DEI Executive Orders and False Claims Act

Executive Orders

- Exec. Order 14151, “Ending Radical and Wasteful Government DEI Programs and Preferencing,” Executive Order of January 20, 2025, 90 Fed. Reg. 8339 (Jan. 29, 2025) (the “J20 Order”)

-Exec. Order 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” Executive Order of January 21, 2025, 90 Fed. Reg. 8633 (Jan. 31, 2025)(the “J21 Order”)

Program Outline - J21 Order and False Claims Act

I. Overview of J21 Orders provisions
II. Overview of Federal False Claims Act (FCA)
III. Interplay between J21 Order and FCA
IV. Active litigation over J21 Order and other barriers to implementation

I. Overview of J21 Order

Section 1 – Purpose

Section 2 – Policy

Section 3 – Terminating Illegal Discrimination in the Federal Government

Section 4 - Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences

Section 5 – Other Actions

Section 6- Severability

Section 7 – Scope

Section 8- General Provisions

Section 1 – “Purpose”

Authority for order: “the Constitution and the laws of the United States of America,”

Cites obligation to enforce “longstanding Federal civil-rights laws” that “protect individual Americans from discrimination based on race, color, religion, sex, or national origin.”

States that “critical and influential of American society” “have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called “diversity, equity, and inclusion” (DEI) or “diversity, equity, inclusion, and accessibility” (DEIA) that **can** violate the civil-rights laws of this Nation.” (emphasis mine)

Section 2 – “Policy”

Orders “all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements”

Orders “all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.”

Sec. 3. “Terminating Illegal Discrimination in the Federal Government”

Section 3(a) Revokes multiple existing executive orders:

- Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity)
- Executive Order 12898 of February 11, 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations);
- Executive Order 13583 of August 18, 2011 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce);

Section 3(b) orders multiple changes to federal contracting to promote “efficiency”, “reduce costs” and ensure compliance “with our civil-rights laws.”

3(b)(ii) Directs Department of Labor to “immediately cease:

(A) Promoting ‘diversity’;

(B) Holding Federal contractors and subcontractors responsible for taking ‘affirmative action’; and

(C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.”

Sec. 3. “Terminating Illegal Discrimination in the Federal Government” (cont’d)

3(b)(iv) “**Certification Provision**” [Important!!!]

(iv) The head of each agency shall include in every contract or grant award:

(A) A term 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 section of title 31, U.S.C.*; and

(B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.

*31 U.S.C. refers to the Federal False Claims Act

Sec. 3. “Terminating Illegal Discrimination in the Federal Government” (cont’d)

Section 3(d) orders the Director of the Office of Management and Budget to:

1) Purge “references to DEI and DEIA principles, under whatever name they may appear” and
2) “Terminate all ‘diversity,’ ‘equity,’ ‘equitable decision-making,’ ‘equitable deployment of financial and technical assistance,’ ‘advancing equity,’ and like mandates, requirements, programs, or activities, as appropriate” from “all Government-wide processes, directives, and guidance;”

Sec. 4. “Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences”

Directs Attorney General to consult with heads of all federal agencies to prepare a report recommending “measures to encourage the private sector to end illegal discrimination and preferences, including DEI.” The report was to include:

- Key sectors of concern within each agency’s jurisdiction;
- The most egregious and discriminatory DEI practitioners in each sector of concern;
- Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and
- Potential regulatory action and sub-regulatory guidance.

Sections 5-7

Sec. 5. “Other Actions”. Orders Attorney General and Secretary of Education to issue “guidance to all State and local educational agencies that receive Federal funds,” as well as colleges and universities that receive federal grants or are participate in federal student loan program “regarding the measures and practices required to comply with *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181 (2023).”

Sec. 6. ”Severability.” - Standard savings clause – one part being invalidated does not affect other sections

Sec. 7. “Scope.”

(a) Does not affect lawful veteran preferences

(b) “This order does not prevent State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-protected speech.”

(c) “This order does not prohibit persons teaching at a Federally funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order.”

Sec. 8. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

II. False Claims Act (FCA) Overview

FCA's history and purpose
Proceedings under the FCA
Examples of recent recoveries under the FCA

False Claims Act (FCA), 31 U.S. Code §§ 3729-3733

“A federal statute originally enacted in 1863 in response to defense contractor fraud during the American Civil War.

The FCA provides that any person who knowingly submits, or causes to submit, false claims to the government is liable for three times the government’s damages plus a penalty that is linked to inflation.

FCA liability can arise in other situations, such as when someone knowingly uses a false record material to a false claim or improperly avoids an obligation to pay the government. Conspiring to commit any of these acts also is a violation of the FCA.

