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Client Alert

White Collar Defense

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The Future of the False Claims Act

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On May 19, 2025, Deputy Attorney General Todd Blanche issued a memorandum titled Civil Rights Fraud Initiative announcing the Department of Justice's (DOJ) plan to use the False Claims Act (FCA) to "aggressively" pursue government contractors and any recipients of federal funds that knowingly violate civil rights laws. Blanche's memo comes on the heels of President Trump's January 21, 2025 executive order (EO), which targeted diversity, equity, and inclusion (DEI) programs at companies and organizations that do business with the federal government. The memo now puts into motion the enforcement mechanisms that the EO contemplated. And it marks a potentially seismic shift in FCA enforcement, one that creates substantial risk for any entity that contracts with or receives funding from the federal government, due to the FCA's treble damages provision. But as explained below, any organization investigated or sued under the FCA for its DEI programs would likely have strong defenses, especially if the organization takes steps now to fortify compliance with civil rights laws.

What is the Civil Rights Fraud Initiative?

Under the Civil Rights Fraud Initiative, public universities, contractors, and other recipients of federal grants or contracts may face FCA liability if they knowingly violate civil rights laws and falsely certify compliance with such laws. Blanche's memo initially focuses on universities and asserts that a university that "encourages antisemitism, refuses to protect Jewish students, allows men to intrude into women's restrooms, or requires women to compete against men in athletic competitions" could violate the False Claims Act. The memo's emphasis on universities comes after last week's revelation in *The New York Times* that DOJ had opened an FCA investigation into Harvard's compliance with the Supreme Court's decision in *Students for Fair Admissions v. Harvard,* 600 U.S. 181 (2023), which struck down a university's use of racial preferences in admissions processes. Indeed, DOJ appears to have already issued multiple civil investigative demands to Harvard, both for documents and for sworn testimony—so Blanche's memo is anything but lip service.

The memo makes plain that any entity that accepts federal funds could face scrutiny under the FCA for adhering to "racist policies and preferences," including through DEI programs. This provision goes well beyond only universities and appears to include virtually any company that does business with the federal government, including those in health care, life sciences, education, defense, and more.

The memo explains that the initiative will be led jointly by DOJ's Civil Fraud Section, which enforces the FCA, and the Civil Rights Division, which enforces civil rights laws. Each of those units will identify teams of attorneys to "aggressively pursue" FCA cases in civil rights contexts along with an Assistant U.S. Attorney from each of the 93 U.S. Attorney's Offices around the country. The memo encourages the Civil Frauds and Civil Rights divisions to "engage with" the Criminal Division, and it impels Civil Frauds and Civil Rights to coordinate with other federal agencies and establish partnerships with state attorneys general and local law enforcement to investigate and enforce FCA violations. (It seems likely that any partnerships with state attorneys general will break down along political lines.)

Finally, DOJ "strongly encourages" private individuals—known as "Relators"—to file *qui tam* (whistleblower) suits identifying potential FCA violations and "sharing in any monetary recovery." One key indicator of the new policy's success may be the volume of *qui tam* lawsuits brought by the Relators' bar, particularly those with a track record of success, under a theory of false certification of compliance with civil rights laws.

What's Next?

Blanche's memo clearly creates risks for universities, companies, and any entities that accept federal funds or contracts with the government. But the extent of that risk is currently unknown and indeed might not be known for some time. As an initial matter, the memo raises many thorny questions about how the government would prove an FCA claim premised on civil rights violations. For example, the first step in establishing an FCA claim is proving falsity. How would the government prove the falsity of a claim in the circumstances contemplated by the memo? The question would turn on the precise content of the entity's certification that accompanied the claim. If an entity certifies that it is in "compliance with civil rights laws" and did not "knowingly engage in racist preferences, mandates, policies, programs, and activities," including through DEI programs, as the memo dictates, then the government would have to prove, by a preponderance of the evidence, that the certification was in fact false. That is a fact-intensive question and one that a jury would have to resolve, likely after years of litigation. That said, however, the Supreme Court in *Universal Health Services v. Escobar*, 579 U.S. 176 (2016) sanctioned using an implied certification theory, meaning even a contractor who submits a claim for payment without explicitly asserting compliance with applicable laws and regulations impliedly certifies that it has met all legal requirements, including compliance with civil rights and anti-discrimination laws. Only time will tell how either express or implied certifications will play out in this context, but the government will bear the burden of proving non-compliance.

And that is not all the government would have to prove: The second step in establishing an FCA claim is proving scienter. Here, that means the false claim was made knowingly, or at least with reckless disregard for its truth. So, a good-faith certification that an entity was not violating antidiscrimination laws would be a strong defense to a false-certification allegation, and proving that it was knowingly or recklessly false would be an uphill battle for the government.

The third requirement of an FCA claim is proving materiality, and there is a colorable (if not strong) legal argument that materiality should be assessed as of the time of the alleged violation—which very well could have occurred during the Biden administration. If that were the case, proving that the government during the Biden administration would have withheld payment of a federal claim because a DEI program violated antidiscrimination laws would be very challenging.

Despite these potentially strong defenses, exposure to treble damages and per-violation penalties (ranging from approximately $14,300 to $28,600 per claim) poses serious financial and reputational risks. And even if the risk of such exposure becoming reality is low the mere existence of a federal investigation into a company, university, or other entity can be extremely disruptive, damaging, and costly. For these reasons, any entity that receives federal funding or makes claims for federal dollars must ensure that it is complying with antidiscrimination laws, carefully scrutinize the certifications it makes to the government, and globally assess its FCA enforcement risk stemming from its current and past DEI efforts.

The Lowenstein White Collar Defense group is closely monitoring the new policy and its potential impact on clients. Our team is available to assist with policy reviews, compliance audits, and training to ensure organizations are equipped to navigate these shifting enforcement priorities.

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