February 17, 2020

Secretary Betsy DeVos
c/o Jean-Didier Gaina
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket ID ED-2019-OPE-0080

Dear Secretary DeVos:

We are providing these comments to expand on the concerns raised in the comments submitted under separate cover by our two associations, joined by numerous other higher education associations, regarding the proposed amendments to sections 75.500 and 76.500 of Title 34 of the Code of Federal Regulations and the related discussion in "Part 2 – (Free Inquiry)" of the preamble. Specifically, we are elaborating here on the proposed rule's language that would create a nexus between private colleges' and universities' compliance with their institutional policies on free inquiry and expression, on one hand, and the False Claims Act (FCA), on the other. The operative language of the proposed rule provides that the Secretary may require private institutions to "certify they have complied with their own freedom of expression policies as a material condition for receiving education grants;" failure to certify provides a basis to deny grants; and an inaccurate certification "may give rise to a cause of action under the [False Claims Act] FCA." As discussed in detail below, we have significant concerns about the proposed rule because, as drafted, it will likely generate a flood of frivolous FCA litigation that will impose untenable cost and disruption on private colleges and universities and lead to less, not more, protection of free inquiry and expression.

A. Background

The FCA is a powerful enforcement tool that provides for treble damages, plus substantial penalties. *See* 31 U.S.C. § 3729(a)(1)(G) (stating that a violation of the FCA makes one "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 . . . plus 3 times the amount of damages which the Government sustains").[1] In addition, the FCA contains so-called *qui tam* provisions, which allow a private person to initiate FCA proceedings on behalf of the government. *See* 31 U.S.C. § 3730(b)(1) (providing that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government."). Notably, the *qui tam* plaintiff (or "relator" in FCA parlance) is entitled to a share of any proceeds the government may recover, either through litigation or settlement. *See* 31 U.S.C. § 3730(d) (explaining that the relator will generally receive 15-25 percent of the proceeds if the government intervenes in the case and generally 25-30 percent if the government does not). The combination of the substantial sanctions for violating the FCA and its *qui tam* provisions generate

[1] FCA penalties now range from approximately $11,000-$22,000 per claim.

significant incentives for private parties (both individuals and advocacy organizations) to file *qui tam* actions. By linking compliance with institutional policies on free inquiry and expression with FCA exposure, the proposed rule would unreasonably amplify those incentives and likely generate a flood of frivolous *qui tam* actions that would impose substantial costs on private colleges and universities.

B. An Invitation to Frivolous Qui Tam Litigation

As explained in our separate set of comments, even though the proposed rule links noncompliance with institutional policy to the issuance of a "final, non-default judgment," it does not *preclude* or even discourage the filing of a *qui tam* case in the absence of such a judgment.[2] Thus, it is highly likely that as drafted the proposed rule will actually encourage the filing of numerous frivolous *qui tam* cases alleging, even absent a final judgment, that institutional policies, which would become a material condition of award under the NPRM, were violated and that the grant or grants should therefore not have been awarded. That type of fraud-in-the-inducement argument would be particularly attractive to potential relators because the damages could be the full value of the award or awards, times three, plus potential penalties. *See, e.g.*, *United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78 (2d Cir. 2012) (applying a fraud-in-the-inducement theory to conclude that the full value of a grant was the appropriate measure of damages); *United States ex rel. Longhi v. United States*, 575 F.3d 458 (5th Cir. 2009) (concluding that damages were the full value of the grant in a false certification case). Moreover, these cases, even if frivolous and/or brought for profile-raising purposes by advocacy groups, would impose a very substantial burden on college and university defendants in the form of disruption and cost.

C. The Proposed Rule Does Not Acknowledge that the FCA Is a Stand-Alone Statute

The preamble of the proposed rule may well be interpreted as establishing a regulatory regime where a final judgment of noncompliance with institutional policies on free inquiry and expression will be perceived by the Department as a *per se* violation of the FCA. Yet, the FCA is a stand-alone statute with its own elements that a plaintiff must meet. A plaintiff, whether the Justice Department or a relator, must prove each of the FCA's elements by a preponderance of the evidence—a judgment finding a violation of an institution's policies on free inquiry and expression does not obviate that requirement.

To that point, in order to establish an FCA violation, the government must show that a defendant "knowingly" (a) submitted, or caused to be submitted, a false or fraudulent claim for payment, or (b) made, used, or caused to be made or used a false record or statement material to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1). The term "knowingly" is defined by the FCA as having "actual knowledge of the information . . . act[ing] in deliberate ignorance of the truth or falsity of the information; or act[ing] in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A).

The requirement for a "knowing" violation matters. Here, the Department would require a certification that a private college or university "certify [that] they have complied with their own freedom of expression policies." One can certainly envision a scenario under which, prior to completing such a certification, a private college or university conducts a thorough assessment of its compliance with its policies on free inquiry and expression and concludes that it has been in compliance. If at some later point a court rules that there was a noncompliance, it would not necessarily follow that the college or university made a knowingly false certification, *i.e.*, that it certified with actual knowledge of

[2] Nor could the Department preclude such a filing.

noncompliance or that it did so recklessly or with deliberate ignorance of the truth.[3] The proposed rule does not acknowledge that possibility, while federal courts do. *See, e.g.*, *United States ex. rel. Main v. Oakland City University*, 426 F.3d 914 (7th Cir. 2005) (distinguishing between breach of contract and fraud and recognizing that noncompliance after a representation of compliance does not automatically generate FCA liability).

Likewise, an FCA plaintiff must meet the statute's materiality requirement. The FCA statute defines "material" as "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). Case law has interpreted that language in a way that makes that standard particularly significant here. Indeed, in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), the Supreme Court emphasized that FCA materiality is a "demanding" standard, without which the FCA could be used as an "all-purpose antifraud statute," which was not the intent. *Id.* at 2003 (quoting *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008)). Rather, the Court explained that an actionable misrepresentation cannot be "minor or insubstantial," but rather must go "to the very essence of the bargain." *Id.* at 2003 & n.5. And, of substantial import here, the Court was clear that

> A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. *Id* at 2003.

Put simply, the Court has ruled that the government merely claiming a condition is material is not enough to make it so under the FCA. *Id.* ("the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive."). Such a position would establish an "extraordinarily expansive view" of FCA liability. *Id.* at 2004.

The *Escobar* concept of materiality is significant because under the proposed rule there is no baseline for a private institution's policies on free inquiry and expression. As noted, those policies can and do take many different forms and the specific words of a given institution's policies have no bearing on whether it will receive Department grants, only that it comply with whatever its policy may be. It is therefore at best uncertain whether a court would conclude that compliance with such policies, which again can be more or less robust, is truly material to a funding decision and subsequent payment. And, if private colleges and universities generally move toward watering down their institutional policies to reduce FCA risk, under the NPRM that too will have no bearing on the Department's funding decisions so as long as there is a policy with which a private college or university can certify compliance. Ultimately, the proposed rule would effectively create a regime where many private institutions that otherwise would have robust policies would conclude that the only way to manage the risk of nuisance suits created by the NPRM is to adopt policies that are <u>*less*</u> protective of free inquiry and expression—exactly the opposite of the what the Department aims to accomplish here.

D. <u>The Proposed Rule Would Create an Arbitrary and Inconsistent Enforcement Environment</u>

[3] For example, the Small Business Administration generally determines eligibility for Small Business Innovation Research projects at the time of award. Subsequent changes to the applicant's size do not make a previously accurate certification inaccurate.

FCA exposure is generally tied to compliance with rules, regulations, statutes, and contract provisions for which there is some level of uniformity in terms of requirements. In contrast, the proposed rule would link FCA exposure to compliance with institutional policies on free inquiry and expression. That will create an uneven playing field. Put another way, policies across private colleges and universities take many different forms, and what would be permissible at one institution may well be impermissible at another. As a result, the same conduct could create FCA exposure for one institution but not another; that is not a rational way to utilize the FCA as it would lead to inconsistent enforcement and would encourage a "race to the bottom" where private colleges and universities would likely move to have weaker, not stronger, policies.

Similarly, the proposed rule provides no guidance on what type of conduct will be imputed to a private college or university. For example, one court may view a student group not allowing a dissenter to speak as a policy violation but another court would not. Likewise, a university might discipline a faculty member for using ethnically derogatory language but have that decision reversed by a faculty committee—it is unclear how a court would view that and two different courts might reach two different conclusions. Again, the end result would be inconsistent degrees of FCA exposure.

E. Conclusion and Recommendations

Protecting free inquiry and expression is a laudable goal that private colleges and universities support. Indeed, fostering free and open inquiry and expression is fundamental to our institutions' educational and public service missions. However, linking compliance with institutional policies to FCA exposure is not the way to achieve that goal. Doing so will open the door to an undue amount of frivolous FCA litigation that will impose too much cost on private colleges and universities. Moreover, to mitigate the risk of such cases, private institutions will be forced to take a hard look at their policies on free inquiry and expression and assess whether they should be revised to reduce FCA exposure by offering fewer protections. In light of these concerns, we strongly recommend that the Department:

- Remove the requirement that private institutions certify to the Secretary compliance with institutional policies on free inquiry as a material condition of an award; and

- De-link noncompliance with institutional policies on free inquiry from the FCA.

We thank the Department for its consideration of our views.

Mary Sue Coleman, President
Association of American Universities

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