

Managing False Claims Act Compliance in the Pandemic

Taking Steps to Minimize Risk

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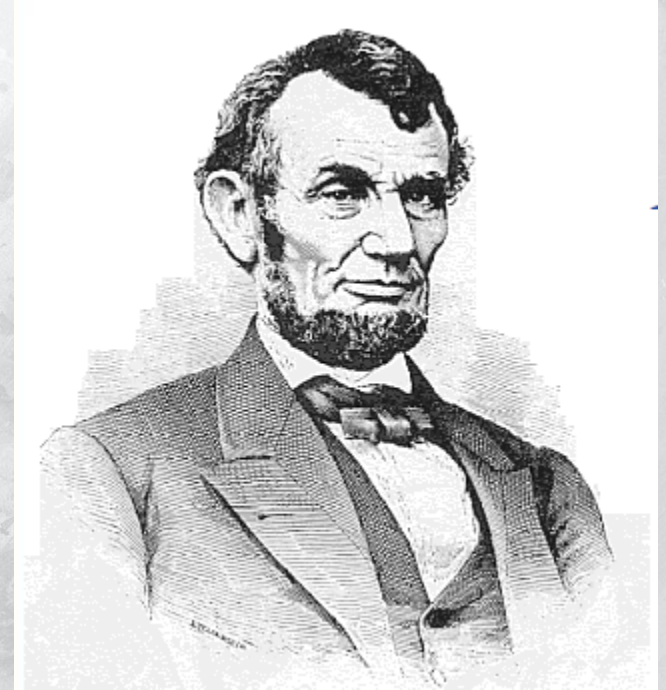
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FCA OVERVIEW

What is the False Claims Act (“FCA”)

- Lincoln’s Law (1863)



FCA At A Glance - Some Statistics

- \$62 billion recovered since 1986 amendments
- \$3 billion in FY 2019 (\$2.1 billion resulting from qui tam suits)
- 633 new qui tam cases filed in FY 2019 (avg. 12 per week)



Source: <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>

Elements of a FCA Case - What is a “False Claim”?

- A “claim” is broadly defined: “any request or demand ... for money or property” 31 U.S.C. Sec. 3729(c)
- Includes:
 - submitting or causing another to submit a false claim to the government for payment
 - making or using a false record or statement to get a false claim paid by the government
 - making or using a false record or statement material to an obligation to pay money to the government
 - falsely concealing, avoiding, or decreasing an obligation to pay money to the government

Elements of a FCA Case - Scienter

- Government or plaintiff must prove false claim was made “knowingly”
 - Actual knowledge of the false statement or claim
 - Deliberate ignorance of the truth
 - Reckless disregard of the truth

Common Theories/Fact Patterns

- Express false statements or false certifications
- Implied false certification of compliance with laws and regulations
- Fraudulent inducement of a government contract
- Reverse false claims

Remedies Available Under The FCA

- Civil penalties, which range from approximately \$11,000 to \$23,000 per false claim.
- Treble damages: three times the amount of harm caused to the government (i.e. potentially three times the PPP loan)
- Reasonable attorneys' fees
- Collateral impact: Suspension or debarment
- Collateral impact: Follow-on costs (e.g. Corporate Integrity Agreement, monitor, etc.)

Procedural Issues And Qui Tam Actions

- Qui Tam aspect of the law delegates to private citizens the right and financial incentive to act on behalf of the government.



Procedural Issues And Qui Tam Actions

- The relator (whistleblower) and her lawyer investigate the case.
- Suit is filed under seal for at least 60 days, but often much longer.
- DOJ conducts its own investigation; not limited to allegations of the sealed complaint.
- DOJ may take over the case, or let the relator proceed on her own on behalf of the government.

FCA Risks Presented by COVID-19 Relief Programs

COVID-19 FCA Risks - PPP Loans

- **Mandatory** audit of loans over \$2M
- Forgiveness certifications:
 - Funds properly used
 - Calculated accurately
 - Statements in application are true
- Documentation of FTEs (covered period and reference period)
- Documentation of fixed obligation expenses

COVID-19 FCA Risks - Provider Relief Funds

- Reverse False Claim
 - Use of Funds Conditioned on Compliance
 - Violation to conceal or avoid an obligation to repay the government
- Ambiguous compliance requirements
 - Expenses must be those “attributable” to the impact of coronavirus
 - Cannot be expenses that are reimbursed by “other sources”
- Accuracy of information required to be reported or recorded
 - Timing - HHS/OIG interim and final reporting requirements

