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FCA Settlement Data Shows Need For Comprehensive Reform

By **Jacob T. Elberg** (February 19, 2019, 5:04 PM EST)

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Based on recent statements, the U.S. Department of Justice seems poised to provide much needed guidance regarding the manner and extent of corporate cooperation credit in False Claims Act cases. Examination of newly available data, however, demonstrates that more wide-ranging, structural changes are necessary: The data raises substantial questions not only about the credit given for cooperation, but about what the DOJ values in resolving FCA cases and whether there is appropriate consistency for cases handled by U.S. attorneys' offices across the country.

The analysis reveals that a detailed structure for DOJ's calculations in FCA settlements, with calculations transparent in each FCA resolution, is needed to accomplish DOJ's goal of encouraging cooperation and investment in compliance programs, as well as to provide an assurance of consistency.

The DOJ has long stated its desire to incentivize companies to invest in compliance programs before misconduct comes to light and to cooperate with government investigations — these behaviors are referred to together as "compliant behaviors" throughout this article. When it comes to handling criminal investigations, internal DOJ policy is explicit through the Principles of Federal Prosecution of Business Organizations[1] and concrete benefits are clear through the United States Sentencing Guidelines. Business organizations can see definitively that they will face reduced fines based on engaging in compliant behavior.

At the same time, the DOJ has offered virtually no guidance as to the impact of compliant behaviors on civil FCA settlements, and there is nothing akin to the sentencing guildelines to force the DOJ to do so in civil cases. This is particularly problematic in the area of health care, an industry for which the FCA is the primary tool for government action in response to misconduct.

Transparency in Criminal Fine/Penalty Calculations

When resolving criminal cases with business organizations, DOJ behavior is of course governed by the Principles of Federal Prosecution of Business Organizations, which describe the factors criminal prosecutors should consider when investigating a business organization and making determinations regarding whether to bring charges and negotiating potential resolutions. Other DOJ references to rewarding compliant behaviors have likewise been linked closely to criminal prosecutions — for example, Hui Chen was hired as a compliance counsel expert by the Criminal Fraud Section of the DOJ and Evaluation of Corporate Compliance Programs was published by the Criminal Fraud Section, both to aid the DOJ's efforts to evaluate compliance programs and incentivize investments in compliance programs by providing guidance to industry as to how DOJ would evaluate such programs.

More concretely, as to the impact of a business organization's compliance program and the decisions whether to self-disclose misconduct and to cooperate in the government's investigation, the sentencing guidelines provide a detailed incentive structure. Because the DOJ has regularly shown the sentencing guideline calculations in criminal plea agreements — as well as deferred and non-prosecution agreements), industry and the defense bar have been able to see the impact of compliant behavior and know it would be valued in criminal cases.

The sentencing guidelines detail explicit and concrete calculations for determining the fine for organizations. Under the sentencing guidelines, a series of factors is used to arrive at a culpability score, which then translates to a minimum — as low as 0.05 — and maximum — as high as 4.00 — fine multiplier, each of which are multiplied by the base fine — frequently the gain to the organization from the offense or the loss from the offense caused by the organization — to create the minimum and maximum of the guideline fine range.[2] Factors related to compliant behavior are central to calculation of the culpability score. As a result, a potential guideline fine multiplier can decrease by .40 to .80 based on cooperating with the government's investigation, .60 to 1.20 based on the existence of a pre-existing effective compliance program, 1.00 to 2.00 based on a self-disclosure or 1.60 to 3.20 in the case of an entity with a pre-existing effective compliance program and a self-disclosure.

Numerous factors, including considerations mirroring sentencing factors detailed in 18 U.S.C. Sections 3553(a) and 3572(a), are then used to determine the amount of a fine within the applicable guideline range.[3] In the context of a significant corporate resolution, the culpability score deductions relating to compliant behavior can easily make a concrete and visible difference of tens or even hundreds of millions of dollars.

DOJ Appears Poised to Address the Impact of Civil Cooperation

The False Claims Act statute provides that a person who violates the FCA,

> is liable to the United States Government for a civil penalty [per claim], plus 3 times the amount of damages which the Government sustains because of the act of [of the person violating the FCA].[4]

This leaves a significant range between single damages — which make the government whole — and the maximum recovery available under the statute. And this range offers a clear opportunity for the government to motivate business organizations to engage in compliant behavior.

