False Claims, Real Climate Harm: How Whistleblowers Can Fight Fraud in the Renewable-Energy, REC, and Carbon-Offset Markets

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ABSTRACT

This Note argues that a federal whistleblower statute, the False Claims Act ("FCA"), can combat fraud in the markets for renewable energy, renewable-energy certificates ("RECs"), and carbon offsets. These assets' sellers purport to fight climate change on behalf of their customers. However, those sellers have several opportunities and incentives to commit fraud. Federal agencies and contractors will soon risk this fraud, as they will need to buy renewable energy, RECs, and offsets to meet new federal sustainability goals. This Note explains how each asset's sellers are most likely to defraud the government. It argues that whistleblowers with knowledge of this fraud can sue the perpetrators—and collect a bounty—using the False Claims Act. This Note further argues that the federal government should incorporate the lessons of previous FCA cases into its procurement rules for these assets. By doing so, the government can maximize climate whistleblowers' odds of success.

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INTRODUCTION

The U.S. government is bringing its buying power to bear on climate change. On December 6, 2021, President Biden issued an Executive Order entitled "Catalyzing Clean Energy and Jobs through Federal Sustainability."[1] It aims to transition the federal government to one-hundred percent carbon-free electricity by 2030, reduce federal greenhouse gas emissions sixty-five percent by 2030, and achieve "net-zero emissions" from federal procurement.[2] Meanwhile, the Inflation Reduction Act Biden signed in August 2022 requires the federal government to "identify and label construction materials and products that have substantially lower levels of embodied greenhouse gas emissions associated with all relevant stages of production, use, and disposal," and to reimburse and incentivize federal contractors that use these low-carbon materials.[3]

These goals signal a shift in federal spending. Transitioning to clean electricity will mean buying more clean electricity—or at least more Renewable Energy Certificates ("RECs"). Each REC represents the environmental benefits of one megawatt-hour of renewable electricity.[4] It can be bought and sold separately from the power, and only the REC owner can claim to use renewable energy.[5]

Reducing carbon emissions and achieving "net-zero" procurement, meanwhile, will require buying carbon offsets. Several linchpins of modern supply chains, like aviation and steel production, rely on fossil fuels.[6] Agencies and contractors that need these services can only meet "net-zero" targets by buying carbon offsets. Carbon offset buyers compensate for their own emissions by paying an offset project to keep one metric ton of CO_2 from being emitted or to remove that ton of carbon from the atmosphere.

The government will need to buy offsets, RECs, and renewable energy on a massive scale to meet the Biden administration's and Congress's goals. In 2020, federal agencies consumed an amount of electricity equal to twenty-seven percent of all renewable electricity sold that year, and more than sixty percent of all

1. Exec. Order No. 14,057, 86 Fed. Reg. 70,935 (Dec. 8, 2021).
2. *Id.* at 70,935.
3. Inflation Reduction Act of 2022, Pub. L. No. 117-169 § 179(a), 136 Stat. 118, 2077–78, 2085 (codified at 23 U.S.C. § 179).
4. *Renewable Energy Certificate Monetization*, EPA, https://perma.cc/VS55-42SK (last visited Feb. 1, 2022).
5. *Id.*
6. *See* Samantha Gross, *Why Are Fossil Fuels So Hard to Quit?*, BROOKINGS INST. (June 2020), https://perma.cc/XA6A-VL3Y.

electricity sold as unbundled RECs.[7] Estimates of the carbon offset market's size vary widely,[8] but with the administration pursuing a goal of net-zero procurement, federal agencies and contractors are poised to spend heavily on offsets as well.

To actually count towards these goals, however, RECs and offsets in the federal supply chain will need to meet certain criteria. A REC will need to represent a unique megawatt-hour of renewable energy generated; an offset must signify an actual ton of carbon kept out of the atmosphere. The government will find it hard to verify that RECs and offsets meet these criteria. In buying them, it runs the risk of fraud.

Both assets' sellers and their intermediaries have several chances to lie about their products' origins. REC sellers can defraud their buyers by selling the same REC on multiple registries.[9] Because a REC represents electricity's renewable attributes, selling the certificate to one buyer, then marketing the electricity to someone else as "renewable," is also considered deceptive. In both cases, the same REC is sold twice, despite only representing one renewable megawatt-hour.[10]

Carbon offsets, meanwhile, could be generated several different ways: reducing emissions, sequestering carbon in conserved forests, returning it to the soil with sustainable farming practices, or scrubbing it from the air by planting trees or using advanced technology.[11] A company or agency might specify which practices count towards its net-zero goals, only to have an offset seller feign compliance with those methods.[12]

Finally, both RECs and offsets are issued and tracked by third-party registries. Typically, these registries maintain audit and verification standards that sellers

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7. *See* JENNY HEETER, ERIC O'SHAUGHNESSY & REBECCA BURD, NATIONAL RENEWABLE ENERGY LABORATORY, STATUS AND TRENDS IN THE VOLUNTARY MARKET (2021 DATA) 8 (2021), https://perma.cc/3HCL-4FKC (stating approximately 192.1 million megawatt hours of renewable electricity were sold in 2020, and 86.4 MWH of that was sold as unbundled RECs); *Federal Agency Use of Renewable Energy*, EPA, https://perma.cc/WW9X-K7XE (last visited Mar. 19, 2020) (Federal agencies used a total of 5.2 million MWH of electricity in FY 2021).

8. *See* Umair Irfan, *Can You Really Negate Your Carbon Emissions? Carbon Offsets, Explained.* VOX (Feb. 27, 2020), https://perma.cc/RZ2U-NMPH (noting that about $100 million worth of voluntary offsets were purchased in 2018, but that "estimates of the size of the global carbon compliance offset market range between $40 billion and $120 billion").

9. *See* Lisa Koperski, *Why the Renewable Energy Credit Market Needs Standardization,* 13 WASH. J.L. TECH. & ARTS 69, 93 (2017) (discussing the risk of "double counting" and concluding that "while little evidence exists that double counting has occurred in the REC market, this does not necessarily mean that double counting has not occurred. It is difficult to prove a null hypothesis and Registries are not audited like public companies").

10. 16 C.F.R. § 260.15(d).

11. *See Approved Methodologies,* AM. CARBON REGISTRY, https://perma.cc/K4ZJ-WRVE (last visited Feb. 2, 2022); *see also* Irfan, *supra* note 8.

12. *See* MYLES ALLEN ET AL., THE OXFORD PRINCIPLES FOR NET ZERO ALIGNED CARBON OFFSETTING 1 (2020) https://perma.cc/6RNT-QVNR (recommending that net-zero-aligned offset projects use certain methods of carbon removal).

must meet.[13] Sellers may be able to evade these standards by providing bad data or establishing fraudulent relationships with auditors.

