Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

Program Fraud Civil Remedies Act Practitioner's Guide

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Approved by
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Introduction

In November, 2012, the Council of the Inspectors General on Integrity and Efficiency (CIGIE) adopted a cross-cutting project to develop processes to enhance the use of the Program Fraud Civil Remedies Act (PFCRA), 31 U.S.C. §§ 3801-3812, and to eliminate barriers to the regular and successful use of this statute. As a result, the CIGIE established a PFCRA Working Group under the authority of the CIGIE Investigations Committee to implement this cross-cutting project. The Working Group determined that many personnel in Offices of Inspectors General (OIGs) and elsewhere in the Federal Government are unfamiliar with the statute's required procedures, which hampers the use of the PFRCA. Accordingly, the PFCRA Working Group developed this Practitioner's Guide to provide guidance on PFCRA procedures and how to handle cases under the statute, and to offer examples of certain key documents used in PFCRA proceedings.

This Guide is intended to provide practitioners with a general overview of Program Fraud Civil Remedies Act cases and procedures. However, as the legal principles discussed in this Guide are subject to change over time, this Guide does not obviate legal practitioners' obligations to ensure the current status of the law in order to provide effective assistance to their clients. Non-legal practitioners should consult with counsel to ensure that the principles remain valid. This Guide does not represent official policy of the United States Government, and is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any civil or criminal matter.

I. Overview

A. Statutory Framework

1. In 1986, Congress provided additional and complementary tools to recover losses sustained by the government because of false claims and fraud in its programs and contracts. First, Congress revised the civil False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, a Civil War era statute, to provide for treble damages and penalties, and to offer a greater role for private whistleblowers (known as "relators") who initiate *qui tam* actions. These amendments helped to make the FCA the primary tool used by the Department of Justice to recover losses to the United States because of false claims and fraud. Second, Congress enacted the PFCRA to give agencies the ability to initiate administrative proceedings on claims of $150,000 or less when DOJ elects not to pursue FCA remedies for the claims.

2. The administrative remedies provided in the PFCRA are available to federal entities that meet the definition of "Authority". The term "authority" means: (a) an executive or military department; (b) an establishment as it is defined in section 11(2) of the Inspector General Act of 1978, which is not an executive department; (c) the U.S. Postal Service; (d) the National Science Foundation; and (e) a designated Federal entity as defined under section 8G(a)(2)

of the Inspector General Act of 1938. PFCRA actions may be brought against "persons", which means any individual, partnership, corporation, association, or private organization. 31 U.S.C. § 3801(a)(6).

3. The Inspector General of the agency investigates alleged false, fictitious or fraudulent claims or statements, and if substantiated, the agency can commence a PFCRA action with the approval of the Attorney General. The PFCRA provides that a person found liable may be required to pay an "assessment" up to double the amount falsely claimed and a penalty up to $5,000 per false claim or statement, which amount agencies may increase for inflation.

4. The PFCRA does not create any new civil fraud violations or change the way agencies receive allegations of false claims or false statements. It simply provides an additional legal remedy for false or fraudulent claims. The PFCRA's liability provisions are similar to the liability provisions of the False Claims Act, with one major exception – PFCRA extends to false statements even in the absence of any claim. For example, the knowledge requirement and burden of proof for both the PFCRA and the FCA are the same, and both statutes require proof of common elements – such as a "claim" or "statement" that is "false" or "fraudulent" and "material" to the government's payment decision. Because the PFCRA and the False Claims Act were designed to "operate in tandem" and share several key features, reference to FCA case law may be helpful to interpret the PFCRA. *See Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 786 n. 17 (2000) (relying in part on PFCRA definition of "person" to interpret the FCA).

5. The Investigating Official, the agency's Inspector General, has authority to investigate allegations of liability under the PFCRA, which includes the power to subpoena documents and other non-testimonial information. 31 U.S.C. § 3804(a). However, OIGs may still use IG Act subpoena authority to investigate PFCRA cases.

6. If the Investigating Official concludes that an action under the PFCRA is warranted, he or she submits a report of investigation to an employee or officer of the agency designated as the Reviewing Official. The Reviewing Official must be independent of the Investigating Official.

7. The Reviewing Official reviews the investigative report to determine whether there is "adequate evidence" to believe that the person named is liable under the law. 31 U.S.C. § 3803(a)(2). Upon determining there is adequate evidence of PFCRA liability, the Reviewing Official must send a written notice of intent to "refer the allegations" to a presiding officer. Within 90 days of receipt of a notice from an agency reviewing official, DOJ should transmit a written statement to the agency approving or disapproving the initiation of a PFCRA proceeding. 31 U.S.C. § 3803(b)(1) and (2).

8. If DOJ approves a PFCRA proceeding, the Reviewing Official shall serve a complaint on the defendant setting forth the allegations and notifying defendant of his or her right to request a hearing on the allegations. 31 U.S.C. § 3803(d)(1). The defendant may request a hearing by filing an answer within 30 days of receiving a complaint. If the defendant requests a hearing, the reviewing official shall refer the allegations to a Presiding Officer, usually an Administrative Law Judge (ALJ), for the commencement of a hearing.[1] 31 U.S.C. § 3803. If the defendant fails to file an answer, the Presiding Officer may issue an initial decision without a hearing.

9. The agency appoints the Presiding Officer on a case-by-case basis to handle PFCRA hearings. If an agency has no authorized Presiding Officer on staff to conduct a hearing, it can arrange to obtain one from another agency. The Presiding Officer supervises discovery and conducts the hearing according to the Administrative Procedure Act (APA), 5 U.S.C. Chap. 5. He or she may subpoena witnesses and documentary evidence.

10. In addition, the PFCRA provides the defendant a number of specific hearing rights, such as the right to counsel (at defendant's expense), the right to cross-examine witnesses, the right to receive exculpatory information relating to the allegations, and the right to copies of non-privileged documents, transcripts and other materials.

11. The agency has the burden of proving its case by a preponderance of the evidence – *i.e.*, that it is more likely than not that the defendant committed the alleged violation. The Presiding Officer issues an initial decision including findings of fact and conclusions of law, and the amount of any penalties and assessments imposed.

12. The PFCRA provides for appeal from an initial decision to the agency head. The agency head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment.

13. If the agency head determines that the defendant is liable for a penalty or assessment, the defendant may appeal to an appropriate United States District Court within 60 days of notice of final decision by the Authority head. The district court may not set aside an agency decision unless it is found to be unsupported by substantial evidence in the whole record.

14. If after authorizing a PFCRA action the Attorney General or designee notifies an agency authority in writing that continuing the PFCRA hearing "may adversely affect any pending or potential criminal or civil action related to such

[1] If an agency does not have an Administrative Law Judge available to serve as the Presiding Officer, the Office of Personnel Management will locate an Administrative Law Judge for that agency through the Administrative Law Judge Loan Program discussed in Section V, Paragraph O of this Guide on page 30.

claim or statement", the hearing shall be immediately stayed and may be resumed only upon the written authorization of the Attorney General. 31 U.S.C. § 3801(b)(3).

B. History

1. In 1981, the General Accounting Office (now the Government Accountability Office)(GAO) report on fraud in Federal programs found DOJ declined 60% of the false claims referred for prosecution for a variety of reasons. One factor frequently cited by DOJ attorneys for declining a case was that the loss to the government was not significant.[2]

2. In 1986, Congress recognized that frauds against the Government had become a serious problem, costing federal agencies millions of dollars annually, and that existing civil and criminal remedies were insufficient. In reaction, Congress enacted major amendments to the False Claims Act to strengthen the Government's remedy under the Act.

3. That same year, Congress enacted the PFCRA to allow agencies that are the victims of false or fraudulent claims to seek recompense for their losses without resort to judicial proceedings. Under the PFCRA, agencies can seek a remedy through "in-house" administrative proceedings. Congress stated in the legislation that false, fictitious, and fraudulent claims and statements in Government programs are a "serious problem", "result in the loss of millions of dollars annually by allowing persons to receive Federal funds to which they are not entitled", and "undermine the integrity of such programs by allowing ineligible persons to participate in such programs."[3]

4. Noting that "present civil and criminal remedies for such claims and statements are not sufficiently responsive," Congress stated that the purposes of the PFCRA were:

   a. to provide Federal agencies which are the victims of false, fictitious, and fraudulent claims and statements with an administrative remedy to recompense such agencies for losses resulting from such claims and statements, to permit administrative proceedings to be brought against persons who make, present, or submit such claims and statements, and to deter the making, presenting, and submitting of such claims and statements in the future; and

[2] GAO Report, Fraud in Government Programs: How Extensive Is It? How Can it Be Controlled, Volume 1, AFMD 81-57.
[3] Congressional Statement of Findings and Declaration of Purposes, Section 6102(a), Pub. L. 99-509 (1986), 31 U.S.C. § 3801 note.

b. to provide due process protections to all persons who are subject to the administrative adjudication of false, fictitious, or fraudulent claims or statements.[4]

5. In 1991, a GAO report on Federal Agency use of the PFCRA found only eight federal agencies had used the PFCRA during the period October 21, 1986 through September 30, 1990, and that the PFCRA was not used more often because the cost to implement it exceeded the potential recoveries and the procedural requirements were cumbersome.

6. In the Inspector General Reform Act of 2008, P.L. 110-409, Congress amended the PFCRA to expand the scope of entities permitted to bring claims under the statute to "a designated Federal entity (as such term is defined under section 8G(a)(2) of the Inspector General Act of 1978)."

7. In 2012, GAO issued another report of the use of the PFCRA by Federal agencies covering fiscal years 2006 through 2010. GAO found five civilian agencies used the PFCRA, and one of those referred 95% of all PFCRA authorization requests to DOJ. GAO found the following factors facilitated agency use of the PFCRA: support of top management; applying PFCRA penalties to already successful criminal prosecutions; proactive IG involvement; coordination within the agency and with DOJ; use of standardized PFCRA case documentation; and a PFCRA case tracking system. In contrast, factors limiting the use of the PFCRA include: available alternative mechanisms to address fraud and wrongdoing; lack of ALJs; recoveries going to U.S. Treasury (rather than the agency); low false claims ceiling and penalty amounts; the cumbersome process; and resource constraints.

II. <u>Agency Regulations</u>

A. History

Each Authority is required to promulgate rules and regulations to implement the PFCRA's provisions.[5] When it passed the PFCRA, Congress expected "that the regulations would be substantially uniform throughout Government."[6] To facilitate this, the Inspector's General community formed an inter-agency task force and drafted model regulations in the late 1980s. These are used as the standard base for PFCRA regulations.

