

The Announcement of the DOJ's Near-Record-Breaking 2021 FCA Recoveries Provides Valuable Guidance on What to Expect in the Coming Years

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INTRODUCTION

On February 1, 2022, the U.S. Department of Justice (“DOJ”) released its annual False Claims Act (“FCA”) recovery statistics and announced that it had obtained more than \$5.6 billion in settlements and judgments in fiscal year 2021 from civil cases involving fraud and false claims against the government.^[1] This total—which was driven by record-breaking recoveries in the health care industry, a traditional leading area for FCA recoveries—is more than double the amount recovered in the previous fiscal year and marks the second-highest annual total ever, behind only the approximately \$6.1 billion recovered in fiscal year 2014. The significant increase in 2021 recoveries reverses a downward trend in the totals obtained by the DOJ during the previous couple of years. A careful analysis of the statistics and announcements demonstrates that the FCA continues to be a powerful tool supporting one of the DOJ’s “top priorities”^[2]—combatting fraud in an ever-expanding array of industries doing business with the government—and reveals what to expect in FCA enforcement in the coming years, from both the government and whistleblowers.

The following article first presents a summary of the statistics reported by the DOJ with an analysis of those statistics relative to earlier years and the particular industries and defendants targeted. The article then discusses what is revealed by the DOJ’s press release, including the implications of the statistics and what we can expect regarding FCA enforcement in 2022 and beyond.

SUMMARY OF THE STATISTICS

The more-than-\$5.6 billion recovered in fiscal year 2021 represents the second-largest total recoveries in a single year ever. Last year marks the thirteenth consecutive year that settlements and judgments in FCA matters have exceeded \$2 billion. The amount recovered in 2021 brings the total recovered since fiscal year 2010—the first full year since the FCA’s expansion through the 2009 Fraud Enforcement and Recovery Act (“FERA”) amendments—to more than \$45.9 billion, an average of more than \$3.8 billion per year since that time.^[3] As in prior years, the health care industry was by far the largest source of recoveries, representing over \$5 billion of the total.^[4]

A wide range of industries beyond health care again found themselves targeted for FCA enforcement, underscoring the DOJ's statement that the FCA "serves as the primary civil tool to redress false claims involving a multitude of other government operations and functions."^[5] The DOJ announced more than \$119 million in Department of Defense ("DOD") recoveries, a substantial increase from the approximately \$75 million recovered in the prior fiscal year.^[6] Outside of health care and defense, the DOJ recovered more than \$463 million in fiscal year 2021—which represents an increase of over 55% from the \$297 million recovered in 2020 and is the highest total recovered in non-health care and non-defense industries since 2017.^[7]

There were 801 new FCA matters docketed in fiscal year 2021, which marks a slight (14%) decrease in the number of new matters initiated from the prior fiscal year. As in earlier years, the vast majority of new matters—598—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%).^[8] The 598 *qui tam* matters docketed is a decline from the 675 cases initiated in 2020 and is the lowest number of filings since 2010. Of the total recovered by the DOJ, approximately \$1.6 billion—only 29%—was secured in *qui tam* matters, with the remainder having been secured in FCA matters initiated by the government.^[9] The \$1.6 billion recovered in *qui tam* matters is the lowest total since 2008 and is a significant deviation from prior years where recoveries in *qui tam* matters typically represent the majority of annual FCA recoveries. Awards to whistleblowers therefore also declined in 2021, totaling \$238 million and representing a decrease of approximately 26% from the year prior. In contrast, the nearly \$4 billion recovered in non-*qui tam* matters—meaning matters initiated by the government rather than by a complaint filed by a whistleblower—is the highest total ever, representing an increase of over 106% of the prior high of \$1.9 billion recovered in 2016.^[10]

INDUSTRIES TARGETED

Health Care Industry

Of the more-than-\$5.6 billion recovered by the federal government in fiscal year 2021, the largest portion by far—more than \$5 billion, an increase of nearly \$3.2 billion from fiscal year 2020 and 90% of the total—was recovered from companies and individuals in the health care industry, including, among others, pharmaceutical manufacturers, managed care providers, diagnostic and testing supply companies, laboratories, medical device manufacturers, hospitals, electronic health records technology vendors, and rehabilitation therapy providers.^[11] This represents the highest recovery ever from the health care industry, far surpassing the previous high of \$3.1 billion secured in 2012. As the DOJ noted, in many of these cases, substantial additional amounts were recovered for state Medicaid programs. Since fiscal year 2010, the DOJ has recovered more than \$32 billion in health care fraud matters, which represents over 70% of the total recoveries during that period. As discussed below, the health care industry remains the prime target for FCA enforcement, a trend that shows no sign of changing in future years, as the DOJ continues to combat the opioid crisis and other fraudulent schemes targeting the health care system.

