Top Ten Column: The Trump Administration's 2025 DEI Executive Order: Unveiling FCA Risks for Health Care Providers

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On January 21, 2025, the White House issued the *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* Executive Order, directing federal agencies to eliminate "discriminatory and illegal" diversity, equity, and inclusion (DEI) programs. The order was directed not only at federal departments and agencies' DEI programs but also targeted federal contractors and grant recipients, requiring them to certify compliance with anti-discrimination laws and explicitly linking this compliance to the materiality standard under the False Claims Act (FCA). This connection potentially raises legal and compliance considerations for the healthcare industry.

The FCA is a civil fraud statute dating back to the Civil War era that imposes liability on anyone who (among other things) knowingly submits false claims to the federal

government. A key link in FCA cases is materiality, meaning whether the alleged misrepresentation influenced the government's decision to pay the claim. The executive order's directive that compliance with anti-discrimination laws is "material" to government payments suggests an evolving enforcement approach under the FCA. This expansion raises the question of whether healthcare providers who maintain DEI programs could face FCA scrutiny if their programs are alleged to run afoul of federal anti-discrimination laws. Under Supreme Court precedent in *Universal Health Services v. United States ex rel. Escobar*, the standard for proving materiality is "demanding" and "rigorous," essentially requiring that the misrepresentation is significant enough that the government would not have paid the claim had it known about the violation. However, by explicitly tying DEI compliance to materiality in federal contracts and grants, the executive order prompts the need for further legal analysis regarding, for example, whether a provider or payer's activities include federal contracts or grants, thus bringing them squarely within the purview of the executive order's mandate. The executive order sheds light on the future of FCA investigations, a topic historically debated.

Given these uncertainties, federal contractors and grantees should proactively evaluate their DEI programs in the context of existing anti-discrimination laws and stay alert to any shifts in enforcement priorities. While it remains to be seen how the executive order will impact the healthcare industry as a whole, its language indicates that the enforcement landscape for FCA claims may shift, particularly in sectors heavily reliant on federal contracts and grants.

Submitted by Hooper Lundy & Bookman.

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