

Fraud & Enforcement



Andy Liu
NICHOLS LIU



Dominique Casimir
BLANK ROME



Jessie Liu
DEPARTMENT OF JUSTICE



Fred Levy
COVINGTON & BURLING

Policy Developments

Key False Claims Act Developments in 2019

- Cooperation policy (May 2019)
 - Civil attorneys have discretion to award credit to cooperative defendants in False Claims Act cases
- Memorandum of understanding between DOJ and HUD on application of False Claims Act (October 2019)
 - Sets prudential guidance on appropriate use of False Claims Act for violations by Federal Housing Administration (FHA) lenders
 - Provides that FHA requirements will be enforced primarily through HUD's administrative proceedings
 - Addresses how DOJ and HUD, including the U.S. Attorney's Offices, will consult with each other regarding use of False Claims Act in connection with defects in FHA-insured mortgage loans

Key False Claims Act Developments in 2019

- Cleary Memo from HHS (October 2019)
 - Authored by Kelly M. Cleary, CMS Chief Legal Officer, and Brenna E. Jenny, Deputy General Counsel
 - Applies Brand Memo and *Azar v. Allina Health Services*, 130 S. Ct. 1804 (2019) to CMS enforcement and False Claims Act referrals
 - Allina: Held that HHS must go through notice-and-comment rulemaking for any rule, requirement, or policy statement that establishes or changes a “substantive legal standard” affecting Medicare benefits
- Executive Order 13892 (October 2019)
 - Applies Brand Memo policy to all administrative enforcement and adjudication across the Government
- Update on Granston Memo
 - DOJ has moved to dismiss roughly 50 *qui tam* cases; roughly 30 of those motions have been granted, with only one denial, which is on appeal

False Claims Act Case Law Developments and Trends

False Claims Act Case Law Developments and Trends

- *Cochise Consultancy, Inc. v. U.S. ex rel. Hunt* (S.Ct. May 13, 2019)
 - Statute of Limitations can be extended even where the government does not intervene
 - Relators may avail themselves of § 3731(b)(2)
- *U.S. v. AseraCare, Inc.* (11th Cir. Sept. 9, 2019)
 - Without objective falsity, liability is not triggered – difference of reasonable opinion, without more, is not enough
 - What more would suffice?

False Claims Act Case Law Developments and Trends

- Post-*Escobar* cases
 - Circuit split deepens but Supreme Court has declined to clarify its standard
 - *U.S. ex rel. Lemon v. Nurses to Go* (5th Cir. May 7, 2019)
 - Prior enforcement actions are relevant to materiality
 - *U.S. ex rel. Doe v. Heart Solutions, PC* (3d Cir. Mar. 14, 2019)
 - Evidence Medicare wouldn't pay without certification from doctor suffices
- Cyber cases
 - *U.S. ex rel. Markus v. Aerojet Rocketdyne Holdings*
 - *U.S. ex rel. Glenn v. Cisco*

False Claims Act Case Law Developments and Trends

- Higher education cases
 - Duke University
 - Drexel University
 - University of Kansas
- Transportation industry cases
 - American Airlines
 - UPS
- *Pack v. Hickey* (10th Cir. June 11, 2019)
 - Affirms award of \$92,592.75 in attorneys' fees to defendants
- Reckitt Benckiser Group plc
 - \$1.4 Billion settlement in opioid case
- Procurement Collusion Strike Force

Mandatory Disclosure and Criminal Enforcement Developments

Dramatic Increase in Parallel Civil/Criminal Investigations

- September 9, 2015: Yates Memorandum calls for DOJ to minimize “corporate fraud” and consider both civil and criminal actions.
- October 25, 2017: Deputy Attorney General Rod Rosenstein announces a “Working Group on Corporate Enforcement and Accountability”
- November 5, 2019: DOJ announces the creation of the “Procurement Collusion Strike Force.”
- WestLaw Department of Justice Press Releases Discussing “Criminal,” “Procurement,” and “Fraud”:
 - 2010: 51
 - 2014: 65
 - 2018: 91
 - 2019: 94 and counting

Government Has Initiated Criminal Investigations Covering Broad Array of Procurement Issues

Recent Criminal Investigations of Contractors Have Involved:

- Small Business and Disadvantaged Business Enterprise Compliance
- Unallowable Costs and Cost Accounting Standards Compliance
- Conflict of Interest and Procurement Integrity Issues
- Non-compliance with Foreign Military Sales Requirements
- Non-compliance with Specification and Testing Requirements

Government has Initiated Criminal Investigation Arising Out of Disclosure by Corporate Parent of Quality Issues at a Subsidiary Despite “Gold Standard” Disclosure

Parties to Consider During a Parallel Investigation

- Department of Justice, Criminal Division
- Department of Justice, Civil Division
- Agency Suspension and Debarment Official (s)
- Customers - Government and Commercial
- DCAA and DCMA
- Other Regulators (e.g., Securities and Exchange Commission)

Key Developments in Suspension and Debarment

Key Takeaways from Interagency Suspension and Debarment Committee's Annual Report to Congress

- The Interagency Suspension and Debarment Committee was created by EO 12549, and consists of representatives from approximately 42 Executive branch organizations, which work together to provide support for suspension and debarment programs, and collaborate with each other to develop best practices.
- The IDSC submits an annual report to congress (required by Section 873) describing Governmentwide progress in improving suspension and debarment processes and summarizing each agency's suspension and debarment activities during the fiscal year.
- Report released on October 30, 2019 is the tenth year of annual reporting.