In short, the federal government is entering a complex market with several opportunities for fraud. The federal government has long addressed this risk by incentivizing whistleblowers to step forward. Since the Civil War, the False Claims Act ("FCA") has attached civil liability to fraud against the government, allowed for recovery of treble damages, and given the whistleblower—also known as a "relator"—a share of those damages, or of the final settlement.[14] The U.S. Department of Justice ("DoJ") estimates that FCA litigation recovered $38.9 billion for the federal government from 1986 to 2013.[15]

The FCA does not just recover taxpayer money. Its stiff penalties aim to deter fraud among government contractors. In 1993, the DoJ stated that "as recoveries have increased, the contracting community is more aware of the watch-dog effect of *qui tam* [another term for FCA litigation], which undoubtedly has led to the deterrence of fraudulent conduct."[16] Researchers examining the healthcare sector have estimated that each dollar paid to settle an FCA lawsuit deters ten times as much additional fraud.[17]

This Note argues that FCA deterrence and recovery can now reach the renewable energy, REC, and offset markets. First, it explains how both the FCA and environmental statutes have failed environmental whistleblowers in the past, and why the government's new procurement plans make the FCA a viable means to reveal REC, renewable energy, and offset fraud. For each of these three products, this Note examines how sellers are most likely to defraud the federal government. These scenarios have parallels in recent FCA cases before the Supreme Court, U.S. Courts of Appeals, and U.S. District Courts. Their holdings show that climate whistleblowers have a strong chance of satisfying each element of an FCA case. Recent FCA cases also reveal how the federal government can craft its procurement rules to maximize these plaintiffs' odds of success.

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13. *See, e.g.,* AM. CARBON REGISTRY, ACR VALIDATION AND VERIFICATION STANDARD (May 2018); N. AM. RENEWABLES REGISTRY, NORTH AMERICAN RENEWABLES REGISTRY OPERATING PROCEDURES 24–25 (2018), https://perma.cc/9N48-TP3P (requiring all data from renewable power generators to undergo a validity check prior to REC generation).

14. 31 U.S.C. §§ 3729–32.

15. *See* John R. Thomas, Jr., et al., *The False Claims Act Past, Present, and Future,* 63 FED. L. 64, 67 (Dec. 2016) (citing JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1–26 (4th ed. 2016)).

16. *Id.* at 67 (quoting CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2.11, 62–63 (2d ed. 2010)).

17. *See* Jetson Leder-Luis, *Can Whistleblowers Root Out Public Expenditure Fraud? Evidence from Medicare*, (Boston Univ., Questrom Sch. Of Bus., Working Paper, 2020) https://perma.cc/Q8KL-WSM5 (estimating that "deterrence from $1.9 billion in whistleblower settlements generated Medicare cost savings of nearly $19 billion"); David H. Howard & Ian McCarthy, *Deterrence Effects of Antifraud and Abuse Enforcement in Health Care* 1 (National Bureau of Economic Research, Working Paper 27900), https://perma.cc/K8HF-BNHS (describing that after settling an FCA case that alleged wrongful Medicare billing for $280 million, hospitals made changes that saved the health care system $2.7 billion over 10 years).

I. BACKGROUND: THE FALSE CLAIMS ACT'S DIM PAST AND BRIGHT FUTURE ON ENVIRONMENTAL ISSUES

Until now, the FCA has had little to do with environmental protection. The FCA was first enacted to fight military contractor fraud during the Civil War.[18] Its main provisions let whistleblowers sue anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval,"[19] who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,"[20] or who makes "a false record or statement" material to these acts.[21] The plaintiff recovers fifteen to thirty percent of the total damages or settlement, and the U.S. Treasury takes the rest.[22]

Congress has also recognized whistleblowing's value for protecting the environment. Many environmental statutes protect whistleblowers from retaliation.[23] Some offer bounties for revealing violations.[24] Typically, these provisions cap awards at $25,000 or less.[25] That's often too little to coax out insider knowledge at large industrial facilities, whose workers risk retaliation for reporting illegal pollution and other environmental hazards.[26] Over the years, many whistleblowers have shunned environmental laws' whistleblower provisions in favor of the FCA, with limited success.

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18. *See* TOM MUELLER, CRISIS OF CONSCIENCE: WHISTLEBLOWING IN AN AGE OF FRAUD 14–16 (2019).

19. 31 U.S.C. § 3729(a)(1)(A).

20. 31 U.S.C. § 3729(a)(1)(G).

21. *See* 31 U.S.C. § 3729(a)(1)(B) ("knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim"); 31 U.S.C. § 3729(a)(1)(G) ("knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government"); *see also* 18 U.S.C. § 1001 (criminalizing making a false statement to the federal government).

22. 31 U.S.C. § 3730(d).

23. *See, e.g.*, 15 U.S.C. § 2622 (protections from retaliation for revealing violations of the Toxic Substances Control Act); 42 U.S.C. § 7622 (protections from retaliation for violations of the Clean Air Act); 42 U.S.C. §9610 (CERCLA); 33 U.S.C. § 1367 (Clean Water Act); 42 U.S.C. § 300j-9(i) (Safe Drinking Water Act).

24. *See* Christopher K. Warren, *Blowing the Whistle on Environmental Fraud: How Congress Can Help the EPA Enlist Private Resources in the Fight to Save the Planet*, 42 B.C. ENV'T AFF. L. REV. 195, 215–16 (2015) (noting a lack of bounty caps in the Endangered Species Act and the Act to Prevent Pollution from Ships, but caps ranging from $2,500 to $25,000 for the Clean Air Act, CERCLA, Bald and Golden Eagle Conservation Act, and the African Elephant Conservation Act).

25. *Id.*

26. *See, e.g.*, First Amended Complaint for Damages Under Federal False Claims Act at 2, 5, 9, United States ex rel Simoneaux v. E.I. DuPont de Nemours and Co., No. 3:12-cv-00219-SDD-SCR, 2014 WL 4352185 (M.D. La. Apr. 16, 2012) (alleging that a DuPont chemical plant employee's attempts to report illegal toxic gas release drew threats and harassment from plant manager); MUELLER, *supra* note 18, at 294–310 (discussing harassment, reassignment, and dismissal of engineers for reporting serious safety problems at nuclear cleanup sites).

These plaintiffs have alleged that their employers violated an environmental statute and concealed the violation.[27] In doing so, the plaintiffs argued, the defendants defrauded the government of fines it otherwise might have collected.[28] Courts have been skeptical of this approach. In one 2016 case, the Fifth Circuit observed that "most regulatory statutes . . . impose only a duty to obey the law, and the duty to *pay* regulatory penalties is not 'established' until the penalties are assessed."[29] Because the government has a choice of whether to assess penalties, whistleblowers can rarely prove that an environmental violation actually costs the government money.

The markets for RECs, carbon offsets, and assets that rely on them are different. Rather than mandate environmentally-friendly actions, RECs and offsets turn those actions into intangible assets that can be bought and sold. When the federal government starts buying assets, FCA liability will follow. This law will soon enable whistleblowers to reveal REC and offset fraud. Previous FCA cases bode well for their success in court—so long as the government incorporates these cases' lessons into its procurement rules.

