A Practical Guide to False Claims Act Investigations Against Skilled Nursing Facilities:
Answers to Commonly Asked Questions

William H. Jordan
Matthew L.J.D. Dowell

Alston & Bird LLP
Atlanta, GA
William H. Jordan is co-chair of Alston & Bird’s Litigation & Trial Practice Group and the firm’s Health Care Litigation Team. He served as a senior official at the Department of Justice from 2001-2004. Since returning to the firm he has represented companies and individuals in a wide range of state, federal, and congressional investigations ranging from health care fraud and compliance issues to antitrust matters to the Foreign Corrupt Practices Act. He also represents companies in complex civil litigation relating to administrative and constitutional law challenges and class actions. From 2005-2009 Bill served as a commissioner and as chair of the Georgia State Ethics Commission, which regulated and adjudicated issues regarding campaign finance and election matters in the state.

Matthew L.J.D. Dowell is a senior associate of Alston & Bird LLP in Atlanta. Matthew helps health care companies and other clients manage difficult litigation and investigations. Matthew has handled complex government investigations with dozens of witnesses, compelled arbitration against almost 20,000 class members and supervises a team that processes thousands of subpoenas each year for a Fortune 50 company.
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I. Basic Questions

A. What Is the False Claims Act?

The FCA is the government’s principal tool for recovering damages, fines, and penalties for alleged fraud in federal programs. Passed originally to combat war profiteers in the Civil War, its current form dates to 1986 when Congress added the qui tam whistleblower provisions to the statute. This allowed private individuals to file complaints, under seal, in federal court alleging that an individual or company defrauded a federal program. If successful in the claim, the whistleblower stands to receive by law anywhere from 15 to 30 percent of the government’s recovery.1 And to incentivize them to represent whistleblowers, plaintiffs’ lawyers often receive a windfall of both the contingent fee the whistleblower agreed to pay them (usually around 30 to 40 percent of the whistleblower’s recovery) plus their attorneys’ fees and costs from the defendant.2

Congress loves this statute and has amended it several times since 1986 to make it easier to bring claims. The Department of Justice loves this statute—touting every year billions of dollars recovered into the federal fisc.3 Federal agencies love this program—indeed, they receive a portion of the recovery back into their coffers to fund additional investigators. Even President Trump loves the program—he ran on a platform of “draining the swamp” and rooting out waste, fraud, and abuse.4 As a result, one of the few areas in his budget blueprint to receive an increase of funds is for healthcare fraud enforcement (which the budget views as a giving a 5x return for every budget dollar spent).5

And, of course, whistleblower lawyers love the statute. There are more than two new whistleblower FCA cases filed every single business day—702 last fiscal year alone, almost double what it was only 10 years ago.6

What does this mean for players in the long-term care space? You are targets for enforcement with a big red X on your chest. This is no exaggeration. In 2016, DOJ created an Elder Justice Task Force because “[p]rotecting our nation’s seniors is one of the department’s highest priorities . . . . ”7 And just look at the press statements from the last 3 years, with recoveries and cases against SNFs and hospices:

• “It is unacceptable for an entity entrusted to care for our most vulnerable and elderly citizens to make decisions based on profit, not quality of care. Subjecting the elderly to inappropriate levels of therapy can be physically harmful, and failing to properly certify and re-certify hospice patients can have a devastating impact on the patients and their families.”8
• “Therapy provided in skilled nursing facilities must be medically reasonable and necessary, and we will continue to vigorously investigate companies that subject their residents to needless and unreasonable therapy.”9
• “Skilled nursing facilities … treat some of the most vulnerable patients in the health care system. These facilities, and the individuals who run them, will be held accountable when they provide treatment based on financial motivations instead of the patients’ needs.”10
• “We will continue to hold accountable those who profit from the care of elderly Medicare and Medicaid beneficiaries, including nursing home operators, while providing non-existent or grossly substandard care.”11
What we attempt to do in this article is provide some practical answers to questions we get all the time related to FCA cases. While each case is different, there are a few common items. Often we deal with individuals or companies who have never been through an investigation or FCA litigation. They are routinely surprised at the government’s investigative power, their lack of control over the litigation, the one-sided nature of the FCA, the difficulty of fighting claims that they believe are without merit without creating a significant drag on their business operations, ability to obtain financing or sell a company, and adverse press statements or competitive conditions. We will try to answer some of these questions and provide a roadmap for an investigation.

