

Senate to Consider Pared Down, But Still Unfavorable, Amendments to FCA

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As we [wrote](#) on July 28, 2021, Senator Chuck Grassley has sponsored a bill (S. 2428) that would amend the False Claims Act (FCA) in several significant ways that are unfavorable to defendants. On October 28, 2021, the Senate Judiciary Committee voted to refer the False Claims Amendments Act of 2021 (FCAA) to the Senate for a full vote. The [current version](#) of the FCAA contains several important changes from its predecessor.

1. **Materiality.** The FCAA still seeks to add a provision regarding the standard for proving materiality under the FCA. But the bill no longer shifts the burden of proof to defendants by requiring them to “rebut” an initial materiality showing by proving with “clear and convincing evidence” that the violation was not in fact material to the government’s payment decision. The proposed bill now provides: “In determining materiality, the decision of the Government to forego a refund or pay a claim despite actual knowledge of fraud or falsity shall not be considered dispositive **if other reasons exist** for the decision of the Government with respect to such refund or payment.” (emphasis added).

The vague “other reasons” language could make it harder for health care providers and other individuals and entities to defeat FCA complaints on materiality grounds at the pleading stage. It will also open the door to broader and more extensive discovery to government agencies, like the Centers for Medicaid & Medicare Services and the Department of Justice (DOJ), to determine what “other reasons” may have informed the government’s payment decisions.

2. **Shifting the Costs of Government Discovery to Defendants.** The FCAA no longer contains a provision that would require defendants seeking discovery from the government in non-intervened cases to pay the government’s costs and attorneys’ fees for responding to discovery requests unless the defendant proves that the information sought is “relevant, proportionate to the needs of the case, and not unduly burdensome.” As we [previously discussed](#), this provision was problematic for several reasons.
3. **The Standard for Approving Government-Requested Dismissals.** Since January 2018, the

DOJ has shown an increased willingness to exercise its authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss meritless or frivolous FCA actions. By heightening the dismissal standard proposed in the previous version of the bill, the FCAA may make it more difficult for defendants to take advantage of the government's dismissal authority. In the current version of the bill, rather than merely demonstrating the "reasons for the dismissal," the government would be required to "identify a valid government purpose and a rational relation between dismissal and accomplishment of the purpose." If such a demonstration is made, the relator would have "the burden of demonstrating that the dismissal is fraudulent, arbitrary and capricious, or illegal." As before, we interpret this proposed amendment as seeking to restrict DOJ's authority to dismiss FCA cases.

4. Retroactivity. The previous version of the FCAA would have applied the changes to any FCA case that is pending on or after the date of enactment. The current version of the bill would only apply these changes prospectively.

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