
Don't Shoot the Messenger!

Effective Compliance and Investigation Strategies in View of Enhanced Whistleblower Incentives and Protections

May 18, 2011

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Overview

- Enhanced whistleblower incentives and protections
 - Federal civil False Claims Act (FCA) overview
 - Recent amendments to the FCA
 - Impact of Dodd-Frank Act
 - State enforcement activity
- Successful compliance program strategies
- Conducting investigations/responding to whistleblowers
- Resolving whistleblower claims
- Fun with Hypotheticals!

Federal False Claims Act

Overview

- Federal civil **False Claims Act** (31 U.S.C. 3729 *et seq.*) enables private citizens to file a lawsuit in the name of the U.S. Government charging fraud by government contractors and others who receive or use government funds, and **share in any money recovered**
 - 1863 statute with 1986 amendments that significantly increase incentives for private individuals, called *qui tam* “Relators”

Federal False Claims Act

Overview

- Liability extends to any person who:
 - (A) knowingly presents or causes to be presented a false or fraudulent claim for payment or approval (a)(1)(A)
 - (B) knowingly makes or uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim (a)(1)(B)
 - (C) conspires to commit a violation of subparagraphs (A) through (G)

Federal False Claims Act

Overview

- Liability extends to any person who:
 - (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or **knowingly and improperly avoids** or decreases **an obligation to pay** or transmit money or property to **the Government**

Federal False Claims Act

Rights of the Relator

- The *qui tam* Relator can:
 - Receive 15-30% of government's recovery in a successful case (three times the amount of actual damages, plus civil penalties of up to \$11K per claim)
 - Attorneys' fees
 - Participate in litigation
 - Be insulated from retaliation by employers
 - Bring a *qui tam* action even when the government already knows about the fraud, except where there has been a "public disclosure," unless he/she is an "original source"

Federal False Claims Act

Procedures for Filing

- Relator files a Complaint, under seal, in a U.S. District Court that has jurisdiction over the case
 - Must also serve written disclosures on DOJ describing “substantially all material evidence and information the person possesses”
 - DOJ has 60 days to investigate and decide whether to intervene in the action (although extensions are liberally granted)
 - Relator is entitled to investigate and prosecute the case if DOJ declines

Federal False Claims Act

Recent Amendments

- Congressional desire to reverse judicial decisions affecting substantive and procedural interpretations of statute
- Game-changers for effective compliance programs and for conducting investigations
 - Fraud Enforcement and Recovery Act of 2009 (FERA)
 - Patient Protection and Affordable Care Act (PPACA)
 - Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)

Federal False Claims Act

Recent Amendments

- Select substantive amendments to the FCA by FERA and PPACA:
 - Definition of Claim and Materiality
 - New overpayment liability
 - Retaliation
 - Broadens scope of FCA expressly to encompass violations of the federal Anti-kickback Statute

Federal False Claims Act

New Definition of Claim

- “Claim”
 - No longer needs direct nexus to the government, just some sort of nexus
 - Clearly covers claims to contractors, grantees and other recipients, and expands retaliation provisions to contractors and agents
 - Government does not have to have title to the money or property
 - Expanded to include retention of an overpayment (must be *returned* within 60 days of being *identified*).

Federal False Claims Act

New Definition of Materiality

- “Materiality”
 - Defined as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”
 - Liability now depends on whether a false record or statement was material to a false claim, but a weak standard

Federal False Claims Act

Prohibition Against Retaliation

- FERA extends prohibition against retaliation to include a **contractor or agent**, in addition to an employee
- Dodd-Frank expands protected whistleblower conduct to preclude retaliation for:
 - Lawful acts done by an employee, agent or contractor **or associated others**
 - In furtherance of an action under the FCA or other efforts to stop a violation of the FCA

Federal False Claims Act

Prohibition Against Retaliation

- Employees, agents, contractors and associated others are entitled to substantial relief, including:
 - Reinstatement
 - Double back-pay, interest and compensation for special damages
 - Recovery of litigation costs and attorney's fees

Federal False Claims Act

Prohibition Against Retaliation

- Additional Dodd-Frank provisions apply to publicly traded companies
- Spillover effect – Dodd-Frank undoubtedly will increase whistleblower activity in all contexts.
- Early reports are that tips are pouring into the SEC

Federal False Claims Act

Recent Amendments

- Select procedural amendments to the FCA by FERA and PPACA:
 - Use of Civil Investigative Demands (CIDs) – approval and information sharing
 - *Qui Tam* service on States
 - Procedural costs

Federal False Claims Act

Civil Investigative Demands

- Authorizes Attorney General to delegate authority to use CIDs in hopes of expanding use in *qui tam* cases
- Authorizes information sharing between government and Relator prior to government intervention decision
- Potential for abuse
 - Very important amendment for Relators' bar
 - Relators can use to support or expand claims
 - Competitors can gain sensitive information
 - One-sided litigation

Federal False Claims Act

Qui Tam Service on States

- Authorizes *qui tam* service on states and local authorities in federal cases
 - Encourages parallel proceedings and collaboration with law enforcement
- Confirms DOJ may coordinate and share information in sealed FCA cases with State and local players
- Provides opportunity for States to act apart from DOJ and go it alone
- Brings States into FCA investigation more quickly and allows States to determine independent role in multidistrict investigations
- Potential for chaos!

