



GOVERNMENT
ACCOUNTABILITY
PROJECT

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By Email

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U.S. Office of Special Counsel
1730 M Street NW # 218
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Office of Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

December 22, 2020

Re: Cancellations of Diversity Educational and Training Programs

To Whom It May Concern:

We represent Department of Justice (DOJ) employees, who are members of DOJ affinity and employee resource organizations who wish to remain anonymous. This letter is a protected disclosure covered by federal whistleblower laws protecting employees and contractors, 5 U.S.C. § 2302(b)(8) and 41 U.S.C. § 4712(a). It discloses recent acts constituting violations of law, abuse of authority, gross mismanagement and gross waste of funds by executive branch political leadership in ending long-standing federal diversity and inclusion programs (collectively referred to here as the “Diversity Directives”).¹

Diversity and inclusion programs are now officially deemed “divisive propaganda.” The Diversity Directives are already having their intended effect: they compel the prohibition or significant chilling of diversity-related speech across the entire federal workforce.

¹ The specific authority and directives are: (i) Executive Order 13950, “Combating Race and Sex Stereotyping,” signed by President Trump on September 22, 2020 (the EO or EO 13950); (ii) two related directives issued by the Office of Management and Budget (OMB), M-20-34 (Sept. 4, 2020), and (iii) M-20-37 (Sept. 28, 2020); and a third directive issued by the Office of Personnel Management (OPM) on October 2, 2020. The EO is published in the Federal Register at 85 FR 60683. The OMB Memoranda, *Training in the Federal Government* (M-20-34) and *Ending Employee Trainings that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All* (M-20-37), are available at <https://www.whitehouse.gov/omb/information-for-agencies/memoranda/>. The OPM Memorandum, *Mandatory Review of Employee Training under E.O. 13950 September 22, 2020*, is available at <https://www.chcoc.gov/content/mandatory-review-employee-training-under-eo-13950-september-22-2020>.



We request that, if not yet done, you promptly investigate these and related disclosures, and make the results of any investigation public.

Background

First OMB Memo, Fox and Breitbart News, Presidential Tweets

On September 4, 2020, OMB issued Memorandum M-20-34, which directs the heads of executive departments and agencies to “ensure that Federal agencies cease and desist from using taxpayer dollars to fund [] divisive, un-American propaganda sessions.”² The memorandum was reportedly issued after President Trump grew interested in targeting federal agency diversity and inclusion trainings after watching the Fox News Tucker Carlson Tonight television show on September 1, 2020.³

The memorandum instructs agencies to identify all agency spending relating to “any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country; or (2) that any race or ethnicity is inherently racist or evil.” Over the next two days, September 5 and 6, the President posted on Twitter 20 tweets or retweets on the topic.⁴ In one, he re-tweeted a Breitbart News report (*Trump Orders Purge of ‘Critical Race Theory’ from Federal Agencies*) and added: “This is a sickness that cannot be allowed to continue. Please report any sightings so we can quickly extinguish!”⁵

² OMB Memorandum M-20-34, *Training in the Federal Government* (Sept. 4, 2020), available at <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf>.

³ Mr. Carlson’s guest that evening was Christopher F. Rufo, a conservative scholar at the Discovery Institute, who discussed the “cult indoctrination” of “critical race theory” programs in the government and who called on the President to “end the widespread practice of indoctrinating federal employees with left-wing ideas.” Fox News, *Chris Rufo Calls on Trump to End Critical Race Theory ‘Cult Indoctrination’ in Federal Government* (Sept. 1, 2020), available at <https://www.foxnews.com/politics/chris-rufo-race-theory-cult-federal-government>; N.Y. Times, *Trump Attack on Diversity Training Has a Quick and Chilling Effect* (Oct. 13, 2020), available at <https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html>; Wall Street Journal, *Conservative Activist Grabbed Trump’s Eye on Diversity Training* (Oct. 9, 2020), available at <https://www.wsj.com/articles/conservative-activist-grabbed-trumps-eye-on-diversity-training-11602242287>.

