False Claims Act
Backgrounder
False Act Backgrounder: What You Need to Know About the False Claims Act (“FCA”)

What Is the False Claims Act?

- The FCA is a federal statute that has become the government’s principal weapon for combating fraud involving federal funds. Thirty states have enacted statutes modeled after the federal FCA that allow for recovery of funds falsely claimed from state-funded programs and projects.
- The FCA and its state equivalents generally prohibit the submission of false or fraudulent claims for reimbursement to the government.
- The original FCA was enacted in 1863 during the Civil War as the Informer’s Act (or “Lincoln Law”). President Lincoln convinced Congress to pass the law after numerous military suppliers were caught selling the Union Army sawdust instead of gunpowder and other worthless military supplies.
- Whistleblowers (known as “relators”) may bring FCA claims on behalf of the government (qui tam actions) and receive a percentage of any recovery.
- The FCA also permits relators to file claims against their employers for any conduct allegedly taken in retaliation for their whistleblowing activity.

Why Is the False Claims Act Important to You?

- The FCA and its state equivalents potentially apply to any program or project that receives government funding.
  - The most frequent targets of FCA investigations and litigation are government contractors and healthcare companies whose products are reimbursed under the Medicare and Medicaid programs.
- Companies can be held responsible for FCA violations by their employees, even if the employees’ conduct is contrary to company policies.
- The conduct covered by the FCA is broad.
  - It extends to causing false claims to be submitted, making false records or statements that are material to a claim, concealing money owed to the government (a “reverse false claim”), and conspiracy to violate the FCA.
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- It also applies to false claims made to a contractor, grantee, or other recipient if the federal government provides or reimburses any portion of the money or property requested.
- The knowledge requirement is satisfied with evidence of reckless disregard of the truth or falsity of the claim or information provided (e.g., failure to ensure adequate compliance and internal controls are in place).

- Companies performing government contracts are subject to mandatory disclosure requirements for any potential FCA violations.
- There are steep penalties: treble damages, civil penalties for each false claim, and attorneys’ fees.
- Collateral consequences include debarment from government contracts, exclusion from participation in federal health care programs, and reputational harm.
- The most recent statistics published by the DOJ confirm that the number of FCA suits and the size of monetary recoveries under the FCA are on a meteoric rise. In 2013 alone, the DOJ recovered $3.8 billion in FCA settlements and judgments. This annual total is second only to the nearly $5 billion that the DOJ recovered in 2012. The number of qui tam cases filed by whistleblowers in 2013 also reached an all-time record of 752, or over 100 more cases than the previous record set in 2012.
- FCA exposure has a long “tail.” Depending on the circumstances, actions under the FCA may be brought as long as 10 years after the relevant claims were submitted.
- Plaintiffs’ counsel are now pushing to expand the FCA’s reach to conduct that has traditionally only been litigated in the context of other statutory prohibitions. For example, the California Attorney General recently filed an FCA suit seeking to recover investment losses sustained by California public pension funds based on allegations that traditionally amounted to nothing more than potential violations of securities laws.

How Can Morrison & Foerster Help?

- We have substantial experience handling FCA investigations and litigation, whether initiated by the government or by whistleblowers.
- Our experience crosses a wide array of business sectors, including pharmaceuticals, aerospace, biotechnology, defense, information technology, telecommunications, healthcare, consumer products and services, higher education and transportation.
- We have handled scores of important FCA matters for major companies and institutions.
  - Litigation: We have represented clients throughout all stages of FCA litigation, from the filing or unsealing of complaints through trial.
  - Negotiations: We have experience negotiating with a broad range of federal and state enforcement agencies, and have successfully reached global Medicaid settlements with the U.S. Justice Department and NAMFCU (the “National Association of Medicaid Fraud Control Units”).
Governmental Investigations: We have represented clients in connection with governmental investigations by grand juries, inspectors general, and other agencies.

Internal Investigations: We have conducted internal investigations of potential FCA violations arising from government contracts and dealings with Medicare and Medicaid.

Compliance: We have assisted clients with the implementation of compliance and remedial programs, and we have negotiated Corporate Integrity Agreements imposed by inspectors general.

- We also provide wide-ranging expertise in handling legal issues that often accompany FCA suits, including white-collar defense, government contracts litigation, employment and retaliation matters, regulatory compliance, shareholder class actions, and derivative actions.

Experience Based on Handling Scores of FCA Matters

The following is a representative sample of our FCA and qui tam work:

- We are representing a national credit rating agency in a suit filed by the California Attorney General under the California FCA, seeking to recover investment losses allegedly sustained by California’s two public pension funds—CalPERS and CalSTRS—during the 2007-2008 financial crisis. This unprecedented lawsuit marks the first time that any governmental entity has sought to recover investment losses under a false claims statute.

