THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

MARCH 11, 2026 | VOLUME 68 | ISSUE 10

¶ 56 FEATURE COMMENT: Living With The EO 14173 Certification Requirement For Federal Contractors, One Year In

Throughout 2025, the Trump Administration communicated that it considered Diversity, Equity, and Inclusion (DEI) programs legally suspect. Executive Order 14173 declared that DEI programs "violate the text and spirit of our longstanding Federal civil-rights laws" and directed agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities." The EO invoked the False Claims Act to signal substantial financial exposure for federal contractors, and the Department of Justice established a Civil Rights Fraud Initiative to pursue claims. Throughout 2025, federal agencies presented Government contractors with EO 14173 certifications, requiring contractors to agree that compliance with federal antidiscrimination laws is material to the Government's payment decisions under the FCA and attesting that any DEI programs do not violate federal antidiscrimination law. Many companies responded by undertaking privileged reviews of their DEI programs and, in some cases, rolling them back.

More recently, however, DOJ has vocally affirmed that DEI programs can in fact be lawful. At the Federal Bar Association's False Claims Act conference on Feb. 19, 2026, Deputy Assistant Attorney General Brenna Jenny from DOJ's Civil Division stated plainly: "Let me start by making absolutely clear, DOJ Civil Fraud is not investigating companies for having a DEI program." https://news.bloomberglaw.com/in-house-counsel/doj-focuses-on-dei-practices-that-sway-employment-decisions. She emphasized that companies "can engage in discrimination with or without DEI programs" and "can also operate a DEI program without it being discriminatory." Instead, she explained that DOJ's investigations focus on "companies that implemented programs and practices that pressured supervisors and management to make hiring and promotion decisions based on race or sex," including setting and tracking demographic goals, tying executive compensation to diversity metrics, and requiring employees to set DEI-related goals that affect compensation and promotion. In Fourth Circuit litigation, DOJ conceded that there is " 'absolutely' DEI activity that falls comfortably within the confines of the law." *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 25-1189, slip op. at 26 (4th Cir. Feb. 6, 2026) (Diaz, C.J., concurring).

The Certification Requirement Has Not Been Standardized Across Federal Agencies—Notably, the EO 14173 certification requirement has not been standardized for federal contractors, and its key terms (such as "DEI," "illegal DEI," and "promoting") remain undefined. This lack of standardization has created uncertainty for contractors operating across multiple agencies.

The absence of a formal rulemaking process was intentional. Unlike prior workplace discrimination-related executive orders, EO 14173 did not instruct the Secretary of Labor to undertake rulemaking to implement its requirements. Ordinarily, to amend the Federal Acquisition Regulation and the binding contract terms specified therein, agencies must go through general rulemaking procedures, including publication in the Federal Register and a public comment period. The administration bypassed these procedures. Instead, the Civilian Agency Acquisition Council issued a memorandum authorizing individual civilian agencies to "issue a class deviation" to implement the orders, leading to the patchwork of certification language that contractors have encountered. https://www.acquisition.gov/sites/default/files/caac/CAAC_Letter_2025-01.pdf.

The Government has defended this variability. In the *National Association of Diversity Officers* litigation, DOJ argued that the certification provision "is simply a directive … to include such certification provisions in substance" and that agencies need not use verbatim language from the executive order. *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 25-cv-333 (D. Md. Dkt. 35 Feb. 18, 2025).

The result has been a proliferation of agency-specific certification language. Below are five examples of DEI certification language used by agencies in 2025, and their variation illustrates what contractors have had to navigate as the differences may affect contractors' legal exposure by changing what must be certified, what documentation must be kept, when noncompliance triggers consequences, and how easily the Government can frame disputes as actionable under the FCA.

