wiley

ALERT

EO 14398 Imposes New DEI-Related Contract Clauses, Audit Rights, and FCA Risks for Federal Contractors and Subcontractors

April 2, 2026

President Trump's March 26, 2026, Executive Order 14398, titled "Addressing DEI Discrimination by Federal Contractors" (the EO), directs agencies to ensure that federal contracts, subcontracts, lower-tier subcontracts, and certain contract-like instruments include a clause targeting what the order describes as "racially discriminatory DEI activities." The new clause requires cooperation with agency information requests related to alleged racially discriminatory DEI activities; contemplates contract termination, suspension, or debarment-related consequences; requires reporting of certain subcontractor conduct; and states that compliance is material to the Government's payment decisions for purposes of the False Claims Act (FCA).

The EO also directs the Office of Management and Budget (OMB), Department of Justice (DOJ), and the Federal Acquisition Regulation (FAR) Council to move quickly on implementation and calls for prompt review of FCA claims predicated on the new contract terms. The EO appeared in the Federal Register on March 31, 2026, and directs covered agencies to begin inserting the new contract terms into contracts and contract-like instruments within 30 days of the order.

What Does It Mean for Contractors?

The EO continues the Trump Administration's focus on "illegal DEI" and bears some similarity in content and purpose to last year's EO 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*.

Authors

Craig Smith
Partner
202.719.7297
csmith@wiley.law

Olaoluwaposi O. Oshinowo
Of Counsel
202.719.4275
ooshinowo@wiley.law

Nick Peterson
Of Counsel
202.719.7466
npeterson@wiley.law

Practice Areas

DEI Counseling

Diversity, Equity, and Inclusion (DEI) Counseling and Support

Employment & Labor

Employment and Labor Standards Issues in Government Contracting

FAR Overhaul

Government Contracts

Oversight, Investigations & White Collar Enforcement

Suspension and Debarment

White Collar Defense & Government Investigations

On its face, the order is directed at race- and ethnicity-based differential treatment, not just initiatives that use "DEI" terminology. Accordingly, contractors should review and update internal guidance and prepare relevant personnel to ensure that all programs, metrics, and practices are compliant and do not make race or ethnicity a basis for eligibility, selection, or resource allocation.

Unlike EO 14173, the EO provides examples of targeted conduct and defines "racially discriminatory DEI activities" as "disparate treatment based on race or ethnicity" in recruitment, employment, contracting, program participation, or the allocation or deployment of an entity's resources. It separately defines "program participation" to include membership or participation in, or access or admission to, training, mentoring, leadership-development programs, educational opportunities, clubs, associations, and similar opportunities sponsored or established by a contractor or subcontractor.

These definitions may be intended to address a central criticism of last year's EO 14173: that EO and related materials, such as a DOJ memorandum issued last summer, left the meaning of "illegal DEI" insufficiently defined. But EO 14398's definitions still leave important questions open, such as how agencies will interpret concepts like "program participation" and "allocation or deployment of resources," and how aggressively they will apply them in practice.

New Contract Terms Imposed by EO 14398

Within 30 days, agencies are directed, to the extent permitted by law, to ensure inclusion of a new clause in covered contracts and contract-like instruments, including subcontracts and lower-tier subcontracts. As set out in the order, that clause will:

1. prohibit the contractor from engaging in covered conduct;
2. require the contractor to provide information and reports and to furnish access to books, records, and accounts;
3. permit cancellation, termination, suspension, and possible ineligibility for further Government contracts;
4. require the contractor to report any subcontractor's "known or reasonably knowable" conduct that may violate the clause and to take remedial action directed by the agency;
5. require the contractor to notify the agency if a subcontractor sues and challenges the clause's validity; and
6. state that compliance with the clause is material to the Government's payment decisions for FCA purposes.

