DEMOCRACY 2025

To: Democracy 2025 Partners
From: Democracy Forward
Re: March 26 Federal Contractor Executive Order
Date: April 24, 2026

President Trump issued Executive Order 14398 on March 26, 2026, to further roll back civil rights advances in this country by targeting what the Trump-Vance administration considers to be diversity, equity, and inclusion ("DEI") programs and initiatives ("March 26 Federal Contractor EO"). This Executive Order (EO) directs federal agencies to include a new clause in all contracts and subcontracts by April 25, 2026, that prohibits what it calls "racially discriminatory DEI activities" and threatens loss of contracts, inability to work on federal contracts in the future, and civil and criminal liabilities. The March 26 Federal Contractor EO threatens to significantly reshape the federal contracting landscape and expands enforcement risk for contractors.

This memorandum explains the March 26 Federal Contractor EO in context of the Trump-Vance administration's ongoing efforts to undermine our multiracial democracy and distort civil rights laws, discusses its implications for Democracy 2025 partners, and suggests potential avenues for opposition. This resource also highlights additional relevant resources to support the Democracy 2025 community in navigating and responding to this EO.

A. Understanding the March 2026 Federal Contractor EO

Previous Actions to Target DEI Programs and Activities

The March 26 Federal Contractor EO is the latest in the Trump-Vance administration's continued assault on our multiracial democracy by attacking so-called "DEI" programs and activities. In January 2025, President Trump signed a pair of executive orders targeting diversity, equity, inclusion, and accessibility ("DEIA"): the "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (collectively the "Anti-DEIA EOs"). The latter order revoked the longstanding EO 11246, "Equal Employment Opportunity," and dismantled much of the legal framework that had applied to recipients of federal funds, including federal contractors, and for decades had ensured equal opportunity and prohibited discrimination. That Anti-DEIA EO also sought to require contractors to certify that they do not operate any DEI programs "that violate any applicable Federal anti-discrimination laws." Further, it stated that compliance "with all applicable Federal anti-discrimination laws" is material to the government's payment decisions under the False Claims Act. In February 2025, a district court enjoined key provisions of the Anti-DEIA EOs. However, in February 2026, the U.S. Court of Appeals for the Fourth Circuit vacated the preliminary injunction in that case. The case was remanded to the district court. Critically, the Fourth Circuit interpreted the orders as requiring adherence to federal

anti-discrimination law and noted that if the government "misinterprets" federal anti-discrimination law, that additional restriction may be open to challenge. At least three other lawsuits have been filed challenging these anti-DEIA EOs: *National Urban League v. Trump* in the District of Columbia; *San Francisco AIDS Foundation v. Trump* in the Northern District of California; and *Chicago Women in Trades v. Trump* in the Northern District of Illinois.

The March 26 Federal Contractor EO expands on the earlier Anti-DEIA EOs in multiple ways, especially by (1) defining race- and ethnicity-related conduct and expression the administration seeks to curtail as "racially discriminatory DEI activities," (2) imposing mandatory contractual obligations on contractors and subcontractors, and (3) establishing concrete—and severe—enforcement mechanisms.

On April 20, 2026, a nation-wide coalition of nonprofit organizations representing university faculty, academic professionals, and federal contractors, subcontractors, and partners filed a lawsuit challenging the March 26 Federal Contractor EO. The lawsuit alleges that by threatening to cancel federal contracts entered into by government contractors and subcontractors, to permanently blacklist the contractors, and to commence civil and criminal prosecution for failing to acquiesce to the administration's unlawful demands to end lawful expression and conduct, the March 26 Federal Contractor EO chills speech and association, which are protected by the First Amendment. Plaintiffs are represented by Democracy Forward Foundation and the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF).

The March 26 Federal Contractor EO

Building upon these prior executive orders, the March 26 Federal Contractor EO mandates the unilateral inclusion of a clause in federal contracts with severe penalties for noncompliance.

(1) Definition of "Racially Discriminatory DEI Activities"

The March 26 Federal Contractor EO replaces the limitation of "[f]ederal anti-discrimination law" that was used in the prior orders with the term "racially discriminatory DEI activities," which it defines as the following:

> [D]isparate 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. (Sec. 2(a))

It further defines "program participation" as "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." (Sec. 2(b)).

This definition does not expressly incorporate or cross-reference any existing anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964 or 42 U.S.C. § 1981. The March 26 Federal Contractor EO also reaches expression, conduct, and programs that are lawful under existing anti-discrimination law and protected by the First Amendment, such as affinity groups, leadership development programs, and others. Note, of course, that executive orders cannot alter existing law, including anti-discrimination law such as Title VII, or the constitutional protections of the First Amendment or Due Process Clause.[1]

(2) Mandatory New Clause in Contracts

The March 26 Federal Contractor EO mandates that federal agencies must incorporate an anti-DEI contractual provision into all covered contracts and contract-like instruments, "including subcontracts and lower-tier subcontracts" within 30 days from when the EO was announced, which is April 25, 2026. The contractual provision purports to mandate the following, all in Section 3 of the EO:

> **No Racially Discriminatory DEI Activities:** The contractor agrees "not to engage in any racially discriminatory DEI activities as defined in Section 2" of the EO.
> **Access to Books and Records:** The contractor must "furnish all information and reports, including access to books, records, and accounts, as required by the contracting agency."
> **Remedies for Noncompliance:** It mandates concrete penalties for noncompliance: "In the event of noncompliance, the contract may be canceled, terminated, or suspended in whole or in part, and the contractor or subcontractor may be declared ineligible for further government contracts."
> **Contractor and Subcontractor Notification Requirements:** It mandates that federal contractors report to the agency any "known or reasonably knowable conduct" by subcontractors that may violate this enforcement clause, and also alert to the agency if the subcontractor sues the contractor in a way that would put this clause at issue.
> **False Claims Act Materiality Acknowledgment:** It requires contractors to recognize that compliance with the clause requirements is "material to the Government's payment decisions" for purposes of 31 U.S.C. § 3729(b)(4), the False Claims Act's materiality element. The False Claims Act is discussed further in Section 3.B below.