II. ANALYSIS

A. THE FALSE CLAIMS ACT, RECS, AND "RENEWABLE" POWER

In 2016, the Supreme Court held that "the False Claims Act encompasses claims that make fraudulent misrepresentations, which include certain misleading omissions."[30] Whistleblowers will soon need a legal strategy to confront "misleading omissions" by the federal government's electricity suppliers.

The nature of RECs gives renewable energy retailers a means to defraud the federal government by omission. According to the EPA, a REC "represents the legal property rights to the 'renewable-ness'—or all non-power attributes—of renewable electricity generation . . . The REC owner has exclusive rights to make

27. *See* United States *ex rel.* Pickens v. Kanawha River Towing, 916 F. Supp. 702, 705 (S.D. Ohio 1996); United States *ex rel.* Marcy v. Rowan Companies, 520 F.3d 384, 386 (5th Cir. 2008); United States *ex rel.* Coppock v. Northrop Grumman Corp., No. 398CV2143D, 2002 WL 1796979, at *1 (N.D. Tex. Aug. 1 2002); United States *ex rel.* Darian v. Accent Builders, Inc., No. CV 00-10255 FMC (JWJx), 2005 WL 8161567, at *4 (C.D. Cal. Jan. 7, 2005); United States *ex rel.* RBC Four Co., v. Walt Disney Co., No. CV 12-08036 DMG (PLAx), 2013 WL 12131741, at *1 (C.D. Cal. Aug. 9, 2013); United States *ex rel.* Stevens v. McGinnis, No. C-1-93-442, 1994 WL 799421, at *1–2 (S.D. Ohio Oct. 26, 1994) (all unsuccessful FCA claims that stemmed from violations of the Clean Water Act); *see also* United States *ex rel.* Simoneaux v. E.I. DuPont de Nemours & Co., 843 F.3d 1033 (5th Cir. 2016); United States *ex rel.* Torres v. BASF Co., 929 F.3d 721, 723 (D.C. Cir. 2019) (unsuccessful FCA case based on violations of the Toxic Substances Control Act); United States *ex rel.* Bain v. Georgia Gulf Corp., 386 F.3d 648, 651 (5th Cir. 2004) (unsuccessful FCA claim based on violations of the Clean Air Act).

28. *Pickens*, 916 F. Supp. at 705.

29. *Simoneaux*, 843 F.3d at 1040; *see also Torres*, 929 F.3d at 726 (holding that "the phrase 'in lieu of any civil penalty' [in the Toxic Substances Control Act] means that not every TSCA violation carries a civil penalty. In short: [the whistleblower's] theory of automatic civil penalty liability is incorrect.").

30. Universal Health Care Services v. United States *ex rel.* Escobar, 579 U.S. 176, 187 (2016).

claims about 'using' or 'being powered with' the renewable electricity associated with that REC."[31] By purchasing RECs that correspond to its electricity use, a business can advertise that it is powered by renewable energy.[32] Electricity suppliers can also buy RECs to meet state renewable energy generation requirements without generating any renewable electricity themselves.[33]

Whenever they sell RECs, renewable energy producers have an opportunity for fraud. Because only the REC owner can claim to be powered by renewable electricity, REC sellers could defraud their customers by generating renewable energy, selling the RECs, then marketing the associated electricity as "renewable." Some federal regulators already consider this illegal in other contexts. The Federal Trade Commission's ("FTC's") "Green Guides" for environmental marketing claims explain that "if a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive"—and in violation of the Federal Trade Commission Act—"for the marketer to represent, directly or by implication, that it uses renewable energy."[34]

To prevent this deception, the FTC expects utilities to tell consumers when they have sold their electricity's RECs. In 2015, for instance, the agency cautioned Vermont-based Green Mountain Power that it "may not have clearly and consistently communicated the fact that it sells Renewable Energy Certificates . . . to entities outside of Vermont for most of its renewable generating facilities and, as a result, may have created confusion among Vermont electricity customers about the renewable attributes of their electricity."[35]

"Although no findings have been made that these claims violate the law," the agency's letter continued, "we urge [Green Mountain Power] in the future to prevent any confusion by clearly communicating the implications of its REC sales for Vermont customers."[36]

Federal agencies have yet to admonish their own power suppliers in this way. But some federal procurement policies reflect a similar understanding that power must be packaged with its REC to count as renewable. The Obama administration had instructed agencies to use RECs, not megawatt-hours, to measure their progress towards renewable energy goals.[37] Initial guidance on the Biden administration's

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31. See Renewable Energy Certificate Monetization, *supra* note 4.

32. *See* 16 C.F.R. § 260.15(d).

33. *See State Solar Renewable Energy Certificate Markets*, EPA, https://perma.cc/MF3T-L47H (last visited Mar. 19, 2022).

34. 16 C.F.R. § 260.15(d); 16 C.F.R § 260.1(a) (citing 15 U.S.C. § 45).

35. Letter from James A. Kohm, Associate Director, Division of Enforcement, U.S. Fed. Trade Comm'n to Jeffrey Behm, 2015 WL 628252 (Feb. 5, 2015).

36. *Id.*

37. *See* Pres. Mem. No. 237, Federal Leadership on Energy Management, 78 FR 75,209 (Dec. 5, 2013) (instructing agencies to measure their progress towards 20-percent renewable energy goal "by reference to the ownership of renewable energy certificates for electric energy consumed."); U.S. DEP'T OF ENERGY, GUIDE TO INTEGRATING RENEWABLE ENERGY IN FEDERAL CONSTRUCTION 7 (2012), https://perma.cc/VWW3-DP67 ("The renewable energy certificates (RECs) for the power must be retained or traded for other RECs to meet the [Energy Policy Act of 2005] bonus provision").

goals states that "agencies must maintain or obtain and retire any attributes representing the renewable or zero-carbon nature of the purchased electricity, such as renewable energy certificates."[38] The White House has instructed the EPA, Department of Energy, and Council on Environmental Quality to prepare carbon-free electricity accounting standards.[39]

The federal government has thus made clear that it only considers electricity "renewable" when it is packaged with the corresponding RECs. Yet its power suppliers have both a financial incentive to sell REC-stripped power as renewable and a way to do so covertly. Remember that RECs are bought and sold on several different registries.[40] A utility might sell a REC on one registry, then use another registry to sell the same REC, packaged with its renewable power, to the federal government.[41] By doing so, the utility could profit twice from the same REC—and thwart the government's sustainability goals.

With the right rules for renewable energy sales, one of the seller's employees can blow the whistle on this fraud and collect a bounty using the FCA.[42] FCA liability covers anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" for federal payment.[43] This means that whistleblowers must show that hiding a prior REC sale was: (1) false; (2) material to the claim for payment; and (3) made knowingly. Recent cases reveal a federal policy that can help whistleblowers plead each element of this statute: a ban on selling RECs before selling the associated electricity to the federal government.

