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PERSPECTIVES

NEW DOJ POLICIES MAY HELP COMPANIES BETTER NAVIGATE FALSE CLAIMS ACT INVESTIGATIONS

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> GOODWIN

The False Claims Act (FCA) should be on the radar of any company doing business, directly or indirectly, with the US government. The FCA is a statute that has been used aggressively to pursue allegations of government programme fraud and submission of false claims for payment – enforcement of the FCA has increased dramatically over the last three decades, and the cases brought often result in steep penalties and the risk of corresponding criminal charges. In the US fiscal year 2017 alone, the US Department of Justice (DOJ) reported that it had obtained over $3.7bn in settlements and judgments from FCA cases and there were nearly 800 new FCA matters filed. Several recent DOJ policy announcements suggest trends that companies faced with potential FCA liability should also be attentive to in seeking to resolve such matters.

The FCA is a US federal statute that imposes liability on companies and individuals that defraud the federal government or any of the programmes it administers, such as Medicare and the Federal Housing Administration mortgage insurance programme. The statute covers claims for money

or property made to the US government or to a government contractor, grantee or other recipient. The FCA has a broad reach, as the US government is one of the world's largest consumers of services and goods across all sectors of industry. The statute has also been broadly used, as it can be enforced not only by the DOJ, but also by private persons suing on the government's behalf – whistleblowers known as 'relators' in *qui tam* actions. In fiscal year 2017, nearly 84 percent of new FCA matters were filed by *qui tam* relators. For the government's part, under the statute, it must investigate all alleged FCA violations that it identifies or that a potential *qui tam* relator brings to its attention, and can then proceed in one of three ways: (i) intervening in the action, in other words, choosing to prosecute the allegations itself; (ii) declining to intervene, but allowing the relator to prosecute the allegations; or (iii) moving to dismiss the relator's complaint, a step that has rarely been taken. Typically, the government intervenes in about 20 percent of FCA cases; it has generally used its authority to dismiss "sparingly" according to the DOJ, although since 2012, relators have voluntarily dismissed over 700 *qui tam* actions after the government declined to intervene.

In light of the significant potential penalties under the FCA, it is unsurprising that FCA enforcement has proceeded at an aggressive pace. The FCA provides that one who is liable must pay a civil penalty for each false claim and must pay two to three times the amount of the US government's damages. And

qui tam relators are entitled to receive up to 30 percent of any monetary recovery in cases they initiate. Accordingly, the financial incentives for whistleblowers – as well as the government – to pursue FCA actions are significant.

Several recently announced DOJ policies regarding corporate criminal enforcement profess a focus on consistency and fairness in pursuing and resolving corporate criminal matters, which may carry over into the FCA area – a possibility made even more likely given recent DOJ policies regarding certain changes in FCA enforcement. Companies doing business with the US government, directly

or indirectly, should take note of these policies and consider how they may provide support for arguments limiting their liability should they face an FCA investigation or action.

The DOJ's Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, announced in November 2017, provides a useful starting point. This policy provides guidance to federal prosecutors regarding corporate resolutions in cases involving foreign bribery. Pursuant to this new policy, among other things, the DOJ will presumptively decline to prosecute companies, even in cases where FCPA violations have occurred, when they voluntarily and promptly self-disclose violations, fully cooperate with the DOJ's investigation of the misconduct, and demonstrate appropriate remediation of the conditions that gave rise to it. Even in those cases where aggravating circumstances compel an enforcement action, notwithstanding such voluntary disclosure and full cooperation, the DOJ will recommend a 50 percent reduction of the applicable fine range. Deputy attorney general (DAG) Rod J. Rosenstein explained that this policy is driven by the DOJ's view that corporate criminal liability is derivative of individual liability. Most US companies intend to act lawfully, he said, and the DOJ's focus should be on protecting companies from "criminals who seek unfair advantages" by prosecuting those individuals, not punishing companies that try to do the right thing and report wrongdoing. In March 2018, the DOJ's criminal division announced that it will follow the FCPA Corporate Enforcement Policy as nonbinding guidance in all corporate criminal cases that it handles, not just those involving the FCPA.