B. How Can the Government Investigate Me or My Company?

In the LTC space, the vast majority of cases start with the filing of a qui tam whistleblower complaint under seal in federal court. The case remains under seal for a minimum of 60 days, subject to additional requests by the government for extensions of the seal while a matter is being investigated. In practice, cases remain under seal for years.

C. Can I Get a Copy of the Complaint or Have the Ability to Respond to It While It Is Under Seal?

The short answer is no. The government and the court are in control of the seal period. On occasion, the government may seek a “limited unsealing” of the complaint to provide notice of the allegations. But the standard playbook is for the government not to provide a copy of the complaint until shortly before an intervention or declination decision.

D. How Do I Know When an FCA Complaint Has Been Filed?

As a practical matter, it is just an educated guess. Often, companies hear that former employees are being interviewed by federal agents. Or a company may receive a Subpoena or Civil Investigative Demand (CID) demanding production of huge swaths of documents dating back many years. This will lead to discussions with the government about response, production timing, limitations on scope, and often substantive meetings, white papers, presentations, or other discussions on the substance of the subpoena. While a case is under seal, however, the government lawyers will not confirm or deny the existence of a qui tam complaint.

II. Company Response to FCA Investigation

A. What Should I Do When I Receive a Subpoena?

This is usually the first indication that a company is under investigation. After consulting with counsel, the outside lawyer will usually call the government to get some information regarding the scope of the investigation. That inquiry will be met with varying levels of openness from the government lawyer. But it is helpful to start those discussions early to establish a relationship with the government to get to it the information that the DOJ needs to make an intervention or declination decision in the least disruptive manner.

Recipients of subpoenas or CIDs also need to remember that the scope of the government’s investigative authority is quite broad. Counsel will want to negotiate reasonable limits on the scope of the subpoena. It can lodge appropriate objections and, on rare occasions, enlist a court’s assistance in resolving issues of breadth and scope. But this should be tempered by the expectation that relief from courts is rare and often limited—courts are not inclined to prevent the government from investigating claims of fraud absent extraordinary circumstances or ridiculously overbroad requests.
B. What Can Be Said About the Investigation While a Case Is Under Seal?

If a company has notice only of a subpoena but not of a *qui tam* complaint itself, then a truthful and accurate disclosure discusses only the subpoena and the company’s response.

- If publicly-traded, most securities counsel are very experienced in helping to craft disclosure language in these situations and in making a determination regarding the materiality of the review and whether it must be disclosed at all. This is a very individualized analysis.
- For non-public companies, don’t forget to determine whether covenants in financing documents require a disclosure to lenders.

All companies should also analyze whether the subpoena or CID should be disclosed to their insurer since coverage for the attorneys’ fees and costs incurred may be available depending on the policy.

C. Who Is the *Qui Tam* Relator?

Companies often want to play this parlor game when they receive a subpoena. It is not unusual. It is also not particularly productive. Better to focus on the government so that the company can get the government to quickly get to a hoped-for declination decision. In our experience, however, the guessing game is practically unavoidable. Relators often are individuals who were fired, felt they were forced out, or who have checkered employment records. Save this information for the right time. The government is going to be more concerned about the merits than about the quality of the relator in the first instance. But there may be a time and place to use this information strategically.

Also keep in mind that many Relators attempted to bring a matter to a company’s attention before resorting to filing a *qui tam* complaint. They may feel that this attempt was rebuffed or that the company did not take sufficient action. And the government is going to be well aware of situations where companies attempted to quash a Relator’s internal compliance complaint. Most companies tend to be viewed skeptically (at least at first) in any attempt to malign a Relator.