⁴ N.Y. Times, *More Than Ever, Trump Casts Himself as the Defender of White America* (Sept. 6, 2020), available at <https://www.nytimes.com/2020/09/06/us/politics/trump-race-2020-election.html>.

⁵ Available at <https://twitter.com/realDonaldTrump/status/1302212909808971776> (re-tweeting Breitbart.com, *Party’s Over: Trump Orders Purge of ‘Critical Race Theory’ from Federal Agencies* (Sept. 5, 2020), available at <https://www.breitbart.com/tech/2020/09/04/partys-over-trump-orders-purge-of-critical-race-theory-from-federal-agencies/>).



Executive Order 13950

On September 22, 2020, the President signed Executive Order 13950 (EO).⁶ The EO is vague in defining divisive concepts, but in general terms, it describes them as “assigning fault, blame, or bias to a race or sex” or “ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex.” The EO requires federal agencies to submit all training programs relating to diversity or inclusion to OPM for review and approval, regardless of whether the trainings discuss “divisive concepts.”

The EO further requires each agency to ensure that employees and contractors do not teach “divisive concepts” in any training for federal agencies.⁷ Sanctions for violating the EO are potentially harsh. If found to be in violation, contractors risk debarment and federal employees will face an “adverse action proceeding.”

Second OMB Memo

OMB issued further guidance, Memorandum M-20-37, on September 28, 2020. That memorandum requires federal agencies to “take immediate and substantive action” to implement certain reporting requirements, along with agency review of all diversity trainings held during FY 2020 “to determine whether they teach, advocate, or promote the divisive concepts specified in the Executive Order . . . (e.g., that the United States is fundamentally racist or sexist or that an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive).”⁸ Like the EO, M-20-27 also threatens unspecified “consequences” and “adverse action[s]” for violations.

OPM Memo

On October 2, 2020, OPM issued a memorandum “to provide general guidance on the implementation” of the EO. It states that OPM must “review and approve training materials before they are used, even if those materials have been utilized in the past” (emphasis in original). OPM promised that “specific instructions for implementing” the diversity directives

⁶ *Executive Order on Combatting Race and Sex Stereotyping* (Sept. 22, 2020), available at <https://www.whitehouse.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/>.

⁷ As an example of now banned practices, the memorandum cites a Treasury Department training program that encourages employees to avoid “narratives” that Americans should “be more color-blind.”

⁸ OMB M-20-37 also instructs agencies to search financial and procurement data and to perform keyword searches to help identify all training programs containing potentially “divisive concepts.”



would be forthcoming, but it did not provide instructions or a process to assist agencies in their compliance. To date, OPM has not publicly issued further implementation instructions.

Agency Responses

Federal agency guidance and implementation has been haphazard, likely because the Diversity Directives are vague and confusing. DOJ responded by cancelling *all* diversity and inclusion programs supporting the Department’s Special Emphasis Programs.⁹ In interim guidance issued on October 8, 2020, the Department’s Justice Management Division (JMD) directed all DOJ components to suspend all diversity awareness and inclusion trainings, including the indefinite postponement of planned implicit bias training for federal prosecutors.¹⁰ The JMD guidance expanded its scope beyond “trainings” to also include “programs, activities, and events that employees are required or permitted to attend while on Government-paid time.”¹¹

Harm

The consequences of the Diversity Directives have adversely affected and will continue to adversely affect federal employees and contractors. For example, one DOJ affinity group was forced to cancel a lunchtime program on how to achieve greater gender diversity in Department leadership—planned before the Diversity Directives were announced. In August 2020, Regina Lombardo, the current Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and Jessie Liu, a former U.S. Attorney for the District of Columbia, agreed to participate in a panel discussion—hosted by the DOJ Gender Equality Network (DOJ GEN)—entitled *Addressing the DOJ Gender Leadership Gap*.

⁹ The programs and DOJ affinity groups are described on DOJ’s web page, Affirmative Employment & Special Emphasis Programs, available at <https://www.justice.gov/jmd/affirmative-employment-special-emphasis-programs#three>.

