New DEI Clauses Will Reshape FCA Exposure For Contractors

By **Jennifer Serafyn, Annette Tyman and Anuj Khetarpal** (April 23, 2026)

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A deadline buried in a March 26 **executive order**, which aims to curb federal contractors' purported discrimination related to diversity, equity and inclusion practices, is drawing attention from federal contractors and their counsel.

Under Executive Order No. 14398, federal agencies are directed to insert new contractual language into procurement agreements by April 25.[1] The new clause imposes several obligations, including that contractors agree that they will not operate racially discriminatory diversity, equity and inclusion programs.

Once agencies begin inserting the new clause, contractors will face a choice: Accept the clause and its obligations, or face potential consequences in the contracting process. For those who sign, the certification creates a new layer of False Claims Act exposure that didn't exist before.

The April 25 deadline is not a routine compliance event. It is a development that highlights how the administration is operationalizing its contract-based enforcement model, as part of the U.S. Department of Justice's Civil Rights Fraud Initiative, and the legal constraints that still govern FCA materiality.[2]

What the April 25 Deadline Actually Means for Contractors

The March 26 order is consistent with the administration's reliance on contract-based compliance mechanisms to regulate what it defines as "racially discriminatory DEI activities," including internal programs and the allocation or deployment of contractor resources.

The enforcement framework is straightforward in design: Federal contractors must certify compliance with antidiscrimination laws as a condition of payment.

If a company maintains what the government considers "racially discriminatory DEI activities" while making that certification, the argument goes, the certification is false. A

false certification that induces a government payment is a false claim.

The central legal question under the FCA is materiality. Under the U.S. Supreme Court's June 2016 decision in Universal Health Services Inc. v. United States ex rel. Escobar, a misrepresentation is actionable under the FCA only if it was material to the government's payment decision.

The court defined material as having a natural tendency to influence, or be capable of influencing, the payment of the claim. That inquiry is particularly relevant where, as here, the alleged violations involve broadly defined compliance obligations rather than discrete billing or eligibility requirements.

The March 26 executive order carries a consistent message regarding the administration's continued focus on DEI activities for federal contractors with immediate implications not only across employment and procurement, but also for broader organizational operations, including how contractors allocate and deploy internal resources.

The introduction of a mandatory contractual acknowledgment of FCA materiality operationalizes a coordinated and standardized enforcement effort to reinforce across agencies and contracts.

Why the Materiality Clause Arguably Falls Short Under Escobar

Executive Order No. 14173, issued on Jan. 31, 2025, first embedded FCA materiality concepts into federal contractors' antidiscrimination obligations.[3]

Going a step further, the new contractual language required by Executive Order No. 14398 asks contractors to acknowledge that their compliance with antidiscrimination laws is material to the government's decision to award and continue the contract.

The theory is that this language addresses concerns raised by Escobar's materiality standard: Once a contractor signs the clause, the argument goes, no one can later claim the certification was immaterial.

That argument has three significant problems.

First, the clause is prospective, not retroactive. It cannot reach conduct that predated the contractor's signature. Any investigations already underway, civil investigative demands

already issued, and alleged violations that occurred before April 25 are governed by the legal landscape that existed before the clause was signed. For those cases, the preexisting materiality record remains intact and remains a defense.

Second, in Escobar, the Supreme Court rejected the proposition that contractual labeling controls the materiality analysis. Escobar makes clear that while relevant, contractual provisions do not displace the FCA's objective, fact-intensive materiality inquiry. Materiality under the FCA is an objective, fact-intensive inquiry. It asks whether the violation actually mattered to the government's payment decision, not merely whether the contract says it did.

Third, the clause attempts to establish materiality for a category of alleged violations that is qualitatively unlike the fraud Escobar addressed. That case involved a mental health provider that submitted Medicaid reimbursement claims without disclosing that its clinical staff lacked the licensure required under state regulations, a straightforward billing fraud issue with a clear connection between the misrepresentation and the payment.

DEI compliance is different. Federal civil rights law involves contested legal standards, evolving regulatory guidance and context-sensitive judgments about the line between unlawful discrimination and lawful diversity efforts.

The Scienter Problem That the Order Cannot Fix

The April 25 clause addresses materiality. It says nothing about scienter, however, which may ultimately prove to be the harder obstacle for the government in most DEI cases.

The FCA imposes liability only for knowing misconduct. The statute requires actual knowledge of a false claim, deliberate ignorance of its falsity or reckless disregard for the truth. Negligence does not satisfy this standard; neither does a good faith judgment that later proves incorrect.

Companies that designed DEI programs over the past decade did so against a backdrop of long-standing employment law, federal agency guidance that in many cases encouraged such programs, and application of legal standards then in effect.

