

# What the False Claims Amendments Act of 2023 May Mean for Whistleblowers

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Attention, whistleblowers. The upcoming False Claims Amendments Act of 2023 may be in line to significantly strengthen the government's most powerful anti-fraud law. This bipartisan bill proposes greater anti-retaliation protections for whistleblowers as well as an attempt to clarify recent U.S. Supreme Court action taken around the materiality clause.

The False Claims Amendments Act of 2023 may substantively expand fraud reporting while fortifying protections for whistleblowers who bravely share valuable information. Additionally, the [Administrative False Claims Act of 2023](#) has proposed expanding recovery potential for smaller claims of fraud against the government. If these two bills become law, these latest updates will be the most important developments for fraud recovery since the 2009 and 1986 False Claims Act amendments.

## Stronger Anti-Retaliation Measures for FCA Whistleblowers

Under the proposed [False Claims Amendments Act of 2023](#), whistleblowers who report on fraud will see expanded protections against employer retaliation. The False Claims Act currently protects employees against harassment, discrimination, firing, reduction of hours or pay, or other retaliatory acts as a result of their protected disclosure. Violation can be responded to with legal action resulting in double back pay, legal fees and possible reinstatement, or front pay when reinstatement is not possible.

The 2023 False Claims Amendments Act would extend the FCA's anti-retaliation protections to former employees, as well as current ones. This would incentivize those who have already left the companies where they witnessed fraud to share what they know, as they will also be protected against discrimination or harassment by the possibility of legal action.

Fear of retaliation is one of the main reasons why whistleblowers may hesitate to share information with government investigators or qui tam attorneys. By expanding protections, the False Claims Amendments Act of 2023 hopes to broaden the pool of those who feel empowered to disclose fraud. Because whistleblowers can recover anywhere from 15 to 30% of a successful settlement under the False Claims Act, expanding protections against retaliation can further incentivize those with

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information about fraud to come forward.

## **Weakening the Materiality Requirement**

In 2016, the United States Supreme Court ruled in [United Health Services v. United States ex rel. Escobar](#) that companies accused of defrauding funds could shirk liability by illustrating that they continued to receive government payments. The presence of these ongoing payments was thought to prove that the fraud was not "[material](#)" to the contract. The False Claims Act only imposes liability for violation of a material statutory, regulatory, or contractual requirement.

The decision in *Escobar* understood materiality to be "demanding," ruling that the False Claims Act is "not an all-purpose antifraud statute . . . or a vehicle for punishing garden-variety breaches of contract or regulatory violations." Continued payments were thought to illustrate that the fraud committed did not meet the materiality standard for prosecution. This ruling in *Escobar* effectively created a loophole around False Claims Act prosecution for companies who received continued government payments while committing fraud.

The False Claims Act Amendments Act of 2023 is in dialogue with this 2016 ruling. The update to the materiality requirement is the most important component of the freshly proposed bill. The False Claims Amendments Act of 2023 would clarify that continued payments should not automatically absolve a company from False Claims Act prosecution, since other reasons may exist for continued payments. Thus, the "materiality" clause would lose its power as a shroud against prosecution for fraud.

Senator Grassley (R-IA), one of the bill's main sponsors, calls the False Claims Act the "single greatest tool in the fight against fraud" since its 1986 revision. "Taxpayers deserve better than this sort of legal gymnastics," Grassley said about the materiality clause as interpreted by the Supreme Court. "Our bipartisan bill clarifies our original intent to hold those accountable when they bilk the taxpayer."

## **Government Accountability Office (GAO) Reporting on the FCA**

Finally, under the False Claims Amendments Act of 2023, the Government Accountability Office (GAO) would become empowered to report on the efficacy of False Claims Act enforcement actions. The challenges, financial hurdles, and total recoveries associated with fraud investigations would be subject to GAO assessment, allowing taxpayers a clearer picture of the benefits of the False Claims Act, as well as where investigations can be improved.

## **Proposed Administrative False Claims Act of 2023**

Meanwhile, the Administrative False Claims Act of 2023, as proposed by Senator Grassley's office, has unanimously cleared the Senate. "The Administrative False Claims Act will significantly improve the process for smaller claims," according to Sen. Grassley.

This bill, should it become law, will update the ways in which smaller instances of fraud against the government can be prosecuted. Under the [Administrative False Claims Act \(AFCA\)](#), the following steps would be undertaken:

- The statutory ceiling for smaller instances of fraud would be raised from \$150,000 to \$1 million, allowing for larger recoveries and reimbursements.
- A greater amount of Justice Department officials would become available to review fraud claims.
- The government would be able to recover costs for fraud investigations and the expenses of prosecution.

The Administrative False Claims Act is also a bipartisan bill, cosponsored by Sen. Dick Durbin (D-III).

## Understanding the Future of the False Claims Act

The False Claims Act is currently the most powerful tool in the government's arsenal for protecting whistleblowers and prosecuting fraud. Senator Grassley was instrumental in the 1986 modernization of the False Claims Act, which gave the historic "Lincoln Law" the teeth that it has today in fighting fraud. Since its previous updates, the False Claims Act has allowed the government to recover more than [\\$72 billion](#) in stolen and misappropriated taxpayer funds. Additionally, more than \$8 billion has been paid to whistleblowers.

This proposed series of updates to anti-fraud discovery, reporting, and recovery would allow more whistleblowers to come forward with legal protections and reduce the amount of loopholes available for fraudulent activity. The 2016 materiality ruling from the U.S. Supreme Court greatly weakened the law's ability to hold corporations accountable for fraud against the taxpayer. However, this 2023 update has the potential to close those loopholes and increase accountability.

Even without the 2023 updates to the FCA, the False Claims Act protects and rewards whistleblowers who share what they know to help recover stolen funds.

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National Law Review, Volumess XIII, Number 284

Source URL: <https://natlawreview.com/article/what-false-claims-amendments-act-2023-may-mean-whistleblowers>