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Higher Education Alert

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DOJ's bid to deploy the False Claims Act in higher education may face headwinds

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DOJ's latest approach to DEI and civil rights enforcement raises risks for higher education institutions receiving federal funds.

What's the impact?

- Colleges and universities face increased legal risk as DOJ and whistleblowers may pursue FCA cases for noncompliance with federal civil rights laws.
- Supreme Court precedent may limit DOJ, as courts require violations to be material to government funding decisions under the FCA.

From the start,[1] the second Trump administration has telegraphed a clear intent to eliminate diversity, equity, and inclusion programs and initiatives that the White House finds objectionable. To date, the administration has targeted colleges and universities, as well as other recipients of federal funding, grants, and tax benefits with an array of investigations and demands, all with the stated goal of incentivizing institutions to change admissions practices, eliminate diversity goals,

[1] See Executive Order 114173 Ending Illegal Discrimination and Restoring Merit-Based Opportunity (Jan 21, 2025).

and ensure compliance with directives governing the administration of federal research grants and funds.

The Department of Justice trumpets the False Claims Act as the latest tool in its higher education enforcement arsenal

Last week, however, marked the opening of a new and significant front in the administration's higher education enforcement efforts, as the Department of Justice announced a new so-called "Civil Rights Fraud Initiative." This new initiative will combine the resources of DOJ's Civil Rights Division and the Fraud Section of the Civil Division to deploy the False Claims Act (FCA) as an enforcement tool against "any recipient of federal funds that knowingly violates federal civil rights laws," with institutions that "allow anti-Semitism and promote divisive DEI policies" explicitly in the crosshairs. Presumably, this initiative will involve both internally-generated FCA cases brought directly by DOJ, and *qui tam* actions filed (initially under seal) by individual whistleblowers (known as "relators") who are entitled to a share of the recovery if the case succeeds. See 31 U.S.C. § 3730(b). Given the substantial financial incentives offered by the FCA to individual whistleblowers, this push could result in a significant number of cases against a broad swath of schools.

Coming on the heels of heightened Title VI enforcement to combat campus antisemitism, this move is far from unexpected. The False Claims Act has lurked in the background as the new administration's priorities and enforcement team have come into focus. Issued on the second day of his term, President Trump's Executive Order 114173 ("Ending Illegal Discrimination and Restoring Merit Based Opportunity") explicitly cites the Act, asserting that "compliance in all respects with all applicable [f]ederal anti-discrimination laws is material to the government's payment decisions for purposes of [the FCA]," perhaps the first time that a FCA element has made its way into an executive order. Similarly, Attorney General Pam Bondi expressly re-affirmed the importance of the Act to Senator Chuck Grassley at the start of her confirmation hearings.

Nonetheless, DOJ's announcement has understandably raised significant concern among colleges and universities who are already navigating a landscape of heightened scrutiny and aggressive action from federal regulators. While the specter of a False Claims Act action or investigation is unquestionably serious, the extent to which DOJ's initiative will prove successful remains an open question. This is especially true given the evolution of Supreme Court jurisprudence on a core issue of False Claims Act liability—materiality—that was underscored just last week by Justice Thomas in his concurrence in *Kousisis v. United States.*[2] To understand why, a brief refresher on the FCA and its core elements is in order.

[2] *Kousisis v. United States*, 606 U.S. ____, 2025 WL 1459593 (May 22, 2025).

The False Claims Act: A primer

In broad brush, the FCA provides that any person who knowingly submits, or causes to submit, false claims to the federal government is liable for three times the government's damages plus a penalty that is linked to inflation.[3] FCA liability can also arise in other situations, such as when someone knowingly uses a false record material to a claim or improperly avoids an obligation to pay the government. Conspiring to commit any of these acts also is a violation of the FCA.[4] To establish FCA liability under any theory, however, the defendant must act with the requisite scienter (actual knowledge, deliberate indifference, or reckless disregard), and perhaps most critically, the falsity must be material to the government's payment of the claim. Establishing materiality requires a "demanding" showing that must go to the very essence of the bargain.[5]

Escobar's framing of materiality is widely understood as an important milestone in FCA enforcement—rejecting the notion that a particular fact is material simply because the government says it is, or because the government designates it as a condition of payment. Instead, *Escobar* and its progeny demand a more rigorous examination that probes whether a particular fact is truly central to the parties' agreement. Generally, the materiality of a particular requirement may be established by proving that the government consistently refuses to pay claims based on noncompliance with such requirement. Conversely, if the government pays a particular claim in full despite knowing that such requirement was violated, those payments would be strong evidence that the requirement was not material.

