

# Client Alert: Future Implications of Low Dollar False Claims Act Recoveries for FY2022

## Publications

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The Department of Justice (DOJ) has released its summary of False Claims Act (FCA) recoveries for Fiscal Year 2022. At \$2.2 billion, financial recoveries were significantly lower than the \$5.7 billion collected the year before. DOJ's press release noted that the overall number of settlements and judgements increased to 351, the second highest total on record. As usual, healthcare recoveries dominated, but the government contracting industry continued to represent a small but significant component of the caseload and overall recoveries.

What do these statistics mean for future FCA enforcement risks? We believe the statistics, combined with other trends, mean more civil fraud enforcement is on the horizon. Specifically, we anticipate:

- 1. More attention to civil fraud matters:** We do not believe that last year's lower recoveries will significantly impact DOJ's resolution demands in individual cases this year. But the statistics will likely motivate DOJ to increase the pace that pending False Claims Act cases move through the system because more cases increase opportunities for recoveries. And increased oversight pressure from the new Congress may contribute additional motivation. As a result, contractors should expect to see more FCA investigations opened, more Civil Investigative Demands issued, and potentially more pressure to respond. There will be ample opportunities for DOJ as significant numbers of new *qui tam* cases have been filed in recent years.
- 2. More DOJ lawyers focused on civil fraud/FCA matters:** A non-trivial number of DOJ civil lawyers at Main Justice and in the US Attorneys' offices have spent time detailed to other components recently. This has reduced the time that those lawyers could dedicate to FCA cases. In recent months, it appears as if more attention is being paid to civil fraud matters again.
- 3. More investigative resources focused on civil fraud/FCA matters:** As travel budgets for agents return to pre-pandemic norms, and pressures caused by other pressing investigative focus areas fade, it appears that investigative resources are again available for civil fraud matters. Additional agents and analysts will also increase case throughput.

In light of what we believe will be an environment of increased enforcement, companies in industries facing FCA risk (*e.g.*, healthcare and government contracting) are well advised to do the following:

1. **Treat inbound requests from Offices of Inspectors General (*e.g.*, subpoenas and informal requests for information) as preludes to civil FCA cases.** Companies sometimes provide requested information to investigators without seeking advice of outside counsel or considering ways to mitigate FCA risk in early communications. It is a best practice to involve skilled counsel at an early stage to help avoid escalation to a full-blown, resource-intensive FCA matter.
2. **Treat your hotline reporters well.** Company personnel generally do not set out to become *qui tam* plaintiffs. Sometimes, those who feel like the company has not “listened” to their concern or responded appropriately take the next step and file a complaint. Taking hotline reports (and informal reports through HR or supervisors) seriously, and responding to the reporter with the results of an internal review, can help avoid escalation to *qui tam* filing.
3. **Double down on compliance matrices and recordkeeping.** If companies have not created or recently updated their compliance matrices or processes, or have less than robust government contract/government grant file systems, this is a great time to focus on those areas. Showing company efforts towards training and compliance, as well as maintaining robust contract documentation, can help build defenses to future FCA allegations. Stated differently, contemporaneous documentation of good faith compliance efforts can help reduce FCA risk by rebutting scienter allegations or otherwise demonstrating government knowledge or a lack of materiality.

Jenner & Block lawyers stand ready to assist with these issues.

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