[4] Congressional Statement of Findings and Declaration of Purposes, Section 6102(a), (b), Pub. L. 99-509 (1986), 31 U.S.C. 3801 note.
[5] 31 U.S.C. § 3809.
[6] S. Rep. No. 99-212 (1986).

B. General

1. PFCRA regulations are generally self-contained definitions, explanations, and instructions for the entire process. Agencies may wish to establish procedures for record retention in regulatory or other guidance.

2. Several agencies have completed the administrative law process and codified regulations. A comprehensive list of examples of implemented regulations is found in the "Parallel Table of Authorities and Rules" published by the Government Printing Office. The examples are listed under 31 U.S.C. § 3809 within the table. The table is published at http://www.gpo.gov/help/parallel_table.pdf.

3. Examples can be found at:
   a. 45 C.F.R. Part 681, National Science Foundation (most recent)
   b. 5 C.F.R. Part 185, Office of Personnel Management
   c. 6 C.F.R. Part 13, Department of Homeland Security
   d. 7 C.F.R. Part 1, Subpart L, Department of Agriculture
   e. 10 C.F.R. Part 1013, Department of Energy
   f. 14 C.F.R. Part 1264, National Aeronautics and Space Administration
   g. 22 C.F.R. Part 224, Agency for International Development
   h. 24 C.F.R. Part 28, Department of Housing and Urban Development
   i. 40 C.F.R. Part 27, Environmental Protection Agency
   j. 43 C.F.R. Part 35, Department of Interior
   k. 45 C.F.R. Part 79, Department of Health and Human Services

C. Requirements

1. The PFCRA requires all regulations ensure Investigating Officials and Reviewing Officials are not responsible for conducting the hearing, making determinations, or making collections. 31 U.S.C. § 3809.

2. Implementing regulations must require Reviewing Officials to include in any notice to the Attorney General under 31 U.S.C. § 3803(a)(2), a statement which specifies the Reviewing Official has determined there is a reasonable prospect of collecting the amount for which the suspect may be liable. 31 U.S.C. § 3809.

D. Rulemaking Process

1. Regulations must be codified into the Code of Federal Regulations (C.F.R.) through the Administrative Procedure Act. 5 U.S.C. Chapter 5. This process begins with a Notice of Proposed Rulemaking published in the Federal Register (FR) inviting the public to comment on the regulations. The public

typically has 60 days to submit comments, after which the agency responds to the comments and publishes the final rule in the FR. The notice typically contains various analyses and statements required by a plethora of Executive Orders, regulations and laws. The National Archives and Records Administration (NARA) administers the FR and publishes a guide for drafting documents for the FR at http://www.archives.gov/federal-register/write/.

2. Examples of notices of proposed rulemaking:
   a. 73 FR 79761, National Science Foundation
   b. 71 FR 5211, Corporation for National and Community Service
   c. 59 FR 24661, Office of Personnel Management
   d. 55 FR 39158, Nuclear Regulatory Commission

3. Examples with unique requirements incorporated into proposed regulations:
   a. 78 FR 672, Rural Housing Service, USDA
   b. 65 FR 52352, Federal Deposit Insurance Corporation

E. Notice

1. Once the Notice of Proposed Rulemaking is drafted, it will need to be published in the FR. The agency Federal Register Liaison Officer (FRLO)[7] can advise on this process.

2. There are multiple and rigid rules for publishing in the FR, such as providing a set number of hard copies, following precise formatting requirements and meeting certification requirements.

3. A handbook on publishing in the FR can be found at http://www.archives.gov/federal-register/write/handbook/ddh.pdf. Also, the FR can be contacted at fedreg.info@nara.gov or 202-741-6000 for more guidance.

III. PFCRA Liability Provisions

A. Remedial Structure

1. Generally, PFCRA authorizes the Federal agency, without resorting to judicial proceedings, to impose a penalty upon a person who makes or causes another to make a false claim or statement and does so knowing or with reason to know that it is false, fictitious, or fraudulent.[8] 31 U.S.C. § 3802(a)(1).

[7] Every agency has a FRLO and a Certifying Officer under 1 C.F.R. § 16.
[8] *See* 31 U.S.C. § 3802; *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786, n. 17 (2000); *Orfanos v. Dep't Health & Human Servs*., 896 F. Supp. 23, 24-25 (D.D.C. 1995).

2. If the agency has made any payment, transferred any property, or provided services because of the false claim, then the person also shall be subject to an assessment up to twice the amount of the claim or portion of the claim that is determined to be false fictitious, or fraudulent. 31 U.S.C. §§ 3802(a)(1), (a)(3).

3. The PFCRA can be used only in those cases where the amount of each claim (or group of related claims submitted at the same time) for money, property, or services does not exceed $150,000.00. 31 U.S.C. § 3803(c)(1).

B. Key Liability Provisions

1. PFCRA's false claims provision, 31 U.S.C. § 3802(a)(1), provides in relevant part:

> "(a)(1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know –
>
> > (A) is false, fictitious, or fraudulent;
> >
> > (B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;
> >
> > (C) includes or is supported by an written statement that -
> >
> > > (i) omits a material fact;
> > > (ii) is false, fictitious, or fraudulent as a result of the omission; and
> > >
> > > (iii) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or
> >
> > (D) is for payment for provision of property or services which the person has not provided as claimed, ..."

shall be subject to civil penalties and assessments under PFCRA, in addition to any other remedy that may be prescribed by law.

2. PFCRA's false statements provision, 31 U.S.C. § 3802(a)(2), provides in relevant part:

> "(a)(2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that

(A) the person knows or has reason to know - (i) asserts a material fact which is false, fictitious, or fraudulent; or

(ii)(I) omits a material fact; and

(II) is false, fictitious, or fraudulent as a result of such omission;

(B) in the case of an omitted statement . . . , is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; and

(B) contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, ... "

shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty for each such statement.

3. The PFCRA is directed not merely at those who submit false claims but also at those who "cause" false or fraudulent claims to be submitted (*e.g.*, subcontractor submits false claims to the prime contractor, knowing they will be used to submit claims on a cost contract).

4. Unlike the False Claims Act, the PFCRA does not provide a specific cause of action for conspiracies to defraud the United States.[9]

5. Under the PFCRA, unlike the FCA, a person may be liable for making or causing a false statement even if no claim for payment of money is made.

C. PFCRA Elements[10]

1. Claim Defined

[9] Compare 31 U.S.C. § 3729(a)(1)(C) with 31 U.S.C. § 3802.

[10] The PFCRA and False Claims Act share several key features. Consequently, PFCRA analysis often borrows from False Claims Act cases. *See Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 786 (interpreting the PFCRA and False Claims Act in parallel). When relying upon FCA case law to interpret the PFCRA, agencies should bear in mind that the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. 111-21, May 20, 2009, 123 Stat. 1617, made several significant changes to the liability provisions of the FCA in order to "clarif[y]" and "to reflect the original intent of the law" (FERA § 4) (emphasis added) after several judicial decisions had limited the FCA's reach, and to strengthen the FCA in other ways. FERA also renumbered the FCA's liability provisions. FERA mostly applies on a prospective basis to conduct occurring after the date of enactment, except for the revised false statements provision, 31 U.SC. § 3729(a)(1)(B). The courts are split on whether the amendments to the false statements provision apply retroactively.

a. PFCRA defines "claim" to mean "any request, demand, or submission --

"(A) made to an Authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(B) made to a recipient of property, services, or money from an Authority or to a party to a contract with an Authority—

(i) for property or services if the United States --

(I) provided such property or services;

(II) provided any portion of the funds for the purchase of such property or services; or

(III) will reimburse such recipient or party for the purchase of such property or services; or

(ii) for the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(I) provided any portion of the money requested or demanded; or

(II) will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(C) made to an Authority which has the effect of decreasing an obligation to pay or account for property, services, or money …."

31 U.S.C. § 3801(a)(3).

b. Examples of Claims. Invoices, progress payment requests, healthcare claims, loan applications, leases, grant and cooperative agreement documents and subsidy payments.

c. Tax Claims Not Actionable Under PFCRA. The term "claim" expressly excludes claims made in any federal tax return. 31 U.S.C. § 3801(a)(3).

2. Statement Defined

a. PFCRA defines "statement" to mean any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made –

"(A) with respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(B) with respect to (including relating to eligibility for)—

(i) a contract with, or a bid or proposal for a contract with; or

(ii) a grant, loan, or benefit from, an Authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit . . . ."

31 U.S.C. § 3801(a)(9).

b. Certification or Affirmation Required for False Statements. To be liable under the PFCRA for a false statement, the defendant must certify or affirm the truthfulness and accuracy of the contents of the statement. See 31 U.S.C. § 3802(a)(2). The FCA does not contain this requirement.

c. Tax Return Statements Not Actionable Under PFCRA. The term "statement" excludes any statement made in any federal tax return. 31 U.S.C. § 3801(a)(9).

d. PFCRA Liability Can Rest on a Stand-alone False Statement. Unlike the False Claims Act, the PFCRA provides that a person may be liable for submission of a false statement even if a claim for money or property is not made.

3. Falsity Defined

a. The PFCRA applies to both false and fraudulent statements and claims. Falsity and fraud are different. Fraud includes a *scienter* element that falsity does not. A claim is false or fraudulent if it seeks money to which the claimant is not entitled.

b. Actionable false or fraudulent claims can take many forms.

(1) False or fraudulent claims may arise in the formation of a contract or through an application to participate in a government program. Where fraud occurs at the inception, every subsequent claim may be tainted. Examples of fraud in the inception include:

collusive bidding, kickbacks, gratuities, bribery and conflicts of interest, misrepresentations concerning eligibility or qualifications to participate in a federal program, such as small business status, misrepresentations concerning cost and pricing data, or other than cost or pricing data.[11]

(2) False or fraudulent claims may arise during contract performance. Examples include claims for goods or services that were not provided as claimed or that failed to meet contract or program requirements.

(3) Failure to comply with various laws and regulations material to payment.

(4) By omission of a fact when the party has a duty to include the fact.

4. Theories of Falsity

a. In FCA cases, courts sometimes distinguish between factually false claims and legally false claims. Both factual and legal falsity can be actionable under the FCA.

(1) Factually false claims involve claims for goods and services that were never actually provided or were not provided as represented.

(2) A legally false claim is one where although a good or service was provided as requested, a legal condition of payment has not been met.