1. Falsity

When a power company sells the federal government renewable energy without mentioning a prior REC sale, it will have made a deceptive omission. The Supreme Court has held that a deceptive omission is false for FCA purposes when it meets two criteria:

1. "The claim [for payment] does not merely request payment, but also makes specific representations about the goods or services provided;"[44] and
2. "The defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[45]

38. Memorandum for the Heads of Executive Departments and Agencies: Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability (M-22-06), from the Executive Office of the President 3 (Dec. 8, 2021).

39. *Id.*

40. *See* Koperski, *supra* note 9, at 88 ("In the United States, ten different registries created between 2002 and 2016 track RECs").

41. *Id.* at 93.

42. 31 §§ U.S.C. 3729–30.

43. 31 U.S.C. § 3729(a)(1)(B).

44. Universal Health Services, Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 190 (2016).

45. *Id.*

A sale of REC-stripped "renewable" power could probably satisfy both elements. When a utility markets a megawatt as "renewable," it has given that electricity a label—a label that the federal government will soon require for its power purchases. The Ninth and Fourth Circuits have found that labels are "specific representations" when they imply compliance with a regulatory or contractual requirement[46] and "misleading half-truths" when that requirement has not actually been met.[47] If the federal government bans prior REC sales for its energy procurement, a court could apply these holdings to find that labeling a megawatt as "renewable" is a "specific representation" that its REC had not been sold elsewhere, and a "misleading half-truth" if that REC had already been sold.

Once a whistleblower has established these two criteria, a REC-less energy sale will satisfy the FCA's falsity requirement. However, this will not automatically win the case. The whistleblower will also need to prove that this false statement was material to the utility's claim for payment, and that the utility made it knowingly.[48]

2. Materiality

Whistleblowers can easily show the next element, materiality, if the federal government refuses to purchase REC-less renewable energy—or, phrased differently, if it bans the sale of RECs to third parties before selling the associated energy to the government. In doing so, the federal government will condition its renewable energy purchases on no prior REC sales. In 2017, the Ninth Circuit found that when a rule is an express condition of payment, hiding non-compliance with that rule is a "misleading omission."[49]

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46. *See* United States *ex rel*. Campie v. Gilead Sciences, Inc., 862 F. 3d 890, 902–03 (9th Cir. 2017) ("Gilead represented that it provided medications approved by the FDA that were manufactured at approved facilities and were not adulterated or misbranded. Just as payment codes correspond to specific health services [in Universal Health Care] . . . these drug names necessarily refer to specific drugs under the FDA's regulatory regime") (citing Universal Health Servs., Inc. v. United States *ex rel*. Escobar, 579 U.S. 176, 189 (2016)); United States v. Triple Canopy, Inc., 857 F.3d 174, 178 (4th Cir. 2017) (finding "specific representation" requirement satisfied by invoices that only listed guards employed and hours worked, without explicitly stating that guards had satisfied marksmanship requirements.

47. *See Campie*, 862 F.3d at 903 (labeling brand-name drugs was "misleading" because "Gilead acquired unapproved FTC from a Chinese supplier, re-labeled it to conceal its true nature, falsified test results that showed it was contaminated, and then used that unapproved and contaminated FTC in drugs for which payment was requested and received"); *Triple Canopy*, 857 F. 3d at 178 (finding invoices were "misleading" because "anyone reviewing Triple Canopy's invoices 'would probably—but wrongly—conclude that [Triple Canopy] had complied with core [contract] requirements'").

48. *See* 31 U.S.C. § 3729(a)(1)(B) (attaching FCA liability to anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim").

49. *See Campie*, 862 F.3d at 899, 905 (holding that "to state a false certification claim under the False Claims Act (FCA), it is not enough to allege regulatory violations; rather, the false claim or statement must be the *sine qua non* of receipt of state funding," and finding that lying about FDA approval met this standard because Medicare and Medicaid regulations explicitly conditioned payment for drugs on FDA approval of those drugs) (citing Ebeid *ex rel*. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010); 42 U.S.C. § 1396r-8; 42 U.S.C. § 1395w-102e; and 48 C.F.R. § 46.408); *see also* United States v.

A ban on prior REC sales may help the whistleblower prove materiality, but it will not be enough. The Supreme Court has held that an express condition of payment is "relevant, but not automatically dispositive" for the materiality inquiry.[50]

That condition's importance to the overall purpose of the payment also helps determine materiality.[51] For instance, in the 2017 case *United States v. Triple Canopy, Inc*., the Fourth Circuit considered an allegation that a military security contractor had hidden its guards' poor marksmanship skills.[52] "Common sense" helped the court find materiality. It concluded that the "decision to pay a contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight."[53] Triple Canopy's omission had concealed its inability to serve the contract's purpose of base security. For that reason, the omission was material.[54]

When the federal government buys renewable energy, its purpose will be to draw all of its electricity from renewable sources. The government's initial procurement plans, and older FTC and Environmental Protection Agency ("EPA") guidance, all make clear that energy labeled "renewable" cannot count towards this goal when the associated RECs have already been sold.[55] By omitting a prior REC sale, an energy generator would conceal the fact that a "renewable" megawatt does not serve the government's purpose in buying it. A relator can therefore establish that prior REC sales would undermine the government's efforts to use all-renewable energy and that the failure to disclose such a sale was material.

3. Knowledge

After demonstrating materiality, the whistleblower will have to satisfy the FCA's two knowledge tests. First, he or she will have to show that the utility knew that the power it was selling the government was not renewable.[56] The FCA

Academy Mortgage Corporation, No. 16-cv-02120-EMC, 2018 WL 4053484 at *10–11 (N.D. Cal. Aug. 24, 2018) (finding that mortgage company's faking certifications was material in part because the company's "participation in the . . . program and therefore its ability to endorse loans and make claims on them was conditioned on [its] annual certification").

50. Universal Health Care Services v. United States *ex rel*. Escobar, 579 U.S. 176, 194 (2016).

51. See *id*. at 194–95 ("proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance . . . Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material").

52. 857 F.3d 174, 175 (4th Cir. 2017).

53. *Id*. at 179 (citing United States v. Triple Canopy, 775 F.3d 628, 638 (4th Cir. 2015)).

54. The 4th Circuit also noted that the defendant's "own actions in covering up the noncompliance" helped it find materiality. *Id*. at 178–79. A REC-less power sale would involve similar actions. The defendant will have needed to somehow conceal the previous REC sale when it retailed "renewable power."

55. *See* Renewable Energy Certificate Monetization, *supra* note 4; 16 C.F.R. § 260.15(d).

