a real education, not only with outside firms, but an education with the people inside as well," she added.

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## RTC Enhances Minority and Women's Program

BY DONNA STEPH HANSARD

Recent changes implemented at the Resolution Trust Corporation (RTC)—the agency created by Congress in August, 1989, to contain, manage, and sell failed savings institutions and dispose of their assets—are giving more

minority- and women-owned businesses an opportunity to secure contracts not always available in the past.

In January, 1992 the RTC consolidated and expanded its minority and women outreach and

contracting program under the direction of a senior level official, Ms. Johnnie B. Booker. Another enhancement occurred in May, 1992, when the RTC's Executive Committee adopted the Minority and Women Outreach and Contracting Policy. This newly adopted policy, which serves as the guideline for the RTC, states that all RTC offices, including sales centers, are expected to reach a 30 percent level of contracts and fees to minority- and women-owned businesses. Additionally, the RTC Division of Legal Services is expected to increase to 20 percent the level of legal fees paid on new assignments to minority- and women-owned law firms and at least 10 percent of legal fees paid on new assignments for services performed by minorities and women in non-minority law firms.

"To ensure that our program continues to move forward, there had to be some enhancements made," said Johnnie B. Booker, Assistant Vice President, Department of Minority and Women's Programs. "This policy direction was necessary to ensure the inclusion of minority- and women-owned businesses in all aspects of RTC's activities. The goals are expected to be reached within the next year. Moreover, the performance appraisals of RTC senior officials will reflect their efforts to attain these goals."

Special initiatives have also been established to ensure that minorities and women have an opportunity to purchase assets, including residential and commercial real estate and thrift institutions.

Since the establishment of the new Department of Minority and Women's Programs and the development of the Minority and Women Outreach and Contracting Policy, the RTC has achieved significant increases in contract awards and fees. From August, 1989 to December, 1991, ethnic minority-owned businesses were awarded 8.4 percent (4,954) of RTC contracts, worth a total of \$140 million.

Non-minority women-owned firms were awarded 18.1 percent (10,697) of contracts, worth a total of \$266.1 million.



Johnnie B. Booker

Firms owned by non-minority men were awarded 73.6 percent (43,614) of the contracts worth a total of \$1.4 billion. By comparison, from August, 1989 to July, 1992 (which includes the period after January, 1992, when the RTC expanded its Minority and Women Outreach and Contracting Program), ethnic minority-owned businesses were awarded 9.4 percent (8,139) of RTC contracts, worth \$357 million. Non-minority women-owned firms were awarded 19.1 percent (16,544) of contracts, worth \$357 million. During this same period, companies owned by non-minority men were awarded 71.5 percent (61,802) of the contracts, worth \$1.8 billion.

It is also important to note that since the implementation of the policy, from June, 1992 to July, 1992, RTC increased contract awards by 4.8 percent (3,960) and related estimated fees increased by 4.2 percent (\$100 million). During this period, contracts awarded to ethnic minority men increased by 7.7 percent (424) and related fees increased by 20.3 percent (\$40.7 million). Ethnic minority women awards increased by 6.3 percent (128) and related estimated fees by 1.5 percent (\$0.7 million). Non-minority women awards increased by 5.5 percent (869) and related estimated fees increased by 1.4 percent (\$5 million).

In an effort to meet the Minority and Women Outreach and Contracting Policy's stated goals, by next year, the RTC has made improvements in its program efforts and has developed some in-

novative approaches directed toward greater participation of minority- and women-owned businesses in the RTC's contracting process.

Source lists, which identify qualified potential offerors, are being developed nationwide for each new contract solicitation. Each source list must include minority- and women-owned firms and are generated for specific services and geographical areas.

In addition, the certification and verification of the status of minority- and women-owned businesses has been given increased attention to ensure the integrity of the program.

Technical and cost bonus points are awarded minority- and women-owned businesses to raise the competitive positions of their acceptable proposals relative to acceptable proposals from non-minority firms. These bonus considerations are also provided to business entities created through joint-ventures and subcontracting agreements between minority- and women-owned firms and non-minority businesses.

To further support the consistent implementation of the policy, the Department of Minority and Women's Programs' field personnel are conducting training programs for RTC field management, receiverships, conservatorships and Standard Asset Management Disposition Agreement (SAMDA) contractors.

The implementation of these guidelines and strategies set forth in the RTC's Minority and Women's Outreach and Contracting Policy not only acknowledges the Corporation's commitment to the participation of minority- and women-owned businesses, but creates avenues for increased participation by these firms. "This policy and its implementation truly represents the commitment of the executive level management of the Corporation, and we have begun to see an increase in the numbers nationally," stated Booker. "This is indeed a win-win situation for the RTC, minority- and women-owned businesses, and non-minority firms as well."