¹⁰ N.Y. Times, *Trump Attack on Diversity Training Has a Quick and Chilling Effect* (Oct. 9, 2020), available at <https://www.nytimes.com/2020/10/09/us/politics/justice-department-diversity-training.html>; N.Y. Times, *Trump Attack on Diversity Training Has a Quick and Chilling Effect* (Oct. 13, 2020), available at <https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html>.

¹¹ National Law Journal, *Jessie Liu Event on Gender Diversity Canceled Due to Trump Order, DOJ Group Says* (Oct. 16, 2020), available at <https://www.law.com/nationallawjournal/2020/10/16/jessie-liu-event-on-gender-diversity-canceled-due-to-trump-order-doj-group-says/> (JMD issued an “interim guidance that suspended all diversity and inclusion trainings, as well as all programs, activities and events on the topic . . . That appears to go further than the scope of Trump’s directive, which focused on trainings;” National Law Journal, *Trump Executive Order Forcing Cancellation of More Diversity Events, DOJ Groups Say* (Nov. 3, 2020), available at <https://www.law.com/nationallawjournal/2020/11/03/trump-executive-order-forcing-cancellation-of-more-diversity-events-doj-groups-say/>).



The event was scheduled for October 21, 2020 and was co-sponsored by the diversity committees from the Antitrust Division, Civil Division, and Environmental and Natural Resources Division. The program generated widespread interest among DOJ GEN's more than 675 members. It was open to all DOJ employees and contractors. Participation was free and voluntary.

DOJ GEN's board of directors specifically reviewed the Diversity Directives after they were issued. Although the directives do not make clear what constitutes a "training," the board did not read the directives to place limits on a voluntary lunchtime speaker event regarding gender diversity in leadership. However, out of an abundance of caution, the board contacted JMD to ensure that the event would not run afoul of the directives.

On October 15, 2020, a JMD official notified DOJ GEN that the October 21 event appeared to fall within the purview of the Diversity Directives, but that there was no process in place for OPM to review and approve the program. As a result, the event was cancelled.

In another case, a different DOJ affinity group was asked, before the Diversity Directives were issued, to co-sponsor high-profile implicit bias training with several prominent national organizations and started assisting with the planning and execution of the training. After the directives were implemented, the group was forced to decline the co-sponsorship opportunity. Additional DOJ affinity and employee resource group events have been cancelled. Most affinity and employee resource groups have been reluctant to host any events in the wake of the Diversity Directives.

Among the additional diversity initiatives cancelled was a program on implicit bias in the workforce sponsored by the DOJ Antitrust Division Diversity Committee. The Executive Office for U.S. Attorneys cancelled a similar program featuring a North Carolina superior court judge. Similar cancellations of diversity trainings and programs have occurred across the federal government.

The Diversity Directives signal to all that minorities are not welcome, their positions are not secure, and that discussing systemic injustice is inappropriate in the workplace or otherwise. This is especially obvious, because they were issued amidst civil unrest and racial reckonings underway throughout the nation in the wake of continued and unjustified killings of Black Americans by law enforcement officers. The directives were implemented to silence conversations surrounding issues of race, nationality, and gender during a time when such conversations have been most needed. The directives are harming and will continue to harm underrepresented employees.



Violations of Laws, Rules and Regulations

The Diversity Directives are unconstitutional—they plainly violate the First and Fourteenth Amendments, among other laws, rules and regulations. Based on their confusing and vague language it is of no surprise that agencies have interpreted the directives broadly, and in the process, limited a wide range of plainly permissible speech. The directives state some unobjectionable concepts—for example, that no race or national origin group is inherently racist or sexist—but then use those objective truths as a cover to eliminate discussion of the racism and sexism that persists in this country, including within the federal government.

Abuse of Authority

The Diversity Directives are also an unimplementable disaster for the over 400 federal agencies, sub-agencies, and departments that need to implement and enforce them. The documents purporting to implement the directives use significantly different terminology; they do not identify or explain with specificity or clarity the kind of diversity-related content qualifies as a prohibited “divisive concept.”

