

2016 DOJ False Claims Act Statistics Signal that DOJ Will Continue Rigorous Enforcement with a Focus on the Health Care Industry and on Individual Accountability

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The U.S. Department of Justice's (DOJ) recent announcements regarding its \$4.7 billion in settlements and judgments from False Claims Act (FCA) cases in fiscal year 2016 reveal noteworthy trends.¹ Specifically, they signal that in 2017 the DOJ will continue its rigorous FCA enforcement efforts to combat government program fraud in all industries, with a particular focus on the health care industry. The DOJ will also look to hold individuals accountable for violations of the FCA.

The \$4.7 billion in FCA settlements and judgments in fiscal year 2016 represents an increase of almost 26 percent over fiscal year 2015 recoveries. This amount is the third highest annual recovery in FCA history and brings the total recovery since 2009 to \$31.3 billion, an average of nearly \$4 billion per year since that time.

Over 800 new FCA matters were docketed in fiscal year 2016, which marked the second highest number of new matters filed in a single fiscal year. The vast majority—over 700—of those matters were filed under the Act'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. Of the total recovered, approximately \$2.9 billion—61 percent—was secured in *qui tam* matters, with awards to whistleblowers of \$519 million.

Industries Targeted

Health Care Industry

Of the \$4.7 billion recovered by the federal government in fiscal year 2016, the largest portion—\$2.5 billion—was recovered from companies and individuals in the health care industry, including pharmaceutical manufacturers, medical device companies, hospitals, nursing homes, laboratories, and physicians accused of a variety of wrongdoing, such as allegations of paying “kickbacks” to health care providers to induce the use of certain goods or services reimbursed by the government, providing unnecessary or inadequate care, or overcharging for goods or services reimbursed by governmental health care programs. In many of these cases, substantial additional amounts were recovered for state Medicaid programs. This marked the seventh consecutive year that recoveries in the health care industry exceeded \$2 billion. Since January 2009, the DOJ has recovered nearly \$19.3 billion in health care fraud matters—well over half of the total recoveries during that period.

The largest recoveries from the health care industry in fiscal year 2016 came from pharmaceutical and medical device companies and totaled \$1.2 billion—48 percent of the \$2.5 billion total recovered in health care fraud matters. In one settlement alone, a drug manufacturer paid \$784.6 million to resolve federal and state claims that it knowingly had reported false and fraudulent prices for two acid reflux drugs by failing to report discounts that were provided to hospitals. Another drug manufacturer paid \$390 million to resolve federal and state claims that it paid kickbacks to specialty pharmacies to promote two of its drugs.

Hospitals and outpatient clinics accounted for \$360 million in recoveries, including one major hospital chain that paid \$244.2 million to resolve allegations that it paid kickbacks in exchange for patient referrals. The nation's largest contract therapy provider paid \$125 million to resolve allegations that it violated the FCA by causing skilled nursing facilities to submit false claims to Medicare for rehabilitation therapy services that were not reasonable, necessary and skilled or were not provided at all. Additional recoveries were also collected from medical labs and nursing homes, some of which involved allegations of claims for unnecessary services and kickbacks paid in exchange for referrals.

In addition to these recoveries, fiscal year 2016 saw the commencement of 570 new FCA matters involving the health care industry.²

Financial Services Industry

The second largest recoveries came from the financial services industry, where the DOJ recovered \$1.6 billion in settlements and judgments resulting from the housing and mortgage fraud crisis. This amount marked the second highest annual recovery in the history of the federally insured mortgage program, behind only the recoveries from fiscal year 2014, and brings the total recovered in housing and mortgage claims since January 2009 to over \$7 billion. The most significant settlements in this area were the \$1.2 billion and \$113 million settlements paid to resolve claims that two banks had originated and falsely endorsed residential mortgages as eligible for Federal Housing Administration insurance and failed to report significant underwriting deficiencies. The substantial amounts recovered in this area suggest that the fallout from the 2008 financial crisis may not be complete in terms of FCA enforcement.

Recoveries in the Energy Exploration, Education, and Defense Industries

The DOJ continued to pursue claims relating to federal programs and contracts in other industries, as well. For example, as part of the \$20 billion consent decree reached with the United States and five states that were impacted by the April 2010 Deepwater Horizon/Macondo Well explosion and oil leak in the Gulf of Mexico, the DOJ recovered \$82.6 million for false claims relating to the operator's allegedly false reports about its "safe drilling margin" that concealed its improper drilling. The DOJ also recovered more than \$52.6 million to settle claims alleging illegal schemes by for-profit schools to obtain federal education funds through unlawful recruitment practices and false certifications of compliance with Title IV of the Higher Education Act.

Although the DOJ also recovered \$25.6 million in an action concerning defective weapon sites sold to the Department of Defense and other federal agencies, recoveries from the defense industry—historically a prime target of FCA enforcement—overall declined. However, there were approximately 32 new FCA matters commenced in FY 2016 involving the Department of Defense and the Defense industry.³

Whistleblower Actions

In fiscal year 2016, 702 of the 845 new FCA matters—83 percent—were filed under the Act's whistleblower, or *qui tam*, provisions. In such actions, the whistleblower, also known as the relator, receives up to 30 percent of any recovery. As in prior years, *qui tam* actions were a significant factor in FCA recoveries in fiscal year 2016. Of the \$4.7 billion total FCA recoveries this past fiscal year, approximately \$2.9 billion—over 61 percent—was received in connection with *qui tam* lawsuits filed in this and prior years. The majority of this total—\$2.8 billion—was attributable to cases in which the government intervened in the *qui tam* action.

