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Proposal Will Require Federal Grant Recipients to Certify DEI Compliance Requirements to Register with System for Award Management

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Quick Hit: A proposed change to the certification required for registration with the System for Award Management ("SAM"), if adopted, will expand the certifications required for entities applying for or receiving grants, cooperative agreements, or financial assistance such as loans, insurance, and direct appropriations from the federal government. The proposed new certifications include certification of compliance with federal antidiscrimination law and that the applicant or recipient will neither recruit "illegal aliens" nor facilitate terrorism.

Key Takeaway: The proposed expanded certification continues the Administration's effort to utilize federal spending to address its view that diversity, equity and inclusion ("DEI") programs violate federal law. By including the new certification language in the SAM registration process, the Administration is seeking to ensure federal assistance recipients review their DEI and related programs and make necessary modifications to comply with federal law, as false certifications risk criminal and civil penalties.

More Detail:

Applicants and recipients of Federal financial assistance must register in SAM and maintain an active account. The proposed revision to the registration form would expand the "Financial Assistance General Certifications and Representations" required to register with SAM to include a provision certifying compliance with Federal antidiscrimination laws, similar to that found in other Trump Administration guidance.

Under the proposed revision, registering entities would have to certify and represent that their organization "[w]ill comply with the US Constitution, all Federal laws, and relevant executive orders prohibiting unlawful discrimination on the basis of race or color in the administration of federally funded programs." The provision specifies that antidiscrimination laws "apply to programs or initiatives that involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA) programs."

The certification includes five examples of practices that "may violate applicable Federal anti-discrimination laws":

- Granting preferential treatment based on race or color, such as race-based scholarships or programs, 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; or
- Retaliation by taking adverse actions against employees, participants, or beneficiaries because they engage in protected activities related to opposing DEI practices they reasonably believe violate federal antidiscrimination laws. Protected activities include raising concerns or filing complaints about, or objecting to or refusing to participate in, discriminatory programs, trainings, or policies.

This change aligns with prior Trump Administration initiatives targeting DEI, including Executive Order 14173 "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" and the Department of Justice's "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination."

The proposed revision includes two other new certification provisions. The first requires recipients to certify that they "[w]ill not knowingly bring or attempt to bring to the United States, transport, conceal, harbor, shield, hire, or recruit for a fee an illegal alien," nor will they "induce an alien to enter or reside in the United States with reckless disregard of the fact that the alien is illegal." The second is a promise they "[w]ill not fund, subsidize, or facilitate violence, terrorism, or other illegal activities that threaten public safety or national security."

The individual completing the new certification will have to "attest[] to the accuracy of the certifications and representations" in the form, and acknowledge that they "may be subject to criminal prosecution under Section 1001, Title 18 of the United States Code or civil liability under the False Claims Act if [they] … provid[e] false, fictitious, or fraudulent information to the U.S. Government."

Recipients of federal aid need to be aware of this new requirement and ensure that they will be able to provide the necessary certification and comply with the representations made therein. This includes taking steps now to assess their DEI and other related programs to ensure compliance with federal law, ideally with the assistance of counsel to ensure the ability to assert privilege.

We will continue to monitor developments in this space.

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