In light of the conflicting and confusing guidance, as discussed above, many diversity-related discussions and events have been cancelled or indefinitely postponed. For example, concerned members of affinity groups at DOJ met with JMD officials on October 29, 2020 to discuss the directives and JMD’s implementation. During that meeting, JMD officials acknowledged that it would be difficult to provide a clear definition of “divisive concepts,” because the documentation had used different and seemingly conflicting terminology. They also explained that the spirit of the directives appeared to apply beyond just trainings, and to ensure that DOJ employees did not inadvertently violate them, JMD extended the scope of coverage of the directives beyond trainings to also include programs, activities, and events.¹²

Gross Mismanagement

The Diversity Directives further amount to gross mismanagement through their explicit rescission of decades of deliberate and iterative planning, review, and implementation. Effectively within the span of a month, the White House, OMB, and OPM published four separate documents scrapping federal diversity and inclusion trainings based on years of

¹² After the meeting, five DOJ employee group members sent officials a letter expressing their concerns. It is available at <https://static1.squarespace.com/static/5a7097c0d55b41a81fbfaec/t/5fac9b461cc5cc66221eb614/1605147464413/Infinity+Group+Follow-Up+Letter+to+AAG+Lofthus+11-3-2020+%28Final+with+Exhibit%29.pdf>.



thoughtful planning and execution.¹³ If the executive branch officials desire, in good faith, to overhaul diversity and inclusion trainings, they should plan in advance, draft clear guidance, engage with subject-matter experts, and create the necessary procedures. That has not happened here.

Federal agencies and employee groups have waited for months and continue to wait for OPM to make its procedures clear. The October 2, 2020 OPM memorandum states that it will “not accept requests for approval of individual training sessions,” and it will “insist upon one complete and all-inclusive submission from each Department, Agency, Board, or Commission” (emphasis in original). This requirement means that employee groups will need to plan even small, ad hoc programs many months in advance so it can submit a request for approval while DOJ submits its “complete and all-inclusive submission.” This is plainly unworkable. DOJ employees and contractors will also be banned from participating in a third-party training when such training has not been planned at the time of the agency’s submission.

The unrealistic burden placed on OPM ensures the failure of such review processes. Even if federal agencies manage to submit their combined proposed training programs to OPM, OPM must then review each and every submission from a workforce with millions of employees without the assistance of any new additional staff or appropriations. This new review system, lacking in additional staff or resources, is, when coupled with the challenges posed by the pandemic, is designed to fail. It constitutes gross mismanagement.

Gross Waste of Funds

The Diversity Directives also place irresponsible and unaccounted for financial burdens on all federal agencies. Among other things, they require agencies to:

- Within 60 days, submit a report to OPM regarding grant programs, including those that may require certification that they will not promote “divisive concepts”;
- Identify all training programs related to diversity and inclusion held during FY2020 and review those programs to determine whether they promote “divisive concepts”;

¹³ An example of past planning is OPM’s website, which continues to rightly acknowledge that “[d]iversity and inclusion increase an agency’s capacity to serve and protect people who have different experiences or backgrounds and enhance its ability to be receptive to different traditions and ideas.” Available at <https://www.opm.gov/faqs/OA.aspx?fid=72bcd219-0b9f-4de8-b366-4817028fbc6e&pid=f2ef3151-b4f2-4f47-a319-acad8175b0b7>.



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- Assign at least one senior political appointee to ensure compliance with the Diversity Directives;
- Have their Inspectors General review and assess agency compliance annually; and
- Postpone all trainings so that OPM can “review and approve training materials . . . even if those materials have been used in the past.”

These processes are a gross waste of funds because they require the diversion of critical funds supporting critical programs and activities. Congress has not appropriated increased funding for the implementation of this burdensome mandate.

* * *

In sum, the Diversity Directives cannot and must not stand. Accordingly, we request that you promptly investigate and report on these protected disclosures.

Respectfully Submitted,

/s/

DAVID Z. SEIDE
Government Accountability Project