



Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

October 5, 2021

The Honorable Richard Durbin
Chairman,
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Margaret Hassan
United States Senate
Washington, DC 20510

The Honorable James Lankford
United States Senate
Washington, DC 20510

Dear Chairman Durbin, Ranking Member Grassley, Senator Lankford, and Senator Hassan:

We write to you today to express our appreciation for your bi-partisan efforts to strengthen an underutilized fraud-fighting tool, the Program Fraud Civil Remedies Act¹ (PFCRA), through [S. 2429, the Administrative False Claims Act](#). While additional technical assistance will be provided below, CIGIE believes enactment of this bill will benefit taxpayers as well as help deter individuals from committing small-dollar fraud.

The enhancements in S. 2429 address several longstanding issues GAO and CIGIE identified as limiting the effectiveness of the PFCRA.² The reforms are particularly timely as the oversight community addresses fraud in pandemic relief programs.

S. 2429 will streamline PFCRA so that agencies are better equipped to pursue and recover fraudulent expenditures. The Inspector General community voiced strong support for the reforms found within the S. 2429 by designating many of these specific reforms as Legislative Priorities of the Inspector General community for the 117th Congress. We noted the importance of these reforms for every Congress since the 114th.

Background

Often referred to as the "mini-False Claims Act," PFCRA is an underutilized tool to provide administrative civil remedies for false claims of \$150,000 or less and for false statements. According to a 2012 GAO report, many agencies were not using the PFCRA for reasons that include: insufficient resources, cumbersome and time-consuming procedures, availability of alternate remedies, and, in many agencies, the absence of administrative law judges to adjudicate PFCRA cases. Almost a decade later, these

¹ The Program Fraud Civil Remedies Act, codified at 31 U.S.C. §§ 3801-3812.

² See, e.g., <https://www.gao.gov/products/gao-12-275r> (last accessed September 15, 2021) and <https://www.nsf.gov/oig/outreach/sbirworkshop/PFCRA%20WG%20First%20Year%20Report.pdf> (last accessed September 15, 2021).

problems persist. Accordingly, to make PFCRA the fraud-deterrent tool that Congress envisioned, CIGIE has recommended statutory changes to improve and enhance the use and effectiveness of PFCRA. CIGIE's recommendations include updating the decades-old dollar threshold for claims subject to PFCRA, allowing PFCRA decisions to be delegated within the Department of Justice (DOJ), allowing agencies to be made whole from PFCRA recoveries, better aligning PFCRA with the False Claims Act, and expanding who can serve as a hearing official. S. 2429 would collectively implement CIGIE's recommendations and will transform PFCRA into a significant tool to recover fraudulent expenditures for the benefit of taxpayers as well as deter individuals from committing fraud.

Section-by-Section

Section 2(b) of the bill amends PFCRA to include language that is substantially similar to the "reverse false claims" provisions under the False Claims Act. Adopting these amendments would better align PFCRA to the False Claims Act by standardizing the language under PFCRA relating to reverse false claims³ and to clarify that an assessment can be recovered for such claims.

Section 2(c) of the bill modernizes the statutory jurisdictional cap on fraudulent claims that can be pursued using PFCRA. The jurisdictional cap on claims set in PFCRA has not changed since 1986. In 1991, GAO documented widespread concern that the cost of processing a PFCRA claim might exceed the recovery. The reluctance of some Federal agencies to make widespread use of PFCRA has resulted in an enforcement gap in which many cases are not prosecuted because the DOJ often lacks the resources to be able to accept low-dollar cases. That gap has grown due to inflation. Section 2(c) would eliminate the enforcement gap by raising the statutory jurisdictional cap to \$1 million per claim and allowing for inflation-based adjustments. CIGIE has identified several instances where eliminating this enforcement gap would be particularly useful for pandemic oversight.

Section 2(d) of the bill would allow agencies and OIGs to recover the costs of supporting the investigation or a prosecution of a PFCRA action. As mentioned above, in 1991, GAO documented widespread concern that pursuing PFCRA cases was greater than the amount that could be recovered. Cost considerations figured prominently in the 2011 and 2015 GAO and CIGIE publications. Anecdotally, these concerns still loom large when the oversight community, as stewards of public funds, considers the most efficient use of its limited resources. Additionally, PFCRA recoveries currently must be returned to the Treasury as miscellaneous receipts, resulting in agencies expending limited resources to investigate and recover funds that are then not available to execute the agencies' programs. CIGIE believes that agencies could be further incentivized to pursue fraud through PFCRA if they could also be reimbursed for and use the program funds that are recovered. Overall, however, Section 2(d) would greatly enhance agency incentives to pursue fraud through this enhanced fraud fighting tool.

