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RESIST THE WEAPONIZATION OF THE FALSE CLAIMS ACT: AN EXPLAINER

Authored by Zoila Hinson and Michael Allen. May 27, 2025.

On May 19, 2025, the Department of Justice announced its Civil Rights Fraud Initiative, an attempt to weaponize the federal False Claims Act ("FCA") to force colleges and universities to abandon their commitments to equity and diversity in admissions, hiring, and curricular offerings. In its announcement, DOJ stated its intent to argue that institutions have submitted false claims for payment for grants and contract funds when they certified compliance with civil rights laws, including several provisions of the Civil Rights Act of 1964 governing educational institutions.

While it is framed as a broad-based effort to stop "fraud, waste and abuse" by all federal contractors and recipients of federal funds, the Initiative's sharp focus is Harvard University and other institutions of higher learning perceived as ideological opponents of the Trump Administration. That much is apparent from the announcement:

> [A] university that accepts federal funds could violate the False Claims Act when it encourages antisemitism, refuses to protect Jewish students, allows men to intrude into women's bathrooms, or requires women to compete against men in athletic competitions. Colleges and universities cannot accept federal funds while discriminating against their students.

Although it was not made public, the New York Times reported that DOJ also sent a 14-page letter to Harvard during the week of May 12 alleging FCA violations, but that letter "did not detail exactly how Harvard may have defrauded the government." Other media report that the letter "demands emails, text messages, and other communication exchanges in which the school's higher ups discussed President Trump and his executive orders."

Harvard and other targeted institutions should resist this shameless attempt at intimidation. DOJ's attempt to render normal university behavior illegal by fiat is legally baseless and it cannot establish violations of the FCA given Harvard's numerous disclosures to the government of its practices, the government's continued payments despite its knowledge of these practices, and the lack of notice of any alleged illegality, among other problems.

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The False Claims Act:

First enacted in 1863 to address the problem of war profiteers, the FCA requires a showing that a defendant: (1) made false claims or statements to the federal government in connection with receipt of federal funds; (2) *knowing* they were false; and (3) the false claims or statements are material to the government's decision to pay out the funds[1]. Most courts also require a showing that the government was actually harmed in the process.

Even in the absence of detailed public allegations against Harvard, there are strong reasons to believe DOJ will be unable to prove any of these elements, let alone all of them:

Falsity: FCA claims will fail unless DOJ can establish that Harvard has made false claims or statements material the government's payment of federal funds. Here, that means that DOJ will need to establish that Harvard's policies in fact violate federal civil rights laws. It's unlikely that it will be able to do so. In its announcement, DOJ relies exclusively on the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), which held that Harvard's then-applicable race-conscious admissions process violated Title VI of the Civil Rights Act. But Harvard has altered its admissions policy in compliance with the Supreme Court's decision. And no court has held that Harvard's current admissions, hiring, or equity policies or similar policies at other universities violate any civil rights law. Notably, DOJ's current assertion that Harvard's policies violate civil rights laws does not establish falsity. Indeed, after the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), even regulations issued by the agency tasked with implementing the relevant statutes—which this announcement is not—would not be entitled to deference.

Knowledge: DOJ's case will not succeed unless it can prove that Harvard knowingly made false claims or false statements material to the payment of its claims for federal funds. This will be extremely difficult for the Government for at least three reasons.

First, DOJ will not be able to show that Harvard acted with actual knowledge, reckless disregard, or deliberate ignorance of the falsity of these claims (as required by the FCA) without presenting evidence that there was some basis on which Harvard could have concluded that its policies were illegal. Given that no court has held that any of the policies DOJ has identified, or similar policies at other universities, violate any civil rights law and that until recently the government *endorsed* many of these policies, DOJ will not be able to make this showing.

Second, a raft of FCA decisions hold that a recipient does not act with FCA knowledge if it discloses to the government the facts that underlie the alleged falsity. See, e.g., *Hooper v. Lockheed Martin Corp*., 688 F.3d 1037, 1051 (9th Cir. 2012).

[1] The FCA also requires the submission of a claim for payment or the retention of funds already paid.

In this case, Harvard has disclosed its admissions, hiring, and equity policies to numerous federal agencies over many years. Having made these disclosures and received repeated approvals and endorsements with respect to its policies—and therefore reasonably believing it was in compliance with federal requirements—Harvard's subsequent certifications of compliance cannot be *knowingly* false.

Third, FCA knowledge is based on a funding recipient's knowledge and subjective beliefs at the time it submitted the relevant claims, not what the government may allege after the fact. See *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 749 (2023). If Harvard's leadership subjectively believed at the time that it submitted claims for payment that it complied with applicable civil rights laws, as it surely did, Harvard cannot be held liable under the FCA.

Materiality: Even if statements can be shown to be knowingly false, the FCA does not impose liability without a showing that the false statements were material to the government's payment decision. In his opinion for a unanimous Supreme Court in Universal *Health Services, Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176 (2016) ("Escobar"), Justice Thomas described the materiality requirement as "rigorous" and "demanding." He wrote:

> The False Claims Act is not "an all-purpose antifraud statute," or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial.

It is difficult to understand how a Harvard policy allowing transgender students or employees to use restrooms consistent with their gender identities could be *material* to a decision by the Defense Department, the National Institutes of Health, or the Centers for Disease Control to fund research at the university. Likewise, the presence of transgender athletes on Harvard's sports teams cannot be *material* to NASA's decision to terminate its research contracts with Harvard. Further, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." Escobar, 579 U.S. at 195. It is extremely unlikely that DOJ will be able to establish that the federal agencies from whom Harvard has received grants and contracts were unaware of the university's widely publicized policies, some of which have existed for decades.

In short, DOJ's approach is fatally flawed on a number of grounds. At the very least, targeted institutions should plan to challenge complaints under Federal Rule of Civil Procedure 9(b), which requires DOJ to plead FCA claims "with particularity."

A federal court may even deem a complaint frivolous and sanctionable under Rule 11 of the Federal Rules of Civil Procedure. It is, therefore, beyond ironic that President Trump just recently directed DOJ to aggressively use Rule 11 to go after organizations and lawyers bringing litigation against the Administration.

Let's call this what it is: a retaliatory shakedown of an academic institution that dares to resist the outrageous demands of the Trump Administration. When clawing back billions of dollars in previously committed funding and threatening Harvard's non-profit status didn't work, the Administration escalated with threats of FCA "civil investigative demands," treble damages, and civil penalties to turn up the heat. It can harass Harvard, collect its internal documents, and force it (and any other perceived "enemy") to spend a lot of money defending itself. Given its collection of documents discussing President Trump and his executive orders—which are entirely irrelevant to the claims DOJ purports to be investigating—DOJ may be weaponizing the investigative process itself.

Just as Relman Colfax PLLC has encouraged law firms to resist the retaliatory Executive Orders and explained that an Executive Order cannot erase disparate impact liability for civil rights violations, we now urge Harvard and other academic institutions to stand by their commitments to admissions, hiring, and operational policies that advance greater opportunity.

Relman Colfax is prepared to stand with you and to map out a path through these dark times.

About Relman Colfax

Relman Colfax PLLC is a national civil rights law firm with a litigation practice focused on combating discrimination. The firm pioneered the use of the False Claims Act by private parties to enforce compliance with federal civil rights law in *U.S. ex rel. Anti-Discrimination Center v. Westchester County* and *California ex rel. Bashin v. Conduent*. For more information, contact Zoila Hinson or Michael Allen.

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