

Raising the Stakes

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March 2015

The government has become increasingly aggressive in pursuing criminal claims not only against corporations, but also against in-house counsel and compliance personnel, for conduct once treated almost exclusively as civil. This trend creates situations in which a judgment call on the part of an in-house attorney or compliance officer could create real and dire personal consequences. Most recently, the U.S. Treasury Department's Financial Crimes Enforcement Network imposed a \$1 million civil penalty against a money services industry compliance officer as a result of a purported failure to ensure his company's compliance with anti-money laundering laws.

The False Claims Act

The False Claims Act (FCA) provides an ideal case study for this phenomenon, as it is increasingly being used in this context. Under the FCA, if a person knowingly presents a false claim to the government, makes a false statement to the government, or influences another person to do either, and such fraudulent representations were made for the purposes of obtaining compensation from the government, the government can hold that person civilly and criminally liable, by combining it with ancillary criminal statutes. 31 U.S.C. §§ 3729(a)(1)(A), (B). The FCA is unique in that it also allows private citizens to file suit for violations *on behalf* of the government. This type of suit is known as a "*qui tam*" action, and the private individual who initiates the filing is known as a "relator." 31 U.S.C. §§ 3729, *et seq.*

Damages under the FCA can pack a punch. For civil violations, damages include penalties from \$5,000 to \$10,000 for each false claim as well as treble the amount of the government's damages. 31 U.S.C. § 3729. The relator stands to benefit from initiating the *qui tam* claim, which serves as an incentive for private citizens to file such actions.

To provide context for the quantity of money involved, and explain the government's incentive to pursue such claims, in 2013, the U.S. Department of Justice (DOJ) obtained \$3.8 billion in settlements and judgments from FCA lawsuits, according to a DOJ press release. This amount was the second largest annual recovery of this type. Since January 2009, the DOJ has recovered \$17 billion on claims brought under the FCA. These figures have the potential to crush a company's bottom line. Because there is a financial incentive to would-be relators, not to mention huge potential recoveries for the government, this trend is likely to continue.

The consequences can be even worse when criminal charges are added to the mix, as is increasingly the case. In 2009, the FCA was amended to make it easier for federal prosecutors to pursue fraud claims against companies facing FCA liability. Once a *qui tam* action is filed (under seal at first, so the target company does not even know of its existence), specialized prosecutors analyze the claims to determine whether a federal criminal prosecution is appropriate. 31 U.S.C. § 3730(b)(2). The government then has choices to make: Will it intervene on the relator's *qui tam* claim and pursue the false claim civilly on behalf of the United States? Will it sue the company alone or add individuals to the complaint? Will it pursue a criminal prosecution for the alleged false claims? And will it pursue criminal prosecutions against individuals in the company's ranks?

In-House Counsel and Compliance Officers in the Line of Fire

The increase in criminal prosecutions for what were once civil claims means ever more pitfalls for businesses and their employees — especially in-house counsel and compliance personnel. It also means that the consequences of making an on-the-job error are more serious than ever. Not only could a company find itself paying the government millions, or even billions of dollars, but executives could also end up paying out of pocket and serving prison time. The prospect, no doubt, creates real and justifiable concerns for in-house counsel and compliance personnel.

Unfortunately, this outcome is increasingly common. In one such FCA case, the general counsel of a large software corporation was convicted of securities fraud and obstruction of justice related to the government's investigation of the company's accounting practices. He was sentenced to two years in prison. The company itself avoided prosecution through a deferred prosecution agreement.

Another worrisome trend is the government's apparent willingness to pursue civil FCA claims against private individuals for their roles in certifying corporate conduct. This could easily escalate to pursuing criminal charges as well. Company counsel and compliance officers are often asked to certify conduct, asserting that the company has complied with the laws. What if a compliance officer or in-house counsel certifies a company's practices to the best of his or her ability, but later discovers that he or she may have made the wrong judgment call and mistakenly certified fraudulent conduct? A chief compliance officer and general counsel for a large health care corporation was caught in the crosshairs of an FCA claim for certifying compliance with Medicare laws despite alleged inconsistencies that resulted in a purported \$18 million in illegal payments from Medicare. The case was initiated, as so many are, by a former employee filing a *qui tam* action against the company. The government then pursued FCA claims against the in-house attorney/compliance officer personally. The government's FCA claims against the compliance officer were eventually dismissed based on the statute of limitations, but this story is a cautionary tale that could easily have ended much differently for that attorney.

Say, for instance, you are corporate counsel at a company that sells widgets. Although your company sells widgets to many commercial customers, the company also has a contract to sell widgets to the U.S. military. One of your major customers, Acme, has been purchasing widgets at a very favorable price and has done so for years. The price your sales team has negotiated with the military is higher than that paid by Acme. You rely on the representations of the company's employees, and you sign certifications to the government attesting that all material information has been disclosed in the bidding process. You learn that a disgruntled former member of your executive team has filed a *qui tam* action against your company and the DOJ is investigating the pricing discrepancy. You are told that the investigation is civil, but outside counsel indicates that the U.S. Attorney is also considering launching a criminal investigation.

You may be surprised that this activity, which has been occurring for years, is now under fire. After all, it was a fairly negotiated contract, right? The sales team handling the government contract was simply more successful at negotiating terms for your company than the team that handled the Acme contract with the lower price tag. How can that be a crime? Well, the DOJ may see it differently.

The government might take the position that this is procurement fraud. Indeed, prosecutors might assert that based on representations made during the sales negotiations, including your representations, the failure to disclose discounts given to commercial customers and not afforded to

the government violates the FCA and has criminal implications. The government might also say that your company should have disclosed the lower price offered to the commercial customer, and failure to do so was a false statement to the government. This seemingly innocuous behavior could result not only in civil damages, but also criminal penalties for the corporation, debarment from government contracts, and prison time for the employees involved. You, as in-house counsel, are potentially in the government's sights.

Criminal Charges?

Criminal charges in such cases, while historically rare, are likely to grow in frequency over the coming years. In a speech in September 2014, Assistant Attorney General for the Criminal Division Leslie R. Caldwell announced that the DOJ will be increasing its commitment to investigate and prosecute criminal conduct stemming from FCA lawsuits. And there is potential for serious prison time and fines. One individual was charged in 2011 with fraud related to an FCA suit and was sentenced to 50 years in prison for orchestrating fraud against the government. The two companies involved were placed on probation and ordered to pay \$87 million in restitution.

Conclusion

The FCA is but one example of how the government has begun pursuing criminal penalties against companies and individuals alike for conduct that may once have just been pursued civilly. This trend is a slippery slope and can turn into criminal prosecutions of individual in-house attorneys and compliance personnel. The daily decisions an in-house attorney must make have never been under greater scrutiny, and the stakes have never been higher. Consequently, such individuals should not only make sure that their companies are complying with the law, but that their own conduct is beyond reproach.

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