The government has objected to the distinction between factually and legally false claims and at least one court has agreed that such distinctions do more to "obscure than clarify the scope of the FCA. *See U.S. ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377 (1st Cir. 2011).

b. Courts adhering to the distinction between factually and legally false claims often assess claims based on legal falsity under two theories: express certification and implied certification. Under an express certification theory, a claim is false if it contains on its face an explicit false statement, such as an express representation or certification that defendant has complied with a particular statute, regulation or contract

[11] If the authority learns at any time during the course of a PFCRA proceeding of any specific information concerning bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to the claim or statement at issue, the PFCRA requires that the authority immediately report such information to the Attorney General. 31 U.S.C. § 3803(c).

provision when it has not. An implied false claim is one where the act of submitting the claim itself implies compliance with statutory, regulatory or contractual requirements that have not been met, and no express representation of compliance has been made.

c. Most circuits that have considered the question have accepted implied falsity as actionable under the FCA. *See, e.g., U.S. ex rel. Wilkens v. United Health Group*, 659 F.3d 295 (3rd Cir. 2011); *U.S. ex rel Mikes v. Straus*, 274 F.3d 687, 699-700 (2nd Cir. 2001); *U.S. ex rel. Augustine v. Century Health Servs., Inc*., 289 F.3d 409, 415 (6th Cir. 2002); *U.S. ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 996-998 (9th Cir. 2010); *U.S. ex rel. Connor v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008); *U.S. ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11 Cir. 2005); *U.S. ex rel. Science Applications International Corp.*, 626 F.3d 1257, 1266, 1269 (D.C. Cir. 2010); *see also Ab-Tech Construction, Inc. v. United States*, 57 F.3d 1084 (Fed. Cir. 1995) (affirming, without opinion, Claims Court's decision expressly endorsing theory).

d. Most courts have held that the key issue in implied falsity cases is whether the defendant failed to comply with a precondition of payment, expressly identified as such in a statute, regulation or contract. The courts are split on whether the provision must expressly state that it is a condition of payment, though the majority of courts have concluded that it need not. *Cf. U.S. ex rel Mikes v. Straus*, 274 F.3d 687 (2nd Cir. 2001) with *U.S. ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377 (1st Cir. 2011); *U.S. v. Science Applications International Corp*., 626 F.3d 1257 (D.C. Cir. 2010*); U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1172 (9th Cir. 2006).

e. The government has resisted, with mixed success, the distinction between factually and legally false claims, and express and implied certification, arguing instead that the touchstone of a false claim is whether the defendant sought money to which it was not entitled. At least one court has agreed that these "[j]udicially-created categories sometimes can help carry out a statute's requirements, but they can also create artificial barriers that obscure and distort those requirements." *U.S. ex rel. Hutcheson v. Blackstone Medical, Inc*., 647 F.3d 377 (1st Cir. 2011). *Blackstone* further stated that "[t]he text of the FCA does not refer to 'factually false' or 'legally false' claims, nor does it refer to 'certification' at all. *See United States ex rel. Hendow v. Univ. of Phoenix,* 461 F.3d 1166, 1172 (9th Cir. 2006) (refusing to give the term 'certification' 'paramount and talismanic significance' in part because it does not appear in the text of the FCA). In light of this, and our view that these categories may do more to obscure than clarify the issues before us, we do not employ them here." *U.S. ex rel. Hutcheson v. Blackstone Medical, Inc.,* 647 F.3d 377 (1st Cir. 2011).

5. Materiality**.** Although the PFCRA does not define the term "material", the meaning of this element has been defined for the FCA.

a. FERA amended the FCA in 2009 to add a definition of the term "material" 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). This new definition parallels the judicial interpretation supported by the Department of Justice and endorsed by most federal circuit courts to decide the issue prior the 2009 FERA amendments. *See, e.g., U.S. v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008); *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008).

b. A statement or omission is "capable of influencing" a decision even if those who make the decision are negligent and fail to appreciate the statement's significance. The statement need not influence the decision *in fact.* In *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008), the court articulated the following rationale for the standard in this way:

Another way to see this is to recognize that laws against fraud protect the gullible and the careless – perhaps especially the gullible and the careless – and could not serve that function if proof of materiality depended on establishing that the recipient of the statement would have protected his own interests. [Citation omitted] The United States is entitled to guard the public fisc against schemes designed to take advantage of overworked, harried, or inattentive disbursing officers; the False Claims Act does this by insisting that persons who send bills to the Treasury tell the truth. As Justice Holmes put it, '[m]en must turn square corners when they deal with the Government.'" [Citation omitted.]

6**.** Who Can Be Liable? Imputed Liability

a. Corporations are "persons" under the PFCRA and may be held liable under the statute. Corporations only know and act through their employees. The general rule is that corporations may be held liable for employee conduct within the scope of their employment under the law of *respondeat superior*.

b. The courts are split as to whether the employee's conduct must also benefit the corporation in order to impute liability to the company. *Cf. United States v. O'Connell*, 890 F.2d 563, 569 (1st Cir. 1989) (an employee's conduct will bind a corporation where the employee acts with apparent authority, irrespective of whether the act benefits the corporation); and *U.S. v. Ridglea State Bank*, 357 F.2d 495, 500 (5th Cir. 1966) (vicarious liability will not be imposed if the corporation did not benefit from the conduct of its employee or agent); *see also U.S. ex rel. Vavra v. Kellogg Brown & Root, Inc.*, --- F.3d ----, 2013 WL 3779225, at *12 n. 11 and 12 (5th Cir. July 19, 2013) (holding that *Ridglea* does not apply to Anti-Kickback Act allegations as damages are not punitive in

character, but declining to decide whether *Ridglea* still applies to FCA cases in the Fifth Circuit). In *United States Dep't of Housing & Urban Dev. v. Professional Am. Mortgage Inst., Inc. (PAMI),* HUDALJ No. 06-033-PF (October 13, 2006), an ALJ found that a loan origination company was not liable for the misdeeds of an employee loan officer who was working for six other companies at the same time because the misconduct "'occur[red] within an independent course of conduct not intended . . . to serve any purpose of the employer.'"

c. PFCRA authority requests to DOJ should address the basis for imputing knowledge and conduct to a corporate defendant. Courts have applied different standards to determine whether and how the conduct and knowledge of individual employees or agents can be imputed to an entity or principal, and the PFCRA authority request should address the law in the circuit where the case will be brought.

7. Knowledge or *Scienter*

a. PFCRA's *scienter* requirement is "knows or has reason to know." This standard is defined at 31 U.S.C. § 3801(a)(5). No specific intent to defraud is required to meet the standard.

b. Section 3801(a)(5) provides that to prove *scienter*, the agency must show that with respect to the truth or falsity of a claim or statement, a person has or acts:

(1) with actual knowledge; or

(2) in deliberate ignorance , *i.e.*, a decision not to inquire where a duty to inquire exists ("ostrich with its head in the sand"); or

(3) with reckless disregard. This standard is akin to gross negligence plus; it does not imply willfulness. For example, a contract requires defendant to monitor prices offered to commercial and non-government customers and report the prices to GSA. The company never bothers to set up a procedure to monitor prices.

c. Collective Knowledge of Individuals. DOJ has sought to extend to FCA cases the collective knowledge doctrine set forth in *United States v. Bank of New England, N.*A., 821 F.2d 844, 855 (1st Cir. 1987), a non-FCA case, that the knowledge of the corporation is "the sum of the knowledge of all of the employees". In *U.S. v. Science Applications Intern. Corp.*, 626 F.3d 1257 (D.C. Cir. 2010), the D.C. Circuit vacated a judgment finding FCA liability where the collective knowledge instruction allowed the government to prove *scienter* by "piecing together scraps of 'innocent' knowledge held by various corporate officials, even if those officials never

had contact with each other or knew what others were doing in connection with the seeking of government funds." *Id*., at 1275 (quoting *U.S. ex rel. Harrison v. Westinghouse Savannah River Co*., 352 F.3d 908 (4th Cir. 2003)). The D.C. Circuit concluded that FCA's knowledge standard permits the United States to demonstrate *scienter* if a defendant's corporate structure prevented it from learning facts that made its claims for payment false, then the defendant acted in deliberate ignorance or reckless disregard of the falsity.

D. Government Knowledge

It is well-established that government knowledge is not a defense to an FCA action.[12] But in certain limited circumstances, government knowledge can negate a person's *scienter*. Government knowledge can only negate *scienter* where the knowledge is possessed by an official with authority to take action; the official knows all material facts; and the surrounding circumstances suggest a meeting of the minds such that the person reasonably believed that its representations were accurate and its conduct was permissible. (*E.g*., "completely cooperated and shared all information" with the Government; "follow[ed] the Government's explicit instructions"; or "affirmatively and openly disclosed" all the facts to the Government.)[13]

E. Statute of Limitations to Commence a PFCRA Hearing

1. The PFCRA requires that a "hearing" under Section 3803(d)(2) with respect to a claim or statement shall be commenced within six years of the date on which the claim or statement was made, presented, or submitted. 31 U.S.C. § 3808(a).

2. Presiding Officers commence a hearing by issuing what amounts to a scheduling order. 31 U.S.C. § 3803(d)(2)(B).

3. The PFCRA's statute of limitations is unusual because it is tied to the commencement of a hearing, and not to service of the government's complaint, as is more typical for other statutory and common law claims. The PFCRA permits defendants a period of 30 days from service of the complaint to request a hearing. 31 U.S.C. § 3803(d)(2).

F. Jurisdictional Limit on Claims

1. The PFCRA states that "[n]o allegations of liability. … shall be referred to a presiding officer if the reviewing official determines that-- (A) an amount of money in excess of $150,000; or (B) property or services with a value in excess of $150,000, is requested or demanded … in such claim or in a group of related

[12] *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991)("The requisite intent is the knowing presentation of what is known to be false. That the relevant Government officials know of the falsity is not itself a defense.").

[13] *United States ex rel. Butler v. Hughes Helicopter Co.*, 71 F.3d 321, 326-327 (9th Cir. 1995).

claims which are submitted at the time such claim is submitted." 31 U.S.C. § 3803(c). The legislative history of the PRCRA refers to this limitation on claims as a "jurisdictional cap." See H.R. Rep. No. 99–1012, at 259, 1986 U.S.C.C.A.N. at 3904.

2. Agencies may, however, pursue multiple claims that are not related (*i.e.*, submitted simultaneously) in a single action provided each independent claim is less than $150,000. There is no cap on the total potential value of a PFCRA case provided all claims are within the PFCRA's jurisdictional limit. For example, in *Orfanos v. Department of Health and Human Services*, 896 F. Supp. 23 (D.D.C. 1995), the court upheld a PFCRA determination that the plaintiff (who was challenging the determination) was liable for $196,800, which was comprised of: (a) 34 counts of fraud, reflecting 34 checks the petitioner had falsely endorsed in the total amount of $13,400, which was doubled to $26,800, and (b) a $5,000 penalty for each of the 34 checks, totaling $170,000.

