

Client Alerts

December 2012

Record Civil False Claims Act Recoveries Point to Increased Whistleblower Cases in 2013

In fiscal year 2012, the Justice Department recovered nearly \$5 billion in False Claims Act (FCA) settlements and judgments, a single-year high, and the second straight year DOJ set a new record. If you are a government contractor, receive payments from the federal government, or operate a government program (or one with the government's imprimatur), you are subject to DOJ's greatly enhanced civil fraud recovery program on every front.

Perhaps of most importance to the private sector is that \$3.3 billion of the \$5 billion came from a record 647 whistleblower (or *qui tam*) suits brought by private citizens. The lesson to be drawn from this is that a company subject to fraud claims actions by the federal government should consider every one of its employees as a potential agent of the U.S. Government. Remember, the whistleblower receives up to 30% of the government's recovery. A company should order its internal controls accordingly and take all reasonable steps to ensure that it meets the government's accounting and auditing standards.

As Acting Associate Attorney General Tony West said on Tuesday, December 4, 2012, in the four years ending September 30, 2012, Justice obtained \$13.3 billion through FCA cases, the largest four year total in the Department's history. With this announcement also came the clear statement that DOJ will continue to support the Civil Division's Fraud Unit and expand its partnerships with U.S. attorneys and other agencies of government across the country. On this point, Principal Deputy Assistant Attorney General Stuart Delery emphasized that civil fraud cases have a very human face; the Department is committed to protecting seniors, children, homeowners, parents, patients, and "our men and women in uniform."

With the government on the hunt for cost reductions, "fraud, waste, and abuse" campaigns are standard. The two largest areas of recovery in FY 2012, health care and housing and mortgage fraud, demonstrate this. For the first time in one year, health care fraud recoveries were over \$3 billion and housing fraud added \$1.4 billion to the total.

In private sector terms, the return on investment in riding the coattails of private whistleblower suits is clearly worthwhile. We will see increasing efforts in FY 2013 in health care as greater attention is focused on those costs through the "fiscal cliff" negotiations, mortgage fraud as the Consumer Financial Protection Bureau gets its feet under it, and government contracts, particularly as the contract apparatus in Afghanistan shifts from "getting it done" to "getting it done absolutely right."

In short, as the government fiscal year begins and the calendar year winds down, now is the time to review your company's internal controls to protect yourself from inquiries, particularly those that begin from within.

- Is your company FAR Compliant?
 - What steps are you taking to ensure that you are complying with all of the terms, conditions and requirements of your contracts?
 - Are you certain that all certifications made to the government (e.g., cost and pricing data, size representations, etc.) are correct?
- What would your contracting agency's IG auditors (or DCAA, or your independent auditor) say if they saw your books?
- Is your Code of Conduct up to standard? Are reviews of the Code and compliance with it part of your internal audit cycle?
- Do your company policies and procedures encourage internal reporting of compliance concerns?
 - Employees generally prefer to report concerns internally, studies show. However, if they fear reprisal or that their concerns are not taken seriously, they may be driven to seek *qui tam* counsel or go directly to government investigators.
 - Employees want to be part of a company that takes pride in doing the job right. Fostering effective

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internal communications encourages better compliance and pays dividends in every aspect of the company's operations.

As every contractor knows, when a disaffected employee files a whistleblower action and IG or DCAA representatives knock on the door, it is too late to ask these questions.

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