

## Alert | Government Contracts



April 2026

### Executive Order 14398 Targets ‘Racially Discriminatory DEI Activities’ in Federal Contracts

#### Go-To Guide:

- President Donald Trump’s March 26, 2026, Executive Order (EO 14398) requires that, by April 25, 2026, federal agencies ensure all federal contracts and “contract-like instruments” include a clause prohibiting “racially discriminatory” diversity, equity, and inclusion (DEI) activities in connection with the performance of a federal contract. The EO directs that the clause flow down to subcontractors at every tier.
- The EO identifies sanctions for noncompliance, including termination of contracts, suspension or debarment, and False Claims Act (FCA) actions. It also directs the U.S. Department of Justice (DOJ) to prioritize FCA actions based on the new contract terms.
- The EO’s clause will require contractors to provide agencies access to records that will allow the agency to evaluate compliance and to report “known or reasonably knowable” violations by subcontractors.

On March 26, 2026, President Trump issued EO 14398, requiring agencies to include in all federal contracts, subcontracts at any tier, and “contract-like instruments” (presumably other transaction agreements, and potentially grants and cooperative agreements) a new clause prohibiting “racially

discriminatory DEI activities” “to the extent permitted by law.” The clause states that it applies “[i]n connection with the performance of work under” “a federal contract,” which may provide some limitation on the applicability of the clause’s broad requirements. The EO directs agencies to ensure they incorporate the clause by April 25, 2026.

The EO builds on the January 21, 2025, [EO 14173](#), Ending Illegal Discrimination and Restoring Merit-Based Opportunity, which revoked EO 11246 (Equal Employment Opportunity) and directed that federal contracts and grants require recipients and contractors to certify they do not operate programs promoting DEI in violation of anti-discrimination laws. EO 14173 further directed agencies to include a term requiring recipients and contractors to agree that compliance with anti-discrimination laws is material to the government’s payment decisions for purposes of the FCA.

Unlike EO 14173, EO 14398 provides some guidance as to what the administration views as discriminatory. “[R]acially discriminatory DEI activities” are defined as “disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity’s resources.” The term “program participation” means “membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor.” The definitions are an apparent effort to address concerns about EO 14173’s failure to define “illegal DEI.”

The EO is limited to “racially discriminatory DEI activities,” which includes “ethnicity” but does not reference gender or sex discrimination. Additionally, while EO 14173 was limited to DEI programs that violate anti-discrimination laws, EO 14398’s definitions and requirements are not tied to federal anti-discrimination laws. Unlike EO 14398, EO 14173 did not expressly require that EO’s contract language flow down to subcontractors.

The new clause will require contractors to:

- “furnish all information and reports, including providing access to books, records, and accounts, as required by the contracting agency,” to allow the agency to assess compliance;
- “report any subcontractor’s known or reasonably knowable conduct that may violate” the clause to the contracting agency and “take any appropriate remedial actions directed by the” agency; and
- notify the agency if a subcontractor sues and challenges the validity of the clause.

The EO directs agencies to cancel, terminate, or suspend contracts for noncompliance, and to “take appropriate action to suspend and debar contractors or subcontractors for such failures to comply.”

Similar to EO 14173, the clause EO 14398 requires will include a provision that states that the contractor recognizes compliance with the clause is “material to the Government’s payment decisions for purposes” of the FCA. This provision appears to be included because, to be actionable under the FCA, a false certification of compliance with a contract provision must be material to the government’s decision to pay.

The EO and accompanying [Fact Sheet](#) further direct DOJ to prioritize FCA actions and review of *qui tam* actions based on noncompliance with the clause. In May 2025, DOJ announced its [Civil Rights Fraud Initiative](#), stating that it will use “the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws.” At the February 2026 Federal Bar Association Qui Tam Conference, Deputy Assistant Attorney General Brenna Jenny, who leads the Commercial Litigation Branch at DOJ’s Civil Division, stated that a DOJ priority is pursuing

discrimination-related FCA cases. Notably, prior announcements by DOJ focused on violations of federal anti-discrimination laws, whereas the clause required by EO 14398 focuses on “racially discriminatory DEI activities,” which is more broadly defined and does not appear to be tied to existing anti-discrimination laws.

