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Q&A: False claims investigations and enforcement

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Q&A: False claims investigations and enforcement

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FW: How would you describe recent investigations and enforcement activity related to the US False Claims Act (FCA)? Could you comment on any recent cases of note?

Monaghan: FCA enforcement is an important priority for the DOJ. The DOJ is particularly interested in healthcare fraud and abuse because it is believed to cost the government billions of dollars each year. The DOJ is concentrating on elder and hospice care, opioids and improper referrals to hospitals and other providers. For example, in October 2017, the DOJ reached a $75m settlement with Vitas Healthcare, which allegedly billed the government for unnecessary hospice and homecare services. In July 2017, the DOJ arrested over 400 individuals for false billings related to opioids. The DOJ has also brought actions involving the mortgages and housing industry. In September 2017, the DOJ won a $296m judgment against a home mortgage broker that allegedly defrauded a federal mortgage insurance programme. These cases highlight the necessity for every company that receives government reimbursement to have a robust compliance programme that prevents, detects and corrects conduct that can lead to FCA violations.

FW: What penalties can firms expect to face if they breach the FCA? What steps have courts taken to limit penalties and damages in recent years?

Monaghan: FCA violations may result in fines of $21,563 per false claim and treble damages – three times the dollar amount of the false claims. The DOJ typically accepts double damages from companies that are cooperative and settle FCA actions voluntarily. Defendants have argued that large FCA awards violate the Eighth Amendment prohibition against excessive fines, but this position has generally been rejected by courts. But defendants still have options. They can seek to reduce penalties and damages by limiting the scope of wrongdoing. For example, a company might argue that the court should reject a whistleblower's attempt to extrapolate wrongdoing at the facility at which she worked to billing at other facilities because the whistleblower did not work at those facilities and had no knowledge of their practices. Another strategy is to seek a negotiated resolution with the DOJ before a matter goes to trial.

FW: In what ways has the government sought to expand its application of implied certification under FCA liability? What are the practical implications of this development?

Monaghan: Implied certification claims are based on the theory that by submitting a billing claim, the defendant is impliedly stating that it complied with the applicable regulations – but was not doing so. Such claims are attractive to the DOJ and whistleblowers because they do not require proof of an expressly false statement. The Supreme Court endorsed "implied certification" in 2016 – with an important caveat. The plaintiff must establish materiality, meaning the government would not have provided reimbursement had it known about the noncompliance.

Defendants have won on materiality when they showed that the government knew about the noncompliance but continued to provide reimbursement. Defendants have lost where plaintiffs showed that the government received something very different from what was described on a reimbursement form, such as healthcare provided by unlicensed practitioners. Since materiality is often debatable, companies should not view the materiality requirement as a licence to relax FCA compliance.

FW: What general advice can you offer to a company that finds itself subject to an FCA-related investigation? What initial steps should it take to assess the matter internally and respond to the authorities?

Monaghan: Companies subject to FCA investigations should retain counsel to conduct an internal investigation to determine whether there has been misconduct and what, if anything, the whistleblower knows about it. Potential misconduct should be stopped immediately and internal controls should be established to prevent it from reoccurring. Overpayments resulting from misconduct should be returned to the government immediately. If a company concludes that it has acted properly, it should both cooperate with government investigators and develop legal defences, such as the whistleblower lacks credibility or that the company followed applicable regulations. If the company believes that there has been misconduct, it may want to enter into early settlement negotiations with the DOJ. Such negotiations could result in double damages – instead of treble damages if the case went to verdict – as well as some limitation in the scope of liability, such as only to billings resulting from certain facilities, time periods or business practices.

FW: While most FCA cases are brought by whistleblowers, their ability to bring a suit is not limitless. What defences can a firm employ to close down a whistleblower FCA suit?

Monaghan: After a whisteblower files an FCA claim, it is placed under seal while the DOJ investigates. The seal is lifted when the DOJ intervenes and takes over the case or declines intervention, and the whistleblower proceeds alone. Either way, the DOJ, as the party in interest, can settle or end the matter. It may be prudent to reach out to the DOJ to convince it that the case is meritless and should be dismissed or to seek early resolution. In court, defendants can file a motion to dismiss. FCA defendants often argue in such motions that the alleged misconduct is not false or fraudulent, is not material, meaning the government would have provided reimbursement even if it knew about the alleged conduct or statement, or reflects public information. Even if the motion is denied, it may educate the court and the DOJ on the weaknesses of the case.

FW: To what extent can action be taken against employees who falsely accuse a company of FCA violations? What considerations does a company need to make before it decides to pursue such action?

Monaghan: Companies should be cautious when taking action against employees who the company believes have made false FCA allegations. A company should take action against an employee for making false allegations only if it has solid evidence that the allegations are false and without a reasonable basis. Otherwise, any retaliation, including just transferring the employee to a new position, may result in a lawsuit under the FCA's 'whistleblower' protection provisions. Employees sometimes can prevail just by demonstrating that their allegations had a reasonable basis. Companies often find that they can minimise the risk of FCA allegations in the first place by treating employees with respect and creating a strong compliance culture. Employees are less likely to bring FCA actions if they believe their concerns are being addressed by management and that they are not being given unrealistic goals that can be accomplished only by cutting corners on compliance.

FW: Based on your experience, what general steps can firms take to minimise and manage FCA risks and liabilities? Are today's firms fully aware of the conduct which can lead to FCA violations?

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Monaghan: The most important step in minimising FCA-related risk is developing and maintaining a robust and comprehensive compliance programme. Such a programme should consist of mechanisms for monitoring, auditing and investigating each business function, as well as third-party contractors, to identify potential activities that could lead to FCA violations. If potential misconduct is identified, it should be remediated immediately, and efforts should be made to ensure that the issue is not systemic and does not occur in the future. Companies should also conduct periodic risk assessments aimed at proactively addressing any areas of concern. Many large healthcare companies have developed robust compliance programmes in response to eight and nine figure FCA resolutions. However, some smaller healthcare companies or companies that receive government reimbursement but are targeted less frequently for FCA actions may be less attuned to FCA risks and may not have invested sufficiently in FCA compliance. ■