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The False Claims Act Confronts DEI and DBE Programs

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For more than 160 years, the False Claims Act (FCA) has been the federal government's primary tool to combat fraud. In 2025, the U.S. Department of Justice (DOJ) underscored just how powerful — and profitable — the FCA can be, announcing a record-shattering $6.8 billion in government recoveries driven largely by health care fraud cases. Now, the Trump administration is using the FCA as a tool to eliminate what it considers to be illegal diversity, equity, and inclusion (DEI) programs. The question companies should be asking moving into 2026 is whether failure to comply with the Trump administration's interpretation of civil rights laws presents a new level of risk. Indeed, a new frontier of potential liability under the FCA — with its treble damages and potentially astronomical statutory penalties — may become the future of enforcement.

In the early days of his second term, President Donald Trump moved swiftly to target diversity initiatives in federal procurement by issuing Executive Order 14151, titled "Ending Radical and Wasteful Government DEI Programs And Preferencing," and Executive Order 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." As others forecasted, this policy objective included opening a new front in FCA enforcement by characterizing DEI programs as potential "civil rights fraud" and subsequently launching the Civil Rights Fraud Initiative in May 2025.

While FCA investigations are confidential until a complaint is made public or a whistleblower speaks to the press, it is becoming clear that the DOJ intends to focus in 2026 on eliminating DEI and diversity, equity, inclusion, and accessibility (DEIA) initiatives that it considers to be illegal, and that the FCA will be its primary legal tool. Below, we look ahead to 2026 based on what we learned in 2025 and the legal theories DOJ likely will pursue under the FCA. We also provide guidance on what companies that contract with the federal government, whether directly — such as hospitals and government contractors — or indirectly — such as pharmaceutical and medical device companies — can do now to prepare for a potential enforcement action related to their DEI programs.

Understanding DOJ's Use of the FCA to Prosecute Civil Rights Fraud

The FCA serves as the primary mechanism for the government to recover losses associated with false or fraudulent claims for payment. The statute has traditionally been employed against government contractors and health care providers that inflate the cost of services provided to the government or bill the government for services not performed. The FCA, codified at 31 U.S.C. § 3729 et seq., imposes civil liability on individuals or

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entities that knowingly submit, or cause to be submitted, false claims for payment to the federal government. The statute authorizes recovery of treble damages and per-claim penalties, and it allows whistleblowers, known as relators, to bring cases on the government's behalf and share in any recovery through its qui tam provisions.

Many FCA cases involve traditional fraud theories, *i.e.*, that the government did not get what it paid for. However, to pursue DEI-related claims, the government will likely rely on an "implied false certification" theory, which can be invoked even when the agreed-upon services were provided to the government.

Under an implied false certification theory, a claim for payment to the government is accompanied by an implied certification of compliance with contractual provisions, applicable laws and regulations, and/or program requirements that are conditions of payment. The government maintains that noncompliance with those requirements renders the implied certification false, and results in a fraudulent claim for payment. In its announcement of the Civil Rights Initiative, the DOJ alluded to employing an implied false certification theory by stating that the FCA is implicated "whenever federal-funding recipients or contractors certify compliance with civil rights laws while knowingly engaging in racist preferences[.]"

Since the announcement of the Civil Rights Fraud Initiative, public reporting indicates that the DOJ has sought enforcement against civil rights fraud across several industries. For example, in May 2025, the DOJ launched an FCA investigation against Harvard University based on whether its admissions policies complied with the recent Supreme Court decision ending affirmative action. More recently in December 2025, *The Wall Street Journal* reported that Alphabet's Google and Verizon Communications were among several companies that received civil investigative demands (CID) for documents and information about their workplace programs. To date, automakers, pharmaceutical companies, defense contractors, and utilities providers also have reportedly received CIDs as part of DOJ's Civil Rights Fraud Initiative.