Unlike in prior years, the vast majority (over 70%) of the recoveries from the health care industry in fiscal year 2021—more than \$3.5 billion—came from non-*qui tam*, government-initiated actions.^[12] This total was driven by a significant recovery from an opioid manufacturer, discussed below, and thus may represent a bit of an aberration. Recoveries from the health care industry in *qui tam* matters totaled approximately \$1.47 billion, which is roughly equivalent to the prior year, although it represents the lowest total since 2009. Somewhat surprisingly, the number of new *qui tam* matters involving the health care industry declined by 15% from the prior year, with the 388 whistleblower actions commenced in 2021 the lowest number of new health-care-related *qui tam* actions initiated since 2010.

The DOJ's record-setting FCA recoveries from the health care industry were driven by two significant resolutions involving opioid manufacturers. Purdue Pharma LP entered into a \$2.8 billion settlement agreement following allegations the company had paid kickbacks to doctors, specialty pharmacies, and an electronic health records developer to increase prescriptions of Purdue's opioid medications.^[13] Separately, members of the Sackler family, which founded Purdue and who are shareholders and board members of the company, agreed to pay \$225 million to resolve FCA allegations that they approved a marketing plan for OxyContin that targeted high-volume prescribers. That plan allegedly led to medically unnecessary, unsafe, or ineffective prescriptions of opioids that were often diverted and abused. In addition, Indivior, Inc. and Indivior PLC paid \$209.3 million to the government as part of a larger global resolution of allegations that the companies encouraged physicians to prescribe Suboxone—

which is typically used to treat opioid addiction—for patients without a medically accepted indication. Moreover, the companies faced allegations that they made false and misleading statements regarding the likelihood of Suboxone Film being diverted, abused, or exposed to children.

Other health-care-related recoveries included resolutions of matters alleging false claims submitted to the Medicare Advantage Program; unlawful kickbacks paid to induce sales of medical testing, equipment, or treatment; and the provision of unnecessary medical services. For example, one California-based health care services company paid \$90 million to settle claims it knowingly submitted unsupported diagnosis codes for patient encounters, leading to higher-than-justified payments from Medicare to Medicare Advantage plans and the health services company. Another example includes a diabetic testing supply company that settled allegations it enticed patients to use its services by waiving or failing to collect copayments from the patients and charging Medicare for the services. That company agreed to pay \$160 million to resolve allegations that it had paid unlawful kickbacks to Medicare beneficiaries.

Defense Industry and Other Procurement Fraud

The government recovered more than \$119 million in FCA matters involving the DOD in fiscal year 2021, which represents a 58% increase over the \$75 million recovered in the prior fiscal year.^[14] Nearly half of that total is derived from a \$50 million settlement with a defense contractor that is alleged to have overcharged the U.S. Marine Corps for a suspension system for armored vehicles. Other settlements reached with government contractors include a \$32.1 million agreement made by a major airline to settle claims that it failed to comply with contract requirements related to the delivery of international mail on behalf of the U.S. Postal Service, as well as a \$7.1 million settlement with a furniture company that failed to disclose its sales practices during contract negotiations for office furniture and violated the terms of the contract by neglecting to offer lower prices to the government.

Recoveries Involving Other Industries

The DOJ continued in 2021 to pursue fraud claims relating to a wide variety of federal programs in diverse contexts, illustrating the far-reaching scope of the FCA as a tool to combat fraud employed by both the government and relators. This past fiscal year, the DOJ recovered nearly \$464 million in non-health-care and non-DOD matters, the highest total since 2017.^[15] In one instance, the DOJ recovered \$6.15 million from an oil and natural gas exploration and production company to settle claims that it had allegedly underpaid and underreported royalties for natural gas from federal lands. In another, two apparel companies and their chief executive agreed to pay \$6 million to resolve claims that they fraudulently underpaid customs duties owed to the United States with regard to garments they brought into the country.

Another area the DOJ has focused on is combatting fraud targeting COVID relief programs, and 2021 saw a number of recoveries involving money fraudulently obtained from the Paycheck Protection Program (“PPP”). For example, the DOJ resolved alleged FCA violations with multiple individuals and companies that improperly obtained more than one PPP loan, including from a Florida-based duct-cleaning company. The DOJ also highlighted that it had achieved settlements with individuals who improperly used PPP loans for personal expenses, including with the owner of a jet charter company. While the amounts recovered in connection with these FCA matters are relatively small, they are examples of the government carrying out its stated commitment to utilize civil fraud statutes such as the FCA to protect the integrity of pandemic-related relief programs, indicating that the “[FCA] will play a significant role in the coming years as the government grapples with the consequences of [the COVID-19 pandemic].”^[16]

INDIVIDUAL ACCOUNTABILITY

The DOJ continued in 2021 to focus on holding not only corporate entities but individuals accountable for defrauding the government, and a number of noteworthy FCA settlements reached this past fiscal year with individuals are highlighted in the DOJ’s press release. One such settlement was with a Florida cardiologist who paid \$6.75 million to resolve claims that he performed medically unnecessary ablations and vein stent procedures, allowed unqualified ultrasound technicians to perform some of the ablations, and falsified records to provide justification for the procedures. Another agreement involved two Texas physicians who agreed to pay \$3.9 million to settle claims that they had ordered unnecessary and excessive urine drug testing without any clinical need for doing so.

WHISTLEBLOWER ACTIONS

Although still a significant number, *qui tam* filings were down in 2021 from the previous year and were the lowest number of whistleblower actions commenced since 2010. This past fiscal year, 598 (nearly 75%) of the 801 new FCA actions were filed under the FCA's whistleblower, or *qui tam*, provisions—which, as the government noted, represents an average of over 11 new cases each week.^[17]

Also unlike prior years, FCA recoveries resulting from *qui tam* actions represented significantly less of the total amount of FCA recoveries in fiscal year 2021. Of the more-than-\$5.6 billion total FCA recoveries this past year, only approximately \$1.6 billion (29%) was received in connection with *qui tam* lawsuits.^[18] This represents the lowest amount recovered in *qui tam* actions since 2008.

The vast majority of the total *qui tam* recoveries—nearly \$1.2 billion—was attributable to cases in which the government intervened. This is illustrative of the potential for greater FCA exposure when the DOJ elects to intervene in a *qui tam* action, and underscores the importance of mounting a strong defense prior to the government's intervention decision. At the same time, the \$479 million recovered in *qui tam* actions in which the government declined to intervene represents a substantial increase over the \$193 million secured in 2020 and is the highest total since 2017 and the third-highest total ever.^[19] This suggests an increasing willingness by whistleblowers to continue litigating FCA actions even when the government declines to intervene and an increase in relators' ability to secure significant recoveries even when the government does not take over the litigation.

Given the decline in recoveries in *qui tam* actions, the total amount awarded to whistleblowers was also its lowest since 2008, totaling \$238 million. However, awards to whistleblowers remain significant. Since fiscal year 2010 (following the FERA amendments to the FCA), the government has paid whistleblower awards of more than \$5.5 billion, based on recoveries of more than \$32 billion in settlements and judgments related to *qui tam* actions.^[20]

GOVERNMENT-INITIATED ACTIONS

Fiscal year 2021 once again saw a significant number—203—of new FCA matters commenced by the government without a corresponding *qui tam* complaint. Although a slight decrease from the 259 government-initiated FCA actions commenced in 2020, this represents the second-highest total since 1995.^[21] As noted earlier, the nearly \$4 billion recovered in government-initiated actions is the highest ever recovered in a single year. Although this total was the result of a substantial opioid-related settlement, the statistics nevertheless suggest that the government is becoming more aggressive in commencing and prosecuting FCA actions on its own in order to protect the public fisc.

KEY TAKEAWAYS

The DOJ's summary of fiscal year 2021 FCA recoveries and related statistics is noteworthy in several respects and reveals what to expect in FCA enforcement in the coming years, from both the government and whistleblowers.

First, the record-setting amount recovered from the health care industry confirms that pursuing health-care-related FCA violations remains a top enforcement priority. Moreover, the statistics suggest that the government may be playing a more active role in rooting out fraud targeting the health care industry, as demonstrated by the fact that the 97 government-initiated actions targeting health care fraud represents the second-highest number of new matters ever, behind only the 122 matters commenced by the government in 2020. The settlements highlighted in the DOJ's press release also reveal certain health care enforcement priorities that are likely to remain the focus in the coming years—namely, combatting the opioid crisis, fraud targeting the Medicare Advantage Program, unlawful kickbacks, and the provision of medically unnecessary services.

Second, the DOJ's highlighting of a number of FCA settlements involving COVID-relief programs, despite the relatively small size of related recoveries, demonstrates that the government intends to prioritize protecting the integrity of these programs regardless of the relatively low dollar amounts involved in each individual case. It is also important to keep in mind that FCA complaints filed by whistleblowers remain under seal while the government conducts its investigation, which oftentimes takes years. As such, the results of the government's various

enforcement initiatives to ferret out and redress fraud targeting the COVID-relief programs may not be seen until 2022 and beyond.