COVID-19 FCA Risks - HHS Waivers

- HHS 1135 blanket and individual waivers of certain regulatory requirements
- FCA concern: claim submission and participation requirements
- Intention provide for flexibility but shifting or new requirements create potential for errors
 - Billing for services outside the scope of the waiver
 - Telehealth example - increases in coverage, services
 - Billing for covered services but other compliance issues
 - Tuesday changes to testing regulations

COVID-19 FCA Risks - Government Contractors

- Increase in government spending and procurement
 - New entrants to field of government contracting
 - Suppliers to government contractors
- Examples of violations: false invoice, record of payment, skimming
- Sec. 3610 of the CARES Act
 - Provides reimbursement for paid leave to keep work force in “ready state”
 - Potential for double dipping

Why should we expect increased FCA enforcement?

- Trillions of dollars in relief
- DOJ COVID-19 Fraud Task Force
 - Regional offices all have COVID-19 Fraud Coordinator
- Whistleblower hotlines
- Plaintiff's/Relator's Attorneys
- Pandemic Response Accountability Committee
 - IGs from various departments including DOJ and SBA
- Mandatory Audits
 - Centers for Medicare/Medicaid announced this month that restarting surveys, enforcement actions

Recent Enforcement Trends

Recent Enforcement Trends and Risks

- Early COVID-related enforcement activity has arisen from cases of **objective falsity**, but that is likely to change.
 - In a March 16, 2020 Memorandum regarding DOJ's COVID-19 priorities, Attorney General William Barr directed every U.S. Attorney's Office to "prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic."
 - 4,000 FCA cases brought by government and whistleblowers, recovering \$23 billion, in the five years after 2009 stimulus

Recent Enforcement Trends and Risks

- Examples:
 - CEO of a Massachusetts-based IT company charged with fraudulent loan applications
 - Overstated payroll expenses
 - False certification re employees' primary residences

Recent Enforcement Trends and Risks

- Washington-based software engineer charged with submitting false loan documentation seeking over \$1.5 million in forgivable PPP loans under the CARES Act.
 - Loan documents included fictitious payroll expenses for fake IT companies the engineer created.
 - Backdated EIN documentation to support claims of payroll at multiple companies

Recent Enforcement Trends and Risks

- Example:
 - California film producer charged with obtaining \$1.7 million in PPP loans under the CARES Act, and then using the funds to pay off personal credit cards and non-business expenses.
 - Certified that loans would be used for specified purposes (e.g. payroll, utilities, rent)
 - Highlights a potentially fruitful hook for whistleblowers in the years to come.

Recent Enforcement Trends and Risks

- The initial focus on individuals making false statements likely to broaden.
 - In June, then head of the Criminal Division, Assistant Attorney General Brian Benczkowski, described the initial focus, explaining, ““I can assure you there will be many more prosecutions that are coming.”
 - In a June 10th press release DOJ reiterated its focus on investigating **"individuals and businesses"** who make false statements to defraud the government - and in some instances, banks - to receive stimulus payments from CARES Act programs."

Recent Enforcement Trends and Risks

- The Treasury Department has now released the list of 4.9 million loans provided under the PPP and the businesses that received them, broken out by loan amount.
- The SBA has indicated that it will audit all recipients of loans of \$2 million or more.
 - Whistleblowers can act as private “auditors”
 - Multiple types of certifications at issue

Recent Enforcement Trends and Risks

- Whistleblower risks:
 - COVID-19 Whistleblower Protection Act → protects disclosures by employees and former employees related to gross mismanagement, danger to public health or safety, abuse of authority, or violation of laws, rules or regulations.
 - Department of Labor has ability to investigate retaliation

Recent Enforcement Trends and Risks

- Whistleblower Risks:
 - The amount of money at stake, the speed with which it was disbursed, and the frequent ambiguity in eligibility criteria and program conditions are ripe for whistleblower claims.
 - “Whistleblower lawyers are preparing for an anticipated surge in cases alleging fraud or mismanagement related to the federal government’s \$2 trillion-plus in spending to combat the COVID-19 pandemic and support hospitals and struggling businesses. Plaintiffs’ lawyers say they are already fielding calls about potential coronavirus-related whistleblower cases.”

Nate Raymond, “Whistleblower lawyers prep for COVID-19 litigation boom,” *Reuters Legal*, May 1, 2020.

