

False Claims Act Alert

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Reducing False Claims Act Exposure in the Aftermath of COVID-19 Legislation

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Key Points

- The government has pledged to prioritize investigations and prosecutions regarding alleged frauds related to coronavirus programs.
- The False Claims Act is the government's primary enforcement tool to prosecute alleged fraud.
- Companies can reduce their exposure to fraud enforcement actions by staying actively abreast of the government's rules and regulations regarding payment and, when those rules are ambiguous, adopting a reasonable interpretation of what those rules require and documenting the deliberative process.
- Companies can further reduce exposure to liability by communicating to the government, in writing, their understanding of the underlying rules because courts find that if the government continues to pay notwithstanding an alleged breach, the breach is not likely material to the government's payment decision.
- Companies can reduce their exposure to FCA retaliation actions by documenting the basis for employment terminations.

The False Claims Act (FCA) is the federal government's chief weapon to combat allegations of fraud against the federal government. It arms government law enforcement officials with a remedy of treble damages and civil penalties against those who are, at a minimum, recklessly disregarding or deliberately ignorant in making materially false claims to the government. It further empowers private citizens (known as relators) to sue on the government's behalf (known as *qui tam* actions) and obtain a substantial bounty if they prevail. It also contains a provision to protect employees, contractors and agents from adverse employment actions for engaging in efforts to stop or investigate FCA violations.

As the federal government prepares to spend more than two trillion dollars to stimulate the economy, and unemployment rates spike, the government and private whistleblowers are more likely to invoke the FCA.¹ Indeed, the Attorney General has already directed all U.S. Attorneys to prioritize the investigation and prosecution of coronavirus-related fraud schemes.² The Attorney General has also urged the public to

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report any suspected fraud scheme.³ Likely targets of this enhanced scrutiny are those who care for the ill (hospitals, skilled nursing facilities), those who find and test new treatments (laboratories), those who manufacture and distribute supplies (pharma, durable medical equipment suppliers), those who formulate and produce vaccines (government contractors) and those who seek aid from the government to restore their businesses (small businesses).

There are some steps, however, that companies can undertake to reduce their exposure to liability under the FCA's substantive and retaliation provisions. As to the FCA substantive provisions, these steps include reviewing any guidance the government issues regarding qualifications to participate in these programs, and when the guidance is ambiguous, forming and documenting contemporaneous reasonable interpretations of what the government's guidance requires. Companies should also communicate, when appropriate, their interpretation to the government because if the government continues to pay on the claim, that tends to prove that any theoretical breach of a rule is not material to the government's payment decision. An affirmative response by the government should provide a dispositive defense to an FCA claim, but even definitively putting the government on express notice of the company's interpretation provides a valuable defense if the government does not oppose the interpretation. Finally, as to FCA retaliation provisions, companies should, prior to reductions in force, carefully document the basis for their actions to validate, when appropriate, that the reduction occurred as a result of the current economic crisis.

FCA Defenses Applicable To Recent COVID-19 Stimulus Legislation

Reasonable Interpretation of the Government's Rules

There is generally no FCA liability unless there is a violation of some statutory, regulatory or contractual provision. One challenge companies frequently confront is that as a condition of receiving payment from the government, they must affirmatively certify that they are operating in compliance with a substantial number of federal and state rules and regulations.

In normal times, the government's rules are frequently opaque and ambiguous. And when Congress and agencies must rush the legislative and rulemaking process, additional drafting errors occur. When statutes, regulations and contracts are ambiguous, companies confront exposure to liability if they act upon one interpretation of a rule and certify compliance with that rule while the government, or a company employee acting under the FCA's *qui tam* provisions, advances a different interpretation. When this occurs, the government or relators will contend that the company's certification is a false certification under the FCA.

