

## How Does the DOJ's Whistleblower Pilot Program Differ From the False Claims Act?

Below is a summary comparing the key terms of the FCA's qui tam whistleblower provisions with those of the DOJ's Whistleblower Pilot Program.

	<b>Federal False Claims Act (31 U.S.C. § 3729 et seq.)</b>	<b>DOJ Whistleblower Pilot Program (Government Guidance/Policy)</b>
<b>Covered Conduct</b>	Civil liability for any person who knowingly presents or causes to be presented a false or fraudulent claim for payment or approval, or who knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim, to the U.S. government.	Criminal liability for violations related to a) federal healthcare offenses and related crimes involving private or other non-public healthcare benefit programs, b) fraud against patients, investors, and other non-governmental entities in the healthcare industry, and c) any other federal violations involving conduct related to healthcare not covered by the federal False Claims Act.
<b>Legal Authority for Awards</b>	Qui tam relators have a statutory right to award under 31 U.S.C. § 3730(d). The amount of damages and civil penalties resulting from an FCA action are appealable.	Awards are purely discretionary under DOJ policy (authority to give awards for information leading to a civil or criminal forfeiture under 28 U.S.C. § 524(c)). Awards are neither appealable nor subject to judicial review.
<b>Whistleblower Award</b>	15-30 percent of the proceeds of the action or settlement of the claim. The court can reduce the award if the whistleblower engaged in improper activities.	Up to 30 percent of the first \$100 million in net proceeds forfeited, and up to 5 percent of any net proceeds forfeited between \$100 million and \$500 million (no award on net proceeds forfeited exceeding \$500 million).
<b>Eligibility</b>	Qui tam relators can be an individual, or a business or partnership.	Whistleblowers must be individuals. Businesses or other types of entities are not eligible.  Whistleblowers must not be (or have been at the time they acquired the original information), a DOJ employee, official, or contractor, or member of the same household as a DOJ employee, official or contractor. Whistleblowers must also not be an elected or appointed foreign government official.
<b>Reporting Mechanism</b>	Qui tam relators must file a civil complaint under seal in federal district court, and confidentially serve a copy to the U.S. Attorney General and U.S. Attorney for the district where the complaint was filed.	Whistleblowers may report information directly to the DOJ through its pilot program intake form. In addition, whistleblowers who first report through an entity's whistleblower, legal, or compliance procedures may then report to the DOJ within 120 days of reporting internally. Whistleblowers who report internally first or simultaneously with their report to the DOJ may be eligible for an increased award amount.
<b>First-to-File Bar</b>	Under 31 U.S.C. § 3730(b)(5), a qui tam relator must be the "first to file," meaning they cannot bring an action under the FCA based on the same conduct that is subject to an already-filed suit.	The Whistleblower Pilot Program does not have a "first to file" bar, and in fact, more than one person can receive an award for providing information about the same scheme so long as the information provided materially adds to the DOJ's investigation and significantly contributes to the successful forfeiture. Where more than one whistleblower qualifies for an award, the total amount paid cannot exceed the percentages outlined in the pilot program.
<b>Public Disclosure Bar</b>	Under 31 U.S.C. § 3730(e)(4)(A) (the public disclosure bar), a qui tam action cannot be based on information that has been disclosed to the public through any of several means, such as criminal, civil, or administrative hearings in which the government is a party, government audits, reports, or investigations, or through the news media, unless the qui tam relator is an original source of the information.	Information provided must be original, or derived from the whistleblower's independent knowledge or independent analysis. It must not be derived from publicly available sources (such as government actions, hearings, judicial proceedings, or the news media) unless the whistleblower was a source of the information.

**Federal False Claims Act  
(31 U.S.C. § 3729 et seq.)**

**DOJ Whistleblower Pilot Program  
(Government Guidance/Policy)**

<b>Rights of Whistleblower</b>	Qui tam relators can sue in the government’s name, and maintain the action even if the government chooses not to intervene (although the government may dismiss the action over relator’s objection).	Whistleblowers must cooperate with the DOJ in its investigation of related conduct and criminal or civil actions, including but not limited to providing truthful and complete testimony and evidence, producing documents or records, and working with law enforcement officers and agents.
<b>Retaliation Protections</b>	Qui tam relators are protected from retaliation under 31 U.S.C. § 3730(h), which authorizes relators to bring a separate civil action against an employer if they are discharged, demoted, suspended, threatened, harassed or discriminated against for bringing an FCA action. The qui tam relator may sue for reinstatement, two times the amount of backpay with interest, and any special damages, including litigation costs and reasonable attorneys’ fees.	Protections for retaliation are discretionary. Whistleblowers who experience retaliation as a result of their report are instructed to provide that information in their report or a follow-up report, and the DOJ will consider any retaliation in assessing whether a company or individual cooperated with or obstructed the DOJ’s investigation and may, in its sole discretion, decline to award the company any cooperation credit in connection with any corporate resolution and/or institute appropriate enforcement action in response to any retaliation.
<b>Corporate Self-Disclosure</b>	Healthcare providers and other entities who self-disclose potential FCA violations to the DOJ may receive credit and leniency during the resolution of an FCA case, including reduced damages and civil monetary penalties.	Corporations who voluntarily self-report within 120 days of receiving an internal whistleblower report – and before the DOJ contacts the corporation – may be eligible for a presumption of declination under the DOJ’s Corporate Enforcement and Voluntary Self-Disclosure Policy.

**For more information,  
please contact:**

**Jacquelyn Papish**  
Healthcare | Partner  
jackie.papish@btlaw.com  
202-831-6732

**Erin C. Steele**  
Healthcare | Associate  
esteele@btlaw.com  
202-408-6932

**John E. Kelly**  
Healthcare | Partner, Healthcare  
Department and Healthcare  
Industry Practice Chair  
jkelly@btlaw.com  
202-831-6731