

## False Claim Act Lawsuits: What Nonprofits Need to Know

### What is the False Claims Act and why is it an Issue?

The False Claims Act (FCA) is a U.S. law that imposes liability on individuals, companies and organizations that knowingly defraud government programs. Private parties, called “relators,” can bring these suits on behalf of the government. Recent lawsuits claim that some nonprofit organizations (NPOs) receiving USAID grants have made false claims because they allegedly provided “material support” to listed terrorist groups in Palestine, contrary to the anti-terrorism certification they signed with USAID. These claims have alleged a very broad and controversial interpretation of what constitutes “material support.” This unusual use of the law has, to date, resulted in one case that was dismissed and two that have settled out of court. So far no court has ruled on the legal issues raised in these cases.

### What must be proved for an NPO to be held liable?

Generally, the FCA imposes liability where a person (or entity) “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” or “knowingly makes, uses or causes to be made a false record or statement material to a false or fraudulent claim.” (31 USC 3729(a)(1))

Key terms defined in the law are:

**Claim:** Can be anything connected to a submission for government payment, and can apply to subcontractors and sub-grantees. Specifically, it refers to any “request or demand, whether under a contract or otherwise, for money or property...” that is “presented to an officer, employee or agent of the U.S.” or is “made to a contractor, grantee of other recipient...” (31 USC 3729(b)(2))

**Knowledge:** In order to prove that an NPO has made a fraudulent claim, the court must find that the NPO knowingly submitted a claim while also knowing they were not in compliance with their USAID terrorism-financing certification. This certification ensures that an NPO does not knowingly provide material support to a person or group on the terrorist list. A “knowing” claim under FCA must either:

- have actual knowledge of the information, or
- act in deliberate ignorance or reckless disregard of the truth or falsity of the information.

No proof of specific intent to defraud is required. (31 USC § 3729 (b)(1))

**Material Noncompliance:** For information to be “material” it must have the power to impact or alter the government’s decision on whether to make payment. Submitting an invoice or claim is considered an “implied certification” that the grantee or contractor is in full compliance with all terms of the contract. Specifically, a statement “material” to a false claim is one “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” (31 USC 3729(b)(4)).

The 2016 Supreme Court decision in *Universal Health Services v. United States ex rel. Escobar* limits the scope of liability under the FCA. It held that “minor or insubstantial” noncompliance is not enough to establish liability. Instead, the violation must be “material” to the false claim. A claim may not constitute a false claim unless:

- (1) the submission not only requests payment but makes specific representations about the goods or services provided, AND
- (2) the defendant’s failure to disclose noncompliance with material requirements constitutes a misleading half-truth.

The Supreme Court’s ruling in the *Escobar* case says that an agency’s knowledge of and response to an alleged false claim is strong evidence of whether the agency considers the violation to be material. This addresses the problem of whistleblowers second-guessing government decisions. [NOTE: “Materiality” for FCA purposes should not be confused with “material support” of terrorism, which is a different standard altogether.] This means that if an agency is aware of a potential violation and still makes payment, the relator’s claim may be dismissed for “lack of materiality.”

## The phases of an FCA case

- **Who qualifies to file a complaint?**

The FCA’s whistleblower provision allows a private citizen to file suit on behalf of the U.S. government as a “relator.” (31 USC 3730(e)) The FCA requires the relator to have “original” knowledge of the alleged fraudulent events. The information provided by a relator cannot be based solely on information from the news media or government proceedings. However, the government may proceed on the basis of public information.

- **FCA cases are sealed while the government investigates**

Complaints filed under the FCA are automatically sealed for 60 days while the government investigates the claims and decides whether or not they merit further action. During this time the defendant (and the public) has no notice that a case has been filed. The court can extend the sealing period for months or even years. During the sealed period there are indicators that a case may have been filed. The NPO may receive requests for documents or interviews or direct inquiries from USAID or the U.S. Attorney’s office.

- **Government investigation and determination of next step**

Once the government has investigated the claims, it may choose to:

- 1) join the lawsuit,
- 2) ask that the case be dismissed or
- 3) allow the complaining party to proceed on their own.

## Examples of legal defenses

NPOs sued under the FCA may have strong legal defenses in the following areas:

- The relator has relied solely on publicly available information (not be an “original source”) and therefore lack standing to sue.
- USAID has knowledge of the alleged violation and still made payment, so that the violation is not “material.”
- The activities referred to in the complaint do not constitute “material support” of terrorism.
- There are no damages caused by the alleged violation.

- **Civil pre-trial and trial phase**

If the case continues, it will proceed to an ordinary civil case, with the Department of Justice representing the government. The regular rules for pre-trial motions, including motions to dismiss or for summary judgement, will apply, as will rules for discovery (information disclosure) between the parties.

- **Judgment, fees and damages, appeal rights**

If an NPO is found liable under the FCA it can be fined up to \$10,000 per violation. In addition, the government can recover up to 3 times as much in actual damages incurred. This would not necessarily be equal to the amount of the USAID grant. If the NPO wins the case it may seek reimbursement for its legal costs from the other parties.

## **What is the definition material support?**

The definition in the USAID certification states that material support includes:

“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.”

The prohibitions on providing training, expert advice or assistance and personnel are particularly relevant in the context of the FCA cases to date, in that the primary allegations involve peacebuilding activities. The Supreme Court’s *Humanitarian Law Project* decision in 2010 found that these activities, even in the context of peacebuilding, can be deemed material support of terrorism.

However, there is a great deal of “gray area” in what is considered material support. A Department of Justice guidance document addressing online activities to counter violent extremism states that, “The Government's position on this is issue clear: the material support statutes do not prohibit legitimate, independent efforts to counter violent extremism.” It notes that the "Department of Justice has never prosecuted an individual or group for a legitimate effort to persuade others not to engage in violence...”

### **Mitigating risks**

- Review due diligence procedures for all programs and make sure staff, consultants and subcontractors are trained and implementing them properly;
- Seek clarification from USAID where there are ambiguities;
- If an NPO suspects it is under investigation, it should retain counsel as soon as possible;
- Contact the Charity & Security Network for a lawyer referral list.

## **Additional Resources**

Information for this brief was sourced from a Charity and Security Network webinar, “**False Claims Act Suits Against NGOs: What Nonprofits Need to Know.**” Available at [bit.ly/FCAonline](https://bit.ly/FCAonline)

Read our June 2018 Issue Brief, “**Nonprofits with USAID Funding May Be Vulnerable to Federal Lawsuits.**” Available at [bit.ly/FCAFactSheet](https://bit.ly/FCAFactSheet)

Read more about “**Intimidation Campaign Using False Claims Act and IRS to Push Problematic Enforcement Policy on NGOs.**” Available at [bit.ly/FCAIntimidation](https://bit.ly/FCAIntimidation)

For further information, legal analyses, a list of legal experts and other expert resources contact the Charity & Security Network or visit our website at [www.charityandsecurity.org](http://www.charityandsecurity.org)

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