

# Government Contract Compliance: How to Maximize Your Profit and Stay Out of Jail

## The Civil False Claims Act and Related Risks

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# Why Are We Here?

- Because the False Claims Act (“FCA”) is the government’s ***most powerful*** litigation tool for combating waste, fraud and abuse
- Recent changes in FCA make it more available to whistleblowers and their lawyers
- Hundreds of cases under investigation at any one time
- Cases often take several years to investigate



# Is Your Contract Just a Local Matter?

- In FY 2011, the federal government provided \$606 Billion in grants to state and local governments
  - Categorical grants given for a specific purpose
  - Block grants such as Community Development Block Grants given for broader purposes
  - General purpose grants, such as revenue sharing
  - Formula grants
  - Project grants

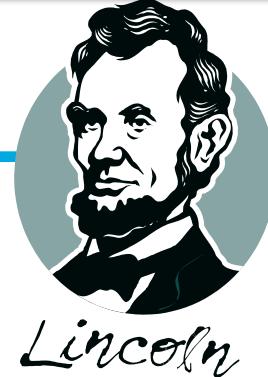
# Is Your Contract Just a Local Matter?

- Number of Grants
  - Over 2,240 different federal grant programs
  - Over 1,530 project grant programs
  - The Department of Justice alone made over 11,000 grants in FY 2011
- Grants also go to NGO's in addition to state and local governmental entities
- Now consider, in addition to grants, the number of federal contracts, subsidies, loans, guarantees, insurance or other forms of federal assistance provided to state and local governments and private organizations
- If the entity with whom you are doing business receives federal funds in any those forms, there is probably a basis for federal jurisdiction and prosecution, even if your contract is not paid from federal funds

## The Federal False Claims Act (31 U.S.C. §§ 3729-3733)



# Brief History of the False Claims Act



- Enacted during the Civil War to address fraud in military procurement contracts.
- Also known as “Lincoln’s Law” or the “*Qui Tam Statute*.”
- Major amendments in 1943 and 1986 (25<sup>th</sup> Anniversary of the 1986 Amendments celebrated by DOJ this year).
- Recent amendments:
  - 2009: The Fraud Enforcement and Recovery Act of 2009 ("FERA") Pub. L. No. 111-21, § 4, enacted May 20, 2009.
  - 2010: The Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, § 10194(j)(2), enacted March 23, 2010.
  - 2010: The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, § 1079A, enacted July 21, 2010.

# Overview of the False Claims Act

- Actions may be brought by either the Department of Justice ("DOJ") or by ***qui tam* Relators** on behalf of the United States.

- Remedies:

- Treble damages (reduction in damages possible)
- Penalties
- Costs
- Relator fees
- Whistleblower reinstatement, double back pay and interest

- Jurisdiction and Venue – Suit may be brought in any judicial district in which:

- The defendant can be found, resides or transacts business
- Any FCA violation occurred

- Statute of limitations bars a claim that is brought:

- More than 6 years after the date of which the violation occurred; or
- More than 3 years after the date when the facts material to the right of action are known or should have been known by the official of the United States charged with responsibility to act in the circumstances but in no event no more than 10 years after the date on which the violation is committed, whichever occurs last.

# False Claims Act Liability – Core Elements



A “claim” must be submitted to the Government for payment or approval;

