

November 3, 2020

Lee Lofthus
Assistant Attorney General for Administration
Justice Management Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
lee.j.lofthus@usdoj.gov

Via Electronic Mail

Re: Affinity Group Concerns with JMD Guidance on the Diversity and
Inclusion Measures at the Department of Justice

Dear Mr. Lofthus:

Thank you for taking the time to meet with the affinity groups on October 29, 2020, about Executive Order 13950, *Combating Race and Sex Stereotyping* (Executive Order) and the Justice Management Division's (JMD) October 8, 2020 Interim Guidance on Diversity and Inclusion Training (Interim Guidance) implementing it. As you know, our groups exist to support and advocate on behalf of the Department of Justice's (Department) diverse workforce and to ensure an inclusive environment for all employees. We therefore strongly support efforts by the Department to develop and offer trainings that help achieve these two important goals. We recognize that the Executive Order constrains the Department's ability to offer such trainings—a development that raises significant concerns for us. However, this letter addresses our specific concerns about the effects that JMD's Interim Guidance will have—and has already had—on the *non-training-related* programs, activities, and events our organizations sponsor. In light of these effects, we write to request that any additional guidance from JMD not exceed the scope of the Executive Order to include programs, activities, and events, as the Interim Guidance does.

As discussed, our greatest concern about JMD's Interim Guidance is that it goes significantly further than the Executive Order, the Office of Management and Budget (OMB) Memoranda M-20-24 and M-20-37, and the Office of Personnel Management's (OPM) October 2, 2020 memorandum by including not only trainings, but also “programs, activities, and events.” Although the Executive Order and the OMB and OPM memoranda contain different messages, one clear through-line is that their scope—with respect to federal agency employees—is limited to “trainings” or “training programs.” Section 7(a) of the Executive Order directs OPM to review only “training programs for agency employees related to diversity or inclusion” for compliance with the Order. Likewise, OMB Memorandum M-20-24—titled “Training in the Federal Government”—mentions no target other than “training”; OMB Memorandum M-20-37—titled “Ending Employee Trainings that Use Divisive Propaganda to Undermine the

Principle of Fair and Equal Treatment for All”—states that only “training programs for agency employees relating to diversity or inclusion must be reviewed by [] OPM for compliance with the E.O. prior to the training program being used”; and the OPM memorandum describes the Executive Order as applying only to “training programs.”

To be sure, the Executive Order’s preamble does object in broad terms to what it describes as “offensive and anti-American race and sex stereotyping and scapegoating.” However, the scope of the directives contained in the Executive Order, as well as in the OMB and OPM memoranda, is carefully cabined to trainings. JMD’s expansion of those directives to “programs, activities, and events” is at odds with the plain text of the directives.¹ JMD’s Interim Guidance is also out of step with other agencies’ implementation documents, which apply the directives only to “trainings.” *See, e.g.*, Exhibit, Health and Human Services Guidance; Humeyra Pamuk, [Exclusive: U.S. State Department Suspends All Diversity Training After Trump’s Directive](#), REUTERS (Oct. 24, 2020) (describing a State Department cable that reads, “the Department is temporarily pausing all training programs related to diversity and inclusion in accordance with Executive Order . . . on Combating Race and Sex Stereotyping”).

The dangerous consequences of suspending more than just trainings have already begun to play out. To wit, the DOJ Gender Equality Network’s planned discussion with former U.S. Attorney Jessie Liu and current Acting ATF Director Regina Lombardo about gender diversity in leadership would not have fallen under the ordinary meaning of “training,” but did qualify as a “program” or an “event.” DOJABA was forced to decline a co-sponsorship opportunity with the National Black Prosecutors Association and to table a town hall meeting related to increasing diversity at the Department. And DOJ AHEAD preemptively cancelled a town hall for its members due to the fear that it would violate the Interim Guidance.

These harms are compounded by the fact that the Interim Guidance applies to “all D&I related” programs, activities, and events, and not just those that involve the types of “divisive concepts” referenced in the Executive Order. To the extent JMD intends to suspend “trainings, programs, activities, and events” based on whether they involve the “divisive concepts” defined in section 2(a) of the Executive Order, the affinity groups stress that they have never—nor would they ever—sponsor anything that promotes the type of “divisive” issues and “offensive and anti-American race and sex stereotyping and scapegoating” that the Executive Order purports to target.

