



# New and Recurring Issues in False Claims Act Investigations

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# Introductions

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# FCA Liability, Damages and Penalties



# FCA Liability – Common Causes of Action

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- Submitting a false claim for payment (31 U.S.C. § 3729(a)(1)(A))
- Making or using a false statement or record to get a claim paid (31 U.S.C. § 3729 (a)(1)(B))
- Reverse false claims, i.e., improperly withholding money or property owed to the government (31 U.S.C. § 3729 (a)(1)(G))
- Conspiracy to commit an FCA violation (31 U.S.C. § 3729 (a)(1)(C))



# FCA Liability – Basic Elements

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- **Claim:** A request/demand for money or property presented to USG or to a contractor, grantee or other recipient of Gov't funds
- **Falsity:** A claim or statement that is false;
  - Falsity can be express or implied. *See Universal Health Servs., Inc. v U.S. ex rel. Escobar*, 579 U.S. 176 (2016) (endorsing “implied false certification” theory of FCA liability).
- **Scienter:** The defendant knew the claim or statement was false; and
  - “Knowledge” defined as actual knowledge, deliberate ignorance, or reckless disregard. 31 U.S.C. § 3729(b)(1).
- **Materiality:** The falsity was material to the decision to pay the claim—i.e., it was “capable of influencing” the decision to pay
  - *See Universal Health Servs., Inc. v U.S. ex rel. Escobar*, 579 U.S. 176 (2016) (discussing the requirements to adequately plead and prove materiality).



# FCA Damages and Penalties

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- Treble damages
  - DOJ generally will not settle an FCA case for less than double damages.
- Penalties of up to \$23,000 per claim
  - Depending on the context, hundreds or thousands of “claims” can be at issue, driving penalties above even the treble-damages amount.
- Collateral consequences
  - Among other things, if you lose or settle an FCA case, you can expect to hear from the affected agency’s suspension and debarment official.
- Bottom line:
  - The FCA has a relatively low bar for liability—e.g., reckless submission of materially inaccurate claims—coupled with draconian sanctions.



# Responding to an FCA Investigation



# Responding to an FCA Investigation – CIDs (31 U.S.C. § 3733)

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- FCA investigations can be triggered by the filing of a *qui tam* action, or can be government-initiated (e.g., referral from a contracting officer, OIG, DCAA, DCMA, etc.).
- Civil Investigative Demand – a pre-litigation investigative tool DOJ uses to obtain evidence of potential violations and make intervention/filing determination
  - CIDs may include requests for (1) documents, (2) interrogatory responses, and (3) testimony under oath
- Issued in both government-initiated and qui tam actions
  - Main Justice and USAOs issue 400+ CIDs annually
- What you can learn from the CID
  - Office of Issuance (Main Justice vs. USAO)
  - What is being investigated
  - Whether there is a qui tam action under seal
  - Whether you are the target of the investigation or a third-party





## Investigations by the Government (cont.)

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- DOJ usually starts with interrogatories and document production, and then pivots to deposition testimony.
- There is usually no practical basis to contest such demands (other than asserting privilege) as long as the information sought is reasonably related to the subject of the investigation and compliance would not be unduly burdensome.
- The discovery is all one-way, and all before litigation commences – and can be shared with a *qui tam* relator and used in litigation.
- FOIA requests are often the only practical means defendants have for obtaining information from the government at this stage (e.g., evidence of government knowledge or lack of materiality).



# Intervention by the Government

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- The government intervenes in approximately 20% of *qui tam* actions.
- Intervention usually requires approval by the DOJ's Civil Fraud Section.
  - The views of the investigative agency are solicited and considered, and a detailed memorandum discussing the relevant facts and law is prepared.
  - This memorandum usually includes a discussion of efforts to advise the named defendant of the nature of the potential claims against it, any response provided by the defendant, and settlement efforts undertaken prior to intervention.
  - The amount allegedly at issue governs what level of approval within the Department is required.
    - Intervention in small-dollar cases can be determined by the Director of the Civil Fraud Section.
    - Higher value cases require approval from the Deputy Assistant Attorney General, the Assistant Attorney General, or the Attorney General depending on the amount at issue and/or the circumstances of the case.