56. *See* 31 U.S.C. § 3729(b)(1) (attaching liability to someone who "*knowingly* makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim") (emphasis added).

requires that a defendant do one of the following: know that they are submitting false information; recklessly disregard the truth or falsity of submitted information; or deliberately ignore whether submitted information is true or false.[57] Of these three tests, the Seventh Circuit recently observed that "reckless disregard is the loosest standard of knowledge."[58] It further found that a defendant can only defeat a claim of reckless disregard if "(a) it has an *objectively* reasonable reading of the statute or regulation and (b) there was no authoritative guidance warning against its erroneous view."[59]

A ban on prior REC sales can resolve both of these tests in the plaintiff's favor. Such a ban could not be reasonably read as condoning previous REC sales and would likely count as authoritative guidance against such a view. By banning prior REC sales, the government will have put utilities on notice that selling the government electricity labeled as "renewable," when the REC signifying its "renewable-ness" has already been sold, is an act of deception.

Second, the relator will need to establish knowledge of materiality—in other words, that the utility knew those sales were material to the government's purchase decision.[60] In 2021, the Seventh Circuit found that two factors established knowledge of materiality: a contractual requirement, and experience that should have informed a defendant of that requirement and its purpose.[61]

The ban on prior REC sales in federal energy purchases can satisfy the first factor. For the second factor, an energy retailer's experience will likely need to be assessed on a case-by-case basis, but the government can aid whistleblowers by reiterating the importance of this rule in purchase negotiations. By conveying its expectations at the contract-proposal stage, the government helped the Seventh Circuit find knowledge of materiality.[62]

With a ban on prior REC sales, then, a renewable energy relator who discovers such a sale should have little difficulty meeting the knowledge requirement and pleading all elements of a FCA case.

Renewable electricity purchases are, of course, just a part of the federal government's sustainability strategy. It will also purchase RECs, net-zero products

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57. *Id.*

58. United States v. Supervalu, Inc., 9 F.4th 455, 468 (7th Cir. 2021) (citing United States *ex rel.* Purcell v. MWI Corp., 807 F.3d 281, 287–88 (D.C. Cir. 2015)).

59. *Supervalu*, 9 F.4th at 468 (citing Safeco Ins. Co. of America v. Burr, 551 U.S. 47 (2007)).

60. Universal Health Services, Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 178 (2016) ("What matters is not the label that the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision").

61. *See* United States *ex rel.* Prose v. Molina Healthcare of Illinois, Inc., 17 F.4th 732, 742–43 (7th Cir. 2021) (examining defendant healthcare provider's experience and practice to conclude that "there is ample detail to support a finding that Molina either had actual knowledge that the government would view skilled nursing services as a critical part of the Nursing Facility rate cell (*i.e.*, as material), or that it was deliberately ignorant on this point").

62. *See id.* at 745 (finding knowledge of materiality in part because the defendant and the government had "discussed these services [to be provided under the contract] at the proposal stage").

and, perhaps, carbon offsets. Each of these assets also presents opportunities for fraud. Fortunately, the FCA gives whistleblowers ways to reveal it.

B. THE FALSE CLAIMS ACT AND FRAUDULENT RECS

RECs themselves will also play a role in the government's sustainability goals. These certificates already help the government meet its current, modest renewable energy targets.[63] Since 2013, federal law has required the government to obtain at least seven percent of its electricity from renewable sources.[64] To this end, it bought nearly $850,000 worth of RECs in Fiscal Year 2021.[65] That may be small for federal procurement, but with the government pursuing a goal of one hundred percent renewable electricity use by 2030, federal REC purchases will likely increase. So will the potential for fraud.

Fraud has already plagued another renewable-energy trading program. Since 2005, the EPA has tried to incentivize biofuel production by administering a trading system for renewable fuel tracking numbers called Renewable Identification Numbers, or RINs.[66] "Unfortunately," writes attorney Lisa Koperski, "egregious fraud occurred in the RIN marketplace when biodiesel generators sold certificates without actually making any biodiesel, which understandably threatened and harmed the credibility of the biodiesel industry."[67] One scheme, code-named "Alchemy" by its perpetrators, generated more than $55 million in illegal profits.[68]

The RIN and REC markets differ in several ways,[69] but the former market's troubles hold an important lesson for REC buyers—creating an asset that corresponds to a unit of renewable energy tempts fraudulent production of that asset.

REC fraud might reach the government in the following way: A generator would first lie to a registry to obtain a REC without generating a megawatt-hour of renewable energy. The generator would then sell the fraudulent REC to a federal agency attempting to meet its renewable energy use target.

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63. U.S. DEP'T OF ENERGY, FEDERAL RENEWABLE ENERGY USE REQUIREMENT, https://perma.cc/288H-VMBV (last visited Apr. 17, 2023) ("As a third option for meeting the Federal Government's renewable electricity requirement [from 42 U.S.C. § 15852(a)(3)], Federal agencies may purchase RECs separately from their electricity, also known as unbundled RECs.").

64. 42 U.S.C. § 15852(a)(3) (requiring that, of the federal government's total renewable electricity use, "not less than 7.5 percent in fiscal year 2013 and each fiscal year thereafter" shall be renewable).

65. Search for federal spending on RECs in FY 2021, USASPENDING.GOV, https://perma.cc/7WRW-B62J (last visited Apr. 24, 2023) (Select "Start Searching Awards," type "Renewable Energy Certificate" in the Keyword field and select FY 2021).

66. *Overview for Renewable Fuel Standard*, EPA https://perma.cc/VHQ9-FWAS (last visited Apr. 18, 2023).

67. *See* Koperski, *supra* note 9, at 95.

68. *See* Brief in Support of Plaintiff-Relator's Motion for Summary Judgment, United States *ex rel.* Alexander Chepurko v. E-Biofuels, LLC, No. 1:14-cv-00377-TWP-MJD, 2020 WL 2085071 at *7 and *10 (S.D. Ind. Sept. 7, 2018).

69. The RIN market is overseen directly by the EPA, rather than third-party registries, and requires RIN owners to retire their certificates and obtain new ones annually. *See id.* at *4–*5.

With minor regulatory changes, an employee who discovers such fraud could prevail under the FCA. The REC seller's initial lie—to the third-party registry—could trigger the act's prohibition on "knowingly mak[ing] . . . a false record or statement material to a false or fraudulent claim."[70] When a REC generator sells a REC to the federal government, that generator will have made a claim for payment.[71] To incur FCA liability, the seller must have made a "false record or statement" material to a false claim for payment.

1. Falsity

Lies about electrical generation made to obtain a REC would count as false statements. The registries that track and issue RECs work hard to verify that each certificate represents a unique megawatt-hour. The North American Renewables Registry ("NAR"), for instance, confirms that new REC sellers meet its requirements by examining third-party data and sometimes requiring third-party inspections.[72] If the REC seller misrepresents any of this information, the registry "reserves the right to withhold issuing Certificates, to freeze an account associated with a particular Asset, or to withhold participation in NAR for Assets that have willfully misrepresented" their data.[73]

Once a REC seller is registered, it must follow NAR guidelines for metering and transmitting its data.[74] NAR also compares the REC seller's output to its own estimates of how much energy the seller can generate.[75] Penalties for lying can include "notifying purchasers of the erroneous Certificates, freezing the account of the offending party, [and/or] levying an administrative fine or banning participation in [the Registry]."[76]

All of these rules reflect an understanding that RECs rely on accurate information about how their electricity was generated. RECs' reliance on truthful statements brings them within the scope of the FCA.

