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BLOG

Understanding and Addressing Increased FCA Exposure Risks Resulting from DEI-Focused Executive Order

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On January 21, 2025, President Trump issued a sweeping executive order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (EO).[1] The EO targets diversity, equity, inclusion, and accessibility (DEI) programs in the public and the private sectors. The EO also signals that organizations receiving federal funds, whether through government contracts or otherwise, may be liable under the False Claims Act (the FCA)—one of the government's most powerful antifraud enforcement tools providing for treble damages and steep penalties—if they maintain what the EO refers to as "illegal" DEI programs that violate federal anti-discrimination laws. Significantly, the EO includes provisions that are likely to make it easier to establish FCA violations. In addition, given the FCA's *qui tam* provision allowing whistleblowers to file FCA claims on behalf of the government and share in any recovery, the EO may function as essentially a "call to action" prompting whistleblowers to file FCA complaints targeting what they view to be "illegal" DEI programs. Further, the EO includes a directive to the Attorney General and federal agencies to identify targets for federal enforcement of civil rights violations based on unlawful DEI programs, which would not necessarily be limited to recipients of federal funding. Given the expected increase in government and whistleblower scrutiny of DEI programs resulting from the EO, it is critical for organizations that maintain DEI programs to take appropriate steps to understand and minimize the FCA and other exposure risks presented by the EO.

KEY PROVISIONS IN THE EO RELATING TO THE PRIVATE SECTOR

Revocation of Executive Order 11246 (dated September 24, 1965): The EO revokes a number of prior executive orders, including Executive Order 11246 issued by President Johnson nearly 60 years ago, which prohibited discrimination in federal contracting and mandated that federal contractors and subcontractors develop affirmative action plans for minorities and women and ensure equal opportunity. The EO provides that federal contractors "may" continue to comply with the prior order's affirmative action requirements and regulatory scheme for a period of 90 days from the date of the EO (i.e., until April 21, 2025).

Contractors and Grant Recipients Must Certify Compliance with All Applicable Federal Anti-Discrimination Laws: The EO directs the Office of Federal Contract Compliance Programs (OFCCP), an arm of the Department of Labor, to hold "contractors and subcontractors responsible for taking 'affirmative action[.]'" The OFCCP is directed to stop contractors from "engag[ing] in workforce balancing based on race, color, sex, sexual preference, religion, or national origin[.]" To that end, the EO mandates two new terms on all future federal contracts and grants:

1. Each agency head will require federal contractors and grant recipients to agree that "[their] compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of" the FCA.[2]
2. Federal contractors and grant recipients must also certify that they do "not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."[3]

Attorney General Directed to Focus on "Illegal" DEI Practices in the Private Sector: The EO instructs the Attorney General to submit recommendations on how to "encourage the private sector to end illegal discrimination and preferences, including DEI" and requires the Attorney General in consultation with the "heads of relevant agencies" to submit a report within 120 days containing recommendations for enforcing federal civil rights laws to end illegal discrimination and preferences. According to the EO, the report must contain a proposed strategic enforcement plan highlighting, among other things, (i) key sectors of concern within each agency's jurisdiction; (ii) the "most egregious and discriminatory DEI practitioners" in each such sector; (iii) a plan of "specific steps or measures to deter DEI programs or principles . . . that constitute illegal discrimination or preferences"; (iv) other strategies to encourage the private sector to end illegal discrimination; (v) litigation that would be potentially appropriate for federal lawsuits, intervention, and statements of interest; and (vi) potential regulatory action. As part of the plan of specific steps "to deter DEI programs or principles . . . that constitute illegal discrimination or preferences," each agency is required to "identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars."

Exceptions to the EO: The EO includes specific carve-outs for veterans of the U.S. armed forces and persons protected by the Randolph–Sheppard Act, which authorizes blind individuals to benefit from business entrepreneurship through operation of vending facilities on federal property.

EO SIGNALS HEIGHTENED RISKS OF FCA INVESTIGATIONS AND LITIGATION

The new EO significantly increases the risk that organizations doing business with the federal government, such as federal contractors and organizations that receive federal funding or grants, will be the subject of an FCA investigation by the government and/or an FCA claim targeting DEI programs that are believed to be in violation of federal anti-discrimination laws. First, the EO specifically requires that the Attorney General and federal agencies identify targets for federal enforcement. Second, as explained more fully below, certain provisions of the EO will make it easier to establish an FCA violation. Third, given that the FCA allows private whistleblowers (known as relators) to file *qui tam* actions on behalf of the government in exchange for a share of the recovery (ranging from 15 to 30 percent), the EO is likely to incentivize whistleblowers to bring FCA claims targeting organizations with DEI programs viewed by the whistleblower as unlawful.