Agency	Certification Text
Department of Transportation	Furthermore, pursuant to Executive Order 14173, Ending Illegal Discrimination And Restoring Merit-Based Opportunity, the Contractor certifies that it is in compliance with the Equal Protection principles of the Constitution and all applicable Federal anti-discrimination laws, and acknowledges that such compliance is material to the Government's payment decision under the False Claims Act (31 U.S.C. § 3729(b)(4)). The Contractor also affirms that it does not operate any diversity, equity, and inclusion (DEI) initiatives that are inconsistent with the Equal Protection principles of the Constitution and the non-discrimination requirements of Federal law, as interpreted by the Supreme Court in *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023).
Department of State	By signing … the Recipient certifies the following: 1) Its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code and; 2) It does not operate any programs promoting Diversity, Equity, and Inclusion that violate any applicable Federal anti-discrimination laws.
DOJ, Office of Violence Against Women	The recipient agrees that its compliance with all applicable federal civil rights and nondiscrimination laws is material to the government's decision to make this award and any payment thereunder, including for purposes of the False Claims Act (31 U.S.C. 3729-3730 and 3801-3812), and, by accepting this award, certifies that it does not operate any programs (including any such programs having components relating to diversity, equity, and inclusion) that violate any applicable federal civil rights or nondiscrimination laws.

Agency	Certification Text
U.S. Army and Air Force Exchange	Contractor will comply with applicable EEO Laws. In accordance with EO 14173, Contractor agrees that its compliance with all applicable Federal anti-discrimination laws is material to the Exchange's payment decisions for purposes of 31 U.S.C. § 3729 (b)(4). Contractor certifies it does not operate any programs in violation of any applicable Federal anti-discrimination laws.
HHS, National Institutes of Health	By accepting the grant award, recipients are certifying that: (i) They do not, and will not during the term of this financial assistance award, operate any programs that advance or promote DEI, DEIA, or discriminatory equity ideology in violation of Federal anti-discrimination laws; and (ii) They do not engage in and will not during the term of this award engage in, a discriminatory prohibited boycott.

However, standardization could potentially be on the way. In January 2026, the General Services Administration announced a proposed rulemaking that would update the Financial Assistance General Representations and Certifications in SAM.gov to align with EO 14173 and DOJ's July 2025 guidance for grant recipients. See Fed. Reg. 3726 (Jan. 28, 2026). If the FAR Council pursues a similar approach for federal contracts, certification language may become standardized and required to be made in the System for Award Management (SAM). Whether this is a welcome development will depend on what the final certification language turns out to be. If the standardized certification merely tracks the language of EO 14173, contractors may not be overly concerned given that courts are increasingly viewing the EO's certification requirement as merely codifying a commitment to comply with existing antidiscrimination law. But if the language is somehow problematic (e.g., by invoking the Equal Protection Clause of the U.S. Constitution or the Supreme Court's *Students for Fair Admissions* decision, or introducing new vague terms), it will be difficult for contractors to object if they want to maintain current SAM registrations.

In Any Certification-related Enforcement Action, the Government Must Prove Actual Discrimination, Not Merely the Existence of a DEI Program—Litigation challenging EO 14173 is playing out in federal courts across the country. In February 2026, the Fourth Circuit vacated a preliminary injunction that had blocked enforcement of the certification provision. *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 25-1189 (4th Cir. Feb. 6, 2026). The court accepted the Government's argument that the certification provision "requires only that plaintiffs certify compliance with federal antidiscrimination laws," not that contractors abandon lawful DEI programs. The practical consequence is that the Government will not succeed in an FCA suit premised merely on the existence of a contractor's DEI program; it will have to establish that specific activities actually violated existing and applicable federal antidiscrimination law. In *Chicago Women in Trades v. Trump*, the Seventh Circuit is considering the Government's argument that the EO 14173 certification merely requires contractors to affirm compliance with existing antidiscrimination law—an argument the district court rejected in light of Attorney General Bondi's declaration that EO 14173 made clear that all DEI policies violate civil rights laws.

It appears likely that the future of challenges to the EO 14173 certification may shift from front-end objections to individual enforcement actions. As DOJ itself argued before the Seventh Circuit, questions about whether a contractor's programs violate antidiscrimination laws "would be resolved by a court, whether in an action directly under the antidiscrimination laws or an action premised on an allegedly false certification under the False Claims Act." *Chicago Women in Trades v. Trump*, No. 25-2144 (7th Cir. Dkt. 69, Jan. 26, 2026).