The FCA, however, provides a valuable defense to this type of allegation. When FCA plaintiffs predicate their action upon an ambiguous rule, the majority of courts have refused to apply the FCA. Specifically, these courts rule that where defendant's conduct is based upon a reasonable interpretation of an ambiguous law, and the government has not provided any official alternative interpretation of the law to warn the defendant away from its reasonable interpretation, there is no FCA knowledge as a matter of law.⁴

Thus, if companies carefully study the relevant government rules governing payment and develop reasonable interpretations notwithstanding the underlying ambiguity, they will have a valuable defense to FCA liability. If the company has a reasonable

interpretation, the government then must show that it has issued formal guidance³ such as official agency action or court decisions⁴ that the government contends should have warned the company away from its reasonable interpretation of the ambiguous rule. If the government cannot identify any, the case law instructs that the government should receive, if its interpretation of the rule is correct, no more than single damages on an overpayment claim, but not treble damages and substantial civil penalties under the FCA, because, under these circumstances, the government cannot satisfy the FCA's knowledge element.

Hence, companies can reduce their exposure to liability by:

- Staying actively abreast of governmental rules and regulations regarding government payment and forming a reasonable understanding of what those rules require.
- Communicating, when applicable, that understanding to the government whenever the issue arises (for example, in written correspondence with government representatives, routine audits, SEC filings or other public reports).
- Monitoring official governmental pronouncements and court decisions to evaluate whether that guidance contains any information that would “warn” the company “away” from its reasonable interpretation.
- Maintaining centralized and retrievable records of the rules, regulations and governmental guidance; communications with the government; and the company's deliberative process to interpret and apply those materials to the company's operations and claims submissions.

Understanding When Perceived Breaches Are Material to the Government's Payment Decisions

The FCA's materiality element also provides an additional valuable defense if the government or relator contends that the defendant falsely certified compliance to a wide array of government rules and regulations.

For a misrepresentation to create FCA liability, the misrepresentation must be material to the government's payment decision. Prior to the Supreme Court's ruling in *Universal Health Servs. v. U.S. ex rel. Escobar*,⁵ the majority of courts applied a strict objective materiality rule in determining when a misrepresentation is material to the government's payment decision.⁶ In *Escobar*, the Supreme Court reversed this body of FCA case law. It ruled that the actual behavior of the government can, and should, be reviewed because “materiality look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.”⁷ The Court elaborated that when the government pays a particular claim in full despite its actual knowledge that certain requirements were violated, the government's payment “is very strong evidence that these requirements are not material.”⁸ The Court also noted that when the government generally, as a matter of course, in administration of the government's program or contract, pays a particular *type* of claim despite its knowledge that certain requirements were violated, and has signaled no change in position, the government's conduct under these circumstances “is strong evidence that the requirements are not material.”⁹ Moreover, the Court, on two separate occasions—to ensure that its mandate was clear that it is the government's actual behavior that matters—rejected the government's position that materiality could be established if the government

merely had the option to decline to pay if it was aware of the defendant's noncompliance.¹⁰

In light of *Escobar* and its progeny, the questions to ask in any FCA litigation to determine whether the relator can satisfy the FCA materiality element include:

- When did the government first become aware of the allegations?
- Did it learn of the allegations before the relator filed?
- Did it learn after the relator filed?
- What tangible actions occurred next?
- Is payment overseen by an administrative agency where agency personnel exercise discretion regarding whether any sanction should be imposed in light of the relator's allegations?
- Did the government impose any administrative sanction? For example, after review, did the government undertake action short of denial of payment (e.g., institute a corrective action plan, impose a civil monetary penalty)?
- Did the government decline to impose any sanction?
- Did the government continue to pay the claims?
- Did the government continue to pay on claims that relate to the subject matter of the relator's complaint?
- Did the government renew any existing contract?
- Did the government pay any incentive payments or reward fees under the contract?

If the government is aware of the purported violation and does not seek repayment, or if the government investigates the purported violation administratively and elects to impose some lesser sanction, the company will likely possess a strong materiality defense under *Escobar*.

Defending FCA Retaliation Claims

Many companies affected by this COVID-19 crisis will have to reduce their workforce, perhaps substantially. The FCA empowers plaintiffs to file actions for wrongful retaliation. To succeed, plaintiffs must generally show that they were engaging in conduct protected under the FCA (i.e., actions to investigate or stop FCA violations); that the defendant knew the person was engaging in that conduct; and the defendant undertook an adverse employment action against the person *because* the person engaged in protected conduct.