FCA Overview. The FCA imposes liability on any person or entity that submits to the federal government a false claim for payment. The FCA provides for treble damages and substantial financial penalties. Further, a violation of the FCA may result in significant collateral consequences, including exclusion from participation in federal programs and contracts. In recent years, the FCA has become the federal government's most effective tool in combating waste, fraud, and abuse in federal spending in a wide variety of industries. In fiscal year 2024 alone, the Department of Justice recovered more than $2.9 billion in settlements and judgments in civil cases involving fraud and false claims against the government.[4]

The essential elements of a typical claim for violation of the FCA are (i) a false statement or fraudulent course of conduct, (ii) made or carried out with knowledge of the falsity, (iii) that was material, and (iv) that involved a claim (a request or demand for money or property from the United States).

EO's Certification Requirement. The EO's requirement that contracts and grants include a term requiring the contractor or grant recipient to certify that it does not operate any DEI programs that violate any applicable federal anti-discrimination laws, *see* EO § 3(b)(iv)(B), likely will make it easier to allege and prove an FCA violation.

FCA liability attaches to claims or certifications that are either factually false or legally false. "Factual falsity" refers to factually false information (e.g., a claim misrepresenting the quantity of goods provided). "Legal falsity" typically involves information that, although true, violates a legal condition of payment (e.g., a claim that correctly states the goods provided but falsely certifies that the contractor has complied with applicable law or contract terms).

Although many government contracts and applications for federal funding typically require the contractor or applicant to provide a general certification that it is in compliance with applicable law, the EO's specific requirement of a certification that the organization's DEI programs are in compliance with federal anti-discrimination laws may simplify what the government or a relator must allege and prove to establish an FCA violation based on a false certification theory.

EO's Requirement of Agreement as to Materiality in Contracts. The EO requires that future federal contracts and grants include a term requiring the contractor or grant recipient to agree that compliance with all applicable federal anti-discrimination laws is "material" to the government's payment decision. *See* EO § 3(b)(iv)(A). This agreement may go a long way to helping the government establish the materiality element of an FCA claim—previously described by courts as "rigorous" and "demanding." *Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176, 194–95 (2016).

Moreover, although this agreement requirement imposed by the EO seemingly applies only to future contracts and grants, it is possible that an agency will seek to amend existing contracts or grants to include this additional provision. In any event, the federal government or relator may seek to use the EO to argue that compliance with federal anti-discrimination laws is material to the government's payment decision regardless of whether the language of the EO is added as an express term to an existing contract.

Whistleblower (*Qui Tam*) Actions. As noted above, the EO is likely to incentivize whistleblowers to bring FCA claims, given the EO requirements that will make it easier to prove an FCA violation and the prospect of recovering a significant bounty for successful FCA claims. Indeed, in fiscal year 2024, whistleblowers filed 979 *qui tam* actions, the highest number of such suits ever commenced in a single year.[5] Moreover, *qui tam* actions historically drive the government's FCA recoveries. For example, in fiscal year 2024, over $2.4 billion of the $2.9 billion total recovered in FCA settlements and judgments arose from lawsuits filed under the FCA's *qui tam* provisions, which resulted in awards to relators of over $400 million.

Damages and Collateral Consequences. As discussed above, the financial consequences of being held liable for violating the FCA can be substantial, including treble damages and steep per claim penalties. Although single damages for an FCA violation can be calculated in different ways, a defendant can expect that the government or relator will seek the full value of the contract at issue where the organization is found to have violated the FCA based on falsely certifying that its DEI program is in compliance with federal anti-discrimination laws, regardless of whether the goods or services provided were as represented. Further, each claim for payment under a federal contract can be viewed as a separate claim, subject to the per claim penalty, which currently can be as high as approximately $28,000 per claim, and periodically adjusted for inflation. Finally, beyond treble damages and per claim penalties, those found liable under the FCA can also face significant collateral consequences, including potential debarment or exclusion from participation in federal programs and contracts or shareholder derivative suits claiming that the failure to manage risk appropriately led to violations of the FCA.