- We represented McKesson Corporation in a federal qui tam action alleging that McKesson defrauded the Medicaid program by conspiring with or otherwise causing a drug price publishing company to artificially inflate the average wholesale price (AWP) of more than 400 brand-name pharmaceuticals. After negotiating a settlement with the DOJ and the National Association of Medicaid Fraud Control Units, we litigated a dozen state false claims act suits filed by opt-out states in federal and state courts across the country.

- We won a dismissal in the District of Massachusetts for a major pharmaceutical company in a federal False Claims Act case alleging misrepresentations that caused states to pay, and the federal government to reimburse, claims for products that were not covered under the Medicaid program.

- We are representing a major accounting firm in a qui tam action alleging that our client conspired with or otherwise caused its audit client to falsely claim billions of dollars in federal student loan money from the U.S. Department of Education. We first secured a dismissal with prejudice of the whistleblowers’ claims under the federal FCA’s public disclosure bar, and then obtained a $500,000 attorneys’ fee and sanctions award against the whistleblowers’ counsel. This case is now on appeal to the Ninth Circuit.

- After completing six days of a 15-day jury trial, we obtained a favorable settlement in a federal FCA case brought by two whistleblowers against our client and its principal shareholder, alleging fraud related to the sale of the Headwaters Forest to the United States government. The settlement amount was a small fraction of the original demand made on our client.

- We represented a large dental health maintenance organization (HMO) in connection with a qui tam action filed under the federal FCA and the California FCA, alleging that our client performed unnecessary medical procedures in an attempt to recoup unwarranted reimbursements from Medicare and the California Medicaid program. After providing comprehensive presentations to the government—with limited document productions and no sworn testimony from any witnesses—the DOJ and the California Attorney General declined to intervene in the underlying qui tam action, and the whistleblower’s claims were dismissed.
• We represented an Ivy League university in a *qui tam* action brought by a former medical school professor who claimed that the university and its affiliated hospital improperly billed Medicare for radiology services. In a reported decision, a federal court in Connecticut dismissed the FCA claims with prejudice pursuant to the public disclosure bar.

• We represented a Fortune 10 company in a unique California FCA case, predicated on alleged pharmaceutical pricing fraud, filed by the City Attorney of San Francisco on behalf of the State of California's Medicaid program. After we moved for summary judgment challenging the City Attorney's standing to assert a claim on behalf of the State of California, the City Attorney voluntarily dismissed its claim on behalf of the State.

• We represented a Fortune 50 company in connection with an investigation by the DOJ under the federal FCA regarding alleged overcharges for shipping services. After convincing the DOJ to decline intervention in the underlying *qui tam* action, a federal court in Los Angeles granted our motion to dismiss with prejudice. This case is now on appeal to the Ninth Circuit.

• We represented a major steel producer in a *qui tam* action and parallel criminal investigation, along with related indemnification claims, in the Middle District of Louisiana. The government and the relator initially sought $750 million in damages and penalties, but we settled the entire matter for $15 million, most of which was ultimately recovered for the client from indemnitors, with no criminal charges filed.

• We represented a prominent New York investment bank in a California FCA suit filed by the State of California and the California Office of Statewide Health Planning and Development (OSHPD). This complex case centered on allegations that representatives of the investment bank made fraudulent statements and omissions that induced OSHPD to insure bonds that secured financing for the acquisition of several Los Angeles hospitals at an excessive purchase price. The claimants sought more than $130 million in damages. After more than four years of litigation, the matter was settled on terms favorable to our client.

• We represented a national drug wholesaler in a *qui tam* suit filed in Philadelphia federal court alleging violations of the federal FCA and various state false claims statutes based on predicate violations of the Anti-Kickback Statute. After we moved to dismiss the case, the whistleblower voluntarily dismissed our client as a defendant without filing an opposing motion.

• We successfully defended two predecessor corporate entities of multinational telecommunications companies in a federal FCA *qui tam* action filed in the U.S. District Court for the District of Columbia. The claimant sought more than $50 million in damages and named approximately 50 defendants. Our clients were dismissed from the action as a result of a successful motion to dismiss.

• We represented an HMO in litigation under the California FCA arising from a business license tax dispute commenced by the City of Modesto. After conducting an audit, the City determined that the HMO owed additional taxes and penalties exceeding $1 million and brought an action seeking an additional $6 million in damages under the Municipal Code and the California FCA. We succeeded in getting all of the claims dismissed.

• We have represented numerous individual defendants in *qui tam* cases. For example, we obtained dismissals of civil actions against several individual defendants in the multidistrict litigation involving Columbia/HCA. We also represented numerous employees of a major aerospace company, first in connection with a grand jury investigation prior to the unsealing of a *qui tam* complaint, and then in connection with subsequent civil litigation against the company in U.S. District Court for the Southern District of Ohio.