D. What If a Relator Is Still Employed? Can I Fire Him or Her?

This is a very sticky situation for both the Relator and the company. Most often we see Relators be put on leave with pay. But companies must be very careful not to run afoul of the whistleblower anti-retaliation provisions in the False Claims Act. Every situation needs to be addressed individually, with the involvement of employment counsel.

III. Investigation

A. How Long Will the Investigation Take?

There is not a happy answer to this very common question. Most cases take a minimum of 18 months from receipt of a subpoena to the government’s intervention or declination decision. Many take far, far longer. A good rule of thumb is 24-36 months, but companies can try to speed up the review by quickly providing the government with information. Companies can also explain that the investigation is having a harmful effect on their operations—ability to obtain financing, engage in a sale, etc. Sometimes this works and sometimes it doesn’t. What is certain is that the length of time investigations take is a top source of concern and consternation. And there is very little that a company can do to speed up a review.
B. What Can I Expect During an Investigation?

Expect it to be more painful and drawn out than you want. The government usually begins with a fairly broad document sweep and review. As a general matter, government lawyers will work with a company on reasonable limitations on production scope and on a phased production. They don’t want the proverbial truckload of documents. At the same time, they will be skeptical of attempts to narrow document searches too significantly for fear that they will miss something important to the investigation. Our best advice here is that credibility is key. If the government lawyer can trust that the company’s counsel is not trying to play “hide the ball,” then the company is likely (although not always) going to get a better result when it comes to reasonable limitations on document production.

Once documents have been reviewed the government then may ask to talk with some individuals. These discussions could come in the form of non-transcribed interviews or in more formal depositions under the government’s Civil Investigative Demand authority. Regardless of the form, the individual should be well-prepared and, of course, truthful. Even if an “informal” interview, it is a crime to lie or deceive a federal investigator.

After the government has digested the information that it receives, there often are meetings or series of meetings to discuss the government’s findings and the company’s response. Sometimes there are formal PowerPoint presentations. Sometimes the company prepares white papers on important legal issues that it believes the government may not fully appreciate. These are opportunities for candid exchanges and provide the company with the chance to convince the government why a case should be declined or why it should be settled for a reasonable amount.

C. Is There a Criminal Investigation?

This is an important question to ask the government. Both before and after the well-publicized “Yates Memo,” the government reviewed qui tam complaints to determine whether to open a parallel criminal investigation. This process has now been formalized given the Yates Memo. The easy answer is that an investigation always has the potential to become criminal and there will be a review, at some point, of the allegations by a criminal prosecutor. If an investigation relates to a violation of the Anti-Kickback Statute, it is much more likely to have a criminal component to it than an investigation focused on quality of care, medical necessity, or upcoding.

D. But My Lawyers Told Me I Could Do This!

The difficulty of meeting and the nuances around the “advice of counsel” defense could fill an entire treatise. In an area as complex and as highly regulated as healthcare and long-term care, it is not uncommon to see questions posed to counsel around deals, deal structure, referral source relationships, and other matters. Lawyers may also opine on an interpretation of a statute or regulation in order to provide a company with guidance. When these complex matters become subject to an investigation, the company will be faced with whether the guidance was sufficient to meet the very detailed requirements of the “advice of counsel” defense — that is, was all material evidence presented to the lawyer, did the lawyer provide reasonable advice, did the company follow the advice to the letter? In this way, the advice of counsel and an individual’s good faith reliance on that advice can negate an inference that the individual or company acted with bad intent.

But this “defense” should not be invoked casually. Once asserted, the company will have to waive attorney/client privilege protections over all communications related to the advice. The company’s lawyers may be subject to examination by the government. And there may be collateral consequences related to the waiver. These are highly individualized determinations. We often see situations where the lawyer may have
done a “drive by” consult on the issue or where not every single material fact related to the matter was disclosed. These can make it difficult to assert to defense successfully. At the same time, even if the advice doesn’t meet each requirement, the mere fact that advice was sought can demonstrate that a company or individual was not acting with the intent to defraud the government.