IV. Remedies

A. Summary

1. PFCRA actions may be particularly useful in instances where DOJ declines to prosecute matters.

2. Yet even when the other remedies are available, agencies should consider using the PFCRA in conjunction with, or as an alternative to, other fraud remedies, such as criminal prosecution[14] or suspension and debarment.

B. PFCRA Assessments and Penalties

1. The remedies available to the Government under the PFCRA vary based on the nature of the conduct that gives rise to the PFCRA violation.

2. If the violation is based upon a false claim, the Government may recover a civil penalty of up to $5,000 per claim (which can be adjusted for inflation, as discussed below). 31 U.S.C. § 3802 (a)(1). In addition, if the Government paid the false claim, then the Government may also recover an assessment, in lieu of damages, of up to twice the amount of the claim. 31 U.S.C. § 3802(a)(3).

3. The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-140, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 101-140 (28 U.S.C. § 2461 note), provides a mechanism to allow for regular adjustment (once every four years) for inflation of civil monetary penalties

[14] When working on contemporaneous civil and criminal matters, attorneys must be aware of ethical restrictions and practical considerations related to the interplay between civil and criminal cases.

established in law. The monetary penalty in PFCRA is subject to this act if Agencies choose to implement the federal register notice procedures.[15]

4. Damages generally are the difference between what the U.S. paid and the amount it would have paid if the claims or statements had been truthful. This is a flexible standard.

5. Examples:

a. Where the government has been overcharged for a good or service, damages are the inflated amount of the claim.

b. Where defendant provided a defective product, damages equal the different between the amount paid and the market value of the product received;

c. Where grant funds have been improperly used, damages equal the amount improperly used.

d. Where defendant falsely represents eligibility for government payments, damages can be all the money defendant received for which it was ineligible. Whether this measure of damages applies depends on many factors, including whether the United States received any tangible benefit from defendant. *See United States v. Science Applications Int'l Corp*., 626 F.3d 1257, 1278 (D.C. Cir. 2010) (SAIC) ("Under th[e] benefit-of-the-bargain framework, the government will sometimes be able to recover the full value of payments made to the defendant, but only where the government proves that it received no value from the product delivered."); *U.S. ex rel. Feldman v. van Gorp*, 697 F.3d 78 (2nd Cir. 2012) (falsified grant applications, government's damages held to be all paid to the grantee where U.S. received no value); *U.S. ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458 (5th Cir. 2009) (where there was "no tangible benefit to the government and the intangible benefit is impossible to calculate" , the government's damages were the full amount of the grant monies paid to the ineligible grantee.); *United States v. Anchor Mortgage Corp*., 711 F.3d 745 (7th Cir. 2013) (holding that in FCA action alleging falsely induced federally insured mortgages, the government's damages should deduct amounts received from the sale of property securing the mortgages from amounts paid on the guarantees (*i.e.*, "net damages") before applying the FCA multiplier).

6. In cases involving only false written statements, the person is liable only for the penalty of up to $5,000 for each false statement (adjusted for inflation).

[15] Agencies have made different adjustments to the PFCRA penalty cap. For example, the Department of Housing and Urban Development adjusted its civil penalty cap under PFCRA to $7,500 in fiscal year 2009, and the Department of Energy adjusted its cap to $8,000 in fiscal year 2010.

No actual damages are required; however only penalties can be sought in those instances. 31 U.S.C. § 3802(a)(2).

7. The above PFCRA remedies are available in addition to any other remedies available to the Government (*i.e*., criminal, civil (including, potentially, the False Claims Act), and administrative (*e.g.*, suspension and debarment and contract remedies)). However, the law generally allows recovery of only one remedy for the same conduct, meaning, *e.g*., that a civil judgment must be credited for any criminal restitution ordered and collected based upon the same conduct (and an administrative judgment must be credited for any civil judgment on the same facts).

C. Eighth Amendment Analysis

1. The Eighth Amendment prohibits the imposition of excessive fines. Agencies should evaluate the amount of requested penalties to ensure they are not constitutionally disproportionate and adjust their requests accordingly. Agencies have the discretion to ask for penalties "up to" a certain amount; penalty amounts are not fixed or mandatory.

2. The Supreme Court has declined to establish a bright line rule as to the appropriate ratio of punitive to compensatory damages, but has observed that few awards significantly exceeding a single digit ratio will satisfy due process, and that awards of more than four times the amount of compensatory damages "might be close to the line of constitutional impropriety." *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

3. DOJ regards at least double damages as compensatory. *See United States v. Bornstein*, 423 U.S. 303, 315 (1976) (finding double damages provision of an earlier version of the FCA to be compensatory); *see also Cook County, Ill. V. U.S. ex rel. Chandler*, 538 U.S 119 (2003) (suggesting that amounts in excess of double damages may be compensatory where, for example, the United States has suffered consequential damages).

4. The approval process with the Reviewing Official and discretion of the Presiding Officer in awarding an assessment should help protect against Eighth Amendment violations in the PFCRA.

D. Offsets for Restitution and Other Repayments

1. In calculating assessments for a PFCRA claim, the Government may need to offset amounts received in mitigation of claims.

   a. For example, if the Government has already received restitution in a criminal case, it must offset that amount from the amount of damages it receives in any subsequent civil or administrative proceeding—an amount that is usually equivalent to single damages.

b. Administrative courts have offset PFCRA assessments to give respondents credit for restitution paid to the Government in other forums.

c. Typically, when a defendant is ordered to pay restitution in a criminal matter involving conduct that forms the basis for a PFCRA case, defendant should be credited for restitution payments actually made, rather than restitution ordered.

2. Credit for restitution or other repayments should be given only after the damages are multiplied. *United States v. Bornstein*, 423 U.S. 303, 316 (1976) ("the "government's actual damages are to be [multiplied] before any subtractions are made for compensatory payments previously received by the Government from any source."). In *United States v. Anchor Mortgage*, 711 F.3d 745 (7th Cir. 2013), the court rejected in this case the government's proposed "gross trebling" method for applying *Bornstein*. Practitioners should research this issue to determine how *Bornstein* applies to the facts of their case.

3. For example, if an individual presents a $100,000 false claim, is convicted for submitting a false claim, is ordered to pay $100,000 in restitution in connection with the criminal case and pays, in fact, $50,000, the Government would back the $50,000 out of the maximum assessment. The potential PFCRA liability would be calculated as follows: $100,000 (single damages) times 2 = $200,000, less $50,000 for restitution actually paid, equals a $150,000 potential assessment.

E. Non-PFCRA Remedies

The Government has several non-PFCRA remedies that it may use against parties that have submitted false claims or made false written statements in order to defraud Government agencies or programs. These remedies should be considered either in addition to or in lieu of PFRCA remedies, depending on what is needed to protect the Government's interest and/or make the Government whole.

1. Statutes:
   a. Anti-Kickback Act, 41 U.S.C. § 51 et seq.
   b. Truth in Negotiations Act, 10 U.S.C. § 2304a.
   c. Competition in Contracting Act, 41 U.S.C. § 253.
   d. Bribery Statute, 18 U.S.C. § 201.
   e. Contract Disputes Act 41 U.S.C. § 604 (Antifraud provision).
   f. Special Plea in Fraud, 28 U.S.C. § 2514.
   g. Financial Institutions Reform Recovery and Enforcement Act, 12 U.S.C. § 1833a.
   h. Anti-Fraud Injunction Act, 18, U.S.C. § 1345.
   i. False Claims Act, 31 U.S.C. §§ 3729-3733.
   j. Procurement Integrity Act, 41 U.S.C. § 423.

2. Examples of Agency Specific Civil Monetary Penalties:
   a. Food, Drug, & Cosmetic Act, 21 U.S.C. § 301.
   b. Anti-Kickback Statute (Healthcare), 42 U.S.C. § 1320a-7.
   c. The Stark Act, 42 U.S.C. § 1395nn.
   d. Higher Education Act of 1965, 20 U.S.C. § 1094(c).
   e. National Housing Act, 12 U.S.C. § 1735f-15(c).

3. Common Law Remedies, such as those available under common law theories of payment by mistake, unjust enrichment, breach of contract, and fraud, are often pled in the alternative in judicial proceedings that seek statutory remedies.

4. Suspension and Debarment prohibits contractors or grantees that are not "presently responsible," i.e., those who have engaged in improper conduct or have a history of poor performance, from obtaining future contracts or grants from the federal Government for a specified period of time. Suspensions are temporary exclusions from doing business with the Government pending the resolution of an investigation and any subsequent legal proceedings. A debarment is a fixed-term exclusion that generally shall not exceed 3 years.[16]

5. Contract remedies are also available to address incidences of procurement fraud, however they must be carefully coordinated. Only DOJ may settle fraud. However, agencies have an obligation to administer their contracts. There is an occasional tension between the need to address false claims and fraud through DOJ or through PFCRA. Coordination between stakeholders is the best option to resolve this tension.

V. Procedures

A. Summary

1. PFCRA cases have six discrete procedural steps:

   a. The Investigating Official drafts a Report, which refers a potential PFCRA matter to a Reviewing Official.

   b. The Reviewing Official assesses the evidence and plausibility of the PFCRA case. If the case is viable, the Reviewing Official may forward the matter to the DOJ for authorization to proceed with a PFCRA case.

   c. If DOJ authorizes the filing of a PFCRA Case, the Reviewing Official receives an authorization memorandum.

[16] See 48 C.F.R. Part 9.4 (procurement); 2 C.F.R. Part 180 (non-procurement).

d. Upon receiving the authorization memorandum, the Reviewing Official or other appropriate party at the Agency will prepare the PFCRA claim and litigate the matter in front of a Presiding Officer – generally an administrative law judge.

e. A defendant may appeal adverse findings to the head of the Agency, and ultimately, to a U.S. District Court.

f. PFCRA provides for the enforcement of judgments through a separate suit filed by United States Attorney in U.S. District Court. The statute also provides for the collection of judgments by administrative offset. 31 U.S.C. § 3807.

2. Statute of Limitations. Under PFCRA, the Presiding Officer must commence a hearing within six years of the submission of the claim or statement. 31 U.S.C. § 3808(a). Presiding Officers commence a hearing by issuing what amounts to a scheduling order. 31 U.S.C. § 3803(d)(2)(B).