In determining whether the adverse employment action was "because of" the person investigating or stopping an FCA violation, the majority of circuits have required that plaintiff show "but-for" causation.¹¹ That is, plaintiff must show that but for the plaintiff engaging in protected conduct, the defendant would not have undertaken the adverse action.

But regardless of whether courts use a but-for standard or a contributing factor standard, there are steps companies can undertake to reduce exposure to a whistleblower retaliation claim. First, when reductions in force occur, companies should carefully document the basis for the reduction. This documentation should

include why certain categories of employees are retained and others are discharged. Second, if employees have previously raised FCA-related concerns, companies should be aware that their line drawing is likely to receive heightened scrutiny if the employees fall into the group that is discharged and ensure that a contemporaneous record supports the reasonableness of the company's ultimate decision.

Conclusion

The two trillion dollar Coronavirus Aid, Relief and Economic Security (CARES) Act will no doubt be a catalyst to a multitude of FCA lawsuits, just like any large federally funded program. By undertaking these steps related to understanding the legislation, forming reasonable interpretations regarding its meaning, communicating those interpretations to the government, when appropriate, and carefully documenting decisions associated with reductions in force, companies may substantially reduce their exposure to FCA liability.

1 The FCA was born in crisis during the Civil War, expanded during WWII, enlarged during the defense buildup at the end of the Cold War and then revised and enlarged again in the aftermath of the 2008 recession. At times of national crisis and increasing expenditures, Congress has sought to expand, and plaintiffs have sought to enforce the FCA.

2 See Attorney General William P. Barr, Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud (Mar. 20, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud>.

3 *Id.*

4 See e.g., *United States v. Allergen, Inc.*, 746 F. App'x 101, 109-10 (3d Cir. 2018) (although the court was not prepared to find that the defendants had the best interpretation of the statute, it found that the plaintiff had failed to plead an FCA cause of action because the defendants had a reasonable interpretation of an ambiguous statute, and the relator did not plead that the government had published any official guidance that would "warn" defendants away from their reasonable interpretation); *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 289 (D.C. Cir. 2015) (defendant did not knowingly submit false claims when there was no "guidance from the courts of appeals' or relevant agency 'that might have warned [the defendant] away from the view it took'" (citation omitted); see also *U.S. ex rel. Donegan v. Anesthesia Assocs. of Kansas City, PC*, 833 F.3d 874, 880 (8th Cir. 2016) (affirming dismissal because the FCA plaintiff had failed to submit any relevant evidence that "the government had warned [the defendant] that the agency interpreted [the relevant regulation] differently" than defendant's interpretation and thus because there had not been sufficient "official government warning," there was not "sufficient evidence of reckless disregard"); *U.S. ex rel. Ketrosor v. Mayo Found.*, 729 F.3d 825, 831-32 (8th Cir. 2013). In short, courts rule that just as the defendants have a duty to understand the law and follow it, the government has an equal and reciprocal duty to promulgate and publish clear rules and regulations to guide and inform those who elect to do business with the government. See generally *United States v. Cooperative Grain & Supply*, 476 F.2d 47, 60 (8th Cir. 1973) (noting in FCA action that "[o]bviously a citizen cannot digest all the manifold regulations, nor can the Government adequately and individually inform each citizen about every regulation, but there is a corresponding duty to inform and be informed").

5 136 S. Ct. 1989 (2016).