HOW TO IMPROVE FCA COMPLIANCE

PRACTICAL STEPS TO MINIMIZE YOUR RISK

(1) Build a Robust Compliance Program (or Reassess an Existing One)

- Twin Goals of any Compliance Program
 - (1) To *prevent* fraud and misconduct; and
 - (2) To **detect** past impropriety and ensure that it is properly investigated, remediated, and reported
- Compliance is more important than ever given the increased risks presented by COVID-19 and the government's response
 - Now is the time to reevaluate and improve compliance programs in light of those increased risks and the risk profile associated with participation in particular programs

DOJ GUIDANCE IN FCA CASES

- May 7, 2019 DOJ “Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in FCA Cases”
 - **“The Department may take into account the prior existence of a compliance program in evaluating a defendant’s liability under the False Claims Act. For example, the Department may consider the nature and effectiveness of such a compliance program in evaluating whether any violation of the law was committed knowingly.”**
- Updated guidance issued by DOJ Criminal Division on June 1, 2020, “Evaluation of Corporate Compliance Program”

THREE KEY QUESTIONS THE GOVERNMENT WILL ASK IN ANY FCA CASE

1. Is the company's compliance program well designed?

- **Well-integrated** into the company's operation and workforce
- Based on appropriate **risk assessment** (location of operations, industry sector, regulatory landscape, potential clients and business partners, relationships with third party vendors)
- **Periodically reassessed and updated** based on the changing nature of the company's business and its risk profile
 - Update compliance protocols to address specific risks related to COVID-19 relief programs and/or specific government funding
- **Risk-based training**

2. Is the program applied earnestly and in good faith?

- Is the program adequately resourced and empowered to function effectively?
- Properly Scoped investigations by qualified personnel
- **MUST BE MORE THAN JUST A PAPER PROGRAM**
- And remember: compliance is a shared responsibility:
 - Company's "governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight of it"
 - "High-level personnel ... shall ensure that the organization has an effective compliance and ethics program."
 - U.S.S.G. Sec. 8B2.1(b)(2)(A)-(C)

3. Does the compliance program work in practice?

- Hallmark of an effective compliance program is its **capacity to improve and evolve** as the business, governing law, and industry standards change over time.
- **Designed, implemented and reviewed in an effective manner**
- **Tailored to the specific needs and risks of the business?**
 - Government will consider whether and how any misconduct was detected

(2) Make Your Record Now

- Document how and when government funds were used
 - Develop and implement procedures to ensure—and document—**eligibility**
 - Develop and implement procedures to ensure—and document—**appropriate use of funds**
 - Develop and implement procedures to ensure—and document—compliance with **ongoing reporting obligations**
 - **Maintain complete, accurate, and contemporaneous records**
- Monitor potential red flags that could trigger heightened scrutiny
 - *E.g.* executive compensation
- Segregate the funds
 - Goal is to better account for use of the funds if/when you need to substantiate when and how funds were put to use, and demonstrate compliance—including in defense of actual or threatened FCA claims

(3) Follow the Changing Legal and Regulatory Landscape

- It is crucial to monitor relevant changes in the law and related regulatory guidance
- Carefully evaluate express and implied certifications in light of latest guidance:
 - Can you safely say that all representations regarding program eligibility, products, pricing, etc. are accurate? Does the record back you up?
 - BUT REMEMBER:
 - Guidance can be vague too
 - Guidance can change
 - Don't assume it's a safe harbor (but conformance to guidance may be relevant to scienter)
- Consult with counsel (especially if not accustomed to doing business with the government)

(4) Develop a Crisis Response Plan

- **Be Prepared to Respond to Government Inquiries**
 - In many cases, it's a question of when, not if, the government will come knocking
 - Expect to be audited
 - Be prepared to respond promptly and accurately to inquiries

(4) Develop a Crisis Response Plan

- **Prepare for Whistleblowers**
 - Don't share information outside core group of decision-makers
 - Establish formal internal reporting structure
 - Gives employees mechanism for raising/addressing concerns without pursuing whistleblower claim
 - May make it harder for terminated employees to claim knowledge of protected activity or discrimination if they didn't pursue formal avenues
 - Provides immediate information to guide decision-making and mitigate risk

(4) Develop a Crisis Response Plan

- **Consider Self-Reporting if Wrongdoing is Discovered**
 - May 7, 2019 DOJ “Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in FCA Cases”
 - “Entities or individuals that make proactive, timely, and voluntary self-disclosure to the Department about misconduct will receive credit during the resolution of a FCA case.”
 - The FCA itself provides for double, rather than treble damages, where company voluntarily discloses misconduct within 30 days of discovery.
 - Disclosure must be made before company learns of an FCA investigation.
- **Consult with Counsel**

Questions?

Thank You!

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