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CLIENT ALERT

DOJ False Claims Act Recoveries Top $3 Billion, Continuing the Trends of Aggressive Health Care Industry Enforcement and Government-Initiated Actions

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Introduction

On January 9, 2020, the U.S. Department of Justice ("DOJ") released its annual False Claims Act ("FCA") recovery statistics and announced that it had obtained more than $3 billion in settlements and judgments in fiscal year 2019 from civil cases involving fraud and false claims against the government.[1] While this is only a marginal increase in recoveries compared to 2018, the statistics and announcements demonstrate that the FCA continues to be a powerful tool for combatting fraud not only in the health care industry—a traditional source of significant FCA recoveries—but in an expanding array of industries doing business with the government. The statistics also demonstrate that the government continues to secure large recoveries in claims initiated based on its own investigation, independent of claims generated by whistleblower complaints.

Summary of the Statistics

The more than $3 billion recovered in fiscal year 2019 brings the total recovered since the FCA's expansion through the 2009 Fraud Enforcement and Recovery Act ("FERA") amendments to nearly $38 billion. This is an average yearly recovery since 2010 of nearly $3.8 billion. Fiscal year 2019 is the eleventh consecutive year that total FCA recoveries have exceeded $2 billion. As in prior years, the health care industry was the largest source of recovery, representing $2.6 billion of the total. Fiscal year 2019 marks the tenth consecutive year that settlements and judgments from health care fraud alone have exceeded $2 billion.

A wide range of industries beyond health care also found themselves targeted for FCA enforcement. Specifically, the DOJ announced more than $252 million in Department of Defense ("DOD") recoveries, more than double the figure for the prior year. Outside of health care and defense, the DOJ recovered approximately $197 million in fiscal year 2019—25 percent less than the prior fiscal year and a precipitous decline from the more than $1 billion recovered in fiscal year 2017 in non-health care and non-defense industries.

There were 782 new FCA matters docketed in fiscal year 2019. As in earlier years, the vast majority of new matters—636—were filed under the FCA's whistleblower, or *qui tam*, provisions that allow individual whistleblowers, known as relators, to file lawsuits alleging false claims on behalf of the government and share in any recovery (typically

between 15 and 30 percent). Of the total recovered, approximately $2.2 billion—72 percent—was secured in *qui tam* matters, with awards to whistleblowers of nearly $272 million (a decline of approximately 20 percent from the year prior). Of note, recoveries in actions in which the DOJ declined to intervene totaled approximately $293 million, more than double the recoveries for non-intervened cases the year prior ($135 million). This means that 13 percent of the total FCA recoveries in Fiscal year 2019 was through actions in which the DOJ declined to intervene. Finally, the $844 million recovered in FCA matters initiated by the government (rather than a *qui tam* relator) marked an increase in recoveries from such matters over fiscal year 2018.

Industries Targeted

Health Care Industry

Of the more than $3 billion recovered by the federal government in fiscal year 2019, the largest portion by far—more than $2.6 billion (85 percent)—was recovered from companies and individuals in the health care industry, including pharmaceutical and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, rehabilitation therapy providers, and physicians. This represents the fourth highest recovery ever in the health care industry and is an increase of $100 million in health care industry recoveries over fiscal year 2018. In many of these cases, substantial additional amounts were recovered for state Medicaid programs. Since fiscal year 2010, the DOJ has recovered more than $25 billion in health care fraud matters—well over half of the total recoveries during that period. As discussed below, the health care industry remains the prime target for FCA enforcement, a trend that is likely to continue with increased enforcement to address the opioid crisis.

As in prior years, the vast majority (73 percent) of the recoveries from the health care industry in fiscal year in 2019—$1.9 billion—came from *qui tam* actions. The remaining health care recoveries—$695 million, a nearly 20 percent increase from the prior year—were attributable to government-initiated (non-*qui tam*) matters. This $695 million in health care recoveries from government-initiated matters represents the second-highest amount ever recovered in such matters, behind only the more than $1 billion recovered in such matters in 2006.