In addition to allowing the United States to pursue perpetrators of fraud on its own, the FCA allows private citizens to file suits on behalf of the government (called “*qui tam*” suits) against those who have defrauded the government. Private citizens who successfully bring *qui tam* actions may receive a portion of the government’s recovery. Many Fraud Section investigations and lawsuits arise from *such qui tam* actions.”

“The False Claims Act” retrieved from: https://www.justice.gov/civil/false-claims-act

False Claims Act

US Department of Justice's Fraud Section recovered $2.9 billion between 2023-2024 in settlements and judgments from civil cases involving fraud and false claims.

DOJ Fraud Section's practice areas:

Healthcare Fraud
Procurement Fraud
Defense Contracting Fraud
Grant Fraud
FIRREA/Financial Fraud
Customs Fraud
Conflicts of Interest
Disaster Relief Fraud
Cyber Fraud

False Claims Act – Overview of *Qui Tam* Procedure

Both the US Attorney General and private whistleblowers can bring FCA suits. 31 U.S.C. § 3730.

If whistleblower (also called "relator") files *qui tam* suit on government's behalf – relator must file under seal and provide government with complaint and supporting evidence. *Id.* § 3730(b)(2).

Government then decides whether it will intervene and take over the case or permit relator to proceed on US's behalf. *Id.* § 3730(b)(4).

Complaint is unsealed and defendant is served. *Id.* § 3730(b)(3).

False Claims Act liability

"Any person who (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or] (B) knowingly makes, uses, or causes to be made or used, a false record or statement **material** to a false or fraudulent claim . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a)(1)(A)-(B)(emphasis added).

The False Claims Act defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 USC § 3729(b)(4)

False Claims Act – recovery examples

- Drug Maker Teva Pharmaceuticals Agrees to Pay $450M in False Claims Act Settlement to Resolve Kickback Allegations Relating to Copayments and Price Fixing
- The Pennsylvania State University Agrees to Pay $1.25M to Resolve False Claims Act Allegations Relating to Non-Compliance with Contractual Cybersecurity Requirements
- Walgreens Agrees to Pay $106.8M to Resolve Allegations It Billed the Government for Prescriptions Never Dispensed
- Duke University Agrees to Pay U.S. $112.5 Million to Settle False Claims Act Allegations Related to Scientific Research Misconduct

https://www.justice.gov/civil/practice-areas-0

False Claims Act-Examples

Lockheed Martin Corporation Agrees to Settle False Claims Act Allegations of Defective Pricing

Thursday, February 6, 2025

Lockheed Martin Corporation (LMC) has agreed to pay $29.74 million to resolve False Claims Act allegations of defective pricing on contracts for F-35 military aircraft. This payment is in addition to $11.3 million that LMC previously paid to the Department of Defense (DOD) for the same undisclosed cost and pricing data on some of the same contracts. LMC, headquartered in Bethesda, Maryland, is one of the world's largest defense contractors.

https://www.justice.gov/opa/pr/lockheed-martin-corporation-agrees-settle-false-claims-act-allegations-defective-pricing

Lockheed Martin FCA Settlement

According to court documents, between 2013 and 2015, LMC inflated pricing proposals it submitted to obtain contracts for the F-35 by failing to provide to DOD's F-35 Joint Program Office (JPO) accurate, complete, and current cost and pricing data during the negotiations leading to the award of five contracts for the production or sustainment of the F-35.

The United States alleged that LMC had knowledge of suppliers' cost or pricing data that it did not disclose to the JPO in violation of the Truth in Negotiations Act (TINA). Congress enacted TINA in 1962 to help level the playing field in sole source contracts — where there is no price competition — by making sure that government negotiators have access to the cost or pricing data that the offeror used when developing its proposal.

The United States alleged that had LMC provided accurate, complete, and current cost and pricing data, JPO would have awarded the contracts in lower amounts.

Materiality in the Lockheed Martin F-35 False Claims Act settlement

Again, “material” means “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” 31 USC § 3729(b)(4)

The government alleged Lockheed Martin had “knowledge of suppliers’ cost or pricing data that it did not disclose to” the government. Had Lockheed Martin disclosed the pricing data the government “would have awarded the contracts in lower amounts.”

Fair to characterize the undisclosed pricing data as “material” to the government’s payment decisions.

III. Interplay between J21 Order and FCA

Certification Provision seeks to expand False Claims Act liability by adding new conditions of materiality to all federal grants and contracts.

Relevant Supreme Court authority on materiality for FCA purposes

A hypothetical exploring the practical complications of making non-compliance with anti-discrimination laws actionable under the FCA.