Rulings from the Seventh Circuit and at least two district courts show that when a lie inflates an asset's value, that lie is "false or fraudulent" under the FCA.[77] In *United States v. Americus Mortgage Corporation*, the defendant bank's

70. 31 U.S.C. § 3729(a)(1)(B).

71. *See* 31 U.S.C. § 3729(b)(2)(A)(i) (defining a "claim" as "any request or demand, whether under a contract or otherwise, for money or property . . . that is presented to an officer, employee, or agent of the United States").

72. N. AM. RENEWABLES REGISTRY, *supra* note 13, at 13.

73. *Id*. at 14.

74. *Id*. at 15–18.

75. *Id*. at 24–25.

76. *Id*. at 25.

77. *See* United States v. Luce, 873 F.3d 999, 1012 (7th Cir. 2017) (holding that "nothing in the FCA contains any indication of an intent to depart from the common-law understanding of causation in fraud cases"); *see also* United States v. Americus Mortgage Corp., No. 4:12-CV-2676, 2017 WL 4083589 at *3 (S.D. Tex. Sept. 14, 2017) (holding that evidence that defendant violated HUD mortgage requirements; that its underwriters "issued false statements regarding borrowers' creditworthiness; that

underwriters "issued false statements regarding [mortgage] borrowers' creditworthiness,"[78] essentially making the mortgages seem safer than they actually were. A lie to a REC registry would make RECs seem cleaner than they actually were. That would inflate the REC's value in the eyes of the federal government, making it false or fraudulent.

2. Materiality

The whistleblower will then need to show that these statements were material to the overall claim for payment. These statements would have first been made to a third-party REC registry.[79] The Ninth and Sixth Circuits have identified two factors that make a false statement to a third-party certifier "material" to a claim for payment.[80]

First, the certification must be an express condition of payment. The Ninth Circuit found that a false claim was material because statutory text made clear that Medicare would pay a claim "only if" a physician certified that certain criteria had been met and prohibited providing false information.[81] The Sixth Circuit also observed that Medicare regulations condition payment on certification.[82]

Second, government guidance must emphasize that the certification, or the part of it being violated, "goes to the essence of the bargain" between the defendants and the government.[83] In 2018, the Sixth Circuit observed that "the government has consistently emphasized the importance of the [Medicare certification] timing requirement" at issue in the case.[84] This "longstanding policy" helped convince the court that following the correct timeline for certification went to the essence of the bargain and, therefore, was material.[85]

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these false statements increased the risk of default; and that loans underwritten by [defendant] did in fact default at a high rate . . . formed a sufficient basis upon which the jury inferred that [defendant's] malfeasance proximately caused these defaults").

78. *Americus*, 2017 WL 4083589, at *3.

79. The government could possibly cut out the registries by simply requiring that its REC suppliers supply it with all of the same data it sends the registries. In that case, falsifying data would amount to making a false statement directly to the government.

80. Winter *ex rel*. United States v. Gardens Regional Medical Center & Memorial Hospital, Inc., 953 F.3d 1108, 1121 (9th Cir. 2020) ("We conclude that a [physician's] false certification of medical necessity can be material" to Medicare claim); United States *ex rel*. Prather v. Brookdale Living Servs., 892 F.3d 822, 836–837 (6th Cir. 2018) (finding fraudulent physician-certification scheme "material" to Medicare claim because it violated regulation that was both an "express condition of payment" and a fraud-prevention mechanism "which the government has consistently emphasized in its guidance regarding physician certifications").

81. *Winter*, 953 F.3d at 1122 (9th Cir. 2020) ("Congress prohibited payment for treatment 'not reasonable and necessary . . . Medicare pays for inpatient hospitalization 'only if . . . such services are required to be given on an inpatient basis for such individual's medical treatment'") (citing 42 U.S.C. § 1395y(a)(1)(A)).

82. *Prather*, 892 F.3d at 832–33 (citing 42 C.F.R. § 424.22).

83. *Prather*, 892 F.3d at 831 (citing Universal Health Care Services v. United States *ex rel*. Escobar, 579 U.S. 176, 193 n.5 (2016)).

84. *See Prather*, 892 F.3d at 836.

85. *Id*.

Current REC policies need to be fortified for whistleblowers to satisfy the "essence of the bargain" test. The Medicaid timing requirement that the Sixth Circuit considered had been emphasized in several guidance documents spanning seventeen years.[86] By contrast, existing procurement guidelines offer little guidance for selling the government stand-alone RECs. There are not yet any firm bans on double-counting for RECs in the federal supply chain. Implementing such a ban in the government's procurement guidelines will enable FCA relators to establish materiality.

3. Knowledge

Finally, a whistleblower will need to prove that the seller knowingly lied to a REC registry.[87] The FCA's knowledge test maps easily onto REC fraud.

A REC could be obtained without actually generating renewable electricity by presenting incorrect technical information to a registry, or a third-party intermediary, for certification.[88] Doing so established knowledge in a 2020 FCA case against the perpetrators of "Alchemy," the fraudulent RIN-generation scheme discussed above.[89] That case's whistleblower, Alexander Chepurko, successfully alleged that employees of the defendant corporation, e-Biofuels, "knowingly made statements to a third-party engineer that e-Biofuels" was complying with the program's requirements.[90] "These statements were false, and [Defendants] knew they were false,"[91] he argued, in a successful motion for summary judgment.[92] At the appellate level, both the Second and Eleventh Circuits have found knowledge when defendants changed information provided by a third party, or established a fraudulent relationship with a third party, to secure payment from the government.[93]

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86. *Prather*, 892 F.3d at 835–36 (citing OIG Compliance Program Guidance for Home Health Agencies, 63 Fed. Reg. 42,410, 42,414 (Aug. 7, 1998); OIG Special Fraud Alert on Physician Liability for Certifications in the Provision of Medical Equipment and Supplies and Home Health Services, 64 Fed. Reg. 1813, 1814 (Jan. 12, 1999); OFF. INSPECTOR GEN., U.S. DEP'T HEALTH & HUMAN SERVS., OEI-02-00-00620, THE PHYSICIAN'S ROLE IN MEDICARE HOME HEALTH 2–4 (2001); Medicare Benefit Policy Manual § 30.5.1—Physician Certification 32 (2015) (Page ID #1270)).

87. *See* 31 U.S.C. § 3729(a)(1)(B) (attaching FCA liability to anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim").

