THE
NATIONAL LAW REVIEW

Predictions on False Claims Act Enforcement in Trump Administration

Monday, November 28, 2016

While there are a number of executive policies that will be affected by the presidential election, there are several reasons to expect modest change in the government's approach to ***False Claims Act (FCA)*** actions. The most significant reason for this expectation is that the vast majority of FCA cases are filed by relators on behalf of the government and the ***Department of Justice (DOJ)*** has historically viewed itself as obligated to conduct an investigation into those cases. There is little reason to suspect the financial motivations that encourage relators and relators' counsel to continue to bring cases under the FCA will diminish. That said, the possibility of repeal of the ***Affordable Care Act (ACA)*** could remove or change some of the ACA's FCA amendments that enhanced the ability of certain individuals to qualify as a relator. The composition of the Supreme Court may have the most significant impact on the FCA given the Court's increasing interest in this area.

McDermott Will & Emery

Article By Rebecca C. Martin
Tony MaidaMcDermott Will & Emery
FCA Update Blog

Health Law & Managed Care
All Federal

- **Relators Are in the Driver's Seat**

In the FCA setting, the reality is that relators largely drive the government's caseload. DOJ's statistics show that the number of cases brought by relators increased during the Obama Administration as compared to the Bush Administration, but that the number of non-*qui tam* cases stayed relatively the same, even taking into account that we do not have 2016 statistics yet from DOJ. This remains true for cases involving the Department of Health and Human Services (HHS), the largest category of FCA cases. Total dollar recoveries significantly increased during the Obama years as well, although since FCA cases typically take several years to investigate and resolve, many of the cases settled in Obama's first term were likely filed during Bush's second term.

DOJ Statistics	Bush (2001-2008)	Obama (2009-2015)
New total qui-tam	2,930	4,404
New total non-qui-tam	809	848
Total recoveries	$13.97 billion	$26.80 billion
New HHS qui-tam	1,775	2,897
New HHS non-qui tam	247	224
Total HHS recoveries	$10.83 billion	$16.81 billion

There are likely several reasons for this increase in *qui tam* suits, including:

- a more sophisticated and aggressive relators' bar;
- increasing awareness of the FCA aided by the requirement under the Deficit Reduction Act of 2005 (DRA) for large healthcare providers to educate their employees about the FCA and whistleblower rights;
- the expansive FCA amendments in the Fraud Enforcement and Recovery Act of 2009 (which overturned the Supreme Court's *Allison Engine* decision); and
- the ACA's easing of the public disclosure bar's requirements, discussed below.

Many of these factors seem likely to remain in place, absent legislation amending the FCA itself, to continue to encourage relator-initiated lawsuits.

- **Potential ACA Repeal Ramifications**

As FCA lawyers know, the ACA deals with more than attempting to provide health insurance to the previously uninsured. The ACA also amended the FCA's public disclosure bar to allow more people to qualify as relators, created a new federal health care program obligation, and eased the government's burden of proof under the federal anti-kickback statute (AKS).

More particularly, the ACA diluted the public FCA's disclosure bar by (1) removing the express reference to the jurisdictional nature of the bar, (2) granting the government the ability to object to a case's dismissal due to the public disclosure bar, (3) narrowing the categories of what qualifies as a "public" disclosure, and (4) providing a relator with a lower standard to qualify as an "original source." In healthcare, the ACA created the so-called "60-day rule" that established an express requirement to report and return Medicare and Medicaid overpayments within 60 days of identification. The failure to comply with this rule can create exposure under the FCA's reverse false claims provision. Finally, the ACA also amended the AKS to affirmatively state that actual knowledge of the AKS or specific intent to violate the AKS is not required to prove a violation as well as to clarify that a claim that includes items or services "resulting from" an AKS violation constitutes a false or fraudulent claim for purposes of the FCA.

Whether some or all of these provisions are included in the campaign to "repeal and replace" the ACA, however, is an unknown at this time.

- **Watch the Supreme Court**

In the last few terms, the Supreme Court has granted *certiorari* on several FCA cases, indicating an increasing interest in the area and addressing the various circuit splits that have emerged. The 2015 Kellogg Brown & Root decision created the potential for multiple lawsuits over the same facts in ruling that a previously-filed *qui tam* lawsuit under the FCA is no longer "pending" under the statute's first-to-file bar once it is dismissed. The 2016 Escobar decision *on* the implied certification theory of liability and "materiality" requirements under the FCA have already been the subject of several district court opinions across industry sectors. Again this term, the Court granted *certiorari* in the *State Farm Fire and Casualty Co. v. United States ex rel. Cori Rigsby and Kerri Rigsby*, which concerns whether a *qui tam* relator's violation of the seal requirement requires a court to dismiss the suit. The ability to appoint at least one Justice, and potentially more, to the Court may have far-reaching impact on FCA jurisprudence.

- **DOJ Policy Positions May Change**

DOJ policy is an area that could change with a new administration. The best example of official DOJ policy pronouncements are the various Deputy Attorney General (DAG) memos. Several of these memos over both administrations have dealt with attempting to give federal prosecutors guidance on evaluating a corporation's cooperation in an investigation in making criminal charging decisions.

The 2003 Thompson Memo (issued during the Bush years) directed prosecutors to consider two controversial factors in evaluating cooperation: 1) whether a company would agree to waive the attorney-client privilege, and 2) whether a company had declined to pay attorneys' fees for its employees. The 2008 Filip Memo (also issued during Bush) backtracked from the Thompson Memo's more controversial elements, but not on the general direction to DOJ attorneys to evaluate corporate cooperation. The 2015 Yates Memo (and subsequent revisions to the US Attorneys' Manual) continues from Filip in focusing the analysis of cooperation on the extent to which the company provides the government with all relevant facts, but expanded the guidance to give additional importance to identifying "culpable individuals." The Yates Memo may be seen as a response to the criticism levied against DOJ for a perceived failure to pursue individuals related to the 2008 financial collapse and

mortgage crisis. However, the positions DOJ official Bill Baer outlined regarding DOJ's expectations for "proactive" cooperation in civil FCA cases raise legitimate concerns that DOJ is undermining the ability of a corporation to properly defend itself.

In sum, as new appointees move into positions at DOJ, there is the potential for change in approach to FCA enforcement policy, such as dialing back some of the more controversial elements of the Yates Memo. For various reasons, such as recent statutory expansions, the Court's increasing interest, and the largely relator-driven nature of FCA complaints, there is good reason to expect that FCA activity is an area that will continue on with little interruption in the absence of additional legislation.