In May 2018, Mr Rosenstein made two additional announcements regarding corporate enforcement, each indicating an approach that may provide opportunities for counsel to advocate for more limited liability in certain cases. First, he announced a policy encouraging coordination among DOJ components and with other enforcement agencies when imposing multiple financial penalties for the same or substantially similar corporate conduct – a policy against 'piling on' these kinds of penalties. Under this policy, federal prosecutors must ensure that resolutions of corporate conduct are "reasonable and proportionate" to the conduct, by, among other things, coordinating both within the DOJ and with other enforcement authorities seeking to resolve a case to "achieve an overall equitable result", considering whether multiple penalties serve (or do not serve) the interests of justice and taking into account factors, including a company's voluntary disclosures and cooperation with the DOJ. Mr Rosenstein also announced the creation of a new Working Group on Corporate Enforcement and Accountability within the DOJ, which he said will focus on internal recommendations about white-collar crime and corporate compliance, and is designed to ensure "consistency" in DOJ outcomes in these areas. Moreover, in July 2018, the DOJ

announced the establishment of a new Task Force on Market Integrity and Consumer Fraud, comprised of a number of DOJ components, as well as a score of executive branch agencies. The stated focus of this Task Force is to provide guidance for the investigation and prosecution of fraud that targets not only the public but also fraud against the government – an area of emphasis that the FCA is designed to protect against. In announcing the formation of this Task Force, Mr Rosenstein emphasised a goal of achieving "more effective and efficient outcomes" in the resolution of fraud cases.

Although not explicitly dealing with FCA enforcement, each of these policy pronouncements – expressly considering consistency, efficiency and fairness in corporate enforcement, in addition to a continued focus by the DOJ on bringing actions against responsible individuals (the identification of whom is a prerequisite for receiving credit for cooperation in criminal and civil fraud matters) – may have implications for companies navigating FCA investigations and actions. Indeed, recent DOJ statements regarding FCA enforcement suggest that considerations of consistency, efficiency and fairness are being emphasised in this context as well.

For example, a January 2018 DOJ memorandum directs prosecutors to seriously consider dismissing FCA cases brought by *qui tam* relators when the DOJ determines that the claims are meritless, add no useful information to pre-existing investigations or otherwise interfere with government agency policies and programmes. While it remains to be seen whether the DOJ will begin to wield its rarely used power under the FCA to dismiss "meritless" *qui tam* actions, this internal policy potentially provides guideposts for companies arguing for dismissal of such cases and suggests that the DOJ may be receptive to such arguments.

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Furthermore, ongoing efforts by the DOJ to promote a more consistent and fair application of the FCA through enforcement reform were also the focus of recent remarks made in June 2018 by acting associate attorney general (AAG) Jesse Panuccio. Although he discussed two priority FCA enforcement areas in which aggressive enforcement may continue apace – opioid distribution and fraud

against the elderly – and Mr Panuccio acknowledged a continued commitment to pursuing vigorous FCA enforcement, most of his remarks focused on FCA reform initiatives consistent with the DOJ's other recent policies, including instructing prosecutors to: (i) consider moving to dismiss *qui tam* actions in which the government declines to intervene and exercising this authority "more consistently, but judiciously"; (ii) avoid 'piling on', including in parallel investigations that involve the FCA both within DOJ and with other enforcement agencies; and (iii) continue to recognise genuine cooperation of companies accused of wrongdoing, including by structuring settlements that make the government whole while also providing a material discount based on cooperation. Even as the government pursues new claims, as Mr Panuccio made clear, it is also "committed to enforcement that is fair and consistent with the rule of law".

While the effect of these various policy initiatives remains to be seen, these are trends that companies doing business with the US government should be aware of, and which may provide opportunities for companies to advocate for more favourable resolutions of FCA matters. As in any case, companies have to carefully consider whether, when and how to engage with the government should they become aware of whistleblower allegations or government scrutiny under the FCA. These recent policy developments may help frame that engagement in a positive way. R&C

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