

## TRUMP ADMINISTRATION ANNOUNCES NEW CIVIL RIGHTS FRAUD INITIATIVE

On May 19, the Department of Justice (“DOJ”) [announced](#) the establishment of the Civil Rights Fraud Initiative (the “**Initiative**”), which will use the False Claims Act (“**FCA**”) to investigate and potentially prosecute federal contractors and government fund recipients for alleged civil rights violations. The Initiative, which we foreshadowed first [here](#), ensures enforcement resources to support the Trump Administration’s efforts to eliminate what it describes as illegal diversity, equity and inclusion (“**DE&I**”) programming, and magnifies the litigation risks for federal contractors and other employers receiving federal funding.

### THE INITIATIVE

The Initiative builds on [Executive Order 14173](#), which requires federal contractors and federal fund recipients to certify that they do not operate any programs promoting DE&I that violate federal anti-discrimination laws, and also to agree that compliance with all applicable anti-discrimination laws is material to the government’s payment decisions for FCA purposes. This certification provides the basis for an FCA enforcement action where a recipient’s programs are deemed non-compliant. The DOJ’s [memorandum](#) announcing the Initiative targets federal contractors and fund recipients who certify compliance with civil rights law while “knowingly engaging in racist preferences, mandates, policies, programs, and activities including through diversity, equity, and inclusion (DEI) programs that assign benefits or burdens on race, ethnicity, or national origin.” It also explicitly warns against operating DE&I programs “camouflaged with cosmetic changes that disguise their discriminatory nature.” Under this Initiative, any such non-compliance will be treated as fraud against the federal government. The FCA liability would be in addition to any underlying violations of the civil rights laws.

### FCA LIABILITY

The FCA imposes civil and criminal liability on individuals and companies that knowingly submit false claims for payment to the government or make false statements that are material to such claims. The new requirement that companies

expressly agree in their certification that compliance with anti-discrimination laws is material is clearly designed to remove any ambiguity as to the materiality.

The FCA can impose liability on both primary contractors and subcontractors. Though subcontractors do not typically submit claims directly to the government, they can still face FCA liability where they cause the primary contractor to present a false claim to the government on their behalf. Additionally, because primary contractors have supervisory responsibilities over their subcontractors' compliance with contractual and legal provision, a subcontractor's liability under the FCA may be imputed to the primary contractor when the primary contractor acted with "reckless disregard" or "deliberate ignorance" regarding the truth of the subcontractor's representations.

Those found liable under the FCA can be subject to treble damages (three times the amount of the fraud) plus substantial civil penalties for each false claim. Importantly, the FCA was written to be expansive, and can apply to conduct outside the United States, if it involves federal spending, procurement, or contracting.

## **FOCUS ON WHISTLEBLOWERS**

As part of the Initiative, the DOJ is also "strongly encourag[ing]" whistleblowers to report any known "discriminatory practices" by federal funding recipients, including by filing a "qui tam" action under the FCA. The FCA's qui tam provision allows private individuals, known as "relators" or whistleblowers, to file lawsuits on behalf of the government to recover money that was fraudulently obtained. Successful qui tam plaintiffs are entitled to receive a portion—typically 15% to 30%—of the recovered funds, plus legal fees and expenses. Whistleblowers must give the government notice and afford it 60 days to investigate the allegations and decide whether to intervene in the suit. If the government intervenes, it assumes primary control of the litigation and the whistleblower's share of the recovery is capped.

The FCA allows anyone, including non-US citizens and NGOs, to serve as qui tam plaintiffs. They are often aggrieved current or former employees of government contractors with inside knowledge of fraud against the government. Under the FCA, qui tam plaintiffs are protected from an employer's retaliatory tactics such as harassment or firing.

## **IMPLICATIONS**

All federal contractors and fund recipients will have to certify compliance with federal anti-discrimination laws, which automatically exposes them to the risk of FCA liability. Bearing in mind the warning against "camouflag[ing]" DE&I programs, companies must weigh these new enforcement risks against the commitments they have made to their workforce and shareholders and consider if and where adjustments are needed. Further, while government agencies are modifying contracts following the EO's directives, federal contractors should also closely review subcontracts and modify any requirements or provisions that may conflict with the applicable law or with the Administration's directives. By the same token, companies who work in a subcontractor capacity on federal contracts should similarly review their workplace policies and commitments and determine whether they hold up to scrutiny.

It is important to remember that federal civil rights laws themselves have not changed, and discrimination on the basis of a protected characteristic remains unlawful. Companies should therefore have comprehensive internal compliance programs to ensure they are complying with existing anti-discrimination laws, and be prepared to defend their policies by explaining how they comply with those laws.

As this topic continues to be in flux with legal challenges and what we should anticipate will be some test cases, we will continue to closely monitor these developments.

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