(3) New Enforcement Mechanisms

The March 26 Federal Contractor EO identifies several tools to enforce its directive towards federal agencies, contractors, and subcontractors:

A. Agency Cancellation of Contracts

[1] For example, see the discussion of this issue in the decisions holding that the Department of Education's "Dear Colleague Letter," which tried to re-write civil rights law, was not lawful.

The March 26 Federal Contractor EO directs federal agencies entering into contracts to cancel, terminate, or suspend contracts, or "contract-like instruments," in part or in full in cases of alleged noncompliance.

If a contractor is deemed to fail to comply with the new certification requirement, the March 26 Federal Contractor EO calls for the contractor or subcontractor to be "suspended" or "debarred" to protect the federal government from alleged fraud, waste, and abuse. Suspension and debarment preclude a business entity or individual from contracting with the government or from receiving grants, loans, loan guarantees or other forms of assistance from the government. Once a potential contractor is suspended or debarred, it is listed on an exclusion list on the government-wide System for Award Management website (SAM.gov). Suspension and debarment, while both severe, are distinct penalties.

Both penalties can affect a contractor's ability to hold any contracts with any part of the government, rather than just the specific contracting agency. Contractors are "suspended" for up to eighteen months, typically during the pendency of an investigation or legal proceeding related to alleged contractor misconduct. Debarment, on the other hand, is a longer-term penalty that typically extends for three years and is based on a conviction based on the preponderance of the evidence. In both circumstances, there are specific processes that executive agencies must follow to suspend or debar a contractor. The March 26 Federal Contractor EO is silent on whether the new contractual provision aligns with or attempts to replace or circumvent those procedures.

B. Actions under the False Claims Act

Another enforcement mechanism the March 26 Federal Contractor EO invokes is the False Claims Act ("FCA"), which prohibits knowingly submitting false claims for payment or reimbursement to the federal government, including by making or using a false record or statement that is material to a claim. 31 U.S.C. § 3729(b)(4).

The FCA imposes civil penalties as well as treble damages, or three times the amount of damages sustained by the government. There are two ways that the FCA is enforced: either the federal government can directly sue an entity for violating the FCA or a private individual can bring a "*qui tam*" action as a whistleblower and obtain a portion of the proceeds of a settlement or judgment against the defendant. The government has the opportunity to take over claims initially brought by whistleblowers, if it chooses. The primary elements that the government or whistleblower must prove are: (1) that the person made a claim under the definition of the statute; (2) that the claim was false; (3) that the person violating the act acted with knowledge or reckless disregard of the falsity of the claim; and (4) that the false statement was "material," or that the false claim had "a natural tendency to influence" or was "capable of influencing" the government's payment decision. The latter is a high bar for the government or whistleblowers to meet. *See United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 106, 109 (2d Cir. 2021) (finding that the materiality bar is a "demanding" and "rigorous" standard, "inasmuch as it serves to

protect the FCA from being transformed into a vehicle for punishing garden-variety breaches of contract or regulatory violations"). In addition to imposing liability for non-compliance with federal statutes, the U.S. Supreme Court has recognized that, in some instances, the FCA can create liability for failures to disclose non-compliance with the law. *See generally Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016).

The March 2026 Federal Contractor EO purports to do several things with respect to the FCA. First, it directs the Attorney General—who leads the U.S. Department of Justice— "in consultation with relevant contracting agencies" to consider bringing FCA actions against allegedly noncompliant federal contractors and subcontractors. Second, it directs the Attorney General to ensure "prompt review" of *qui tam* actions filed by whistleblowers. Third, it requires federal contractors to agree that compliance with the new contractual provision is "material to the Government's payment decisions," tracking closely with the fourth element of a claim brought under the FCA.

Next Steps Outlined by the March 26 Federal Contractor EO

The March 26 Federal Contractor EO outlines multiple next steps for federal agencies. Specifically, the EO directs:

1. Executive departments and contracting agencies, within 30 days of the order, to include the new mandatory clause in contracts;
2. the Office of Management and Budget (OMB) to issue additional guidance to contracting agencies;
3. the Director of OMB to coordinate with the Attorney General, the Assistant to the President for Domestic Policy, and the Chairman of the Equal Employment Opportunity Commission to "identify economic sectors that pose a particular risk of entities engaging in racially discriminatory DEI activities" and subsequently identify "best practices" to ensure compliance;
4. Contracting agencies to review their implementation of the mandatory clause within 120 days and report back their findings to the White House; and
5. the Federal Acquisition Regulatory Council (the "FAR Council") to amend the FAR—the extensive set of regulations governing federal procurement—to include this new contractual language within 60 days.

Generally, the March 26 Federal Contractor EO gives federal agencies and departments 30 days from when the Order was announced to incorporate the contractual language.

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The March 26 Federal Contractor EO is a continuation of the Trump-Vance administration's efforts to attack our hard-won multiracial democracy and use legal levers to pervert existing civil rights statutes and Constitutional law. But the underlying legal framework for what actions to ensure equal opportunity are lawful has not changed. This EO is vulnerable to pushback in

multiple ways; don't hesitate to reach out to democracy2025@democracyforward.org if we can be helpful in convening a space to discuss avenues for challenge.