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# Fueled by Whistleblower Claims, DOJ Reports Record Year for False Claims Act Recoveries

The U.S. Department of Justice (DOJ) and whistleblowers obtained more than $2.68 billion in False Claims Act (FCA) settlements and judgments in Fiscal Year 2023—a record year for FCA enforcement. The DOJ highlighted these record recoveries in its annual FCA statistics press release, issued February 22, 2024, and in remarks delivered the same day to the Federal Bar Association's *Qui Tam* Conference, Principal Deputy Assistant Attorney General, Civil Division, Brian Boynton, emphasized the government's continued commitment to robust FCA enforcement in 2024 and beyond.

The FCA is one of the government's most important tools to combat alleged fraud against the government and protect taxpayer dollars. The FCA makes it unlawful to submit false claims (defined broadly as "any request or demand … for money or property") to the government, or to cause such claims to be submitted. 31 U.S.C. § 3729(a)(1)(A). The consequences of violating the FCA are significant. The FCA authorizes the imposition of civil penalties, treble damages and fee awards, allowing the government (and whistleblowers) to recover substantial sums. Every year for the past 15 years, FCA recoveries have exceeded $2 billion. Perhaps not surprisingly, given the amounts at stake (and the obvious financial benefit to whistleblowers, in particular), FCA enforcement activity has steadily increased over the years, with no signs of slowing down in years to come. In 2023, the nearly $2.7 billion recovered came from the resolution of 543 separate cases—another record high, up from 351 cases in 2022.

## Whistleblowers Continue to Drive Record Recoveries Under the FCA

The FCA incentivizes whistleblowers to report fraud. It protects whistleblowers from retaliation, and it compensates them for generating suits, whether the claims are ultimately pursued by the government or by the whistleblowers themselves in so-called *qui tam* actions. Whistleblowers typically receive between 15 percent and 30 percent of the overall recovery. Of the $2.68 billion recovered in 2023, $2.3 billion, or approximately 85 percent, came from whistleblower suits (up from $1.9 billion in 2022). As a result, whistleblowers received more than $349 million for their disclosures of fraud and abuse. This trend is unlikely to change. In 2023, whistleblowers filed 712 new suits (up from 652 in 2022), marking the

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fourth time since 2013 *qui tam* filings exceeded 700.

## Sharp Increase in DOJ-Initiated Suits and Investigations

This is not to suggest that the government relies exclusively on whistleblowers for purposes of FCA enforcement. Indeed, the government has increased its own enforcement efforts in recent years. In 2023, the government opened 500 new FCA matters that were not the result of whistleblowers' disclosures. That number is up from 305 such matters in 2022. The government also issued more than 1,500 Civil Investigative Demands (CIDs) in 2023. Similar to a subpoena, a CID is a discovery tool used by the government to obtain documents, information and testimony in connection with its investigation of FCA claims.

## Enforcement Priorities for 2024 and Beyond

While the government's "focus is always evolving," Mr. Boynton identified certain areas of particular interest to the DOJ, including health care, cybersecurity and pandemic fraud. He also stressed the DOJ's growing concern with the role of third parties, like private equity investors, in the submission of false claims.

***Health Care*.** As in years past, the health care sector remains a leading focus of FCA enforcement activity, accounting for more than $1.8 billion of the $2.7 billion in total recoveries for the year. In his remarks, Mr. Boynton made clear that the government intends to closely scrutinize alleged kickbacks for referrals, schemes involving medically unnecessary services or substandard care (particularly in nursing home settings), participants in the Medicare Advantage (Part C) program and claims relating to the opioid crisis.

***Cybersecurity*.** Mr. Boynton likewise touted the DOJ's Civil Cyber-Fraud Initiative, which uses the FCA to bring enforcement actions against contractors that put government data and systems at risk by allegedly violating cybersecurity requirements applicable to those doing business with the government.

***Pandemic Fraud***. The DOJ also plans to continue using the FCA to pursue pandemic-related fraud, including in connection with the Paycheck Protection Program (PPP) and other relief programs. In 2023 alone, the DOJ resolved 270 FCA matters involving PPP loans.

***Private Equity*.** In his remarks, Mr. Boynton emphasized DOJ's heightened interest in the role third parties—private equity firms, in particular—play in submitting false claims. He made clear that the DOJ has private equity in its crosshairs and intends to aggressively pursue investors who dictate business practices or


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benchmarks that may knowingly encourage or cause the submission of false claims.

### So, what should businesses do to minimize those risks?

- **Build a robust compliance program—or reassess an existing one.** Evaluate your compliance efforts and/or programs to determine whether they are adequate to detect and investigate alleged improprieties and prevent fraud and misconduct in the future. Consider whether your compliance program reflects the size and nature of your business and risk profile.
- **Invest in building a culture of compliance.** Apply your compliance program earnestly and in good faith. Give employees a mechanism for raising and addressing concerns without pursuing a whistleblower claim. Listen to their concerns, investigate them diligently and objectively, and document your efforts.
- **Consider the influence of owners, investors or other third parties.** As Mr. Boynton said, "One reason why the False Claims Act has been so successful is its wide reach. It covers those who submit false claims and those who cause such claims to be submitted. It is no defense that an individual or entity did not sign or transmit the specific claim at issue if their conduct played a significant and foreseeable role in advancing the scheme." The DOJ has made clear that it intends to aggressively pursue third parties that it suspects had a hand in causing the submission of false claims. This includes non-managing ownership (*i.e.*, private equity). Carefully consider whether changed business practices or revenue targets could encourage compliance failures or false claims.
- **Consult with legal counsel.** Consider seeking the assistance of counsel when assessing compliance risks, building your compliance program or responding to inquiries from the government. While doing so certainly comes with a cost, the cost of involving counsel early pales in comparison to the exposure you face in an FCA investigation or whistleblower suit.

## Key Takeaways

The record FCA recoveries in 2023, ever-increasing whistleblower activity and the government's renewed commitment to FCA enforcement in 2024 and beyond once again highlight the substantial risks facing individuals and companies that do business with the government**.** We encourage our clients to be proactive and to take steps to mitigate compliance risks and minimize their exposure to FCA


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liability—in this area, an ounce of prevention is always worth far more than the cost of defending an FCA claim against the government or whistleblowers.

For questions or more information regarding the FCA, contact Tom Burnett, Dan Murphy, your Reinhart attorney or another member of our False Claims Act Team.

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