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# The False Claims Act: Understanding Liability and the Importance of a Proper Initial Response

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# Overview

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- Trends In Claims Asserted Under the False Claims Act and Qui Tam Actions
- Responding to Potential Violations
- Potential Criminal Implications

# False Claims Act

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- Oldest But Most Powerful Tool Used to Combat Fraud Against the Federal Government
- FCA Prohibits Anyone from Knowingly Submitting a False Claim to the Government

# False Claims Act

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- What is a False Claim?
- What Does “Knowingly” Mean?
  - Actual Knowledge
  - Deliberate Ignorance
  - Reckless Disregard for the Truth
  - Does Not Require Specific Intent to Defraud

# False Claims Act

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- Penalties Range from \$13,508 to \$27,018 per False Claim
- Government Recovers Treble Damages
- Contractors Face Suspension & Debarment

# Violations of the FCA

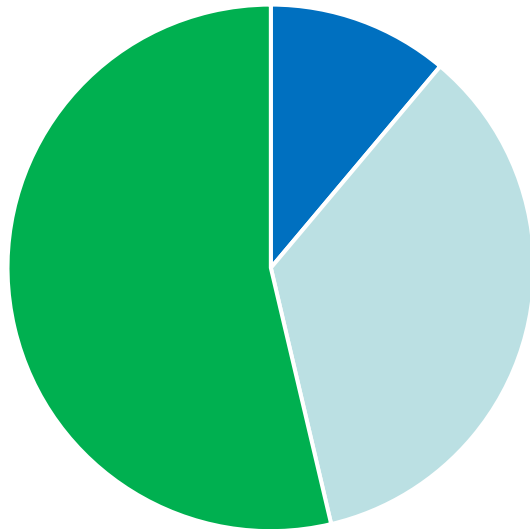
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- Since 1986: U.S. Department of Justice Collected Over \$70 Billion in Civil Settlements and Judgments in FCA Cases
- FY 2021: U.S. Department of Justice Collected Over \$5.6 Billion in FCA Settlements and Judgments – The Second Largest Sum in FCA History
- FY 2022: U.S. Department of Justice Collected Over \$2.2 Billion in FCA Settlements and Judgments – The Smallest Sum Since 2008

# Violations of the FCA

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## 2022 FCA Settlements and Judgments



Non-Qui Tam: \$245,586,952

Qui Tam – Where Government Intervenes: \$776,751,374

Qui Tam – Where Government Declined to Intervene: \$1,184,884,813

**Total: \$2,207,223,139**

- Non-Qui Tam
- Qui Tam - Where Government Intervened
- Qui Tam - Where Government Declined to Intervene

# Violations of the FCA

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- Procurement Fraud
  - Matters Involving the Government’s Purchase of Goods and Services
    - Submitting Fraudulent Invoices
    - Selling Faulty or Defective Products
    - Inflating or Misrepresenting Costs in Sole Source Contracts
    - Bid Rigging and Collusion with Other Suppliers
    - Kickbacks or Bribes
    - Billing for Unauthorized Expenses



# Enforcement of the FCA

## The Qui Tam Action

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- Allows Relator (*i.e.*, whistleblower) to Stand in the Government's Shoes and Commence Litigation Against a Government Contractor
- Relator Receives a Percentage of the Recovery
  - 15% to 25% if Government Intervenes
  - 25% to 30% if Government Does Not Intervene, as well as Attorneys Fees and Costs

# The Qui Tam Action

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- Unique Procedure of Qui Tam Actions Creates Unique Issues for Government Contractors
  - Complaint is Filed Under Seal
  - Allegations Are Investigated by Government
  - Government Then Determines Whether to Intervene
  - Relator May Pursue Lawsuit Even if Government Does Not Intervene
  - Relator Entitled to Receive Portion of Recovery

