What Trump Admin's Anti-DEI Push Means For FCA Claims

By **Denise Barnes and Scott Gallisdorfer** (February 12, 2025)

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On Jan. 21, President Donald Trump **rescinded** Executive Order No. 11246, signed by former President Lyndon B. Johnson in 1965, by issuing a new executive order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."[1] Previously, Executive Order No. 11246 had imposed affirmative action obligations and nondiscrimination requirements on certain federal contractors.

This order asserts that preferences based on race or sex can violate civil rights laws and mandates a streamlined contracting process that emphasizes compliance with anti-discrimination laws.

The implications of this shift are profound. Under the order, instead of the prior obligations imposed under Executive Order No. 11246, federal contracts and grants will now be required to include a clause mandating that the contractor or grant recipient agree that they are in compliance "with applicable Federal anti-discrimination laws."

The order notes that such a certification is a term "material to the government's payment decisions" for purposes of the False Claims Act.[2] Contractors and grant recipients must also certify that they do "not operate any programs promoting DEI [diversity, equity and inclusion] that violate any applicable Federal anti-discrimination laws."

The order has far-reaching implications as it relates to federal contractors and grant recipients — namely, potential FCA liability should a contractor or grant recipient fail to comply.

The FCA is a powerful tool used by the government to combat fraud involving false claims for payment. It imposes treble damages and penalties on individuals or entities that knowingly submit false claims or cause such claims to be submitted. In fiscal year 2024 alone, over $2.9 billion was recovered through FCA settlements.

Indeed, given the attendant treble damages and per-claim civil monetary penalties, even the mere possibility of potential FCA liability may well have a significant chilling effect on the operation of DEI programs and related initiatives, including those that may well be perfectly legal.

But, the order also raises a bevy of questions and issues that the government would have to surmount in the FCA context to establish liability, several of which are addressed below.

Materiality

First, is the language in the order sufficient to deem certification related to compliance with anti-discrimination laws material to payment for purposes of the FCA?

In 2016, in the seminal case Universal Health Services v. United States ex rel. Escobar, the U.S. Supreme Court held that "[a] misrepresentation about compliance with a statutory,

regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act."[3]

The court described the materiality standard as demanding and rigorous,[4] and explained that a material misrepresentation is one that goes "to the very essence of the bargain."[5]

In Escobar, the Supreme Court clarified that the government's decision to identify a provision as a condition of payment is relevant, but not always dispositive of materiality. Escobar also established that the government's continued payment of a claim despite knowing of a violation is a strong defense against materiality.[6]

The court set forth various considerations to guide the materiality inquiry, which primarily focuses on the government's actual conduct and its payment or nonpayment of purportedly false claims.[7]

Post-Escobar, several courts found the materiality element satisfied based on evidence that the government would not have paid particular claims had it known about the alleged misrepresentations.

For example, in 2019, in U.S. ex rel. Doe v. Heart Solution PC, the U.S. Court of Appeals for the Third Circuit affirmed the district court's grant of summary judgment based on unrebutted evidence submitted by the government that it would not pay claims for diagnostic neurological testing "in the absence of a certification from a supervising neurologist."[8]

Similarly, that same year, in U.S. ex rel. Park v. Legacy Heart Care LLC, the U.S. District Court for the Northern District of Texas held that the relator had plausibly alleged the materiality of the defendants' purported violations of a Medicare national coverage determination in part because the complaint "state[d] that the government recoups payment for procedures performed in violation of the NCD."[9]

Notably, there are similarities between the order and the Anti-Kickback Statute for purposes of analyzing FCA materiality. Much like the order, the Affordable Care Act explicitly provides that "a claim that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for the purposes of [the FCA]."[10]

And, although the elements of falsity and materiality are distinct, courts typically view compliance with the AKS as per se material for purposes of the FCA. Set against the materiality language of the order, that could suggest that courts would view compliance with the order's requirements as per se material as well.

Arguably, however, the AKS context may be distinguishable from the executive order. First, the ACA is a statute enacted by Congress, whereas the executive order is based on the president's Article II powers, although that fact may be a distinction without a difference.