State False Claims Acts

- Social Security Act provides financial incentive for states to adopt State FCA (laws that satisfy federal standards entitle State to an additional 10 percent of any recoveries of federal Medicaid funds)
- Over 30 States currently have FCA modeled on the federal FCA
- Most but not all have *qui tam* provisions
- Most limited to state-funded programs, contracts and/or Medicare

Successful Compliance Programs

Many Strategies Remain the Same

- Establish an effective code of ethics
- Designate specific high-level personnel with direct responsibility for overseeing compliance who have direct access to the President / CEO and board of directors
- Appoint a compliance officer with responsibility for independently investigating and acting on matters related to compliance
- Train employees on the existence and details of the company's compliance program
- Implement policies that provide protection for whistleblowers

Successful Compliance Programs

Many Strategies Remain the Same

- Arrange for regular reports to the board concerning internal investigations
- Establish effective methods of auditing and monitoring compliance to detect, prevent and correct weaknesses in corporate culture and controls; overpayment liability compels process check-up and disclosure strategies
- Implement systems to ensure reasonable steps to respond to or investigate reported violations
- Consistently enforce the company's policies and procedures through corrective action

Successful Compliance Programs

Internal Reporting Undermined by FCA

- No requirement to report through an internal compliance program
- No financial incentive for reporting internally
- Plaintiff's counsel are actively recruiting whistleblowers
- Proposed Dodd-Frank rules attempt to balance these incentives

Successful Compliance Programs

Internal Reporting Undermined by FCA

- Proposed Dodd-Frank rules seek to discourage the bypassing of internal compliance programs by:
 - Preserving whistleblower's "place in line" by designating date of report as day reported internally (provided a report is made to the SEC within 90 days)
 - Considering higher percentage awards for those who first report information through an internal compliance program

Successful Compliance Programs

Internal Reporting Undermined by FCA

- Barring certain individuals from award eligibility, including:
 - Individuals who obtain the information because that person has legal, compliance, etc. responsibilities (e.g., a CCO)
 - Individuals who obtain the information through audits required under federal securities laws
 - Individuals with a legal or contractual duty to report the information

Successful Compliance Programs

Strengthen Internal Reporting Mechanisms

- Maintain an effective system for:
 - Providing advice on an urgent basis
 - Encouraging internal and, where possible, confidential reporting
 - Protecting those who report internally
 - Responding to requests and reports
- Consider anonymous hotlines and intranet portals
- Consider incentives for internal reporting
 - Performance and compensation reviews
 - BUT do not penalize for failure internally to report – anti-retaliation provisions

Internal Investigations

What would you do?

- Have a plan of action to deal promptly and effectively with the complaint.
 - Who do I call to investigate?
 - Do I want to ensure that the investigation remains privileged, and if so, how?
 - What about the authorities?
 - What about internal communications?
 - What about the press?

Internal Investigations

Where to Start

Managing the Investigation

Controlling the scope,
participants and confidentiality
of the process

Managing Ethical Concerns

Protecting the privilege; when to
waive the privilege as it pertains
to investigations and
documentation

Managing the Public Domain

Controlling inappropriate
dissemination of confidential
or privileged information that
can be used as leverage in
filings or litigation

Managing the Whistleblower

Complaints may range from
“protected activity” to
“insubordination”

Internal Investigations

More and Better Internal Investigations

- Conduct prompt and effective internal investigations
 - Ensure adequate resources (legal, compliance, internal audit, outside counsel and consultants)
 - Take steps to maintain the attorney-client privilege
 - Determine the scope of the wrongdoing across employees, agents, business units
 - Determine whether conduct is ongoing

Internal Investigations

Who Should Investigate?

- Compliance issues typically “silo-ed” to a compliance department.
 - Reconsider a more centralized approach, with in-house counsel as liaison between HR, compliance and management – compliance not typically trained to handle it all (e.g., possible Title VII issues)
 - Consider the need for outside counsel/consultants
 - Specialized knowledge, expertise, tools and equipment
 - Independence
 - Privilege issues
 - Drain/impact on internal resources

Internal Investigations

Who Should Investigate?

- If there are allegations of retaliation, consider conducting two separate investigations:
 - One to address whistleblower's allegations (*i.e.*, I'm being unfairly treated)
 - Another to address the underlying allegations of illegal or improper practices
 - Usually conducted by compliance department or outside counsel

Internal Investigations

Preparing for the Investigation

- Preparation is key!
 - Determine who will be interviewed, why, in what order, etc.
 - Determine what portions of the investigation will be protected by privilege, and what portions will not be protected
 - Company must document that an adequate investigation was conducted
 - This documentation should be separate from attorney advice and counsel
 - Determine who the appropriate investigator is – has he or she been trained?

Internal Investigations

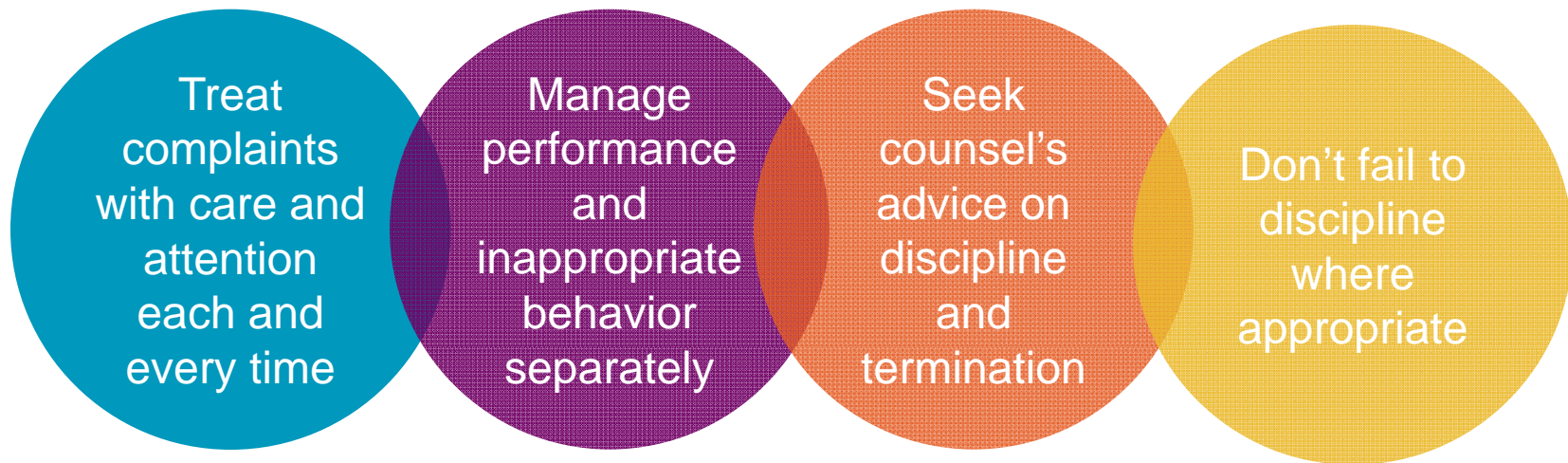
Important Considerations

- Managers and supervisors must be educated on and appreciate the potential legal risks and liability
- Managers and supervisors must understand the protections of privilege in order to preserve the integrity of the company's defenses and legal positions
- What managers do post-incident/complaint may impact that integrity

The Whistleblower

Managing the Whistleblower Employee

- The Whistleblower-Employee must continue to be managed appropriately and effectively



The Whistleblower

Managing the Whistleblower Employee

- Watch for *qui tam* Relators who start building a case while still employed by the Company
- Seek opportunities for Relator to disclose information, correct problems (e.g., I notice that you seem concerned about something. Is there something you'd like to share?)

Managing the Public Domain

- Anticipate public attention – whistleblowers and health care fraud are a “hot” story
- To the extent feasible, consider utilizing:
 - Filing documents under seal
 - Motions to quash certain investigative steps, discovery requests or use of certain evidence
 - Filing documents under seal
- When responding to allegations, address procedural arguments to avoid addressing merits or disclosing privileged information
- If merits must be discussed, find ways to avoid discussion of information or materials protected by legal privilege

Resolving Whistleblower Claims

Whether to Self-Report

- The self-reporting decision
 - Nature of violation
 - Strength/completeness of investigation and evidence
 - Likelihood of independent discovery
 - Concerns about discovery of additional improper conduct
 - Affirmative duty to report (obligation to refund overpayments)
 - Possibility of leniency and better long-term relationship with regulators

Resolving Whistleblower Claims

Where and How to Self-Report

- The self-reporting location
 - Medicare Contractor
 - HHS-OIG
 - Local U.S. Attorney's Office
 - U.S. Department of Justice ("Main Justice")

Resolving Whistleblower Claims

Government – Relator Relations

- Government intervenes
 - Government controls the action and has ability to settle – Relator remains a party
 - Government may amend Relator's complaint
 - Government may decline to pursue some of Relator's claims
 - Government may add common law claims
 - Relator may accept the amendment and the *de facto* dismissal of the claims the Government did not adopt, or assert any unadopted claims in a separate complaint/action.

Resolving Whistleblower Claims

Government – Relator Relations

- Government declines to intervene
 - Relator controls the action
 - Government is real party in interest and can request copies of pleadings and deposition transcripts
 - DOJ often monitors declined cases and can file “statements of interest”
 - 2009 Amendments allow DOJ to share material received by DOJ under a CID with the Relator
 - Company can seek a confidentiality agreement if confidential information would harm company if released to Relator

Resolving Whistleblower Claims

Other Government Entities

- Deferred prosecution and non-prosecution agreements
- Parallel settlement negotiations with HHS-OIG
 - Corporate Integrity Agreements
- Parallel settlement negotiations with State Attorneys General
- Increased focus on individual liability (Responsible Corporate Officer/Park Doctrine)
- Exclusion and/or debarment