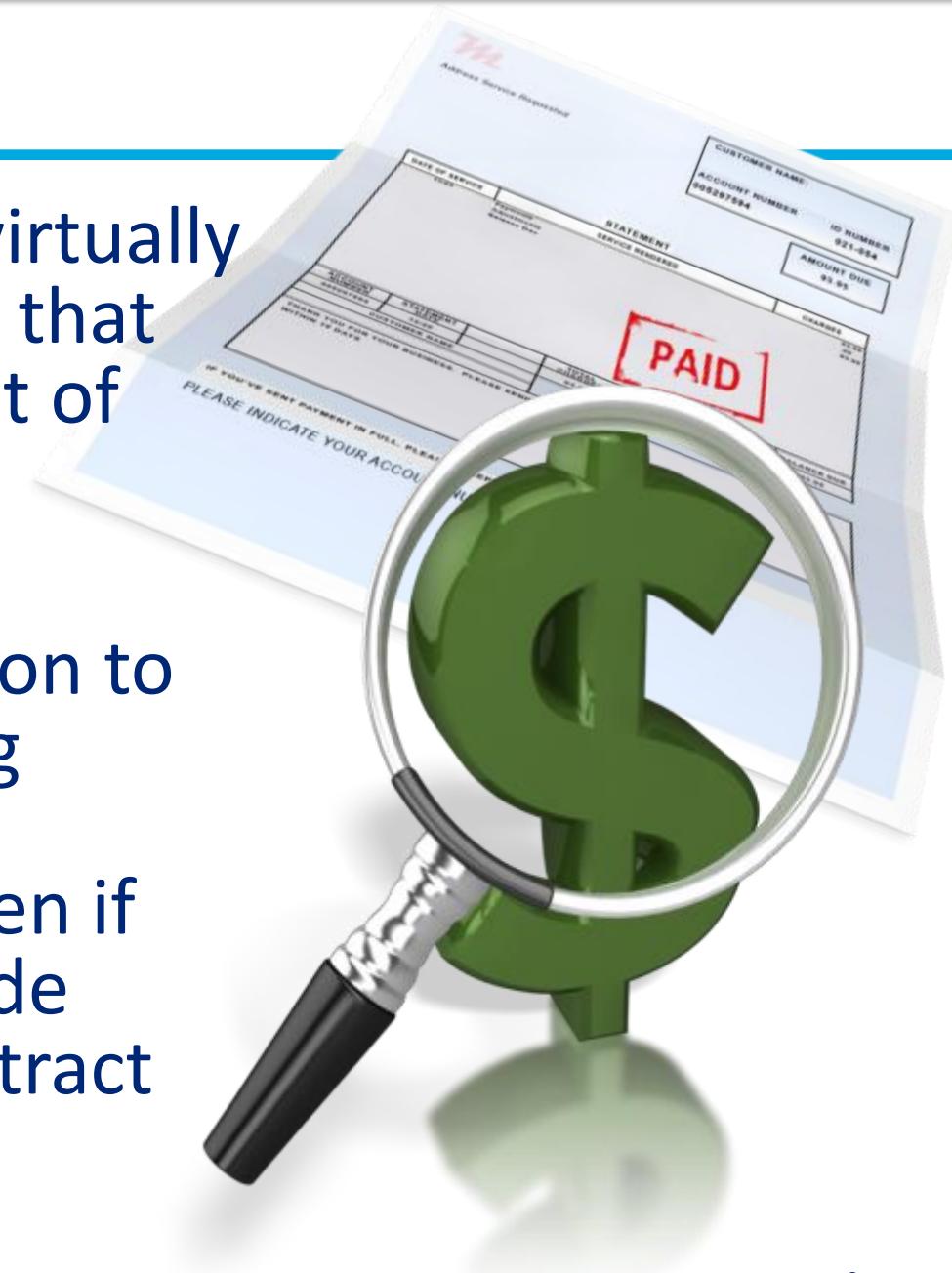
The claim must be “false or fraudulent”; and

The person who submitted the claim, caused the claim to be submitted, or conspired to submit the claim, must “know” the claim is false.



# What is a “Claim”?

- “Claim” encompasses virtually all demands or requests that call for the disbursement of Government funds
- Each separate submission to the Government seeking payment is a claim for purposes of the FCA, even if the submissions are made pursuant to a single contract



# False Claims Act Overview

- **Substantive violations of the FCA:**

- Submitting a false or fraudulent claim for payment or approval
- Making or using a false record or statement material to a false or fraudulent claim
- Conspiracy to violate the FCA
- Keeping government money or avoiding an obligation owed to the government (reverse false claim)
  - Overpayments are “obligations” to the government



Violations must  
be committed  
“knowingly”

## “*Scienter*”

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BUT... “knowingly”  
includes:

- *Actual knowledge* of falsity;
- *Reckless disregard* of truth or falsity; or
- *Deliberate ignorance* of the truth or falsity.

