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PERSPECTIVE

Surge in False Claims Act enforcement continues

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The False Claims Act is the government's primary mechanism for combatting fraud in connection with federal programs and funding. Over the past decade, annual recoveries by the United States Department of Justice under the statute have totaled in the billions of dollars each year. Despite the economic and social disruption caused by the COVID-19 pandemic, this past fiscal year saw more than $2 billion in recoveries and the most new FCA cases filed, ever. With record levels of COVID-relief government spending, a new presidential administration, and recent legislative efforts to strengthen the statute, the threat to government contractors or recipients of government funding from FCA litigation is likely to continue, if not increase.

The FCA prohibits the knowing submission of false or fraudulent claims for payment to the government or a government agency. Because the statute generally applies wherever government funding or programs are involved, it affects a wide set of industries engaged in government contracting or procurement, including health care, defense, infrastructure and information technology. Although the statute's materiality requirement (restricting liability to instances where the alleged fraud was "material" to the government's decision to pay) offers defendants some protection, violators face stiff penalties under the statute — including treble damages, up to more than $20,000 in financial penalties per false claim, and liability for attorney fees and costs.

The FCA uniquely incentivizes private citizens, known as "relators" or "whistleblowers," to pursue FCA claims on behalf of the government in what are known as qui tam actions. Such actions are filed under seal while the government decides whether to intervene and take over the suit itself, or to decline and let the whistleblower proceed with the case alone. Successful whistleblowers receive a "bounty" of up to 30% of the government's recovery under the statute. Whistleblowers filed nearly 700 new cases in 2020 alone and since 1985, cases originally filed as qui tam suits account for more than 70% of all federal recoveries.

As the Biden administration settles into its first year, the government has signaled not only that the FCA remains its primary tool for combatting fraud, but that it will aggressively pursue such actions.

However, by far, the most critical inflection point is whether the government takes over the qui tam lawsuit — with over 90% of recoveries last year being in cases where the government took over the qui tam action or filed the action on its own.

The majority of states, including California, have enacted their own versions of the FCA containing similar prohibitions against fraud in relation to funding from state or local programs, providing for similarly stiff financial penalties and similar whistleblower incentives.

Even as the pandemic has appeared to begin to subside, a surge in FCA enforcement is underway. To start, last fiscal year saw a combined 922 new FCA cases filed by the government and qui tam relators. Not only does this bring the five-year total number of new FCA cases filed to more than 4,100, it represents the largest combined single year total of new cases — by a substantial margin. Perhaps more importantly, the number of new cases that the government itself initiated jumped to 250 — its highest total, by far, in nearly 30 years.

This uptick in FCA filings corresponds with the significant government stimulus in connection with COVID-19 relief, similar to upswings in enforcement in the wake of past emergency spending, such as in connection with the 2008 financial crisis and Hurricane Katrina. Yet if this past increase in FCA enforcement activity is any indication, these unprecedented enforcement numbers are merely the beginning. Last year alone the government enacted legislative stimulus packages totaling nearly $4 trillion in COVID-relief funds. This amount dwarfs the amount of emergency spending that has led to past increases in FCA litigation — setting the stage for FCA cases

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to surge further in the coming years. Moreover, a huge portion of the relief spending has been in the healthcare sector, which has long been a focus of DOJ scrutiny (cases involving healthcare spending have accounted for more than 80% of all FCA recoveries each year for the better part of the past decade).

As the Biden administration settles into its first year, the government has signaled not only that the FCA remains its primary tool for combatting fraud, but that it will aggressively pursue such actions. Already in 2021, DOJ has announced nearly half a billion dollars in recoveries. And DOJ's efforts to prioritize rooting out COVID-related fraud have only intensified under the Biden administration, which has promised that its efforts to fight COVID-19-related fraud will result in "significant cases and recoveries" under the FCA. The new Administration may also make expansive use of the FCA in other ways, such as to combat the opioid crisis. While campaigning, Biden pledged to make it a "top priority" to hold pharmaceutical companies liable "for their role in triggering the opioid crisis," and DOJ has already set a precedent by settling several cases alleging FCA liability, including one in October 2020 relating to allegedly unlawful promotion of, and kickbacks relating to, prescriptions of opioids.

In addition, while the previous administration's FCA policies sought to ease the burden on regulated industries — by backing away from pursuit of FCA cases predicated on violations of non-binding agency guidance, and encouraging use of the government's power to seek dismissal of cases perceived to have little merit, even over a relator's objection — it is not certain this will continue. The trend may, in fact, reverse course, with President Biden having already taken executive actions demonstrating a fundamental shift in policy toward greater deference to agency guidance.

Regardless of how the new administration's policies ultimately take shape, recently proposed legislation could be a game changer. In early August, a bipartisan group led by Senator Chuck Grassley (R-Iowa), architect of the 1986 amendments strengthening the statute, introduced a bill that would amend key provisions of the FCA specifically to make it easier "for plaintiffs and whistleblowers to succeed in lawsuits against government contractors engaged in fraud."

The bill would accomplish this by shifting the burden of proof on the statute's key materiality requirement to defendants, as well as restricting the government's authority to seek dismissal of cases it perceives as meritless. The proposed legislation would also make it more costly for defendants to seek discovery from the government, a key source of materiality evidence, by requiring payment of attorney's fees in certain situations. If enacted into law, these amendments, which would apply to all pending and future FCA cases, would significantly increase the burden for those facing FCA suits, whether brought by the government or qui tam relators.

The states are also doing their part in legislating and litigating FCA issues. In California, for instance, earlier this year legislators introduced a bill that would expand liability under the state FCA to certain tax payments. Specifically, the bill would impose a new wealth tax (on high-net worth residents) that subjects submission of false claims or records relating to the tax to FCA liability. And already in 2021 California has settled actions against large healthcare providers, involving millions of dollars in state recoveries.

Finally, we note that the courts continue to strike an independent chord when it comes to the FCA. For example, two federal courts of appeals declined to allow relators to proceed with FCA suits where the only alleged fraud relied on a statistical analysis, rather than allegations identifying particular instances of false or fraudulent claims. On the other hand, another federal appellate court held that claims involving a theory that a defendant fraudulently induced the government into a contract are viable under the FCA.

In light of the shifting FCA landscape, what should you do if your company receives government funding? The following FCA issues are of critical importance:

- Prevention. Statistics show that the majority of whistleblowers complain internally before filing a lawsuit. Ensuring a strong HR and compliance program can help prevent FCA cases from ever being filed, and evidences that your company seeks to comply with government rules and funding requirements.
- Investigation. If there is an allegation of wrongdoing, promptly investigate it through counsel — don't wait to hear from the government. This will position you to understand what occurred, correct any potential shortcomings, and prepare a response to any inquiry.
- Avoid government intervention and attempt to convince the government to dismiss. The bulk of recoveries come from cases brought by the government or in which the government intervened. It is therefore critical to engage the government early and make the best case as to why the government should not take over a matter, or even why it should dismiss the case.
- Attack the pleadings. Once the case is at issue, attempt to dismiss the case at the pleadings stage to avoid costly discovery. Any alleged facts showing the government paid, despite having knowledge of the alleged fraud, can be a key tool here. Consider Freedom of Information Act requests to the government to develop this information. ■

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