False Claims Act and *Qui Tam* Lawsuits:

Whistleblower Claims
FRAUD

IS YOUR COMPANY TOO BIG TOO FALL?

ENRON

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False Claims Act Basics

• To state a claim, Plaintiff/Relator must prove:
  • A claim or statement to compel governmental payment
  • Claim or statement was false or fraudulent
  • Defendant knew the claim or statement was false or fraudulent
• Innocent mistakes, negligence do not give rise to FCA liability
• Statute of limitations
False Claims Act Basics (continued)

• What is actionable:
  • Factually False
  • Legally False

• Knowledge:
  • Actual Knowledge
  • Deliberate Ignorance
  • Reckless Disregard
False Claims Act Basics (continued)

• An FCA Complaint must be filed under seal.

• The government can then investigate the claims.

  • The government can intervene.
    • 15-25% bounty

  • The government can decline to intervene.
    • 25-30% bounty
Some potential defenses:

- The government's knowledge of the allegedly wrongful acts and omissions
- Lack of the heightened factual specificity under FRCP 9(b)
- The running of the statute of limitations; lack of falsity of the claim
- Lack of the requisite scienter
- Improper relator
- Lack of materiality
Remedies under the FCA

- Four separate pieces to consider:
  - Civil money penalties
  - *Qui tam* damages
  - Retaliation damages
  - Fees and expenses/costs
Civil Money Penalties

- Set by the Court, from $5,500 to $11,000
- Assessed on a *per claim* basis
- Mandatory
- General trend at DOJ to settle without penalties
Qui Tam Damages

- Not an element of the *prima facie* case
- Trebled
  - Doubled, if self-reported
- Any offset done after trebling
- Trebling is remedial – not punitive
- Trend at DOJ to settle on doubles rather than singles, as in the past
- Award to relator ranges from 15 to 30%
  - Based on a host of factors
  - No provision for input from defendant
Retaliation Damages

- “Protected activity” is very broad.
- Remedies are likewise broad.
- Relief under 3730(h)(2) includes:
  - Reinstatement with same seniority (or front pay)
  - Back pay x2 and with interest
  - Special damages (*including* litigation costs and reasonable attorneys’ fees)
Attorneys’ Fees and Costs

- “Fees” means comparable to defense rates.
- “Costs” means actual expenses, not “cost of litigation.”
- Defendant pays costs and fees whether intervened or declined.
- Defendant pays costs and fees whether case ends via trial or settlement.
- Defendant pays costs and fees for both *qui tam* and retaliation portions of case.
- Defendant’s obligation flows directly to the attorney, not the relator.
Settlement Challenges in *Qui Tam* Cases: Framework

- Challenges negotiating with a two-headed monster
- Both the government and the relator have the right to object
- Relator receives 15% to 25% in intervened cases and 25% to 30% in non-intervened cases
- Attorney’s fees and costs for relator
- Calculating damages can be complex
Government’s Right to Object

• The government may object, even in non-intervened cases
  - Actions may be dismissed only if the court and the Attorney General give written consent. 31 U.S.C. § 3730(b)(1)
  - “[U]pon a showing of good cause”, government has right to intervene in cases where it initially declined. 31 U.S.C. § 3730(c)(3)
Relator’s Right to Object

- Settlements must be “fair, adequate and reasonable under all the circumstances.” 31 U.S.C. § 3730(c)(2)(B)
- High degree of deference to government
The Effects

- Communication challenges
- Competing interests
- Government will want to avoid ongoing litigation with relator over how to allocate settlement shares
- May increase settlement amount paid by defendant and percentage paid to relator
FCA Whistleblower Protections

Fraud Enforcement and Recovery Act of 2009 (FERA)

- Scope of protected activity expanded
- Addresses indirect retaliation
- Protects “employees,” “contractors,” “agents”
- 3-year statute of limitations
The Dodd-Frank Whistleblower Provision

• Section 1057 of Dodd-Frank protects employees against retaliation because of:
  
  – Providing, or attempting or causing to provide, information to an employer or government agency relating to a violation of certain consumer laws
  
  – Testifying or intending to testify in, or filing, instituting, or causing to be filed or instituted, any proceeding under any federal consumer financial law (TILA, RESPA, FCRA, EFTA, etc.)
  
  – Objecting to, or refusing to participate in, any activity the employee reasonably believes violates any laws subject to the CFPB’s jurisdiction
  
• Dodd-Frank brings such individuals into the same anti-retaliation provisions applicable to securities whistleblowers under Sarbanes-Oxley, as expanded by Dodd-Frank.

