

## *False Claims Act Amendments of 2021*

### **Background**

The False Claims Act defines materiality as having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property. This was long understood to mean that if the government was capable of withholding payment or demanding the return of payment, then the fraud was material. However, The Supreme Court's 2016 decision in *United Health Services v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016), has created confusion amongst courts by stating that the government's conduct after a claim is submitted is "strong evidence" that a requirement is not material to the government. This has led companies accused of defrauding the government to go on fishing expeditions to see if someone, somewhere, in the government was aware of the fraud and then argue that the fraud was not material because no government action was taken. This reasoning fails to take into account that government bureaucrats are highly segmented and often unable to make key decisions for their monolithic organizations. Nor are they highly motivated to stop fraud. Yet, the *Escobar* decision has made it all too easy for fraudsters to argue that obvious fraud was not material simply because the government continued payment.

### **The Bill**

- Does not change the existing definition of materiality, but shifts the burden of proof to the defendant to prove by clear and convincing evidence that the government's conduct, such as continued payment, was material. This will reduce instances in which fraudsters can successfully argue that the government's continued conduct made what would otherwise be a serious violation void.
- To further reduce fishing expeditions and financial burdens on taxpayers, upon a Department of Justice motion, the defendant would reimburse the government for costs associated with irrelevant, disproportional, or unduly burdensome discovery.
- Clarifies that in order for the Department of Justice to dismiss a relator's claim, a hearing must be held in which a judge makes a determination and the relator shall have the opportunity to show that the reasons for dismissal are arbitrary and capricious.
- Clarifies that the existing anti-retaliation provisions of the False Claims Act apply to post employment retaliation.
- These changes would be applied to all pending and future litigation to ensure that it covers the trillions of dollars spent on COVID relief.

The False Claims Act is the government's most powerful tool in deterring fraud and protecting taxpayer dollars. These changes are needed to correct the misinterpretations of the Supreme Court decision and ensure that the government has the tools needed to recover the billions of dollars lost annually to fraud.