

FCA Basics: Government Investigations and Self-Disclosure

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by Alex Hontos, Chris DeLong, Matthew Gillespie, Annie Boeckers, and Joe Coffey

This is the sixth post in the Dorsey FCANow Blog's FCA Basics Series covering the fundamentals of the False Claims Act ("FCA"), outlining FCA procedure and highlighting key facets of FCA practice. Today's post discusses pre-litigation matters: government investigations and voluntary self-disclosure of violations.



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FCA Investigations

There are a few different ways the government finds out about fraudulent activity. When a relator files a *qui tam* action, the government concurrently receives a disclosure of material evidence from the relator, assesses the allegations, makes a delegation determination, and typically opens an investigation. Early in the assessment process, DOJ often determines how the investigation will be staffed: (1) delegated investigations are fully delegated to the local U.S. Attorney's Office ("USAO"); (2) monitored investigations include some degree of reporting from the USAO to Civil Frauds, but the local USAO typically maintains primary responsibility for the investigation; or (3) joint investigations which are handled by both Civil Frauds and the USAO. The government may also initiate an investigation based on whistleblowers who report fraudulent activity directly to the Department of Justice without filing a *qui tam*, public reporting or litigation,

data mining, self-disclosures, or through other agency oversight activities.

CIDs and Subpoenas

The Department of Justice wields potent pre-trial investigative tools that are not available in other forms of litigation. One such tool is the civil investigative demand (“CID”). CIDs give the government authority to compel witnesses to produce documents, sworn testimony, and answers to interrogatories—all before a complaint is filed (or before a *qui tam* is unsealed). The scope of discovery with CIDs is broad, and DOJ may serve CIDs on any organization or person the government believes has information relevant to an FCA investigation.

CIDs are, however, subject to certain limitations. CIDs can only be issued before the government files a lawsuit or intervenes in *qui tam* suit, at which point the government’s investigative tools are largely the traditional civil discovery methods. Additionally, the government cannot demand information protected by a grand jury subpoena or other recognized protections from disclosure of documents or information. This includes attorney-client privileged communications, attorney work product, or Fifth Amendment-protected communications. Courts often defer to Department of Justice authority and enforce CIDs so long as they are reasonably relevant to the investigation and follow procedural requirements. CIDs are enforced through direct action in federal district court.

Additionally, many agencies, including the Department of Health and Human Services Office of Inspector General, can issue administrative subpoenas compelling production of documents or testimony relevant to FCA claims or other potential violations of regulations or statutes.

Self-Disclosure

“Self-disclosure” refers to a voluntary disclosure to the government of a potential FCA violation. Some agencies, like the Department of Health and Human Services, have formal mechanisms to self-disclose potential FCA violations, whereas other agencies do not. Self-disclosure can be a valuable tool to mitigate the potential consequences of an FCA violation for a couple reasons, both legal and strategic. The FCA contains provisions that allow for a reduction in damages for voluntary disclosures of a violation of the FCA, and the Justice Manual contains similar language. DOJ considers voluntary disclosure when evaluating the appropriate resolution of FCA violations. While the Justice Manual does not provide clear guidance on how cooperation credit is calculated, it does require some form of credit for “proactive, timely, and voluntary” self-disclosure. Voluntary self-disclosure may also reduce the likelihood the government demands other serious disciplinary action, such as corporate integrity agreements or administrative penalties.

Voluntary self-disclosure also carries possible risks. The government will frequently conduct its own investigation in response to significant self-disclosures to verify the scope of the disclosure and potential violations. As a result, it often behooves the self-disclosing party to undertake its own assessment of the full scope of any potential

violations to ensure that the self-disclosure is as thorough and accurate as possible.