

BIGLAW REDEFINED.

Compliance Plans and
Codes of Business
Ethics and Conduct
ACC DFW In-House
Counsel Symposium

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What We'll Address

- The False Claims Act (FCA)
- FCA Fiscal 2023 Settlements and Judgments
- HHS OIG Compliance Program Guidance
- Government Contracts and Compliance



False Claims Act

The False Claims Act, 31 U.S.C. § 3729 *et seq.*


- Civil War era legislation
- Generally, the FCA prohibits knowingly presenting false claims to the government or using false records to get claims paid. “Knowingly” may be based on 1) actual knowledge, 2) deliberate ignorance, or 3) reckless disregard
- Because of the large disbursement of public monies to government healthcare programs, healthcare providers are frequent targets of False Claims Act actions

The False Claims Act, 31 U.S.C. § 3729 *et seq.* (cont'd)

- Enforcement
 - Government initiated
 - Relator initiated with government intervention
 - Relator initiated without government intervention
- Seal provisions
 - Relator initiated cases must be filed under seal and served on the government
 - At least 60 days for government to investigate claims to decide if it will intervene

The False Claims Act, 31 U.S.C. § 3729 *et seq.* (cont'd)

- Treble Damages
- Civil Penalties
 - Minimum \$13,508.00 and Maximum \$27,018.00 *per claim* as adjusted by the Federal Civil Penalties Inflation Adjustment Act



False Claims Act Settlements and Judgments Fiscal 2023

False Claims Act Settlements and Judgments Fiscal Year 2023

Per the report – “The False Claims Act imposes treble damages and penalties on those who knowingly and falsely claim money from the United States or knowingly fail to pay money owed to the United States. The False Claims Act thus serves to safeguard government programs and operations that provide access to medical care, support our military and first responders, protect American businesses and workers, help build and repair infrastructure, offer disaster and other emergency relief, and provide many other critical services and benefits.”

False Claims Act Settlements and Judgments Fiscal Year 2023

- Exceeded \$2.6 billion
- 543 Settlements and Judgments – a single year record
- Over \$1.8 billion involving healthcare
- Whistleblowers filed 712 *qui tam* lawsuits
- Over \$2.3 billion from *qui tam* cases
- Over \$349 million paid to whistleblowers

A person in a dark suit is seated at a desk, writing in a notebook with a pen. In the foreground, a brass scale of justice stands on the left. To the right, a wooden gavel rests on a sound block. A stethoscope is placed on a clipboard in the lower right. The background is softly blurred, showing a window with light streaming in.

HHS OIG Guidance Update

OIG Adopts 7 Elements of Compliance

1. Written Policies and Procedures
2. Compliance Leadership and Oversight
3. Training and Education
4. Effective Lines of Communication with the Compliance Officer and Disclosure Program
5. Enforcing Standards: Consequences and Incentives
6. Risk Assessment, Auditing, and Monitoring
7. Responding to Detected Offenses and Developing Corrective Action Initiatives

1. Written Policies and Procedures

- Codes of Conduct
 - Periodic updating (*i.e.* new leadership → review/update code of conduct)
- Compliance Policies and Procedures
 - Two goals: (1) implement and operate compliance program, and (2) create processes to reduce risk of noncompliance
- Policy Maintenance
 - Easy employee access
 - Comprehensible
 - Establish lines of communication to compliance officers or committee

2. Compliance Leadership and Oversight

- Compliance Officers
 - Direct access to board (and direct reporting to CEO or Board, not CLO)
 - Clearly defined role and duties
- Compliance Committee
 - Compliance officer and department heads
- Board Compliance Oversight

3. Training and Education

- Develop annual training plan (and annual review by compliance committee)
- Develop trainings tailored to company-specific risks
- New board member trainings
- Tie mandatory trainings to annual performance review

4. Effective Lines of Communication with the Compliance Officer and Disclosure Program

- Develop clear confidentiality and nonretaliation policies
- Develop multiple, independent reporting channels
 - Consider anonymous email inbox, hotline, or website
- Ensure proper recording of compliance complaints

5. Enforcing Standards: Consequences and Incentives

- Consequences
 - Non-punitive (*i.e.* educational or remedial)
 - Punitive (*i.e.* sanctions of some sort)
- Incentives
 - Compensation, job performance recognitions, etc.
- OIG encourages creativity

6. Risk Assessment, Auditing, and Monitoring

- Risk Assessment
 - Routine, periodic assessments (at least annually)
 - Compliance committees should self-educate on best practices
- Auditing and Monitoring
 - Internal and external
 - Routine practices preferred

7. Responding to Detected Offenses and Developing Corrective Action Initiatives

- Investigating violations
 - Prompt action and document activity
- Government reporting
 - Prompt self-reporting signals good faith
- Implementing corrective actions
 - Act promptly (*i.e.* quickly refund overpayments etc.)

A person in a dark blue suit is seated at a desk, writing in a notebook with a silver pen. In the foreground, a brass scale of justice stands on the left. To the right, a wooden gavel with a brass band rests on a dark wooden base. A silver stethoscope is placed on a clipboard with a white sheet of paper. The background is softly blurred, showing a window with warm light.

Government Contract Compliance

Federal Acquisition Regulation 52.203-13

- Code of Business Ethics and Conduct
 - Must be written (HHS #1)
 - Copy available to each employee engaged in performance of the contract (HHS #1)

Federal Acquisition Regulation 52.203-13

- Contractor shall:
 - Exercise due diligence to prevent and detect criminal conduct
 - Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law
 - Timely disclose whenever Contractor has credible evidence of a violation of Federal Criminal law involving fraud, conflict of interest, bribery or gratuity violations; or a violation of the civil False Claims Act. (HHS #7)

Federal Acquisition Regulation 52.203-13

- Contractor shall establish an ongoing business ethics awareness and compliance program that must:
 - Include reasonable steps to train individuals (HHS #3)
 - As appropriate, train agents and subcontractors

Federal Acquisition Regulation 52.203-13

- Contractor shall establish an internal control system that must:
 - Establish standards and procedures to facilitate timely discovery of improper conduct
 - Ensure corrective measures are promptly instituted and carried out (HHS #7)
 - Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness (HHS #2)
 - Reasonable efforts not to include as a principal anyone whose prior conduct conflicts with Code of Business Ethics and Conduct

Federal Acquisition Regulation 52.203-13

- Contractor shall establish an internal control system that must (continued):
 - Periodic review of business practices, procedures, policies, and internal controls for compliance, including:
 - Monitoring and auditing to detect criminal behavior (HHS #6)
 - Evaluation of effectiveness of the program (HHS #6)
 - Assessment of the risk of criminal conduct
 - An internal reporting mechanism, such as a hotline (HHS #4)
 - Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct (HHS #5)
 - Timely disclosure whenever Contractor finds credible evidence of a violation (HHS #7)



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A person in a dark blue suit is sitting at a desk, writing in a notebook with a pen. In the foreground, there is a brass scale of justice on the left, a wooden gavel on the right, and a silver stethoscope on a clipboard in the center. The background is softly blurred, showing a window with light coming through. The text "Thank you. Questions?" is overlaid in the center of the image.

Thank you. Questions?