J21 Order's Certification Provision

"The head of each agency shall include in every contract or grant award:

(A) A term 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 section of title 31, U.S.C. and

(B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

J21 Order § 3(b)(iv)(A)-(B)

Does clause declaring materiality trigger FCA liability?

Declaration of Materiality

"The materiality standard is demanding. The False Claims Act is not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations. **A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment.** Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial. In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive."

Universal Health Servs., Inc. v. United States ex rel. Escobar, 579 U.S. 176, 190 (2016)

Supreme Court expressly rejected “compliance with all laws” definition of materiality in *Escobar*

"Likewise, if the Government required contractors to aver their compliance with the entire U.S. Code and Code of Federal Regulations, then under this view, failing to mention noncompliance with any of those requirements would always be material. The False Claims Act does not adopt such an extraordinarily expansive view of liability."

Escobar, 579 U.S. at 196.

Hypothetical

“According to court documents, between 2013 and 2015, LMC inflated pricing proposals it submitted to obtain contracts for the F-35 by failing to provide to DOD’s F-35 Joint Program Office (JPO) accurate, complete, and current cost and pricing data during the negotiations leading to the award of five contracts for the production or sustainment of the F-35.”

What if Lockheed Martin had provided accurate pricing data supporting the pricing proposals but instead its contract contained language agreeing “that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions” for FCA purposes? J21 Order § 3(b)(iv)(A)

Lockheed Martin to Pay $115,000 to Settle EEOC Disability/Retaliation Discrimination Lawsuit

“The two-year consent decree resolving EEOC’s lawsuit has been approved by the federal court. In addition to paying $115,000 in monetary relief to the employee with a disability, Lockheed Martin will provide specialized training on reasonable accommodation processes to managers and human resources; post a notice of employee rights under the ADA; and report employee reasonable accommodation requests to the EEOC.”

https://www.eeoc.gov/newsroom/lockheed-martin-pay-115000-settle-eeoc-disability-retaliation-discrimination-lawsuit

How to calculate liability?

FCA imposes liability for submitting false claims in the following amounts:

- “A civil penalty of not less than $5,000 and not more than $10,000,”
- “Plus 3 times the amount of damages which the Government sustains because of the act of that person.”

31 U.S. Code § 3729(a)(1)

Lockheed Martin agreed to pay $29.74 million for the FCA settlement.

Unclear how to calculate the “amount of damages the government sustains” by contractor violating anti-discrimination laws while certifying compliance with the same as “material to the government's payment decisions”.

US Government paid $416 billion for the F-35 project from 2001-2021 and is estimated to pay $1.7 trillion over next 40 years. Would entire amount be forfeit for one instance of violating anti-discrimination act during contract term?

IV. Active litigation over J21 Order and other barriers to implementation

First Amendment

Two federal district courts have entered injunctions baring, inter alia, implementation of the Certification Provision on First Amendment grounds

Other Arguments

- Tenth Amendment/Penhurst Requirement
- Separation of Powers/Spending Clause

First Amendment & DEI

J21's Certification Provision requires contracts and grants contain "a term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

However, "promoting DEI" is protected First Amendment speech.

Florida's unconstitutional "Stop W.O.K.E. Act"
Honeyfund.com Inc. v. Governor, 94 F.4th 1272 (11th Cir. 2024)

"Florida's law, the Individual Freedom Act, bans certain mandatory workplace trainings. The Act says employers cannot subject 'any individual, as a condition of employment,' to 'training, instruction, or any other required activity that espouses, promotes, advances, inculcates, or compels' a certain set of beliefs. It goes on to list the rejected ideas, all of which relate to race, color, sex, or national origin . . . Discussion of these topics, however, is not completely barred—the law prohibits requiring attendance only for sessions *endorsing* them. Employers can still require employees to attend sessions that reject these ideas or present them in an 'objective manner without endorsement of the concepts.'"

Honeyfund.com Inc. v. Governor, 94 F.4th 1272, 1275–76 (11th Cir. 2024)

"That many people find these views deeply troubling does not mean that by banning them Florida is targeting discrimination. To discriminate generally means to treat differently. But the Act does not regulate differential treatment: the employer's speech, offensive or not, is directed at all employees, whether they agree with it or not. Florida has no compelling interest in creating a per se rule that some speech, regardless of its context or the effect it has on the listener, is offensive and discriminatory."

Id., 94 F.4th at 1281

"It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969).

Honefund.com cont'd

In a last-ditch effort, Florida ties its Act to Title VII. According to Florida, because the Individual Freedom Act, like Title VII, seeks to regulate discrimination, the two statutes rise and fall together—if one is unconstitutional, the other must be too. We disagree. Having similar asserted purposes does not make the two laws the same.

Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"; it never mentions speech or content to define discrimination. 42 U.S.C. § 2000e-2(a)(1). While that law may have an incidental effect on speech, it is not directed at it. . .

Here, speech is not regulated incidentally as a means of restricting discriminatory conduct—restricting speech is the point of the law. That important distinction sets this Act apart from Title VII as an outright violation of the First Amendment.

No matter how hard Florida tries to get around it, viewpoint discrimination is inherent in the design and structure of this Act. Given our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the answer is clear: Florida's law exceeds the bounds of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). No matter how controversial the ideas, allowing the government to set the terms of the debate is poison, not antidote.

Honeyfund.com Inc., 94 F.4th at 1283

Municipalities have Free Speech rights too!

“This order does not prevent State or local governments, Federal contractors, or Federally-funded State and local educational agencies or institutions of higher education from engaging in First Amendment-protected speech.” J21 Order, Sec. 7(b) “Scope.”

‘If petitioners [Utah municipality and its officials] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. *See Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005) (“[T]he Government's own speech ... is exempt from First Amendment scrutiny”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, n. 7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression”). A government entity has the right to “speak for itself.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). “[I]t is entitled to say what it wishes,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and to select the views that it wants to express, see *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *National Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (SCALIA, J., concurring in judgment) (“It is the very business of government to favor and disfavor points of view”). Indeed, it is not easy to imagine how government could function if it lacked this freedom. “If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.” *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990). *See also Johanns*, 544 U.S., at 574 (SOUTER, J., dissenting) (“To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the ‘marketplace of ideas' would be out of the question”’

Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467–68 (2009)

First Amendment challenges to Certification Provision

National Association of Diversity Officers in Higher Education v. Trump, No. 25-333, Dkt. #44-45 (D. Md. Feb. 21, 2025)(Memorandum Opinion and Order granting and denying in part Motion for Preliminary Injunction)

Chicago Women In Trades (CWIT) v. Trump, No. 25-2005, Dkt # 52-53 (N. D. Ill. March 27, 2025)(same)

But see, National Urban League v. Trump, No. 25-471, Dkt. #57 (D.D.C. May 02, 2025)(Memorandum opinion denying, *inter alia*, plaintiff's facial First Amendment challenge to Certification Provision)

Excerpt from Memorandum Opinion in Chicago Women In Trades (CWIT) v. Trump, No. 25-2005, Dkt # 58 (N. D. Ill. March 27, 2025)

‘[F]unding condition[s] can result in an unconstitutional burden on First Amendment rights" when the government goes beyond "defining the limits of the Government spending program" and extends to "leverag[ing] funding to regulate speech outside of the contours of the federal program itself.” *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 206 (2013).

The government conceded at oral argument that the Certification Provision attempts to regulate grantees' speech outside of their federally-funded programs. The provision on its face makes clear that a counterparty must certify that it does not operate any programs that promote DEI, irrespective of whether the program is federally funded.’

Pennhurst Doctrine

"Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power ... rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.' . . . **Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously**.'" *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)(quoting *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 17 (1981))

"Though Congress's power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions.'" *Pennhurst*, 451 U.S. at 25

See National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012),

Spending Clause/Separation of Powers

The President's authority to act “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Article I of the Constitution grants Congress the federal spending power. (U.S. Const. art. I, §8, cl. 1. “Incident to this power, Congress may attach conditions on the receipt of federal funds . . . .” *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). The Impoundment Control Act of 1974, 2 U.S.C. §§ 683 *et seq*. limits the president’s ability to withhold or “impound” funds Congress has appropriated and sets forth a process subject to congressional approval the president must follow to do so. The Administrative Procedures Act, 5 U.S.C. § 551, *et seq*., further limits executive agencies’ ability to act absent Congressional authorization.

These principles are more fully discussed in Temporary Restraining Order enjoining president’s order to pause all federal funding granted in *New York v. Trump*, No. 25-cv-39, Dkt. # 50, pp. 5-7 (D.R.I. January 31, 2025)

Overview

J21 Order's Certification Provision requires agencies to add provision to all federal grants and contracts making compliance with federal anti-discrimination laws a material condition of the government's decisions to pay.

The provision would also add a term requiring grantees and contractors to certify that they did not have any programs promoting illegal DEI.

These changes, if upheld, would subject recipients of federal monies to liability under the False Claims Act.

However, there are several barriers to implementation including:

- False Claims Act jurisprudence on "materiality"
- First Amendment Concerns
- The Pennhurst Doctrine
- Separation of powers issues arising from the spending clause (Article I) and lack of constitutional grant of authority to the president to make changes to laws after enactment.


ANY QUESTIONS?
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