** PFCRA referrals must allow for sufficient review time consistent with the PFCRA's procedural requirements.

3. Jurisdictional Cap on Claims. As noted in Section III.D.2 above, the authority to bring a case under PFCRA is limited to a claim of $150,000 or less. 31 U.S.C. § 3803(c).

B. Investigating Official's Report

A Report of Investigating Official contains the findings and conclusions of the Investigating Official. The PFCRA requires no particular form or content, but a suggested template accompanies this guidance as Appendix C.

1. The Investigating Official's Report Should Contain:

a. Limitations Period. Although not required by statute, it is always a good practice to provide a Reviewing Official with likely statute of limitations dates early in the referral.

b. Identification of Defendants.

c. Identification of false claims and statements, including any explanation necessary to appreciate how the claims or statements are false.

d. Identification of the "express certification or affirmation of the truthfulness and accuracy of the contents of the statement" required for actions involving allegations of false statements pursuant to 31 U.S.C. § 3802(a)(2).

e. Identification of assets that may be available to pay any judgment. The Government must often make a practical determination regarding whether any likely recovery justifies the cost it will incur pursuing a PFCRA in addition to, or in lieu of, other remedies.

f. Identification of, status and contacts for, any ongoing related or concluded criminal, civil or administrative matters. If possible, the report should contain declination letters from civil Assistant United States Attorneys.

** OIG offices should consider all convictions and other investigatory or audit findings for use in PFCRA cases. Even where the primarily liable party does not have sufficient means to pay a PFCRA judgment, an Agency may be able to impute liability to a party that can make the Government whole.

2. Delivery of the Report. Agencies should establish an internal procedure to ensure the prompt, appropriate handling of Investigating Official reports.

C. Reviewing Official

1. Reviewing Officials are typically the General Counsel of an Authority.

2. The Reviewing Official determines whether there is adequate evidence to believe the proposed defendants are liable under the PFCRA.

3. Request to Proceed. If the Reviewing Official believes there is adequate evidence, the Reviewing Official sends DOJ a written notice of intent to refer the allegations of liability to a Presiding Officer. Under 31 U.S.C. § 3803(a)(2), the request to proceed must contain, at a minimum:

a. Reasons for the referral;
b. Identification of the evidence supporting the allegations;
c. Description of the claims or statements;
d. Estimate of the amount requested in violation of the PFCRA; and,
e. Exculpatory or mitigating circumstances.
f. By regulation, most agencies require the Reviewing Official to include a statement affirming there is a reasonable prospect of collecting the amount for which such person may be liable under the PFCRA.

** Agencies should identify and explain any program regulations related to the statements and claims.
** DOJ also requests that agencies identify the potential venues for the action as applicable law may vary by circuit.

4. The Notice of Intention to Proceed must contain sufficient evidence and explanation for DOJ to perform a full review of the case on the merits.

5. Suggested Forms. A form for this referral accompanies this guidance as Appendix A. A suggested routing sheet accompanies this guidance as Appendix D.

D. Department of Justice

DOJ analyzes all PFCRA requests for authorization to determine whether the case is legally permissible and supported by a preponderance of the evidence. This review is based on the agency request for authorization and any supplemental material the DOJ reviewing attorney believes is necessary for a proper assessment of the case.

** The templates that are attached as Appendix A (sample letter to DOJ) and Appendix D (PFCRA cover sheet) were developed in consultation with the DOJ Civil Fraud Section. To expedite DOJ processing of PFCRA referrals, agencies should use these templates. Additionally, agencies may facilitate DOJ review by including a letter from the pertinent United States Attorney's office indicating that office does not wish to proceed with a False Claims Act case on the facts presented in the PFCRA referral. A suggested form for this declination letter accompanies this guidance as Appendix F.

1. Review of Request to Proceed.

a. Address: Name of Current Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Patrick Henry Building
601 D Street, N.W., Rm. 9902
Washington, D.C. 20004

b. Triage. DOJ attempts to assess all cases in a timely manner so that requesting agencies have sufficient time to file a case. Although the PFCRA generally provides for DOJ to complete its case assessment within 90 days, OIG's and agencies should allow more time for unforeseen circumstances.

2. Statute of Limitations. DOJ reviews PFCRA authorization requests to determine whether the applicable limitations periods have lapsed, and also looks at whether the Agency may realistically have a Presiding Officer issue a scheduling order in time to preserve the agency's right to proceed on its PFCRA claims.

3. Authorization to Proceed

a. If DOJ approves of the agency proceeding, DOJ will send a memorandum signed by an Assistant Attorney General allowing referral to a Presiding Officer. This approval will contain:

(1) The date upon which approval is granted.
(2) Approved targets for the PFCRA case.
(3) The amount of claims and assessments the Agency is authorized to pursue.

b. If DOJ does not approve of an agency proceeding, DOJ will send a memorandum disapproving the request.

E. Pre-Filing

1. Contact Letters. Although not required by statute, sending a contact letter before proceeding with a PFCRA case may ultimately be the most efficient way to address PFCRA matters. Contact letters should give enough information for the defendant to fully appreciate the potential PFCRA liability, but not be used when there is a risk that the defendant will, upon receiving notice of the PFCRA, attempt to evade service of process. Contact letters may not be practical in situations where the statute of limitations will imminently expire. A form contact letter is attached to this guidance at Appendix B.

** Contact letters can save agencies significant time and resources in PFCRA litigation if the defendant is interested to settle without litigation. Agencies may want to confer with DOJ in advance of sending contact letters, if DOJ has not acted on an authorization request to proceed, the case raises novel or significant issues, or you have reason to believe that DOJ may be pursuing or considering an action related to your proposed PFCRA claims.

2. Notice to the defendant. Upon receiving authorization from DOJ, the Government may send the defendant notice specifying the allegations of liability against the defendant and stating the right of such person to request a hearing with respect to the allegations. 31 U.S.C. § 3803(d)(1). Agencies may elect to use a traditional complaint format to convey these allegations, but the statute does not mandate that particular form of notice. A form notice, styled in a traditional complaint format, accompanies this guidance at Appendix E.

3. Service. Service of the notice must be by registered mail, certified mail, or personal delivery. 31 U.S.C. § 3803(d)(1). Agency regulations may vary this service requirement and allow for overnight commercial carrier delivery or other reasonably reliable manner of service. See 24 C.F.R. § 28.25(a) (allowing delivery of a complaint "through such other means by which delivery may be confirmed.")

F. Defendant's Response

The Defendant must respond within 30 days of receiving the complaint.

G. Filing the Complaint and Response with a Presiding Officer

1. Default. If the Defendant does not respond when required, the Agency should file for a default judgment according to that Agency's regulations.

2. Response. If the Defendant files a response, the Reviewing Official must refer the allegations to the Presiding Officer for proceedings.

H. Presiding Officer Procedures

1. Scheduling Order. One of the Presiding Officer's first duties is to issue a scheduling notice to commence the proceedings. As noted previously, the statute of limitations for a PFCRA case runs until the Presiding Officer commences a hearing by issuing a document containing information commonly found in a scheduling order. 31 U.S.C. § 3803(d)(2)(B). This notice advises the parties of the time, place and nature of the hearing as well as legal authority, jurisdiction and matters of fact and law to be asserted.

2. Limited Discovery

a. Any time after the Presiding Officer commences the hearing the defendant may review, and pay for copies of, all relevant and material documents or other matter that serve as the basis for the Investigating Official's conclusions. 31 U.S.C. § 3803(e)(1)(A). Defendants are not, however, entitled to obtain material privileged under Federal law, unless the information is exculpatory. 31 U.S.C. §§ 3803(e)(1)(B) and (e)(2).

b. After receiving the complaint, the defendant is entitled to obtain all exculpatory information notwithstanding whether that information is in a privileged document. 31 U.S.C. § 3803(e)(2).

c. The Presiding Officer may order additional discovery if necessary for the expeditious, fair and reasonable consideration of the issues. 31 U.S.C. § 3803(g)(3)(B)(ii).

3. Pre-Trial Matters. Agency regulations and orders from the Presiding Officer will determine the timing and necessity of pre-trial filings.

4. Hearing Location. PFCRA trials should be held in the:

a. District where the Defendant resides or does business. 31 U.S.C. § 3803(g)(4)(A);

b. District where the claim or statement was made or presented. 31 U.S.C. § 3803(g)(4)(B); or,

c. District mutually agreed upon by the parties and the presiding officer. 31 U.S.C. § 3803(g)(4)(C).

5. Trial/Hearing. PFCRA hearings are held on the record to determine whether the defendant is liable and what amount of penalties and assessments would be appropriate. 31 U.S.C. § 3803(f).

a. Burden of Proof. The Government must prove its case by a preponderance of the evidence. 31 U.S.C. § 3803(f).

b. Evidentiary Matters. Significant evidentiary stipulations in advance of trial may facilitate a more expeditious handling of the case. The Federal Rules of Evidence inform, but are not mandatory, in these proceedings.

6. Preliminary Decision. After the trial, the Presiding Officer issues an initial decision and serves that decision on the parties. 31 U.S.C. § 3803(h).

a. The initial decision becomes final if the defendant does not appeal.

b. The defendant may appeal a preliminary decision within 30 days. 31 U.S.C. § 3803(h)(2)(A)(i). Although the PFCRA is silent on the Government's ability to appeal, some agency regulations allow the Government to appeal the Presiding Officer's determination. See, e.g., 24 C.F.R. § 26.52 (allowing appeals in the HUD's general hearing procedures governing the PFCRA).

c. Some agencies have elected to provide Presiding Officers with aggravating and mitigating factors to help inform the amount of any penalty and assessment. See, e.g., 24 C.F.R. § 28(40)(b) (identifying factors for calculation of HUD penalties and assessments).

I. Appeal of the Preliminary Decision to the Agency Head

1. Scope. The Agency Head may affirm, reduce, reverse, compromise, remand or settle any PFCRA award. 31 U.S.C. § 3803(i)(2)(C). The Agency Head must not, however, consider objections that were not raised during the hearing in front of the Presiding Officer unless the moving party demonstrates extraordinary circumstances for the failure to object. 31 U.S.C. § 3803(i)(2)(B).

2. New Evidence. If any party demonstrates additional evidence not presented at the hearing is material and there were reasonable grounds for that party's failure to present such evidence, the Agency Head will remand the case back to the Presiding Officer for consideration of the additional evidence. 31 U.S.C. § 3803(i)(2)(B).

J. Finality

The initial decision becomes final unless the respondent appeals to the Agency Head or the appropriate U.S. District Court. 31 U.S.C. § 3803(i).