Second, courts have long held that an AKS violation is material to payment for purposes of the FCA — even before enactment of the ACA in 2010[11] — whereas, here, while compliance with federal anti-discrimination laws has long been important to the government, the nature of the relevant requirements, and what it means for contractors to comply, has evolved significantly over time.

This is evidenced by Trump's upheaval of the 60-year-old executive order.

In short, the government will likely face significant exposure on the question of materiality as that question turns on a number of factors.

Ambiguous Language

In addition to materiality concerns, the order also raises questions about what it means to "operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." This question affects two necessary elements of the government's case in an FCA action: scienter and falsity.

Scienter

The FCA imposes liability on anyone who knowingly submits a false claim to the government. The government may establish scienter by demonstrating: (1) actual knowledge; (2) deliberate ignorance; or (3) reckless disregard for the truth.[12]

In its recent SuperValu decision, the U.S. Supreme Court held that a defendant's subjective knowledge and beliefs are relevant in determining if the defendant acted knowingly under the FCA, a standard that includes reckless disregard.[13] Thus, if a defendant both (1) correctly interpreted the relevant phrase and (2) believed their claims were false when submitting them, then they could have acted knowingly.[14]

However, the only question before the Supreme Court in SuperValu was whether the pharmacies involved there "could have the scienter required by the FCA if they correctly understood" the relevant standard and "thought that their claims were inaccurate."[15]

SuperValu did not address a scenario where the defendant both honestly believed, and submitted claims based on, an objectively reasonable interpretation of the law, even if a court later rules that the interpretation is wrong, i.e., falsity but no scienter. And that could well be a key consideration here.

It remains unclear what constitutes "programs promoting DEI that violate any applicable Federal anti-discrimination laws." Although the Supreme Court addressed the question of whether race may be considered in college admissions in Students for Fair Admissions Inc. v. President and Fellows of Harvard College last year,[16] the court has not yet addressed to what extent other DEI programs may be unconstitutional or otherwise unlawful, if at all.

SuperValu also raised another interesting question that remains unresolved: What exactly creates an awareness of an unjustifiably high risk of falsity?[17]

Justice Clarence Thomas noted that "ambiguity does not preclude [one] from having learned the[] correct meaning — or, at least, becoming aware of a substantial likelihood of the … correct meaning."[18]

And through a driving and speed-limit analogy, Justice Thomas noted that certain circumstances may demonstrate an awareness of what constitutes an unjustifiably high risk.

But, what would be enough here? The president's recent order? One contracting officer's review of a DEI program? A written policy statement by the Trump administration? What about competing publications from known constitutional law experts?

The government will need to surmount this hefty barrier to satisfy the scienter element.

Falsity

Likewise, the government would need to prove legal falsity, which arises when the claim is factually correct, but it misrepresents compliance with underlying statutes, regulations or contract terms through an express or implied certification.

As noted above, the Supreme Court narrowly defined SuperValu's applicability — the court did not address the interplay between the falsity element and ambiguous regulations and whether an objectively reasonable interpretation of an ambiguous regulation is sufficient to undermine the government's falsity argument.

It remains to be seen how the court may rule on this issue, and specifically, where, like here, the legal question at issue remains unsettled.

Like with materiality and scienter, the government would likely face significant challenges when it comes to proving falsity.

Damages

The final question relates to how the government would determine damages for potential false claims submitted related to operating "programs promoting DEI that violate any applicable Federal anti-discrimination laws."

Would the government consider asserting a fraudulent inducement theory where the government may attempt to seek the full value of the contract or modification? And, if not, how would damages possibly be measured?

FCA liability does not attach until after the contractor or grant recipient has lied on a required certification. Under the theory of fraudulent inducement, liability generally arises when eligibility to receive funds or enter into a government contract was obtained by false statements or fraudulent conduct.[19]

The government's potential recovery in fraudulent inducement cases can be quite high because it generally seeks the full value of each claim resulting from the contract.

