University Risk Management & Insurance Association

GOVERNMENT AND REGULATORY AFFAIRS BLAST

Insurance Coverage and the Federal False Claims Act[1]

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STATUTE/REGULATION SOURCE

False Claims Act (FCA), 31 U.S.C § § 3729-3733

BRIEF DESCRIPTION

This briefing describes how claims filed under the False Claims Act can impact universities.

POTENTIAL/ACTUAL IMPACT

The False Claims Act (FCA) prohibits individuals or corporations from knowingly submitting a false claim to the federal government. Examples of false claims include knowingly submitting inaccurate information in a grant proposal, intentionally failing to perform a service under a contract with the government, or a physician knowingly billing Medicaid/Medicare at the doctor's rate for services provided by interns in a teaching hospital. The statute provides that, if found liable, penalties can be assessed in the amounts of $5,500 to $11,000 per false claim with each and every individual invoice potentially qualifying as a separate claim. A claim to the Federal Government can be, for example, an invoice for services rendered or an expense report on a grant submission. If multiple invoices or expense reports are submitted, each one constitutes a single claim.

The FCA allows private persons to file suit for violations of the FCA on behalf of the government. The relator (individual filing the *qui tam* action) is entitled to a percentage of the penalties and damages. Insurance policies may or may not respond to these types of claims. If successful, these claims may have significant financial and reputational impacts.

EXAMPLES OF RECENT SETTLEMENTS IN HIGHER EDUCATION

- $1,200,000 (Health Care): Anesthesia administered without supervision
- $2,500,000 (Educational): False certification of eligibility under student aid assistance program
- $2,930,000 (Grant Programs): Misuse of grant funds (NIH)
- $956,590 (Health Care): No proof that authorized persons performed services
- $1,500,000 (Health Care): Double-billing, Medicare/Medicaid

DISCUSSION

Liability under the FCA arises where a person knowingly submits a false claim to the government, causes another to submit a false claim, or makes a false record. Liability may also arise where one acts improperly to avoid payment or where persons conspire to violate the FCA. Violations of the FCA arise where a claim is submitted with "knowledge of its falsity." The statute defines this as:

1. Actual knowledge
2. Deliberate ignorance
3. Reckless disregard of the truth or falsity of the information

[1] Many states have enacted their own False Claims Acts. Not all state False Claims Acts cover all types of fraud.

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Insurance Coverage and the Federal False Claims Act (cont.)

A suit filed by an individual for violations of the FCA is known as a *qui tam* action. The individual bringing the action is referred to as a "relator." The *qui tam* action is filed under seal for 60 days or more. During this period, the government is required to determine whether it will intervene in the action or decline. If the government declines to take over the action, this doesn't mean that the matter is ended. The relator can then proceed with the action. If there is an intervention, then the relator is entitled to receive between 15 and 25 percent of the amount recovered by the government. If not, then the relator's share is increased to 25 to 30 percent of the amount recovered.

In addition, the FCA provides any employee, contractor, or agent relief against retaliation in the amount of double the back pay, interest, litigation costs, and reasonable attorney's fees.

Insurance Coverage for qui tam Actions:
The availability of insurance for these kinds of actions is an important consideration. Costs to defend can have a major financial impact on an organization. Seeking insurance coverage for claims filed under the FCA can be challenging. Challenges include difficulties posed by complaints filed being sealed and in turn discharging the insured's responsibility for timely notice to the carrier. Depending on the allegations contained in the complaint, coverage *may* be found under directors and officers liability policies, errors and omissions policies, crime/fidelity insurance, and public officials and employment practices liability, to name a few. For example, FCA claims which allege retaliation or wrongful termination may trigger employment practices liability coverage.

Common exclusions include fraud, punitive actions, fines, and penalties.

ACTION
Review terms and conditions to determine whether existing insurance policies will be able to respond. Understand the limits of coverage of each policy purchased by your institution. Identify potential gaps in coverage and, where appropriate, purchase insurance coverage. If you receive a *qui tam* complaint, review with your insurance counsel. You may want to submit notice of the *qui tam* complaint to your carrier, even though it is under seal.

SOURCES AND REFERENCES
1. "The False Claims Act: A Primer," United States Department of Justice (http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf).