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Legal Sidebar

False Claims Act Enforcement Involving Diversity, Equity, and Inclusion Programs

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The Trump Administration has adopted the view that some "diversity, equity, and inclusion" (DEI) programs and policies illegally consider protected characteristics in violation of antidiscrimination laws, such as Title VI of the Civil Rights Act of 1964 (Title VI) and Title IX of the Education Amendments of 1972 (Title IX). Title VI prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin, while Title IX bans sex discrimination in federally funded education programs or activities. The Administration has not formally defined "DEI," but it has referred to it as involving "dangerous, demeaning, and immoral race- and sex-based preferences." Through executive orders, President Trump has directed executive agencies to review, and in some cases "terminate," federal grants related to "DEI." (Although this Sidebar focuses on grants, the executive orders also address federal procurement contracts, which are discussed in other CRS products.)

On May 19, 2025, the Department of Justice (DOJ) established the Civil Rights Fraud Initiative to "utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws." The False Claims Act (FCA) prohibits any person, including federal grantees, from presenting a "fraudulent claim for payment or approval" to the federal government. In a memo, the Deputy Attorney General wrote that the FCA is "implicated whenever federal-funding recipients . . . certify compliance with civil rights laws while knowingly engaging in racist preferences . . . including through [DEI] programs that assign benefits or burdens on race, ethnicity, or national origin." Some FCA practitioners have viewed this announcement as a shift in DOJ's FCA enforcement priorities and interpretation of the statute. For grantees, the compliance risks may lead them to review their policies and procedures to more closely align with the executive branch's interpretation of antidiscrimination laws. Some organizations contend that there is uncertainty about which DEI practices could subject grantees to FCA liability, which could have a "chilling effect" on lawful practices.

This Sidebar explores these developments from a legal perspective. It begins with an overview of the FCA, before discussing funding recipients' potential FCA liability for false certifications of compliance with antidiscrimination requirements. It then briefly explains how the second Trump Administration has interpreted and implemented federal antidiscrimination statutes and the FCA with respect to "DEI" programs and policies. The Sidebar also discusses litigation challenging DEI-related conditions in federal grants and examines the federal government's present efforts to use the FCA to address "illegal DEI" activities. The Sidebar concludes with considerations for Congress.

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The FCA and Liability for False Certifications

The FCA is designed to deter fraud against the government and protect the public fisc. The law prohibits knowingly submitting false claims for payment or reimbursement to the federal government, including by making or using a false record or statement that is material to a claim. A person who violates the FCA is subject to civil penalties currently ranging from $14,308 to $28,619, plus three times the amount of damages sustained by the government (i.e., treble damages).

The FCA authorizes two types of civil actions. The federal government can sue a person for violating the act and seek to recover damages as described above. Alternatively, a private individual, known as a *relator*, can bring a "*qui tam*" action—a lawsuit on behalf of the individual and the federal government—and obtain a portion of the proceeds in any settlement or judgment against the defendant. The essential elements of an FCA action, which the government or relator must prove, are that (1) a person made a "claim" as defined in the statute; (2) the claim was false; (3) the person acted with knowledge or reckless disregard of the falsity (i.e., scienter); and (4) the false statement was "material," meaning it had "a natural tendency to influence" or was "capable of influencing" the government's payment decision.

Although the FCA is commonly used to address allegations of overbilling or affirmative misrepresentations, the statute can also create liability for failure to disclose noncompliance with federal law. In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Supreme Court recognized an "implied false certification" theory of liability where a defendant "makes specific representations about the goods or services provided" in a claim for payment or approval, and "knowingly fails to disclose [its] noncompliance with a statutory, regulatory, or contractual requirement." In such circumstances, the omissions render the representations "misleading half-truths." Because of the FCA's "demanding" materiality requirement, not every undisclosed instance of noncompliance rises to the level of an FCA violation. "[M]inor or insubstantial" noncompliance, for example, will not suffice. The Court set out the following factors for lower courts to consider in assessing materiality:

- if the government made a statutory, regulatory, or contractual requirement "an express condition of payment," which would tend to show its materiality but is "not automatically dispositive";
- if the defendant knew that the government "consistently refuses to pay claims" when payees fail to comply with the particular requirement, which might indicate the materiality of that requirement; and
- if the government (1) paid "a particular claim in full despite its actual knowledge that certain requirements were violated," or (2) regularly paid similar claims under those circumstances and "has signaled no change in position," either of which presents "strong evidence" that the requirements were not material.