CRITICAL STEPS TO MINIMIZE RISK OF EXPOSURE

- ***Stay Current on Changing Rules and Regulations.*** Given certain ambiguities in the EO, including how DEI policies and practices are defined and what attributes will be deemed to be in violation of civil rights laws, we expect that additional guidance and regulations are likely to be introduced in short order. Indeed, the Department of Energy (DOE) recently issued a memorandum applying to all DOE funding agreements and awards advising that the DOE is "moving aggressively" to implement the EO and directing the suspension of DEI programs and certain other requirements and principles in any loans, grants, contracts, and other sources of DOE funding. States may also take steps to issue rules and regulations targeting DEI programs maintained by organizations receiving state funds, subjecting such organizations to potential exposure under state false claims acts.

- ***Identify Potential DEI Policies and Practices at Risk.*** Although parts of the EO remain vague and additional guidance is likely forthcoming, it is important for organizations with DEI programs to take steps as soon as possible to identify DEI policies and practices that could be viewed as "illegal" under the EO and consult with counsel to determine potential risks under existing law. To that end, companies should also consult with counsel should they seek to alter or eliminate their existing DEI policies and practices, as doing so could subject them to legal challenges, including discrimination claims. By understanding the risks faced should DEI policies and practices come under scrutiny, efforts can be made to address and mitigate those risks in advance in order to potentially avoid exposure to the financial and operational consequences of an FCA investigation or action, and other legal challenges.
- ***Seek Guidance Before Entering into Any New Contracts or Amendments.*** Given the potential breadth and ambiguity of the EO, it is advisable to consult with counsel before entering into any new contract with the government or otherwise applying for any federal funding from the government.
- ***Maintain a Strong Compliance Program.*** It is crucial to have a strong compliance program in place with an effective reporting system. Whistleblowers are often disgruntled current or former employees; whenever there is any prospect of dissatisfaction or resentment among employees there is an increased likelihood that personnel will reach out to the government to report any perceived improprieties with an organization's DEI program. Accordingly, companies should take steps to encourage and remind employees to be vigilant about reporting complaints internally, take any complaints seriously, and reiterate the importance of maintaining an ethical and compliant workplace. Taking these steps will allow the company to conduct an internal investigation and take steps to remediate any issues, possibly prior to the commencement of an FCA investigation or litigation by the government or the filing of a *qui tam* action by a whistleblower.

If you have any questions regarding this or related subjects or if you need assistance, please contact the authors of this article (Suzanne Jaffe Bloom, Cristina Calvar, Benjamin Sokoly, Josh A. Roth), members of our Government Investigations, Enforcement, and Compliance Practice or your Winston & Strawn relationship attorney. You can also visit our Government Investigations, Enforcement, and Compliance Practice webpage and our Government Program Fraud, False Claims Act & Qui Tam Litigation Playbook for more information on this and related subjects.

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[1] Exec. Order, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* (Jan. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

[2] EO § 3(b)(iv)(A).

[3] EO § 3(b)(iv)(B).

[4] DOJ Off. of Pub. Affairs, *False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024* (Jan. 15, 2025), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-29b-fiscal-year-2024.

[5] *Id.*

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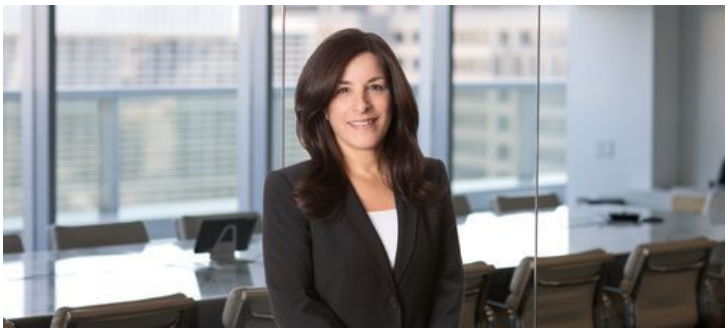

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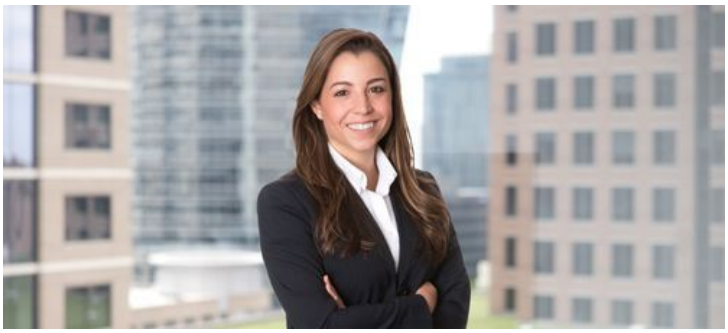

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