The Complete Compliance and Ethics Manual 2024
False Claims Act Risks

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Overview

The False Claims Act[2] (FCA) is the government's principal legal tool to combat fraud in federal programs and federal procurement. The FCA is enforced not only by the government, but also by private parties known as qui tam plaintiffs or "relators" (also known as whistleblowers) who stand to recover a bounty by bringing suit in the name of the government. All companies that sell products or services to the government; that participate in any federal programs such as Medicare or Medicaid; or that receive any federal money, either directly or through intermediaries, need to be aware of the substantial risks posed by the FCA.

Over the past 36 years, there have been more than 21,400 FCA matters, and companies have paid more than $72 billion in civil damages and penalties to resolve investigations and lawsuits alleging violations of the FCA.[3] This averages to roughly $3 million per lawsuit. In recent years, FCA matters have proliferated, with more than half of the settlements and judgments (over $37 billion) occurring since October 2012.[4] Even when companies have ultimately prevailed, they typically have needed to pay substantial legal fees to defend the allegations—sometimes exceeding $1 million. Win or lose, any company subjected to a lawsuit under the FCA faces considerable monetary exposure as well as other nonmonetary risks.

This is a brief overview of the risks posed by the FCA. More detailed information concerning the statute is available in the resources identified in the final section of this article or from legal counsel familiar with the law.

Identification of False Claims Act Risks

The FCA imposes liability in two principal situations:

- Where a company knowingly submits a false claim seeking payment from government funds; and
- Where a company knowingly seeks to avoid paying money owed the government.

It is important to understand the contours of these two different types of liability—sometimes referred to as "direct false claims" and "reverse false claims" liability. In understanding the risks posed by the law, it is also important to understand how damages and penalties are calculated, and how the statute can be enforced both by the government and by qui tam plaintiffs.

Direct False Claims

1. **Standard for liability.** A company is liable under the FCA when it "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[5] Similarly, a company is also liable when it "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[6] In practice, these two provisions operate together to impose liability in the majority of cases brought under the FCA. The government or a relator must establish the following elements for

liability under the FCA:

- **Claim.** The FCA only applies to "claims" for payment. The term "claim" is defined as any request for money or property that is directly presented to the government, or that is made indirectly to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government's behalf or to advance a government program or interest, and if the government provides or will provide any portion of the money or property requested.

  This broad definition of "claim" means that *any* person receiving funds traceable to the federal government is potentially subject to liability under the FCA.

- **False or fraudulent.** The FCA imposes liability only when a claim is "false or fraudulent." There is no definition of this phrase in the FCA. But all courts agree that a claim is "false" if it is false on its face —for example, if it seeks payment of more money than is owed. Claims can also be considered "false" if a company makes representations about compliance in submitting a claim, while failing to disclose violations of material contract or grant conditions, regulations, statutes, or other requirements.

- **Material.** The FCA imposes liability only when a party makes a false claim that is "material," or uses a false record or statement that is "material." The statute defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[7] The Supreme Court has emphasized that the standard for what is material is demanding. Generally, a claim is materially false where it leads the government to make a payment that it would not have made otherwise. Evidence that the government regularly pays a particular type of claim despite knowing that certain requirements were violated is strong evidence that a requirement is not material.

- **Knowing conduct.** The FCA imposes liability only when a claimant has "knowingly" submitted a false claim. The term "knowingly" is defined to include not only actual knowledge of falsity, but also "deliberate ignorance" and "reckless disregard" as to whether a claim is true or false.[8] In other words, the FCA does not impose liability when a company has acted negligently or merely made a mistake. On the other hand, a company cannot evade liability by contending that it did not intend to commit fraud or submit false claims; the law expressly states that liability can be imposed even when there is no intent to defraud the government.

2. **Examples of liability.** There are myriad types of conduct that could serve as the basis for liability under the FCA. These are a few examples of such conduct:

   - A manufacturer of equipment used by the military knowingly provides products that fail to meet quality requirements.
   - A healthcare provider knowingly requests payments from Medicare for services that were not provided.
   - A bank knowingly originates and underwrites federally insured mortgage loans that are not compliant with the federal requirements for those loans.
   - An aircraft company knowingly fails to disclose the complete and accurate costs of spare parts to the military during contract negotiations.
   - A healthcare provider knowingly provides services to patients that are not medically necessary.

- A healthcare provider falsely states that procedures occurred in a setting that provides for a higher level of reimbursement, such as a hospital, when it knows that the procedure occurred in a different setting, such as an outpatient clinic.
- A healthcare provider offers discounts to other healthcare entities in exchange for those entities' Medicare and Medicaid business.
- A pharmaceutical company provides marketing materials to doctors, knowing that the doctors will prescribe these medications for off-label uses to Medicare patients, even though Medicare does not permit reimbursement for these purposes. (Note that here, the company itself does not submit false claims, but it "causes" the doctors to submit claims contrary to regulations.)
- A hospital knowingly submits claims for Medicare reimbursement, knowing that it has not complied with regulatory provisions that are a precondition for payment.
- A construction contractor conspires with other contractors to engage in a bid-rigging scheme on federally funded projects, increasing the price the government pays for the resulting construction work.
- A company working on a federal project knowingly submits a false Request for Equitable Adjustment that seeks more money than actually owed.
- A defense contractor knowingly shifts costs from fixed-price government contracts to cost-reimbursement contracts in order to improperly recover more money than it is entitled to recover.
- A company certifies that it is eligible to receive stimulus or recovery funds from the government while knowing that it does not, in fact, meet the eligibility criteria.