Antidiscrimination Laws and Recent DEI-Related Executive Orders

Several federal laws condition receipt of federal funds on compliance with antidiscrimination requirements. For example, Title VI bans race discrimination in all federally funded programs, while Title IX bans sex discrimination in federally funded education programs or activities. All federal agencies that distribute financial assistance are required to promulgate rules implementing Title VI. The same is true under Title IX for agencies distributing funds for federal education programs or activities. If a recipient is found to have violated Title VI or Title IX, or their implementing regulations, agencies may terminate or

refuse to provide federal funds after following a statutorily required process. Such agency decisions are subject to judicial review.

Executive orders issued during the first Trump Administration and the Biden Administration addressed "DEI" initiatives but did not specifically tie them to antidiscrimination laws. EO 13950, signed by President Trump on September 22, 2020, stated that diversity trainings for federal employees must not "promote race or sex stereotyping or scapegoating" or the notion that some people are more privileged than others on account of their race or sex, and it sought to prohibit federal funds from being used for those purposes both within federal agencies and via a grant-review process. EO 13985, signed by then-President Biden on his first day in office, revoked EO 13950 and, among other things, directed the White House Domestic Policy Council to "remove systemic barriers" and "advance equity" across the federal government.

At the beginning of his second term, President Trump issued two executive orders related to DEI. The first, EO 14151, directed agencies to terminate "'equity-related' grants or contracts" and "all DEI . . . performance requirements for employees, contractors, or grantees." The second order, EO 14173, stated that "DEI" policies "can violate the civil-rights laws of this Nation" and directed the "head of each agency" to "include in every . . . grant award" (1) a term requiring the grantee to "agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of" the FCA; and (2) a requirement that each grantee "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." In August 2025, President Trump also issued EO 14332, which aimed to "improve the process of Federal grantmaking while ending offensive waste of federal tax dollars." That EO directed agencies to ensure that discretionary grant awards do not "fund, promote, encourage, subsidize, or facilitate . . . racial preferences or other forms of racial discrimination" or "the notion that sex is a chosen or mutable characteristic," among other things.

The implementation of these executive orders has varied. Some agencies updated their grant policies or agreements to include terms related to DEI. For example, the National Science Foundation (NSF) stated that by accepting a new or amended NSF award after May 19, 2025, the recipient certifies that it does "not, and will not . . . operate any programs that advance or promote DEI, or discriminatory equity ideology in violation of Federal anti-discrimination laws" for the term of the award. In February 2026, the General Services Administration released a draft certification for public comment that it estimates would apply to more than 220,000 applicants and recipients of federal financial assistance. The draft would expressly require those entities to certify their understanding that federal antidiscrimination laws "apply to programs or initiatives that involve discriminatory practices, including those labeled as [DEI]" when they register on SAM.gov.

Some agencies have issued guidance to recipients of federal funds elaborating on ways in which, in the Administration's view, "DEI" programs might violate federal antidiscrimination laws. For example, the Department of Education (ED) sent a Dear Colleague Letter (DCL) to state K-12 education agencies stating that "DEI" programs violate Title VI because they "frequently preference certain racial groups and teach students that certain racial groups bear unique moral burdens that others do not." The DCL was followed by a letter requiring those agencies to certify their compliance with ED's interpretation of Title VI in order to continue receiving federal funds. (As of the date of this writing, ED has stated it is not implementing or enforcing either the DCL or the certification requirement after a court preliminarily enjoined these agency actions; another court later held them to be unlawful.)

Litigation Over DEI-Related Certification Requirements

Some federal funding recipients have challenged DEI-related funding conditions in court, including certification requirements that may increase their exposure to FCA liability. The legal arguments have primarily fallen into three categories.

