



Government & Internal Investigations ADVISORY ■

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Criminal Division to Investigate All False Claims Act Qui Tam Claims

The United States Department of Justice (DOJ) announced last week that its Criminal Division will review all future complaints filed under the *qui tam* provisions of the federal False Claims Act. Assistant Attorney General Leslie Caldwell introduced the new policy during a speech before the Taxpayers Against Fraud Education Fund.

The False Claims Act (FCA) is the government's primary civil remedy for redressing fraud against the government. Most FCA actions are filed by private citizens under the statute's whistleblower, or *qui tam*, provisions. Previous DOJ policy required only that federal civil prosecutors review *qui tam* complaints; review by criminal prosecutors has always been discretionary. Now, according to AAG Caldwell, "experienced prosecutors in the [Criminal Division's] Fraud Section are immediately reviewing the *qui tam* cases . . . to determine whether to open a parallel criminal investigation."

Although the Criminal Division will review all *qui tam* complaints, AAG Caldwell highlighted three industries that will face particular scrutiny: health care, defense procurement, and financial services. DOJ has devoted substantial resources to these industries in recent years: in 2013 alone, it recovered \$2.6 billion for health care fraud violations and charged 345 individuals with associated crimes. Since 2009, over 100 individuals have been charged for procurement fraud, while financial institutions and executives have faced criminal scrutiny for alleged mortgage fraud, Ponzi scheme involvement, and various other allegations of fraud and corruption.

These numbers will only increase under the Criminal Division's new *qui tam* policy. Some reasons are obvious—criminal prosecutors will have greater exposure to criminal activity. Other reasons might be less obvious—criminal prosecutors may notice potential criminal allegations in an otherwise civil complaint. For example, an FCA action brought under the civil Stark Law may result in a criminal investigation under the Anti-Kickback Statute. A contractor facing civil procurement fraud allegations might also be investigated under the Foreign Corrupt Practices Act.

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For these and other reasons, AAG Caldwell encouraged *qui tam* relators to consult with criminal authorities when filing *qui tam* complaints. Said Caldwell, “the earlier we begin our investigation, the more legal tools and investigative techniques we have available to us. . . . [W]e can bring more cases and hold more companies and individuals responsible for the crimes they commit.”

The new policy creates procedural and strategic challenges. Most investigations begin with the receipt of a subpoena or Civil Investigative Demand for documents (CID). Because of the mandatory sealing provisions under the FCA, companies often do not know at the outset whether a government inquiry is the result of a *qui tam* complaint or some other type of review. Given the significance of this new policy, companies or individuals facing these investigations should assume that an inquiry is related to a *qui tam* complaint *and* that the Criminal Division is also involved. Nothing in AAG Caldwell’s new policy announcement provides any guidance as to when a company or individual will be informed that the Criminal Division’s review is complete and that an inquiry is only civil.

Companies and individuals should adjust their strategy to account for increased Criminal Division presence. For example, a defendant should assume that criminal prosecutors will review materials that are produced in response to a CID. Fifth Amendment protection may be appropriate and necessary in certain circumstances. In order to mitigate the risk of prosecution, *qui tam* defendants should carefully consider these potential issues, including whether and when to communicate with the Criminal Division, in order to obtain certainty around whether the DOJ intends to open a parallel criminal investigation.

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