This material from *The Government Contractor* has been reproduced with the permission of the publisher, Thomson Reuters. Further use without the permission of the publisher is prohibited. For further information or to subscribe, call 1-800-328-9352 or visit https://legal.thomsonreuters.com. For information on setting up a Westlaw alert to receive *The Government Contractor* in your inbox each week, call your law librarian or a Westlaw reference attorney (1-800-733-2889).

THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

APRIL 8, 2026 | VOLUME 68 | ISSUE 14

¶ 79 FEATURE COMMENT: An Overview Of The New DEI Executive Order: Scope And Limitations

On March 26, 2026, President Trump signed Executive Order 14398 titled "Addressing DEI Discrimination by Federal Contractors," taking aim at the diversity, equity, and inclusion (DEI) practices of federal contractors. EO 14398 ventures into territory already covered by the President's prior DEI-related executive orders (EOs), in particular EO 14173, which requires a contractor certification regarding "illegal DEI," but goes further. It directs federal agencies to include a mandatory contract clause prohibiting "racially discriminatory DEI activities" in all covered contracts and subcontracts, requires prime contractors to police the DEI practices of subcontractors at every tier, imposes new reporting requirements, and threatens a panoply of consequences for noncompliance, including contract termination, False Claims Act exposure, and suspension and debarment. Like EO 14173, it also requires the Government to "identify economic sectors that pose a particular risk of entities engaging in racially discriminatory DEI," signaling the Administration's ongoing desire to stamp out DEI. The accompanying White House Fact Sheet declares that the EO will ensure "merit-based and efficient contracting and employment."

EO 14398 is likely to be challenged in court on a variety of theories, similar to the ongoing wave of EO 14173 litigation. Contractors will almost certainly question the EO's scope and the ambiguity in its key terminology, as well as its enforcement assumptions.

EO 14398's Ambiguous Definition of "Racially Discriminatory DEI Activities"—EO 14173 introduced the undefined phrase "illegal DEI" and required contractors to certify that their DEI programs did not violate federal antidiscrimination laws. Much of the litigation involving EO 14173 over the past year has focused on understanding the meaning of "illegal DEI," with judges pressing Department of Justice attorneys for definitional clarity. The emerging commonsense consensus seems to be that illegal DEI refers to workplace practices that violate existing applicable antidiscrimination statutes such as Title VII.

EO 14398 does not reference "illegal DEI," EO 14173, or any existing federal statutory definition of discrimination. Instead, it introduces a new concept: "racially discriminatory DEI activities," defined as "disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity's resources." EO 14398 broadly defines "Program participation" as encompassing training, mentoring, leader-

ship development programs, educational opportunities, clubs, associations, and similar contractor-sponsored opportunities.

The definition of "racially discriminatory DEI activities" arguably reaches further than "illegal DEI." The reference to the "allocation or deployment of an entity's resources" tells federal agencies to scrutinize the ways in which a contractor directs its time, funding, and internal investments to find evidence of racially discriminatory practices. This theoretically could encompass small business subcontracting participation goals, having a DEI director, or funding employee resource groups, potentially sweeping in initiatives that have been longstanding standard features of the corporate landscape. The EO aligns to some degree with DOJ's recently identified enforcement priorities, including scrutiny of executive training and mentoring programs where participation is restricted on the basis of race or sex, and diverse slate policies.

The fact that the EO's definition of "racially discriminatory DEI activities" is not specifically grounded in any antidiscrimination statutes raises the issue of whether EO 14398 addresses conduct that is already unlawful or whether it goes beyond existing law. EO 14398 denigrates DEI activities regardless of their legality, stating: "DEI activities are not only unethical and often illegal, but also cause inefficiencies, waste, and abuse within entities that engage in such practices." The EO's expansive reach also appears at odds with official statements from DOJ. For example, at a recent FCA conference, the DOJ Deputy Assistant Attorney General for the Commercial Litigation Branch of the Civil Division stated that "DOJ Civil Fraud is not investigating companies for having a DEI program" and that companies "can operate a DEI program without it being discriminatory." Similarly, 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*, 167 F.4th 86 (4th Cir. 2026) (Diaz, C.J., concurring).

Against this backdrop, it is unclear what activities the Government will consider to be "racially discriminatory DEI" under EO 14398, beyond those already covered by Title VII. This will make compliance unpredictable and render the Government's enforcement efforts subject to challenge.

EO 14398 Does Not Define DEI—EO 14398 is based on a number of assumptions.

First, the EO treats DEI as a uniform concept across all workplaces and addresses its legal implications accordingly. But as DOJ has implicitly recognized, DEI is a broad concept that refers to an organization's articulated values and practices; these differ considerably from one organization to the next.

Second, the EO assumes that DEI is only about race, when in reality DEI programs can encompass veterans, immigrants, women, persons with disabilities, LGBTQ individuals, and other groups.

Third, the EO assumes that DEI is synonymous with waste, fraud, abuse, and the abandonment of merit. In reality, a well-designed DEI program can mitigate legal risk for employers by fostering a respectful workplace and combating bias. Additionally, it is not unlawful for employers to advertise for open positions in a wide variety of publications, including those likely to reach diverse candidates.

The New Contract Clause Makes Primes Responsible for Subcontractor DEI Programs—Although EO 14173 already requires contractors to certify compliance with antidiscrimination laws, this certification was not designed to reach subcontractors. Some prime contractors who attempted to flow down the certification encountered subcontractors that refused to accept it given that it is not a mandatory flow-down. EO 14398 attempts to close this gap by directing agencies to include the mandatory clause not only in prime contracts but in "contractors' subcontracts and subcontractors' lower-tier subcontracts." Paragraph 4 of the model contract clause creates a reporting obligation that casts prime contractors into an oversight role, requiring them to "report any subcontractor's known or reasonably knowable conduct that may violate this clause." The "reasonably knowable" standard is undefined but implies that a prime contractor that does not affirmatively seek information about subcontractors' DEI practices at every tier may face potential FCA liability

© 2026 Thomson Reuters

if a subcontractor is later found to have engaged in "racially discriminatory DEI."

This scheme creates a notable contradiction. EO 14398's stated rationale is that DEI activities "impose artificial costs" and "create unnecessary costs" that are "inevitably passed on to the Federal Government." However, the obligation to police the DEI practices of the entire subcontract chain could have the perverse result of substantially increasing monitoring and compliance costs that, presumably, will be passed on to the Federal Government in the exact fashion EO 14398 purports to prevent. Such extra effort by prime contractors may be inefficient to the extent that the DEI practices the Administration seeks to eradicate are already prohibited under existing federal antidiscrimination law.

False Claims Act Exposure: Attempted Materiality by Fiat—Paragraph 6 of the new contract clause provides that "the contractor recognizes that compliance with the requirements of this clause are material to the Government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code (False Claims Act)." EO 14398 further directs the Attorney General to "consider" bringing FCA actions against noncompliant contractors, while the Fact Sheet uses stronger language, directing the Attorney General to "prioritize" such claims.

This provision is designed to establish one of the necessary elements for FCA enforcement, but it will likely not deter a contractor from challenging materiality in FCA litigation. This is because the Supreme Court held in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176 (2016), that a contractual provision labeled as a condition of payment is "relevant to but not dispositive of the materiality inquiry." In other words, the Government cannot establish materiality by declaring something material in a contract clause. Courts must still examine whether the alleged violation would have a "natural tendency to influence or be capable of influencing" the Government's payment decision, meaning the Government must establish that a known DEI compliance issue caused the Government to withhold payment for goods or services that otherwise fulfilled the contract.

As a practical matter, contractors are likely to be cautious of DEI-related FCA threats given the enormous financial incentives for qui tam whistleblowers and the directive in EO 14398 that the Attorney General ensure prompt review of FCA actions. Even a meritless FCA suit imposes discovery costs, potential reputational harm, and management distraction that contractors will want to avoid. The FCA threat may influence contractors to discontinue DEI initiatives and require their subcontractors to do the same in order to minimize legal risk.

Suspension and Debarment: a Less Credible Threat than It Appears—EO 14398 authorizes contracting agencies to "take appropriate action to suspend and debar contractors or subcontractors" for noncompliance. The Fact Sheet reinforces this, stating that the EO "authorizes contracting agencies to cancel, terminate, or suspend contracts—and to suspend or debar contractors—for failure to comply." Paragraph 3 of the contract clause states that "In the event of the contractor's or a subcontractor's noncompliance with this clause … the contractor or subcontractor may be declared ineligible for further Government contracts." This language is designed to convey severity and immediacy. But the practical reality of suspension and debarment is more nuanced than the EO suggests.

Suspension and debarment are governed by Federal Acquisition Regulation subpt. 9.4 and are imposed by Suspending and Debarring Officials (SDOs) "only in the public interest for the Government's protection and not for purposes of punishment." SDOs have traditionally viewed their role as protecting the Government from irresponsible contractors, not as advancing the political or policy agendas of a particular presidential administration. SDOs are not political appointees and do not ordinarily change from one administration to the next. Critically, the administration cannot order a contractor to be suspended or debarred. The SDO has the independence of judgment to make that determination. This independence is not a formality; it is a structural feature of the system that exists precisely to prevent exclusion decisions from becoming instruments of political pressure.

A FAR-based exclusion is not automatic even when a contractor has committed a legal violation.

© 2026 Thomson Reuters

Rather, the SDO must find that the contractor is not presently responsible for purposes of future work with the U.S. Additionally, except where immediate action is necessary to protect the U.S., the SDO typically waits until the relevant legal process is complete before considering whether exclusion is warranted. A suspension or debarment for "racially discriminatory DEI" would be unprecedented, and SDOs are likely to be cautious about imposing an exclusion on this basis before judicial proceedings on the matter are complete, enabling them to rely on a final judicial finding rather than conclude in the first instance that a contractor has committed "racially discriminatory DEI."