Third, the substantial number of FCA matters commenced by the government rather than by whistleblowers in 2021 and the record-breaking recoveries in government-initiated cases suggest an increasing vigilance by the government and its aggressive use of the FCA to recover fraudulently obtained government funds and hold the wrongdoers accountable.

Fourth, although 2021 witnessed a decline in the number of new whistleblower actions and related recoveries, the statistics regarding recoveries in cases in which the government declined to intervene indicates that whistleblowers are likely to remain an important and driving force in FCA recoveries in the years to come. Specifically, 2021 saw the third-highest total ever recovered in declined *qui tam* cases, demonstrating that relators are willing to continue to pursue—and are able to successfully obtain recoveries—even when the government declines to intervene in their cases. The prospect of reaping significant rewards with or without government intervention, coupled with the many government pronouncements regarding FCA enforcement initiatives, are likely to continue to incentivize whistleblowers for years to come.

Finally, the DOJ's press release suggests that contractors providing cybersecurity products and services to the government may find themselves the target of FCA enforcement efforts based on allegations of, among other things, false claims arising out of statements regarding the security of their products and services. Specifically, in its press release, the DOJ highlighted President Biden's May 2021 executive order aimed at preventing, detecting, assessing, and remediating cybersecurity incidents affecting federal government systems, and setting forth an expectation that government systems will have high security thresholds. The DOJ made clear that it will pursue any potential FCA violations related to misrepresentations made to government agencies by cybersecurity companies in connection with government acquisition of their technologies. This is consistent with the October 2021 DOJ launch of a civil cyber-fraud initiative signaling that it will use the weight of the FCA to act against federal contractors that have fallen short of cybersecurity requirements imposed as a condition for payment by the government.^[22]

If you have additional questions or need further assistance, please reach out to Suzanne Jaffe Bloom, Co-Chair – White Collar, Regulatory Defense, and Investigations Practice; Benjamin Sokoly, Of Counsel – White Collar, Regulatory Defense, and Investigations Practice, or your Winston relationship attorney.

View all of our FCA Playbook perspectives [here](#).

^[1] See DOJ Press Release, "Justice Department's False Claims Act Settlements and Judgments Exceed \$5.6 Billion in Fiscal Year 2021" (Feb. 1, 2022), available at <https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year> ("2021 FCA Recoveries Press Release"); see also DOJ Fraud Statistics – Overview, October 1, 1986–September 30, 2021, available at <https://www.justice.gov/opa/press-release/file/1467811/download> ("DOJ Fraud Statistics").

^[2] 2021 FCA Recoveries Press Release.

^[3] See DOJ Fraud Statistics – Overview.

^[4] See DOJ Fraud Statistics – Health and Human Services ("HHS").

^[5] 2021 FCA Recoveries Press Release.

^[6] See DOJ Fraud Statistics – Department of Defense.

^[7] See DOJ Fraud Statistics – Other (Non-HHS and Non-DOD).

^[8] See DOJ Fraud Statistics – Overview.

^[9] See DOJ Fraud Statistics – Overview.

^[10] See DOJ Fraud Statistics – Overview.

^[11] See DOJ Fraud Statistics – HHS.

^[12] See DOJ Fraud Statistics – HHS.

^[13] As noted in the DOJ press release, Purdue agreed to “an allowed, unsubordinated, general unsecured bankruptcy claim for \$2.8 billion” in the company’s bankruptcy proceeding. *see* 2021 FCA Recoveries Press Release.

^[14] See DOJ Fraud Statistics – Department of Defense.

^[15] See DOJ Fraud Statistics – Other (Non-HHS and Non-DOD).

^[16] Brian M. Boynton, Acting Assistant Att’y Gen., Dep’t of Just., Address at the Federal Bar Association *Qui Tam* Conference (Feb. 17, 2021), *available at* <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar>.

^[17] See 2021 FCA Recoveries Press Release; DOJ Fraud Statistics – Overview.

^[18] See DOJ Fraud Statistics – Overview.

^[19] See DOJ Fraud Statistics – Overview.

^[20] See DOJ Fraud Statistics – Overview.

^[21] See DOJ Fraud Statistics – Overview.

^[22] See “DOJ Launches Civil Cyber-Fraud Initiative to Use False Claims Act to Enforce Federal Contractors’ Cyber Security Requirements,” Nov. 2, 2020, *available at* <https://www.winston.com/en/government-program-fraud-false-claims-act-and-qui-tam-litigation-playbook/doj-launches-civil-cyber-fraud-initiative-to-use-false-claims-act-to-enforce-federal-contractors-cyber-security-requirements.html>.

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