Immediate Steps for Federal Contractors

Many contractors can leverage reviews they performed after EO 14173. EO 14398, however, differs in ways that should prompt contractors and higher-tier subcontractors to refresh last year's internal review with a narrower and more operational focus. That review should include an inventory of all programs, policies,

metrics, or requirements in which race or ethnicity may affect recruiting, hiring, promotion, supplier participation, mentorship, leadership development, training access, internships, fellowships, employee groups, or resource allocation. It should also assess whether manager objectives, compensation mechanisms, staffing expectations, or supplier goals could be read to require race-conscious decisions.

If not already done, contractors should update their internal guidance and protocols for human resources, recruiting, legal, compliance, procurement, and business leaders to emphasize equal-opportunity and merit-based decision-making and to make clear that access to opportunities cannot be conditioned on race or ethnicity.

Prepare Contracts and Supply-Chain Personnel

Based on last year's experience, contractors should expect contracting officers to begin incorporating EO 14398's contract language into solicitations and contracts in the coming weeks, likely with little, if any, flexibility to negotiate. Contracting officers may also expect primes and higher-tier subcontractors to flow down the contract terms quickly, although any direction or guidance on flowdown timing remains to be seen. (For comparison, note that EO 14173 did not expressly require that EO's contract language be flowed down to subcontractors.)

On the supply-chain side, primes should review subcontract templates, confidentiality provisions, information-sharing terms, cooperation clauses, and escalation procedures. The EO's "known or reasonably knowable" reporting standard is likely to result in contractors adopting more formal diligence, documentation, and reporting processes for subcontractor conduct.

Supply-chain personnel should also review existing subcontracts for confidentiality or similar provisions that limit disclosure of subcontract information to third parties. Such terms often include carve-outs for disclosures required by law or necessary to comply with contract obligations, which may provide a basis for contractors that determine the circumstances warrant reporting on subcontractors as contemplated by the clause.

Monitor Regulatory and Subregulatory Developments

EO 14398 also directs the FAR Council to issue deviation and interim guidance within 60 days on implementing the contract terms described above. The EO further directs the FAR Council to amend the FAR to provide for these contract terms and to "remove any provisions that conflict or are inconsistent with" them.

The rulemaking to amend the FAR may take some time. Last year's implementation of EO 14173 may be instructive as the draft interim rule to implement relevant terms of EO 14173 has been under review at OMB's Office of Information and Regulatory Affairs for almost a year, even though such reviews are generally expected to take only 90 days.

The FAR Council's drafters may also need time to address how these EO-created contract terms fit with the FAR Overhaul's effort to "remove most non-statutory rules."

Understand the Overall Risk Environment

Contractors should understand the ongoing Government activity required by EO 14398. The EO directs:

- OMB to issue guidance to contracting agencies on appropriate remedies for noncompliance, including suspension or debarment;
- OMB to coordinate 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 that engage in "racially discriminatory DEI activities," and to issue guidance on contracting in these economic sectors;
- agency heads to review and report on implementation within 120 days, with regular ongoing reviews to follow; and
- the Attorney General to ensure prompt review of FCA whistleblower claims predicated on the contract terms described above.

Bottom Line

EO 14398 does not, on its face, prohibit every initiative that uses "DEI" terminology. It does, however, direct the federal Government to use procurement tools to target race- and ethnicity-based differential treatment by contractors and subcontractors, and it does so through contract clauses, record-access rights, flowdown, reporting obligations, potential FCA liability, and suspension or debarment risk. Federal contractors should treat this as a contract-compliance development with immediate operational consequences.

Wiley's Government Contracts, Employment, and White Collar Defense & Government Investigations practices have extensive experience helping clients navigate compliance and have been engaged with the Executive Branch and Congress on evolving law and policy in this area.

We continue to monitor developments from this Administration and are ready to assist clients in navigating these changes. To stay informed on Executive Orders and related announcements from the Trump Administration, please visit our dedicated resource center below.

Trump Administration Resource Center