E. What Happens When the Government Declines to Intervene?

At some point during its investigation, the government has to decide if it is going to intervene (or take over) the FCA case. If the government declines to intervene, the whistleblower’s lawyers will control the litigation. Although historically many whistleblowers dropped their claims if the government declined (preferring to piggyback on the government’s efforts rather than litigating the case themselves), more whistleblowers are now choosing to litigate declined cases. For example, the Ruckh case discussed in Section IV.A below was a declined case that resulted in a $350 million judgment against a SNF chain. With these eye-popping recoveries in declined cases, we expect to see the trend continue of declined matters pursued by relators. Since 2010, defendants have paid out over $1.8 billion in these cases and whistleblowers were awarded close to $500 million (not counting attorneys’ fees).

Even if the government declines to intervene, it will still play some role in the litigation going forward. The government receives copies of all filings in the case and can intervene later for “good cause.” The government may also file “statements of interest” reflecting the government’s position on key legal issues.

IV. Liability and Settlement

A. What Is My Company’s Potential Liability?

Defendants in False Claims Act cases are often surprised by the punitive nature of the potential exposure. There are reasons why it is not uncommon to see multi-billion dollar settlements recovered by the government in these matters. To start, the FCA imposes treble damages. On top of that there are penalties of $11,000 to $22,000 per claim that are imposed as a matter of law. And then on top of that a qui tam defendant must pay the relator’s reasonable attorneys’ fees and costs. This extraordinary potential exposure makes the trial versus settle calculus very difficult.

In the SNF industry, just consider for a moment the analysis that faced the defendants in the case, United States ex rel. Ruckh v. CMC II LLC in Florida earlier this year. This was a case involving allegations of RUG-level manipulation and falsely inflating medical records to justify additional therapy. The parties took the case to trial and defendants lost. The jury awarded single damages of $115 million, which became a $347 million judgment following the verdict. That verdict threatens to force the defendant to shutter operations, closing more than 10 percent of nursing facility beds in Florida. The case is currently awaiting a ruling on the defendant’s motion to overturn the verdict.

Given the possibility of treble damages and penalties, the cards are stacked against a defendant in any settlement versus trial financial analysis. This does not mean that cases shouldn’t be tried (in fact, more should in order to help develop the law), but companies need to conduct this analysis with their eyes wide open.

B. What Is an Individual’s Personal Liability?

The FCA applies to individuals and to entities. As a part of its review of a company, the government will determine whether associated individuals should be held liable or investigated for FCA violations. This
process, which was somewhat informal, was formalized across the country following the “Yates Memo.” That memo, crafted by then-Deputy Attorney General Sally Yates, directed government attorneys, among other things, to examine whether individuals should also be subject to criminal or civil investigations in connection with government fraud cases. These are fact-specific determinations but companies and counsel are well-advised to carefully consider the possibility of individual exposure before bringing executives in to meet with the government. For example, does the executive or employee need individual counsel to advise him or her? Does the company need to take action against an individual who might have culpability? What investigation did the company do to determine if there had been individual wrongdoing? And what should a company do if (as often happens) its view of the facts and individual actions differ from the government’s?

Regardless of the answers, in nearly every case someone will ask company counsel whether they have individual exposure or whether they need a lawyer. These are tough ethical situations and company counsel cannot provide an individual with legal advice—he or she must get independent counsel to do that.

C. Can I Settle Without Going to Trial?

If the government decides to intervene in a FCA case, the vast majority settle. While there is no typical settlement, most FCA cases settle in the range of 2 to 2.5 times the government’s actual damages (called “single” damages). The single damages number and the multiples are, of course, negotiable. But companies that have not engaged in these discussions before are sometimes surprised by the rigidity of the government’s view. In a normal civil case both sides might look at the legal and other costs to go forward. The government rarely considers these costs—it looks at what it believes to be the damage to federal programs and negotiates from there. These negotiations are, therefore, quite different than the negotiating tactics and strategies used in regular civil litigation. This negotiating style and the government’s fairly intractable position is very frustrating to companies because rarely will they have been involved in these types of discussions.

D. Will the Settlement Be Public?

Yes. There are no confidential settlements with the government. The settlement will be publicly available and usually the government (and relator) will issue a press release announcing the settlement. The press cycle for these settlements is usually very short. There are settlement announcements every day and even very large settlements tend to draw only limited attention given the frequency of announcements.