# Deliberate ignorance



Is NOT a Defense

# Common Theories of Liability

**Liability under the FCA has taken several forms, most commonly:**

- *Facially (Explicitly) False Claims* – Submission of false requests for payment.
  - E.g. services not rendered or services not covered.
- *Express False Certification Claims* – Submission of false certification of compliance with provision, rule or law.
  - E.g. false certification that no organizational conflicts of interest exist.
- *Implied Certification* – Noncompliance with regulations or underlying contractual provisions giving rise to liability on the belief that the defendant implicitly certified compliance by submitting claim for payment.
  - E.g. company submits accurate bills, but violates the Anti-Kickback Statute or other regulation.
- *Fraud-in-the-Inducement* – False representations that induce Government to act.
  - E.g. false representation that company qualifies for federal program.

# **Recent Cases and Issues**

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- **Kickbacks**
  - 2010: Yonkers Contracting Company VP built in kickbacks on pricing of Fed. Highway Admin. Funded project
  - 2011: Serono Pharmaceuticals -- \$44.3 million FCA – inducements to MD's; Medtronic -- \$23.5 million FCA – inducements through studies
- **Failure to Conform to Specifications**
  - 2011: Frederick Precast Concrete, Inc. Director of QC – false statements and certifications of compliance with rebar specifications and concrete mix testing on precast structures for Wilson Bridge and interstate highway project

# Recent Cases and Issues

- DBE Compliance

- 2011: Minnesota Transit Constructors -- \$4.6 million FCA settlement re Fed. Transit Admin. Light rail project in MN
- 2011: Environmental Energy Associates officers—criminal plea related to NY City Transit and MTA projects
- 2010: Schiavone Construction Co. -- \$20 million FCA settlement on NY MTA projects
- 2010: John Carlo, Inc., and Iafrate Construction Co. -- \$1.4 million FCA settlement re Detroit airport runway project.
- 2009: Schuylkill Products, Inc. and Marikina Construction owners and executives – plead guilty re \$136 million in Pa. highway projects fraud

# Recent Cases and Issues

- **Tainted Products**

- 2010: GlaxoSmithKline -- \$750 Million – adulterated drugs paid for by federal health care programs

- **Regulatory Violations**

- 2011: Oracle -- \$199 Million – failure to provide “current, accurate and complete” information about discounts to commercial customers
- 2011: Education Mgmt Corp – DOJ intervenes in claims of false certification of compliance with prohibition of incentive payments to recruiters
- 2011: Merck Pharma --\$950 Million FCA and criminal plea – off-label marketing of Vioxx, plus false statements re safety of drug

# Recent Cases and Issues

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- **Bond Reimbursement Claims**

- Morse Diesel/AMEC Construction Management, Inc. -- \$19 million False Claims Act settlement re false bond reimbursement claims and premium kickbacks re building of federal courthouse in St. Louis
- In addition to penalties (criminal and civil) also forfeited \$53 million in claims

# Recent Cases and Issues

- **False Certification of Equitable Adjustment Claim**
  - 2010: Daewoo Engineering -- \$51 million settlement of FCA counterclaim in Court of Federal Claims litigation re Army Corps of Engineers highway construction project in Palau
  - Request for Equitable Adjustment of \$50.6 million based on site conditions – denied
  - Daewoo sued in Court of Federal Claims seeking same damages as REA – Claim “certified” as made in good faith

# But What REALLY Makes the FCA So Unique?

#1

The Qui Tam  
“Whistleblower”  
“Provisions”



#2

Severe  
Damages and  
Penalties

# “Qui Tam”: What Does it Mean?

*Qui tam pro domino rege quam pro se ipso  
in hoc parte sequitur*

“He who sues for the king as well as for himself”



*Qui Tam* provisions allow for a private individual (or “Relator”) with knowledge of past or present fraud committed against the Government to bring a suit on its behalf. If the suit proves to be successful, the Relator takes a share of the recovered proceeds as a reward for “blowing the whistle”.

# ***Qui Tam* “Whistleblower” Provisions**

## **Qui Tam Procedure:**

- ***Initiation*** -- The whistleblower must file his/her lawsuit on behalf of the government in a federal district court.
- ***Investigation*** -- The action is kept “under seal” (confidential) during governmental review and investigation of the allegations.
- ***Intervention*** -- If the government determines that the lawsuit has merit and decides to intervene, the prosecution of the lawsuit will be directed by the Department of Justice. If the government decides not to intervene, the whistleblower may continue with the lawsuit on his or her own.