What's Next

Materiality Will Continue to Be Key

The DOJ's ability to prove materiality, a central issue in any FCA case, may be challenging in DEI-related FCA cases. To prove a claim under the FCA, the government must prove the alleged misrepresentation would actually affect the government's payment decision. In other words, the DOJ would need to prove that the existence of a government contractor's DEI program would have affected the government's decision to grant the contractor a contract – or in the case of a hospital submitting claims to Medicare, that the hospital's DEI program would have affected the government's decision to pay those claims. In *Universal Health Services, Inc. v. U.S. ex rel Escobar*, the U.S. Supreme Court established a rigorous materiality standard for FCA cases, requiring a fact-specific analysis focusing on the behavior of the government, rather than strict compliance with a designated condition of payment.[1]

Trump's Executive Order 14173 (EO 14173) addressed this issue by requiring agencies to include terms in federal contracts that certify the recipient does not operate DEI programs that violate federal antidiscrimination laws. EO 14173 also attempted to predefine materiality through contractual language referencing the FCA statute. Specifically, EO 14173 required agencies to incorporate terms into federal contracts and grants "requiring the contractual counterparty or grant recipient to agree 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 FCA. However, not all federal agencies have added the certification and materiality provisions to federal contracts pursuant to the executive order, and some face lawsuits as a result that remain pending.[2]

Going forward, courts will continue to apply *Escobar*'s rigorous materiality standard in this context, which looks to the government's conduct, asking whether an agency continued to pay claims with knowledge of the alleged civil rights law violation, or whether such agency instead suspended payments, sought recoupments, or terminated agreements.

DBE Requirements Are Likely to Face Enhanced Scrutiny

The U.S. Department of Transportation (DOT) has operated the Disadvantaged Business Enterprise (DBE) Program for more than 40 years, which requires recipients of DOT federal funds to ensure that a percentage of contract dollars are spent with small businesses owned and controlled by socially and economically disadvantaged individuals. DBE requirements generally flow down to prime contractors and subcontractors.

Historically, FCA investigations into DBE fraud focused on contractors using DBEs as pass-throughs for services on government-funded projects. In other words, the DOJ or relators would allege that the DBE did not perform a commercially useful function and served only as a means of compliance with DBE utilization requirements. While the U.S. Supreme Court's May 2025 decision in *Kousisis, et al., v. United States*[3] clarifies that DBE fraud remains a legally viable prosecution theory, the DOJ's interest in prosecuting such cases is likely to be tempered by its focus on DEI-related initiatives.

After Trump's January 2025 executive orders directing the federal government to excise DEI and DEIA principles from federal acquisition and contracting, the future of DBE programs seemed uncertain. At the time, the federal government had not clarified whether compliance with contracts that included DBE utilization goals would be considered unlawful discrimination under the new guidance.

On October 3, 2025, the DOT issued an interim final rule removing from the DBE program race- and sex-based presumptions to determine socially disadvantaged applicants and requiring businesses to recertify their eligibility to participate by providing a personal narrative and evidence of individualized social and economic disadvantage.[4] As a basis for its interim final rule, the DOT cited the DOJ's evolving positions on DEI and a 2024 decision by the U.S. District Court for the Eastern District of Kentucky in *Mid-Am. Milling Co., LLC v. United States DOT*, which found that the DBE program's use of a rebuttable race- or sex-based presumption may violate the Constitution's guarantee of equal protection.[5]

In this environment, DBE compliance is likely to be an attractive target for the DOJ's Civil Rights Fraud Initiative. Many state and local governments that receive federal DOT funds have similar DBE utilization requirements or incentives, which could be primed for scrutiny if they include presumptions based on race, sex, or another protected characteristic. Additionally, since DBE requirements flow down, many companies have internal policies or utilization goals regarding contracting with DBEs that may violate the DOT's new stance on DBE presumptions. Finally, as the DOT moves to an individualized disadvantage standard, relying on unsupported DBE certifications based on race or sex may create FCA risk if those certifications are used to support claims for payment.

Health Care Organizations May Be the Next Target

Health care has long been the single largest source of FCA recoveries. The DOJ routinely uses the FCA to pursue cases involving medical services not rendered, lack of medical necessity, upcoding, and kickbacks. In June 2025, the federal government reinforced its focus on health care companies by announcing the results of its "2025 National Health Care Fraud Takedown," which resulted in criminal charges against 324 defendants in connection with over $14.6 billion in alleged losses. Additionally, of the $6.8 billion recovered under the FCA in 2025, $5.7 billion stemmed from health care-related matters.

