



THE FALSE CLAIMS ACT LEGAL CENTER



July 23, 2021

The Honorable Senator Richard Durbin
Judiciary Committee
U.S. Senate
Washington, DC 20510

The Honorable Senator Charles E. Grassley
Judiciary Committee
U.S. Senate
Washington, DC 20510

Dear Chairman Durbin and Senator Grassley:

Taxpayers Against Fraud, National Whistleblower Center, Project On Government Oversight and Government Accountability Project write you in support of your legislation to strengthen the False Claims Act, the government's primary fraud-fighting law. Our organizations have been advocating for whistleblowers and fraud-fighting for decades and view this legislation as critical to the continued success of False Claims Act enforcement and the public-private partnership.

The Department of Justice has stated that since the Act was revitalized in 1986 over \$64 billion have been recovered, with nearly 80% of the recoveries coming from whistleblower-initiated actions. Our experience shows that the indirect benefit of the FCA could be worth an additional trillion dollars in deterrence. As Congress and the Biden Administration are considering ways to move our country forward post-pandemic, we need to stand guard against those who seek to pilfer government programs.

By any measurement, the FCA has been a remarkable success, we believe that legislative changes you have put forward will strengthen the Act against modern fraud schemes. We are confident that the legislation you have introduced will encourage more whistleblowers to come forward to assist the government and result in the recovery of billions of additional stolen government dollars.

We particularly encourage you to focus on the following provisions which would most significantly benefit whistleblowers and the continued enforcement of the FCA:

1.) Clarify the materiality standard. The current FCA "materiality" standard is easy to understand—liability only results from "material" violations. The FCA explicitly defines "material" to mean "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property" by the United States. Congress added this statutory definition in 2009 to clarify that liability attaches when the government *could have* rejected the fraudsters' claims for payment.

Nonetheless, this clear-cut standard was arguably undermined in a 2016 Supreme Court decision, *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). In this case, the Supreme Court provided numerous factors that a court could consider for when determining whether fraud was “material” to the government’s decision to pay a claim. On one such factor, the Court wrote: “[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.”

Although the government’s prior knowledge was described as merely being “strong evidence” that a false claim was not material, some courts and many companies have made the government knowledge factor dispositive, stating that there must be proof that the government *actually* refused to pay the claim. This logic leaves no room for the government to pay a claim in an emergency situation and later bring an FCA case.

For instance, the government might make the decision to continue paying Medicare payments to a dishonest hospital that is the only available healthcare facility for a rural population. Under the wayward reading of the Supreme Court’s *Escobar* decision, such corrupt entities could use the government’s payment decision to shield itself from FCA enforcement and drain government funds with impunity.

The proposed FCA amendments restore the Act by granting a heightened presumption of materiality to all instances when the government *could have* demanded repayment or payment from the defendant. The defendant can then only overcome this highly deferential presumption by meeting a strict “clear and convincing evidence” standard.

If a company accused of defrauding the government actually admits to submitting false claims, but then argues that the false information is not material, it is only fair for that company to be required to prove that false information has no tendency to impact the government’s payment decision. This high burden correctly rests with the defendant.

2.) Clarify when the government may dismiss whistleblower cases. The FCA permits the government to dismiss whistleblower, or so-called “*qui tam*,” actions if the whistleblower “has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.” 31 USC 3730(c)(2)(A).

Recognizing that whistleblower-initiated actions have recovered the bulk of FCA recoveries over the last 100 years, the government has been reluctant to dismiss these actions. In fact, prior to 2018, the government had dismissed less than 50 cases in the 155-year history of the Act.

Then, in January 2018, the Justice Department released the so-called “Granston Memo,” which outlined the Department’s focus on dismissing whistleblower-initiated FCA actions. Since then, *over 50 whistleblower actions* have been silenced through arbitrary dismissals, in less than four years. When challenged, the Justice Department has argued that it has “unfettered discretion” to dismiss these cases, notwithstanding the statutory requirement that the court provide the whistleblower with a “hearing.”

By dismissing whistleblowers and their fraud concerns without any oversight, the Justice Department is discouraging individuals from even stepping forward. The Amendments provide a level of assurances for would-be whistleblowers, clarifying when a whistleblower-initiated action may be dismissed by the court.

With our country spending trillions of dollars in pandemic spending and infrastructure improvements, now is not the time to silence whistleblowers with backroom dismissals. We applaud these leading anti-fraud Senators for providing a level of certainty and protection to America's courageous whistleblowers.

3.) Clarify that the FCA provides anti-retaliation protection to former employees. The current FCA is arguably silent on whether individuals receive protection from employers who blackball or otherwise retaliate post-employment. The proposed amendment removes any uncertainty by explicitly extending the protections found in 31 USC 3730(h).

For too long, whistleblowers have faced retaliation from former employers. The amendments put the world on notice that blackballing whistleblowers will no longer be tolerated. We applaud your long-standing commitment to protecting whistleblowers.

On behalf of whistleblowers, we thank you both for your leadership on anti-fraud initiatives and championing these much-needed improvements to the FCA. These amendments would not only encourage more whistleblowers to step forward, but they will deter future fraudsters from targeting vulnerable government programs.

Please feel free to contact us with any questions or comments. We would be eager to meet and further discuss how your efforts will improve anti-fraud efforts. Please contact Jeb White, at JWhite@TAF.org to schedule a meeting.

Sincerely,

Taxpayers Against Fraud
National Whistleblower Center
Project On Government Oversight
Government Accountability Project