IBM’s April 10, 2026, settlement, in which it agreed to pay \$17 million to resolve allegations it violated the FCA with efforts to increase the diversity of its workforce, highlights the administration’s focus on using the FCA as an enforcement tool. IBM denied engaging in the alleged conduct in the settlement agreement. Nevertheless, contractors may see more investigations and settlements in this area.

### **Authority for the EO**

To have legal effect, EOs must be issued pursuant to one of the president’s sources of authority: *i.e.*, Article II of the Constitution or a delegation of authority from Congress. Like many contractor-related EOs, EO 14398 identifies the Federal Property and Administrative Services Act (FPASA) (40 U.S.C. 101 et seq.) as the source of authority for its issuance. FPASA authorizes the president to “prescribe policies and directives that the president considers necessary to carry out” FPASA’s purpose of “provid[ing] the Federal Government with an economical and efficient system” for “[p]rocur[ing] and supplying property and nonpersonal services, and performing related functions.” 40 U.S.C. §§ 101, 121(a).

Courts will uphold EOs issued under FPASA’s authority if there is a sufficient nexus between the order and FPASA’s goals of economy and efficiency in procurement. EO 14398 seeks to establish that nexus by asserting that eliminating DEI activities promotes “economy and efficiency in Federal contracting” because DEI activities are “unethical and often illegal” practices that “cause inefficiencies, waste, and abuse” and “impose artificial costs in hiring, promotion, and operations by precluding implementation of merit-based principles,” which the order contends are passed on to the government by contractors.

Courts have upheld various EOs directed at federal contractors under the authority of FPASA, including EOs imposing anti-discrimination-related contract provisions. *See, e.g., Contractors Ass’n of E. Pa. v. Sec’y of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971). But courts have increasingly sustained challenges to the president’s authority under FPASA, including to policies with major economic and social implications. One such example is the COVID-19 vaccine mandate (EO 14042), which three U.S. Circuit Courts of Appeal found exceeded the president’s authority under FPASA. *Louisiana v. Biden*, 55 F.4th 1017, 1033–35 (5th Cir. 2022); *Commonwealth v. Biden*, 57 F.4th 545, 555 (6th Cir. 2023); *Georgia v. President of the United States*, 46 F.4th 1283, 1297 (11th Cir. 2022). Similarly, the Ninth Circuit held that the federal contractor minimum wage mandate (EO 14026) exceeded the president’s authority because FPASA “does not give the president unrestrained authority to issue any procurement policy that he desires.” *Nebraska v. Su*, 121 F.4th 1, 7–9 (9th Cir. 2024).

EO 14042 and EO 14026 both included statements explaining the Biden administration’s position that those EOs would support economy and efficiency in procurement. This means that the statements in EO 14398 regarding inefficiencies and costs passed through to the government, by themselves, may not be enough for a court to find a sufficient nexus between the EO’s policy and economy and efficiency in procurement for the EO to fall within the president’s authority under FPASA.

### **Incorporation into the Federal Acquisition Regulation (FAR)**

Despite the 30-day timeline for agencies to ensure the clause is incorporated into contracts and contract-like instruments, the EO sets a 60-day timeline for the FAR Council to issue deviations and interim guidance implementing the EO’s clause. This may create inconsistencies in agency implementation. While

there is no timeline for a permanent FAR revision, the EO directs the FAR Council to amend the FAR to require inclusion of the clause “in Federal procurement, solicitations, and contracts” subject to the order and to remove any conflicting FAR provisions. Although deviations and guidance will be issued, contractors should consider commenting on proposed FAR provisions under 41 U.S.C. § 1707. *See* FAR Subpart 1.5.

The EO also applies to “contract-like instruments,” indicating it will be incorporated into agreements that are not subject to the FAR, such as other transaction agreements. While the EO is not clear on how the clause will be implemented for “contract-like instruments,” it may be addressed in the OMB Guidance discussed below.

