FEDERAL DEPOSIT INSURANCE CORPORATION
OFFICE OF INSPECTOR GENERAL
Policies and Procedures Manual

PART	IV	Investigations Policies and Procedures
SECTION	OIG-420	Legal Guidelines
CHAPTER	420.3	Program Fraud Civil Remedies Act

1. Purpose. This chapter establishes the policies and procedures for the evaluation and prosecution of cases under the Program Fraud Civil Remedies Act (PFCRA).

2 Background. In order to fill a perceived gap in addressing small-dollar fraud cases (under $150,000) against federal agencies, Congress established an administrative remedy known as PFCRA in 1986. PFCRA is designed to permit an agency to initiate administrative litigation and hold liable persons who have defrauded the agency of smaller sums, and whom the Department of Justice (DOJ) decides not to prosecute.

FDIC regulations generally track the model regulations that were developed in 1987 by DOJ and the Council of Counsels to the Inspector General, under the auspices of the President's Council on Integrity and Efficiency (PCIE). In certain key areas, as noted below, FDIC has adopted a different approach from that of the Model Regulations. The reasons for the differences, according to the regulation, are due to the FDIC's status as an independent regulatory agency.

FDIC has narrowed the areas to which PFCRA applies. (b)(2)

3. Applicable FDIC Program Fraud. FDIC regulations specifically include false claims and statements made in connection with FDIC employment matters, FDIC contracting activities, and the FDIC Asset Purchaser Certification Program.

a. FDIC employment matters may include the submission of falsified travel vouchers or petty cash vouchers; false statements made on SF-171's or other job application or promotion materials; falsification of T&A forms; or other false claims and statements made in connection with areas related to pay and benefits.

b FDIC contracting activities would include submission of any invoice, bill, or claim that is false; a claim by a contractor for payment for work not performed (or underperformed) or goods not delivered (in whole or in part); providing a false certification on any form required to be submitted to FDIC; the failure to provide a certification or declaration

where the law requires one to be filed. This also includes contracting by the FDIC in receivership and liquidation activities.

c. The FDIC Asset Purchaser Certification Program is covered by PFCRA with regard to any forms or situations requiring a certification by a purchaser of FDIC assets, where the person providing the certification does so falsely, or fails to file a declaration or certification that is required by law to be filed.

4. Programmatic Limitations. By regulation, the FDIC has chosen to exclude certain program areas from consideration of prosecution under PFCRA. Matters relating to deposit insurance are excluded, as are most areas where FDIC has other civil or administrative remedies available to seek redress for wrongful or fraudulent conduct. Thus, except as noted above, the FDIC will not prosecute a PFCRA case where the false statements or claims were made in connection with programs related to the FDIC's regulatory, supervision, enforcement, insurance, receivership, or liquidation responsibilities.

5. Elements of a PFCRA Case. The FDIC's case will depend upon the successful development in the OIG investigation of the facts needed to prove all the elements of the case. These elements include:

- the falsity involved,
- the knowledge by the defendant of the falsity,
- the time period during which the false claims or statements were submitted to the agency,
- the fact of submission to the agency, and
- the dollar amount of the fraud against the agency.

a. The Falsity of Claims. The PFCRA provides FDIC with a remedy for false, fictitious, or fraudulent claims. Four types of circumstances will support a finding of falsity:

(1) the claim is outright false, fictitious, or fraudulent; or

(2) a material fact that is false, fictitious, or fraudulent was part of a written statement that supported the claim or was included in the claim; or

(3) a written statement supporting or included in the claim is false, fictitious, or fraudulent because a material fact has been omitted, and the person making the statement had a duty to include that fact; or

(4) the property or services were never provided as claimed.

(b)(2)

b. False Statement(s). The PFCRA also provides FDIC with a remedy for false, fictitious, or fraudulent statements. Two kinds of circumstances will support a finding of falsity for a false, fictitious, or fraudulent statement:

(1) the statement asserts a material fact that is outright false, fictitious, or fraudulent; or

(2) the statement omits a material fact that the person making the statement had a duty to include and, as a result of the omission, the statement becomes false, fictitious, or fraudulent.

In both cases, the statement needs to be accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

c. Knowledge of the Falsity and Intent. In order for the defendant to be found liable for a false claim, the agency will have to prove that the person making the claim knew or had reason to know that one or more of the circumstances listed above existed. The knowledge can be direct or it can be constructive, i.e., that the defendant acted either in deliberate ignorance of or with reckless disregard for the truth.