Key Takeaways from the FY 2018 ISDC Annual Report to Congress

- (1) FY2018 saw a small decline in the total number of suspensions and debarments relative to FY 2017, but overall activity levels within each agency remain high.
- (2) Agencies are increasingly willing to use pre-notice letters to engage with a respondent prior to taking a formal action.
- (3) Contractors are willing to initiate engagement with the SDO.
- (4) The ISDC has formed a subcommittee that will focus on tracking and reporting cybersecurity contractor compliance issues and developments.
- (5) The ISDC is developing an online lead agency coordination portal.

(1) Decline in Total Numbers

- Decrease in suspensions and debarments of approximately 11% relative to FY2017.
- But activity levels still high – 3,256 actions (480 suspensions, 1,334 debarments, 1,542 proposed debarments). Double the number of actions since data first began to be collected in FY 2009.
- Agency programs are maturing – may not see dramatic year to year spikes in activity levels, but rather slight increases or decreases from one year to the next.
- Slightly fewer administrative agreements in FY2018 (61) versus FY2017 (64).

(2) Agencies increasingly willing to use pre-notice letters

- Overall use of pre-notice letters has more than doubled since FY 2009: 70 in FY2009 versus 197 in FY2018
- Good news for contractors
- But, use of pre-notice letters is a matter of SDO discretion, and agencies differ in their inclination to send such notices.
- For instance → the Defense Logistics Agency issued only 1 pre-notice letter, but had 6 suspensions, 111 proposed debarments and 46 debarments.
- Therefore, contractors should still strongly consider proactive, early engagement with the SDO.

(3) Contractors Increasingly Willing to Initiate Engagement with the SDO

- Companies need not wait for the SDO to initiate contact. Companies can bring misconduct/illegality to the attention of the SDO proactively.
- FAR provides an incentive for proactive engagement. Mitigating factor at FAR 9.406-1(a)(2) focuses on whether the contractor brought the action that is the cause for debarment to the attention of the government in a timely manner.
- ISDC notes that of the 8 agencies that tracked proactive outreach in FY2018, there were 40 instances of such proactive engagement.
- Increased proactive engagement may help explain the relatively stable level of exclusion activity over the past few years.
- Proactive engagement may also lead to a declination. (41 declinations at EPA)

(4) Creation of Cyber-Related Subcommittee

- The ISDC announced the creation of a new subcommittee that will track and report to its membership information about cybersecurity contractor compliance issues and developments.
- The report does not explain how this subcommittee plans to collect information or how often it will provide reports to the full membership.
- This area of focus appears to be part of a broader trend of government interest in cybersecurity in the contractor community.
- This development suggests to contractors a need to be particularly vigilant and proactive with respect to cybersecurity compliance.

(5) Development of a Lead Agency Coordination Portal

- ISDC report states that it is “advancing its proposal to modernize and streamline the lead agency coordination process in collaboration with the Office of Management and Budget through development of an internal, online lead agency coordination portal.”
- Unclear when the portal will be operational.
- Contractors that do business with multiple agencies need clarity early on regarding lead agency, particularly when contractors are initiating proactive engagement, or where the cause for potential suspension or debarment is over-arching and not squarely associated with just one Federal customer.

JBL System Solutions LLC *et al.* vs. Williams *et al.*, No. 1:19-cv-00226 (E.D. Va. 2019)

- Judicial challenges to suspensions or debarments are an uphill battle, particularly given the wide latitude afforded by the Administrative Procedures Act.
- Additionally, the Federal Acquisition Regulation expressly allows SDOs to take action against affiliates even if the affiliates have not committed any misconduct.
- In JBL, DLA suspended plaintiffs, including primary respondent and affiliates. Plaintiffs sued, and DLA then terminated the suspensions and issued notices of proposed debarment. Plaintiff sought injunctive relief as to affiliates while primary respondent contested proposed debarment administratively. Court denied injunctive relief, finding that affiliation existed and that the FAR's standard for inclusion of affiliates is very broad. Thus, plaintiffs could not show that proposing affiliates for debarment was arbitrary, capricious, an abuse of discretion or contrary to law.



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