Notably, there is no guidance or transparency from the DOJ to industry or the defense bar as to what constitutes a standard settlement or what factors influence what the DOJ will demand — there is nothing akin to the Principles of Federal Prosecution of Business Organizations on the civil side. And unlike on the criminal side where the sentencing guidelines provide an outside-DOJ impact for compliant corporate behavior, there is very little to restrain the DOJ's discretion in this area. Courts have placed constitutional limits on the amount of available penalties[5], and the FCA statute does limit recovery to double damages in the case of a true and prompt self-disclosure[6], but as the data analysis below demonstrates, both limitations are largely meaningless in the context of an agreed-upon resolution.

Without guidance or transparency, industry and the defense bar have been left to speculate as to whether compliant behaviors were being rewarded at all in FCA resolutions. It was notable when Deputy Attorney General Sally Yates's Memorandum on Individual Accountability for Corporate Wrongdoing — the "Yates memo" — which focused heavily on the link between criminal and civil investigations, was explicit regarding civil prosecutors taking corporate cooperation into account.[7]

None of the pre-Yates memo iterations or discussions of the Principles of Federal Prosecution of Business Organizations mentioned the impact of the principles on civil cases handled by the DOJ or required the DOJ's civil prosecutors to take the factors into account.Still, while the Yates memo made clear that civil prosecutors were required to reward cooperation, the memo and its aftermath offered virtually no guidance as to how cooperation was to be taken into account.

Both in relation to the Yates memo and since, the DOJ has made statements in support of a compliant behavior discount in FCA cases, at least as it pertains to cooperation. In particular, following publication of the Yates memo in 2015, the Justice Manual chapter on civil cases was updated to include a reference to the requirements for business organization cooperation to earn credit in civil cases.[8] The reference, however, provided only one example – that "[f]or example, the Department's position on 'full cooperation' under the False Claims Act, 31 U.S.C. Section 3729(a)(2), is that, at minimum, all relevant facts about responsible individuals must be voluntarily provided … " But that example refers to an entity's ability to take advantage of the statutory provision limiting FCA damages to doubles in the context of a voluntary self-disclosure.

As demonstrated by the analysis below, the FCA's reduced damages provision has been rendered largely meaningless. Business organizations know that they do not generally need to make a self-report, or even cooperate or accept responsibility, in order to obtain a double-damages settlement, thus removing the provision's intended incentive.

As industry and the defense bar have questioned whether and to what degree civil cooperation is rewarded, the DOJ has made public statements assuring that compliant behaviors by corporate entities will be rewarded in civil cases as well, and increasingly acknowledging that there is currently insufficient policy or transparency regarding those benefits.

Last June, Acting Associate Attorney General Jesse Panuccio delivered a speech affirming the DOJ's commitment to reward corporate defendants for "invest[ing] in strong compliance measures" and for "genuine cooperation," noting that "the extent of the discount will depend on the nature of the cooperation and how helpful it is to the Department's investigation, including our pursuit of individual wrongdoers."[9]

Just last month, Deputy Associate Attorney General Stephen Cox delivered a speech in which he assured the audience that "the Department is committed to rewarding companies that invest in strong compliance programs and who cooperate with our investigations into wrongdoing."[10]

But if Cox's statement is any indication, the DOJ is preparing only to address cooperation credit and what sort of deduction may be available. Cox concluded his remarks by stating,

> [t]he Department has significant discretion under the False Claims Act to resolve cases in a way that provides a material discount based on cooperation while still making the government whole. Stay tuned on this front.[11]

Addressing only cooperation credit would not only fail to address benefits for investing in compliance programs — a claim which is as questioned by industry and the defense bar as benefits for cooperation — but would likely lack the context necessary for any articulated cooperation benefit to have meaning for defendants. As an analysis of newly available data makes clear, addressing cooperation in a vacuum, without doing so in the context of a defined and transparent structure, will fail to provide the level of information necessary to achieve the DOJ's goals of incentivizing compliant corporate behavior.

Analysis of FCA Resolutions Revealing Multiplier

Until 2018, it was virtually impossible to analyze FCA settlements and come away with any understanding of what impact the government's view of the defendant's compliance program or level of cooperation (or anything else) had on the government's calculations. In reaching and announcing FCA settlements, the DOJ historically did not disclose the amount of "single damages" or the multiplier used to arrive at the ultimate resolution. Even the defendant could be left in the dark, as FCA settlements did not necessarily involve a meeting of the minds between the government and the defendant as to the method of calculation.

