

Trump Administration Announces False Claims Act Investigation Into Harvard

On May 15, 2025, the [New York Times](#) reported that the Trump Administration has opened a False Claims Act ("FCA") investigation into Harvard University's admissions procedures. Michael C. Bender & Michael S. Schmidt, *Trump Administration Escalates Harvard Feud With New Justice Dept. Investigation*, N.Y. Times (May 15, 2025). According to the report, the focus of the investigation is whether Harvard University "defrauded" the federal government in connection with Harvard's admissions process. *Id.* In 2023, the Supreme Court overruled decades of precedent by holding that affirmative action programs (such as the ones at Harvard University) violated the Equal Protection Clause of the Fourteenth Amendment. See *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

While Harvard has already been the subject of other recent investigations into its admissions and hiring processes by the U.S. Department of Education and the Equal Employment Opportunity Commission, the initiation of a FCA investigation is a significant escalation due to the nature of the charges under the FCA and the stiff penalties permitted under the statute. The FCA is an anti-fraud statute that is meant to permit the government and private individuals (known as "relators") who learn of alleged fraud against the government to sue government contractors and recipients of government payments. If successful, the government can recover damages equal to three times the value of government payments obtained through the making of false or fraudulent claims. If the lawsuit is initiated by a relator, the relator stands to receive a percentage of the recovery by the government. In addition to this news, we have seen in other, related contexts that the Trump Administration has threatened to use the FCA as a means of policing diversity programs of private parties. In light of these events, it is important for anyone who is has received government contracts or awards to consider the FCA and how it might be employed.

False Claims Act: An Overview

The FCA was enacted during the Civil War in 1863 to provide a means for the government to deter and punish fraud in government contracting. A person or institution is liable under the FCA if they knowingly present a false or fraudulent claim to the government for payment or approval. 31 U.S.C. § 3729(a)(1)(A). The FCA also creates liability for, *inter alia*, the use of false records or statements in support of a false claim or for avoiding or decreasing an obligation to pay money to the government (sometimes called a "reverse" FCA), or conspiring to violate the FCA. 31 U.S.C. § 3729(a)(1). A claim is defined to mean "any request or demand . . . for money or property [that] . . . (i) is presented to an officer, employee or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf . . . and if the United States Government . . . provides or has provided any portion of the money or property requested or demanded . . . or will reimburse such contractor, grantee, or other recipient[.]" 31 U.S.C. § 3729(2)(A).

Not all false claims for payment are punishable under the FCA. To be liable, the maker of the claim must (i) have knowledge that the claim is false, (ii) consciously avoid learning the truth of the information provided to the government, or (iii) have acted in reckless disregard of the truth or falsity of the information provided to the government. 31 U.S.C. § 3729(b)(1). In addition, the false claim must be "material," which the statute defines to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). The Supreme Court has described the materiality standard under the FCA as "demanding" and explained that materiality "cannot be found where noncompliance is minor or insubstantial." *Universal Health Services, Inc. v. United States ex rel. Escobar et al.*, 579 U.S. 176, 194 (2016).

Garden-variety regulatory violations or contractual breaches should not give rise to FCA liability. See *id.* (“The False Claims Act is not ‘an all-purpose antifraud statute’ . . . or a vehicle for punishing garden-variety breaches of contract or regulatory violations”).

The classic material false statement is one that misrepresents the express conditions of payment, for example, by falsely telling the government that a firm sold military equipment to the government at cost plus a certain premium, when in fact the true cost was far lower than represented to the government, thereby resulting in overcharging. This type of statement would be material. See, e.g., *United States v. McNinch*, 356 U.S. 595, 599 (1958). The statute also creates liability for an “implied certification” where “the claim does not merely request payment, but also makes specific representations about the goods or services provided” and where the “failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.” *Escobar*, 579 U.S. at 190. A statement can be material if it “misleadingly omits critical facts,” thereby rendering it “a misrepresentation irrespective of whether the other party has expressly signaled the importance of the qualifying information.” *Id.* at 191.

Finally, violations of the FCA are punishable with a civil penalty of \$5,000 to \$10,000 per claim (as adjusted by inflation), plus three times the amount of damages sustained by the government due to the submission of the false claim. 31 U.S.C. § 3729(a)(1).

