Morgan Lewis

WHITE COLLAR LITIGATION AND THE ENERGY INDUSTRY: GOVERNMENT ENFORCEMENT

June 5, 2025

Presenters

Meredith S. Auten

John J. Pease, III

Steven Strauss

Agenda

- Recent FCA Actions in the Energy Industry
- Tariffs & Customs
- DEI
- COVID-19 Pandemic Fraud
- Recent DOJ Enforcement Policy Revisions

Recent FCA Actions in the Energy Industry

Essential Elements of an FCA Case

1. **Falsity**
   - Legal Falsity: express or implied false certification of compliance with underlying laws/contractual provisions
   - Factual Falsity: billing for goods or services that are incorrectly described, do not comply with contractual specifications, or are not provided at all
2. **Knowledge** (scienter)
   - Actual knowledge – awareness of falsity
   - Deliberate ignorance – aware of substantial risk of falsity, but intentionally avoided learning whether it was
   - Reckless disregard – aware of substantial and unjustifiable risk of falsity, but submit claims anyway
3. **Material** to the government's decision to pay
4. **Loss** to the government for treble damages
   - No loss required for per-claim penalties

Recent Energy-Related FCA Enforcement Actions

- Several noteworthy FCA settlements involving companies in the energy space in recent years
- Two primary areas of focus:
  - Royalty underpayments for oil and gas leases
  - Fraud in connection with government contracts

Royalty Underpayments: Hilcorp San Juan

- Oil and natural gas exploration and production company
- January 2024: $34.6 million FCA settlement with the U.S. Attorney's Office for the Southern District of Texas to resolve claims related to allegedly knowingly underpaying royalties for oil and natural gas produced from federal land
  - Hilcorp allegedly made initial royalty payments without indicating payments were based on estimated volumes and prices and failed to subsequently true-up payments based on actual volumes and prices
- Received credit for assisting in calculating losses and for cooperating in the investigation
  - Made an initial repayment of $20.6 million in July 2021, which was subtracted from settlement amount
- Direct enforcement action by DOJ and Department of Interior

Royalty Underpayments: XTO Energy

- Natural gas exploration and production company
- November 2023: $16 million FCA settlement with the U.S. Attorney's Office for the District of Colorado to resolve claims related to allegedly knowingly underpaying royalties for natural gas produced from federal and Native American land
  - XTO allegedly improperly deducted costs necessary to put the gas in marketable condition and costs for transporting carbon dioxide prior to calculating royalty payments
- Direct enforcement action by DOJ and Department of Interior

Contract-Related Fraud: Consolidated Nuclear Security LLC

- CNS manages and operates the Pantex Plant near Amarillo, Texas pursuant to a contract with the Department of Energy National Nuclear Security Administration
  - Primary facility for assembly/disassembly and retrofitting of nuclear weapons
- April 2024: $18.4 million FCA settlement with the U.S. Attorney’s Office for the Northern District of Texas to resolve claims related to timecard fraud
  - Employees allegedly submitted timesheets for hours they did not work
- Received cooperation credit for self-disclosure, terminating employees, and assisting with the investigation
- Direct enforcement action by DOJ and Department of Energy

Contract-Related Fraud: MOX Services LLC (f/k/a C&I AREVA MOX Services LLC)

- Designed, built, and operated a mixed oxide fuel fabrication facility at the Savannah River Site in Aiken, SC
  - The facility converts weapons-grade plutonium into nuclear fuel for commercial reactors
- March 2022: $10 million FCA settlement with the U.S. Attorney’s Office for the District of South Carolina to resolve claims that MOX failed to verify receipt of materials from subcontractors before billing DOE for them
  - As a result, MOX allegedly submitted nearly 500 claims for non-existent materials to DOE
- Settlement resolves a complaint DOJ originally filed in 2019

State Statutes

- 44 states and territories have false claims laws
  - Approximately 1/3 are limited to healthcare violations
  - 32 have qui tam provisions
- State false claims landscape still evolving
- Sometimes go beyond the federal FCA and certain areas are unique to state/local laws, including tax- and escheatment-based claims
- May see increased activity by the states and/or relators in the states given current uncertainties in the federal space

Tariffs & Customs

Tariffs/Customs Violations as "Reverse False Claims"

- Enforcement Trend: Import Violations as "Reverse False Claims"
- Primarily based on these alleged actions:
  - Misclassification of goods
  - Undervaluation
  - Inaccurate country-of-origin marking
- Other alleged trade violations brought as FCA claims
- Already a focus in recent years for relators and DOJ
- Trump administration's focus on tariffs likely to lead to additional activity in this area per recent DOJ statements
  - February 2025, Deputy Assistant AG Michael Granston: DOJ will "aggressively" enforce FCA, including to combat foreign trade and tariffs issues
  - DOJ intervened in a qui tam alleging underpayment of customs duties on imported apparel on April 18, 2025

