

SESSION 12

FCA/FCPA: FRAUD AND ENFORCEMENT

THURSDAY, JANUARY 28, 2021
12:00 PM to 2:00 PM



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Overview

- 2020 – FCA by the Numbers
- Key FCA Developments – Cases, Regulatory, and Policy
- “New” DOJ Guidance
- Key Criminal Procurement Fraud Developments
- Key FCPA Developments
- Trends and the Forecast for 2021

2020 – FCA by the Numbers

- General Observations
- Industry
- Qui Tam v. Non-Qui Tam
- Recovery Trends
- What the Stats DON'T Tell Us

Key FCA Developments – Cases, Regulatory and Policy

■ Circuit Split on “objective falsity”

- ▶ *U.S. v. AseraCare, Inc.*, 938 F.3d 1278 (11th Cir. 2019)
(requiring objective falsity)

vs.
- ▶ *U. S. ex rel. Druding v. Care Alternatives*, 952 F.3d 89, 100 (3d Cir. 2020) (medical opinions can give rise to FCA liability)
- ▶ *U.S. ex rel. Winter v. Gardens Regional Hospital and Medical Center*, 953 F.3d 1108, 1117 (9th Cir. 2020) (same)

Key FCA Developments – Cases, Regulatory and Policy

■ Data Mining and Statistics in FCA Cases

- ▶ As an investigative tool
 - ▶ Granston Remarks to ABA in December 2020
- ▶ As a basis for pleading FCA violation
 - ▶ *U.S. ex rel. Integra Med Analytics LLC v. Baylor Scott & White Health* (W.D. Tex., 5th Cir., *cert denied*)
 - ▶ But see *Integra Med Analytics LLC, et al v. Providence Health & Services, et al* (C.D. Cal., 9th Cir. – arguments in Feb. 2021)
- ▶ Implications for CARES Act and other pandemic relief funding
 - ▶ Publicly available data sets re: lending and funding

Key FCA Developments – Cases, Regulatory and Policy

■ Further application of Escobar and materiality requirements

- ▶ *Ruckh v. Salus Rehabilitation, LLC*, 963 F.3d 1089 (11th Cir. 2020) (reversing District Court’s finding that relators had failed to establish materiality and scienter and decision to set aside a \$100+ million (pre-trebling) jury verdict)
- ▶ *United States ex rel. Janssen v. Lawrence Memorial Hospital*, 949 F.3d 533 (10th Cir. 2020) (affirming grant of summary judgment to defendants on materiality grounds)
- ▶ *United States ex rel. Drummond v. BestCare Laboratory Services, L.L.C.*, 950 F.3d 277 (5th Cir. 2020) (rejecting defendants’ materiality arguments)

Key FCA Developments – Cases, Regulatory and Policy

- Attorney-client privilege issues in the context of mandatory disclosures (*In re Fluor Intercontinental, Inc.*, 803 F. App'x 697, 700 (4th Cir. 2020))
 - ▶ In November 2019, the District Court found that defendant's disclosures pursuant to FAR 52.203-13 constituted a voluntary subject-matter waiver of the attorney client privilege and fact work product
 - ▶ Fourth Circuit issued a writ of mandamus to clarify application of the privilege in that regulatory context, since the issue "has potentially far-reaching consequences for companies subject to 48 C.F.R. § 52.201-13 and other similar disclosure requirements."

Key FCA Developments – Cases, Regulatory and Policy

- **Third Parties may challenge CIDs** (*General Medicine, P.C. v. U.S.*, No.1 3:20-mc-00053 (S.D. Ill.))
 - ▶ Target of investigation has standing to challenge CID issued to a third party
 - ▶ Challenge denied on the merits
 - ▶ Government authority is not unfettered

Key FCA Developments – Cases, Regulatory and Policy

- DOJ Dismissals under the Granston Memo
 - ▶ Continued split regarding dismissal standard
 - ▶ Practical impact?

Key FCA Developments – Cases, Regulatory and Policy

■ Procurement Collusion Strike Force

- ▶ Continued government priority
- ▶ New staffing
- ▶ Expanded members
- ▶ First cases brought

“New” DOJ Guidance in 2020

- Corporate Compliance Programs (June 2020)
 - ▷ Criminal Division (JM 9-28.300)
 - ▷ Risk; Resources; M&A; 3rd Party
- FCPA Resource Guide, 2nd ed. (July 2020)
 - ▷ DOJ and SEC revision to 2012 Guide
 - ▷ CEP; Monitors; Debarment; NPA
- Ability-to-Pay (Sept. 2020)
 - ▷ Civil Division (JM 4-3.200)
 - ▷ Policy; Factors; Authority

Key Criminal Procurement Fraud Developments

- Continued Prosecution of Individuals
- FCA settlement by CEO as part of civil/criminal resolution by company (Quantadyn case)

Key FCPA Developments – Enforcement Actions

- More than \$6.4 Billion in corporate FCPA recoveries in 2020
- *AirBus* settlement in January 2020
 - ▶ \$3.9 Billion in Global Penalties (\$527M U.S.)
 - ▶ Sale of U.S. defense items/ITAR penalties (\$10M)
 - ▶ State Dept. Consent Agreement – avoided debarment
 - ▶ Implications for international supply chain, working with third parties

Trends and the Forecast for 2021

- Enforcement under a Biden Administration
- CARES Act cases
- Domestic Preferences
- Cybersecurity certifications
- Grants/China Initiative
- Liability of private equity investors (e.g., Gores Group)
- Increased focus on FCA litigation funding
- New whistleblower protection legislation/policy
 - ▷ AML provisions in 2021 NDAA
 - ▷ Changes to SEC whistleblower program
- Others

Challenge Question



Submit your answer to craig@pubklaw.com
Subject line: Panel 12 Challenge Question