E. What Is a Corporate Integrity Agreement/Corporate Monitor?

In any settlement discussions, the company must also deal with the HHS-OIG, which is responsible for determining whether to impose a Corporate Integrity Agreement (“CIA”)—essentially a five-year mandatory compliance program with an outside monitor who reports to the HHS-OIG on the company’s compliance. There are a variety of factors that determine whether a CIA will be required. The most important factor is the sophistication and effectiveness of the company’s existing compliance program. If faced with an investigation, companies can help themselves by analyzing their existing compliance program, reviewing recent CIAs, and changing their program to meet the structural and operational requirements in those CIAs. CIAs (all of which are available on the HHS-OIG website) are a great tool to use. And they help a company in its discussions to tell the government that they already have a compliance program that meets or exceeds HHS-OIG standards as reflected in their CIAs and therefore shouldn’t need to have one imposed along with the expense of an outside monitor.

If a CIA is required, it is not the end of the world. Plenty of companies that have been through the CIA/outside monitor process will report that they are better for it. While a CIA is neither painless nor cheap,
there are many instances where it helped a company move its compliance program to become best-of-class and thereby prevent future issues.

F. What If the Company Can’t Pay What the Government Believes Are the Damages?

This is not uncommon. The government has a process known as an “inability to pay” review. If a company (or individual) cannot afford a settlement, it can produce detailed financial records to demonstrate what it can reasonably pay. The government has a staff of financial analysts who regularly review this information and engage in negotiations. These are extremely detailed reviews and the government may seek not only the company’s information but also may ask for information about individual distributions and, occasionally, information regarding a company’s owners. Following the review and negotiation, the parties will negotiate a payment plan. If the payment plan is not met, there are automatic default provisions that kick in. Letters of credit and, sometimes, personal guarantees may also be required. A company should involve its CFO or outside financial consultants in these discussions since they are very exacting.

V. Compliance and Self-disclosure

A. What Should a Company Do to Reduce Its FCA Risk?

The easiest answer is to maintain a robust and effective compliance program. Starting at the top, the company and its senior executives should create a culture of ethics and compliance that encourages high-quality patient care and that does not foster an environment where employees think that “it’s only about the money, everything else be damned.” There are myriad resources available to help provide guidance and benchmarks for effective compliance programs—some put out by the government21 and some by third-parties.22

B. Something Went Wrong, What Should the Company Do?

Bad things happen. Individuals make wrong decisions. No one is perfect. As in politics, it is often not the violation but the cover-up that becomes the problem. If a company has an issue it should investigate it thoroughly. This investigation can involve compliance personnel, in-house counsel, or external counsel. The investigation may conclude there is not a problem. If that is the conclusion, document the investigation and result in case there is a later review. Or it may find there is an issue and money is owed back to the government. It could also find that employees should be disciplined or terminated depending on the severity of the violation. And if money is owed, the company may determine that it can go through a repayment process with the government or payor, or it may find that it needs to go through a voluntary self-disclosure process with the government.

If a self-disclosure is required, there are several ways to go. DOJ, CMS, HHS-OIG, and most states all have different types of self-disclosure programs and requirements. These should be reviewed carefully depending on the issue. There are some real benefits to self-disclosure programs (reduced fines, etc.) but also some significant costs. Each situation will be different but it is important to make sure that counsel guide the company through the analysis.
Endnotes

1 See 31 U.S.C. § 3730(d)(1)-(2).
2 Id.
4 See, e.g., Jeff Sessions, Prepared Remarks for Confirmation Hearings, Senate Committee on the Judiciary (Jan. 10, 2017) (“I will make it a high priority of the Department [of Justice] to root out and prosecute fraud in federal programs and to recover any monies lost due to fraud or false claims.”), available at https://www.judiciary.senate.gov/imo/media/doc/01-10-17%20Sessions%20Testimony.pdf.
15 See 28 C.F.R. § 85.5.
17 United States District Court for the Middle District of Florida Case No. 8:11-cv-1303-T-23TBM.
