PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 7 **NUMBER 4** **April 2021**

LexisNexis®

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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(2021–Pub.4938)

Editor-in-Chief, Editor & Board of Editors

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The Biden DOJ and False Claims Act Enforcement: A Look Ahead

By Murad Hussain, Kirk Ogrosky, and Amanda Claire Hoover*

The authors of this article explore the government procurement space and False Claims Act enforcement in the Biden administration.

Although Department of Justice ("DOJ") recoveries under the False Claims Act ("FCA") reached historic lows in fiscal year 2020, President Biden's administration is poised to usher in a return to aggressive FCA enforcement. Under President Obama, DOJ's FCA recoveries hit all-time peaks, totaling over $5 billion in 2012, $6.1 billion in 2014, and $4.9 billion in 2016. From there, they trended consistently downward throughout the Trump Administration, averaging under $3 billion annually. Given the Biden Administration's focus on tackling the COVID-19 pandemic and stimulating the economy, we anticipate that DOJ's scrutiny of alleged fraud in government programs will be as probing as ever.

BACKGROUND

In the 1980s, then-Senator Biden supported the seminal 1986 amendments to the FCA, emphasizing in his Senate remarks that enforcement should enjoy bipartisan support: "Fraud against the Government is not a matter that ought to be used for political advantage. . . . It is not a matter that divides Democrats from Republicans." More recently, as vice president under President Obama, Biden famously oversaw the 2009 Recovery Act in the wake of the 2008 financial crisis and touted the lower-than-average rate of fraud investigations into the stimulus spending. In 2011, he also led the Government Accountability and Transparency Board to advance efforts to detect and remediate fraud, waste, and abuse in federal programs as part of the "Campaign to Cut Waste." When announcing this campaign, he underscored his commitment "to changing the way government works and . . . stepping up the hunt for misspent dollars."

Although Attorney General (and former Arnold & Porter partner) Merrick Garland did not sign many FCA opinions during his 24 years as a judge on the

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U.S. Court of Appeals for the District of Columbia Circuit, one of his rare dissents stands out for its defense of the FCA's underlying policies. In 2004, a D.C. Circuit panel held in *U.S. ex rel. Totten v. Bombardier Corp.*[1] that presenting a false payment claim to Amtrak, a federal grant recipient, was not actionable because the claim was never presented to a federal government employee. Dissenting from the panel's ruling, Judge Garland emphasized that the FCA is "the Government's primary litigative tool for combating fraud" and criticized the panel's narrow statutory interpretation as "a dramatic cutback in the federal government's ability to protect itself against false claims on federal grant money." Five years later, his broad view of FCA liability was endorsed by the FERA amendments, which expanded the definition of false "claims" to include submissions to certain federal grantees and contractors.

FCA ENFORCEMENT PRIORITIES

In the near term, FCA enforcement priorities will likely continue to be steered by Michael Granston, the longtime career official serving as Deputy Assistant Attorney General ("DAAG") for the DOJ Civil Division's Commercial Litigation Branch. In remarks at a December 2, 2020 FCA conference, Granston reiterated "that protecting taxpayer funds is a nonpartisan issue and that enforcement of the False Claims Act will likely continue to be an area of emphasis for the Department." Much ink has been spilled about "Granston dismissals," referring to Granston's 2018 memorandum articulating when DOJ would seek to exercise of its statutory authority to dismiss FCA suits under 31 U.S.C. § 3730(c)(2)(A).

In the years since the Granston memo issued, DOJ has moved to dismiss several dozen *qui tam* suits, a notable increase over prior years. Because DOJ has always possessed this dismissal authority, the Granston memo's significance has arguably been overstated. Regardless, we suspect that the DOJ led by Attorney General Garland may be more restrained in using its dismissal authority.

ON CAPITOL HILL

On Capitol Hill, FCA enforcement has staunch Republican support in the form of Senator Chuck Grassley, a co-author of the FCA's 1986 amendments. Grassley has remained an outspoken FCA advocate—and a prominent critic of the Granston memo. In September 2019, Grassley wrote a letter to Attorney General William Barr expressing skepticism of DOJ's recent uses of its FCA dismissal authority. And in July 2020, Grassley announced his work on a legislative proposal to restrict DOJ's deployment of its statutory authority,

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[1] https://www.cadc.uscourts.gov/internet/opinions.nsf/98104A89703573D185256F82006D5562/$file/03-7128a.pdf.

explaining that "[i]f there are serious allegations of fraud against the government, the Attorney General should have to state the legitimate reasons for deciding not to pursue them in court." While the Biden DOJ has yet to flex its FCA dismissal powers, the prospect that a key Senate Republican may generally share its orientation toward robust enforcement could increase the chances of bipartisan support for future FCA amendments and initiatives.

