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Client Alert Commentary

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Key Insights on Executive Order Directing Scrutiny of Private-Sector DEI Efforts

The executive order creates new obligations and risks for companies, foundations, universities, and federal contractors.

Key Points:

- The Trump administration has taken a strong stance against diversity, equity, and inclusion (DEI) policies and practices in both the federal government and the private sector.
- Publicly traded corporations and other entities — particularly those with federal contracts or federal grant awards — should conduct a careful audit of their DEI programs and equity-related practices to ensure that they align with federal civil rights laws.

On January 21, 2025, President Trump issued an executive order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (the Order) directing federal agencies to enforce federal civil rights laws to "combat illegal private-sector DEI preferences" and to identify private entities that may be subject to civil enforcement actions for "discriminatory" DEI practices.[1] The Order has broad implications for the private sector, including universities, nonprofit organizations, and philanthropic foundations, as well as for-profit companies — especially those with federal contracts.

Risk of Federal Investigations and Litigation

The Order directs the Attorney General, in collaboration with relevant agency heads, to develop a strategic enforcement plan to encourage the private sector to "end illegal discrimination and preferences, including DEI." As part of this strategic enforcement plan, each agency must within 120 days identify: (1) key sectors "of concern" within its jurisdiction; (2) the "most egregious and discriminatory DEI practitioners" in each of those sectors; (3) litigation that may be appropriate to enforce federal civil rights laws, including lawsuits, intervention, or statements of interest; and (4) potential regulatory action and sub-regulatory guidance.

Significantly, also as part of the enforcement plan, the Order directs each agency to identify "up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars." The identified entities, and others, will likely face increased federal regulatory and enforcement activity around DEI programs and initiatives — including civil investigations by agency offices for civil rights and investigations and litigation brought by the Department of Justice.

While the Order lays the groundwork for increased federal scrutiny of DEI programs, it does not expand the scope of federal anti-discrimination laws or impose new legal requirements on the private sector. The scope of the federal government's enforcement authority remains limited to enforcing existing law, which does not altogether bar programs or initiatives that promote diversity, equity, inclusivity, or access. However, the Order signals that the administration will take an aggressive, expansive view of federal civil rights laws and the extent to which those laws prohibit private-sector DEI programming.

Additionally, because the Order does not define DEI or specify the equity-related practices it targets, we can expect future enforcement activity to target a wide range of programs and initiatives that the administration contends are illegal, including those related to recruitment and employment, promoting inclusion, training opportunities for particular groups, and external-facing efforts to advance equity, such as company-sponsored scholarships and fellowships.

Given that federal agencies have the greatest enforcement authority over private entities that contract with the federal government or receive federal grants, companies and organizations that fall in those categories face more significant risks. Nonetheless, even entities that are not federal contractors or grant recipients face potential risk. The Order directs the US Attorney General to develop "[o]ther strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws," which could result in novel initiatives to reach DEI efforts across the private sector.

Further, by requiring the identification of sectors and entities engaged in DEI practices, the Order could expose companies to private litigation under federal anti-discrimination statutes like Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment, and 42 U.S.C. § 1981, which prohibits racial discrimination in contracting.

New Contracting Requirements

The Order creates specific requirements and risks for federal contractors and grant recipients.

First, the Order rescinds long-standing executive orders related to federal contracting, most significantly Order 11246 of 1965, which has long set non-discrimination and affirmative action requirements for most federal contractors.

In place of these past orders, the Order states that federal contractors' employment, procurement, and contracting practices "shall not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws." The Order directs the Department of Labor's Office of Federal Contract Compliance Programs to "immediately cease": (1) "[p]romoting 'diversity'"; (2) "[h]olding Federal contractors and subcontractors responsible for taking 'affirmative action'"; and (3) "[a]llowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin." Some agencies, including the General Services Administration, have issued notices stating that they will not enforce DEI and affirmative action provisions in current contracts.[2]

Second, the Order requires federal agencies to include in all contracts and grants terms requiring: (1) a certification that the contractor or grant recipient "does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws"; and (2) an agreement "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 False Claims Act (FCA).

This materiality provision appears aimed at increasing the risk of liability under the FCA, as materiality is a key defense under the Act. By doing so, the provision will likely increase the probability that whistle-blowers will file FCA cases alleging companies' knowing non-compliance with federal anti-discrimination laws in their efforts to promote diversity.

How and when federal agencies will implement this new contracting regime is unclear. The Order provides a 90-day safe harbor, meaning that federal contractors and grant recipients may continue to comply with prior equal opportunity and affirmative action requirements through April 21, 2025. Thereafter, agencies are to include these new terms in contracts and grants, but agency implementation may vary unless the Federal Acquisition Regulatory (FAR) Council promulgates unified language and timing.

Separately, government contractors may also be affected by the January 20, 2025, executive order titled "Ending Radical and Wasteful Government DEI Programs and Preferencing."[3] While that executive order is directed at federal agencies eliminating DEI programs in their own offices, it also directs agencies to terminate "equity-related" grants and contracts, which could impact federal contractors with contracts involving equity-related scopes of work.

Takeaways

The Order confirms that the administration will take aim at DEI efforts within the government and beyond, but it remains to be seen exactly what enforcement steps will (or can) be taken within the confines of existing federal civil rights laws. Private entities across all sectors —particularly government contractors and recipients of federal grants — should exercise care to understand federal anti-discrimination laws, guidance, and interpretative decisions from the courts, and should carefully review all DEI programs and other efforts to foster equity and inclusion, including those implemented to comply with FAR 52.222-26 (Equal Opportunity) and FAR 52.222-25 (Affirmative Action Compliance), to ensure that they are non-discriminatory and otherwise comply with federal law.

Latham & Watkins is closely following these developments, including actions taken pursuant to the Order.

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Endnotes

[1] https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

[2] https://www.gsa.gov/system/files/DEI%20EO%20Implementation_0.pdf.

[3] https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/.