Presumably, given DOJ's recent announcement and the language of EO114173, the government will argue that contract and grant submissions by higher education institutions are grounds for FCA liability if they make false representations regarding diversity initiatives or practices that the government deems contrary to federal civil rights laws. In any such case, however, the burden will be on the government (or a relator) to prove that those representations are material.

Which brings us to *Kousisis*, where the Supreme Court affirmed the criminal wire fraud convictions of two defendants who made false representations to secure a government painting contract: promising that they had subcontracted with socially and economically disadvantaged small businesses to perform the work. *Kousisis*, 2025 WL 1459593, *3. The defendants' painting work was satisfactory in all respects, but their compliance with the minority small business subcontracting requirement was a sham. *Id.* at *4. In *Kousisis*, while both parties agreed that the false representations were material, and while the case involved criminal fraud allegations rather than FCA claims, two notable points stand out. First, the government expressly urged the Court to adopt the same stringent standard of materiality laid out in *Escobar*. Second, Justice Thomas wrote an extensive concurrence in which he expressed extreme skepticism that conditions such

[3] The current civil penalty amount ranges from $14,308 to $28,619 per claim.

[4] See 31 U.S.C. §§ 3729(a)(1)(A)-(G).

[5] See *Universal Health Services, Inc. v. United States ex rel Escobar*, 579 U.S. 176, 193 n.5, 194 (2016).

as the minority small business requirement—based primarily on factors of race and sex, and couched in "more than a thousand pages . . . impos[ing] numerous regulatory, technical and ethical obligations"—could be material at all. *Kousisis*, 2025 WL 1459593, *12, *14.

As Justice Thomas put it "[t]he contracts in this case were for bridge repairs, not minority hiring[,]" and, in his view, there were "several reasons to think that the [minority small business] provisions did not go 'to the very essence of the bargain.'" *Id. at* *14. Given the distinction between the essential service bargained for under the contract—a paint job—and the slew of regulatory conditions that lay atop them, Justice Thomas suggested that the correct application of *Escobar* "may doom the Government's prosecutions in D[isadvantaged] B[usiness] E[nterprise] cases where materiality is contested." *Id.* at *16.

Where does this leave schools facing FCA scrutiny?

The Supreme Court has long made clear that the False Claims Act is "'not an all-purpose anti-fraud statute' . . . or a vehicle for punishing garden-variety breaches of contract or regulatory violations."[6] At this early stage, it remains to be seen if DOJ's announcement will serve as a rallying cry to either the traditional relators' bar or to non-traditional whistleblowers who are motivated by either ideological or financial incentives. And, Justice Thomas' recent concurrence is merely the latest example of reasons to suspect that the government's attempt to stretch the FCA to this new frontier may not prove as easy as the government thinks it will be—as discussed above, there are ample grounds to suspect that reviewing courts may not see the diversity program-related certifications and conditions that the administration is targeting as material.

In the interim, however, those questions may prove small comfort to schools facing a raft of government Civil Investigative Demands[7] for documents and testimony, or the prospect of defending False Claims allegations in court after relators/whistleblowers file suit. In fact, the stringency of the materiality test may prompt the government to move aggressively to impose new grant and contract conditions in an effort to establish new benchmarks relevant to *Escobar's* materiality framework.

All told, the need to prudently navigate these demands, together with the significant financial penalties imposed by the FCA, make it imperative for colleges and universities to preemptively ensure that their compliance programs are current. Institutions must best position themselves to

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[6] *Universal Health Services, Inc. v. United States ex rel Escobar*, 579 U.S. 176, 194 (2016) (quoting *Allison Engine Co., Inc. v. United States ex rel Sanders*, 553 U.S. 662, 672 (2008).

[7] Under 31 U.S.C. § 3733, the government is empowered to issue compulsory process for documents, testimony, or interrogatories in order to conduct a False Claims Act investigation, prior to filing suit or intervening in a whistleblower's *qui tam* complaint. These extraordinarily powerful investigative tools are likely to be front and center in the rollout of DOJ's new enforcement efforts against colleges and universities.

defend themselves against FCA claims and seek appropriate legal advice as they navigate a new and radically expanded FCA enforcement universe.

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