The executive orders that support the DOJ's Civil Rights Fraud Initiative and further this enforcement agenda were challenged in court shortly after issuance.

Rulemaking that might have provided clear, prospective notice of what DEI practices the government considered unlawful has not occurred. In this environment, a contractor that has maintained employee resource groups, for example, in reliance on years of settled practice may present the government with a difficult case for establishing knowing fraud liability.

This is particularly true given the absence of rulemaking or sector-specific guidance defining prohibited conduct with precision.

Going forward, the April 25 clause introduces a new dynamic. By signing a clause that expressly acknowledges DEI compliance as a condition of payment, a contractor makes it harder to later claim it had no reason to know its programs were legally relevant to its certifications.

That is not a scienter finding, but it is a fact the government will attempt to use. As a result, contractors should think carefully about what programs they operate and what legal analysis supports them before signing contracts with such clauses.

The Structural Mismatch That Creates New Exposure

Beyond materiality and scienter, the administration's approach reflects a structural mismatch that the April 25 clause may actually make worse.

Civil rights law has developed a careful framework for evaluating discrimination claims. It includes burden-shifting tests, fact-specific inquiries and doctrinal distinctions between unlawful discrimination and lawful efforts to achieve a diverse workforce. That framework exists because the line is genuinely difficult to draw, and because getting it wrong in either direction has consequences.

The executive order reflects a deliberate choice to rely on procurement and contract administration as the primary enforcement vehicle for DEI compliance. It does not ask whether a company's DEI program is actually discriminatory. Rather, it asks whether a certification about that program was knowingly false and material to a government payment.

By embedding FCA materiality language in every federal contract, the contractual framework creates incentives for qui tam relators, who bring cases in the name of the government and stand to benefit financially from these lawsuits, to scrutinize contractor

DEI programs through an FCA lens.

What Contractors Should Do That Standard Compliance Advice Does Not Cover

In addition to reviewing programs and internal messaging, contractors should consider the following FCA-specific issues. Many contractors are already reviewing their programs for compliance with the executive order's requirements. That advice addresses core compliance obligations, but it does not fully account for FCA-specific litigation risk. Three additional steps deserve attention.

First, contractors should proactively preserve the pre-April 25 materiality record. This means documenting, now and in a privileged setting, the absence of any connection between those programs and the government's actual payment decisions. That record is the foundation of a materiality defense for any investigation or suit that reaches back before the new clause was signed.

Second, contractors should build the scienter record before a civil investigative demand arrives. That means preparing a purely fact-based document that details the basis for concluding that their programs are not discriminatory and that supports their decision to sign the new contract provisions. This is distinct from privileged legal analysis, which should be developed separately and protected accordingly.

The fact-based document serves a dual purpose: It preserves the contractor's contemporaneous reasoning, and provides a ready response for compliance officers or other requesting parties. This documentation should be created now, while the reasoning is fresh and before any government contact makes the timing look defensive.

Third, contractors need to understand what they are signing when they accept the April 25 clause. The clause is not a rote compliance checkbox. It is a prospective legal commitment that changes the evidentiary landscape for FCA purposes going forward.

Contractors should make an informed, deliberate decision about what programs they are prepared to maintain, and what legal analysis supports each of them, and that decision should be made before, not after, signing.

Conclusion

The April 25 deadline is consequential, though its most significant effects are likely to

emerge through judicial application of existing FCA doctrine. Its real significance is diagnostic: A new executive order imposing a mandatory contractual acknowledgment of materiality is a consequential development in how the administration is translating DEI policy objectives into enforceable contract terms.

It does not, however, resolve all of the legal questions that will ultimately be addressed by courts applying existing FCA doctrine. The clause is prospective, leaving the pre-April 25 payment history, the most powerful evidence of nonmateriality under Escobar, fully intact.

It cannot override an objective materiality inquiry by contractual fiat. And it says nothing about scienter, which may prove to be the harder obstacle in the cases the government is most likely to bring.

What contractors are left with is a document that raises the stakes without resolving the underlying legal questions. Until those questions are resolved, contractors should approach the new contractual clause from Executive Order No. 14398 as a significant prospective commitment with meaningful implications for FCA risk management.

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[1] https://www.federalregister.gov/documents/2026/03/31/2026-06286/addressing-dei-discrimination-by-federal-contractors.

[2] https://www.justice.gov/opa/pr/justice-department-establishes-civil-rights-fraud-initiative.

[3] https://www.federalregister.gov/documents/2025/01/31/2025-02097/ending-illegal-discrimination-and-restoring-merit-based-opportunity.