6 See, e.g., *U.S. ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 95-96 (2d Cir. 2012) (concluding "that the test of materiality in the case before us is objective—asking what would have influenced the judgment of a reasonable reviewing official—rather than subjective—asking whether it influenced the judgment of a reviewer of a proposal in the case at hand" and noting that to "decide otherwise—that materiality must be established in each case based on the testimony of a decisionmaker—would subvert the remedial purpose of the FCA. The resolution of each case would depend on whether such a decision maker could be identified and located, and whether that particular person would have treated the claims as material, regardless of whether they were one of several individuals charged with evaluating the claims at issue"); *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 916-17 (4th Cir. 2003) ("Courts give effect to the FCA by holding a party liable if the false statement it makes in an attempt to obtain government funding has a natural tendency to influence or is capable of influencing the government's funding decision, not whether it actually influenced the government not to pay a particular claim." (citation omitted)); *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cnty.*, No. 06 Civ. 2860, 2009 U.S. Dist. LEXIS 14399, at *62 (S.D.N.Y. Feb. 24, 2009) (rejecting defendant's contention that because agency had reviewed its submissions and continued funding that its submissions could not be "material" to payment because "an individual government employee's decision to approve or continue such funding, even with full access to all relevant information or knowledge of the falsity of the applicants certification does not demonstrate that the falsity was not material. After all, the FCA is intended to police the integrity of those claims submitted to the government for payment, and the materiality of statements made in those claims is tested as of the time of submission to the government and in the context of the regulatory requirements. Thus, the assertion that certain HUD bureaucrats reviewed the [defendant's] submissions and continued to

grant the [defendant] funding cannot somehow make the false...certification immaterial, where the funding was explicitly conditioned on certifications" (footnote omitted); *United States v. President & Fellows of Harvard Coll.*, 323 F. Supp. 2d 151, 186 (D. Mass. 2004) (finding that the government's burden to establish materiality is that the false statement has a natural tendency to influence agency action or is capable of influencing agency action and that "[e]vidence of the government's actual conduct is less useful for FCA purposes than evidence of the government's legal *rights*. I decline to adopt rules of law that would enable the government to determine materiality by its reaction to either a violation of the [regulations], or a failure to submit properly signed financial forms. Materiality must turn on how [the government] was *authorized* to respond to such failures, or else violation of identical provisions in separate case could have different materiality results based on the predilections of particular program or accounting staff").

7 136 S. Ct. at 2002 (alterations, internal quotation marks and citation omitted); see also *U.S. ex rel. Bishop v. Wells Fargo & Co.*, 870 F.3d 104, 107 (2d Cir. 2017). For example, materiality can include "evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." 136 S. Ct. at 2003.

8 136 S. Ct. at 2003-04 (if "the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that these requirements are not material"). Of course, this situation would arise in many *qui tam* actions post-filing because the relator must produce "substantially all material evidence and information the person possesses" at the time of filing the action. See 31 U.S.C. § 3730(b)(2). Thus, if the government pays actual claims at this point, that "is very strong evidence" that the alleged breach is not material.

9 136 S. Ct. at 2003-04 (If "the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.").

10 *Id.* at 2003 ("Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance."). The *Escobar* Court rejected the government's position that "any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation." *Id.* at 2004. The Court explained that "[w]hat matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Id.* at 1996. That is because, if the "Government required contractors to aver their compliance with the entire U.S. Code and Code of Federal Regulations, then under this view, failing to mention noncompliance with any of those requirements would always be material," but the "False Claims Act does not adopt such an extraordinarily expansive view of liability." *Id.* at 2004.

11 See, e.g., *Nesbitt v. Candler Cty.*, No 18-14484, 2020 U.S. App. LEXIS 64, at *10 (11th Cir. Jan. 3 2020) (ruling that the "but-for" causation standard applies to claims under the FCA's anti-retaliation provision); *DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 76-78 (3d Cir. 2018) (ruling that the "because of" statutory language compelled the use of "but-for" causation standard based upon the Supreme Court's rulings in an age discrimination case applying that statute's "because of" language and a Title VII case applying its "because" language where the Court ruled that this language requires a plaintiff to prove that the desire to retaliate was the "but-for" cause of the adverse employment action); *U.S. ex rel. Cody v. Mantech Int'l*, 746 F. App'x 166, 177, 182-83 (4th Cir. 2018) (rejecting the contributing factor test and adopting the "but-for" causation standard between participation in the protected conduct and the adverse employment action and finding that as to one plaintiff, the plaintiff could not establish that her engagement in protected conduct was the but-for cause of her termination because the defendant demonstrated that the Army, and not the defendant, had eliminated the plaintiff's position in its contract.)

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