# Who Files *Qui Tam* Lawsuits?

- 1. EMPLOYEES:** A current or former employee who “blows the whistle” on an employer is the most common type of *qui tam* plaintiff. In the case of a former employee, they may have been terminated or quit as a result of complaining about the fraud or trying to blow the whistle internally – which is often what brought them to an attorney to begin with.
- 2. COMPETITORS AND SUBCONTRACTORS:** A less common type of whistleblower is the competitor of the company committing the fraud or an employee of the competitor who has knowledge of the fraud being committed. Companies or persons who subcontract with a government contractor have also filed *qui tam* actions against the primary contractor.
- 3. INDUSTRY EXPERTS:** In a few cases, industry experts have brought FCA suits against industry-participant defendants alleging an industry-wide fraudulent practice.

# The False Claims Act – The Relator

- The relator can get up to 30% of the recovery.
- If the Government decides to take over the action, the relator can still get between 15% and 25% of the recovery.
  - In 2008, two whistleblowers shared \$92 million of a \$650 million Medicaid billing-fraud settlement against Merck & Co. See *United States ex rel. Lacorte v. Merck & Co, No. 99-CV-3807, settlement agreement filed (E.D. La., New Orleans Feb. 7, 2008)*.

# Overview of State False Claims Acts

- Commencing with California in 1987, a number of states have enacted their own false claims statutes to address fraud against state and local governments.
- So far, about 30 states and the District of Columbia have passed FCAs.
- States with FCAs:
  - California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, Washington and Wisconsin

# STATUTORY CHANGES

- **Fraud Enforcement and Recovery Act of 2009 (“FERA”)**
  - Major substantive changes -- effective May 20, 2009
  - Eliminated "presentment" requirement – can now trace funds through subcontractors, grants, state programs, etc.
  - Eliminated purpose language for false statements; violation exists where statement or record is “material” to a false claim

# STATUTORY CHANGES

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- (“FERA”), con’t
  - Enlarged the scope of reverse false claims provision
  - Provided for sharing of information with states and relators
  - Expanded whistleblower protections
  - Relation back of new claims added by DOJ

# STATUTORY CHANGES

- **PATIENT PROTECTION AND AFFORDABLE CARE ACT (“PPACA”), adopted in 2010, further expanded FCA liability**
  - Amended public disclosure bar
  - Made "original source" exception easier to satisfy – requires only being “independent of and materially adds to publicly disclosed allegations . . .”
  - Created 60-day deadline for reporting and returning overpayments
  - Established that an overpayment is "an obligation" under FCA
  - Made violations of the anti-kickback act a clear FCA violation

# DOJ POLICY CHANGE: PROSECUTE INDIVIDUALS



# Enforcement Trends



The following trends are emerging in, and surrounding, the prosecution of FCA actions:

- Increasing number of criminal convictions and fines.
- Increasing numbers of cases against individuals under the Responsible Corporate Officer Doctrine (Park Doctrine), obstruction, and others.
  - Includes individual executives, related doctors and surgeons.
  - Includes company inside counsel.
    - United States v. Stevens
- Suspension/debarment/exclusion of executives and others responsible for violations.
  - GTSI
  - Friedman v. Sebelius

# Enforcement Trends, cont.

- Pressure from courts and Relators to "unseal" cases before DOJ intervenes.
- Increased use of state false claims acts.
- Increased use of Corporate Integrity Agreements.
- Use of Task Forces
  - National Procurement Fraud Task Force;
  - Financial Fraud Enforcement Task Force;
  - Financial Institutions and Public Sector Fraud Unit;
  - Health Care Fraud Prevention and Enforcement Action Team; and
  - Corporate Fraud Task Force.



# Enforcement By The Numbers

- More *qui tam* actions:

Fiscal Year	New Non Qui Tam Cases	New Qui Tam Cases	Total New Cases
2008	162	379	541
2009	132	433	565
2010	140	575	715
2011	124	638	762

# Enforcement Impact

- Emergence of self-reporting requirements and incentives.
  - Prevalent programs:
    - FAR Mandatory Disclosure Rule.
      - Contractors and subcontractors must "timely disclose" any "credible evidence" that a principal, employee, agent or subcontractor has committed a violation of certain federal criminal laws (fraud, conflict of interest, bribery or gratuity), or a violation of the FCA.
    - Securities and Exchange Commission Self-Disclosure.
    - Department of Defense Voluntary Disclosure Program.
    - Health and Human Services OIG Provider Self-Disclosure Protocol planned revision.
    - State self-disclosure programs.
  - Self disclosure can reduce culpability score.



