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PERSPECTIVE

False Claims Act enforcement under the Trump administration

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The False Claims Act, 31 U.S.C. Section 3729, et seq., has long served as the federal government's primary mechanism for rooting out fraud and corruption by companies doing business with the government. Recoveries under the statute totaled nearly $40 billion over the past decade, with the United States Department of Justice announcing recovery of more than $3 billion in 2019 alone.

The FCA is an extraordinarily broad statute, reaching all government programs and instrumentalities, including Medicare, the information technology sector, and defense contracting, among others. The statute provides for significant liability — including treble damages, up to more than $20,000 in financial penalties per claim, and attorneys' fees and costs — for the knowing submission of false or fraudulent claims for payment to the government or a government agency.

On the state side, the majority of states, including California, have their own "mini" FCA statutes with similar prohibitions regarding funding in relation to state or local programs.

Under either set of statutes, private parties known as whistleblowers may pursue FCA claims on behalf of the government in what are known as qui tam actions. These are filed under seal while the government decides whether to intervene and take over the suit, or to decline, and let the whistleblower proceed with the case. Whistleblowers receive a "bounty" of up to 30% of the government's recovery in any successful suit under these statutes. This incentive works, with qui tam suits accounting for more than 70% of all federal recoveries since 1985.

As we enter the fourth year of the Trump administration, the question is often asked: How has enforcement of the FCA changed?

Well, in some respects, enforcement of the FCA has changed little. For example, DOJ's efforts have continued to largely target fraud in health care programs, which accounted for over 85% of recoveries in 2019. These numbers are consistent with DOJ's historical focus on combating health care fraud. Likewise, the government has continued to indicate the FCA is its primary means of rooting out fraud, and has aggressively pursued FCA cases where it perceives alleged harm to the government fisc.

But in other respects, the enforcement of the FCA has changed significantly over the last several years. While FCA enforcement remains robust overall, policies certainly have shifted to DOJ focusing more on practical uses of government resources and reducing the burden on both the courts and regulated industries in defending against cases of little merit.

DOJ's policy changes in the last year alone have included, for example, efforts to change how DOJ approaches whether to exercise its right to intervene in and voluntarily dismiss qui tam actions filed by whistleblowers. Prior to the instant administration, this was a rarely used power. Now, DOJ has promulgated specific guidance about the appropriate circumstances in which to invoke this power — including in whistleblower cases that DOJ determines are without substantial merit or those that are otherwise not brought in the government's interests (such as where the suit might interfere with agency policies). It is no coincidence, then, that DOJ has now sought dismissal of nearly *50 cases* over the past two years — approximately the same number it had moved to dismiss over the previous *30 years* combined.

DOJ also has taken steps to reduce the use of the FCA as a sub-regulatory enforcement mechanism in certain areas. For example, DOJ policy changes have included directives prohibiting pursuit of FCA actions predicated on violations of non-binding agency guidance. And DOJ pledged in an October 2019 memorandum that administrative proceedings, and not FCA suits, would serve as the primary method of enforcing regulatory requirements in federal home loan programs. This change — following several high profile FCA settlements involving federal lending programs in recent years — was specifically intended to enhance participation by financial institutions in such programs, which had been seemingly scuttled on account of the fear that potential FCA cases can create.

Whether related or not, it bears mentioning that average annual recoveries under the FCA during the first three years of the Trump administration were down by over 30%, as compared to the prior five years ($3.12 billion/fiscal year from 2017-2019 vs. $4.48 billion/fiscal year from 2012-2016). This change, however, is likely more due to the fact that the massive settlements from the financial crises in 2008 have run their course than to anything else.

Whatever the signals from the administration, plaintiffs' counsel have continued unabashed. In 2019, qui tam suits accounted for over 80% of new FCA filings, with nearly 700 new suits filed. Further, recoveries from declined qui tam suits totaled nearly $300 million in 2019 — more than double the amount from the prior year. This has not gone without notice. DOJ has announced it is considering whether to require qui tam plaintiffs to disclose if they are being financed in these suits by third-party funding and the effects that relationship might have on the litigations purportedly brought on behalf of the government.

The states are also doing their part — ferociously legislating and litigating FCA issues. In California, for instance, the legislature took steps in 2019 to amend its FCA to make it easier for plaintiffs to prove "materiality" — often a key point of attack for FCA defendants — and to extend the statute's reach, for the first time, to cases involving tax-related fraud (the assembly-approved bill remains under consideration in the senate).

Finally, we note that the courts continue to strike an independent chord when it comes to the FCA. For example, several courts questioned DOJ's ability to dismiss qui tam cases — requiring DOJ to provide a justification for its decision. A federal court of appeals also has weighed in on the scope of the statute's reach in relation to government programs — finding the FCA applies to claims relating to emergency lending by Federal Reserve Banks, despite such banks not paying the claims using federal funds. And another federal appellate court found that FCA claims involving a medical provider's clinical judgment — such as whether certain care was necessary — cannot be predicated solely on a reasonable difference of opinion among physicians, which may impact the government's ability to pursue health care fraud cases.

With all of this, what do you do if your company receives government funding and you are thinking about FCA issues? The following are critical:

- Prevention. Most whistleblowers complain internally before going to an attorney. A strong HR and compliance program helps prevent FCA cases from being filed, but also serves as compelling evidence your company is doing the right thing.
- Investigation. If there is an allegation of wrongdoing, conducting a prompt investigation — even before the government reaches out — is essential. Doing so will put you in a position to understand what occurred, correct any errors, and prepare a response. But it also may allow your company to take advantage of cooperation credits based on additional recent DOJ guidance.
- Avoid government intervention and attempt to convince the government to dismiss. Each year approximately 90% or more of recoveries come from cases brought by the government or in which the government intervened. It is therefore critical to attempt to convince the government not to take over a matter, or even to dismiss the case based on DOJ's recent guidance.
- Attack the pleadings. Once the case is at issue, attempt to dismiss the case at the pleadings stage. Plaintiffs' counsel may try to get these cases to discovery, to leverage a settlement and impose crippling discovery costs. ■

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