### Office of Management and Budget (OMB) Guidance

The EO requires the OMB director to issue guidance to agencies to ensure compliance with the EO. The EO also requires the OMB director, in coordination with the attorney general, the chair of the Equal Employment Opportunity Commission (EEOC), and the assistant to the president for domestic policy, to “identify economic sectors that pose a particular risk of entities engaging in racially discriminatory DEI activities based on current or past conduct and issue additional guidance to contracting agencies regarding best practices to ensure compliance with this order within such sectors.”

### Increased Compliance Obligations

One of the Trump administration’s key initiatives has been to increase the use of simplified, less-burdensome, and faster acquisition procedures. (See, e.g., EO 14275, Restoring Common Sense to Federal Procurement.) EO 14398’s requirement for prime contractors to report “known or reasonably knowable” potential violations of subcontractors and its access to records/audit provision will create additional compliance requirements, especially for commercial products and commercial services procurements. This may cause some contractors and subcontractors to avoid federal work. It also may conflict with the Revolutionary FAR Overhaul’s goal to “remove most non-statutory rules,” depending on how it is implemented.

### Key Takeaways

The EO seeks to employ a suite of tools to enforce the new clause’s requirements, including compliance reviews and extensive access to records, unclear requirements for prime contractors to disclose known or “reasonably knowable” actions of subcontractors that “may” violate the clause, contract terminations and suspensions, referrals for suspension and debarment, and FCA actions.

The clause’s requirement for contractors to acknowledge that compliance is material for purposes of the FCA highlights the administration’s efforts to bolster its assertion that contractors who fail to accurately certify compliance should be subject to the FCA’s penalties and triple damages provision. Regardless of whether the government is able to establish FCA liability (including the high materiality standard established under *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 193-94 (2016)), the threat of an FCA investigation alone may achieve the EO’s goals, as demonstrated by the IBM settlement.

The threat of suspension or debarment based on noncompliance with the forthcoming clause may be relatively limited, but it does suggest that the administration considers noncompliance to be a matter of present responsibility. The clause provides that contractors “may be declared ineligible for further Government contracts.” While it directs agencies to “take appropriate action to suspend and debar

contractors or subcontractors” for failing to comply, agencies can only refer a contractor to the Suspending and Debarment Official (SDO) for potential suspension and debarment and cannot force the SDO to debar a contractor. The SDO would need to conclude that a contractor’s violation of the clause renders it not presently responsible to work with the government. SDOs may be unlikely to take that step, particularly if the validity of the clause is being contested.

Contractors should keep in mind that this clause does not apply unless incorporated into their contracts. The EO’s directive to agencies to ensure the clause is incorporated in all contracts, subcontracts, and contract-like instruments by April 25 suggests that the administration wants agencies to apply the order’s requirements to existing contracts as well as prospectively in new contracts. For existing contracts, agencies will need to seek bilateral contract modifications to incorporate the clause. *Compare* FAR 43.103(a) to FAR 43.103(b). Efforts to implement the clause may be challenged in court, which might delay implementation, so contractors should monitor litigation and related agency announcements, along with the FAR comment period referenced above.

In the meantime, contractors should consider working with experienced counsel to prepare for the clause’s implementation. This may include a comprehensive review of existing DEI-related (even if not formally labeled as such) programs, policies, and procedures; reviewing subcontracts to determine the process for incorporating government-directed clauses; reviewing prime and subcontractor oversight processes in light of the EO’s obligation to report “reasonably knowable” potential subcontractor violations; and reviewing whistleblower and anti-retaliation policies.

Contractors should also consider working with counsel on evaluating and navigating potentially conflicting obligations under the clause, on the one hand, and state and local subcontracting goals or supplier diversity requirements (particularly those related to minority businesses) and anti-discrimination laws, on the other. Flow downs to non-U.S. subcontractors and potential conflicts with foreign laws are another complex area that contractors should consider reviewing with counsel.

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