Section 2(e) of the bill would enact new transparency requirements for agencies that would result in various PFCRA metrics being published in the OIG semiannual reports. CIGIE believes the agency reporting requirements will assist Congress and the public to better understand and compare how agencies use PFCRA following its enhancements.

³ Reverse false claims arise when a person withholds information or submits a false record or statement to understate how much money is owed to the Government.

Section 2(f) of the bill would enact measures aimed at increasing the efficiency of DOJ processing of PFCRA referrals. In particular, section 2(f)(2) would allow the Attorney General to delegate the responsibilities of the Attorney General or Assistant Attorney General under PFCRA. Currently, the Attorney General is prohibited from doing so, which in effect requires lower dollar fraud cases to be approved by the highest levels of DOJ. Section 2(f)(2) would enact a CIGIE Legislative Priority and would increase the efficiency of DOJ processing of PFCRA referrals.

Section 2(g) would generally revise the definition of “hearing officials” to include several boards of contract appeals, enacting a CIGIE Legislative Priority. CIGIE believes the current restriction that limits PFCRA presiding officials to administrative law judges in most situations to be an unnecessary constraint. Many agencies, including large agencies and departments, do not employ Administrative Law Judges. Boards of contract appeals are established, independent administrative tribunals that specialize in resolving disputes between agencies and third parties (e.g., contractors). CIGIE believes that Section 2(g) will provide an additional avenue for agencies without administrative law judges to pursue fraud. Further, CIGIE believes section 2(g) rightly maintains the independence of the Boards by allowing the Boards to decide whether to hear a PFCRA referral, to allow Board decisions to be considered a final agency decision, and to allow Boards to promulgate procedures needed to conduct PFCRA hearings.

Section 2(h) will enhance PFCRA by amending the statute of limitations (SOL) under PFCRA to better align with the False Claims Act. The current statute of limitation under PFCRA requires that a hearing be commenced (*i.e.*, a scheduling order be issued) within 6 years after the date on which an allegedly false claim or statement is made. However, this gives the Government less time to file a PFCRA case than under the False Claims Act and, unlike the False Claims Act, there is no provision to account for when the Government has not learned of the fraudulent act. Further, there are a number of lengthy processes which the Government must take prior to the hearing being commenced,⁴ resulting in the Government having significantly less time to bring a PFCRA case than it does a case under the False Claims Act. Section 2(h) would enact a CIGIE Legislative Priority by aligning the statute of limitations under PFCRA to both match the timelines under the False Claims Act and adopt the “discovery” provision from the False Claims Act.

Section 2(i) would also enact a CIGIE Legislative Priority by incorporating by reference the definition of “material” from the False Claims Act, ensuring PFCRA is enforced consistently and fairly. While the term “material” appears in key parts of the current PFCRA statute, the term is not defined. In adopting by reference the False Claims Act definition of “material,” CIGIE believes that Section 2(i) would provide additional clarity and consistency between how the two laws are implemented.

Section 2(j) would require agency heads to promulgate or update regulations and procedures to carry out PFCRA within 180 days of enactment. CIGIE believes this instruction to be important as some agencies either have not promulgated regulations enacting PFCRA or will need to update their regulations to do so. CIGIE believes that this provision will help agencies to implement PFCRA programs

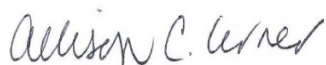
⁴ PFCRA requires the presiding official to commence a hearing within six years, which can only take place after an agency has (1) obtained DOJ approval to proceed; (2) notified the defendant of the proposed action; (3) received a response from the defendant requesting a hearing; (4) notified the presiding official of the defendant’s response; and (5) received notice from the presiding official that a hearing has been commenced.

if they have not done so already or amend their PFCRA regulations to account for the enhancements in the bill.

Conclusion

CIGIE greatly appreciates the bipartisan support for reforming this key tool to fight fraud. Under the best of times, agencies struggle with protecting the integrity of their programs and operations. Those challenges have been exacerbated by the pandemic and large increases to Federal funding and programs to address it. CIGIE believes S. 2429 will help recoup funds, including enhanced pandemic-related funding, lost to fraud by enhancing PFCRA and incentivizing agencies to use it. We thank you for considering these views and are available should you want to discuss CIGIE's technical assistance.

Sincerely,



Allison C. Lerner,
Chair, CIGIE
Inspector General, National Science Foundation



Kathy A. Buller
Chair, CIGIE Legislation Committee
Inspector General, Peace Corps

CC:

The Honorable Gary Peters, Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Rob Portman, Ranking Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Carolyn B. Maloney, Chairwoman, Committee on Oversight and Reform, U.S. House of Representatives

The Honorable James Comer, Ranking Member, Committee on Oversight and Reform, U.S. House of Representatives