Reverse False Claims

1. **Standard for liability.** The "reverse false claim" provision of the FCA imposes liability for the "reverse" of the typical, direct false claims situation—when a company seeks to avoid paying money that it owes to the government. Specifically, liability is imposed when a company "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."[9] A reverse false claims case requires the government or qui tam plaintiff to establish "knowing" conduct. It also requires that the government or the qui tam plaintiff establish "improper" conduct or "concealment" of the obligation to pay.

   Importantly, this type of liability can be imposed when a company improperly retains a government overpayment, or otherwise seeks to evade other kinds of established duties that arise from contracts, grants, licenses, fee-based relationships, statutes, or regulations. Medicare and Medicaid overpayments that are not reported and returned to the government within 60 days of being identified (or the date of the applicable cost report) are treated as false claims under the FCA.[10] However, liability is not imposed when a company seeks to avoid paying a "contingent" future obligation, such as the potential imposition of a fine.

2. **Examples of liability.** There are many types of conduct that can serve as the basis for reverse false claims liability, including the following examples:

   - An oil company has an agreement with the government that it can pump oil from governmentowned land and must pay a royalty to the government based on the volume of oil. The oil company then knowingly falsifies records indicating how much oil is pumped, thereby reducing its obligation to pay royalty revenues to the government.

- A company wrongly claims nonprofit status in order to send mail through the US post office at a lower nonprofit rate.
- A defense contractor knowingly and improperly fails to return duplicate amounts it has wrongly received from the government.
- A contractor knowingly misclassifies aircraft wings on inventory schedules and on that basis purchases the wings for scrap value from the United States rather than paying for their actual higher value.
- A contractor managing a Department of Energy facility knowingly estimates future overhead costs at an unjustifiably high rate, thereby recovering more in overhead payments than it should have been paid and fails to return these overpayments. (Note that in this situation, the contractor arguably has violated the direct false claims provisions by claiming more than is due, as well as the reverse false claims provisions by failing to return overpayments.)

Emerging Areas of Potential Liability

Criminal liability. Although the FCA is a civil statute, certain alleged conduct may also give rise to criminal liability. The Department of Justice (DOJ) has publicly stated that qui tam complaints will be shared with criminal prosecutors, which could result in more companies and individuals being subjected to both criminal liability under federal criminal statutes and civil liability under the FCA for the same underlying conduct.

Individual liability. The DOJ has announced a priority of holding individuals accountable for corporate fraud, emphasizing that prosecutors should explore individual wrongdoing from the outset of an investigation. In service of this goal, the DOJ now requires companies to provide information about individuals involved in the alleged misconduct in order to secure credit for cooperating with the DOJ's investigation—a factor which in some circumstances can reduce the measure of any damages later imposed for an FCA violation. This has led to an increase in FCA investigations and claims targeting individuals.

Predictive analytics. In the healthcare arena, the Centers for Medicare & Medicaid Services (CMS) has shifted its focus to preventive measures to detect and stop fraud prior to payment, rather than relying solely on the traditional "pay and chase" model. CMS has implemented a system that relies upon predictive algorithms and analytics technology used by other industries, such as credit card fraud detection systems, to review Medicare fee-for-service claims and to identify possible patterns of fraud. The system is designed to prevent CMS from ever paying an improper claim, but the information is shared with federal law enforcement and enables the government to detect and investigate possible patterns of fraud.

Data security. Corporate computer systems are increasingly subject to cyberattacks by computer hackers. Many companies that contract with the United States or participate in Medicare or Medicaid programs have obligations imposed by contract, regulation, or statute to guard against data theft. A company may be subject to potential FCA liability if it fails to satisfy these obligations knowingly, with reckless disregard, or with deliberate ignorance.

Damages and Penalties

The FCA provides that a company in violation of the statute's substantive provisions is liable for "3 times the amount of damages which the government sustains because of the act of that person."[11] In addition, the violator must also pay a civil penalty; as of January 2023, FCA penalties range from $13,508 to $27,018 per false claim, and the DOJ is charged with adjusting the penalty range upward every year to account for inflation.[12] A company found liable in a qui tam action must also reimburse the qui tam plaintiff for litigation costs and attorneys' fees.

The FCA provides for a reduction in the amount of the damages, down to double damages, if the violator made a voluntary disclosure to the government within 30 days and cooperated with the government in any ensuing investigation.[13] Under formal guidance issued by the DOJ in 2019, maximum cooperation credit in FCA cases may be earned by timely self-disclosure of misconduct unknown to the government, including the identification of individuals substantially involved in or responsible for the misconduct; cooperating fully with the government's investigation; and undertaking remedial measures designed to prevent and detect similar wrongdoing in the future.

There are no hard and fast rules governing the measure of damages. But most courts have found that the statute is intended to afford the government a complete recovery and to make the government "completely whole." These courts have therefore used broad measures of damages to ensure the government recovers any losses associated with false claims. However, the courts generally agree that the government cannot recover so-called "consequential damages" that do not directly result from the submission of false claims (such as repair or replacement costs).

The penalties assessed under the FCA can also be very significant in some cases. In situations where a company is submitting multiple claims for payment, the penalties can reach astronomical amounts. In healthcare cases in particular, a hospital or doctor may submit hundreds or thousands of claims every day. Even if the out-of-pocket losses to the government are small, the penalties add up quickly at up to $27,018 for each claim. In sum, the combination of treble damages and penalties means that potential monetary exposure under the FCA is extremely high.