First, funding recipients in several cases have argued that federal agencies did not have statutory authority to impose DEI-related certification requirements—sometimes framed as a separation-of-powers violation because an agency's authority to act comes from Congress. In one such case, more than 30 cities and counties sued the Department of Housing and Urban Development (HUD), the Department of Transportation (DOT), and other federal agencies, challenging funding conditions that linked billions of dollars of federal grants to the Administration's interpretations of antidiscrimination laws. One of the challenged HUD conditions stated that the recipient "agrees that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the U.S. Government's payment decisions for purposes of [the FCA]." A federal district court preliminarily enjoined enforcement of HUD's and DOT's conditions, reasoning that the agency had pointed to no statutory authority to impose "[s]ubstantive conditions implicating controversial policy matters that are unrelated to the authorizing statute." This ruling is currently on appeal. In a subsequent opinion, the court explained that, in its view, the agencies' interpretation of antidiscrimination law contravened "well-established legal precedent." For example, the court observed, DOJ released guidance suggesting that any attempt by a grantee to improve diversity would violate the law, when courts had historically allowed the use of race-neutral criteria for such purposes. The court found that it was "untenable" to require grantees to certify compliance with antidiscrimination law, under threat of FCA liability, when the executive branch's interpretation of the law conflicted with "controlling legal authority."

Second, some litigants have argued that DEI-related funding conditions are unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. In September 2025, a federal district court preliminarily enjoined DEI-related conditions from HUD, DOT, and HHS, reasoning that grantees "do not have notice as to whether trying to reach disadvantaged communities or women and children, hosting groups of a particular background for an event, or training with regard to cultural competency, bias or racial disparities in housing, transportation, or health 'promot[es] DEI' that could trigger funding clawbacks or FCA liability." An appeal is pending.

Third, litigants in several cases have challenged DEI-related requirements as violating the Constitution's Spending Clause. For example, the cities of Chicago, Illinois, and Saint Paul, Minnesota, challenged certain conditions on grants awarded to them pursuant to the Community Oriented Policing Services (COPS) program administered by DOJ. One of the challenged conditions required the cities to certify, subject to FCA liability, that they do "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." On January 15, 2026, a federal district court ruled that this condition likely violated the Spending Clause. Although Congress may place conditions on federal funding, those conditions must be related to the purposes of the funded program or activity, and the court reasoned that the prohibition on DEI programs was "not reasonably related to the purpose of the COPS Act." That law includes a requirement that applicants "provide assurances that the applicant will, to the extent practicable, seek, recruit, and hire members of racial and ethnic minority groups and women in order to increase their ranks within the sworn positions in the law enforcement agency."

Some grant recipients have also sought to enjoin parts of the EOs that serve as the basis for DEI-related grant conditions, with mixed success. In one case, a group of grantees challenged the certification provision of EO 14173 after several agencies refused to provide funding without assurances that grantees were not operating "any programs promoting DEI that violate any applicable Federal anti-discrimination laws." A federal district court preliminarily enjoined enforcement of this provision on free speech

grounds, reasoning that its "sole purpose" is for "grantees to confirm under threat of perjury and False Claims Act liability that they do not operate any programs promoting DEI that the government might contend violate federal anti-discrimination laws." The court concluded that, because certification was not limited to the use of federal funds, it affected all of the plaintiffs' activities (including expressive ones) that might be characterized as promoting "DEI"—an undefined term. Thus, the court held that the provision impermissibly sought to control private speech. On appeal, however, the Fourth Circuit disagreed. While the scope of the certification requirement gave it "some pause," the Fourth Circuit held that the provision "requires only that plaintiffs certify compliance with federal antidiscrimination laws, which the First Amendment doesn't confer a right to violate." Because the grantees challenged the certification provision on its face, the Fourth Circuit held that the plaintiffs were unlikely to succeed on their First Amendment claim and vacated the district court's preliminary injunction order. In another case, a district court preliminarily enjoined the executive branch from enforcing EO 14173's certification provision against a city under the Administrative Procedure Act, concluding that the certification requirement exceeded the executive branch's statutory authority and violated the constitutional separation of powers.

FCA Actions Based on Allegations of False Certifications Related to "DEI"

The certification requirements described in the previous sections could give rise to more than one theory of FCA liability. A funding recipient that knows that some of its policies violate federal antidiscrimination laws at the time it signs a certification of compliance with those laws could be liable under an express false certification theory. For a funding recipient that accepts DEI-related funding conditions in good faith, but later adopts policies or practices that the government considers to violate those conditions, the submission of a claim for payment might be deemed a certification of continuous compliance for purposes of an implied false certification case. A DEI-related certification could also help the government or future relators in an FCA action to prove materiality by showing that the government intended to condition payment on compliance with its interpretation of federal antidiscrimination laws and that the defendant was aware of the government's position. Proving falsity and scienter based on a grantee's "DEI"-related activities may be more difficult if the certification requires general compliance with antidiscrimination statutes, particularly if the statute authorizing the funding could be construed to "*require[]* consideration of diversity."

