

False Claims Act Suits Against NGOs: What Nonprofits Need to Know



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Prohibition on Material Support

- Federal law prohibits the provision of “material support” to listed terrorist groups or individuals. (18 USC 2339A(b)) The USAID certification defines it as follows:

“Material support and resources” means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”

“Training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.

“Expert advice or assistance” means advice or assistance derived from scientific, technical, or other specialized knowledge.

- Law does *NOT* require that this support be *intended* to support terrorism, only that the provider *know* that the recipient is a listed entity.

FCA Liability after Escobar

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False Claims Act

31 U.S.C. § 3729(a)(1)—

Any person who . . .

- “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval”
- “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim”
- “is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted . . . plus 3 times the amount of damages which the Government sustains because of the act of that person.”

False Claims Act

31 U.S.C. § 3729(b)(2)—

The term “claim” means any “request or demand, whether under a contract or otherwise, for money or property . . .”

- “presented to an officer, employee, or agent of the United States”
- “made to a contractor, grantee, or other recipient . . .”

False Claims Act

31 U.S.C. § 3729(b)(1)—

The terms “knowing” and “knowingly” mean that a person:

- Has “actual knowledge”
- Acts in “deliberate ignorance” of truth or falsity
- Acts in “reckless disregard” of truth or falsity

There is no requirement for “proof of specific intent to defraud”

False Claims Act

31 U.S.C. § 3729(b)(4)—

The term “material” means

“having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”

False Claims Act

31 U.S.C. § 3730—

(b) Actions by Private Persons.—

(1) A person may bring a civil action for violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government

(d) Award to Qui Tam Plaintiff.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. . . .

False Claims Act—original source

31 U.S.C. § 3730(e)—

(4) (A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . .

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

United States ex rel. Escobar v. Universal Health (S. Ct. 2016)

Accordingly, we hold that the implied certification theory can be a basis for liability, at least where two conditions are satisfied: **first**, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and **second**, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

United States ex rel. Escobar v. Universal Health (S. Ct. 2016)

- “Minor or insubstantial” noncompliance is not enough
- “Materiality”—
 - Is “demanding” and more fact-intensive
 - No distinction between “conditions of payment” and “conditions of participation”
 - Government entitlement to withhold payment not enough
 - Government response to knowledge of falsity is important; continuing to pay “is very strong evidence that requirements are not material”

Impact of *Escobar*

- *U.S. ex rel. Harman v. Trinity Industries, Inc.*, 872 F.3d 645 (5th Cir. 2017) (overturning \$663 million jury verdict).
- *U.S. ex rel. Ruckh v. Salus Rehabilitation, LLC*, No. 11-1303 (M.D. Fla. Jan. 11, 2018) (overturning \$350 million jury verdict).

False Claims Act-risk mitigation

- Adopt and adhere to a compliance program
- Train employees, consultants, and subcontractors
- Seek clarification of ambiguities
- Investigate and disclose apparent violations

False Claims Act—defense strategies

- Retain counsel early
- Cooperate with government investigators
- Persuade DOJ, AUSA that there is no false claim
 - Relator not an “original source”
 - No knowledge of falsity
 - Implied certification is not “material”
 - Damages questions
- Attorney’s fees recovery may be available to successful defendants

FCA Liability after Escobar



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Additional Resources

- [Intimidation Campaign Using False Claims Act and IRS to Push Problematic Enforcement Policy on NGOs](#)
- [Nonprofits with USAID Funding May Be Vulnerable to Federal Lawsuits](#)