

September 8, 2025

Thomas Tso, Solicitor
Federal Labor Relations Authority
1400 K Street NW
Washington, D.C. 20424-0001
Via email to SolMail@flra.gov

RE: Comment on Implementation of the Administrative False Claims Act

Dear Mr. Tso:

The Federal Labor Relations Authority (FLRA) has proposed procedural regulations for the Administrative False Claims Act (AFCA). Implementation of the Administrative False Claims Act, 90 Fed. Reg. 30,019 (proposed July 8, 2025) (to be codified at 5 C.F.R. pt. 2419). The Competitive Enterprise Institute respectfully submits the following comments on that proposed rulemaking.

The FLRA states in the preamble to the proposed regulations that Executive Order 14219, “Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative” (Feb. 19, 2025) (E.O. 14219), directs agencies to evaluate potential new regulations under factors related to legality and the national interest. The FLRA asserts that it “has determined the proposed rule is lawful and in the national interest as the proposed rule is narrowly tailored to comply with the AFCA and will provide a tool for the FLRA to recover misappropriated taxpayer funds and deter misconduct.” 90 Fed. Reg. at 30,019-20. That assertion does not establish that the proposed rule is lawful and does not address the issues E.O. 14219 directed agencies to consider in making that determination.

E.O. 14219 states, “In evaluating potential new regulations, agency heads . . . shall consider, in addition to the factors set out in Executive Order 12866, the factors set out in section 2(a) of this order.” One of the factors in E.O. 14219’s section 2(a) is “unconstitutional regulations and regulations that raise serious constitutional difficulties.” E.O. 14219 § 2(a)(i). A later presidential memorandum pointed out more specifically serious constitutional difficulties that regulations can raise. That memorandum directed agency heads to evaluate the lawfulness of regulations under ten Supreme Court decisions, one of which is *SEC v. Jarkesy*, 603 U.S. 109 (2024). “Directing Repeal of Unlawful Regulations,” Compilation of Presidential Documents 202500466 (Apr. 9, 2025), <https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/>.

Jarkesy held that the Seventh Amendment right to a jury trial applies to statutory claims that are legal in nature. These include administrative actions that are akin to common law causes of action and seek civil penalties.

The proceedings governed by this new regulation fall into this exact category: they provide for the administrative imposition of civil penalties. 31 U.S.C. § 3802(a). That in itself is all but dispositive that a claim is legal in nature. *Jarkesy*, 603 U.S. at 123. The Supreme Court went on to say in *Jarkesy*, “The close relationship between the causes of action in this case and common law fraud confirms that conclusion.” *Id.* at 125. The same is true here. The Administrative False Claims Act was adopted to govern “smaller, and potentially more frequent, instances of fraud committed against the government” than does the False Claims Act (FCA). *Senate Approves Administrative FCA Legislation*, 65 No. 14 Gov’t Contractor ¶ 91 (Apr. 12, 2023) (quoting Sen. Charles Grassley). The Supreme Court has recognized the close relationship between common law fraud and the FCA.

That the text of the FCA tracks the common law is unsurprising because, as we have recognized, the FCA is largely a fraud statute. *See* [*Universal Health Services, Inc. v. United States ex rel.*] *Escobar*, 579 U.S. [176], at 187–188, and n. 2. Indeed, the FCA was first enacted in 1863 to “‘sto[p] the massive frauds perpetrated by large contractors during the Civil War.’” *Id.*, at 181. To this day, the FCA refers to “‘false or *fraudulent*’” claims, pointing directly to “the common-law meaning of fraud.” *Id.*, at 187 (emphasis added).

United States ex rel. Schutte v. SuperValu Inc., 598 U.S. 739, 750–51, (2023). Further evidence is found in *Universal Health Services, Inc. v. U.S.*, 579 U.S. 176 (2016), where the Court notes that the term “fraudulent,” in the context of the FCA, “is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud.” *Id.* at 187. As one would expect, the Seventh Amendment right to trial by jury applies to FCA cases. *See U.S. ex rel. Drakeford v. Tuomey Healthcare Sys., Inc.*, 675 F.3d 394, 405 (4th Cir. 2012) (holding that the district court impermissibly resolved a factual issue in an FCA claim before a jury had adjudicated it thereby depriving the defendant-appellee of its right to a jury trial).

AFCA cases have the same close relationship to common law fraud that FCA cases have. Accordingly, the AFCA, “when read with due regard for the constraints that the U.S. Constitution imposes,” *Nat’l Guard Bureau Air Nat’l Guard Readiness Center and Ass’n of Civilian Technicians*, 72 F.L.R.A. 350, 353 (2021), also implicates the Seventh Amendment. *Cf. Feature Comment: The Significance of the Fiscal Year 2025 National Defense Authorization Act to Federal Procurement Law— Part II*, 67 No. 4 Gov’t Contractor ¶ 19 at 5 (Jan. 29, 2025). Defendants in AFCA cases are entitled to a jury trial in an Article III court before a civil penalty may be imposed on them. The proposed regulations establish procedures that make no provision for jury trials and would thereby violate the Seventh Amendment.

The FLRA should not adopt unconstitutional regulations. Instead it can establish procedures implementing the AFCA that do not violate the Seventh Amendment and do not require

legislation. The FLRA should revise its proposed regulations to provide that civil penalties are available in the administrative proceedings that they establish only if the defendant consents to the administrative proceedings and to an agency final decision on the merits, waiving the defendant's right to a jury trial in an Article III court. *See* Christopher J. Walker & David Zaring, *The Right to Remove in Agency Adjudication*, 85 Ohio St. L.J. 1 (2024). Otherwise, civil penalties for a false claim may be recovered in a civil action pursuant to 31 U.S.C. § 3730.

Finally, the Administrative Procedure Act provides that in administrative hearings “the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). The proposed regulations do not place the burden of proof on the proponent of an order, or on the opponent either. Proposed section 2419.5 entitled “Hearing” only sets forth the determinations that the presiding officer has to make without indicating who has to prove them or how.

Thank you for your consideration of these comments.

Cordially yours,

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