That changed, however, with the 2017 passage of the Tax Cuts and Jobs Act.[12] Section 13306 of the Act made clear that business organizations can deduct only those portions of settlements paid to the government that they can establish were paid as restitution or expended to come into compliance with the law — a defendant settling for single damages can thus deduct the entire cost of the settlement, while a defendant settling for triple damages can only deduct one-third.

Significantly, the statute requires that the money must be specifically identified as such in a court order or settlement agreement and imposes on the government an obligation to provide notice to the Internal Revenue Service and to the settling party of the restitution amount contained within civil settlements. In response, the DOJ has regularly been including the "restitution" figure in FCA Civil Settlement Agreements, or CSAs, since early 2018, from which the multiplier used in each particular case can be easily calculated.

I have attempted to review the CSAs from all civil-only FCA settlements entered into between health care business organizations and the DOJ since early 2018, as well as the accompanying DOJ press releases and other public statements made by the DOJ or the settling defendants. Some CSAs were not available, several available CSAs did not reference a restitution figure or contained arrangements which made determination of the intended multiplier impossible, and, unfortunately, there is no mechanism to determine whether there have been any CSAs which my analysis did not identify. My analysis includes 61 CSAs for which the restitution and thus the multiplier could be determined.

The DOJ has long trumpeted its ability to obtain triple damages plus penalties. One 2018 DOJ press release announcing a FCA settlement went so far as to note that triple damages are the "typical[]" liability under the False Claims Act.[13]

Of the 61 CSAs for which the multiplier could be determined, however, 53 were at or below double damages — 27 were at double damages and 26 were between 1.0 to 1.9, seemingly confirming widespread sentiment amongst industry and the defense bar that double damages is the DOJ's unofficial default settlement multiplier. For purposes of this article, I thus refer to 2.0 as the "default" multiplier — the mean multiplier was 1.75.

There were only eight CSAs above 2.0, and neither the CSAs nor the DOJ press releases provided an explanation for why they had a higher than default multiplier. If those eight organizations engaged in conduct the DOJ wishes to disincentivize, the lack of transparency prevents any such general deterrence from taking place. While the Commercial Litigation Branch participated on only one of the eight above-2.0 CSAs and four of the eight were from one U.S. attorney's office — which also had two CSAs at 2.0 and one below 2.0 — given the small sample size and the lack of information, it is fair to ask but impossible to conclude definitively that there is a lack of consistency among U.S. attorney's offices in determining FCA multipliers. Only through greater transparency, though, can the DOJ avoid speculation that certain prosecuting offices are requiring higher multipliers than others, and instead provide guidance as to what affirmative compliance steps organizations should take.

Of greater significance to the DOJ's efforts to incentivize cooperation, it was notable that several defendants received the default 2.0 multiplier despite clear evidence of substantial cooperation, including references to the defendant's cooperation in some of the CSAs and the DOJ press releases. At the same time, several defendants received multipliers below 2.0 despite clear evidence that they did not cooperate.

That is not to say the first group did not receive adequate credit for their cooperation — it is possible those multipliers would have been above 2.0 if not for their cooperation — or that there were not other reasons for the second group to receive below 2.0 multipliers. But if these resolutions do reflect a true cooperation benefit, the lack of transparency necessarily means they fail to adequately inform industry and the defense bar of the existence and extent of those benefits.

The data also makes clear that, as currently calculated, any credit given for cooperation or for investing in strong compliance programs is dwarfed by the credit given for the simple act of settling. Under the sentencing guidelines, the reduction for a defendant organization's self-disclosure is five times the reduction for mere acceptance of responsibility. The reductions for cooperation or for having had an effective compliance and ethics program in place are two times and three times the acceptance of responsibility deduction, respectively. The sentencing guidelines multiplier reduction for acceptance of responsibility is only .2 to .4 — smaller than adjustments based on the size of the organization and the role in the organization of the responsible individuals.[14]

In the FCA context, however, the mere act of settling dramatically reduced the multiplier, and did so even where the settling defendant did not accept responsibility — several of the cases resolved at or below 2.0 multipliers were with defendants who issued press releases at the time of the settlement denying that they had engaged in any wrongdoing. If a settling benefit of this magnitude is truly the DOJ's intention, transparency will benefit the DOJ by setting clear expectations for defendants.