## Intervention by the Government (cont.)

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- Factors that can influence the government's decision to decline:
  - Lack of evidence;
  - Low potential damages;
  - Finite resources; and/or
  - The government is content to let the *qui tam* relator take the lead in litigating the case.
- The government can change its mind and intervene in a previously declined case upon a showing of good cause.



# Dismissal by the Government

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- The government has the right to dismiss *qui tam* actions against the relator's will, but this right is not necessarily unfettered.
  - See 31 U.S.C. § 3730(c)(2)(A) (government may move to dismiss but relator must be given opportunity for a hearing).
- The government's right to dismiss was rarely used until DOJ in 2018 issued guidance to DOJ lawyers regarding various grounds for dismissal of *qui tam* actions. Government motions to dismiss have since increased, though not materially.
  - E.g., curbing meritless actions, preventing parasitic actions, preventing interference with agency policies or programs, controlling litigation in order to protect DOJ's litigation prerogatives, preserving government resources.
- Various federal circuit courts have adopted different standards for so-called "(c)(2)(A)" dismissals, but under any of these standards courts are generally very deferential to the government's decision to dismiss.



# Recurring Issues: Government FCA Investigations

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- When to conduct an internal investigation while responding to a government investigation of alleged false claims
- Presentations
  - Strategy
  - Government role: Judge and jury? Friend or foe?
  - Government power over qui tam actions:
    - Intervention
    - Declination
    - Dismissal



# Responding to an FCA Investigation – Engagement and Resolution

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- Proactive vs. Reactive Engagement
  - Demonstrating cooperation
  - Conducting an internal investigation
  - Narrowing the CID requests and obtaining reasonable period to respond
  - Obtaining redacted version of qui tam complaint
  - Shaping the narrative
  - Previewing defenses
  - Influencing DOJ intervention / filing decision
  - Presenting bases for § 3730(c)(2)(A) dismissal
  - Resolving claims



# Responding to an FCA Investigation – Best Practices

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- Consult experienced outside counsel to develop comprehensive response strategy and engage with DOJ
- Dialogue regularly with government
- Demonstrate good faith and credibility
- Be transparent about document collection and review methodology
- Memorialize agreements related to CID and response
- Look for opportunities to educate the government and shape the narrative early and often
  - But beware getting ahead of the developing facts



# New and Recurring Issues: CIDs, Subpoenas, and Depositions

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- Differences between Agency subpoenas and DOJ CIDs
  - What getting an Agency subpoena v. a DOJ/USAO CID can tell you
- Peculiarities of CID depositions
  - What triggers deposition requests?
  - What triggers interrogatories?
  - How should you approach a CID deposition?
- Use of CIDs for Rule 30(b)(6) / corporate deposition testimony





# Behind the CID Curtain

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- What DOJ is doing during the course of an investigation into a qui tam?
- What does it mean to extend the sealing period and different phases of an FCA Investigation?
  - Initial Fact Development
  - Written Discovery
  - Oral Discovery
  - Presentations/Negotiations
- Should you poke the bear?
  - What should a company do when the Government goes silent?



# Recurring Issues: Cooperation Credit

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- What is cooperation credit?
  - See DOJ Manual 4-4.112
- What counts toward cooperation credit?
- What does cooperation credit actually do for a company?
- Stipulations in FCA settlements



# New Frontiers In FCA Investigations

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- DOJ Initiatives and Interagency Coordination
  - Procurement Collusion Strike Force (2019)
  - DOJ Civil Cyber-Fraud Initiative (Oct. 2021)
  - DOJ Office of Environmental Justice (May 2022)
  - Healthcare
  - Tech
  - Academia
- New investigative techniques
  - Data Analytics



# Questions?

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