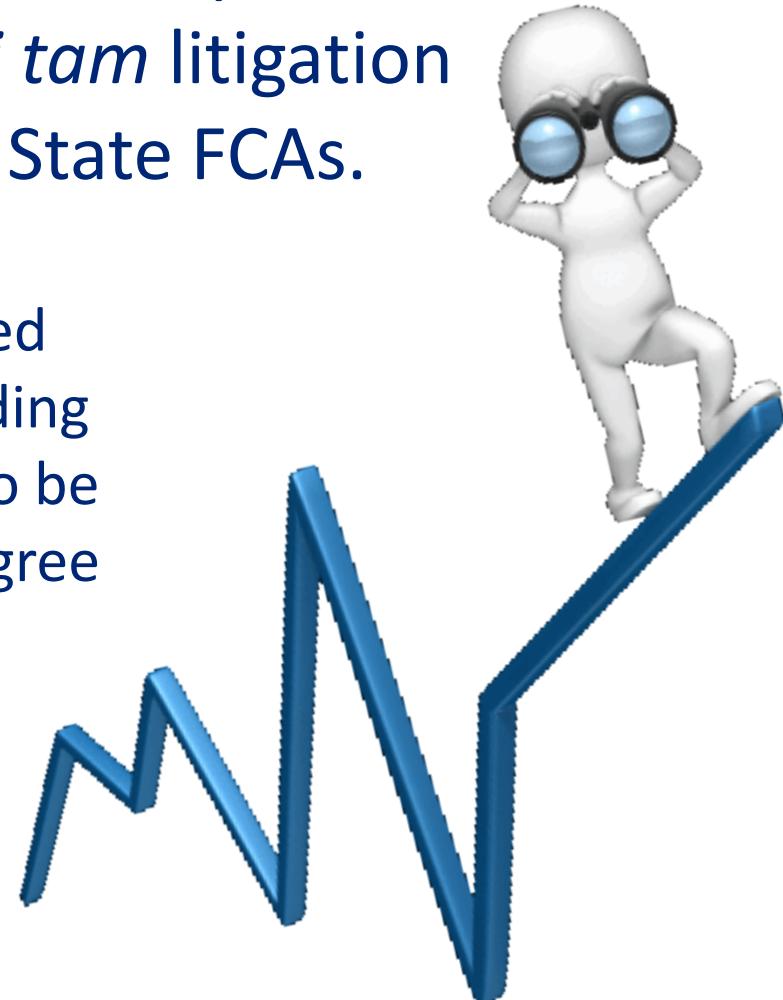
# Enforcement Impact, cont.

- Increased use of Corporate Integrity Agreements ("CIA").
  - CIA's typically last for 5 years and will include requirements that the entity:
    - hire a compliance officer/appoint a compliance committee;
    - develop written standards and policies;
    - implement a comprehensive employee training program;
    - retain an independent review organization to conduct annual reviews;
    - establish a confidential disclosure program;
    - restrict employment of ineligible persons;
    - report overpayments, reportable events, and ongoing investigations/legal proceedings; and
    - provide an implementation report and annual reports to OIG on the status of the entity's compliance activities.

# The Forecast: More FCA Storms Ahead

As the Budget crisis progresses, expect to see **more** governmental and *qui tam* litigation under both the Federal and State FCAs.

Also, because of reduced opportunities to get cases dismissed on procedural grounds and expanding types of FCA liability, there will also be more pressure on defendants to agree to expensive settlements.



# Compliance and Ethics Programs



# Compliance 101

Implementation of an "effective" compliance and ethics program is evidence of a company's intent to behave ethically and comply with laws and regulations. DOJ reviews compliance programs as part of its evaluation of FCA matters and settlements.

- Government contractors are required to have a compliance and ethics program under FAR 52.203-13 and prescribing clauses.
- Sources of compliance program standards:
  - Chapter Eight of the United States Sentencing Guidelines
  - Title Nine of the United States Attorney's Manual
  - Deferred Prosecution Agreements
  - Non-Prosecution Agreements
  - Cooperation Agreements
  - Recent Corporate Integrity Agreements



# Questions?

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