The Administration’s Threatened Use of The False Claims Act To Challenge DEI Programs

The Harvard investigation is not the first time the Trump Administration has sought to use the FCA as a means of advancing its viewpoint relating to workplace and academic diversity. On January 21, 2025, the administration issued [Executive Order 14173](#), entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.” This order criticizes what it calls “illegal” diversity, equity, and inclusion policies and insists that the head of each federal agency “shall include in every contract or grant award” the following terms relating to diversity, equity and inclusion (“DEI”) programs:

- (A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code; and
- (B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”

The Executive Order is aimed at requiring those doing business with the government to certify that they do not violate Federal anti-discrimination laws. In addition, the Executive Order’s statement that the counterparty must agree that compliance with anti-discrimination law is “material” is meant to avoid the materiality requirement imposed by the FCA. In litigation over this Executive Order, the administration has taken the position that it does not prohibit all DEI programs, only those programs that violate federal law. See e.g., *Nat’l Ass’n of Diversity Officer in Higher Education v. Trump et al.*, No. 1:25-cv-00333-ABA, ECF No. 44, at 45-47 (D. Md. Feb. 21, 2025). However, it is possible that the Executive Order will deter government contractors from retaining DEI programs that were created in recent years.

The Harvard False Claims Act Investigation

Not much is known about the FCA investigation into Harvard. For example, public reporting has not identified the alleged false statement, or explained how it was material to a government contracting decision. A few observations are, however, possible at this point.

First, regardless of the merits of the investigation, it seems likely that the investigation will cause burden and disruption to Harvard. FCA investigations typically involve the government’s issuance of a civil investigative demand, which can seek documents, information and testimony from the target of the investigation or from any witness. These can require the review and production of employee

emails, the collection of vast amounts of data, and the taking of depositions of employees. Such investigations can drag on for months and cause the subject of the investigation to incur millions of dollars in expenses. According to public reporting, the Trump Administration has already requested emails, text messages, and other communications from Harvard officials related to the Executive Order. There are also reputational harms caused by being publicly accused of engaging in fraud against the government. Even when an investigation under the FCA turns out to be completely meritless and does not lead to a lawsuit, the investigation itself is often punitive due to these burdens and other harms.

Second, the FCA is meant to punish the knowing submission of false statements to the government. The government will need to prove both that Harvard made false statements to the government about its admissions programs and that the statements were *knowingly* false (as opposed to mistakenly false). According to public reporting, the Administration has given Harvard 30 days to identify a university official to testify under oath about its current admissions policies and how those policies may have changed following *Fair Admissions* (a decision which also made clear that “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise,” see *Fair Admissions*, 600 U.S. at 230).

Third, the government will need to prove that whatever defect in Harvard admissions it uncovers—if it uncovers any defect at all—meets the “demanding” standard of materiality under the FCA. A minor or insubstantial instance of noncompliance with federal antidiscrimination law, or one that was entirely unrelated to the government’s contracting decision, would not violate the FCA. *Escobar*, 579 U.S. at 194.

Finally, the government may need to respond to a government knowledge defense. Harvard’s admissions policies prior to 2023 were broadly known, the subject of litigation in *Fair Admissions*, and indeed were specifically approved by the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265, 316 (1978) (Powell, J.) (praising the Harvard admissions program as “tak[ing] race into account in achieving the education diversity valued by the First Amendment” without assigning a “fixed number of places to a minority group”). If the government paid claims to Harvard while knowing about its admissions program, then Harvard should not be liable under the FCA. See *U.S. ex rel. Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1050-51 (9th Cir. 2012); *U.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 951-52 (10th Cir. 2008).

A final thought: the announcement of the Harvard investigation and the promulgation of Executive Order 14173 may lead to more private relators filing *qui tam* lawsuits against universities and colleges across the country on the government’s behalf. The financial incentives provided to relators and their counsel, who will share in any government recovery, already provide an inducement to bring such lawsuits. The prospect that the government may intervene on the side of the relators and against universities will only further encourage these lawsuits, thereby increasing the expense and burden to universities.

Patterson Belknap Webb & Tyler LLP has extensive experience in litigating claims under the False Claims Act for both nonprofit and commercial clients and we will be closely monitoring the Harvard investigation, as well as any similar government investigations as they proceed. If you receive a civil investigative demand, it is important to consult with experienced counsel, to develop a strategy for addressing the government’s discovery requests, and to make an assessment of any possible liability.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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