K. Appeal of the Final Decision to District Court, 31 U.S.C. § 3805

1. Petition of Review. A person found liable under the PFCRA by a Presiding Officer may file a petition for review of the determination.

2. Venue: the petition appealing a PFCRA judgment should be filed in:
   a. The judicial district where the defendant resides or conducts business;
   b. Where the statement or claims occurred; or
   c. The U.S. District Court for the District of Columbia.

3. Standard of Review. The reviewing court will determine whether substantial evidence in the administrative record supports the PFCRA decision. *Orfanos v. HHS*, 896 F. Supp. 23, 26 (D.D.C. 1995), *see also, Cain v. U.S. Postal Service*, 1999 WL 761138, *2 (E.D. Pa., Unreported 1999). Substantial evidence, in this context, means evidence a reasonable mind would accept as supporting a conclusion. Id.

4. Scope. The reviewing court will determine whether the PFCRA decision should be modified or set aside. The court will not set aside those findings unless the findings are unsupported by substantial evidence. A reviewing court will not consider any objection unless that objection was raised before the Presiding Officer, or the proponent demonstrates extraordinary circumstances for not having raised that objection.

5. Remand. The reviewing court will remand a matter back to the Agency to consider additional evidence if the proponent of the evidence can demonstrate that the evidence is material and there were reasonable grounds for the failure to present that evidence at trial.

6. Timeliness. The petition for review must be filed within 60 days after the date the agency sends the agency's final decision to the defendant, and after exhausting all administrative remedies. 31 U.S.C. § 3805(b)(1)(B).

7. Jurisdiction. The district court has jurisdiction by statute. 31 U.S.C. § 3805(b)(1)(A).

L. Collection on the Government's Judgment

1. Limitation of Actions. The Government must commence a civil action to collect any PFCRA penalties and assessments awarded at the administrative level within three years of the date on which the determination of liability becomes final. 31 U.S.C. § 3808(b).

2. Limited Scope of Review. The district court will not consider matters that were raised, or that could have been raised as a defense in a PFCRA hearing. 31 U.S.C. § 3806(b). Likewise, the district court will not review the determination of liability or the amount of penalties or assessments. Id. The review available in a suit to collect enforce a PFCRA judgment is substantially more narrow than the review available in a suit appealing a PFCRA judgment to the district court.

3. Judgment. The Judgment imposed by a district court is subject to further appeal as determined by local and Federal rules.

4. Collection. The Government may collect upon any judgment as provided for in local or Federal rules. Agencies may, for example, use the Treasury Offset Program where the defendant has other Federal Payments or the Priority Act, 31 U.S.C. § 3713, when a representative fails to pay a Federal debt in violation of the Government's priority.

M. Disposition of Funds Collected Under PFCRA

1. Generally, agencies deposit all penalties and assessments collected under the PFCRA into miscellaneous receipts at the United States Treasury. 31 U.S.C. § 3806(g).

2. The Post Office and Department of Health and Human Services have statutory authority to deposit certain recoveries back into agency accounts.

N. Equal Access to Justice Act, 5 U.S.C. § 504

1. Applicability. The PFCRA is an adversarial adjudication for the purposes of the Equal Access to Justice Act (EAJA). Under EAJA, if a defendant prevails in a PFCRA suit, the Government may be liable for the defendant's fees and expenses incurred in connection with the PFCRA case. The Government will not be liable where the Presiding Officer finds that the position of the agency was substantially justified or that special circumstances make an award unjust. 5 U.S.C. § 504(a)(1).

2. EAJA Petitions. EAJA petitions must be filed within 30 days of the defendant's final, successful adjudication. 5 U.S.C. § 504(a)(2). Successful defendants should pursue these petitions as determined by agency regulations. At a minimum, an EAJA petition must include:

a. an application which shows that the party is a prevailing party and is eligible to receive an EAJA award;

b. the amount sought, including an itemized statement, identifying both the time spent and the rate, from any attorney, agent, or expert witness representing or appearing in behalf of the defendant.

c. an allegation that the position of the agency was not substantially justified.

3. Exclusions. Certain parties may not file petitions under EAJA if they exceed financial benchmarks at the time a PFCRA case is initiated. Those parties are:

a. individuals with a net worth in excess of $2,000,000.

b. individuals who own entities with a net worth in excess of $7,000,000 or more than 500 employees.

c. entities with either a net worth in excess of $7,000,000 or more than 500 employees.

O. Obtaining Administrative Law Judge Services From Another Agency

Agencies that do not have an ALJ available to act as a Presiding Officer may obtain one through the Office of Personnel Management's (OPM) Administrative Law Judge Loan Program. OPM regulations at 5 C.F.R. § 930.208 identify the information necessary for an ALJ request. Once OPM identifies an available ALJ, the requesting agency enters into a separate agreement with the agency employing the available ALJ. Generally, the separate agreement will be similar to the Economy Act agreements accompanying this Guide at appendices H through J. Agencies interested in requesting detailed or loaned ALJs should contact OPM's Administrative Law Judges Program Office.

Appendices

A. Draft DOJ Authorization Letter
B. Draft PFCRA Contact Letter
C. Form Report of Findings and Conclusions of Investigation
D. PFCRA Authorization Cover Sheet
E. Sample Complaint
F. Suggested AUSA Declination Letter
G. Sample OLC Spreadsheet (for tracking status of PFCRA Case)
H. Sample Inter-Agency Agreement to Obtain ALJ Services– part 1
I. Sample Inter-Agency Agreement to Obtain ALJ Services – part 2
J. Attachment to Sample Inter-agency Agreement
K. Sample Notice from ALJ to Defendant(s)

Appendix A

Draft DOJ Authorization Request:

Michael Granston, Director
Civil Fraud Section
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Ben Franklin Station
P.O. Box 261
Washington, DC 20044

Re: Program Fraud Civil Remedies Act
Notice of Intention to Refer to Presiding Officer
((PROPOSED DEFENDANTS))

Dear Mr. Granston:

This letter requests that the Department of Justice (DOJ) approve the initiation of an administrative action seeking $(()) under the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. §§ 3801-3812. ((Agency)) (Agency Abbreviation) intends to pursue ((PROPOSED DEFENDANTS)), and any liable successor entity, under the PFCRA for ((false statements and/or false claims)).

As more fully discussed below, ((SUMMARY OF FACTS)).

As the Reviewing Official identified in the PFCRA at 31 U.S.C. § 3801(a)(8) and ((AGENCY)) implementing regulations at ((CITATION)), I have reviewed the report of the ((AGENCY)) Office of the Inspector General (OIG), regarding this matter. The OIG's report is attached to this letter as Attachment A. Based upon my review of the OIG report, I have determined that there is adequate evidence to establish that the proposed defendants are liable for a civil penalty and assessment under the PFCRA. The Office of the United States Attorney for the District of (()) has declined proceeding under the False Claims Act. Attachment A, Tab (()). ((IF NO CIVIL REFERRAL MADE, EXPLAIN)). ((IDENTIFY ANY CRIMINAL DISPOSITION)). The following discussion addresses the issues identified in ((AGENCY REGULATION)) for ((AGENCY)) requests to DOJ for approval to initiate a PFCRA case.

I.

Statute of Limitations

Under the PFCRA, a Presiding Officer must commence a hearing within six years of the submission of the claim. 31 U.S.C. § 3808(a) (referencing 31 U.S.C. § 3803(d)(2) as commencement of a hearing for statute of limitations period). The statute of limitations runs on

the first ((claim/statement)) in this referral on ((DATE)). The statute of limitations runs on the final ((claim/statement)) in this referral on ((DATE)). The PFCRA action must be authorized no later than ((DATE)) in order for a hearing to be commenced within the statute of limitations.

Contact with Defendant(s) and Settlement Efforts

[The ((AGENCY)) contacted defendants to inform them of their potential liability under PFCRA [DATE AND METHOD OF COMMUNICATION]. [DESCRIBE DEFENDANTS' RESPONSE TO CONTACT.] [DESCRIBE ANY SETTLEMENT DISCUSSIONS, OFFERS, COUNTEROFFERS AND CURRENT STATUS.]

II. Program Background

(())

Reasons for the Referral/ Evidence that Supports Liability

The ((AGENCY)) has identified fraud or false statements, and believes a PFCRA case is the most effective way to ensure program integrity.

The OIG Report contains evidence demonstrating the submission of false information that appears to support liability under the PFCRA. Specifically, (()).

Claims Upon Which Liability Would Be Based

((IDENTIFY CATEGORICALLY AND BY DATES – ATTACH DOCUMENTS)).

Estimate of the Amount of Money Demanded in the False Claim

We have calculated the proposed PFCRA case as follows:

Assessment per claim:

False Claim (Damages)	$(())
Doubled	X2 $(())
Less Any Repayments or Restitution Actually Paid	- $(())
Total for (()) Claim	$(())

False Claim (Damages)	$(())
Doubled	X2 $(())
Less Any Repayments or Restitution Actually Paid	- $(())

Total for (()) Claim	$(())

((REPEAT AS NECESSARY))

Penalties for False Claims and Statements:

((CLAIM ID))	[# OF FALSE CLAIMS]	$(())
((STATEMENT ID))	[# OF FALSE STATEMENTS]	$(())
((REPEAT AS NECESSARY))		$(())
Total Civil Penalties		

The maximum total assessment and penalty amount sought in this request for authorization is ((TOTAL ASSESSMENT PLUS TOTAL PENALTIES)).

Litigation Risk

[DESCRIBE FACTUAL OR LEGAL ISSUES THAT MAY PREVENT THE AGENCY FROM ESTABLISHING PFCRA LIABILITY AND DESCRIBE THE AGENCY'S ASSESSMENT OF THOSE RISKS AND PLAN TO ADDRESS THEM.]

Exculpatory or Mitigating Circumstances

We are not aware of any exculpatory or mitigating circumstances in this matter. ((PRESUMES NO RESTITUTION OR MITIGATION OR EXCULPATORY CIRCUMSTANCES)).[OR – The following exculpatory or mitigating circumstances exist.]

Likelihood of Collecting the Proposed Penalties and Assessments

The OIG report identifies sufficient assets and probable income to conclude ((AGENCY)) would be able to collect a judgment from (()). Attachment A, Page 3 and Tabs (()).

Based on this summary, ((AGENCY)) requests DOJ approval to initiate administrative proceedings against (()) under the PFCRA. We proposed to seek the following remedies:

Civil Penalties		$(())
Assessments	+	$(())

Total

Thank you for your time and attention to this matter.