In fiscal year 2016, whistleblowers received over \$519 million in FCA cases, a slight decline from the whistleblower awards paid in the past few years. From January 2009 through the end of fiscal year 2016, the government recovered nearly \$24 billion in settlements and judgments related to *qui tam* suits and paid whistleblower awards of more than \$4 billion.

Takeaways

As in prior years, the DOJ's summary of fiscal year 2016 FCA recoveries and related statistics are noteworthy in several respects.

First, given that 2016 marked the seventh consecutive year that over 700 new FCA matters were filed, it seems clear that the DOJ's focus on FCA enforcement will continue. The consistently high number of *qui tam* suits filed in recent years may be explained, at least in part, by recent amendments to the FCA which strengthened the Act and provided additional protections to whistleblowers. For example, the 2009 Fraud Enforcement and Recovery Act expanded the scope of FCA liability by, among other things, loosening the intent requirement by effectively overturning the Supreme Court's decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, 128 S.Ct. 2123 (2008); broadening "reverse" false claims liability by adding a provision that creates liability even where a defendant does not make a false record or statement; eliminating the direct presentment requirement; and broadening the anti-retaliation provision. In addition, the 2010 Patient Protection and Affordable Care Act amended the public disclosure bar in ways favorable to whistleblowers, such as by removing the express reference to the jurisdictional nature of the bar, granting the government the ability to object to the dismissal of a case due to the public disclosure bar, narrowing the categories of what qualifies as a public disclosure, and providing a relator with a lower standard to qualify as an original source.

Second, the statistics reveal that the health care industry continues to be a prime target for FCA enforcement. As discussed above, the health care industry once again represented the leading area for recoveries in fiscal year 2016, representing over 50 percent of the total recovered. This trend will likely continue in fiscal year 2017, as suggested by settlements that the DOJ has already announced in the current fiscal year. For example, in October, the DOJ announced that a skilled nursing facility chain and its owner agreed to pay \$145 million to resolve claims that the chain violated the False Claims Act by causing skilled nursing facilities to submit false claims to Medicare and TRICARE for rehabilitation therapy services that were not reasonable, necessary or skilled. In announcing the settlement, the DOJ stated that this is the largest settlement with a skilled nursing facility chain in the department's history.

Third, the statistics reveal a notable change between 2015 and 2016 with respect to the total recoveries attributable to *qui tam* cases where the government intervened as compared to *qui tam* cases where the government declined to intervene. Specifically, a much larger portion of the total FCA recoveries in 2016—approximately 97%—resulted from cases in which the government intervened and only 3% of the recoveries were from actions in which the government declined to intervene. This is a marked difference from the 2015 FCA recoveries, where only 62% of the recoveries resulted from cases in which the government intervened and 38% of the recoveries were from cases pursued by whistleblowers without government intervention. As such, 2016 marked a return to the normal distribution, where the majority of recoveries in *qui tam* cases stem from cases where the government intervenes. Nonetheless, the continued high number of *qui tam* cases filed suggests that whistleblowers and the relators' bar will continue to pursue FCA matters regardless of whether the government decides to intervene in the action.

Fourth, the DOJ's press release highlights the significant number of settlements involving individuals, rather than just organizations, and suggests that the government's increasing and public focus on holding individuals accountable for corporate wrongdoing, including in FCA matters, will undoubtedly continue. This development is likely due to the DOJ's increased focus on strengthening its enforcement efforts against corporate wrongdoing by individuals and ensuring that individuals are held accountable for corporate misdeeds, both criminally and civilly, which was announced by the policy memorandum issued by the DOJ on September 9, 2015, commonly referred to as the "Yates Memo," after its author Deputy Attorney General Sally Quillian Yates. Interestingly, in its December 14, 2016 press release, the DOJ references the Yates Memo and also highlights various settlements with individuals involving alleged false claims totaling nearly \$42 million in fiscal year 2016. This increased scrutiny of individuals for

FCA enforcement is a trend that is likely to continue in the coming years, particularly in light of comments made by U.S. Attorney General nominee Jeff Sessions during his January 10, 2017 confirmation hearing that, in certain cases, it may be more appropriate to subject corporate officers who created a problem to more severe punishment than the stockholders who also suffer when a corporation is penalized.

Finally, the statistics regarding fiscal year 2016 recoveries once again reinforce the fact that the government appears to be increasing its efforts to protect the public fisc by scrutinizing all industries that do business with the government. The FCA is being used as a powerful enforcement tool to ensure that all recipients of government funds are obtaining and retaining those funds properly and in accordance with the law. Accordingly, any organization that receives public funds should take steps to ensure that all claims submitted to the government for payment and all dealings with the government are compliant with applicable regulations and requirements.

¹ See DOJ Press Release, "Justice Department Recovers Over \$4.7 Billion From False Claims Act Cases in Fiscal Year 2016" (Dec. 14, 2016), available at <https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016>; see also DOJ Fraud Statistics (Dec. 13, 2016), available at <https://www.justice.gov/opa/press-release/file/918361/download>.

² See DOJ Fraud Statistics.

³ See DOJ Fraud Statistics.

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