Finally, while there is insufficient data to conclude definitively that there is a lack of nationwide consistency, the mean multiplier for the 23 cases involving the Commercial Litigation Branch was 1.59, while the mean multiplier for the 38 delegated cases handled by individual U.S. attorney's offices without the involvement of the DOJ's Civil Division in Washington, D.C. was a significantly higher 1.84. Even putting the multiplier gap aside, that more than 60 percent of the cases were resolved without the Commercial Litigation Branch points to the need for a comprehensive, transparent methodology for calculating FCA multipliers.

To be clear, the analysis does not disprove the DOJ's claims that it has been taking cooperation and investment in compliance programs into account in resolving FCA cases. It does make apparent, however, that more substantial transparency is necessary regarding all aspects of the multiplier calculation. Addressing only the deduction appropriate for cooperation, as Deputy Associate Attorney

General Cox's recent comments have hinted, would leave industry and the defense bar with more questions than answers.

Conclusion

At minimum, analysis makes clear that if the DOJ wishes to achieve its oft-stated goal of incentivizing business organization cooperation and investments in compliance programs, the DOJ must increase the level of transparency and guidance. By documenting and applying a structure to the calculation of False Claims Act settlements, the DOJ has the opportunity to improve the relationship between the DOJ and industry and create deterrence far beyond what can be achieved through individual enforcement actions. Without change in this area, the DOJ risks undercutting its efforts at encouraging compliant behavior in one of the DOJ's primary enforcement areas.

To the extent the DOJ is already appropriately rewarding compliant behavior in civil FCA resolutions, adopting such a framework would come at no cost and would provide an assurance of consistency among cases handled by U.S. attorney's offices around the country. Revealing restitution figures while making no further comment on calculation methodology, however, will continue to lead to speculation and misinformation. Instead, DOJ should take the opportunity to reexamine its approach, both to how it calculates FCA settlements internally, and as to its historic unwillingness to be transparent about its calculations.

By adopting a structure of calculating the appropriate amount of civil settlements modeled, in general terms, on U.S. Sentencing Guidelines Section 8C — including increases based on the severity of the misconduct and the level of those involved, and decreases based on compliant behavior and acceptance of responsibility, among other factors — the DOJ can incentivize compliant behavior while also taking the opportunity to explain settlements to the public and industry.

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[1] Justice Manual Section 9-28.000.

[2] U.S. Sentencing Guidelines Sections 8C2.4-2.7.

[3] U.S. Sentencing Guidelines Section 8C2.8.

[4] 31 U.S.C. Section 3729(a).

[5] See e.g., United States v. Mackby, 261 F.3d 821 (9th Cir. 2001) (noting that the Eight Amendment's prohibition against excessive fines and penalties may in some cases limit the application of treble damages and penalty awards).

[6] 31 U.S.C. Section 3729(a)(2).

[7] Memorandum from Sally Quillian Yates, Deputy Attorney General, Department of Justice, on Individual Accountability for Corporate Wrongdoing, to Assistant Attorneys General, Directors, and United States Attorneys (Sep. 9, 2015), available athttps://www.justice.gov/archives/dag/file/769036/download.

[8] Justice Manual Section 4-3.100(4). At the time, what is now referred to as the Justice Manual was referred to as the U.S. Attorneys' Manual.

[9] Remarks of Acting Associate Attorney General Jesse Panuccio at the American Bar Association's 12th National Institute on the Civil False Claims Act and Qui Tam Enforcement, June 14, 2018.

[10] Remarks of Deputy Associate Attorney General Stephen Cox at the 2019 Advanced Forum on False Claims and Qui Tam Enforcement, Jan. 28, 2019.

[11] Id.

[12] Pub. L. No. 115-97 (2017)

[13] "Medical Equipment Company Agrees to Pay $5.25 Million to Resolve Allegations of Fraudulent Claims for Compounded Medical Creams," Press Release, U.S. Attorney's Office, Eastern District of Kentucky, Oct. 22, 2018.

[14] U.S. Sentencing Guidelines Section 8C2.8.