88. *See* N. AM. RENEWABLES REGISTRY, *supra* note 13 at 22–24 (requiring that REC generators submit electrical-generation data to NAR prior to REC issuance).

89. *See supra* section II.B.

90. *See* Brief in Support of Plaintiff-Relator's Motion for Summary Judgment, United States ex rel. Alexander Chepurko v. E-Biofuels, LLC, No. 1:14-cv-00377-TWP-MJD, 2020 WL 2085071 at *21 (S.D. Ind. Sept. 7, 2018).

91. *Id.*

92. *See* United States ex rel Alexander Chepurko v. E-Biofuels, LLC, No. 1:14-cv-00377-TWP-MJD, 2020 WL 2085071 at *15 (S.D. Ind. Apr. 30, 2020) (finding that Chepurko's allegations "establish the substantive FCA claim and the FCA conspiracy claim").

93. *See* Yates v. Pinellas Hematology & Oncology P.A., 21 F.4th 1288, 1303–04 (11th Cir. 2021) (finding that emails and witness testimony regarding the alteration of material information about outside lab constituted "sufficient evidence for the jury to find that Pinellas acted with reckless disregard of the

REC fraud can also satisfy the knowledge-of-materiality test—so long as the government makes its expectations for RECs clear. Circuit courts have also identified several factors in the contracting and procurement process that prove knowledge of materiality. A contractual requirement, combined with a defendant's background knowledge of that requirement and its purpose, can establish this knowledge.[94] So can attempting to conceal or lie about contractual violations.[95] These holdings provide another reason why federal REC procurement regulations and contracts must prohibit double-counting and lying to third-party registries. Doing so will ease the path for whistleblowers who reveal it.

C. THE FALSE CLAIMS ACT AND CARBON OFFSETS

Temptations for fraud also exist in the offset market. Offsets, like RECs, derive their value from environmental claims made to third-party registries. Whereas RECs pose a risk that the seller has not actually generated a unique megawatt-hour of renewable electricity, offsets present a risk that the project did not actually keep a ton of carbon out of the atmosphere. If a project lies to a registry and the federal government buys the offset, the FCA could apply as it would to a fraudulent REC sale.

For now, this scenario is hypothetical. The federal government has no plans to buy carbon offsets,[96] but its current procurement plans create other opportunities for offset fraud.

The White House has instructed federal agencies to "pursue procurement strategies to reduce contractor emissions," with the goal of achieving "net-zero emissions from Federal Procurement."[97] The Biden administration has created a Buy Clean Task Force and launched several pilot programs to advance these goals.[98] Meanwhile, the Inflation Reduction Act ("IRA") has directed the EPA, Federal

truth or falsity of the information it included in the 214 [Medicare] claims for which it was found liable"); United States v. Strock, 982 F.3d 51, 66 (2nd Cir. 2020) ("And the [district] court further acknowledged that facts alleged by the government 'could support an inference that Strock knew that VECO did not qualify as [a type of business qualifying for preferential contract payment],such as that Strock gave Anderson a 51% share in VECO (the minimum required for veteran ownership), set up email addresses in Anderson's name to be managed by other employees, and established VECO for his and Strock Contracting's profit.'").

94. *See* United States *ex rel.* Prose v. Molina Healthcare of Illinois, Inc., 14 F.4th 732, 742–43 (7th Cir. 2021) (examining defendant healthcare provider's experience and practice to conclude that "there is ample detail to support a finding that Molina either had actual knowledge that the government would view skilled nursing services as a critical part of the Nursing Facility rate cell (*i.e.*, as material), or that it was deliberately ignorant on this point").

95. United States v. Hodge, 933 F. 3d 468, 473 (5th Cir. 2019) ("The government, though, identifies evidence that Allied Capital, with Hodge's approval, hid the involvement of unregistered branches from HUD and that Hodge lied about them when the violations were discovered in a state audit . . . The jury could have relied on such evidence to find Hodge and Allied Capital acted with scienter").

96. *See* M-22-06, *supra* note 38.

97. Exec. Order No. 14,057, 86 Fed. Reg. 70,935 (Dec. 8, 2021).

98. *See* WHITE HOUSE, FACT SHEET: BIDEN-HARRIS ADMINISTRATION ANNOUNCES NEW BUY CLEAN ACTIONS TO ENSURE AMERICAN MANUFACTURING LEADS IN THE 21ST CENTURY (2022).

Highway Administration, and General Services Administration to identify and label construction materials and products whose production, use, and disposal emits "substantially lower" levels of greenhouse gasses than the industry average.[99] The IRA requires the government to reimburse or incentivize contractors that use these "low-carbon-embodied products and materials."[100] However, the federal government and its suppliers still need products and services—aviation, maritime shipping, steel, and cement—that rely on fossil fuels.[101] Somewhere down the supply chain, net-zero federal procurement and low-embodied-carbon incentives will require contractors to buy offsets.

These goals will also require the federal government to specify which types of offsets its suppliers can buy. Not all offset projects and methods can guarantee that agencies or contractors have fully offset their emissions to the extent federal regulators require. For example, one 2021 study found that California's forest offset program was plagued by "systemic flaws" that allowed "widespread gaming of the market."[102] These flaws gave rise to millions of "ghost credits" that did not represent the advertised amount of sequestered carbon.[103] Buyers of these "ghost credits" were offsetting far less carbon than they believed.

Given problems like these, scientists are beginning to recommend that net-zero entities focus on buying certain types of offsets. In 2020, a team of Oxford researchers concluded that "a net zero aligned portfolio of offsets must increase the portion of carbon removals over emission reductions, and the portion of long-lived storage over short-lived storage, over time."[104] In other words, a net-zero or low-embodied-carbon contractor should avoid offsets that merely reduce emissions by sequestering carbon in forests or reducing fossil fuel use.[105] Instead, the contractor should buy offsets that represent carbon removed from the air. In the near future, most of these offsets will be generated by planting trees or sustainably managing farmland.[106] But as technologies develop that can store carbon in more durable forms, like injecting it underground or converting it to stone, the researchers recommend buying more offsets derived from these methods.[107]

Effective federal procurement regulations will therefore need to limit which types of offsets qualify a contractor for net-zero status. The federal government

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99. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat.1818, 2077–78.

100. *Id*. at 2085.

101. *See* Gross, *supra* note 6; Irfan, *supra* note 8.

102. Lisa Song & James Temple, *The Climate Solution Actually Adding Millions of Tons of CO2 into the Atmosphere*, PROPUBLICA, (Apr. 29, 2021, 5:00 AM), https://perma.cc/6HXT-MU3L.

103. Each offset in California's program represents the same amount of carbon. However, the state allocates forest offsets based not on the amount of carbon stored in a project's trees, but how much carbon it stores relative to the average density of carbon in that region. Offset project sellers conserved tracts that had unusually high carbon densities for that region. By doing so, projects could receive far more credits than they would have for sequestering the exact same amount of carbon elsewhere. *Id*.

104. ALLEN ET AL., *supra* note 12, at 10.

105. *Id*.

106. *Id*. at 9–10.

107. *Id*.

may already be preparing to do so. The guidance from the President to agency heads on the executive order on federal sustainability states that the "Federal Acquisition Regulatory Council should leverage existing third party standards . . . in the development of regulatory amendments to promote contractor attention on reduced carbon emissions and Federal sustainability."[108]

Whatever federal offset restrictions require, they will create two opportunities for fraud. First, a contractor could buy non-compliant offsets, then present itself or its products as "net-zero" or "low-embodied-carbon." This fraud could be targeted as a deceptive omission, like a utility passing off REC-stripped electricity as "renewable".

Second, offset sellers could try to pass off their offsets as compliant with the government's net-zero or low-embodied-carbon regulations, then sell them to a contractor. Their fraud would reach the government indirectly. However, as long as this fraud satisfies one of the FCA falsity tests discussed above, an insider could still reveal it using the FCA. Clear, well-enforced offset limits would let whistleblowers at the end of the federal supply chain satisfy the FCA's materiality and knowledge requirements.

1. Materiality

Whistleblowers have successfully extended the FCA to lies that reached the government through a third-party contractor. Lies to that contractor are false statements "material" to the contractor's false claim for payment. The Seventh Circuit confirmed this in a 2016 case, *Garbe v. Kmart*, when it held that the law's current "materiality" definition "had the effect of bringing within the FCA's ambit false claims to intermediaries or other private entities that either implement government programs or use government funds."[109]

The defendant in that case, Kmart, was one of several companies implementing Medicare Part D.[110] It violated Part D pricing rules in its contracts with intermediate companies.[111] As a result, it over-billed those firms, which then over-billed Medicare.[112] The fraud concealed a regulatory violation at the end of the chain.

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108. M-22-06, *supra* note 38, at 8–9.

109. United States *ex rel*. Garbe v. Kmart Corporation, 824 F.3d 632, 639 (7th Cir. 2016).

110. *See id*. at 636 ("The Part D program is overseen by the federal Centers for Medicare and Medicaid Services (CMS). CMS . . . uses Plan Sponsors, which are private entities that compete for the opportunity to manage Part D beneficiaries' claim submissions and payment processes. Most Plan Sponsors subcontract with Pharmacy Benefit Managers, which are other private entities that work directly with retail pharmacies to provide prescriptions to Part D beneficiaries").

111. *Id*. at 636–37 ("under industry practice and the terms of over 1,000 contracts between Kmart and Medicare Part D Benefit Managers and Plan Sponsors, Kmart should have based its reimbursement requests to the insurance companies handling Medicare Part D on its 'discount program' prices. Dr. Hay's examination revealed that Kmart instead used significantly higher prices when submitting those requests and was thus reimbursed at a much higher level.").

112. *Id*.

Because that violation was "capable of influencing the decisionmaking body to which [the fraud was] addressed,"[113] it satisfied the materiality requirement.

An offset seller would also be implementing a government program: net-zero or low-embodied-carbon procurement. Regulations would specify the types of offsets that qualify a product as net-zero. An offset seller violating those standards would be several steps removed from the federal government but would still thwart the goals of its net-zero procurement programs. *Kmart* shows why federal regulations must specify the types of offsets that government contractors may purchase. Doing so will enable FCA relators, alleging that these projects scrub less carbon than they claim, to prove that these failures are material.

2. Knowledge

Clear rules for offsets in the federal supply chain are also necessary for whistleblowers to satisfy the FCA's two knowledge requirements. Ambiguous regulations allow a defendant to plead lack of knowledge.[114] Conversely, when an agency gives specific, authoritative guidance about how it interprets a material regulation, a defendant cannot claim that they lacked knowledge.[115]

Indicative of how the government can provide this guidance for offset buyers, the Seventh Circuit recently held that "at minimum, [authoritative guidance] must come from a governmental source—either circuit court precedent or guidance from the relevant agency."[116] The Seventh Circuit also found that this guidance must speak to the specific practice at issue.[117] The plaintiff had argued that a Medicare manual counted as authoritative guidance.[118] The court rejected this claim because it found the manual "says nothing about" the programs at issue in the case.[119]

This holding suggests that once the federal government decides what kinds of offsets satisfy its net-zero goals, it needs to issue clear guidance on that decision. Currently, only the FTC has spoken to the issue of carbon offsets in its "Green Guides."[120] Even if a court could be persuaded that the FTC is a "relevant agency" for purposes of federal procurement, the Green Guides do not specify which types of offsets meet the government's new sustainability targets.[121]

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113. *Id.* (quoting Neder v. United States, 527 U.S. 1, 16 (1999)).

114. *See* United States *ex rel.* Complin v. North Carolina Baptist Hospital, 818 F. App'x 179, 184 (4th Cir. 2020) (holding that a defendant had not adequately pleaded scienter due to regulatory ambiguity).

115. United States v. Supervalu, Inc., 9 F.4th 455, 471 (7th Cir. 2021) (citing Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 70 (2007)).

116. *Id.*

117. *Id.*

118. *Supervalu*, 9 F.4th at 471.

119. *Id.* at 472.

120. *See Green Guides,* FED. TRADE COMM'N, https://perma.cc/RXT3-DZFV (last visited Aug. 17, 2023).

121. 16 C.F.R. § 260.5 (2023).

Federal guidance must address this topic to improve whistleblowers' odds of satisfying the FCA's knowledge requirement—and, more broadly, to ensure that its net-zero goals actually benefit the climate.

Although offset fraud may take a different form than REC fraud, the FCA nonetheless provides paths for whistleblowers to expose it. As with REC fraud, clearer federal regulations will boost their odds of success.

III. CONCLUSION

The cases discussed in this paper arose in a wide range of circumstances, from military contracting to Medicare. Federal money reached all of these industries. Soon, it will reach renewable energy, RECs, and carbon offsets. Whistleblowers can bring FCA claims against renewable-energy producers who fraudulently sell REC-less renewable energy and against net-zero contractors who buy subpar carbon offsets. FCA claims for selling fraudulently-generated RECs to the government, or bad offsets to government contractors, have precedent in successful FCA cases in other areas. This statute can therefore help ensure that the U.S. government actually achieves its climate goals—and that the countless businesses in its supply chain are honest about theirs.

To achieve these benefits, however, the Biden administration must heed the lessons of previous FCA cases. First, it must refuse to purchase renewable energy whose RECs have already been sold. Second, it must refuse to buy RECs that have previously been sold on other registries. Third, it must specify and clearly communicate what types of carbon offsets a federal contractor can purchase to qualify for net-zero status.

The federal government aims to use the sheer scale of its buying power to fight climate change and accelerate the energy transition. Both RECs and carbon offsets will play a role in that transition for the foreseeable future. These assets pose the risk of fraud, but the False Claims Act can fight and deter it.