

Senator Grassley and Others Propose Amendments to the False Claims Act

Article By:

Samantha P. Kingsbury

Brian P. Dunphy

Laurence J. Freedman

Last week, a bipartisan group of Senators led by Senator Chuck Grassley (R-Iowa) introduced two pieces of proposed legislation, one of which would amend the False Claims Act (FCA) and the other of which would amend the Program Fraud Civil Remedies Act of 1986 (PFCRA) to create the Administrative False Claims Act of 2021 (AFCA). The proposed FCA amendments are designed to make it harder for defendants to assert a lack of materiality defense and to strengthen relators' ability to object to dismissals of FCA *qui tam* cases by the Department of Justice (DOJ). As noted by the bills' sponsors, this legislation is supported by whistleblower advocacy groups. The AFCA would focus on smaller claims than does the FCA. Senator Grassley described the bills as being intended to "help recoup even more money by clarifying confusion after the *Escobar* case" and as being needed more than ever "to fight the significant amounts of fraud we are already seeing" related to the trillions of dollars Congress has appropriated for COVID relief.

The False Claims Act Amendments Act of 2021

The bill that would amend the FCA is the [False Claims Act Amendments Act of 2021](#) (FCA Amendments Act of 2021), and it includes several particularly notable features: (1) requiring a higher burden of proof applicable solely to defendants rebutting materiality; (2) requiring the Government to demonstrate its reasons for moving to dismiss under Section 3730(c)(2)(A) and providing relators with a statutory standard for challenging the Government's decision; (3) explicitly providing retaliation protections to former employees; and (4) allowing the Government to recover expenses, costs, and attorneys' fees from parties requesting discovery in declined cases.

First, with respect to materiality, Senator Patrick Leahy (D-Vermont) opined that the Supreme Court weakened the FCA in 2016 when it issued its [Escobar decision](#) and thereby "made it all too easy for fraudsters to argue that their obvious fraud was not material simply because the government continued payment." The FCA Amendments Act of 2021 proposes to address this issue by amending Section 3729 of the FCA to add subsection (e), which would impose upon defendants trying to rebut the allegation of materiality a *higher burden of proof* than applies to the Government

and relators in establishing materiality. Currently, the Government and relators must prove FCA allegations “by a preponderance of the evidence.” The FCA Amendments Act of 2021 would require defendants trying to rebut materiality to present “clear and convincing evidence” that the alleged fraud was not material.

Second, [regarding the Government’s dismissal authority](#), the proposed amendments to the FCA would add to Section 3730(c)(2)(A) a requirement that the *Government* “demonstrat[e] reasons for dismissal” and give the *qui tam* relator “the opportunity to show that the reasons [for the Government’s dismissal] are fraudulent, arbitrary and capricious, or contrary to law.” The statute currently requires that the relator have an opportunity for a hearing on the Government’s motion to dismiss under Section 3730(c)(2)(A), and the proposed amendment creates a statutory standard that is similar to how courts decide these motions under a “fraudulent” or “arbitrary and capricious” standard. However, the “contrary to law” language seems to provide a much broader basis for a relator to oppose a dismissal by the Government. (There is currently a [circuit split](#) on the standard that courts should apply when the Government moves to dismiss cases under 3730(c)(2)(A), which the [Supreme Court declined to resolve](#) last week when it denied a petition for a writ of certiorari in *CIMZNHCA LLC v. United States*.)

It is notable that this amended provision would *hinder* the Government’s ability to enforce the FCA by restraining its Executive Branch authority to dismiss cases. Given that the bills’ sponsors commented that the FCA is the “best tool to fight fraud against the government and recover lost taxpayer dollars,” it is curious that they suggest that relators should be able to litigate cases the Government has declined and *determined should be dismissed* to preserve federal resources, avoid case law that would weaken the FCA, or serve other legitimate DOJ interests. Many in the FCA defense bar would likely add that allowing DOJ the authority and discretion to dismiss meritless or frivolous FCA *qui tam* suits is likewise an important tool for protecting taxpayer dollars that are spent evaluating and investigating such cases.

Third, the FCA Amendments Act of 2021 would amend Section 3730(h)(1), the FCA’s anti-retaliation provision, to state that “[a]ny *current or former* employee, contractor, or agent” is entitled to relief if that person is subject to retaliation based on their acts as a whistleblower, for the purpose of protecting against “post-employment retaliation.”

Finally, the proposed legislation would add a new subsection (f) to Section 3731, which would apply in declined cases and allow the Government to move that any party requesting discovery from the Government be required to “pay the Government’s expenses, including costs and attorneys’ fees...unless the party can demonstrate that the information sought is relevant, proportionate to the needs of the case, and not unduly burdensome on the Government.” The press release posted on Senator Grassley’s website suggests that this provision is intended to “make[] fraudsters liable for reimbursing the government for costs associated with a burdensome discovery process,” but, as written, this provision would apply to any party that requested discovery in a declined case.

The Administrative False Claims Act

The [bill regarding the AFCA](#) proposes to amend the existing PFCRA (codified at 31 U.S.C. § 3801, *et seq.*), which allows certain agencies to impose civil penalties and assessments through administrative adjudication for the submission of false claims or statements. In short, the AFCA would raise the statutory ceiling on such claims, expand the DOJ officials who can review these claims, and allow the government to recoup costs for investigating and enforcing these matters.

We will monitor these proposed bills closely and continue to report on legislative developments.

©1994-2025 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. All Rights Reserved.

National Law Review, Volume XI, Number 214

Source URL: <https://natlawreview.com/article/senator-grassley-and-others-propose-amendments-to-false-claims-act>