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False Claims Act

Trump's Justice Department Kept Pace on False Claims in 2017

BY DANIEL SEIDEN

False claims attorneys were wondering prior to President Donald Trump's inauguration whether swamp draining would mean the Justice Department would lean harder on the False Claims Act to fight contractor fraud, or whether the return of industry-friendly Republicans would mean restraint.

Dedication to enforcement appears to be holding steady as the Justice Department completes its first year under the Trump administration.

The Justice Department's \$3.7 billion false claims recovery for fiscal 2017, announced Dec. 21, is on par with recoveries for fiscal 2014 and 2015 under the Obama administration.

"We continue to anticipate robust FCA enforcement efforts by the federal government across a full range of federal programs," said Bradley D. Wine, a Washington-based partner at Morrison & Foerster LLP and co-chair of the firm's government contracts and public procurement practice.

The \$3.7 billion total marks a \$1 billion decrease, but the Justice Department's \$4.7 billion haul in fiscal 2016 may have been skewed by a \$1.2 billion settlement with Wells Fargo & Co. over improper mortgage lending practices.

The announcement also showed the continued importance of False Claims Act whistle-blowers in fighting contractor fraud as they filed more than five cases for every case the Justice Department filed last year.

"The primary take-away from the 2017 statistics is FCA enforcement lies firmly in the hands of qui tam relators [whistle-blowers], and the Trump administration has had little effect on enforcement," said John G. Horan, a Washington-based partner in Dentons' government contracts practice group.

Trump v. Obama The Justice Department under Trump continued its reliance on whistle-blowers to enforce the False Claims Act, but it has also "been slightly more active in its first year" than the Obama administration was, on average, during the years of its second term, Horan said.

"Under the last four years of the Obama administration, the government filed, on average, a little more than 114 cases per year," Horan said. "In its first year under the Trump administration, the government filed 125 cases."

Government filings pale, however, compared with whistle-blower filings, he said.

Whistle-blowers "filed a little more than six times as many cases than the government under the last four years of the Obama administration, and more than five times as many cases in the first year of the Trump administration," he said.

Defense Up, Mortgages Down Defense Department programs received significant enforcement attention in 2017 from the Justice Department, which began 19 new false claims matters, more than doubling the number from fiscal 2015 and 2016.

The total false claims recovery for defense matters increased to \$220 million in 2017 from \$122 million in 2016.

"As the Trump administration continues to focus on increased spending generally, and defense spending in particular, we can expect continued increased enforcement in federal programs for FY '18 and beyond," Wine told Bloomberg Government.

Conversely, the drop in mortgage fraud-related recoveries of \$1.6 billion to \$543 million "appears consistent with the fact that cases arising from the sub-prime mortgage lending crisis are likely tailing off," he said.

Yates Memo The Justice Department received more than \$60 million in settlements and judgments from individuals, the announcement said, despite "mixed signals" about the department's commitment to the Obama-era Yates memo, which renewed a focus on individual alleged corporate criminals.

The Justice Department will probably continue to assess the culpability of individuals and pursue FCA matters jointly and separately with corporate defendants, Wine said.

"Until the Justice Department provides more formal guidance on the matter, contractors have to remain mindful of identifying responsible individuals when making disclosures and investigating potential FCA exposure," he said.

The Yates memo is under review, but "any changes will reflect our resolve to hold individuals accountable for corporate wrongdoing," Deputy Attorney General Rod Rosenstein said in an Oct. 6, 2017, speech.

Any changes will also "affirm that the government should not use criminal authority unfairly to extract civil payments," Rosenstein said.

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