(1) The FDIC does not have to prove that the defendant had specific intent to defraud the FDIC. Rather, the agency simply has to prove the falseness of the claim or statement and the defendant's knowledge of the falsity in order for the defendant to be found liable under PFCRA.

d. Monetary Threshold. PFCRA is designed to address small dollar fraud that does not rise to the level where the DOJ will prosecute a civil fraud claim. The DOJ will not authorize a PFCRA case where the amount of fraud from a single claim, or from a group of related claims submitted at the same time, exceeds $150,000. However; an investigation could include multiple separate claims that together total more than $150,000, as long as no single claim (or group of related claims) exceeds that amount.

e. Statute of Limitations. Under the rules, any administrative hearing must begin within six years from the date that the defendant submitted the false claim or statement.

f. Burden of Proof. In a PFCRA case, the government must prove the elements of the case by a preponderance of the evidence. The amount of proof needed at this level is often compared to proving the case with at least 51% of the evidence supporting a finding of liability.

g. Remedies. In the case of claims that the FDIC has paid, the agency is entitled to double damages (technically, these are deemed to be "assessments" in lieu of damages) plus penalties up to $5,000 per claim or statement. For false claims that had not been paid, and for false statements, the FDIC is entitled to penalties up to $5,000 per claim or statement, regardless of whether the money, property, or services has actually been delivered.

(1) The defendant is considered to have made a claim when the claim has been actually submitted to the FDIC, or when the claim has been submitted to any agent acting on behalf of the FDIC. Similarly, a statement is considered to have been made to the FDIC when it actually has been made to the agency or to any person or entity acting on behalf of the FDIC.

6. Path of Litigation: From OIG Case to Legal Division Case

a. Origin of Case. A case that is suitable for PFCRA may originate in several ways. The dollar amount of the fraud may be too small to interest the DOJ in prosecuting. This is the kind of case which provided the major political thrust for the enactment of PFCRA.

(b)(2)

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b. Investigation and Recommendation to Prosecute. The regulations provide that, "if the [OIG] concludes that an action under the PFCRA may be warranted, the [OIG] will submit a report containing the findings and conclusions of such investigation to the [General Counsel]." It is likely that OIG and the Legal Division will have to develop a mutual understanding of what

evidence will be needed to comprise the contents of the required report, which may differ somewhat from the standard OIG Report of Investigation.

(1) (b)(2)

(2) The PFCRA provides the OIG with subpoena authority to investigate these cases. However, this subpoena authority coincides with the same authority under the IG Act, which is sufficiently broad to cover PFCRA investigations. As a matter of office policy, OIG will use the subpoena authority derived under the IG Act to investigate PFCRA cases.

(3) (b)(2)

c. Review by General Counsel. Before a case can be brought under PFCRA, the General Counsel or his designee must determine, based on the report from OIG, that adequate evidence exists to prove that the potential defendant (usually the subject of the investigation) is liable under the regulations. If the General Counsel makes this determination, then he/she must transmit to the Attorney General a written notice indicating his intention to prosecute the case under PFCRA.

(1) The General Counsel's notice will include a fairly comprehensive statement of the case, including a statement of the reason for deciding to go forward with the case, the supporting evidence, the mitigating or exculpatory evidence, an estimate of the amount of fraud involved, and a statement "that there is a reasonable prospect of collecting" an appropriate amount of penalties and assessments." This last item "may be based upon information then known, or upon an absence of any information indicating that the [defendant) may be unable to pay such amount."

d. Approval by DOJ

(1) The DOJ must approve, in writing, the agency's prosecution of a PFCRA case. The PFCRA gives the DOJ 90 days in which to respond to the agency, with either disapproval or with an approval. Once this approval is received by the General Counsel, an administrative complaint may be issued against the defendant.

(2) At any time during the process, DOJ may transmit a written finding that the "continuation of the administrative process...may adversely affect any pending or potential criminal or civil action related" to the PFCRA case. At that point, the FDIC Board of Directors will "immediately" stay the process. The PFCRA case may resume only by Board order and only after the Board received a written authorization from the Attorney General.

e. Litigation by Legal Division

(1) Under the rules, the actual litigation of PFCRA cases will be conducted by attorneys in the Legal Division. (b)(2)

(2) The defendant is entitled to all of the exculpatory evidence that the agency possesses, even if that evidence is contained in material that is otherwise privileged. (The one exception to this requirement is that the written notice from the General Counsel to the DOJ is not available to the defendant under any circumstances.)

f. Hearing and Decision by Administrative Law Judge (ALJ)

(1) The PFCRA litigation and hearing process is a full-blown administrative litigation process, replete with discovery, depositions, procedural rules, various powers given to the ALJ, protective orders, witnesses, recorded testimony, examination and cross-examination, etc.

(2) The ALJ will issue a decision based only on the record produced at the hearing. If the defendant is found liable, the regulations provide that, "...ordinarily double damages and a significant civil penalty should be imposed." The rules also provide a lengthy list of factors that may either mitigate or aggravate the penalties and assessments that are imposed.