Recent FCA Actions Related to Tariffs/Customs

- Evolutions Flooring Inc. (C.D. Cal.)
  - Flooring company agreed to $8.1 million settlement in March 2025 alleging underpayment of customs duties by misrepresenting country of origin of imported products
- Alexis, LLC (S.D. Fla.)
  - Womenswear company agreed to $7.7 million settlement in August 2024 alleging it misrepresented value of imported clothes and underpaid customs duties
- Precision Cable Assemblies, Inc. and Global Engineered Products, Inc. (E.D. Wis.)
  - Companies selling wiring and power distribution products agreed to $10 million settlement in August 2024 alleging submission of false invoices undervaluing imported goods to reduce customs duties
- Penta International Inc. (D.N.J.)
  - Fragrance and chemical manufacturer agreed to $3.1 million settlement in March 2024 alleging mislabeling of chemicals imported from China
- Anyclo International Inc. (D.N.J.)
  - South Korean clothing manufacturer agreed to $2 million settlement in June 2023 alleging it used false invoices to evade customs duties on imported clothing

DEI

U.S. Administration Priority – Focus on "Illegal" DEI

- On January 21, 2025, White House issued Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"
- Orders "all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."
- The order requires a certification in government contracts and grant awards that purports to address "materiality" for FCA purposes

EO 14173’s Certification

“The head of each agency shall include in every contract or grant award:

(A) A term requiring the **contractual counterparty or grant recipient** to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is **material to the government’s payment decisions** for purposes of section 3729(b)(4) of title 31, United States Code; and

(B) A term requiring such counterparty or recipient to **certify** that it **does not operate any programs promoting DEI that violate** any applicable Federal anti-discrimination laws.”

Section 3(b)(iv)

FCA Materiality

- "A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act." *Universal Health Services v. Escobar ex. rel. U.S.*, 136 S. Ct. 1989, 1996 (2016).
- "What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Id.*
- "[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id.* at 2004-05
- Open Issues:
  - Is there a lack of materiality pre-EO?
  - Is an EO's declaration of materiality dispositive?
- In mid-April, a district court (N.D. Ill.) held on First Amendment grounds that the Department of Labor cannot require grant recipients to make the required certification and issued a preliminary injunction blocking DOL from enforcing the certification requirement

COVID-19 Pandemic Fraud

COVID-19 Pandemic Fraud

- COVID-19 pandemic fraud continues to be an area of focus for DOJ
- During FY 2024, DOJ obtained 250+ FCA settlements and judgments exceeding $250 million in connection with pandemic fraud
  - Healthcare fraud (COVID-19 testing and treatment, telehealth, etc.)
  - PPP and EIDL
- Likely to continue to be a priority across all industries given new administration's focus on waste, fraud, and abuse
- Statute of limitations has been extended to 10 years for PPP and EIDL fraud
  - PPP liability theories are not industry-specific
  - At least 20,000 PPP loans disbursed to companies in mining, quarrying, and gas extraction industry

PPP Fraud: Freedom Solar LLC

- Solar energy company that installs photovoltaic solar arrays for residential and commercial customers
- May 2024: entered into a $425k settlement with the U.S. Attorney’s Office for the Western District of Texas to resolve claims regarding improper payroll calculations on its PPP loan application
  - Failed to cap employees’ salaries at $100k (per PPP rules) when determining loan amount

Recent DOJ Enforcement Policy Revisions

Priorities for Corporate and White-Collar Crimes

- In May 2025, DOJ announced revisions to its enforcement priorities and policies for corporate and white-collar crimes
  - Focus on areas with "the greatest impact in protecting citizens and companies and promoting U.S. interests"
  - Continued emphasis on fraud and abuse in government healthcare programs, defense spending, trade/customs, and financial fraud
  - Urges prosecutors to "avoid overreach that punishes risk-taking and hinders innovation" and to "strike an appropriate balance between the need to effectively identify, investigate, and prosecute corporate and individuals' criminal wrongdoing while minimizing unnecessary burdens on American enterprise"

Corporate Voluntary Self-Disclosure Policy

- DOJ revised its corporate voluntary self-disclosure policy in early 2023 for the first time in more than 5 years, which was amended again in May 2025
- Disclosures must be:
  - Voluntary – not based on preexisting obligations or regulation, contract, or prior resolution
  - Original – information not previously known to DOJ
  - Timely – prior to imminent threat of disclosure or government investigation and within "a reasonably prompt time after" the company learns of the misconduct
  - Complete – all relevant, non-privileged facts concerning the misconduct that the company knows at that time
- If a company voluntarily self discloses, fully cooperates, and remediates conduct, it will receive a declination absent aggravating circumstances
  - Prior to May 2025 amendment, only a "presumption of a declination"

Corporate Voluntary Self-Disclosure Policy

- Even if aggravating circumstances are present, prosecutors have discretion to recommend declination based on severity of circumstances and the company's efforts to cooperate and remediate
  - Declinations will be made public
- If a company does not meet the definition of a "voluntary self disclosure" or there are aggravating factors present, but if it acted in good faith, fully cooperated, and timely remediated misconduct, the Criminal Division "shall"
  - Provide an NPA "absent particularly egregious or multiple aggravating circumstances"
  - Allow a term length of 3 years or less
  - Not require an independent compliance monitor
  - Provide a reduction of 75% off the low end of the Sentencing Guidelines fine range