Central Premise of EO 14398—The central premise of the EO is to impose obligations in a way that will potentially dissuade contractors and subcontractors from continuing DEI practices in order to avoid the perceived costs and risks. Contractors that want to stand by their DEI practices should remember that an EO does not create new law. An EO is a directive to federal agencies about how to manage and implement existing laws. Regardless of the statements in EO 14398 that DEI is "unethical," the fact remains that the actual legal prohibitions applicable to contractors are what they have always been: the antidiscrimination statutes that DOJ itself has acknowledged permit a wide range of DEI activities. The courts have demonstrated their willingness to hold the Government to established processes and legal standards.

EO 14398 effectively places the responsibility on every contractor to decide whether to accept the potential risk of maintaining a DEI program in the current environment or alternatively, to altogether forgo their DEI program. That is not necessarily a legal question, but it is a significant one for contractors.

What Federal Contractors Should Be Doing Now—While the legal landscape surrounding EO 14398 continues to develop, federal contractors need not wait for formal FAR amendments or agency guidance before taking action. The 30-day timeline for agencies to begin inserting the new clause into contracts means that contractors may encounter the new requirements in solicitations and contract modifications in the near term. The following steps can help contractors prepare for and manage the risks presented by the new EO.

1. Conduct a Comprehensive Review of DEI-Related Programs, Policies, and Practices. Contractors should conduct a privileged review of their DEI-related programs not only against existing federal antidiscrimination law, but also against the EO's potentially broader definition of "racially discriminatory DEI activities." This review should encompass recruitment, hiring, promotions, training programs, mentoring and leadership development initiatives, employee resource groups, and vendor diversity requirements. The focus of the review should be on identifying any practices that could be characterized as disparate treatment based on race or ethnicity. Contractors that have previously reviewed their programs solely through the lens of Title VII and similar statutes should consider revisiting those assessments in light of the new EO and Fact Sheet.

2. Assess and Strengthen Subcontractor Oversight. Given the EO's requirement that prime contractors report "known or reasonably knowable" subcontractor conduct that may violate the clause, contractors should plan to review their subcontractor agreements and oversight processes. This may include updating subcontract terms and conditions to flow down provisions related to the EO and establishing mechanisms to identify and address potential noncompliance down the supply chain. Prime contractors should also consider what level of inquiry into subcontractor DEI practices is necessary to satisfy the "reasonably knowable" standard, even though that term remains undefined.

3. Review Public-Facing DEI Messaging. Contractors should conduct a review of all public-facing DEI messaging and disclosures, including website content, SEC filings, recruiting materials, and internal communications platforms. Public statements or internal messaging that suggest race-based preferences or restricted access to programs may heighten the risk of audits, enforcement actions, or FCA litigation. Any changes to descriptions of a company's DEI program should be made in consultation with counsel and appropriate stakeholders to avoid inadvertent legal admissions or the perception that the company has abandoned its commitment to lawful compliance.

© 2026 Thomson Reuters

4. Document the Lawful Purposes of DEI Programs. Contractors that maintain DEI programs should document the lawful business purposes those programs serve. If programs are designed to expand the talent pool, ensure inclusive access, and base decisions on skills and qualifications, that documentation supports defenses on both falsity and scienter should the contractor face an FCA investigation. A well-documented record of the company's good faith belief in the lawfulness of its programs can be useful as a future defense.

5. Prepare for New Contract Terms and Certification Requirements. Contractors should expect to see the new clause appearing in solicitations, new contracts, and potentially modifications to existing contracts in the coming weeks. Contractors should review any such clause language carefully, understand the obligations it creates, and identify the individuals within their organization likely to receive certification requests. Where certification language is ambiguous, contractors should consider bringing those ambiguities to the attention of the contracting officer and memorializing the basis for any reasonable interpretation of the language. Cross-functional coordination across legal, human resources, Government contracts, procurement, and compliance teams may be essential to address the full scope of exposure created by the new EO.

6. Ensure Anti-Retaliation Protections Are in Place. The FCA's anti-retaliation provisions protect employees who raise concerns about potential violations. In the current environment, employees may raise questions about the legality of a contractor's DEI programs. Contractors should ensure that employees have appropriate avenues to report concerns and should provide managers and human resources professionals with guidance on responding appropriately. Anticipating and documenting how the company addresses such inquiries can help avoid potential retaliation claims.

7. Monitor Ongoing Litigation and Agency Guidance. The legal landscape around DEI-related EOs continues to evolve. Contractors should closely monitor developments in the appellate courts, including in the Seventh and Ninth Circuits, as these outcomes will shape the enforcement landscape. Additionally, contractors should watch for Office of Management and Budget guidance identifying high-risk sectors, FAR Council interim guidance and formal rulemaking, and any standardized certification language that may emerge. These developments will significantly influence the scope and practical impact of EO 14398 going forward.

♦

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. For more information or assistance, please contact Dominique (dominique.casimir@blankrome.com) or another member of Blank Rome's Government Contracts practice group (www.blankrome.com/services-and-industries/government-contracts#team).

© 2026 Thomson Reuters