DOJ has long used the health care industry to test and expand theories of FCA liability, and the Trump administration is continuing that tradition. For example, in July 2025, the DOJ announced that it had sent more than 20 CIDs to doctors and clinics involved in performing gender-affirming care pursuant to investigations into health care fraud, false statements, and more.

Health care organizations often sign multiple contracts and make multiple certifications to the federal government in the context of submitting claims to federal payers, like Medicare, Medicaid, and TRICARE, either directly or indirectly. This reality makes health care a prime space to test FCA theories for DEI-related claims under an implied certification theory.

What to Do Now

If You Are Looking to Mitigate Risk Related to Your DEI Programs

Recipients of federal funds wishing to continue lawful opportunity?enhancing efforts should consider the following to reduce risk under the Civil Rights Fraud Initiative:

1. ***Reassess participation in DEI, DBE, and other opportunity programs under current law and guidance***: Pay particular attention to any policy that (i) explicitly uses race, sex, or other protected characteristics; or (ii) uses facially neutral criteria that could be viewed as proxies for protected characteristics.

2. ***Review federal contracts, grants, and certifications to understand conditions of payment or DEI-related requirements*:** For health care companies, review Medicare and Medicaid enrollment forms, revalidation filings, provider agreements, grant documents, and cost reports to understand where you certify compliance with civil rights and nondiscrimination requirements. For government contractors, review contracts and grants with federal agencies to understand any DBE utilization requirements.

3. ***Review state and local contracts for DBE utilization requirements***: State and local agencies may have programs that mirror the DOT's DBE programs. If those requirements do not align with the DOT's most recent interim final rule, you can consider seeking a waiver with the relevant state or local authority.

4. ***Strengthen internal reporting and response*:** Ensure employees have clear, trusted channels to raise concerns about discrimination or compliance, that complaints are investigated promptly, and that non-retaliation policies are enforced. Robust internal processes may reduce the likelihood of FCA whistleblower filings and can provide an important good faith defense in FCA investigations and litigation.

By proactively aligning DEI practices with the evolving legal framework, tightening controls around certifications

and reporting, and preparing for potential government scrutiny, businesses can better manage their exposure under the Civil Rights Fraud Initiative while continuing to pursue lawful strategies that expand opportunity and inclusion.

If Your Company Becomes a Target of a DEI-related FCA Investigation

As the DOJ expands the scope of FCA enforcement to target DEI-related initiatives in several industry sectors, such as institutions of higher education, technology and telecommunications companies, health care organizations, and other government contractors, your organization may be next. If your organization receives a CID or administrative subpoena related to DEI, DBE, or alleged civil rights violations, swift, structured action is critical.

1. ***Understand and preserve your rights under the FCA statute***: The FCA provides an express mechanism to set aside improperly issued CIDs that fail to comply with the FCA statutory provisions or any constitutional or other legal right or privilege of the petitioner, but a petition must generally be filed within 20 days of service.[6]

2. ***Evaluate the DOJ's case theory and potential defenses early***: Identify the program or incentive at issue and determine whether any federal contracts contain certifications of materiality or compliance with antidiscrimination laws.

3. ***Coordinate a structured response and preserve privilege***: Centralize communications with the DOJ through counsel and implement a litigation hold for potentially relevant data and documents.

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[1] 579 U.S. 176 (2016).

[2] *See, e.g., National Association of Diversity Officers in Higher Education v. Trump*, No. 25-1189, slip op. (4th Cir. Mar. 14, 2025); *Chicago Women in Trades v. Trump*, 778 F.Supp.3d 959 (2025), *City of Seattle v. Trump*, No. 2:25-CV-01435-BJR, 2025 WL 3041905 (W.D. Wash. Oct. 31, 2025).

[3] *Kousisis v. United States*, 605 U.S. 114 (2025).

[4] 90 Fed. Reg. 47969 (Oct. 3, 2025).

[5] No. 3:23-cv-00072-GFVT, 2024 WL 4267193 (E.D. Ky. Sept. 23, 2024) *opinion clarified*, No. 3:23-CV-00072-GFVT, 2024 WL 4635430 (E.D. Ky. Oct. 31, 2024).

[6] 31 U.S.C. § 3733(j)(2).

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