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False Claims Act Update: Heightened Risk and Record Settlements Predicted In Fiscal Year 2015

False Claims Act (“FCA”) settlements and judgments continued their striking rate of growth in fiscal year 2014. According to the Department of Justice (“DoJ”), FCA settlements and judgments for the year surpassed the \$3.8 billion the government secured under the FCA in 2013. In fact, although the government generally does not publish its official FCA statistics until December, recent press releases suggest that 2014 FCA settlements have reached an all-time high—possibly exceeding the previous annual record of \$5 billion. The growth in FCA settlements is explained in large part by the steady rise in new FCA matters filed annually—DoJ’s most recent statistics indicate that the number of FCA cases has increased by about 6% annually since 2007. We expect the number of newly filed cases and settlements to increase in fiscal year 2015.

The FCA is the government’s primary vehicle for pursuing civil damages to resolve allegations of fraud, and its use has grown significantly over the past 20 years. In fact, the number of new FCA matters has almost doubled between 2006 and 2013, and companies on the receiving end of FCA complaints are paying dearly. According to DoJ, the government has received more than \$22.4 billion in settlements and judgments from FCA matters since 2009.

The government’s FCA success is due in no small part to provisions within the FCA that permit individual whistleblowers (*qui tam* relators) to file suits on the government’s

behalf. The government reviews each case and decides whether it desires to join, or “intervene,” in the case based on several factors, including probability of success, the amount and issues at stake, and the government’s own resource limitations. According to DoJ, if the government intervenes in a case, the probability that the government obtains a favorable settlement or judgment is approximately 95%.

This high rate of success and the growing recovery amounts parallel a corresponding increase in the number of whistleblowers bringing FCA actions. In 1990, whistleblowers initiated 22% of new FCA matters, and DoJ initiated the balance. By fiscal year 2013, that ratio had flipped: whistleblowers accounted for approximately 89% of the new FCA matters initiated. In this way whistleblowers are a key force multiplier—pursuing cases the Justice Department does not have the resources or inclination to pursue, greatly increasing the government’s capacity for pursuing allegations of fraud.

Historically, however, the government has intervened in just 20% of FCA suits initiated by whistleblowers, and because whistleblowers that go it alone without government intervention have had an abysmal rate of success—just 5%—some companies have ignored whistleblower complaints. Recent whistleblower successes in cases where the government has declined to intervene suggest that the risk of this approach is growing. For

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example, on June 25, 2014, Omnicare, Inc., settled an FCA matter for \$124 million in a case in which the government declined to intervene, and on September 5, 2014, two FCA whistleblowers litigating without government intervention scored a major victory against Merck & Co. when a federal district court judge in Pennsylvania denied Merck's motion to dismiss the whistleblowers' claims.

Companies should be aware that although the government may not intervene at the outset of a case, the government might decide to intervene at a later time—sometimes years later. Many whistleblowers press on without government involvement specifically because they hope that once the facts are developed more fully the government will decide to intervene. Other whistleblowers continue to pursue litigation without government intervention because, despite the high cost of litigation, the reward for success is so large—the Omnicare whistleblower received \$17.24 million for his efforts.

The increasing number of FCA litigation cases, record-setting judgments and settlements, and recent successes of whistleblowers going it alone highlight a “new normal” of amplified FCA exposure for those conducting business with the

government. Likewise, the risk of criminal exposure may be rising. In a speech on September 17, 2014, Leslie Caldwell, Assistant Attorney General for DoJ's Criminal Division, announced a change in how the Criminal Division handles FCA whistleblower complaints: “We in the Criminal Division have recently implemented a procedure so that all new *qui tam* complaints are shared by the Civil Division with the Criminal Division as soon as the cases are filed. Experienced prosecutors in the Fraud Section are immediately reviewing the *qui tam* cases when we receive them to determine whether to open a parallel criminal investigation.”

To minimize risk of FCA entanglement, either civil or criminal, companies should maintain and enforce their anti-fraud compliance policies and should address whistleblower complaints immediately and diligently. Equally important is having a plan and procedure for handling whistleblower complaints. Internal coordination, notification, and whistleblower response procedures work best when not left to chance—a good plan can be the difference between an amicable resolution and another record-breaking year for DoJ.

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