SIGNATORY OFFICIAL

Appendix B

DRAFT PFCRA CONTACT LETTER:

((DEFENDANT NAME))

((DEFENDANT ADDRESS))

Re: Liability Under the Program Fraud Civil Remedies Act for (()).

Dear ((SALUTATION)):

((IF NO COUNSEL IDENTIFIED -- I am writing to you directly because it is my understanding that you do not have an attorney for the matter identified in this letter. If you do have an attorney for this matter, please forward this letter to that attorney.))

I am an attorney with ((AGENCY)). ((AGENCY)) has sought, and obtained, authorization from the Department of Justice to pursue an action against you under the Program Fraud Civil Remedies Act (PFCRA) for false ((claims/statements)). Specifically, you ((claim/statement synopsis)).

The PFCRA is found at 31 U.S.C. §§ 3801-3812., Under the PFCRA, parties can be liable for an assessment of up to twice the amount of a false claim, and a civil penalty of up to ((AGENCY ADJUSTED AMOUNT)). Likewise, parties may also liable for civil penalties of up to ((AGENCY ADJUSTED AMOUNT)) for each false statement submitted to an Agency.

It appears that you may be liable under the PFCRA for (($)). ((UNPACK CALCULATION))

Please review the matters raised above and contact me, or if you have an attorney, have your attorney contact me, at your earliest convenience, but no later than (()) if you wish to resolve this matter without litigation. If we do not hear from you by that time, we will assume that you do not wish to resolve these issues and proceed with a PFCRA suit.

Sincerely,

((ASSIGNED ATTORNEY AND CONTACT INFO))

Appendix C

M E M O R A N D U M

TO: ((Reviewing Official))
((Reviewing Official Title))

FROM: ((Investigating Official))
((Investigating Official Title))

DATE: (())

RE: Report of Findings and Conclusions of Investigation Regarding:
(())
OIG Case Number – (())

This report presents the findings and conclusions of the ((AGENCY)) ((AGENCY ABBREVIATION)) Office of the Inspector General (OIG) regarding ((PROGRAM AND TARGETS)). The ((AGENCY ABBREVIATION)) OIG is providing this report to you under ((REFERRAL REGULATION)), which identifies ((REVIEWING OFFICIAL)) or designee as the ((AGENCY ABBREVIATION)) Reviewing Official for the Program Fraud Civil Remedies Act (PFCRA), 31 U.S.C. §§ 3801, et seq. The ((AGENCY ABBREVIATION)) OIG has concluded ((TARGETS)), submitted false statements in obtaining ((PROGRAM PARTICIPATION)) at issue in this report. Further, the ((AGENCY ABBREVIATION)) OIG believes that an action under the PFCRA is warranted to recover $(()) (double the $(()) claim submitted to ((AGENCY ABBREVIATION)) plus a $5,000 penalty for each of the ((NUMBER)) false statements that were made).

As set forth in ((REVIEWING OFFICIAL REGULATION)), if you determine this report and attachments provide adequate evidence that ((TARGET)) made a false claim or statement with respect to a claim, please forward a written notice to the Department of Justice requesting approval for ((AGENCY ABBREVIATION)) to pursue a PFCRA case. The OIG believes the first statute of limitations for this matter will expire on (()) and the last will expire on (()).

Summary: (())

Factual Narrative: (())

Identification of Claims and/or Statements: ((IDENTIFY SPECIFIC STATEMENTS AND ATTACH ALL PERTINENT DOCUMENTS)).

Referrals to DOJ: The United States Attorney's Office for the District of (()) has elected not to initiate a civil fraud case for this matter. Tab (()).

Likelihood of Collecting the Proposed Penalties and Assessments: (()) should have sufficient assets to pay any judgment resulting from the proposed PFCRA action. ((ATTACH EVIDENCE AND PROVIDE ADDITIONAL ANALYSIS AS APPROPRIATE))

Statute of Limitations: Under PFCRA, the Presiding Officer must commence a hearing within six years of the submission of the claim. 31 U.S.C. § 3808(a).[17] The OIG believes the first ((claim/statement)) will lapse on (()), with the last ((claim/statement)) being time-barred on (()). OIG determined the statute date by ((ANALYSIS)).

Status of Other Remedies: ((IDENTIFY ANY OTHER CRIMINAL, CIVIL OR ADMINISTRATIVE PROCEEDINGS ALONG WITH POINTS OF CONTACT AND STATUS)).

Conclusion: For the reasons discussed above, the OIG believes that ((TARGET)) has submitted fraudulent statements in connection with a claim, and that recovery under PFCRA is warranted. The OIG is also willing to provide any assistance to the Office of General Counsel needed in this matter. If there are any questions regarding this report, please contact (()).

[17] As noted above, subsection 3803(a) requires that a hearing is commenced within six years of the claim submission. Ssubsections 3803(d) and (g) indicate that a hearing is "commenced" when the administrative law judge (known as the "presiding officer") issues notice to the defendant of the date and procedures for a hearing. Because the final step required to commence a hearing is in the hands of the Presiding Officer, and not the Reviewing Official, there can be some uncertainty whether an agency has enough time to meet the statute of limitations for a PFCRA case, particularly where the limitations period is about to expire.

Appendix D

Request for PFCRA Authorization Cover Sheet
Action Requested No Later Than ((Date – Six Months before Statute Runs – if expedited review requested, explain in comment section))

Proposed Defendants	((Identify all potential defendants by legal names and a/k/as, and city and states where located))
Statute of Limitations/Basis	((Identify date first and last claim or statement lapses with brief analysis explaining how Agency arrived at the statute of limitations date))
Case Synopsis	((Brief recitation of essential case background, identifying the false statements and claims))
Maximum Case Value and Basis for Calculating Maximum Value	False Claims (Damages) $ (())
	Doubled X2 = $ (())
	Less Mitigation - $ (())
	Equals Base Assessment $ (())
	Plus (()) Claim Penalties at $(()) Each + $ (())
	Plus (()) Statement Penalties at $(()) Each + $ (())
	Maximum Total Case Value $ (())
Facts Established in Other Proceedings?	__Yes __No (Please Select Yes if admissions or judicial findings form part of the evidence the Agency intends to use in litigation) Attach admissions or judicial findings (if applicable). Provide case number and court, and name and contact information for responsible government attorney.
AUSA declined Criminal and False Claims Act case on these facts?	__Yes __No If yes, identify who reviewed the case and attach any declination letter.
Other Related Proceedings	((E.g., criminal proceedings, civil actions, suspensions or debarments))
Other Comments	
Agency Point of Contact	Name: Telephone: E-Mail:
DOJ Use Only (sign & date):	_____ Reviewing Attorney (Print Name:)

	Comments/Opinion attached: __Yes __No
DOJ Use Only (sign & date):	_____ Reviewing Attorney (Print Name:) Comments/Opinion attached: __Yes __No

Appendix E

((AGENCY))
OFFICE OF HEARINGS AND APPEALS ((OR OTHER DESIGNATION))

((AGENCY)), Plaintiff, v. ((DEFENDANTS)) Defendants.	COMPLAINT

Plaintiff, ((AGENCY)), seeks penalties and assessments under the Program Fraud Civil Remedies Act (PFCRA) of 1986 (31 U.S.C. §§ 3101 *et seq.*) against Defendants ((DEFENDANTS)). The Plaintiff alleges the Defendants are liable under the PFCRA because the Defendants, or a predecessor interest, ((CLAIM SUMMARY)). Plaintiff alleges the following in support of a finding of liability:

I. PARTIES

1. Plaintiff is ((AGENCY)) (AGENCY ABBREVIATION), an Agency of the United States Government established under ((AUTHORIZING LEGISLATION)). (AGENCY) is an "Authority" within the meaning of 31 U.S.C. § 3801(a).
2. Defendant ((IDENTIFY DEFENDANT)).
3. Defendant ((IDENTIFY ADDITONAL DEFENDANTS AS NECESSARY)).

II. JURISDICTION

4. The Attorney General or designee approved the referral of the allegations in this Complaint for adjudication by ((AGENCY)) on ((DATE)).

5. ((AGENCY))'s Office of Hearings and Appeals has jurisdiction over this matter under 31 U.S.C. § 3803(g) and ((AGENCY REGULATION)).

III. FACTUAL ALLEGATIONS

6. ((FACTUAL ALLEGATIONS))

7. ((REPEAT AS NECESSARY and ATTACH PERTINENT DOCUMENTS))

IV. ALLEGATIONS OF LIABILITY

Count 1: False Claim (())

8. Plaintiff realleges the allegations contained in Paragraphs (()) through (()).

9. In representing ((FALSE CLAIM BASED UPON WRITTEN STATEMENT)), Defendant ((DEFENDANT)) submitted a written statement which ((he/she)) knew or should have known was false, fraudulent or fictitious within the meaning of 31 U.S.C. § 3102(a)(1)(B), and which ((he/she)) knew or should have known omitted a material fact which ((he/she)) was obligated to disclose, making the written statement false, fraudulent or fictitious, within the meaning of 31 U.S.C. § 3102(a)(1)(C).

10. ((WHERE YOU HAVE A BANK SUBMITTING A FALSE CLAIM BASED UPON AN INSURANCE OR GUARANTEE CLAIM)). By submitting false statements as aforesaid in order to obtain the loan, and in subsequently defaulting on the loan, Defendant (()) caused (()) to make a claim upon ((AGENCY)) which Defendants knew or should have known was false, fraudulent or fictitious.

11. ((WHERE YOU HAVE A BANK SUBMITTING THE CLAIM ON AN INSURED OR GUARANTEED LOAN)) ((BANK))'s demand that ((AGENCY)) pay ((AGENCY))'s ((INSURANCE/GUARANTEE)) obligation on the Loan was based

upon false, fictitious or fraudulent written statements. Specifically, Defendant ((DEFENDANT))'s ((STATEMENT DESCRIPTION)).

12. ((Agency)) paid (($)) as a result of the claim. Accordingly, ((DEFENDANT)) submitted, or caused the submission of a false claim in the amount of (($))

Count 2: False Statement (()).

13. Plaintiff realleges the allegations contained in Paragraphs (()) through (()).
14. Defendant's statement regarding (()) was made, presented or submitted to ((AGENCY)).
15. Defendant knew, or had reason to know ((STATEMENT)) ((was false // was false because it omitted (FACT))).
16. Defendant's statement regarding (()) contained or was accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.
17. ((ADD ALLEGATIONS AS NECESSARY)).

WHEREFORE, the Plaintiff respectfully requests judgment in the amount of (()). The Plaintiff bases its request on the following calculation of liability:

Count 1, a civil penalty and assessment of (()) representing a penalty of (()) for (()) false claims at (()) each and an assessment of (()) representing twice the amount of the claim at issue in that Count. ((The Government's request has deduced (($)) in restitution ((DEFENDANT)) paid. This deduction occurred after doubling the claim amount.))

Count 2, a civil penalty of (()) for (()) false statements at (()) for each false statement.

The Plaintiff further requests any other relief the Presiding Officer deems appropriate.

Respectfully Submitted,

_____

((ATTORNEY INFORMATION))

Notice of Procedure

You have thirty (30) days from your receipt of this Complaint to file an Answer with the Office of Hearings and Appeals. Your failure to answer this letter and the allegations in the complaint will result in ((AGENCY)) seeking a default judgment and the imposition of the maximum amount of penalties and assessments.

You should send your answer to:

((RESPONSE ADDRESS))

You should send a copy to me:

((ATTORNEY INFORMATION))

Your answer will serve as a request for hearing, and the Office of Hearings and Appeals will schedule one for you at its earliest convenience. See ((AGENCY REGULATION)).

You have a right to be represented by a person of your choosing.

CERTIFICATE OF SERVICE:

I certify that this _____ day of _____ 20(()), the foregoing Complaint was served on the parties identified below at the addresses indicated, by Certified Mail, return receipt requested:

((DEFENDANT ADDRESSES))

_____
((ATTORNEY INFORMATION))

Appendix F

Suggested AUSA declination letter

Dear Agent (()):

The Civil Division of the United States Attorney's Office has completed its review of (Agency) OIG's investigation into (()). After considering all relevant information, including the governing case law, and the agency's ability to seek remedies under the Program Fraud Civil Remedies Act, we have determined not to proceed with this case. Accordingly, (Agency) should feel free to pursue any remedies available to it under PFCRA or other statutes. Thank you very much for all of your efforts in preparing this case.

Signature Block

Appendix G

#	NAME	Case number	Type (Claim/Statement)	Program	Office (A/I)	Region	Date Received	Date assigned to Atty

Atty	Status (Closed/assigned/suspended/reclassify)	Date Closed/Suspended	Reason (Lack of assets/pending court/SOL/CR)	Days (From Date Recv'd to Date Closed/Suspended/ Settled)	Date to OGC	Days (From Date Recv'd to Date Sent to OGC)	Outcome

Potential Collection	Amount Collected	Date Collected	Referral With OI/OA	Comments

Status (Open/Closed)	Case Summary

Appendix H

United States Government
Interagency Agreement (IAA) – Agreement Between Federal Agencies
General Terms and Conditions (GT&C) Section

IAA Number_____ - 0000 - _____
GT&C # Order # Amendment/Mod #

DEPARTMENT AND/OR AGENCY			
1.		**Requesting Agency of Products/Services**	**Servicing Agency Providing Products/Services**
	Name		
	Address		

2. Servicing Agency Agreement Tracking Number (Optional)_____

3. Assisted Acquisition Agreement Yes No

4. GT&C Action (Check action being taken)

New

Amendment – Complete only the GT&C blocks being changed and explain the changes being made.

Cancellation – Provide a brief explanation for the IAA cancellation and complete the effective End Date.

5. Agreement Period Start Date _____ End Date _____ of IAA or effective cancellation date
MM-DD-YYYY MM-DD-YYYY

6. Recurring Agreement (Check One) A Recurring Agreement will continue, unless a notice to discontinue is received.

Yes **If Yes,** is this an: Annual Renewal

Other Renewal State the other renewal period: _____

No

7. Agreement Type (Check One) Single Order IAA Multiple Order IAA

8. Are Advance Payments Allowed for this IAA (Check One) Yes No

If Yes is checked, enter Requesting Agency's Statutory Authority Title and Citation

Note: Specific advance amounts will be captured on each related Order.

FMS Form 6-10 **7600A**

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE
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Appendix I

United States Government
Interagency Agreement (IAA) – Agreement Between Federal Agencies
Order Requirements and Funding Information (Order) Section

IAA Number _____ - _____ - _____ Servicing Agency's Agreement
GT&C # Order # Amendment/Mod # Tracking Number (Optional) _____

PRIMARY ORGANIZATION/OFFICE INFORMATION		
24.	**Requesting Agency**	**Servicing Agency**
Primary Organization/Office Name		
Responsible Organization/Office Address		

ORDER/REQUIREMENTS INFORMATION

25. Order Action (Check One)

New

Modification (Mod) – List affected Order blocks being changed and explain the changes being made. For Example: for a performance period mod, state new performance period for this Order in Block 27. **Fill out the Funding Modification Summary by Line** (Block 26) if the mod involves adding, deleting or changing **Funding for an Order Line**.

Cancellation – Provide a brief explanation for Order cancellation and fill in the Performance Period End Date for the effective cancellation date.

26. Funding Modification Summary by Line	Line # _____	Line # _____	Line # _____	Total of All Other Lines (attach funding details)	Total
Original Line Funding	$	$	$	$	$
Cumulative Funding Changes From Prior Mods [addition (+) or reduction (-)]	$	$	$	$	$
Funding Change for This Mod	$	$	$	$	$
TOTAL Modified Obligation	$	$	$	$	$
Total Advance Amount (-)	$	$	$	$	$
Net Modified Amount Due	$	$	$	$	$

27. Performance Period Start Date _____ End Date _____
For a performance period mod, insert the start and end dates that reflect the new performance period. MM-DD-YYYY MM-DD-YYYY

FMS Form 07/10 7600B

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE
Page 1 of 5

(ALJ Agency)Attachment A
Supporting IAA #_____

A. Scope and Responsibilities (Section 12 of IAA)

1. **AGENCY**'s Assistant Administrator (AA) will assign appeals to be processed by (ALJ Agency) to the Chief Administrative Law Judge for (ALJ Agency), who may reassign the case to an available (ALJ Agency) ALJ.

2. New filings for each appeal will be received at **AGENCY**, and will be time-stamped and logged into **AGENCY**'s case-tracking system. **AGENCY** staff will promptly inform (ALJ Agency) of appeals and any filings.

3. **AGENCY** and (ALJ Agency) will determine how and when filings, orders, and decisions are transferred between **AGENCY** and (ALJ Agency), and whether the original, a paper copy, or an electronic copy will be transferred.

4. (ALJ Agency) will process each appeal in accordance with the APA, **AGENCY** regulations, and prior **AGENCY** decisions.

5. (ALJ Agency) will draft and issue written orders and decisions as necessary to process the appeals. Upon request, **AGENCY** staff will assist (ALJ Agency) by transmitting electronic copies of prior orders and decisions of its former administrative law judge.

6. At the time of issuance, (ALJ Agency) will assign to each decision, remand order, and dismissal a decision number in **AGENCY**'s established sequence. **AGENCY** will maintain the list of decisions and corresponding decision numbers.

7. (ALJ Agency) will transmit to **AGENCY** a Word file of the decision and faxed or electronic copies of signed orders and decisions. (ALJ Agency) will serve the orders and decisions. (ALJ Agency) will maintain the service list for each appeal and a (ALJ Agency) staff member will sign the certificate of service for orders and decisions.

8. **AGENCY** will post each issued decision on the internet.

9. Unless there is a substantial showing the agency determination was made in bad faith, it is the understanding of the parties that all **AGENCY** cases assigned to (ALJ Agency) can be decided on the written administrative record, therefore (ALJ Agency) will not be required to travel in order to fulfill any duty under this agreement.

B. Procedure for Reimbursement (Section 32-34 of IAA)

1. Quarterly, (ALJ Agency) will present **AGENCY** an itemized report of the total hours expended by the assigned (ALJ Agency) personnel for services provided pursuant to this agreement. (ALJ Agency) will provide the corresponding billing statement and invoice identifying the total dollar amount billed for that quarter.

2. The billing statement will include the total dollar amount to be reimbursed to (ALJ Agency) by **AGENCY**. Such amount will be calculated by multiplying the total hours expended by the hourly rate of the assigned (ALJ Agency) personnel.

3. Upon receipt of the billing statement, **AGENCY** will pay (ALJ Agency), via the U.S. Treasury's intra-Governmental payment and collection system (IPAC).

4. The costs associated with this agreement may not exceed $_____.

C. Protection of Information

The parties agree to take appropriate measures to protect proprietary, privileged, or otherwise confidential information that may come into their possession as a result of this agreement.

Appendix K

OFFICE OF HEARINGS AND APPEALS
U. S. Department of [ ]
Washington DC 20024
Phone: (202) 555-0000
Facsimile: (202) 555-1111

July 19, 2011

Name(s)
Address

Re *Case Name*
File Number

Dear Ms. Last Name:

The Office of Hearings and Appeals is an independent body within Department of [ ](Agency) headquarters that serves as the "trial court" to resolve many types of disputed complaints brought by Agency against individuals and organizations.

We have received a copy of the Complaint in the above matter, which AGENCY also sent to you. If you want to contest the imposition of penalties and assessments by AGENCY, you must request a hearing by filing a written response within 30 days of your receipt of the Complaint. Your response must include: the admission or denial of each allegation of liability made in the Complaint; any defense on which you intend to rely; any reasons why the penalties and assessments should be less than the amount set forth in the Complaint; and the name, address, and telephone number of the person who will act as your representative, if any.

If you do not submit a timely response, the Government may seek a default judgment, which would be immediately due and payable by you. You may contact AGENCY's counsel to discuss the possibility of settling this matter without a hearing. If that is not possible, you may request a hearing.

If you request a hearing, it will be conducted by an impartial Administrative Law Judge, who will decide the issues based upon the facts and law. Each party may be represented by counsel, and may present evidence, including the testimony of witnesses. The hearing will be transcribed by a court reporter, and the parties may submit legal briefs and motions. The administrative law judge considers the exhibits and the witness testimony, and renders a decision based upon the law and the facts established in the record of the hearing.

Your request for a hearing and response to the Complaint should be sent to this office, with a copy to the Government Counsel who sent you the Complaint.

By U.S. Postal Service mail, our address is:

Office of Hearings and Appeals
[Address][City, State, Zip code]

For courier or other delivery service, our address is:

Office of Hearings and Appeals
[Address] [City, State, Zip code]

You may also send your response by email scanned attachment to: [email address].

Sincerely,

Name
Docket Clerk

Enclosure: Complaint

CC: [Government Counsel Name].
[Agency]
[City, State, Zip code]
Gov Counsel email address