

GAME CHANGER? FALSE CLAIMS AMENDMENTS ACT OF 2021 BILL INTRODUCED

July 27, 2021

On Tuesday, July 26, 2021, a bipartisan group of senators led by Sen. Chuck Grassley (R-Iowa) introduced the [False Claims Amendments Act of 2021](#) (“Amendments Act”). The False Claims Act (“FCA”) deters fraud against the federal government and American taxpayers while incentivizing whistleblowers to come forward with knowledge of fraud and noncompliance. Relevant to an FCA claim is an evaluation of whether the noncompliance was material to the payment of a false claim. Prior to 2016, it was long understood that under the FCA, materiality went to the issue of whether the government was capable of withholding payment or demanding the return of payment. However, the Supreme Court’s 2016 decision in *United Health Services v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016) fostered further discussion on the meaning of materiality under the FCA, stating that the government’s conduct after the submission of a claim constitutes “strong evidence” of whether the relevant billing requirement is material to the government’s payment of a claim. As a result, entities and individuals accused of defrauding the government sought to identify instances that showed that the government was aware of the alleged fraud and that this inaction demonstrated that their alleged fraud was not material since the government continued payment despite the awareness of the fraud. If passed, the Amendments Act would clarify the current law to further interpret materiality in a manner that will increase the burden for an FCA defendant to succeed in litigation.

The Amendments Act introduces the following changes that would apply to all currently pending and future litigation under the FCA:

- The definition of materiality is maintained, but the burden of proof will be shifted to the defendant to prove by “clear and convincing evidence” that the government’s conduct was material.
- If the Government elects not to intervene, costs will be shifted to the defendant to reimburse the government for costs associated with discovery.
- 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 may show that the reasons for dismissal are arbitrary and capricious.
- The FCA’s existing anti-retaliation provision will apply to post employment retaliation.

The proposed changes seek to further refine the FCA and ensure the government has the necessary tools to recover the billions of dollars lost annually to fraud. The bill reportedly has the endorsement of several legislators, Taxpayers Against Fraud, the National Whistleblower Center, the Project on Government Oversight, and the Government Accountability Project. While assisting the government with enforcement of the FCA, the impact of the Amendments Act would have serious ramifications for healthcare providers.

If you have any questions or need assistance regarding the FCA or the Amendments Act, please contact Hancock Daniel's [Compliance](#) or [Fraud & Abuse](#) team.

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