As was the case for the last several fiscal years, the largest recoveries from the health care industry in fiscal year 2019 came from pharmaceutical and medical device companies. In particular, the DOJ highlighted two settlements with opioid manufacturers that totaled nearly $700 million in recoveries for the government, accounting for approximately 35 percent of 2019's health care fraud recoveries. In one case, the drug manufacturer paid $195 million to the government to settle civil allegations that it paid kickbacks to induce physicians and nurse practitioners to prescribe a fentanyl-based pharmaceutical to their patients. In the second case, the DOJ recovered $500 million from a manufacturer to resolve civil allegations that it directly or through its subsidiaries promoted an opiate to physicians who were writing prescriptions for uses that were unsafe, ineffective, and medically unnecessary. In connection with the settlement, the DOJ also noted that the manufacturer promoted its drug as being less susceptible to diversion, abuse, and accidental pediatric exposure than other related drugs and that the manufacturer also took steps to delay the entry of generic competition in order to improperly control pricing.

Outside of opioid-related actions, the DOJ recovered more than $624 million from seven drug manufacturers to resolve claims that they illegally paid patient copays for their own drugs through purportedly independent foundations that the companies in fact treated as mere conduits. The DOJ announced that it is continuing to investigate efforts by drug manufacturers to facilitate increases in drug prices by funding the co-payments of Medicare costs. These enforcement efforts could fuel FCA recoveries in future years.

In addition to these significant recoveries from drug manufacturers, the DOJ also entered into a $57 million settlement with a company that developed and implemented an electronic health record ("EHR") system. The DOJ contended that the company paid kickbacks to referring physicians in the form of subsidies for the EHR system and free or discounted consulting services. The DOJ further alleged that the manufacturer misrepresented the capabilities of its EHR system, including that it complied with certain requirements.

Fiscal year 2019 saw the commencement of 505 new FCA matters (nearly 65 percent of the 782 new matters initiated) involving the health care industry, 449 of which were commenced by whistleblowers. These numbers are

essentially the same as the prior fiscal year and suggest that the health care industry will continue to lead the way in FCA recoveries in future years.

Defense Industry

The government recovered approximately $252 million in matters involving the DOD, which is more than double the amount recovered in fiscal year 2018 ($107 million). Sixty-four percent of that total—more than $162 million—is derived from a settlement with five South Korea-based companies alleged to have engaged in anticompetitive conduct targeting contracts to supply fuel to the U.S. military in South Korea. The companies were alleged to have made false statements to the government in connection with their agreement not to compete.

Recoveries Involving Other Industries

As in prior years, the DOJ has pursued fraud claims relating to a variety of federal programs in diverse contexts, illustrating the ever-expanding use of the FCA by both the government and relators. For example, a manufacturer of Omega-3 rich fish oil and related products paid $1 million to resolve allegations that it obtained a U.S.-government loan by falsely certifying compliance with federal environmental laws. In a second case, a university paid $2.5 million to resolve allegations that it submitted false claims to the U.S. Department of Education as a result of making incentive payments to student recruiters based on their success in securing student enrollment. As in past years, the DOJ pursued companies that hold licenses to remove minerals from federal lands. One such company paid the government $3.5 million this past fiscal year to resolve allegations that it engaged in a scheme to reduce mineral royalty payments for natural gas. The DOJ also announced that a major university paid $112.5 million to resolve allegations that it violated the FCA by submitting applications and progress reports that contained falsified research on federal grants to the National Institute of Health and the Environmental Protection Agency.

Of note, the DOJ also announced a recovery with a compounding pharmacy and a private equity firm to resolve a lawsuit alleging that they submitted false claims to TRICARE, the federal health care program for military members and their families. The settlement made headlines because it was reported to be the first time the DOJ intervened in an FCA case against a private equity firm.

Individual Accountability

As it has in recent years, the DOJ has continued to focus on holding individuals accountable. The fiscal year 2019 recoveries include, for example, a resolution involving the majority owner and former Chief Executive Officer of a defense contractor who paid $20 million to settle allegations that he fraudulently obtained federal set-aside contracts reserved for small businesses for which his company was ineligible. This settlement adds to the government's prior settlement with the company's former general counsel for $225,000. The DOJ also announced settlements with seven clinics and their owners for $7.1 million. In another settlement, a nursing home company's majority owner and former director of operations each paid $250,000 to resolve allegations that five of the company's nursing homes submitted false claims to Medicare and Medicaid for services that were grossly substandard or worthless. And in the settlement with the compounding pharmacy and private equity firm discussed above, the compounding firm's Chief Executive Officer and former Vice President of Operations settled claims against them individually for more than $300,000.

