

Justice Department Annual Release Shows Decreased FCA Recoveries But Increased FCA Matters in FY2020, Suggesting Likely Uptick in 2021

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by Eric Weisenburger

On January 14, 2021, the United States Department of Justice (“DOJ”) issued its annual press release highlighting its recoveries from False Claims Act (“FCA”) enforcement over the last fiscal year. Total recoveries in FY2020 exceeded \$2.2 billion, with the majority—\$1.8 billion—of those recoveries coming from the healthcare industry. These totals are down substantially from FY2019, in which total recoveries exceeded \$3 billion with \$2.6 billion relating to matters involving the health care industry.

As was the case last year, recoveries from *qui tam* actions—lawsuits brought by whistleblowers or “relators” suing on behalf of the government—continued to fall, with only \$1.6 billion in recoveries coming in *qui tam* actions following \$2.2 billion in FY2019. As we noted last year, this is unsurprising given former Attorney General Barr’s well-documented distaste for the *qui tam* provisions of the FCA, calling them “patently unconstitutional” in a memo he wrote as an Assistant Attorney General in 1989. It also highlights the continuing effect of the “Granston Memo” on *qui tam* enforcement. The Granston Memo, issued in 2018, instructed DOJ prosecutors to dismiss *qui tam* cases that lack substantial merit on the grounds that meritless *qui tam* cases drain limited government resources and may “generate adverse decisions that may affect the government’s ability to enforce the FCA.” But the most likely factor for the lower recoveries in FY2020 is, of course, COVID-19, which has slowed judicial proceedings around the country and undoubtedly affected the progression of *qui tam* suits—an issue quickly identified by the DOJ in qualifying its reduced recoveries.

The COVID-19 factor that led to a decrease in recoveries in FY2020, however, is likely to be responsible for what is expected to be a substantial increase in FCA recoveries and enforcement in 2021. First, the government’s response to the pandemic by injecting trillions into the economy has created massive FCA exposure. The risk of civil enforcement actions to combat fraud relative to the government’s expenditures are just starting to be seen now, with the recent announcement of the first civil FCA settlement based on a Paycheck Protection Program (“PPP”) loan. Many more settlements and

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actions are likely to follow, given the congressional authorization of nearly \$1 trillion of PPP funding since March 2020. The rate of these enforcement actions is likely to increase, too, as the vaccine rollout continues and courts resume normal activities.

Moreover, the government will be able to more effectively investigate and resolve FCA matters as the pandemic subsides, including addressing not only the new cases filed in 2021, but also, the still-pending 2020 matters. Notably, although the total recoveries and total *qui tam* recoveries for FY2020 were down as compared to FY2019 (\$2.2/1.6 billion compared to \$3/2.2 billion), the total number of new FCA matters *increased*. In FY2019, there were a total of 786 new FCA matters (148 non-*qui tam* and 638 *qui tam*). This number increased by nearly 17% in FY2020, with 922 new FCA matters reported (250 non-*qui tam* and 672 *qui tam*). Thus, as the government is able to better investigate these lingering 2020 matters in FY2021, the recoveries that may have otherwise been realized in FY2020 are now more likely to be realized in FY2021.

Second, COVID-related expenditures—and the associated FCA exposure—are only expected to increase after President-Elect Biden proposed a \$1.9 trillion relief plan on January 14, 2021. Although a large percentage of that sum will go to individuals and the vaccine program, hundreds of billions are likely to go to businesses, opening the door for more fraud.

Finally, the Biden administration may be more willing to pursue *qui tam* suits than the Trump administration, leading to an increased number of *qui tam* actions and a corresponding increase in overall recoveries. President-Elect Biden stated plans to nominate Merrick Garland as Attorney General, who does not appear to have taken the same strong position against *qui tam* suits as seen with former Attorney General Barr.

In short, while FY2020 was a down year for FCA recoveries, the number of total new FCA matters increased, and the conditions are ripe for a rise in FCA enforcement actions and recoveries throughout 2021.