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General Services Administration Proposes New DEI Certification for Federal Financial Assistance Recipients

March 18, 2026

The General Services Administration (GSA) recently proposed revisions to the Financial Assistance General Representations and Certifications within the System for Award Management (SAM), the registration system through which applicants and recipients of federal financial assistance register to receive federal funding.

The proposal, "Information Collection; System for Award Management Registration Requirements for Financial Assistance Recipients," and the GSA's draft Supporting Statement propose to implement the January 2025 Executive Order 14173 (EO), in alignment with updated executive branch guidance, including the Department of Justice's Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination (DOJ guidance). Public comments on the proposal are due by March 30, 2026.

Background

As required by the EO, the head of each agency must include in every contract or grant award a "term requiring [the] counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws" (certification provision). While both the Equal Employment Opportunity Commission (EEOC) and the DOJ have issued guidance on unlawful diversity, equity and inclusion (DEI) programs, no guidance had been issued specifically addressing the certification provision or its implementation, nor has such a certification requirement been rolled out. GSA's proposal seeks to implement the EO and fill this gap. According to the GSA, as of January 2026, there were 222,760 entities registered in SAM for financial assistance, all of which may be affected by the proposed certification requirement.

New DEI certification

The proposal requires recipients of federal financial assistance to certify compliance with all federal laws and "relevant" executive orders "prohibiting unlawful discrimination on the basis of race or color in the administration of federally funded programs." Notably, the proposal does not explicitly mention other categories protected under federal anti-discrimination laws, such as sex.

The proposed certification states that federal anti-discrimination laws apply to programs involving "discriminatory practices" – including DEI or diversity, equity, inclusion and accessibility (DEIA) programs. The certification provides many examples of potentially prohibited DEI practices, several of which track the DOJ guidance, including:

- Granting preferential treatment based on race or color, such as race-based scholarships, preferential hiring or promotion practices, or access to facilities or resources based on race or ethnicity – including through the use of "cultural competence" requirements, "overcoming obstacles" narratives or "diversity statements."
- Segregation based on race or color, such as race-based training sessions, segregation in facilities or resources, or implicit segregation through program eligibility.
- Other unlawful use of race or color as criteria, such as race-based "diverse slate" policies in hiring, race-based selection for contracts or race-based program participation or resource allocation.
- Training programs that stereotype, exclude or single out individuals based on protected characteristics or create a hostile environment.
- Retaliation against employees, participants or beneficiaries who raise concerns about or object to DEI practices they reasonably believe violate federal anti-discrimination laws. The certification notes that such protected activities include raising concerns or filing complaints about or objecting or refusing to participate in DEI programs or trainings.

Other certifications

The proposed certification goes beyond DEI. Notably, recipients must also certify that they will "not knowingly bring or attempt to bring to the United States, transport, conceal, harbor, shield, hire, or recruit for a fee an illegal alien; and will not induce an alien to enter or reside in the United States with reckless disregard of the fact that the alien is illegal." In addition, recipients must also certify that they will not "fund, subsidize, or facilitate violence, terrorism, or other illegal activities that threaten public safety or national security," though neither the types of activities contemplated under this provision nor the terms "public safety" or "national security" are further defined. Recipients must also certify compliance with the Constitution and executive branch guidance "in promoting the freedom of speech and religious liberty in the administration of federally-funded programs."

These additional certifications are not required by the EO and are not addressed by any prior DEI-related guidance.

Enforceability and legal exposure

In a nod to ongoing litigation challenging the EO, the proposal includes a carve out providing that, to the extent any certification or representation is subject to an active court order or injunction legally binding on the recipient and the relevant awarding agency, the affected certification will be deemed inapplicable to that recipient, although other certifications will remain in force.

As we reported in February 2025, the certification provision was challenged as unconstitutional in several cases, including in *National Association of Diversity Officers in Higher Education v. Trump*. Most recently, on February 6, 2026, the US Court of Appeals for the Fourth Circuit vacated the US District Court for the District of Maryland's preliminary injunction order and remanded the case, holding that while the plaintiffs had standing to challenge the certification provision, they were unlikely to succeed on the merits, because the provision requires only that recipients certify compliance with federal anti-discrimination laws – and the First Amendment does not confer a right to violate those laws.

An appeal is also pending in the US Court of Appeals for the Seventh Circuit in *Chicago Women in Trades v. Donald J. Trump, et al.*, where the government has appealed the US District Court for the Northern District of Illinois' preliminary injunction enjoining the Department of Labor from requiring any grantee or contractor to make any certification, and prohibiting the government from initiating any False Claims Act (FCA) enforcement action against a plaintiff pursuant to the provision. Notably, the Fourth Circuit's decision in *National Association of Diversity Officers in Higher Education* left open the possibility of a legal challenge in a specific enforcement action if the "President, his subordinates, or another grantor misinterprets federal antidiscrimination law."

The proposal further provides that the authorized official signing the certification attests to its accuracy and acknowledges that they may be subject to criminal prosecution or civil liability under the FCA for providing "false, fictitious, or fraudulent information" to the government. The FCA exposure, in particular, carries the risk of treble damages and significant penalties, heightening exposure for individuals signing such certifications.

Next steps

Recipients of federal financial assistance may wish to comment on the proposal by March 30, 2026. The GSA invites comments on whether the information collection is necessary, whether it will have practical utility, and ways to enhance the quality, utility and clarity of the information to be collected.

In the meantime, organizations that receive or apply for federal grants, loans or other financial assistance should work with legal counsel to audit existing DEI programs, with particular attention to those cited as examples of potentially unlawful practices. Organizations should also evaluate their SAM registration processes – including who within the entity should sign the revised certifications – given the potential liability risks and the government's broad interpretation of anti-discrimination laws. Organizations should also monitor litigation developments and the finalized certification requirements. Although the proposal is limited to recipients of federal financial assistance, it is plausible that a similar certification requirement may be forthcoming for federal contractors and subcontractors as well.

Please contact a member of Cooley's DEI strategic counseling and litigation practice if you have questions concerning how these developments affect your organization.

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