Whistleblower Actions

In fiscal year 2019, 636 (82 percent) of the 782 new FCA actions were filed under the FCA's whistleblower, or *qui tam*, provisions. In such actions, the whistleblower, also known as the relator, can receive up to 30 percent of any recovery. As in prior years, *qui tam* actions led to a significant amount of the total FCA recoveries in fiscal year 2019. Of the more than $3 billion total FCA recoveries this past year, more than $2.2 billion (72 percent) was received in connection with *qui tam* lawsuits. Although this is a slight increase from the prior year, it is a 30 percent reduction from the $3.1 billion recovered in 2017 in connection with *qui tam* matters.

The vast majority of the $1.9 billion recovered in connection with *qui tam* matters was attributable to cases in which the government intervened, suggesting that a company's exposure increases if the DOJ elects to intervene in a *qui tam* action. However, the $293 million recovered in *qui tam* actions in which the government declined to intervene represents a more than doubling of the prior year's recoveries in declined cases. This suggests a greater willingness by whistleblowers to continue litigating FCA actions even when the government declines to intervene, and greater ability to secure significant recoveries in those declined cases.

Despite the large recoveries in *qui tam* actions, the total awards to the whistleblowers was just under $272 million in 2019. This marked the third consecutive year that whistleblower awards declined and the lowest total whistleblower awards since 2009. Nevertheless, recoveries by relators are significant. From fiscal year 2010 (following the FERA amendments to the FCA) through the end of fiscal year 2019, the government has paid whistleblower awards of nearly $4.9 billion, based on recoveries of more than $29 billion in settlements and judgments related to *qui tam* actions.

Fiscal year 2019 once again saw a significant increase in recoveries in actions instituted by the government without a corresponding *qui tam* complaint. The $844 million recovered in these actions represents the fifth-highest total since 1987 and an increase of nearly $77 million from the prior fiscal year. This recent trend of increased recoveries in government initiated (non-*qui tam*) actions suggests that the government is becoming more aggressive in commencing and prosecuting FCA actions without the involvement of whistleblowers.

Key Takeaways

The DOJ's summary of fiscal year 2019 FCA recoveries and related statistics are noteworthy in several respects.

First, as in prior years, the statistics confirm that the health care industry remains the top target for FCA enforcement. With more than $2.6 billion recovered, representing the fifth-highest total ever, the health care industry once again represented the leading area by far for recoveries. The DOJ statistics also demonstrate that whistleblower actions continue to be a key driver of health care fraud actions, representing 449 (57 percent) of the 782 total new FCA matters initiated in fiscal year 2018. Fiscal year 2020 will likely yield additional recoveries from companies involved in the manufacture and sale of opiates, given the DOJ's indications that this is an ongoing enforcement priority.

Second, the recent uptick in DOD actions should put government contractors on notice that health care is not the only sector in which the government and relators are pursuing alleged fraud. Increased government spending on defense projects may expose a growing number of companies to liability should they fail to comply with rigorous government requirements and specifications in connection with government contracts. Indeed, any industry doing business with the government should be on notice that they may face government scrutiny for potential violations of the FCA. For example, although not referenced in the DOJ's year-end press release, contractors providing cybersecurity services may also be increasingly subject to liability for alleged false representations arising out of statements regarding the security of their services.

Third, as with last year, the government has proved increasingly aggressive in its independent FCA enforcement initiatives. The past two years have seen an increase in FCA recoveries in actions brought by the government based on its own investigation, rather than an investigation prompted by a whistleblower complaint. This can be seen most clearly in the health care industry, where the government recovered more than $695 million in government initiated (non-*qui tam*) cases, an increase of almost $128 million from fiscal year 2018 and the second highest amount ever recovered in such actions.

Finally, for the second year in a row, the DOJ has made reference to its authority to dismiss cases that do not advance the goal of fraud prevention, noting that the government made increasing use of its dismissal authority in fiscal year 2019 in order to prioritize the use of limited government resources. This follows the January 2018 leak of an internal DOJ memorandum (the "Granston Memo," which in substance is now incorporated into the *Justice Manual*[2]) that directed government attorneys to consider whether the government's interests are served by seeking dismissal of a *qui tam* FCA action. However, it remains to be seen how this DOJ directive will affect

defendants facing FCA *qui tam* complaints, given that we continue to see increasing recoveries in cases pursued by whistleblowers even after the government has declined to intervene.

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[1] *See* DOJ Press Release, "Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 11, 2020), available at https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019; *see also* DOJ Fraud Statistics – Overview, October 1, 1986 – September 30, 2019, available at https://www.justice.gov/opa/press-release/file/1233201/download.

[2] *See* Justice Manual 4-4.111, *available at* https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111.

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