Voluntary Self-Disclosure Policy for Individuals

- In April 2024, DOJ's Criminal Division announced a pilot program to incentivize disclosure of corporate and white-collar misconduct by individuals
- DOJ will offer non-prosecution agreements to individuals if they disclose:
  - Original information (non-public information not previously known to DOJ)
  - Related to specific types of defendants and offenses (financial institutions, money laundering, financial market integrity, foreign corruption/bribery, health care fraud/kickbacks, government contract fraud, and bribes/kickbacks for domestic public officials)
  - Voluntarily (before a request, inquiry, or demand, without pre-existing disclosure obligation, and not due to an investigation or threat of imminent disclosure)
  - Truthfully and completely
- Individual must agree to:
  - Fully cooperate and provide substantial assistance to the DOJ during its investigation
  - Forfeit or disgorge any profits from criminal wrongdoing
  - Pay victim restitution

Revised Whistleblower Award Program

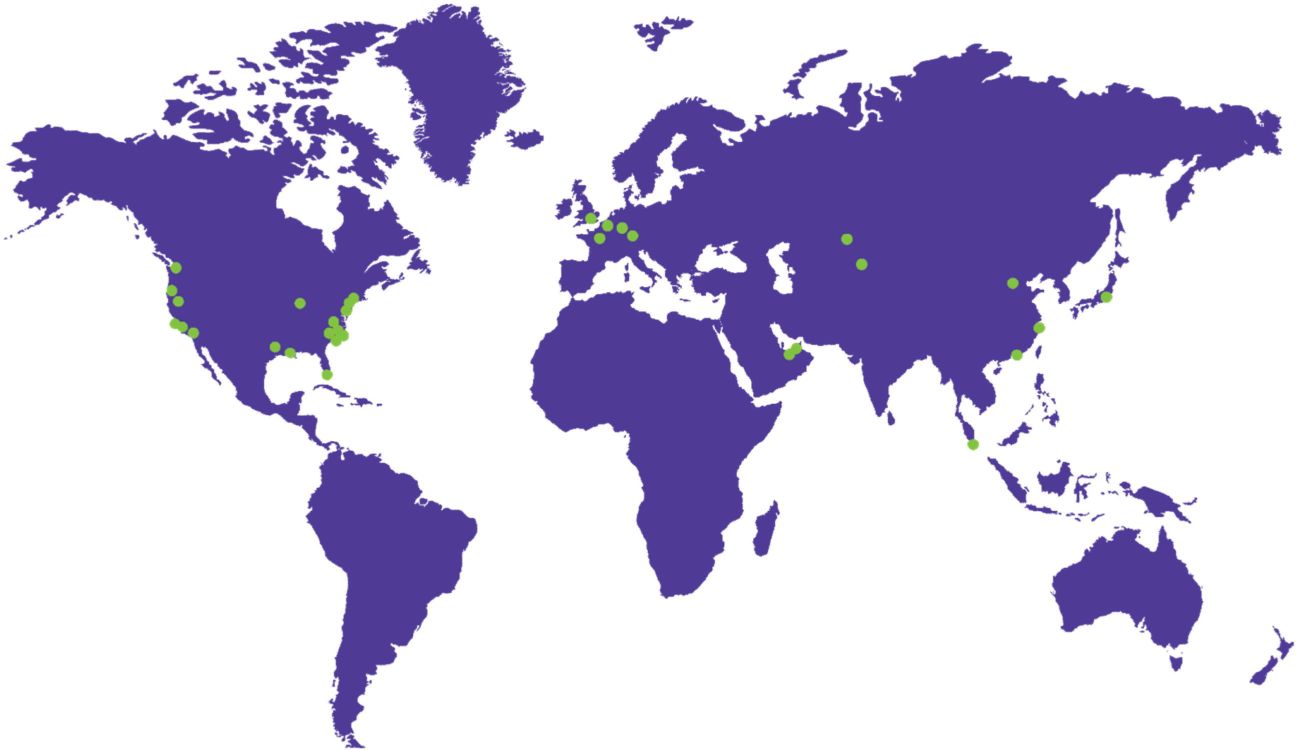
- Individuals are eligible for awards if they voluntarily provide truthful, complete, and original information leading to criminal or civil forfeiture exceeding $1 million related to:
  - Violations by financial institutions related to money laundering or fraud
  - Foreign or domestic corruption or bribery
  - Federal health care offenses or fraud against patients, investors, or NGOs in the health care industry
  - Other, non-health care fraud against the government
  - Trade, tariff, and customs fraud
  - Federal immigration violations
  - Sanctions offenses, material support for terrorism, or violations by cartels and transnational criminal organizations, including money laundering, narcotics, and CSA violations

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Astana
Beijing
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong
Houston
London
Los Angeles
Miami
Munich
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Seattle
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, DC
Wilmington



Morgan Lewis

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU