

## DE&I UNDER THE TRUMP ADMINISTRATION – HOW FAR HAS THE PENDULUM SWUNG?

As expected, President Trump signed several Executive Orders focused on Diversity Equity and Inclusion ("DE&I") within the first days of his new presidency. While the focus is largely on terminating DE&I programs and initiatives within and related to the Federal Government, significantly, there are two developments which squarely impact private companies who may be forced to pivot in their hiring and promotion criteria on threat of a civil rights discrimination investigation or disqualification from government contracts/tenders. While the actual enforcement policy in practice has yet to emerge, companies should assess and understand their risks under this new civil rights policy, recognizing that the new policy may come under legal challenge.

### EXECUTIVE ORDER: "ENDING ILLEGAL DISCRIMINATION AND RESTORING MERIT BASED OPPORTUNITY" (JAN. 21, 2025)

Based on the argument that DE&I programs are illegal and "violate U.S. civil-rights laws," the [Executive Order](#) instructs the U.S. Attorney General to assist the heads of all federal government agencies, within 120 days (i.e., by May 20, 2025), to deliver a "proposed strategic enforcement plan," that covers the following elements:

- "recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI;"
- identifies "key sectors of concern within each agency's jurisdiction;"
- identifies "most egregious and discriminatory DEI practitioners in each sector of concern;"
- "plan of specific steps or measures to deter DEI programs or principles;"

- "other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws;"
- "Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest;" and
- "Potential regulatory action and sub-regulatory guidance."

The Executive Order directs each agency to identify "up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations and foundations with assets of 500 million dollars or more, and State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars." It remains uncertain how each agency will seek to identify the entities for such investigation.

Secondly, as noted in the accompany [fact sheet](#) released by the White House and as detailed in the Executive Order, there is also a focus on companies that are awarded federal government contracts and directs that every contract or grant award will require the company contracting/grant recipient to agree to two contractual terms: (1) compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and (2) certify that it does not operate any programs promoting DE&I that violate any applicable Federal anti-discrimination laws. Including these additional terms in the federal contracts and grants sets up the basis for a False Claims Act enforcement action in the event the terms are deemed violated.

## **EXECUTIVE ORDER: "ENDING RADICAL AND WASTEFUL GOVERNMENT DEI PROGRAMS AND PREFERENCING" (JAN. 20, 2025)**

While this [Executive Order](#) focuses primarily on ending DE&I, equity, and environmental justice programs within the Federal Government, it also has the potential to affect some companies in the private sector. Specifically, it requires all Federal agencies to terminate "all 'equity action plans,' 'equity' actions, initiatives, or programs, 'equity-related' grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees." Additionally, it requires all heads of agencies to provide the Director of the OMB with a list of all "Federal contractors who have provided DEI training or training materials to agency or department employees," as well as anyone who has "received Federal funding to provide or advance DEI, DEIA, or 'environmental justice' programs, services, or activities since January 20, 2021."

It is not yet clear what this list will be used for, or how many private companies will be on it. However, companies who have contracted with the Federal government in connection with DE&I policies or services should, at a minimum, prepare for increased scrutiny.

## **WHAT'S NEXT FOR PRIVATE COMPANIES?**

Several of the Executive Orders signed by President Trump are already facing legal challenge and it is possible that these Executive Orders could face legal

challenges, although as of now, no such challenges have been brought. And while the agencies have several months to identify companies for civil compliance investigations, undoubtedly no company wants to find itself on that list or as part of the test cases of whether their DE&I program is illegal and in conflict with existing U.S. civil rights laws. Further, companies seeking to win contracts or be awarded grants may not have as much time given the "affirmations" that they will be required to make, and face materially incremental risks under the False Claims Act.

Companies are in the position of having to weigh the new expectations under the Trump Administration against the commitments they have made to their workforce and shareholders and consider whether policies and disclosures may need adjustment. Further, multinational companies that face potentially conflicting requirements such things as board diversity will need to reconcile these obligations.

At a minimum, companies should examine what programs they have in place, what they have committed to and announced publicly (and what they've called those programs), and prepare to demonstrate how their workforce programs and actions comply with US civil rights laws and regulations.

We will continue to monitor for developments in this space and support our clients in responding to these developments.

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