Contractors May Have Strong FCA Defenses—President Trump stated in his 2026 State of the Union address that "[w]e ended DEI in America." https://apnews.com/article/donald-trump-transcript-state-of-union-2026-c13e2a07df999b464b733f4a6e84dbd4. This statement of victory reflects the reality that the administration successfully leveraged the threat of enforcement to persuade many private sector companies to modify or abandon their DEI programs. https://www.nytimes.com/i

nteractive/2025/03/13/business/corporate-america-dei-policy-shifts.html.

But many contractors have retained their DEI programs and are prepared to defend them if challenged. And even contractors that rolled back their programs in recent months could nevertheless face Government scrutiny for past practices. Thus, it may be helpful to bear in mind that strong defenses to alleged FCA violation are available.

The FCA requires both that the defendant have made a false statement (falsity) and that the defendant acted "knowingly," meaning with actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of the statement (scienter). A certification of compliance with anti-discrimination laws is not false simply because a company has a DEI program or has undertaken steps to encourage a diverse workforce. The Government would need to prove both that a company engaged in practices that were unlawful, and that the company had no basis to believe it was acting lawfully. Companies that have in the past year undertaken a privileged review of their DEI program and have or had a good faith belief that it was lawful will have a very strong defense that there is no FCA liability because the company did not represent anything knowingly false.

Even if a statement were arguably false, the Government must show it was material to the payment decision, meaning that it must have a "natural tendency to influence, or be capable of influencing," the Government's decision to pay the claim. Although the Government has asked contractors to certify that compliance with nondiscrimination law is material, those certifications are not dispositive. Even beyond a company's own DEI practices, substantial evidence may emerge to show that federal agencies were aware many companies engaged in affirmative DEI practices, yet continued doing business with those companies despite that awareness.

Finally, the FCA allows the Government to recover damages, measured as the difference between what the Government paid and the value it actually received. Most DEI-related cases will have difficulty establishing any meaningful damages under this standard. While DOJ leadership recently suggested that DOJ may seek total contract damages in some cases, that is a difficult case to make, particularly where the contractor delivered the goods or services for which it was paid. DOJ has also suggested it may treat the cost of discriminatory programs as the measure of damages. That approach, however, faces its own difficulties, and would make sense only to the extent that the Federal Government bore the cost of the program in question. While low or nonexistent damages do not erase FCA liability, they will make many cases unattractive to pursue.

Conclusion: What Government Contractors Should Do Now—The past year has demonstrated that the administration's DEI enforcement initiative is real but bounded by existing legal constraints that have not changed. Contractors should:

1. Understand what is actually prohibited. The Government's focus is not on DEI programs per se, but on practices that result in employment decisions based on protected characteristics.

2. Document the lawful purposes of DEI programs. If programs are designed to expand the talent pool, ensure inclusive access, and base decisions on skills and qualifications, that documentation supports defenses on falsity and scienter.

3. Monitor the appellate litigation. The outcomes in the Seventh and Ninth Circuits will shape the enforcement landscape. The Fourth Circuit's reasoning that the certification requires only compliance with existing law may provide a template for how courts will interpret the provision going forward.

4. Read certification language carefully. If it appears to demand more than compliance with existing law, consider seeking clarification before signing. Bring ambiguities to the contracting officer's attention and memorialize the basis for a reasonable interpretation.

5. Watch for standardized certification language. If GSA's proposed rulemaking for grants proceeds, and if the FAR Council fol-

lows suit for contracts, certification language may become standardized in SAM, making front-end objections more difficult and shifting the focus to enforcement-stage defenses.

Experienced FCA counsel can assist contractors retaining DEI programs to navigate any perceived risk in light of continued legal developments.

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This Feature Comment was written for THE GOVERNMENT CONTRACTOR by **Dominique Casimir,** ***a partner in the Government Contracts practice group of Blank Rome LLP and co-chair of the firm's General Litigation practice group, and*** **Sara N. Gerber,** ***an associate in the firm's Government Contracts group. For more information or assistance, please contact Dominique (dominique.casimir@blankrome.com), Sara (sara.gerber@blankrome.com), or another member of Blank Rome's Government Contracts practice group (www.blankrome.com/services-and-industries/government-contracts#team).***