¹ *See, e.g.*, Katie Benner, [Justice Dept. Suspends All Diversity and Inclusion Training for Staff](#), N.Y. TIMES (Oct. 9, 2020) (JMD’s Interim Guidance “seemingly goes further than the president’s than the president’s executive order—which pertains only to diversity training—to include work-related programs, activities and events that touch on diversity”); Jacqueline Thomsen, [Jessie Liu Event on Gender Diversity Canceled Due to Trump Order](#), NATIONAL LAW JOURNAL (October 16, 2020) (JMD’s “interim guidance that suspended all diversity and inclusion trainings, as well as all programs, activities and events on the topic . . . appears to go further than the scope of Trump’s directive, which focused on trainings).

The affinity groups also seek clarity on the following issues:

1. What specific training, programs, activities, and events must be submitted to JMD for approval?
2. Who at the Department will be reviewing and approving the affinity groups' proposed training, programs, activities, and events?
3. What is the process for submitting a proposed training, program, activity, or event for approval?
4. Is there an appeal process if a proposed training, program, activity, or event is denied?

Additionally, we are concerned about whether the enforcement of the Executive Order will be arbitrary or unfairly severe. The Executive Order and OMB Memorandum M-20-37 imply that the agency will take disciplinary action against our groups and employees for engaging in conduct that appears to fall within the White House diversity directives.

We want to emphasize, as we did on our call with you, our appreciation of your consistent support of us in the past, and we are grateful for your consideration of our concerns now. If continuing this conversation would help as you move forward in your implementation of the Executive Order, please let us know.

Respectfully,

DOJ Association of Black Attorneys
DOJ Gender Equality Network
DOJ Association of Hispanic Employees for Advancement and Development
DOJ Pan Asia
DOJ Pride
Blacks in Government, Edward Woods Jr. Chapter

cc: Monty Wilkinson
Arthur Gary
Richard Toscano
Theresa Toll

EXHIBIT



THE DEPUTY SECRETARY OF HEALTH AND HUMAN SERVICES

WASHINGTON, D.C. 20201

OCT 07 2020

TO: Operating and Staff Division Heads

FROM: Deputy Secretary

SUBJECT: Implementation of Executive Order 13950 on *Combating Race and Sex Stereotyping* and Office of Management and Budget's Memorandum, M-20-37: *Ending Employee Training that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All*

On September 22, 2020, President Trump issued Executive Order 13950, *Combating Race and Sex Stereotyping*, which outlined actions federal departments and agencies (agencies) were required to take "to promote unity in the federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating." The Executive Order indicated that it:

Shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees.

The Executive Order specifically prohibits any training being provided to federal employees (whether by contractor or employee), which includes any of the nine defined "divisive concepts," or race or sex stereotyping and race or sex scapegoating. A few examples of these divisive concepts that are prohibited from such training are that:

- One race or sex is inherently superior to another race or sex; or
- The United States is fundamentally racist or sexist; or
- An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.

For a complete list of the Divisive Concepts including the definitions of race or sex stereotyping and race or sex scapegoating see Section 2 of the Executive Order (Tab A).

The applicability of the Executive Order is comprehensive and includes federal agencies and their employees, federal contractors (including sub-contractors), Uniformed Services, including Public Health Service, and federal grant recipients. The obligation to abide by the Executive Order is expansive as well, and includes any office, Institute, Center, etc., within the Department of Health and Human Services (HHS) that independent of the designated Equal Employment Opportunity and/or Diversity and Inclusion office, provides diversity and/or inclusion training for its employees whether the training is by contract or by federal employee (HHS and non-HHS).

In support of this Executive Order, the Office of Management and Budget (OMB) issued M-20-37: *Ending Employee Training that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All*, on September 28, 2020, providing additional guidance related to the implementation of the Executive Order (Tab B).

In accordance with the Executive Order and OMB's M-20-37, HHS will immediately initiate action. The Assistant Secretary for Administration (ASA) has been designated as the lead senior HHS official in this initiative. In support of this initiative, each OpDiv/StaffDiv must designate a senior Political Appointee to oversee and confirm the execution of these requirements within each Division.

Effective immediately, pursuant to and to ensure compliance with the Executive Order and OMB's memorandum, diversity and inclusion trainings are to be halted until they have been approved by the designated HHS official(s) and by the Office of Personnel Management. The ASA will issue additional direction and guidance shortly and as part of this initiative, the Assistant Secretary for Financial Resources (ASFR) will be issuing a data call for information related to the FY2020 expenditures for diversity and inclusion training.

If you have questions regarding this initiative, contact EO13950@hhs.gov.



Eric D. Hargan

Attachments:

- TAB A: Executive Order 13950 on *Combating Race and Sex Stereotyping*, issued September 22, 2020
- TAB B: Office of Management and Budget's Memorandum, M-20-37: *Ending Employee Training that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All*