• Same 180-day limitations period and DOL filing procedure applies to these claims as to “opposition” claims under Sarbanes-Oxley.
The CFPB's Solicitation of Whistleblower Complaints

- Established e-mail address and toll-free line for whistleblowers to communicate with the Bureau
- Ignored key issue of compliance with internal reporting requirements
- Key difference with SEC Whistleblower provision: no bounty payable to complaining party
- No public statements by CFPB about whistleblowers or number of tips received
How To Spot (and Defuse) Whistleblowing

- Portrait of a whistleblower
- The care and feeding of employees (at high risk and otherwise)
- Common (avoidable) mistakes made by employers
Whistleblower?

When should you tattle tale?
I will not be a tattletale
I will not be a tattletale
I will not be
IS THIS PERSON A WHISTLEBLOWER?

When is it okay to be a tattle tale
Ryszard Kukliński

Between 1971 and 1981 he passed 35,000 pages of mostly Soviet secret documents to the CIA.

On May 23, 1984 Kukliński was sentenced to death, in absentia, by a military court in Warsaw. After the fall of communism, the sentence was changed to 25 years.

In 1995 the court cancelled the sentence and said that Kuklinski was acting under special circumstances that warranted a higher need.
THE DELICATE BALANCE
YOU CAN NOT IGNORE
Keys To Avoiding Me An FCA Case

- Don’t commit fraud 😊
  - Stay up to date on very fast-moving laws
  - Training throughout the organization on same

- **Frequent** training for employees on the **company’s plan**
  for seeing issues resolved

- Training for **supervisors and middle management** on
  how to handle possible whistleblowers
If it’s too late to avoid it…

- Don’t commit more fraud 😊
  - Consider self-reporting
- Be candid with the government
- Understand the government’s view
  - Of itself
  - Of relators
  - Of relators’ counsel
- Avoid further acts that may be seen as retaliatory
- If not intervened, consider pre-litigation mediation (with competent neutral)
Existing Statutes Encouraging Whistleblowing

• **Sarbanes-Oxley Act**
  - Establishes anti-retaliation protection
  - Mandates that corporations establish procedures to allow for confidential reporting of accounting or financial irregularities
  - Does not provide for financial reward

• **Securities Exchange Act**
  - Provides for financial reward
    • Vests the SEC with complete discretion over whether to provide an award
    • Award capped at 10%
    • Applies only to insider trading cases
Existing Statutes Encouraging Whistleblowing

• False Claims Act
  - Entitles individuals who report fraud on the government to between 15 percent and 30 percent of any award that the government may receive
  - Percentage based on value of the information provided by the relator and level of relator’s participation
  - Provides for private right of action
  - Hugely profitable for government
Dodd-Frank Whistleblower Provisions

• Whistleblower who:
  - Provides original, independently derived information
  - Leading to recovery of monetary sanctions in excess of $1 million

• Entitled to between 10% and 30% of amount recovered
  - Amount to be determined by SEC
Who Is Ineligible to Recover?

- Person who learned information through performance of SEC-mandated audit
- Criminally culpable (if convicted)
- Employees of:
  - regulatory agencies
  - DOJ
  - self-regulatory organizations
  - Public Company Accounting Oversight Board
  - any law enforcement organization
Universe of Claims Expanded

- Whistleblower may recover as part of any action brought by the SEC "under the securities laws" or brought by the CFTC under the Commodity Exchange Act
  - insider trading
  - Ponzi schemes
  - Foreign Corrupt Practices Act
Protocols Against Retaliation

- Creates private right of action against employers that retaliate
- Whistleblower who prevails in retaliation or discrimination action entitled to:
  - Reinstatement at same status
  - Compensation in amount of back pay with interest
  - Reimbursement for litigation costs
What to Expect

- “We expect our Whistleblower Program to generate significant tips from individuals with direct knowledge of serious securities law violations”

- SEC is establishing a Whistleblower Office within its new Office of Market Intelligence and has begun staffing the office

- Will be mindful of competing interests including:
  - desire to encourage whistleblowers to provide SEC with high-quality tips regarding potential violations
  - need to avoid creating undue burdens on the SEC and the constituencies protected and regulated by SEC that could result from groundless whistleblower submissions
What to Expect

- False Claims Act
  - Successful whistleblowers average high awards
What to Do

- Ensure that you are prepared to handle a possible increase in reports of misconduct
  - Evaluate and update compliance program
  - Must have:
    - Clear procedures for employees to report possible violations (and incentives for doing so)
    - Plan in place to investigate allegations of misconduct
  - Re-analyze whether and when to self-disclose
What to Do

• Create, distribute, and ensure receipt of FCPA guidelines
• Analyze extent to which FCPA compliance needs to be implemented for foreign subsidiaries and affiliates
• Utilize standardized documentation and contractual terms for all foreign entities and personnel
• Train new employees regarding the FCPA at the time of hiring and yearly training of all employees
• Perform due diligence and oversight of third parties
What to Do

- Identify and investigate any FCPA-related issues relating to target of any merger, acquisition, or joint venture
- Institute effective mechanisms to address any suspicious or fraudulent activity
- Develop and act on compliance risk assessments
- Audit and ensure adherence to internal controls