# The Qui Tam Action

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- **Competing Interests & Complex Dynamic All Working Against Government Contractor**
  - Department of Justice (DOJ) or U.S. Attorney's Office
    - The Fight Against Fraud & Restoring Public Faith
    - Recouping Funds for the Government
  - The Defrauded Government Agency
    - Maintain Long-Standing & On-going Relationship with Government Contractor
  - The Relator
    - Personal Financial Interest

# Responding to Suspected or Potential Violations of the FCA

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- How Do Contractors Receive Notice of Purported Misconduct?
  - Internally
    - Employee Hotlines or Reporting Procedures
    - Internal Company Audits
  - Traditional Government Investigative Tools
    - Grand Jury Subpoena
    - Search Warrant

# Responding to Suspected or Potential Violations of the FCA

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- Government Investigative Tools Unique to Government Contractors
  - Inspector General Subpoena
  - Civil Investigative Demand
- The Qui Tam Call

# Investigative Tools

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- Civil Investigative Demands (CIDs)
  - Attorney General Can Delegate Authority to Issue CIDs
  - U.S. Attorneys Have Authority to Issue CIDs
  
- Effect
  - Increased Use and Impact of CIDs
  - Contractors Can be Compelled to Turn Over Requested Documents, Respond to Interrogatories, and Depositions Can be Taken of Company Personnel Very Early On
    - Even Before Government Intervenes
  - Information Can be Shared with Whistleblowers

# Responding to Suspected or Potential Violations of the FCA

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- Unique Considerations for Contractors
  - Significant Investigation Already Completed by Government and Whistleblower Prior to Contractor's Awareness of Claim
  - Contractor May Want to Settle Before Qui Tam Action is Unsealed in Order to Minimize Bad Publicity

# Responding to Suspected or Potential Violations of the FCA

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- Maintain or Salvage Business Relationship with “Defrauded” Government Agency
- Convince Government Not to Intervene Because Claims are Meritless



# Responding to Suspected or Potential Violations of the FCA

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- **Government Contractors Must:**
  - Have Heightened Sensitivity to Allegations of Wrongdoing
  - Be Quick to Conduct Internal Investigation and Thoroughly Investigate Purported Wrongdoing
  - Determine Whether Violation Exists in Order to Minimize Consequences
  - Take Great Care When Responding to Government Inquiries

# Internal Investigation

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- Internal Investigations are Critical
  - To Determine Credibility of Allegations
  - To Assess Scope of Alleged Wrongdoing
  - To Help Mitigate Resulting FCA Liability
  - To Convince the Government Not to Intervene in Qui Tam Action

# Internal Investigation

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- Importance of No Government Intervention
  - The Government
    - Has Significant Resources
    - Has Significant Institutional Knowledge & Expertise
  - Government's Decision Not to Intervene
    - Strengthens Contractor's Position
    - Relator's Resources are Likely Limited

# Self Reporting Obligations

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- Contractor Must Decide Whether to Report Results of Internal Investigation
  - Voluntary Disclosure
    - Formal Voluntary Disclosure Program
    - Cooperation May Result in Reduction of FCA Damages
  - Mandatory Disclosure
    - Nondisclosure Itself Would Constitute a Crime

# Potential Criminal Implications

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- High Probability that Allegations Against Government Contractor Will Also be Reviewed for Possible Criminal Prosecution
- If Government Pursues a Civil Fraud Investigation, Will Likely Also Conduct a Parallel Criminal Investigation

# Effect of Parallel Criminal Investigation

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- Information from Internal Investigation or Civil Proceedings Used in Criminal Matter
- Contractor's Choice to Voluntarily Self Report
  - Demonstrate Good Faith and Cooperation
  - Disclosure of Internal Investigation to Escape Indictment
  - Beneficial in Prosecutor's Charging Decisions and Sentencing

# Practical Considerations for Government Contractors

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- Strong Compliance Program
- Effective Code of Ethics
- Maintain Anti-Fraud Environment
- Appropriate Response to Notice of FCA Issues

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