

**Crowell & Moring to the Associated General Contractors of America**  
**Overview of Executive Order 13950 on Combating Race and Sex Stereotyping**

*October 20, 2020*

On September 22, 2020, President Trump issued [Executive Order 13950](#) (EO), which prohibits federal agencies, federal contractors and subcontractors, and certain federal grantees from conducting training that (1) “inculcates in its employees any form of race or sex stereotyping,” which is defined as “ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex,” or (2) “race or sex scapegoating, defined as “assigning fault, blame or bias to a race or sex, or to members of a race or sex because of their race or sex.” What follows is Crowell & Moring’s current analysis based on current information. Please note that (1) this general perspective should not be considered legal advice, (2) the situation and government guidance is rapidly evolving, and (3) individual circumstances may vary and additional considerations may bear on this analysis which is complex.

**What entities are covered by the Executive Order?**

The EO applies to any government contractor subject to Executive Order 11246 (Equal Employment Opportunity), which includes any entity that has entered into one or more agreements with the federal government, totaling at least \$10,000, for the purchase, sale or use of personal property or nonpersonal services, including construction. It also applies to any subcontractor subject to EO 11246, defined as an entity that has entered into an agreement for the purchase, sale or use of personal property or nonpersonal services (including construction) which is necessary to the performance of a federal contract or under which a portion of the prime contractor’s obligation under a federal contract is performed, undertaken or assumed. While federally assisted construction contractors and subcontractors must comply with Executive Order 11246, there is some ambiguity as to whether such contractors are also subject to this EO, which states that “government contracting agencies shall include [its requirements] in every Government contract” but does not define “Government contract.” Federally assisted construction contracts are often funded by grants from federal agencies to state governments. The EO directs the heads of all agencies -- including, for example, the head of the Federal Highway Administration -- to “review their respective grant programs and identify programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use federal funds to promote [the prohibited concepts].” It is as yet unknown whether agencies will identify the grants that fund federally assisted construction projects, or how the OFCCP will interpret coverage.

**What constitutes “training”?**

The EO does not define “training,” and it is unclear whether the term is broad enough to encompass workshops, discussion groups, or reading materials. The EO requires the Office of Federal Contract Compliance Programs (OFCCP) to issue a Request for Information for “training, workshops, or similar programming *provided* to employees,” suggesting that the EO applies to voluntary as well as mandatory training programs. Furthermore, the Office of Personnel Management (OPM) has issued a Memorandum to all agencies that states that all training for *government employees* must be reviewed for compliance with the EO before it is presented. This memorandum identifies for review “all diversity and inclusion training programs” that employees are “required or permitted to view, listen to, or participate in while on Government-paid time.

Included is . . . live training sessions conducted in person or by any electronic means, whether telephonic or video; materials posted on any Federal agency’s public-facing or internal Internet or Intranet sites; and, written or video materials or other content that have been produced or procured with Federal funds and that are available to the general public or that Federal employees are required or permitted to read or view.” This guidance (though not binding on contractors/subcontractors) suggests that the administration will interpret “training” broadly.

### **What types of training are prohibited?**

The EO prohibits workplace training that includes any of the following prohibited concepts:

- one race or sex is inherently superior to another race or sex;
- an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- an individual’s moral character is necessarily determined by his or her race or sex;
- an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; and
- meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

### **Is there any further guidance regarding prohibited training?**

Beyond the definitions included in the EO, guidance from the OFCCP and Office of Management and Budget (OMB) provide some insights into the types of training that may violate the EO. A September 28, 2020 [OMB Memorandum](#) requires federal agencies to search their training materials for words such as “critical race theory,” “white privilege,” “intersectionality,” “systemic racism,” “positionality,” “racial humility,” and “unconscious bias.” The memorandum only applies to federal agencies, and not “Government contractor[s],” but the terms nonetheless indicate the types of training the EO seeks to prohibit. Independently, the OFCCP issued an [FAQ](#) on October 8, 2020 stating that “unconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously.” Tempering that statement, OFCCP added that “[t]raining is not prohibited if it is designed to inform workers, or foster discussion, about pre-conceptions, opinions, or stereotypes that people—regardless of their race or sex—may have regarding people who are different, which could influence a worker’s conduct or speech and be perceived by others as offensive.” OFCCP Director Craig Leen has also stated publicly that unconscious bias training is “perfectly fine” as long as the training “teaches that everyone, based on the human condition, has unconscious biases,” and does not specifically call out a particular race, national origin, or sex as being inherently biased.

## **How will the Executive Order be Implemented across Contractors?**

The Executive Order contains the language that agencies must include in federal contracts. The exact mechanism is a bit unclear and could take the form of an interim Federal Acquisition Regulation (FAR) provision, a class deviation, or a special contract clause. Even if the language is not included in a “Government contract,” certain contracting agencies, or the OFCCP, might still take the position that the provisions of the EO apply.

## **Are there flow-down obligations?**

Contractors/subcontractors must flow down the requirements of the EO to “every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor.” Much like the regulations that implement Executive Order 11246, the EO also states that “the contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance. Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.” The mechanics of the flow-down requirements will likely become clearer as the agencies shed light on how they will implement the requirements at the prime level.

## **Are there other requirements?**

Each contractor/subcontractor must send each labor union or representative of its workers a notice advising the labor union or workers’ representative of the contractor/subcontractor’s commitments under the EO. Each contractor/subcontractor must also post copies of this notice in “conspicuous places available to employees and applicants for employment.” Finally, the EO requires the OFCCP to issue a Request for Information (RFI) by October 22, 2020 seeking information and copies of any “training, workshop or similar programming having to do with diversity and inclusion, as well as information about the duration, frequency and expense of such activities.” Neither the EO nor the OFCCP’s FAQs indicate whether this RFI will be mandatory or voluntary.

## **What are the consequences for non-compliance?**

If a contractor or subcontractor violates the EO, its “contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts.” While we do not yet know how aggressively the OFCCP will enforce this EO, in other contexts, the OFCCP has rarely sought debarment unless there is egregious non-compliance.

## **What is the timing for enforcement of the Executive Order?**

The OFCCP has stated that the requirements for federal contractors/subcontractors apply only to those with federal contracts/subcontracts entered into on or after November 21, 2020. However, the OFCCP has noted that “training programs prohibited by the new Executive Order may also violate a contractor’s obligations under the existing Executive Order 11246.” The OFCCP has already set up email and phone hotlines to receive

complaints regarding training that an individual believes may violate the EO or EO 11246, and has begun to receive complaints.

With respect to grants, as noted above, the EO directs the heads of all agencies to identify federal grants which they may condition on a certification that the recipient “will not use federal funds to promote [the prohibited concepts].” Agencies must submit a report to the Office of Management and Budget by November 21, 2020 that lists all identified grant programs.

The EO also directs the U.S. Attorney General to “assess the extent to which workplace training that teaches the divisive concepts . . . may contribute to a hostile work environment and give rise to potential liability under Title VII,” but there is no particular timing associated with such assessment.

### How are companies responding to the Executive Order?

While a few companies have put their diversity, equity and inclusion programs on hold or made certain modifications, many have thus far adopted somewhat of a wait-and-see approach for the moment. If there is a new administration in January, it is widely presumed that this EO will be revoked. If there is a second Trump administration, many in the industry speculate that the EO will likely face legal challenges. It is, as yet, unknown how quickly or aggressively the OFCCP may enforce the EO in the meantime.

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