The extent to which the government or private relators may pursue FCA actions to address perceived noncompliance with the certification requirements described above is uncertain. By law, *qui tam* complaints must remain under seal (i.e., not publicly available) for at least 60 days while the government investigates the relator's allegations and initial evidence. Still, there are some early indications that the federal government is investigating potential FCA-related violations based on DEI practices.

In November 2025, the federal government sought to revive an intervened *qui tam* action against Harvard College that the government had successfully moved to dismiss in July 2024. The relator had alleged that Harvard made false statements about its compliance with Title VI while applying for a grant from the Department of Education. The government sought to have the court amend the dismissal order to allow the relator to refile an amended FCA action, citing the January 2025 executive order on DEI programs as "a change in the controlling law." The court denied the government's motion, explaining that the change in policy positions across Administrations did not amount to a change in the law warranting relief and that, in any event, it did "not see how the termination of DEI-related grants bears on the question whether Harvard violated the False Claims Act by making fraudulent assurances of compliance with Title VI."

In December 2025, the *Wall Street Journal* reported that DOJ was investigating major U.S. companies "ranging from automotive and pharmaceuticals to defense and utilities" for their use of "DEI." DOJ has not publicly commented on this report but did state in a press release that the government opened 401 FCA investigations in FY2025, "including matters announced as Administration policy objectives." To define these objectives, DOJ cited an internal memorandum listing "combatting discriminatory practices and policies" as an enforcement priority. It is not clear how many of these FCA investigations are or were related to DEI. A DOJ Fact Sheet highlighting "representative" FCA settlements and judgments from FY2025 did not mention any related to DEI or antidiscrimination laws.

Considerations for Congress

Congress has a number of options to address federal funding recipients' compliance with antidiscrimination requirements or potential FCA liability, should it choose to do so. Were Congress seeking to shift executive branch priorities away from FCA enforcement related to "DEI," it could direct or incentivize agency officials to use Title VI or Title IX enforcement procedures instead to address concerns about the legality of DEI initiatives. Before funds can be terminated for violations of either statute, Title VI and Title IX require agencies to provide funding recipients with notice of the alleged violation, an opportunity for voluntary compliance, a trial-like hearing, and a report to Congress followed by a 30-day waiting period. Agency regulations add more specific directions. Once these steps are completed, the agency's final decision is subject to judicial review. If Congress wished, it could legislate different procedures for enforcing Title VI or Title IX that agencies must follow. Congress could also potentially prohibit DOJ from initiating an FCA action or joining a *qui tam* action premised on a false certification of compliance with these titles. Congress might prohibit such actions entirely, or only while a Title VI or Title IX enforcement action is under way.

Alternatively, if Congress were to support use of the FCA to promote compliance with DEI-related funding conditions, it could advance legislation expressly authorizing DOJ to pursue FCA cases related to antidiscrimination or DEI-related certifications instead of, or in addition to, agency-led Title VI or Title IX enforcement procedures. Congress could also decide whether to appropriate more funding for DOJ's Civil Fraud Section to augment its investigative and litigation resources. With respect to the FCA, Congress could amend the statute to specify whether the government or a *qui tam* relator can recover based on an implied false certification theory, either generally or more specifically as it relates to compliance with antidiscrimination laws. As previously indicated, the Supreme Court in *Escobar* addressed at least one circumstance in which a claim for payment may imply compliance with legal or contractual requirements. Congress could codify or reject the Supreme Court's interpretation through amendments to the FCA. Congress could also legislate the circumstances under which noncompliance is "material" for purposes of the FCA, either adopting or superseding the Supreme Court's reasoning in *Escobar*.

There may be constitutional limits to linking DEI-related requirements to funding repercussions or FCA liability. First, under the Supreme Court's Spending Clause case law, funding conditions generally must provide "clear notice" to the recipient of prohibited conduct and be "related" to the purposes of the funded program or activity. To create funding repercussions for "DEI" programs or policies, the federal government may need to unambiguously define what practices violate the federal antidiscrimination laws, and tie DEI-related certifications to a programmatic function or purpose. Second, while antidiscrimination laws are generally regarded as regulations of *conduct*, requirements or restrictions related to DEI could implicate protected *speech* if they restrict the ideas or messages that a funding recipient promotes. Case law involving the unconstitutional conditions doctrine, for example, suggests that requiring funding recipients to alter their expressive activities outside the contours of the funded program could violate the First Amendment.

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