

Hidden Costs Of FCA, Anti-Kickback Claims For Public Cos.

By **Michael Shaheen and Rebecca Baskin** (February 22, 2023, 2:00 PM EST)

A U.S. Department of Justice Civil Division press release usually starts with the result — that is, how much money a company has paid to resolve allegations of fraud. But that settlement price is only a small fraction of the actual economic toll inflicted upon an entity targeted by the government.

Public disclosure of enforcement actions results in reputational and pecuniary penalties that are exponentially costlier than the value of the announced settlement as investors adjust share prices to reflect the cessation of targeted behaviors, the threat of disbarment, the removal of corporate officials and board members, shareholder derivative suits and other ancillary litigation.

Examining 16 publicly traded companies that resolved False Claim Act and/or Anti-Kickback Statute claims in the past five years, and comparing their stock prices at the time of the public disclosures of the investigations with their prices at the time of resolution, reveals the staggering cost of being targeted by the government: On average, the companies lost 25% of their value over the public lifespan of the cases.

The conclusion here — investing in a strong compliance program and creating an open environment where concerning behavior is identified and resolved in its infancy is far cheaper than becoming the target of a DOJ investigation.



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Why DOJ Settlements Are Only Part of the Cost of FCA and AKS Matters

Each year, the government recovers billions of dollars in settlements and judgments from cases involving allegations that health care companies violated the FCA and/or the AKS.

Many FCA and AKS cases are initially filed by whistleblowers who bring suit on behalf of the government. By statute, these cases are sealed — not seen by the public — while the government investigates the allegations, a process that can take years.

As a result, the markets only learn of the matter when the seal is lifted, or when a company publicly discloses the existence of a government investigation.

A majority of FCA and AKS cases settle, and, if the economic toll of such an action was limited solely to the price paid to resolve the action, the damage done would still be extraordinary, but manageable.

However, government investigations trigger myriad ancillary consequences, all of which negatively affect a company's value.

The disclosure of a DOJ investigation — usually in a company's proxy statement or a Form 8-K — not only causes direct reputational harm, but also frequently portends derivative actions by shareholders and other lawsuits filed by entities claiming they, too, were harmed by the alleged fraud.

Furthermore, the cessation of the lucrative conduct that is the subject of FCA and AKS investigations also adversely affects a company's profits, as can the loss of leadership involved in the alleged conduct.

Hedge funds often are eager to exploit the reduced expectations of the company's future success, especially if the company faces disbarment from participating in the Medicare and Medicaid programs.

These problems result in major devaluations of a company's stock price and cause lasting and sometimes permanent damage.

Case Studies

The 16 cases reviewed for this article were made public between 2005 and 2020, and resolved between 2018 and 2022.[1] Between the dates the DOJ investigations were publicly disclosed through the dates of the resolutions, the companies lost, on average, 25% of their value.

One example is Eargo Inc., a company that sells and dispenses hearing aid devices. Eargo first disclosed that it was the target of a DOJ criminal investigation related to insurance reimbursements on Sept. 22, 2021, when Eargo's stock was \$433.40. The following morning, the stock opened at \$167.40.

On Oct. 6, 2021, when Eargo's stock was in the mid-\$130 range, a shareholder derivative action was filed.[2]

Eargo's stock continued to fall thereafter until April 29, 2022, when the DOJ announced it had reached a \$34.4 million settlement with Eargo, and Eargo's stock price closed at \$75.60, representing an almost 83% loss in value since Eargo's initial disclosure of the case in 2021.

Biogen Inc. — a multinational biotechnology company that takes in more than \$1 billion in yearly revenues — is another example.

In July 2015, Biogen disclosed the existence of four qui tam actions alleging violations of the FCA. Seven years later, on Sept. 26, 2022, the DOJ announced that Biogen had agreed to settle for almost \$900 million.[3]

Biogen's stock price plummeted by more than 50% between the date of disclosure and the date of resolution, and then subsequently gained about 100 points in the two days of trading after the case was resolved.

In almost all 16 cases reviewed, companies' stock prices significantly dropped over the lifespan of the enforcement actions and then rebounded after resolution.

Obviously, other factors — including the economy generally, trends in health care, and additional

internal and external factors — affected the value of these companies' stock prices. But the precipitous decline, averaging out to more than 25% of the companies' predisclosure values, ran contrary to the S&P 500, which rose at an average rate of 56% over the corresponding time periods.

Finally, the companies that were still actively traded — i.e., not in bankruptcy — after resolution gained an average of 19.8% between the date of the resolution announcement and the date of our research: Jan. 15.

Again, there are many factors at play here, but the data shows share prices on the rise predisclosure, prices plummeting post-disclosure in an otherwise aggressive bull market, and then prices soaring again post-resolution. It is a logical conclusion that the dark cloud of a government investigation is the driving force behind that trend.

Takeaways

The devaluation companies experience over the public lifespan of an FCA or AKS matter are often considerably more expensive than an already pricey settlement.

Some publicly traded companies, especially smaller health care companies, never recover from the losses. Larger health care companies, while still intact, may suffer massive economic and reputational damage.

Looking at FCA and AKS cases this way, one thing is clear: The cost of a robust and forward-thinking compliance program is far cheaper than the real cost of being the target of a government enforcement action.

What does that look like in practice? Smaller health care companies and startups should invest early in their compliance practices.

Larger companies must make conscious efforts to ensure that different business units and subsidiaries, as well as representatives in the field, comply with companywide compliance policies.

Indeed, it is common to see a large or parent company's name in the headline of a DOJ press release about a settlement with the company's subsidiary or local branch.

No matter the size, companies and their compliance personnel should create environments where employees feel comfortable raising concerns and where internal investigations identify misconduct before it becomes the subject of an FCA or AKS case. This especially is true given the DOJ's policy of rewarding companies that self-disclose and remediate misconduct.

Given the ancillary damage caused by an FCA or AKS case and settlement, a company's best bet is to deter misconduct before it becomes an expensive problem.

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[1] The eighteen companies were: Biogen Idec, Inc., Bayer Corp., Mallinckrodt Pharmaceuticals Inc., Taro Pharmaceuticals Industries Ltd., Eargo, Incyte Corp., Bristol-Meyers Squibb Co., Merit Medical Systems, Inc., Teva Pharmaceuticals USA, Inc., Universal Health Services, Inc., Novartis Pharmaceuticals Corp., MiMedx Group, Inc., ResMed Corp., Amgen Inc., Jazz Pharmaceuticals, and Pfizer Inc.

[2] See *Fazio v. Eargo, Inc. et al.*, 2021-cv-07848 (N.D. Ca.).

[3] Department of Justice, Biogen, Inc. Agrees to Pay \$900 Million to Settle Allegations Related to Improper Physician Payments, <https://www.justice.gov/opa/pr/biogen-inc-agrees-pay-900-million-settle-allegations-related-improper-physician-payments> (Sept. 26, 2022).