A HISTORICAL MOMENT

Increased FCA enforcement would also be consistent with the historical moment. Over the years, national mobilization after natural disasters and manmade crises have been followed by new federal dollars, new federal rules, and new waves of federal enforcement. Under the Paycheck Protection Program ("PPP"), part of Congress's Coronavirus Aid, Relief, and Economic Security ("CARES") Act, the federal government had approved over five million business loans worth over $500 billion by early August 2020. And by the following month, DOJ had already brought over 50 PPP-related fraud prosecutions against individual defendants.

Two weeks ago, DOJ announced its first FCA settlement based on alleged PPP fraud,[2] involving false statements to federally insured lenders that concealed the loan applicant's ongoing bankruptcy proceedings. Notably, DOJ apparently pursued this case without an underlying *qui tam* suit. Due to the PPP's complex eligibility requirements, certifications, and loan forgiveness conditions, as well as the speed with which businesses and the federal government had to take action, we expect that many more PPP-related FCA cases are waiting in the wings. In its criminal fraud cases, DOJ has cited its increasing use of data analytics to uncover potential PPP-related fraud by individual defendants. Those analytical tools will no doubt be turned toward more sophisticated entities in the FCA context. The creation and appointment of the Special Inspector General for Pandemic Recovery ("SIGPR"), and his signing of various memorandums of understanding with U.S. Attorney's Offices across the country, will reinforce DOJ's ability and incentives to focus on pandemic stimulus fraud.

The COVID-19 pandemic has also created other potential FCA enforcement hotspots. For example, President Biden recently invoked the Defense Production Act "to secure supplies necessary for responding to the pandemic,"[3] with

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[2] https://www.justice.gov/usao-edca/pr/eastern-district-california-obtains-nation-s-first-civil-settlement-fraud-cares-act.

[3] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-a-sustainable-public-health-supply-chain/.

a focus on quickly expanding vaccination capacity nationwide. This will inevitably lead to greater scrutiny, warranted or not, of pharmaceutical companies, diagnostic laboratories, pharmacies, providers, and vendors up and down the chain of testing, treatment, and vaccine development, pricing, and distribution.

Additionally, the U.S. Department of Health and Human Services ("HHS") administers the CARES Act's Provider Relief Fund, which allocates $175 billion to hospitals and healthcare providers on the frontlines of the COVID-19 pandemic. Funding applicants must certify that they will abide by various conditions,[4] such as by agreeing that funds would be used only "to prevent, prepare for, and respond to coronavirus," and to reimburse providers only for "healthcare related expenses or lost revenues that are attributable to coronavirus." As with traditional Medicare certifications, healthcare providers who sought relief funding should expect that disgruntled employees, patients, competitors, and others may file FCA suits that challenge the accuracy of their certifications, potentially backed by DOJ's affirmative civil enforcers.

BEYOND THE PANDEMIC

Beyond the pandemic, DOJ will continue to prioritize FCA enforcement in the healthcare space generally. As usual, healthcare cases accounted for the vast majority of all FCA recoveries in fiscal year 2020. In recent years, nursing homes had become a particular focus of DOJ oversight, and the pandemic has only magnified the government's concerns. DAAG Granston's recent remarks noted that DOJ launched the National Nursing Home Initiative in March 2020 "[i]n light of continuing evidence of deficient care being provided to our nation's seniors." And during the 2020 election campaign, President Biden highlighted his plan[5] to require Inspector General audits of nursing home cost reports and ownership data, and to enhance oversight by the Centers for Medicare & Medicaid Services ("CMS") through expanded data collections and surveys.

GOVERNMENT PROCUREMENT UNDER PRESIDENT BIDEN

The government procurement space will also be ripe for FCA enforcement under President Biden. His 2020 campaign website proposed[6] a $400 billion investment to power demand for American-made products, materials, and services, and promised to "crack down" on "companies that label products as

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[4] https://www.hhs.gov/sites/default/files/terms-and-conditions-phase-3-general-distribution-relief-fund.pdf.

[5] https://joebiden.com/covid-nursing-homes/.

[6] https://joebiden.com/made-in-america/.

Made in America even if they're coming from China or elsewhere." President Biden signed an executive order that promotes federal procurement of American-made goods and services by, among other things, seeking the revision of regulations in order to raise the amount of domestically sourced content that some construction materials and end products must contain. The executive order also requires the creation of a public website that will list requests for, and decisions on, certain waivers from "Made in America" laws.

Depending on how the executive order is implemented, these potential changes to the standards for what qualifies as American-made, coupled with publicizing exemption requests for all competitors to see, could inspire a new cycle of *qui tam* complaints based on alleged "Buy American" violations—much like the past two decades saw a flurry of procurement-related FCA suits based on allegedly false certifications of compliance with the Trade Agreements Act.[7]

All told, FCA enforcement under President Biden and DOJ's new leadership will likely differ from the prior administration's focus more by tone and degree of engagement, rather than by any radical redirection. But given the strong political incentives to continue targeting alleged fraud arising out of the federal government's COVID-19 relief efforts, it seems inevitable that DOJ's recoveries may reach new highs as it pursues investigations and litigation with an increased sense of urgency.

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[7] https://scholar.google.com/scholar_case?case=14936770019713461156.