Here, however, if it surmounted the challenges identified above, the government could only recover claims submitted after the contractor entered into a new agreement or modification of the existing contract, which would require certification of compliance with the newly issued order.

And, although the threat of FCA liability will no doubt have a chilling effect for federal contractors and grant recipients — as evidenced by rolling back of DEI policies within the private sector — it is important to remember that the FCA is a fraud statute and the treble damages provision is punitive.

The punitive nature of the statute is specifically designed to punish defendants engaged in fraudulent conduct and deter future conduct, and it is unclear whether the damages arising from a potential violation would result in appreciable damages for companies. The reason is simple: time. The executive order was just issued last week and contractors and grant recipients have 90 days from its issuance to comply.

A fraud case is not manufactured overnight — generally, it is the result of years of misconduct, not months, and any potential damages resulting from the fraud would be

limited to conduct that occurred after new modification or entry into a new contract.

And if contracting officers were to seek certifications outside of the ordinary course, it is unclear whether such ad hoc statements attesting to one's compliance would be sufficient to constitute a statement material to payment for purposes of the FCA, as discussed above.

Simply put, even if the government were to surmount the materiality, scienter and falsity challenges in bringing an FCA case, the monetary exposure for a potential defendant under the FCA, as well as actual enforcement risk, may be limited.

Criminal Liability

In addition to the FCA exposure described above, on Feb. 5, Attorney General Pam Bondi issued a memorandum titled "Ending Illegal DEI and DEIA [diversity, equity, inclusion and accessibility] Discrimination and Preferences."

Like the order, the memo advises that the U.S. Department of Justice's Civil Rights Division will be taking efforts to "investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds."

Specifically, the memo instructs the DOJ's Civil Rights Division and the Office of Legal Policy to jointly submit a report to the associate attorney general by March 1, containing recommendations for enforcement actions and other measures "to encourage the private sector to end illegal discrimination and preferences."

Most relevant here, the report will identify "the most egregious and discriminatory DEI and DEIA practitioners in each sector of concern" and will include a plan with "specific steps or measures to deter the use of DEI and DEIA programs or principles that constitute illegal discrimination or preferences," including proposals for criminal investigations.

The memo does not, however, specify which criminal statutes might serve as a basis for criminal prosecution.

Although it remains to be seen what the grounds for criminal liability could be, the government will likely face similar — if not greater — hurdles, in establishing a criminal case on the basis of promoting DEI policies and programs.

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

[2] False Claims Act, 31 U.S.C. § 3729et seq.

[3] 579 U.S. 176, 181 (2016).

[4] Id. at 192.

[5] Id. at 193 n.5.

[6] See, e.g., United States ex rel. Petratos v. Genentech Inc. ,855 F.3d 481, 490-92 (3d Cir. 2017).

[7] See Escobar, 579 U.S. at 194-95 ("[P]roof of materialitycan include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.").

[8] 923 F.3d 308, 318 (3d Cir. 2019).

[9] 2019 WL 4450371, at *8 (N.D. Tex. Sep. 17, 2019).

[10] 42 U.S.C. § 1320a-7b(g).

[11] See, e.g., United States v. Rogan , 517 F.3d 449, 452 (7th Cir. 2008); United States ex rel. Bidani v. Lewis , 264 F. Supp. 2d 612, 615 (N.D. Ill. 2003); United States ex rel. Barrett v. Columbia/HCA Health Care Corp. , 251 F. Supp. 2d 28, 33 (D.D.C. 2003).

[12] 31 U.S.C. § 3729(b)(1).

[13] United States ex rel. Schutte v. SuperValu Inc. , 598 U.S. 739 (2023).

[14] Id. at 743.

[15] Id.

[16] 600 U.S. 181 (2023).

[17] SuperValu, 598 U.S. at 754.

[18] Id. at 753.

[19] See, e.g., United States ex rel. Miller v. Weston Educ., Inc. , 840 F.3d 494, 498 (8th Cir. 2016); Harrison v. Westinghouse Savannah River Co. , 176 F.3d 776, 787(4th Cir. 1999).